



**Lorunyei & another v Attorney General & 3 others (Environment and Land  
Petition 1 of 2023) [2025] KEELC 3053 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3053 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND PETITION 1 OF 2023**

**AK BOR, J**

**MARCH 21, 2025**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT  
OF THE RIGHTS AND FREEDOMS IN ARTICLES 25, 27,  
28, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT  
OF THE CONSTITUTION IN ARTICLES 1, 2, 3, 10, 60, 63, 66, 67, 73,  
232, 248, 249, 252, 258 & 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF  
2012, THE LAND ACT NO. 3 OF 2012 AND THE COMMUNITY LAND ACT, 2016**

**AND**

**IN THE MATTER OF: THE UNITED NATIONS  
DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

**BETWEEN**

**HON LAWRENCE LORUNYEI ..... 1<sup>ST</sup> PETITIONER**

**LORIKOT EGIRON ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF SAMBURU ..... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF DEFENCE ..... 4<sup>TH</sup> RESPONDENT**



## **The annexation of Turkana community land by the National Land Commission on behalf of the Kenya Defence Forces is unlawful for violating the Constitution**

*The petition challenged the decision of the National Land Commission (NLC) and the County Government of Samburu to allocate Turkana community land in Kawap and Suguta Valley to the Kenya Defence Forces (KDF) in exchange for land in Maralal. The petitioners claimed that there was a violation of their rights to equality, property, and fair administrative action. The court held that the suit land was community land; that the respondents' actions amounted to compulsory acquisition without due process and compensation; that failure to involve the Turkana community violated the principle of public participation and that Gazette Notice No. 2080 of 2021, which allocated the suit land to the KDF was unconstitutional. The court finally held that the process of annexation of the suit land by the NLC on behalf of KDF was unlawful for violating articles 10, 27, 40, 47 and 56 of the Constitution of Kenya.*

Reported by Kakai Toili

**Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to property, right to language and culture and right to equality and freedom from discrimination – whether the annexation of community land without participation of members of the community violated their rights to property and to enjoy and participate in their cultural life; and the constitutional requirement of public participation – whether the exchange of community land belonging to a marginalized community by a county government, for another parcel of land that benefited a different community while depriving the marginalized community of their land, was discriminatory – Constitution of Kenya, articles 27, 40 and 44.

**Land Law** – categories of land – community land – unregistered community land – conversion of unregistered community land into public land – whether unregistered community land automatically became public land – whether county governments could dispose of unregistered community land held in trust on behalf of a community – what was the process of allocating public land – Constitution of Kenya, articles 40 and 63(3); Community Land Act (cap 287), sections 6(7), 6(8), 10(3) and 22(1).

**Statutes** – interpretation of statutory provisions – interpretation of section 30 of the Land Adjudication Act on staying of land suits and section 78 of the Physical and Land Use Planning Act on the functions of the county physical and land use planning liaison committee – whether section 30 of the Land Adjudication Act and section 78 of the Physical and Land Use Planning Act were applicable to a dispute concerning the alleged annexation of community land for use by the Kenya Defence Forces – Land Adjudication Act (cap 284), section 30.

**Jurisdiction** – jurisdiction of the Environment and Land Court – jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, the right to protection of property – whether the Environment and Land Court had jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, the right to protection of property – whether the Environment and Land Court had jurisdiction over a matter challenging the deprivation of community land without compensation and in a discriminatory manner – Constitution of Kenya, article 40; Environment and Land Court Act (cap 8D), section 13(2).

**Words and Phrases** – discrimination – definition of discrimination – the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability; the differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured – Black's Law Dictionary, 10<sup>th</sup> Edition.

### **Brief facts**

The petitioners filed the petition alleging that ancestral land of the Turkana community in Kawap and Suguta Valley, Samburu County (the suit land), was unlawfully annexed and allocated to the Kenya Defence Forces (KDF) without due process, public participation, or compensation. The petitioners contended that the land



constituted community land under article 63 of the Constitution of Kenya, used for grazing, habitation, and cultural purposes since pre-colonial times. The petitioners alleged violations including discrimination, deprivation of property, and denial of fair administrative action following the publication of Gazette Notice No. 2080 of February 4, 2021 by the 2<sup>nd</sup> respondent, National Land Commission (NLC) which deleted an earlier gazette of KDF land in Maralal and replaced it with the suit land.

The petitioners averred that the Samburu community had successfully lobbied for the return of its ancestral land in Maralal, prompting the 3<sup>rd</sup> respondent, County Government of Samburu, NLC, and the Ministry of Defence to exchange it for the Turkana community's land in Kawap without consultation. The petitioners maintained that the suit land was critical for the Turkana's pastoral livelihood and that alternative, less intrusive solutions existed. They claimed the exchange process violated constitutional principles of public participation, equality, non-discrimination, transparency, and good governance, and that it amounted to a historical injustice. The petitioners sought for among other orders a declaration that the process of identification, setting aside and annexation of the suit land was unlawful.

The 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the petition, asserting that the suit land was unadjudicated public land, unsuitable for human settlement due to its volcanic terrain and insecurity, and identified after public consultations as a replacement for KDF land in Maralal that had been encroached by over 3,000 families. They argued that the exchange was authorised under section 12(1)(f) of the Land Act, did not constitute compulsory acquisition, and therefore required no compensation. They denied discrimination or exclusion, maintained that the Turkana community had no legally recognised claim. The NLC contended that the petitioners had not proved that the land qualified as community land.

#### **Issues**

- i. Whether the annexation of community land without participation of members of the community violated their rights to property and to enjoy and participate in their cultural life; and the constitutional requirement of public participation.
- ii. Whether the exchange of community land belonging to a marginalized community by a county government, for another parcel of land that benefited a different community while depriving the marginalized community of their land, was discriminatory.
- iii. What was the procedure of converting community land to public land?
- iv. Whether unregistered community land automatically became public land.
- v. Whether county governments could dispose of unregistered community land held in trust on behalf of a community.
- vi. What was the process of allocating public land?
- vii. Whether section 30 of the Land Adjudication Act on staying of land suits and section 78 of the Physical and Land Use Planning Act on the functions of the county physical and land use planning liaison committee was applicable to a dispute concerning the alleged annexation of community land for use by the Kenya Defence Forces.
- viii. Whether the Environment and Land Court had jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, the right to protection of property.
- ix. Whether the Environment and Land Court had jurisdiction over a matter challenging the deprivation of community land without compensation and in a discriminatory manner.

#### **Held**

1. Section 30 of the Land Adjudication Act prescribed the mode of appeal by persons aggrieved by a determination of objections to the adjudication register while section 78 of the Physical and Land Use Planning Act set out the functions of the County Physical and Land Use Planning Liaison Committee which included the mandate to hear appeals against decisions made by the planning authority as well as appeals with respect to enforcement notices. Those legal provisions were not applicable to the dispute before court.



2. Based on article 23(1) of the Constitution read with articles 165(5)(b) and 23(3) of the Constitution, the court was mandated to hear and determine applications for redress of a violation or infringement of, or threat to the right to property, which may be in the form of land, protected by article 40 of the Constitution.
3. Under section 13(2) of the Environment and Land Court Act, the court had power to hear and determine disputes relating to compulsory acquisition of land and disputes relating to public, private and community land. Those formed the subject matter of the petition. The court also handled any other dispute relating to the environment and land. As the court mandated to handle land matters, it had jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, the right to protection of property and not to be arbitrarily deprived of property under article 40 of the Constitution.
4. Article 20 of the Constitution stipulated that the Bill of Rights applied to all law and bound all State organs and all persons. Further, that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. When handling matters within its jurisdiction, article 20(3) enjoined the court, to develop the law to the extent that it did not give effect to a right or fundamental freedom and adopt the interpretation that most favoured the enforcement of a right or fundamental freedom when applying a provision of the Bill of Rights. When interpreting the Bill of Rights, the court should promote the values that underlay an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights falling within its mandate.
5. Article 259 of the Constitution required that the Constitution be interpreted in a manner that promoted its purposes, values and principles; advanced the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permitted the development of the law; and contributed to good governance. When dealing with claims alleging the violation of the right to property guaranteed by article 40 of the Constitution, the court was bound by articles 20 and 259 of the Constitution.
6. By virtue of articles 52 and 56 of the Constitution, that extended to the rights of minorities and marginalised groups where they claimed that their rights over their community land had been infringed. Based on articles 22, 23, 40, 61 and 63 of the Constitution and section 13 of the Environment and Land Court Act, the court was vested with the jurisdiction to determine the dispute.
7. Under article 63(1) of the Constitution, community land vested in, and was held by communities identified on the basis of ethnicity, culture or similar community of interest. Some of the clusters that constituted community land under article 63(2)(d)(i) and (ii) were land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; and ancestral lands and lands traditionally occupied by hunter-gatherer communities. The other cluster that constituted community land was trust land held by county governments.
8. What was specifically excluded and did not fall within the ambit of community land was public land comprising what was unalienated government land; land sold, surrendered or which reverted to the State; and land whose heir or individual or community owner could not be established by any legal process. Those categories of public land vested and were held by a county government in trust for the residents of that county with the administration of such land falling on the NLC.
9. Section 2 of the Community Land Act defined a community as a consciously distinct and organised group of users of community land who were citizens of Kenya and shared a common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space or ethnicity. The members of the Turkana community who lived in Baragoi area within Samburu County shared a common ancestry, similar culture or unique mode of livelihood, socio-economic common interest, geographical space, ecological space and ethnicity. Members of the Turkana community lived in the northern part of Samburu County. The Turkana community were



- pastoralists and owing to that fact and the dry nature of the land which they occupied in Northern Kenya, they moved from place to place seeking pasture and water for their animals.
10. The suit land fell within the definition of community land under article 63(2)(d)(i) and (ii) of the Constitution for it was held and used by the Turkana community identified on the basis of their ethnicity, culture and other community interest. The Turkana community used the land for grazing and it was their ancestral land where they had buried their dead. The land need not have been fenced.
  11. Based on articles 63(1), (2)(d)(i) and (ii) and (3) of the Constitution, the suit land constituted community land. By virtue of article 63(3), any unregistered community land was held in trust by county governments on behalf of the communities for which it was held. Being unregistered community land, the 3<sup>rd</sup> respondent held the land in Suguta Valley and Kawap in trust on behalf of the Turkana community.
  12. Article 63(4) of the Constitution restricted the disposal of community land except as stipulated in legislation specifying the nature and extent of the rights of members of each community individually and collectively. Section 6 of the Community Land Act mirrored what was in article 63(3), that county governments such as the 3<sup>rd</sup> respondent, held in trust all unregistered community land on behalf of the communities for which it was held. Section 10(3) of the Community Land Act provided that until any parcel of community land had been registered in accordance with that Act, such land shall remain unregistered community land and was held in trust by the county governments on behalf of the communities for which it was held pursuant to article 63(3).
  13. Section 5(2) of the Community Land Act provided that customary land rights shall be recognised, adjudicated and documented for purposes of registration in accordance with that Act and any other written law while section 5(3) stipulated that customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer. That provision afforded the Turkana community recognition of their customary land rights in Suguta Valley and Kawap, and was supported by the attempt made towards the adjudication and registration of the Suguta Valley and Kawap land in 2014.
  14. Section 5(4) of the Community Land Act provided that subject to article 40(3) of the Constitution and the Land Act, no interest in, or right over community land may be compulsorily acquired by the State for a public purpose, except in accordance with the law and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement. Based on those legal provisions, the respondents could only have compulsorily acquired the suit land which comprised community land used by the Turkana community for use by KDF for military training, which was a public purpose, in accordance with the law and upon payment of just compensation to the members of the Turkana community in Suguta Valley and Kawap. That did not happen in the instant case.
  15. The exchange of the land in Suguta Valley and Kawap areas for the land KDF land in Maralal by the 3<sup>rd</sup> respondent amounted to compulsory acquisition of community land used by the Turkana in Northern Samburu County in contravention of article 40 of the Constitution.
  16. Section 6(7) of the Community Land Act required any transaction in relation to unregistered community land within the county to be in accordance with the provisions of that Act and any other applicable law. The 3<sup>rd</sup> respondent could only have undertaken any transaction in relation to the suit land, which was unregistered community land within its county, while adhering to the Community Land Act. Section 6(8) of the Community Land Act forbade the 3<sup>rd</sup> respondent from disposing of the suit land which was unregistered community land that it held in trust on behalf of the Turkana community.
  17. The respondents did not lead evidence to show how the suit land came to be public land. Based on the constitutional definition and statutory provisions, the suit land constituted unregistered community land held in trust by the 3<sup>rd</sup> respondent on behalf of the Turkana Community resident in Kawap, within the meaning of article 63 of the Constitution and the Community Land Act.



18. Article 63(3) of the Constitution and section 10(3) of the Community Land Act took cognisance of the fact that community land may be unregistered. It did not follow that when community land was not registered it automatically becomes public land. The Constitution distinguished between those two categories of land without suggesting that community land was inferior to public land.
19. The steps taken towards the adjudication of the suit land pointed to recognition of the claim of the Turkana community in Kawap to the suit land as that community's land. The fact that the area was declared an adjudication section by the Samburu County Government on March 12, 2014 undeniably confirmed that the Turkana community in Kawap had legitimate rights and interests over the suit land as community land. It was a recognition that their presence and use of the land were substantial enough to warrant consideration of creation of the Kawap Adjudication Section.
20. Section 7 of the Land Act listed the modes of acquiring land, which included allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions and transfers. Land may be converted from one category to another pursuant to section 9 of the Land Act but community land may be converted to either private or public land in accordance with the law relating to community land enacted pursuant to article 63(5) of the Constitution, which was the Community Land Act of 2016.
21. Section 12 of the Land Act which dealt with allocation of public land stated that whenever the national or county government was satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to NLC for the necessary action through various ways including public exchanges of equal value as may be prescribed. From the facts of the case, that was the approach which NLC and the other respondents adopted when the KDF land in Maralal was exchanged for the land in Suguta Valley and Kawap.
22. By virtue of section 12(7) of the Land Act, public land was not to be allocated unless it had been planned, surveyed and serviced and guidelines for its development prepared in accordance with section 17 of that Act. The respondents did not tender any evidence to prove that indeed the two parcels of land said to have been exchanged were valued to meet the legal requirement for the public exchanges to be of equal value. There was no proof that the parcel of land in Suguta Valley and Kawap was planned, surveyed and serviced as the law required. Nor was it demonstrated that the process of allocation of public land stipulated by section 12 was followed by the respondents in the allocation of the suit land to KDF.
23. Before allocating any public land under the Land Act, NLC was obligated under section 14 to issue, publish or send a notice of action to the public and interested parties at least thirty days before offering for allocation a tract or tracts of public land. Section 14(4) stated that at least thirty days prior to the allocation of the public land, NLC should have sent a notice to the Samburu County Governor and to the head of the governing body of the administrative subdivision having development control or other land use regulatory responsibility in Suguta Valley and Kawap area which is where the land they contend is public land was located. Such a notice was to be sent to known interested parties including adjoining landowners, persons in actual occupation of the land, marginalised communities and groups living in the general vicinity of the public lands proposed for allocation.
24. Based on section 14(5) of the Land Act, and assuming the suit land constituted public land, which it did not, NLC would have been under an obligation to issue a notice to the members of the Turkana community living in Suguta Valley and Kawap before allocating the suit land to KDF. There was nothing to show that NLC sent the notices envisaged by section 14 of the Land Act to the Turkana community living in Samburu County, yet it was marginalised as a minority in that county as it were.
25. Although public participation did not mean that every member of the public should be consulted, that did not mean that the Turkana community was to be excluded and ignored altogether when decisions touching on the community's land were taken. The Turkana community was neither consulted nor



- involved before the decision to allocate the suit land to KDF was made. It was imperative for the Turkana community in Kawap to be consulted so that it could make recommendations and have its input considered when the decision to allocate the suit land to KDF was made.
26. In the discharge of its functions and exercise of its powers under the Land Act, some of the guiding principles listed in section 4 that should guide NLC were non-discrimination and protection of the marginalized and non-discrimination and protection of the marginalized. The facts of the case did not show that NLC paid heed to those guiding principles when it sanctioned the exchange of the two parcels of land.
  27. The petitioners did not willingly give the suit land to the KDF, it was taken away from them on the strength of Gazette Notice No 2080. That act amounted to compulsory acquisition of the land held by the Turkana Community in Kawap within Samburu County. Section 22(1) of the Community Land Act prescribed the procedure for converting community land to public land, which was done through compulsory acquisition, transfer, or surrender. For the conversion to be lawful, the Government must follow specific procedures, including public participation, and provide compensation to the affected community. That was derived from article 40 of the Constitution which provided that subject to the restrictions on landholding by non-citizens, every person had the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya.
  28. Article 40(3) of the Constitution restricted the State from depriving a person of property or interest in or right over property except in two instances:
    1. Where the deprivation resulted 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 the principles of land policy and the classification, vesting, holding and administration of land under Chapter Five of the Constitution.
    2. The deprivation was sanctioned by the Constitution where it was for a public purpose or in the public interest and was carried out in accordance with the Constitution and any Act of Parliament which made it conditional upon the payment of compensation to the person which was just, prompt and in full with the person being deprived of the property being afforded access to a court of law.
  29. Marginalisation generally came about when a group of people was disadvantaged by discrimination on the grounds listed in the Constitution which included ethnic or social origin and culture. The Turkana were a relatively small population in Samburu County and it had been unable to fully participate in the integrated social and economic life of Kenya as a whole.
  30. It was not clear how the exchange of the KDF land in Maralal for the suit land was undertaken because there was no valuation of the two parcels of land said to have been exchanged. The fact that no form of compensation was paid to the Turkana Community in Kawap raised doubt as to whether the process of allocation of the suit land by the 3<sup>rd</sup> respondent to KDF in concert with the 1<sup>st</sup> respondent was lawful. The process was carried out in blatant violation of article 40 of the Constitution, the Community Land Act and the Land Act. Gazette Notice No 2080 of 2021 purporting to allocate the suit land to KDF was unconstitutional and therefore null and void.
  31. Article 56 of the Constitution required the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups such as the members of the Turkana Community living in Kawap, participated and were represented in governance and other spheres of life; develop their cultural values, languages and practices; and had reasonable access to water, health services and infrastructure. The affirmative action programs were intended to ensure that marginalized communities were protected from discrimination and exclusion.
  32. Article 44 of the Constitution, which guaranteed the right of every person, including communities, to enjoy and participate in their cultural life protected the right of the Turkana community to participate



- in their cultural life which was intertwined and linked to their ancestral land in Kawap hence the annexation of the suit land without their participation violated their rights protected by law.
33. Article 40 of the Constitution protected the right to property, including community land, and prohibited arbitrary deprivation of such property without due process and just compensation. To forcefully alienate their land without following due process not only deprived the Turkana community in Kawap of their means of survival but it also eroded their cultural heritage in violation of their rights under the Constitution.
  34. Article 10 of the Constitution set out the national values and principles of governance which bound State organs, State officers, public officers and all persons whenever any of them applied or interpreted the Constitution or applied or interpreted any law; or made or implemented public policy. It was paramount and imperative for NLC to be guided by the rule of law, participation of the members of the Turkana community in Suguta Valley and Kawap in decision making before their land was annexed. Further, NLC was bound and should have been guided by the principles of equality, inclusivity, non-discrimination and protection of the Turkana community in Kawap as a marginalised group.
  35. The 3<sup>rd</sup> respondent ought to have been guided by the rule of law, participation of the members of the Turkana Community in Kawap in the decision making before their land was annexed, non-discrimination and protection of the Turkana Community in Kawap as a marginalised group within Samburu County. The other values and principles which the respondents were bound to apply in arriving at the policy decision to move the KDF military training ground from Maralal to Kawap pursuant to article 10 of the Constitution included human dignity, equity, social justice, inclusiveness, equality, human rights, good governance, rule of law, transparency, accountability, good governance and sustainable development.
  36. The marginalisation and violations of the rights of the members of the Turkana Community to property guaranteed by article 40 of the Constitution was closely linked and intertwined with violations of their other rights to non-discrimination, human dignity, fair administrative action, participation among other others. The court had jurisdiction over the claim since the predominant issue in the petition was the deprivation of community land without compensation and in a discriminatory manner.
  37. Although Kenya had not ratified UNDRIP, it was bound by international and regional treaties to protect human rights especially rights of marginalised communities, which it had ratified pursuant to article 2(6) of the Constitution. Those conventions dealt with human rights including rights to land, non-discrimination, culture and the right to participate in decision making.
  38. The Constitution made participation in decision making an imperative, besides incorporating the right to access information (article 35) and access to justice (article 48) where it was alleged that a community's rights to property or protection from non-discrimination had been violated. Discriminating an already marginalised community by taking away its land to which their economic and social life was closely linked would curtail their development and marginalise the members of that community further.
  39. Article 27 of the Constitution went beyond the identities to add ethnic or social or social origin, culture, language or birth as the grounds upon which the State (which would include the respondents) should not directly or indirectly discriminate against any person. The decision taken by the 3<sup>rd</sup> respondent which led to the exchange of the suit land for the KDF land in Maralal was discriminatory as it conferred the privilege of the return of the KDF land in Maralal to members of the Samburu Community while depriving the Turkana Community of their community land in Kawap. That pointed to the marginalisation of the already marginalised Turkana community living in Samburu County characterised by the intersectionality of the grounds set out in article 27 of the Constitution.
  40. The suit land was occupied by KDF. The Turkana community who were pastoralists in the area were not compensated by either the 2<sup>nd</sup> respondent or the KDF. Section 2 of the Land Act defined



compulsory acquisition as the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation. Just compensation in relation to compulsorily acquired land was defined as a form of fair compensation that was assessed and determined through criteria set out under that Act.

41. Under article 241 of the Constitution, KDF was responsible for the defence and protection of the sovereignty and territorial integrity of the Republic of Kenya. Article 66 of the Constitution gave the State power to regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety and public order. The Constitution required that any such regulation must adhere to due process including payment of prompt and fair compensation to the Turkana Community in Suguta Valley and Kawap and their meaningful public participation in decision making more so because of their marginalisation.
42. Given that KDF was already in occupation of the suit land for military training, the court must balance community rights with national security interests. Since repossession of the suit land from KDF which was already using the suit land for military training and other national defence purposes was not tenable.

*Petition partly allowed.*

### **Orders**

- i. *A declaration was issued that the process of identification, setting aside, and annexation of Turkana community ancestral land in Suguta Valley and Kawap areas by the NLC on behalf of KDF, in conjunction with the 3<sup>rd</sup> and 4<sup>th</sup> respondents was unlawful and void for violating articles 10, 27, 40, 47 and 56 of the Constitution of Kenya.*
- ii. *An order of certiorari was issued to quash Gazette Notice No 2080 of February 4, 2021.*
- iii. *NLC was directed to initiate forthwith and conclude without delay the compulsory acquisition of the suit land which was previously occupied by the Turkana community in Kawap and Suguta Valley that it caused to be allocated to KDF for military training vide Gazette Notice No 2080 of February 4, 2021 for purposes of prompt payment of full and just compensation to members of the Turkana community in Kawap and Suguta Valley in strict compliance with Part VIII of the Land Act and other relevant provisions of the Land Act, the Land Registration Act, the Community Land Act, the National Land Commission Act and the Constitution. The fair and just compensation determined by NLC must be paid in full to members of the Turkana community within 18 months of the date of the judgment.*
- iv. *A consultative team comprising the petitioners, three other leaders selected from the Turkana Community living in Kawap and five representatives nominated by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents would be constituted within 14 days of the date of the judgment to oversee and facilitate the participation of the Turkana community in the determination of, and full payment of the fair and just compensation to members of the Turkana community for their land in Kawap and Suguta Valley which the 3<sup>rd</sup> respondent allocated to KDF. The team would liaise with NLC in the determination of the just compensation payable to the Turkana Community in Kawap and Suguta Valley.*
- v. *The consultative team was to first ascertain and compile a full list of the members of the Turkana community who were displaced and who directly affected by the acquisition of the Turkana community land in Kawap and Suguta Valley for KDF.*
- vi. *The consultative team must ensure that the process is inclusive and as many as possible members of the Turkana community who were displaced and directly affected by the acquisition of the Turkana community land in Kawap for KDF participate in the process and that their participation was meaningful and not merely tokenistic. The team must take into account the viewpoints of women (including widows), children, the elderly, youth and persons with disability.*
- vii. *The team was to liaise with the National Environment Management Authority (NEMA) to ensure the sustainable utilisation, management and conservation of the natural environment in Suguta Valley and Kawap for purposes of safeguarding the rights of nature in compliance with article 69 of the Constitution.*



- viii. *The 3<sup>rd</sup> respondent in conjunction with the Cabinet Secretary, Ministry of Lands and Settlement was to undertake a survey, adjudication and registration of the remainder of the Turkana community land in Kawap.*
- ix. *The respondents in consultation with other State organs were to design and implement affirmative action programmes and formulate policies to redress the land injustices and other disadvantages suffered by the Turkana community in Kawap because of past discrimination and marginalisation.*
- x. *The 3<sup>rd</sup> respondent shall take measures to include representatives of the Turkana community in decision making in Samburu County and ensure that they meaningfully participated in matters that affected the Turkana community living in Samburu County.*
- xi. *The court declined to order the cancellation of the certificate of title which the petitioners referred to as I.R. 212367 alleged to have been issued to KDF on May 1, 2018 since its existence was not proved.*
- xii. *The petitioners were awarded the costs of the petition which would be borne jointly by the respondents.*

## Citations

### Cases

#### Kenya

1. *Attorney General v Halal Meat Products Limited* Civil Appeal 114 of 2009; [2016] KECA 306 (KLR) - (Explained)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR) - (Mentioned)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2014] KESC 53 (KLR) (Consolidated) - (Mentioned)
4. *County Government of Taita Taveta v Isangaiwich Group Ranch & 3 others* Environment & Land Case 37 of 2021; [2021] KEELC 1343 (KLR) - (Mentioned)
5. *Havi, Nelson Andayi v Law Society of Kenya & 2 others* Civil Application 28 of 2018; [2018] KECA 731 (KLR) - (Mentioned)
6. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Mentioned)
7. *KKB v SCM & 5 others* Constitutional Petition 014 of 2020; [2022] KEHC 289 (KLR) - (Mentioned)
8. *Krystalline Salt Limited v Kenya Revenue Authority* Judicial Review 359 of 2018; [2019] KEHC 6939 (KLR) - (Mentioned)
9. *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* Petition 1 of 2015; [2016] KESC 2 (KLR) - (Mentioned)
10. *Non-Governmental Organizations Co-ordination Board v EG & 5 others* Civil Appeal 145 of 2015; [2019] KECA 902 (KLR) - (Mentioned)
11. *Okiya Omtatah Okoiti v County Government of Kiambu* Constitutional Petition 48 of 2018; [2018] KEHC 2649 (KLR) - (Mentioned)
12. *Orix Oil (Kenya) Limited v Paul Kabeu & 2 others* Civil Suit 191 of 2008; [2014] KEHC 5086 (KLR) - (Mentioned)
13. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); (1989) KLR 1 - (Mentioned)
14. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 243 - (Mentioned)
15. *Republic v Council for Legal Education ex parte Desmond Tutu Owuoth* Judicial Review Application 177 of 2018; [2019] KEHC 11742 (KLR) - (Mentioned)
16. *Republic v County Government of Kiambu Ex Parte Robert Gakuru & another* Judicial Review 434 of 2015; [2016] KEHC 7642 (KLR) - (Mentioned)
17. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); (2008) 1 KLR EP 425 - (Mentioned)



## ***South Africa***

1. *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town & another* (9934/2005) [2008] ZAWCHC 62; 2009 (1) SA 644 (EqC) - (Mentioned)
2. *Michael Weare & another v Joel Sibusiso Naebel N.O. & 4 others* (CCT15/08) [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) - (Mentioned)
3. *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others* (CCT59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006(1) BCLR 1 (CC) - (Mentioned)

## ***United States***

*Ashwander v Tennessee Valley Authority* 297 US 288 (1936) - (Mentioned)

## ***Regional Court***

*Africa Commission on Human and Peoples' Rights v Republic of Kenya* Application 006 of 2012; [2022] AfCHPR 1 (KLR) - (Mentioned)

## **Statutes**

### ***Kenya***

1. Civil Procedure Act (cap 21) section 27(1) - (Interpreted)
2. Constitution of Kenya articles 1, 2, 3, 10, 19, 20, 21, 23, 25, 27, 35, 36, 40, 44, 47, 48, 56, 60, 62, 63, 66, 67, 73, 75, 162, 165, 232, 241, 248, 249, 252, 258, 259, 260; Chapter 5 - (Interpreted)
3. Community Land Act (cap 287) sections 2, 5, 6, 22 - (Interpreted)
4. Environment And Land Court Act (cap 8D) section 4; 13 - (Interpreted)
5. Fair Administrative Action Act (cap 7L) section 9(2) - (Interpreted)
6. Land (Allocation of Public Land) Regulations 2017 (cap 280 Sub Leg) regulation 3(1)(f) - (Interpreted)
7. Land Act (cap 280) sections 4; 7; 9; 12(1) (f); 14(5); 17 - (Interpreted)
8. Land Adjudication Act (cap 284) sections 26, 30 - (Interpreted)
9. Land Registration Act (cap 300) In general - (Cited)
10. National Land Commission Act (cap 281) section 3 - (Interpreted)
11. Physical and Land Use Planning Act (cap 303) section 78 - (Interpreted)

## **Instruments**

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981  
In general
2. African Charter on the Rights and Welfare of the Child (ACRWC), 1990  
In general
3. Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979  
In general
4. International Covenant on Civil and Political Rights (ICCPR), 1966  
In general
5. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966  
In general
6. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo Protocol, 2003  
In general
7. United Nations Convention on the Rights of the Child (UNCRC), 1989  
In general
8. United Nations Declaration on the Rights of Indigenous Persons (2007)  
article 8(2); 10; 26(1), (2); 30 (1)
9. Universal Declaration of Human Rights (UNDHR), 1948  
In general



## Advocates

*Ms. Diana Bosire* for Petitioners

*Ms. Mumbi Murigub* for 2nd Respondent

*Mr. Marcelino Lesaigor* for 3rd Respondent

*Ms. Atieno Nyonje b/b for Mr. G. Kabi* for 4th Respondent

## JUDGMENT

1. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners filed the petition dated March 30, 2021 as the Member of County Assembly (MCA) for Nachola Ward within Samburu County and Chairperson of Kawap Land Community Mobilisation Group respectively. The 1<sup>st</sup> respondent was sued as the Chief Legal Adviser of the Government of Kenya. The 2<sup>nd</sup> respondent, the National Land Commission (NLC) is established by article 67 of the [Constitution](#) and its functions set out under the [NLC Act](#), including the mandate to oversee the management of public land and initiate investigations into historical land injustices.
2. The 3<sup>rd</sup> respondent, the County Government of Samburu was made a party to the proceedings on the claim that it acted in concert with the Kenya Defence Forces (KDF) to unlawfully identify and set aside land belonging to the Turkana community in the northern part of Samburu County, Baragoi, specifically the areas of Kawap, Suguta Valley, Nachola, Marti and Parkati, (“the suit land”) which the petitioners claim is ancestral land used by the Turkana community for grazing, habitation and other community services. The 4<sup>th</sup> respondent was sued as the Chairperson of the Kenya Defence Council responsible for the overall policy, control, and supervision of KDF whose mandate is protection of the sovereignty and national territory of Kenya under article 241 of the [Constitution](#).
3. The petitioners’ claim is that the suit land was set aside for public use without following the law. The petitioners cited articles 1, 2, 10, 19, 20, and 23 of the [Constitution](#) as the legal foundation for the petition as well as articles 27, 36, 40, 47 and 48 in the bill of rights. They pleaded that article 60 sets out the principles of land management while article 63 vested community land in communities based on ethnicity, culture or similar community of interest. They added that article 66 gave the State power to regulate land use in the interest of security, public health, order, immorality. They also relied on articles 67, 73, 75, 232, 248, 249, 258 and 260 of the [Constitution](#).
4. The petitioners stated that article 8(2) read with article 26(1) and (2) of the [United Nations Declaration on the Rights of Indigenous People](#) (UNDRIP) obligated the State to put in place measures to ensure that indigenous communities were not deprived of their lands and their customary tenure systems or resources. Further, that article 10 of [UNDRIP](#) safeguarded indigenous people from being forcibly removed from their lands or territory and that relocation should not take place without the free, prior and informed consent of the indigenous people concerned and that that can only be after agreement on just and fair compensation with the option of return to their land if that were possible. They cited article 30(1) of [UNDRIP](#) which stipulates that military activities should not take place in the land or territory of the indigenous people unless it is justified by relevant public interest or it is freely agreed with the indigenous people concerned.
5. The petitioners pleaded that section 3 of the [National Land Commission Act \(NLC Act\)](#) dealt with the management and the administration of land while section 5(2) mandated NLC to monitor registration of interests and encourage alternative dispute resolution mechanisms. They also referred to section 4 of the [Land Act](#) and sections 5(4) and 22(2) of the [Community Land Act](#).



6. The petitioners' claim is that the land which is the subject of this petition was community land belonging to the Turkana community in Baragoi area and that it fell within article 63 of the Constitution as ancestral land used by the Turkana community for grazing, habitation and other community activities. The suit land is in Kawap and Suguta Valley in the Northern part of Samburu County, South of Lake Turkana in an area predominantly occupied by Turkana people in Samburu County.
7. They averred that the Turkana community had lived in the suit land from precolonial times and that the colonial records including reports by Lt. Col Llewellyn and Von Otter confirmed that the land was occupied by the Turkana before the colonial administration and was used by the community as the only viable land. Further, that the community was sent away by Mr Kittermaster in 1912 but they went back after losing some community members due to drought and famine. That before the Northern Frontier District was carved out, the Turkana had settled in Kawap area and Suguta valley.
8. Following the promulgation of the Constitution in 2010, the Turkana community living in Kawap commenced the adjudication process in order to determine and register their community's land and at a meeting held on October 3, 2019, resolutions were passed for mapping and registration of the land and members of the community. The area in question was declared as an adjudication section on March 12, 2014 by the Samburu County Department of Land Adjudication.
9. The petitioners claimed that they received information that the land which had been set aside for KDF near Maralal in Samburu County would be given back to the Samburu community and in exchange, land belonging to the Turkana community in Kawap would be given to KDF without the knowledge of the Turkana community. A petition dated January 11, 2017 was dispatched to NLC who responded on January 12, 2017 indicating that an investigation would be lodged into the matter. They never heard from NLC after that.
10. The petitioners stated that they wrote a memorandum to the Cabinet Secretary on September 7, 2020 indicating that they had been living on the suit land since time immemorial and that they had been subjected to historical injustices without redress. In that letter, they highlighted that they were a minority within Samburu County hence susceptible to violation of their rights in decision making.
11. On February 4, 2021 vide Gazette Notice No 2080 of 2021 (Vol CXXIII-No 46), the Chairman of NLC, Mr Gerishom Otachi, declared the suit land as land allocated to KDF by deleting Gazette notice No 3210 of 1977 which had allocated land in Maralal, predominantly occupied by the Samburu community for use by KDF. The Petitioners averred that at the time of gazettelement, the Turkana community living in Kawap and Suguta Valley in Samburu County were and are still using the suit land as ancestral land for pasture and seasonal settlement. They emphasised that that was the place they had known as home for centuries across many generations as it was the only fertile and vegetative area for the Turkana community living in the region.
12. The petitioners added that the degazettelement of the land in Lpartuk and Lkuroto in Maralal and the titling of that land meant that the ancestral land belonging to the Samburu was being given back while the land belonging to the Turkana was being taken away on account of KDF moving to Baragoi without following due process. They surmised that that action followed the agitation of the Samburu to get their land back which was allocated to KDF for training. Through avenues including the Building Bridges Initiative (BBI) and parliamentary petitions, the Samburu community petitioned for the return of their land which happened but they purported to give out land belonging to the Turkana community in exchange without the involvement of the Turkana community.



13. The petitioners averred that the 1000 hectares (ha) of land given to KDF in Suguta Valley and Kawap areas would only affect the Turkana who rely on the large swathe of land for habitation, grazing and watering holes during the dry season. They pointed out that the Samburu County Government and the National Government did not consult the Turkana community and its leaders to get their input and views on the annexation of their community land as required by the Constitution and the Community Land Act.
14. They claimed that reports indicated that the Governor of Samburu County purported to approve the grant of suit land to KDF on behalf of the community without providing evidence of the involvement of the Turkana community living in Samburu County besides the contention by the 3<sup>rd</sup> respondent that KDF needed to settle in the specific area due to increased insecurity.
15. The petitioners pointed out that in other instances where land was acquired by KDF from the communities in Northern Kenya the communities were consulted, made recommendations and their input was considered. They gave the example of Karare in Marsabit County where they claimed the community was involved. According to the petitioners, the situation was aggravated by the increased unavailability of land for pasture due to the privatisation of community land through conservancies south of Samburu County such as Namunyak Conservancy which forms part of the Northern Rangeland Trust.
16. They contended that the proper procedure should have entailed valuation of the suit land and cultural assets belonging to the Turkana community in Suguta Valley and Kawap including the possible consequences of displacement, its economic implications and provision of viable alternative land for use by the Turkana community which was not done. They claimed that they had been discriminated against by the County government of Samburu.
17. They expressed fear that owing to the minority status of the Turkana community in the National Government and the County Government of Samburu, it was unlikely that their grievances would be addressed as a result of which the Turkana community in Northern Samburu would continue to suffer in silence as their constitutional rights were violated. They mentioned that the Turkana Community's attempts to hold a consultative meeting on March 17, 2021 to discuss the implications of the gazettment of their land was thwarted by the OCS Baragoi on March 16, 2021. They stated that a title had already been issued to KDF over the suit land in Baragoi belonging to the Turkana community yet the community was not involved or consulted.
18. They claimed that to the extent that the NLC in concert with the Ministry of Interior and Coordination of National Government and the County Government of Samburu had annexed community land without consulting the locals and without following the law on compulsory acquisition of community land, various articles of the Constitution had been violated and contravened. They urged that article 10 of the Constitution made it paramount for NLC to be guided by public participation, non-discrimination and marginalisation, rule of law, transparency, openness, accountability, inclusivity, human rights and good governance.
19. Further, that articles 20 and 21 of the Constitution enjoined the State and its organs to give effect to the spirit, purport and object of the Bill of Rights and observe, respect, protect and promote the rights and fundamental freedoms. Article 25 provides for freedom from inhuman or degrading treatment as one of the rights which cannot be limited. They urged that the peculiar and disparate treatment of Turkana people compared to their Samburu neighbours was degrading while pointing out that article 27 guaranteed equal protection before the law and equal benefit of the law for all citizens yet the decision made to give the Samburu community its land back while taking away land for the Turkana community was discriminatory and a biased application of the law.



20. They also relied on article 35 which safeguards the right to access information held by the State while urging that it was important for NLC to explain how the land belonging to the Turkana community was annexed without compliance with the minimum standards provided by the law. They cited article 40 which guarantees the right to property and prohibits the deprivation of property without prompt and just compensation. They urged that the continued acquiescence by NLC to the deprivation of the rights of the Turkana in Samburu County amounted to violation of their rights to property. They added that there was no evidence of compliance with the laid down procedures for compulsory acquisition and the involvement of NLC.
21. They referred to articles 47 of the [Constitution](#) on the need for fair administrative action and urged that NLC, the County Government of Samburu, KDF and the national government did not comply with the requirements of the law in annexing the suit land. They urged that NLC was supposed to ensure security of land rights for bona fide proprietors and that the principles of land use and management in article 60 fell within the domain of NLC. They also cited articles 73, 75, 232, and 248 of the [Constitution](#) in support of their claim.
22. The petitioners urged that to the extent that the respondents had not facilitated the realisation of the rights of the Turkana Community in Northern Samburu recognised under article 63 and the [Community Land Act](#) and the Turkana in Northern Samburu as a result of which they were evicted, barred or excluded from the enjoyment of the pasture lands of Suguta Valley and Kawap, and were also barred from peaceful and lawful meetings, various provisions of the Bill of Rights were violated as follows: Article 27 on the right to equal treatment and benefit before the law in juxtaposition to the Samburu Community; Article 36 on the right to associate and discuss matters of mutual interest without unnecessary interference; article 40 regarding the right not to be arbitrarily deprived of property of any description or any interest or right over property; and article 47 guaranteeing the right to administrative action that is expeditious, efficient and lawful.
23. They stated that their claim was based on the apparent inaction of government agencies charged with public administration and that on account of impunity in government, the Turkana community in Kawap could not make use of the formal law to their benefit or enjoy protection under the self-same law.
24. The petitioners sought a declaration that the process of identification, setting aside and annexation of Turkana community ancestral land in Suguta Valley and Kawap areas by NLC on behalf of KDF and in conjunction with the Cabinet Secretary for the Ministry of Defence and the County Government of Samburu was unlawful and null for violating articles 27, 36, 40, 47 and 48 of [Constitution](#) as well as articles 1, 2, 10, 60, 67, 73, 75, 248 and 260 of the [Constitution](#).
25. They sought judicial review orders of certiorari to quash Gazette Notice No 2080 of 2021 (Vol XXIII-No 46) of February 4, 2021 which annexed and set aside Turkana Community land in Suguta Valley and Kawap areas for use by KDF for training and an order of prohibition to restrain KDF, NLC, the CS Ministry of Interior and Co-ordination of National Government and the County Government of Samburu from actualising the annexation and exclusion of grazers from the Turkana Community from accessing their ancestral land.
26. Further, they sought an order for cancellation of the certificate of title noted as IR 212367 issued to the KDF on May 15, 2018. They also sought a conservatory order to restrain NLC, KDF and the Ministry of Defence from commencing, concluding, or actualising the annexation of Turkana Community land in Suguta Valley and Kawap without compliance with the [Constitution](#), [Land Act](#) and the [Community Land Act](#).



27. The petition was supported by the affidavit sworn by Hon. Lawrence Lorunyei, the MCA for Nachola Ward in Samburu County who deponed that the land in Kawap and Suguta Valley in Baragoi, in the Northern part of Samburu County belonged to the Turkana community, is community land which falls within article 63 of the Constitution. He annexed reports explaining the settlement and challenges of the Turkana Community in Northern Samburu.
28. He deponed that on February 4, 2021 *vide* Gazette Notice No 2080 of 2021 (Vol CXXIII-No 46), the Chairman of the NLC, Mr Gerishom Otachi declared the suit land as land allocated for the KDF by deleting Gazette Notice No 3210 of 1977 which had allocated lands predominantly occupied by the Samburu Community for use by the KDF. He deponed that at the time of the gazettelement, the Turkana community in Samburu County were and still are using the land for pasture and seasonal settlements, that they have called the land home for many centuries and across generations.
29. Further, that the deleted Gazette Notice No 3210 of 1977 was altered by the removal of the reference to Samburu County Council and the coordinates identified as A and B referring to the land in Maralal and expressly provided for replacement with land in Suguta Valley and Kawap. He averred that the degazettelement of the land in Maralal, specifically Lpartuk and Lkuroto and the continuing titling of those lands meant that the ancestral land belonging to the Samburu was being given back to them, adjudicated and titles issued but the land belonging to the Turkana was being taken away to allow KDF to move into Baragoi without following due process.
30. The 1<sup>st</sup> petitioner averred that the Governor of Samburu indicated that the gazettelement of the new land and titling of land in the outskirts of Maralal town was occasioned by agitation by the local Samburu community. He averred that the land had been allocated for training but the locals who knew it as their ancestral land started building permanent houses and social amenities like schools on that land. He averred that the 1,000-acre parcel of land allocated to KDF in Suguta Valley and Kawap was deliberately and discriminately allocated to KDF without any regard to the adverse effect on the Turkana community who rely on it for grazing and watering holes during the dry season.
31. The 1<sup>st</sup> petitioner stated that as a leader and the MCA of Nachola Ward in Northern Samburu, the Turkana community and its leaders were not consulted by either the national or county governments on the annexation of their community land as required by the Constitution and the Community Land Act. He further stated that a newspaper report showed that the Samburu Governor approved the grant of their land to the KDF on behalf of the Turkana community without any evidence of the involvement of members of the Turkana community based on the assertion that KDF needed to settle in the area due to insecurity. He pointed out that in other instances where land was acquired by KDF from communities in Northern Kenya, the communities and their leaders were consulted and their input was considered. He gave the example of the acquisition of Karare land in Marsabit County by KDF where the community was involved as reflected in the Hansard of Parliament.
32. The 1<sup>st</sup> petitioner deponed that the scarcity of land for pasture had increased due to privatization of community land through conservancies to the South of Samburu County such as Namunyak Conservancy which forms part of the Northern Rangelands Trust and other large scale government projects in the region. He explained that the proper procedure for acquisition would have entailed valuation of the lands and cultural assets belonging to the Turkana community in Suguta Valley and Kawap while taking into account the economic implications of displacement and provision of viable alternative land.
33. He averred that the County Government of Samburu had discriminated against the Turkana community within the county and treated them like second class citizens and added that the



discrimination was likely to go on owing to their minority both in the national government and the County Government of Samburu.

34. Lorikot Egiron, the 2<sup>nd</sup> petitioner swore a supporting affidavit on March 26, 2021 and expounded the 1<sup>st</sup> petitioner's averments with regards to the ownership of the suit land. He averred that the Turkana community had lived on the suit land from pre-colonial times and that colonial records confirmed that the suit land was occupied by the Turkana community before the colonial administration. That the records showed that members of the Turkana community were sent away by Mr Kittermaster in 1912 but they went back and settled on that land having lost some members of their community due to drought and famine. He annexed a copy of the Colonial Administration Report by Lt Col Llewyn & Von Otter.
35. The 2<sup>nd</sup> petitioner deponed that before the Northern Frontier Districts were carved out, the Turkana community had settled in Suguta Valley and Kawap and that when marking the boundary, the colonial administration decided to have the Turkana divided on both sides of the boundary. He cited Captain CH Stigand's article entitled "To Abyssinia Through an Unknown Land" which indicated that the Turkana were in the suit land before colonialism and that the boundary between the Turkana and the Samburu at the time was set at El Barta. He annexed a map of the area as well as excerpts from the book by Captain CH Stigand.
36. The 2<sup>nd</sup> petitioner averred that after the enactment of the 2010 Constitution, the Turkana community living in Kawap commenced the process of adjudication of their land. A meeting was held on October 3, 2013 where resolutions were made for mapping and registration of the land. That the Samburu County Department of Land Adjudication declared the area as an adjudication section on March 12, 2014 as can be gleaned from the minutes and copy of the letter from the adjudication office. Shortly thereafter, they received information that the land set aside for KDF in Maralal would be given back to the Samburu community and in exchange, the land in Kawap would be given to KDF. They petitioned NLC on January 11, 2017 for a review of the matter. NLC wrote back and indicated that an investigation would be launched but it never got back to the petitioners. He annexed a copy of the petition and the letter from NLC dated January 12, 2017.
37. The 2<sup>nd</sup> petitioner asserted that the Samburu community used its influence and presence in both levels of government to get its land back and purported to give away land in Kawap and Baragoi which in actual sense belonged to the Turkana community, and not the Samburu. He annexed copies of the petitions made to Parliament and the submissions the Samburu elders made to the BBI team.
38. The 2<sup>nd</sup> petitioner added stated that they wrote a memorandum dated September 7, 2020 to complain that the Turkana community had lived on the disputed land since time immemorial and had been subjected to historical land injustices without redress as the minority within the Samburu County. He was emphatic that a title was issued to the KDF on May 1, 2018 without the knowledge of the Turkana community who only learnt about it later and exhibited a copy of the memorandum.
39. The 2<sup>nd</sup> petitioner surmised that this was a case of marginalisation and discrimination. He contended that since independence, the government practice had been that pastoralist community land in the northern frontier districts was not ordinarily issued a title and that such land vested in the communities. He elaborated that KDF did not have a title over the Maralal land when they used it for training. That after NLC gazetted their land for use by KDF, *vide* the letter dated MARCH 13, 2021 addressed to the Officer Commanding the Baragoi Police Station (OCS), the Turkana community tried to convene a legal and consultative meeting on March 17, 2021 to discuss the implications of the gazettelement but the OCS wrote back on March 16, 2021 declining the request. He annexed copies of these letters.



40. The 4<sup>th</sup> respondent opposed the petition through the replying affidavit of Captain Julius Meso sworn on June 28, 2021. Captain Meso deponed that Gazette Notice No 2080 of 4/2/2021 was made pursuant to an exchange of the land known as Samburu-Murramur Lkuroto measuring 949 hectares (2,345 acres) and Lpartuk measuring 792 hectares (1,956 acres) for the alternative parcels of land described in the gazette notice. He averred that the 4<sup>th</sup> respondent is the lawful proprietor of the Samburu-Murramur Lkuroto and Lpartuk land which it acquired for defence purposes and was using as training grounds.
41. Captain Meso deponed that the Samburu-Murramur Lkuroto and Lpartuk land was initially administered as trust land until November 11, 1977 when it was set apart for use and occupation by KDF *vide* Gazette Notice No 3210. According to him, the land remained military land until letters of allotment were issued to the 4<sup>th</sup> respondent. He exhibited copies of the gazette notice and letters of allotment dated July 24, 2018. He deponed that while KDF was in possession of the Samburu-Murramur Lkuroto and Lpartuk land, residents of Samburu County began intruding on the land and to date the land had been encroached by over 3000 families of squatters who have put up permanent residences, schools, hospitals and other public amenities which made the land unsuitable for military training. He added that the proximity of that land to Maralal town was considered by the 3<sup>rd</sup> respondent to be strategic for expansion.
42. Owing to the strategic value of the land to the people of Samburu County, the persistent encroachment and in public interest, engagements involving the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were initiated to find a solution. On July 27, 2018, they agreed that in consideration of the encroachment and public interest, the 3<sup>rd</sup> respondent would identify alternative land of equal acreage in exchange for the Samburu-Murramur Lkuroto and Lpartuk land military land. After consultations with the residents of Samburu County, the 3<sup>rd</sup> respondent identified the suit land as suitable for exchange culminating in the publication of Gazette Notice No 2080 of February 4, 2021.
43. The 4<sup>th</sup> respondent emphasised that the procedure contemplated in Gazette Notice No 2080 of February 4, 2021 was the exchange of public land and not the compulsory acquisition of land as the Petitioners purport. Captain Meso stated that the legal framework for allocation of public land through exchange was stipulated by section 12(1)(f) of the Land Act read with regulation 3(1)(f) of the Land (Allocation of Public Land) Regulations, 2017. The Captain urged that although the 4<sup>th</sup> respondent holds the right to evict the encroachers from the original KDF land, the exercise would have been against public interest due to the advanced settlement of residents of Samburu county.
44. He averred that when the notice to establish Kawap land as an adjudication area was given, the 3<sup>rd</sup> respondent raised objections causing cancellation of the notice. That the petitioners did not appeal against the objection by the 3<sup>rd</sup> respondent and the silence could only be interpreted as consent. He argued that since the attempts at adjudication had failed, the suit land, which is unregistered, undeclared and not transferred is considered as public land under article 62(1) of the Constitution.
45. He went further to explain that led by the Deputy Army Commander, the 4<sup>th</sup> respondent conducted a reconnaissance on the suit land on August 20, 2020 and found the land to be bare and unoccupied. He added that the suit land is dominated by rugged volcanic raised features and deep gullies characterised by lava rocks and volcanic ash type of soil. He argued that it cannot be urged that the suit land was originally occupied or used by the petitioners because it is unsuitable for human habitation but useful for military training and defence activities.
46. Captain Meso insisted that the exchange of land was made in the best interests of the entire Samburu County without discrimination between ethnicities while contending that the alternative would have



been to evict the entire population settled on the original land and demolish schools, hospitals and other infrastructure to pave way for the 4<sup>th</sup> respondent. He averred that even if the suit land were to be declared as an adjudication section the declaration would not be conclusive proof of ownership as it would be subject to objection under section 26 of the *Land Adjudication Act*. He emphasised that the 3<sup>rd</sup> respondent, in exercising its fiduciary duties as trustee was obligated to manage the land in the best interest of its constituents.

47. The 3<sup>rd</sup> respondent opposed the petition through the replying affidavit of Bosco Sambu, the acting County Secretary of Samburu County, sworn on September 20, 2021. He averred that the 3<sup>rd</sup> respondent had put in place elaborate systems to ensure that land and land resources within the county were utilised strictly in accordance with chapter 5 of the *Constitution*. He averred that the 3<sup>rd</sup> Respondent distributed resources equitably among the various ethnic communities and administrative sections within the county and that the function of resource planning and distribution which is overseen by the County Assembly, was public and transparent. He deponed that the robust oversight by the County Assembly and other public agencies ensured equity.
48. Mr Sambu deponed that *vide* Gazette Notice No 3210 of October 31, 1977, the Commissioner of Lands declared the intention to compulsorily acquire unregistered land in Maralal for use by KDF and invited all persons and communities to declare their interest and lodge claims for compensation. The process was successful and the land converted from trust land to public land, becoming the property of the KDF. Thereafter there was exponential growth in population and human activities around the land leading to encroachment and making it unsafe for continued use by KDF since military training involved the lethal use of ammunition.
49. Mr Sambu deponed that following the President's directive for the training camp to be relocated to a suitable location to the north of the county and a further directive by the Ministry of Lands, the County Government engaged in a robust planning exercise to identify the most suitable land in line with article 60 of the *Constitution*. This led to the identification of the suit land, which according to Mr Sambu is public land held in trust by the county government in accordance with article 62(1)(d) of the *Constitution*. According to him, the land was identified because it was arid with volcanic ash and was thus unsuitable for agricultural or economic use being a harsh terrain prone to insecurity and that it had never been used for human settlement.
50. He maintained that the suit land had never been adjudicated. Sometime in 2014 the Land Adjudication Officer, Samburu County announced plans to create an adjudication section in the area, but the plan was opposed by communities and their leaders leading to the termination of the process. In his view, Gazette Notice No 2080 of 2021 was proper and the question of compensation did not arise since the suit land was public land with no one entitled to claim it. He argued that there had never been any settlers, either permanent or temporary on the suit land.
51. The hearing of this suit proceeded on May 13, 2024. The petitioners called three witnesses who adopted the affidavits they swore in support of the petition as well as a witness statement of Hellene Lomang'at. They told the court that their grandparents and forefathers occupied the suit land, had always lived as pastoralist communities in Samburu County and that their ancestors were buried on the suit land. They did not have pictures in court to show that they have been occupying the disputed area.
52. The 1<sup>st</sup> petitioner told the court that the effect of the degazettement of the Lpartuk and Lkuroto land in Maralal was that the Samburu were given their land back while land belonging to the Turkana community was taken away to allow KDF to move to Baragoi without following due process. He urged that the 1000-acre piece of land in Suguta Valley and Kawap was deliberately and discriminately given to KDF without regard for the impact this would have on the Turkana community who rely on the



- large swathe of land for grazing and watering holes during the dry season. He was emphatic that as a leader in Nachola Ward, he and other leaders had never been consulted by the national and county governments for their input and views about the annexation of their community land.
53. He stated that the reports indicated that the Governor of Samburu purported to have approved the grant of the suit land to KDF on behalf of the Turkana Community yet there was no evidence of the involvement of the community. Further, that the Governor's explanation was that KDF needed to settle in that area due to increased insecurity. He mentioned that in other instances where land was acquired for KDF from communities in Northern Kenya, the leaders of those communities were consulted and their input considered.
54. He averred that the Turkana of Northern Samburu continue to suffer in silence as their constitutional rights were violated. He added that owing to the minority status of the Turkana in Samburu County, they would continue to suffer discrimination. He produced the article titled "Briefing Paper No 9: An Analysis of Turkana- Samburu Conflict" by Shalom-SCCRR. He also produced the article on "War and Predatory Economy in Northern-Kenya: How Ethnomusicology Can Explore Social Change" by Giordano Marmone. The other documents he tendered in evidence were Gazette Notice No CXXIII-No 46, an undated newspaper article and the Hansard for the Senate sitting of June 23, 2020 where the acquisition of Kararei land in Marsabit County by KDF was discussed.
55. The 2<sup>nd</sup> petitioner told the court that the Turkana community did a petition to NLC on January 11, 2017 seeking a review of the decision to give KDF Turkana community land without the community's knowledge. He urged that the Samburu community used its influence and presence in both levels of government to get back its land in Maralal. He adverted to petitions to Parliament and the Memorandum of the Samburu Council of Elders Association's Resolutions on the BBI where the Samburu mentioned that they had given KDF land in Baragoi. He produced copies of documents including the Memorandum dated September 7, 2020 indicating that the Turkana community had been living on the suit land since time immemorial and that they had been subjected to historical injustices without redress.
56. He explained that ordinarily, all pastoralist land in Northern Kenya is not issued title deeds but is treated as community land and pointed out that the Samburu community did not have a title over the land in Maralal when KDF used it. He contended that the act of issuing a title to KDF for the land occupied by the Turkana was clearly a case of discrimination and marginalisation. He added that the request by the Turkana community to have a consultative meeting to discuss the implications of the gazettelement of their community land in Baragoi was declined by the OCS Baragoi Police Station.
57. The 3<sup>rd</sup> respondent did not call any witnesses and only relied on the replying affidavit of Bosco Sambu who could not attend court because he had taken his wife to India for medical treatment. In his affidavit, he averred that the 3<sup>rd</sup> Respondent distributed resources equitably among the various ethnic communities and denied that there was any discrimination in the distribution of resources in Samburu County. He stated that the 3<sup>rd</sup> respondent became the trustee and custodian of all public land within Samburu County and administered it for the benefit of the public and the respective communities in the case of trust land.
58. Mr Sambu deponed that following a directive by the President of the Republic of Kenya to have the KDF training camp relocated to a suitable location to the North of the County and the directive by the Ministry of Lands dated April 4, 2021, the 3<sup>rd</sup> respondent engaged in a robust planning exercise to identify suitable land in line with article 60 of the *Constitution*. The 3<sup>rd</sup> respondent settled on the land located to the North of the County in Baragoi at the intersection of Kawap and Suguta Valley which in his view was public land held in trust by the 3<sup>rd</sup> respondent in accordance with article 62(1)



- (d) of the Constitution. The choice of the land was based on the land being arid with volcanic ash and unsuitable for agriculture or herding livestock; harsh terrain unsuitable for human habitation; the land being a security nightmare as a safe haven for cattle rustlers and other criminals; and lastly that the land was not being used for any human settlement or economic activity and was not being claimed by any community.
59. The Acting Secretary of the 3<sup>rd</sup> respondent averred that the suit land had never been adjudicated and remained public land under article 62(1)(d) of the Constitution and maintained that it was not community land as the Petitioners contend. That sometime in 2014, the Land Adjudication Officer Samburu County announced plans to create Kawap Adjudication Section which would have included the suit land but the plans were opposed by the affected communities. He relied on the letters dated November 11, 2019 by Hon Alois Lentoimaga, MP for Samburu North Constituency and letter dated November 22, 2019 from the Nyiro West Inhabitants.
  60. Mr Sambu averred that Gazette Notice No 2080 by NLC was a product of a robust consultative process involving the 3<sup>rd</sup> respondent, Ministry of Lands, KDF, NLC and other stakeholders. He maintained that the Gazette Notice was proper for it prescribed the exchange of public land. He was emphatic that the issue of compensation did not arise because the suit land was public land to which no one was entitled to lay claim to. He added that there were no settlers on the suit land and no eviction or disruption of people's lives in the conversion of barren land for use by KDF. He termed the petitioners' claim for compensation as spurious.
  61. Major Meso, an officer of the 4<sup>th</sup> respondent gave evidence. He denied that KDF had a title deed to the suit land just as it did not have a title over previous training grounds near Maralal in Lpartuk and Lkuroto. He clarified that KDF did not seek out the disputed lands, but was given the land by the 3<sup>rd</sup> respondent in an exchange guided by the NLC. He told the court that he did not attend any meetings held with the community in Kawap and did not know if other officers attended.
  62. He told the court that KDF had been using the land in Kawap area in Baragoi and Suguta Valley for training since 2020, with plans for further development. He confirmed that KDF did not pay the Turkana community and he did not know whether NLC compensated them. He denied that KDF displaced the Turkana community and argued that the land was not fenced. According to him, the Turkana community had been grazing their livestock outside KDF land. On being questioned by the court, he conceded that there had been confrontations between KDF and the local community.
  63. Major Meso produced copies of Gazette notice No 3210 of November 11, 1977, letters of allotment dated July 24, 2018 for unsurveyed plots A and B in Samburu County for military training, gazette notice number 2080 and a map for Baragoi area from Google maps.
  64. Upon conclusion of the hearing, the court directed parties to file and exchange written submissions. The 1<sup>st</sup> respondent adopted the 4<sup>th</sup> respondents' submissions. NLC sued as 2<sup>nd</sup> respondent, did not file documents or call evidence. During the initial stages of the case, NLC raised a preliminary objection which was dismissed by the High Court in Nairobi after which it did not participate in the proceedings save to file submissions at the tail end of the proceedings.
  65. The petitioners' submitted that the respondents' actions took us back to the days of the Crown Land Ordinances of 1902 and 1903 which the settler communities used to justify dispossession of locals which runs contrary to the spirit of the Constitution. They urged that conversion of their community land was not done under the Land Act and Community Land Act because there was no public participation and input of the Turkana community. Additionally, that no compensation was paid to



- the Turkana community. They argued that articles 10, 63 and 232 of the Constitution were violated, as well as article 27 on non-discrimination and article 47 which makes fair administrative action a right.
66. They emphasised that based on the evidence, the history of Kenya and the communities that inhabit the Northern Frontier Districts, the land on which the Turkana community in Samburu county find pasture is community land under article 63 of the Constitution. They emphasised that according to the National Land Policy Sessional Paper No 3 of 2009, such lands are not open access (terra nullius) for blanket declaration as public land. That being grazing and hunting fields used by the Turkana community living in Kawap, the land is categorized as community land under article 63.
67. They argued that the respondents' assertions that there was an exchange of land for land of equivalent value cannot fly based on the fact that the respondents did not demonstrate how the exchange happened and how valuation was done since the parcels of land were not of equivalent value. The petitioners contended that the property of the Turkana community could only have been lawfully acquired by the KDF if the procedure for compulsory acquisition was followed and as such there was a violation of article 40(3) of the Constitution.
68. The petitioners argued that discriminating an already marginalised community by taking away land to which their economic and social life was closely interlinked only served to curtail their development and marginalise them further. They cited article 10 of the Constitution and relied on the decision in African Commission of Human Rights and Peoples' Rights v Republic of Kenya (2017) and invited the court to recognise the importance of safeguarding community land rights.
69. The petitioners cited several decisions among them County Government of Taita Taveta v Isangaiwich Group Ranch & 3 others [2021] eKLR on community land; Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR and Republic v County Government of Kiambu ex parte Robert Gakuru & another [2016] eKLR on the importance of public participation; IEBC v NASA Kenya & 6 others [2017] eKLR on national values and the spirit of governance; and Nelson Andayi Havi v LSK & 2 others [2018] eKLR on the test for discrimination.
70. The petitioners urged the court to compensate the community for the constitutional violations against them and to grant the Petitioners the costs of the petition seeing that they were defending their rights in court against national entities with huge budgets. They relied on section 27(1) of the Civil Procedure Act and decisions in Orix Oil (Kenya) Limited v Paul Kabuu & 2 others [2014] eKLR and Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR.
71. The petitioners urged the court to be guided by article 259(1) of the Constitution in the determination of this dispute which demands that the Constitution be interpreted in a manner that advances good governance, the purpose of the Constitution and human rights.
72. The 3<sup>rd</sup> respondent argued that the suit land had not been adjudicated and therefore did not belong to any community by virtue of occupation or historical use for grazing or cultural activities. Further, that the exchange of the two parcels of land followed a consultative process involving the County Government of Samburu, the Ministry of Lands, KDF, NLC and other stakeholders. It emphasised that public participation did not mean that every member of the public should be consulted. The 3<sup>rd</sup> Respondent cited Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (CCT59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006(1) BCLR 1 (CC) (30 September 2005) and Okiya Omtatah Okoiti v County Government of Kiambu [2018] eKLR.
73. The 3<sup>rd</sup> respondent argued that the right to own land was not absolute and that the state could recall such rights subject to the law. It went on to urge that in this case, the issue of compensation did not arise because the suit land was public land. It maintained that the suit land was barren land and that



- there was no disruption of people's lives when the land was converted to use by KDF. It argued that the petitioners had failed to meet the threshold for grant of the reliefs they seek in this petition.
74. The 4<sup>th</sup> respondent emphasised that the suit land was public land under article 62(1)(d) of the Constitution held in trust by the Samburu County Government and that it had neither been previously used traditionally for any human settlement, economic activities nor did it have shrines or cultural resources claimed by any community. The 4<sup>th</sup> respondent referred the court to the extract from Google Earth Map it exhibited in support of this point.
75. It submitted that the procedure contemplated in Gazette Notice No 2080 of 2021 was for the exchange of public land under section 12(1) of the Land Act as read together with regulation 3(1)(f) of the Land (Allocation of Public Land) Regulations, 2017, and that it was not compulsory acquisition of land.
76. The 4<sup>th</sup> respondent challenged the jurisdiction of the court and submitted that if the matter were a constitutional petition it should be handled by the High Court pursuant to article 165 of the Constitution and not the Environment and Land Court (ELC) established under article 162(2) of the Constitution and sections 4 and 13 of the ELC Act. It contended that the ELC was clothed with the jurisdiction to entertain constitutional matters arising from land which were properly placed before it and cited *Republic v Karissa Chengo & 2 others*. Further, that since no land dispute existed between the petitioners and the 4<sup>th</sup> respondent, the ELC lacked jurisdiction to entertain the petition as the court of first instance. It went on to urge that the constitutional violations were not incidental to any land dispute between the petitioners and the respondents so as to bring the dispute within the jurisdiction of the ELC.
77. The 4<sup>th</sup> respondent emphasised that KDF had not been issued a title noted as IR 212367 on 1/5/2018 and pointed out that the petitioners did not produce a copy of such a title. The 4<sup>th</sup> respondent urged that section 30 of the Land Adjudication Act rendered this petition premature since the adjudication process was incomplete and that the court therefore lacked jurisdiction to handle the dispute. It relied on *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* (1989) KLR 1 and *Moses Mwicigi and 14 others v IEBC and 5 others* [2016] eKLR in support of this argument.
78. The 4<sup>th</sup> respondent submitted that by approaching the court to address their grievance, the petitioners were attempting to circumvent section 30 of the Land Adjudication Act read with section 78 of the Physical and Land Use Planning Act. Further, that under section 9(2) of the Fair Administrative Action Act, the High Court or a subordinate court should not review an administrative action or decision under the Act unless the mechanisms or remedies available under any written law had first been exhausted. It submitted that the petitioners had not demonstrated that they exhausted the internal grievance mechanisms provided under those statutes. It relied on *NGO Coordination Board v EG & 5 others* [2019] eKLR and *Speaker of the National Assembly v Karume* (2008) 1 KLR EP 425 among other authorities.
79. Regarding the exceptional circumstances anticipated under section 9 of the Fair Administrative Action Act and the need for exhaustion of remedies, the 4<sup>th</sup> Respondent relied on *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR and *Republic v Council of Legal Education ex parte Desmond Tutu Owuoth* [2019] eKLR.
80. On the doctrine of constitutional avoidance, the 4<sup>th</sup> respondent submitted that after this petition was transferred from the Constitutional and Human Rights Division of the High Court, the petitioners did not amend the suit to bring it within the ambit of another body of law other than the Constitution and that the petition ought to fail in limine. Several cases including *Ashwander v Tennessee Valley Authority* (1936) and *Communications Commission of Kenya & 5 others v Royal Media Services Ltd*



- [§ 5 others](#) [2015] eKLR and [KKB v SCM § 5 others](#) [2022 KEHC] 289 were cited to buttress this argument.
81. The 4<sup>th</sup> respondent reproduced excerpts of the [Community Land Act](#) on the definition, registration and adjudication process for community land and submitted that the petitioners' claim should fail for not adhering to those provisions, while reiterating that the suit land was public land under article 62(1) (d) of the [Constitution](#).
82. The 4<sup>th</sup> respondent maintained that KDF was entitled to train on the suit land after the exchange exercise and relied on articles 19 and 20 of the [Constitution](#). It cited [Michael Weare § another v Joel Sibusiso Naebel N.O. § 4 others](#), High Court at Natal Case No 8337/06 and [Manong § Associates \(Pty\) Ltd v City Manager, City of Cape Town § another](#) [2009] JOL 22914(c) among other decisions that discuss the fundamental rights that can be upheld by juristic persons and urged that it was also entitled to equality before the law as a juristic person.
83. The 2<sup>nd</sup> respondent, NLC, which filed its submissions much later after being indulged and granted time by the court, submitted that under article 63(2)(d)(iii) of the [Constitution](#), public land was exempted from being considered as community land. That where it is claimed that land is community land, the first step was to seek registration of the land in accordance with the [Community Land Act](#) and sections 7 to 14 of the [Land Act](#). NLC argued that the procedure for recognition, protection and registration of unregistered community land entailed confirming if it was available for registration in favour of the community by checking existing records and maps. It urged that the petitioners had not tendered evidence that the suit land was community land and invited the court to dismiss the petition with costs.
84. The court has read and considered the petition, the affidavits, evidence tendered in court as well as submissions filed by the parties. The main issues for determination are, firstly, whether the land in Kawap area and Suguta Valley in the northern part of Samburu County comprised community land belonging to the Turkana community or it is public land; secondly, whether the rights of the Petitioners have been infringed or violated as pleaded in the petition; thirdly, whether due process was followed in the allocation of the suit land to KDF; and lastly, whether the court should grant the reliefs sought in the petition.
85. The court will first address the issue of jurisdiction which the 4<sup>th</sup> respondent brought up in its submissions. This petition was initially filed in the High Court in Nairobi as Milimani High Court Constitutional and Human Rights Division Petition No E105 of 2021. Lady Justice M Thande transferred the suit to the High Court at Nanyuki on 4/7/2023 after which AK Ndung'u J of Nanyuki High Court administratively transferred the matter to the Environment and Land Court (ELC) in Nanyuki on 25/7/2023 on the basis that although the petition raised constitutional issues, the substratum of the case was purely a land issue.
86. AK Ndung'u J observed that by dint of article 162(2) of the [Constitution](#), the ELC, which has the status of the High Court, was vested with the power to interpret and determine constitutional matters touching on its specific jurisdiction. He directed that the matter would be mentioned before the ELC Court sitting at Nanyuki on October 12, 2023. The 4<sup>th</sup> respondent did not challenge the directions of Ndung'u J and only brought up the issue in its submissions, arguing that there was a procedural flaw in filing the petition before the ELC.
87. The other contention by the 4<sup>th</sup> respondent is that the court lacked jurisdiction to hear the petition based on section 30 of the [Land Adjudication Act](#). This issue was conclusively dealt with by AC Mrima J in his ruling of March 10, 2023. The court reiterated that section 30 of the [Land Adjudication Act](#) was not applicable where an aggrieved person pleads violations of the Bill of Rights under the [Constitution](#).



The 4<sup>th</sup> respondent did not lodge an appeal against the decision of AC Mrima J It is not for this court to revisit the issue which was determined by a court of concurrent jurisdiction.

88. Section 30 of the [Land Adjudication Act](#) prescribes the mode of appeal by persons aggrieved by a determination of objections to the adjudication register while section 78 of the [Physical and Land Use Planning Act](#) sets out the functions of the County Physical and Land Use Planning Liaison Committee which include the mandate to hear appeals against decisions made by the planning authority as well as appeals with respect to enforcement notices. These legal provisions are not applicable to the dispute before court.
89. Article 23 of the [Constitution](#) grants the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights. Article 165 which establishes the High Court expressly divests the High Court of jurisdiction with respect to matters falling within the jurisdiction of the courts contemplated in article 162(2) vide article 165(5)(b) of the [Constitution](#). Pursuant to article 162(2), Parliament enacted the [Environment and Land Court Act](#) which established the ELC and through section 13 of the [ELC Act](#), clothed it with the original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title to land in accordance with article 162(2)(b) of the [Constitution](#) as well as those under the [ELC Act](#) or any other written law relating to the environment and land.
90. Based on article 23(1), read with articles 165(5)(b) and article 23(3) of the [Constitution](#), the ELC is mandated to hear and determine applications for redress of a violation or infringement of, or threat to the right to property, which may be in the form of land, protected by article 40.
91. Under section 13(2) of the [ELC Act](#), the ELC has power to hear and determine disputes relating to compulsory acquisition of land and disputes relating to public, private and community land. These form the subject matter of this petition. The ELC also handles any other dispute relating to the environment and land. As the court mandated to handle land matters, it has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, the right to protection of property and not to be arbitrarily deprived of property under article 40 of the [Constitution](#).
92. Article 20 of the [Constitution](#) stipulates that the Bill of Rights applies to all law and binds all State organs and all persons. Further, that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
93. When handling matters within its jurisdiction, article 20(3) enjoins the ELC, to develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom when applying a provision of the Bill of Rights. When interpreting the Bill of Rights, this court should promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights falling within its mandate.
94. Article 259 requires that the [Constitution](#) be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. When dealing with claims alleging the violation of the right to property guaranteed by article 40 of the [Constitution](#), the ELC is bound by articles 20 and 259 of the [Constitution](#). By virtue of articles 52 and 56 of the [Constitution](#), this extends to the rights of minorities and marginalised groups where they claim that their rights over their community land have been infringed.



95. The petitioners' claim is that the suit land comprising community land held and used by members of the Turkana community in Suguta Valley and Kawap areas within Samburu County, was unlawfully acquired by the Respondents without the participation of the Turkana community in a manner that violated various articles of the *Constitution* including article 40 of the *Constitution*, which affords every person protection of the right to property. Based on articles 22, 23, 40, 61 and 63 of the *Constitution* and section 13 of the *ELC Act*, this court is vested with the jurisdiction to determine this dispute.
96. The respondents contended that the suit land comprised public land and that on that basis, in conjunction with NLC, the 3<sup>rd</sup> respondent offered the suit land to KDF in exchange for the land near Maralal which had been set aside for the use of KDF in 1977. On their part, the petitioners urged that the suit land comprised community land within the meaning of article 63 of the *Constitution* as ancestral land used by the Turkana community in Samburu County for grazing, habitation and other community activities.
97. The petitioners' claim is that the land in dispute belonged to the Turkana Community living in Suguta Valley and Kawap in the northern part of Samburu County. They relied on reports and other writings dating back to the precolonial times to demonstrate that members of the Turkana community had occupied and utilised the suit land for habitation and grazing for more than a century and that they had buried their ancestors on that land. The evidence of the witnesses called by the petitioners gave details of the historical occupation and communal use of the land which aligns with the definition of community land in the *Constitution* and the *Community Land Act*.
98. The respondents' main contention is that the suit land was public land vested in the 3<sup>rd</sup> respondent. By its very nature, public land is distinct from community land as it comprises land that cannot be shown to have any individual or community ownership, and is typically held by the government for public use and benefit.
99. Under article 63(1) of the *Constitution*, community land vests in, and is held by communities identified on the basis of ethnicity, culture or similar community of interest. Some of the clusters that constitute community land under article 63(2)(d)(i) and (ii) are land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; and ancestral lands and lands traditionally occupied by hunter-gatherer communities. The other cluster that constitutes community land is trust land held by county governments. What is specifically excluded and does not fall within the ambit of community land is public land comprising what was unalienated government land; land sold, surrendered or which reverted to the State; and land whose heir or individual or community owner cannot be established by any legal process. These categories of public land vest and are held by a county government in trust for the residents of that county with the administration of such land falling on the NLC.
100. Section 2 of the *Community Land Act* defines a community as a consciously distinct and organised group of users of community land who are citizens of Kenya and share a common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space or ethnicity. It is not in dispute that the members of the Turkana community who live in Baragoi area within Samburu County share a common ancestry, similar culture or unique mode of livelihood, socio-economic common interest, geographical space, ecological space and ethnicity. The 3<sup>rd</sup> respondent did not dispute the fact that members of the Turkana community live in the northern part of Samburu County. It is also not in contention that the Turkana community are pastoralists and owing to this fact and the dry nature of the land which they occupy in Northern Kenya, they move from place to place seeking pasture and water for their animals.



101. Hon. Lawrence Lorunyei, Lorikot Egiron and Hellen Lim Lomang'at who gave evidence on behalf of the petitioners told the court that the Turkana Community had lived on the suit land since pre-colonial times and that the community utilised the land as ancestral land for pasture and seasonal settlements across many generations. They relied on articles that confirm that the Turkana had occupied the land in question even in precolonial times. The petitioners were emphatic that the Turkana community in Samburu relies on the large swathe of land for habitation, grazing and watering holes during the dry season.
102. The suit land therefore falls within the definition of community land under article 63(2)(d)(i) and (ii) of the *Constitution* for it was held and used by the Turkana community identified on the basis of their ethnicity, culture and other community interest. The evidence adduced by the petitioners showed that the Turkana community used the land for grazing and it was their ancestral land where they had buried their dead. The land need not have been fenced as the 4<sup>th</sup> respondent contended.
103. Based on article 63(1), 2(d)(i) and (ii) and article 63(3) of the *Constitution*, the suit land constituted community land. By virtue of article 63(3), any unregistered community land is held in trust by county governments on behalf of the communities for which it is held. Being unregistered community land, the 3<sup>rd</sup> respondent held the land in Suguta Valley and Kawap in trust on behalf of the Turkana community.
104. Article 63(4) restricts the disposal of community land except as stipulated in legislation specifying the nature and extent of the rights of members of each community individually and collectively. Parliament enacted the *Community Land Act* pursuant to article 63(5) of the *Constitution*, whose preamble states that it is an Act of Parliament to give effect to article 63(5) of the *Constitution*; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.
105. Section 6 of the *Community Land Act* mirrors what is in article 63(3) of the *Constitution*, that County governments such as the 3<sup>rd</sup> respondent, hold in trust all unregistered community land on behalf of the communities for which it is held. Section 10(3) of the *Community Land Act* provides that until any parcel of community land has been registered in accordance with that Act, such land shall remain unregistered community land and is held in trust by the county governments on behalf of the communities for which it is held pursuant to article 63(3) of the *Constitution*.
106. Section 5(2) of the *Community Land Act* provides that customary land rights shall be recognised, adjudicated and documented for purposes of registration in accordance with that Act and any other written law while section 5(3) stipulates that customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer. This provision affords the Turkana community recognition of their customary land rights in Suguta Valley and Kawap, and is supported by the attempt made towards the adjudication and registration of the Suguta Valley and Kawap land in 2014.
107. Section 5(4) of the *Community Land Act* provides that subject to article 40(3) of the *Constitution* and the *Land Act*, no interest in, or right over community land may be compulsorily acquired by the State for a public purpose, except in accordance with the law and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement. Based on these legal provisions, the Respondents could only have compulsorily acquired the suit land which comprised community land used by the Turkana community for use by KDF for military training, which without



- doubt is a public purpose, in accordance with the law and upon payment of just compensation to the members of the Turkana community in Suguta Valley and Kawap. That did not happen in this case.
108. The respondents urged that the suit land was exchanged for the land near Maralal after it became untenable for KDF to continue military training on that land due to encroachment and the 3<sup>rd</sup> respondent's need for the land for the expansion of Maralal town. The exchange of the land in Suguta Valley and Kawap areas for the land KDF land in Maralal by the 3<sup>rd</sup> respondent amounted to compulsory acquisition of community land used by the Turkana in Northern Samburu County in contravention of article 40 of the *Constitution*.
  109. Section 6(7) of the *Community Land Act* requires any transaction in relation to unregistered community land within the county to be in accordance with the provisions of that Act and any other applicable law. The 3<sup>rd</sup> respondent could only have undertaken any transaction in relation to the suit land, which was unregistered community land within its county, while adhering to the *Community Land Act*. Section 6(8) of the *Community Land Act* forbade the 3<sup>rd</sup> respondent from disposing of the suit land which was unregistered community land that it held in trust on behalf of the Turkana community.
  110. It was the testimony of the witnesses called by the petitioners that they began the adjudication process in order to register their entitlement to the suit land and that the area in question had been declared as an adjudication section on March 12, 2014 by the Land Adjudication Officer, Samburu County but the process was not completed. The respondents' argument that since the suit land was not adjudicated and registered it therefore constitutes public land held in trust by the county government is not backed by any evidence or the law.
  111. The petitioners produced the letter dated November 11, 2019 written by the MP for Samburu North Constituency and letter dated November 25, 2019 from the Nyiro West Inhabitants which show that the communities protested against the adjudication and registration of community land in various places including the Kawap registration section. The common thread in those letters was that the communities were opposed to the adjudication and registration of their land mainly because they were dissatisfied with the registration of members and registration of group ranches without the participation and involvement of the affected communities.
  112. The respondents did not lead evidence to show how the suit land came to be public land. Based on the constitutional definition and statutory provisions referred to above, it is evident that the suit land constituted unregistered community land held in trust by the County Government of Samburu on behalf of the Turkana Community resident in Kawap, within the meaning of article 63 of the *Constitution* and the *Community Land Act*.
  113. The 4<sup>th</sup> respondent's position was that the attempts for adjudication having failed, the suit land which was unregistered, non-transferred and undeclared was considered to be public land under article 62(1) (d) of the *Constitution*. Article 63(3) and section 10(3) of the *Community Land Act* take cognisance of the fact that community land may be unregistered. It does not follow that when community land is not registered it automatically becomes public land. The *Constitution* distinguishes between these two categories of land without suggesting that community land is inferior to public land.
  114. The steps taken towards the adjudication of the suit land point to recognition of the claim of the Turkana community in Kawap to the suit land as that community's land. The fact that the area was declared an adjudication section by the Samburu County Government on March 12, 2014 undeniably confirmed that the Turkana community in Kawap had legitimate rights and interests over the suit land



- as community land. It was a recognition that their presence and use of the land were substantial enough to warrant consideration of creation of the Kawap Adjudication Section.
115. Section 7 of the [Land Act](#) lists the modes of acquiring land, which include allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions and transfers. Land may be converted from one category to another pursuant to section 9 of the [Land Act](#) but community land may be converted to either private or public land in accordance with the law relating to community land enacted pursuant to article 63(5) of the [Constitution](#), which is the [Community Land Act](#) of 2016.
  116. Section 12 of the [Land Act](#) which deals with allocation of public land states that whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to NLC for the necessary action through various ways including public exchanges of equal value as may be prescribed. From the facts of this case, this is the approach which NLC and the other respondents adopted when the KDF land in Maralal was exchanged for the land in Suguta Valley and Kawap.
  117. By virtue of section 12(7), public land is not to be allocated unless it has been planned, surveyed and serviced and guidelines for its development prepared in accordance with section 17 of that Act. The respondents did not tender any evidence to prove that indeed the two parcels of land said to have been exchanged were valued to meet the legal requirement for the public exchanges to be of equal value. There is no proof that the parcel of land in Suguta Valley and Kawap was planned, surveyed and serviced as the law requires. Nor was it demonstrated that the process of allocation of public land stipulated by Section 12 was followed by the respondents in the allocation of the suit land to KDF.
  118. Before allocating any public land under the [Land Act](#), NLC is obligated under section 14 to issue, publish or send a notice of action to the public and interested parties at least thirty days before offering for allocation a tract or tracts of public land. Section 14(4) states that at least thirty days prior to the allocation of the public land, NLC should have sent a notice to the Samburu County Governor and to the head of the governing body of the administrative subdivision having development control or other land use regulatory responsibility in Suguta Valley and Kawap area which is where the land they contend is public land was located.
  119. Such a notice is to be sent to known interested parties including adjoining landowners, persons in actual occupation of the land, marginalised communities and groups living in the general vicinity of the public lands proposed for allocation. Based on section 14(5) of the [Land Act](#), and assuming the suit land constituted public land which it did not, NLC would have been under an obligation to issue a notice to the members of the Turkana community living in Suguta Valley and Kawap before allocating the suit land to KDF. There is nothing to show that NLC sent the notices envisaged by section 14 of the [Land Act](#) to the Turkana community living in Samburu County, yet it is marginalised as a minority in that county as it were.
  120. The 3<sup>rd</sup> respondent claimed that it engaged in a robust planning exercise to identify suitable land for KDF in line with article 60 of the [Constitution](#). Although the court agrees with the 3<sup>rd</sup> respondent that public participation did not mean that every member of the public should be consulted, this did not mean that the Turkana community was to be excluded and ignored altogether when decisions touching on the community's land were taken. The 3<sup>rd</sup> and 4<sup>th</sup> respondents told the court that the exchange of the two parcels of land followed a consultative process involving the County Government of Samburu, the Ministry of Lands, KDF, NLC and other stakeholders. There is no doubt that the Turkana community was neither consulted nor involved before the decision to allocate the suit land to KDF was made. It was imperative for the Turkana community in Kawap to be consulted so that



it could make recommendations and have its input considered when the decision to allocate the suit land to KDF was made.

121. In the discharge of its functions and exercise of its powers under the *Land Act*, some of the guiding principles listed in section 4 that should guide NLC are non-discrimination and protection of the marginalized and non-discrimination and protection of the marginalized. The facts of this case do not show that NLC paid heed to these guiding principles when it sanctioned the exchange of the two parcels of land.
122. From the evidence tendered in court, it is apparent that KDF took possession of the suit land pursuant to Gazette Notice 2080 of 2021. The petitioners told the court that they were not consulted before their land was allocated to the KDF. This was confirmed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. According to them, they merely facilitated an exchange of public land in terms of section 12(1)(f) of the *Land Act* which did not require consultation of the petitioners.
123. The petitioners did not willingly give the suit land to the KDF, it was taken away from them on the strength of Gazette Notice No 2080. In this court's view, that act amounted to compulsory acquisition of the land held by the Turkana Community in Kawap within Samburu County. In *Attorney General v Halal Meat Products Limited* (2016) eKLR the court relied on the definition of compulsory acquisition in Halsbury's Laws of England, Vol 18 (2009) at para 501 as instances where land or an interest in land is purchased or taken under statutory powers without the agreement of the owner.
124. Section 22(1) of the *Community Land Act* prescribes the procedure for converting community land to public land, which is done through compulsory acquisition, transfer, or surrender. For the conversion to be lawful, the government must follow specific procedures, including public participation, and provide compensation to the affected community. This is derived from article 40 of the *Constitution* which provides that subject to the restrictions on landholding by non-citizens, every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya.
125. Article 40(3) restricts the State from depriving a person of property or interest in or right over property except in two instances. Firstly, where the deprivation 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 the principles of land policy and the classification, vesting, holding and administration of land under Chapter 5 of the *Constitution*. Secondly, the deprivation is sanctioned by the *Constitution* where it is for a public purpose or in the public interest and is carried out in accordance with the *Constitution* and any Act of Parliament which makes it conditional upon the payment of compensation to the person which is just, prompt and in full with the person being deprived of the property being afforded access to a court of law.
126. The petitioners contended that the respondents' acts of annexation of the Turkana community land in Kawap amounted to marginalisation and discrimination in violation of their rights under the Bill of Rights. The *Constitution* defines a marginalised community as
  - (i) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
  - (ii) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
  - (iii) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or



- (iv) pastoral persons and communities, whether they are nomadic or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.
127. The Constitution goes further to define a marginalised group as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27(4). The grounds include race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
128. The petitioners contention was that as the minority community living in Samburu County, members of the Turkana community in Kawap were discriminated against when their land was allocated to KDF for military training in exchange for the KDF land in Maralal which was returned to the Samburu community. Marginalisation generally comes about when a group of people is disadvantaged by discrimination on the grounds listed in the Constitution which include ethnic or social origin and culture. From the facts of this case, it is apparent that the Turkana are a relatively small population in Samburu county and it has been unable to fully participate in the integrated social and economic life of Kenya as a whole.
129. It is not clear how the exchange of the KDF land in Maralal for the suit land was undertaken because there was no valuation of the two parcels of land said to have been exchanged. The fact that no form of compensation was paid to the Turkana community in Kawap raises doubts as to whether the process of allocation of the suit land by the 3<sup>rd</sup> defendant to KDF in concert with the 1<sup>st</sup> defendant was lawful. The process was carried out in blatant violation of article 40 of the Constitution, the Community Land Act and the Land Act. Gazette Notice No 2080 of 2021 purporting to allocate the suit land to KDF is unconstitutional and therefore null and void.
130. The petitioners urged that the suit land holds cultural and historical significance for them. The land is not only their ancestral home but also a vital resource for their pastoralist way of life providing grazing grounds, seasonal settlements and watering holes for their animals during the dry season. It is the place where their ancestors have been buried.
131. Article 56 of the Constitution requires the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups such as the members of the Turkana community living in Kawap, participate and are represented in governance and other spheres of life; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure. The affirmative action programs are intended to ensure that marginalized communities, such as the Turkana community living in Samburu County, are protected from discrimination and exclusion. Article 44 of the Constitution, which guarantees the right of every person, including communities, to enjoy and participate in their cultural life protects the right of the Turkana community to participate in their cultural life which is intertwined and linked to their ancestral land in Kawap hence the annexation of the suit land without their participation violated their rights protected by law.
132. Article 40 of the Constitution protects the right to property, including community land, and prohibits arbitrary deprivation of such property without due process and just compensation. To forcefully alienate their land without following due process not only deprived the Turkana community in Kawap of their means of survival but it also eroded their cultural heritage in violation of their rights under the Constitution.



133. Article 10 of the *Constitution* sets out the national values and principles of governance which bind State organs, State Officers, public officers and all persons whenever any of them applies or interprets the *Constitution* or applies or interprets any law; or makes or implements public policy. It was paramount and imperative for NLC to be guided by the rule of law, participation of the members of the Turkana community in Suguta Valley and Kawap in decision making before their land was annexed. Further, NLC was bound and should have been guided by the principles of equality, inclusivity, non-discrimination and protection of the Turkana community in Kawap as a marginalised group.
134. The 3<sup>rd</sup> respondent ought to have been guided by the rule of law, participation of the members of the Turkana community in Kawap in the decision making before their land was annexed, non-discrimination and protection of the Turkana community in Kawap as a marginalised group within Samburu County. The other values and principles which the respondents were bound to apply in arriving at the policy decision to move the KDF military training ground from Maralal to Kawap pursuant to article 10 of the *Constitution* include human dignity, equity, social justice, inclusiveness, equality, human rights, good governance, rule of law, transparency, accountability, good governance and sustainable development.
135. What emerges from this petition is that the marginalisation and violations of the rights of the members of the Turkana community to property guaranteed by article 40 of the *Constitution* was closely linked and intertwined with violations of their other rights to non-discrimination, human dignity, fair administrative action, participation among other others. This court has jurisdiction over the claim since the predominant issue in the petition is the deprivation of community land without compensation and in a discriminatory manner.
136. Although Kenya has not ratified *UNDRIP* which the petitioners quoted extensively, nevertheless, it is bound by international and regional treaties to protect human rights especially rights of marginalised communities, which it has ratified pursuant to article 2(6) of the *Constitution*. These include the *Universal Declaration of Human rights*, the *International Covenant on Civil and Political Rights*, *International Covenant on Economic Social and Cultural Rights*, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, the *United Nations Convention on the Rights of the Child*, *African Charter on Human and Peoples' Rights*, *African Charter on the Rights and Welfare of the Child*, *Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol)*. These Conventions deal with human rights including rights to land, non-discrimination, culture and the right to participate in decision making.
137. The Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters commonly referred to as the Aarhus Convention which focuses on the right to access environmental information, the right to participate in environmental policy making and the right to environmental justice gives a broad overview of what the participation of the Turkana Community in Kawap should ideally have entailed before the suit land was allocated to KDF.
138. the *Constitution* of Kenya makes participation in decision making an imperative, besides incorporating the right to access information (article 35) and access to justice (article 48) where it is alleged that a community's rights to property or protection from non-discrimination have been violated. The court agrees with the Petitioners' contention that discriminating an already marginalised community by taking away its land to which their economic and social life was closely linked will curtail their development and marginalise the members of that community further.
139. The petitioners' contention is that the suit land which was held and used by the Turkana community in Samburu County was allocated to KDF for military training purposes in exchange for the KDF land in Maralal which was given back to the Samburu community in a discriminatory manner. *Black's Law*



*Dictionary*, 10<sup>th</sup> Edition defines discrimination as the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability. Article 27 of the *Constitution* goes beyond these identities to add ethnic or social or social origin, culture, language or birth as the grounds upon which the state (which would include the respondents) should not directly or indirectly discriminate against any person. Discrimination is also defined by the dictionary as the differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

140. The 3<sup>rd</sup> respondent did not dispute the fact that members of the Turkana community lived in Kawap within Samburu County. The 3<sup>rd</sup> and 4<sup>th</sup> respondents were emphatic that the suit land was chosen as being most ideal for the relocation of KDF because it is arid with volcanic ash and unsuitable for agriculture or herding livestock. The other reason advanced by the 3<sup>rd</sup> respondent was that the land was a security nightmare for providing a safe haven for cattle rustlers and other criminals. The decision taken by the 3<sup>rd</sup> respondent which led to the exchange of the suit land for the KDF land in Maralal was discriminatory as it conferred the privilege of the return of the KDF land in Maralal to members of the Samburu community while depriving the Turkana community of their community land in Kawap. This points to the marginalisation of the already marginalised Turkana community living in Samburu County characterised by the intersectionality of the grounds set out in article 27 of the *Constitution*.
141. The 4<sup>th</sup> respondent submitted that the petitioners should have exhausted other remedies before moving this court. However, it did not specify which remedies those were and whether those remedies would have adequately addressed the contention by the petitioner's of violations of the rights of the Turkana community to the suit land.
142. The 1<sup>st</sup> petitioner contended that the 1000-acre piece of land in Suguta Valley and Kawap was discriminately given to KDF without any consideration for members of the Turkana community who rely on the large swathe of land for grazing and watering holes during the dry season. The 2<sup>nd</sup> petitioner produced an illegible copy of the certificate of title which he claimed was issued to KDF in respect of Baragoi Camp for 217.7 hectares on May 1, 2018. The suit land is much bigger than this. The letters of allotment which the 4<sup>th</sup> respondent produced dated July 24, 2018 refer to Plot A and Plot B Samburu County, site for military training for 949 hectares and 792 hectares respectively. Ordinarily, the issuance of the letters of allotment should have preceded the issuance of the certificate of titles and reflect the same measurement of land.
143. The 4<sup>th</sup> respondent's witness, Major Julius Meso stated in his testimony that KDF had already taken possession of the suit land and the petitioners now graze outside the KDF grounds. He stated that there had been clashes between the Turkana Community and the KDF over the suit land which further signifies that there was prior use of that land by the Turkana community. The respondents should have, and still can take advantage of article 40(4) to make provision for compensation to be paid to the Turkana community in Suguta Valley and Kawap for their land acquired even though they did not hold title to the suit land.
144. It is not in dispute that the suit land is now occupied by KDF. It is also not in dispute that the Turkana community who are pastoralists in the area were not compensated by either the 2<sup>nd</sup> respondent or the KDF. Section 2 of the *Land Act* defines compulsory acquisition as the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation. Just compensation in relation to compulsorily acquired land is defined as a form of fair compensation that is assessed and determined through criteria set out under that Act.
145. Under article 241 of the *Constitution*, KDF is responsible for the defence and protection of the sovereignty and territorial integrity of the Republic of Kenya. It is not lost to this court that article



66 of the Constitution gives the State power to regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety and public order. The Constitution requires that any such regulation must adhere to due process including payment of prompt and fair compensation to the Turkana community in Suguta Valley and Kawap and their meaningful public participation in decision making more so because of their marginalisation.

146. The petitioners sought various reliefs, including the return of the suit land to the Turkana Community in Kawap besides an order nullifying the Gazette Notice allocating the land to KDF. Given that KDF is already in occupation of the suit land for military training, the court must balance community rights with national security interests. Since repossession of the suit land from KDF which is already using the suit land for military training and other national defence purposes is not tenable, the orders that this court deems appropriate to make in the circumstances of this dispute are: -
- a. A declaration is hereby issued that the process of identification, setting aside, and annexation of Turkana community ancestral land in Suguta Valley and Kawap areas by the NLC on behalf of KDF, in conjunction with the Cabinet Secretary, Ministry of Defence and the County Government of Samburu, was unlawful and void for violating articles 10, 27, 40, 47 and 56 of the Constitution of Kenya.
  - b. An order of *certiorari* is issued to quash Gazette Notice No 2080 of February 4, 2021.
  - c. NLC is directed to initiate forthwith and conclude without delay the compulsory acquisition of the suit land which was previously occupied by the Turkana community in Kawap and Suguta Valley that it caused to be allocated to KDF for military training vide Gazette Notice No 2080 of February 4, 2021 for purposes of prompt payment of full and just compensation to members of the Turkana community in Kawap and Suguta Valley in strict compliance with Part VIII of the Land Act and other relevant provisions of the Land Act, the Land Registration Act, the Community Land Act, the NLC Act and the Constitution. The fair and just compensation determined by NLC must be paid in full to members of the Turkana community within eighteen months of the date of this judgment.
  - d. A consultative team comprising the petitioners, three other leaders selected from the Turkana Community living in Kawap and five representatives nominated by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents will be constituted within 14 days of the date of this judgment to oversee and facilitate the participation of the Turkana community in the determination of, and full payment of the fair and just compensation to members of the Turkana community for their land in Kawap and Suguta Valley which the 3<sup>rd</sup> respondent allocated to KDF. The Team will liaise with NLC in the determination of the just compensation payable to the Turkana Community in Kawap and Suguta Valley.
  - e. The consultative team will first ascertain and compile a full list of the members of the Turkana community who were displaced and who directly affected by the acquisition of the Turkana community land in Kawap and Suguta Valley for KDF.
  - f. The consultative team must ensure that the process is inclusive and as many as possible members of the Turkana community who were displaced and directly affected by the acquisition of the Turkana community land in Kawap for KDF participate in the process and that their participation is meaningful and not merely tokenistic. The Team must take into account the viewpoints of women (including widows), children, the elderly, youth and persons with disability.



- g. The Team will liaise with the National Environment Management Authority (NEMA) to ensure the sustainable utilisation, management and conservation of the natural environment in Suguta Valley and Kawap for purposes of safeguarding the rights of nature in compliance with article 69 of the *Constitution*.
- h. The 3<sup>rd</sup> respondent in conjunction with the Cabinet Secretary, Ministry of Lands and Settlement will undertake a survey, adjudication and registration of the remainder of the Turkana Community land in Kawap.
- i. The respondents in consultation with other State organs are to design and implement affirmative action programmes and formulate policies to redress the land injustices and other disadvantages suffered by the Turkana community in Kawap because of past discrimination and marginalisation.
- j. The 3<sup>rd</sup> respondent shall take measures to include representatives of the Turkana community in decision making in Samburu County and ensure that they meaningfully participate in matters that affect the Turkana community living in Samburu County.
- k. The court declines to order the cancellation of the certificate of title which the petitioners referred to as IR 212367 alleged to have been issued to KDF on May 1, 2018 since its existence was not proved.
- l. The petitioners are awarded the costs of the petition which will be borne jointly by the respondents.

**DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH 2025.**

**K. BOR**

**JUDGE**

In the presence of: -

Ms. Diana Bosire for the Petitioners

Ms. Mumbi Muriguh for the 2<sup>nd</sup> Respondent

Mr. Marcelino Lesaigor for the 3<sup>rd</sup> Respondent

Ms. Atieno Nyonje holding brief for Mr. G. Kabi for the 4<sup>th</sup> Respondent

No appearance for the 1<sup>st</sup> Respondent

