Chuma & 5 others (Suing on their behalf and on behalf of Kapterik Clan, Kabon Clan, Toiyoi Clan, Kobil Clan, Saniak Clan & Tungoi Clan) v Kenya Flourspur Company Limited & 4 others (Petition 12 of 2022) [2023] KEELC 16877 (KLR) (17 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16877 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

PETITION 12 OF 2022

L WAITHAKA, J

APRIL 17, 2023

FORMERLY ELDORET ELC PETITION NO.2 OF 2019

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 20, 22(3), 27(1), 28, 40, 47, 60, 63, 67(2)(E)(H); 69, 70 AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013 (UNDER RULES 2, 3, 4, 5, 7 & 8)

BETWEEN

MATHEW SAWE CHUMA ..... 1ST PETITIONER

JOSEPH KIPKOSGEI LELON ..... 2ND PETITIONER

KIMACHUL CHANGWONY KOTUT ..... 3RD PETITIONER

MIKE K. KIBIEGO ..... 4TH PETITIONER

GILLYBH KORIR CHUMA ..... 5TH PETITIONER

JOHN KIPTANUI KIMAIYO ..... 6TH PETITIONER

SUING ON THEIR BEHALF AND ON BEHALF OF KAPTERIK CLAN, KABON CLAN, TOIYOI CLAN, KOBIL CLAN, SANIAK CLAN & TUNGOI CLAN

AND

KENYA FLOURSPUR COMPANY LIMITED ..... 1ST RESPONDENT

KERIO VALLEY DEVELOPMENT AUTHORITY ..... 2ND RESPONDENT

THE COUNTY GOVERNMENT OF ELGEYO MARAKWET 3RD RESPONDENT

THE NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

THE HOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners herein who have described themselves as members of Kapterik, Kabon, Toiyoi, Kobil, Saniak and Tungoi clans respectively and as residents of Kimwarer Mining area of Keiyo South Sub County, Elgeyo Marakwet County, brought this Petition on their own behalf and on behalf of their clansmen and women.

2. The Petition is premised on the grounds that the petitioners are the occupiers and owners of all that land known as Kimwarer Mining Area (KMA) of Keiyo Escarpment. The petitioners acknowledge that the area known as KMA was vide gazette notice Nos 320 and 321 of 1995 set apart by the Government of Kenya and leased for a period of 42 years from 1976 to the 1st respondent, Kenya Flourspar Company Limited.

3. Claiming that the 1st respondent's lease expired on 31st March 2018 and that upon expiry of the lease the land reverted back to the community, the petitioners contend that continued stay, occupation, mining and related activities on the land by the 1st respondent is illegal and prejudicial to their rights as the host community. It is noteworthy that vide paragraph 14 of the Petition, the petitioners appear to contradict their contention that KMA was reverted back to the community by pleading with the court to order that the suit land reverts back to the 3rd respondent and that the 3rd respondent should be compelled to register it as community land for their benefit and the benefit of the clans they represent.

4. The petitioners further claim that the entire Keiyo South Eastwards towards Baringo County from Keiyo Escarpment to river Cheploch and Soy area has been set apart for an irrigation plan to be undertaken by the 2nd respondent, Kerio Valley Development Authority, without their participation yet they are the inhabitants of the land with a communal claim over it. The petitioners further claim that the land earmarked by the 1st and 2nd respondents for acquisition comprise virgin land which has not been adjudicated, surveyed, mapped or parceled.

5. Claiming that the land ordinarily belongs to them as members of the Keiyo community, the petitioners contend that the acquisition is meant to displace them and render them destitute.

6. The petitioners have further pleaded that the 1st to 4th respondents, with approval and advice of the 5th respondent, intent to appropriate the land comprised in Kimwarer area, survey, parcel and allocate it as private land to individuals and organizations without regard to their community interest therein. It is alleged that the impugned survey, acquisition, appropriation and allocation of the suit land is being done secretly and without public participation, contrary to public policy and sound land management.

7. The petitioners have further pleaded that they learnt through press that the respondents have compiled lists of beneficiaries of the impugned allocation of their land from the Government of Kenya and investors. They complain that the beneficiaries were sourced from outside the mining area and excluded the genuine owners of the land and the clans they represent.

8. The petitioners have further pleaded that they did not benefit from funds set aside by the Government of Kenya for compensation of people affected by acquisition of their land that was leased to the 1st respondent for 42 years.

9. Contending that the entire Kimwarer Mining Area has never been demarcated, planned or parceled, the petitioners term the impugned allocation exclusionary, arbitrary, fraudulent, secretive and aimed at excluding them while benefiting strangers.

10. Terming the impugned action of the respondents a breach of their rights and freedoms, the petitioners seek the following reliefs:-

    a. An order of conservatory nature prohibiting the respondents individually and collectively from engaging in the acquisition, mapping, survey and in any other way developing the Kimwarer Mining area of Elgeyo Marakwet County without first consulting and agreeing with them and all communities that inhabit and occupy the area;

    b. A declaration that Kimwarer Mining Area of Keiyo Escarpment of Elgeyo Marakwet County is community land belonging to them and their respective clans and should always be treated as such;

    c. Upon grant of (b) above the county government of Elgeyo Marakwet County do undertake and underwrite the speedy registration of all unregistered community land including but not limited to Kimwarer Mining Area of Keiyo Escarpment in trust for the Keiyo sub tribe on behalf of whom it shall be held as required by section 6(1) of the *Community Land Act*.

    d. The purported profiling of plot owners in the Kimwarer area of Keiyo Escarpment be recalled until proper registration that is consultative is done with participation of the Petitioner and their kinsmen;

    e. A declaration that the conduct of the respondents individually and collectively in acquiring, mapping, survey, parceling and profiling plot owners in the Kimwarer Mining Area of Keiyo Escarpment infringes on and violates their inviolable right to fair administrative action, fair hearing guaranteed by articles 25, 27, 47, and 51(1) of the *Constitution*.

    f. A declaration that the respondents' actions, omissions and conduct have infringed, infracted and/or violated their right to property under article 40(1) and 63 of the *Constitution*.

    g. An order of permanent injunction directed to the respondents to halt their activities in Kimwarer Mining Area of Keiyo escarpment so as not to interfere with their proprietorship over the same;

    h. Costs consequent upon the Petition be borne by the respondents;

    i. The court be pleased to make any such order or orders as it may deem necessary, just and expedient in the circumstances to remedy the violation of their fundamental rights necessary for their existence.

11. The Petition is supported by the affidavits of Mathew Sawe Chuma, supporting and supplementary, sworn on March 6, 2019 and May 15, 2019 respectively.

12. It is opposed by the 2nd and the 5th respondents through replying affidavit of Francis Kipkech, the Managing Director of Kerio Valley Development Authority, sworn on April 4, 2019.

13. Pursuant to directions given on 22nd June, 2022 that the Petition be disposed of by way of written submissions, the petitioners and the 2nd and 5th respondents filed submissions.

Analysis and Determination

14. From the pleadings, the affidavit evidence adduced in support thereof and the submissions, the issues for the court's determination are found to be:-

    i. What is the status of the parcel of land known as Kimwarer Mining area, is it Public or Community land?

    ii. Whether the activities of the respondents on the Parcel of land known as Kimwarer Mining area were/are a violation of the petitioners' constitutional rights and fundamental freedoms;

    iii. Whether by publication of Gazette Notice No 925 of 1st February 2019, the respondents violated or threatened the petitioner's Constitutional Rights with violation;

    iv. Whether the petitioners have made up a case for being granted the orders sought, or any of them;

    v. What order(s) should the court make.

15. With regard to issue (i), the petitioners, vide paragraphs 1, 2, 7, 10 and 25 of the Petition contend that the parcel of land known as KMA belong to them by virtue of being the residents and/or occupants of the area. However, vide paragraph 7 of the Petition the petitioner acknowledge that the said parcel of land was vide Gazette Notice No 320 and 321 of 1975 set apart by the Government of Kenya and leased to the 1st respondent for a period of 42 years.

16. Claiming that the land reverted to the community after the lease expired on March 31, 2018, the petitioners contend that the 1st respondent's continued stay, occupation, mining and related activities on the land are illegal and prejudicial to them as the host community.

17. In response, the 2nd and 5th respondents, vide the replying affidavit of Francis Kipkech sworn on April 4, 2019, paragraph 12 thereof, contend that the issue as to whether KMA is public, private or community land was resolved when it was established that the Flourspar Mining Area Measuring over 9,000 hectares was vide Legal Notices No 320 and 321 of January 31, 1975 set apart for fluorspar mining and for purposes ancillary thereto.

18. On the effect of setting apart of the trust land reference is made to gazette notices Nos 320 and 321 of January 25, 1975 and the contention by the petitioners that the land was set apart for 42 years w.e.f from March 31, 1976 and submitted that the petitioners misapprehended and misconstrued the instrument of setting apart and the legal ramifications of setting apart of trust land.

19. It is contended that the instrument setting apart Kimwarer Mining Area, FK6/MSC2, does not in any way suggest that the setting apart of the said parcel of land was for a period of 42 years. Terming the petitioners interpretation of the gazette notices inadmissible, the respondents urge the court to reject it as it tends to add, vary or contradict a written instrument contrary to the parole evidence rule.

20. It is the 2nd and 5th respondents' case, that the purported lease by the Government of Kenya to the 1st respondent to extract minerals from the suit land has nothing to do with setting apart of the trust land. According to the 2nd and 5th respondents, expiry of the lease between the Government of Kenya and the 1st respondent would not in any way revert the said parcel of land to the Community.

21. Based on the provisions of Section 117 and 118 of the retired constitution and the decisions in the cases of Athman Mbosio Mwakulu & another v. National Land Commission & 4 others (2021) e KLR and Bahola Mkalindi v. Michael Seth Kaseme & 2 others (2013) e KLR it is submitted that setting apart of

trust land under Section 118 of the retired constitution automatically converted trust land into public land for public use only. It is further submitted that setting apart extinguishes any customary claims to trust land by any tribe, group, family, individual or clan.

22. It is further submitted that Article 62(1)(f) of the *Constitution* recognizes all minerals and oils as public land and contended that the letter of March 10, 1975 (MSC-5) recognized that Kimwarer area had been vested to the Government by not only setting apart but also by virtue of being a mining area.

23. According to the 2nd and 5th respondents, setting apart was completed when gazette notices Nos 320 and 321 were published.

24. It is submitted that the respondents demonstrated that persons affected by the setting apart were fully compensated. In that regard reliance is placed on the letter dated April 28, 1986 (MSC-4) and the report dated January 2019 (FK7) and the Schedules thereto (FK8).

25. It is contended that no legal challenge against the setting apart was ever raised by the land owners and submitted that the setting apart was lawful, legal and procedural.

26. It further submitted that Kimwarer Mining area was not community land hence not amenable for compulsory acquisition.

27. It is further submitted that under Section 5(4) and 22 of the *Community Land Act*, the 4th respondent has power to compulsorily acquire community land for public purposes subject to meeting the conditions listed therein.

28. Maintaining that Kimwarer Mining Area was not community land, the 2nd and the 5th respondents submit that the process of compulsory acquisition was inapplicable to it.

29. Based on the legal notices, which notices are annexed to the affidavit and marked FK6 and the cases of *Athman Mbosio Mwakulu & another v. National Land Commission & 4 others* and *Bahola Mkalindi v. Michael Seth Kaseme & 2 others* supra it is submitted that the Petitioner's claim that the area is community land is not maintainable.

30. The respondents further contend that, even assuming the land is community land, the 4th respondent has power to acquire it for public use through the impugned notice.

31. I have carefully considered the pleadings, evidence, submissions and authorities cited on the issue as to whether the parcel of land known as KMA is public or Community land.

32. It is common ground that the area known as KMA was set apart for purpose of mining of fluorspar and for purposes ancillary thereto. Whilst the petitioners, vide paragraph 7 of the Petition claim that the area reverted back to the community in 2018, after the lease issued to the 1st respondent expired, they did not produce any evidence capable of substantiating leave alone proving that allegation. Vide paragraph, 14 of the Petition, the petitioners appear to be contradicting their position as pleaded in paragraph 7 to the effect that the land reverted to the community by indicating that theirs is merely a wish/ a prayer that the area reverts to the 3rd respondent and thereafter to them by the 3rd respondent being ordered to register it as community land belonging to them and their clans.

33. Based on the affidavit evidence adduced in this case showing that KMA was vide Gazette Notices No 320 and 321 of 1975 set a part as public utility land and on the basis of the decisions in the case of Athman Mbosio Mwakulu & another v. National Land Commission & 4 others and Bahola Mkalindi v. Michael Seth Kaseme & 2 others, supra, where it was held that the effect of setting apart land under section 117(2) of the former Constitution was to extinguish all customary law rights, interests or

benefits over the land set apart, I find and hold that the parcel of land known as KMA ceased to be community land upon being set apart for the purpose notified in gazette notices number 320 and 321.

34. Turning to issue (ii), whether the activities of the respondents on the parcel of land known as KMA were/are a violation of the petitioner's constitutional rights and fundamental freedoms; it is noteworthy that the determination of issue (i) above has a bearing on this issue. This is so because as the custodian of the land; the Government; subject to the applicable laws and procedures, has the right to use and develop the land.

35. In the circumstances of this case, the petitioners cannot sustain their case against the respondents on the grounds that the land is community land in respect of which they are entitled to prompt compensation if the Government is desirous of compulsorily acquiring it. My view of the totality of the evidence is that there could not have been any attempt to compulsorily acquire the parcel of land known as KMA since the same is already public land having been set apart as such in 1975. The petitioners claims, as far as they are premised on their alleged residence, occupation and entitlement to the area is misplaced and misadvised. I therefore reject it as it is incapable of founding a claim in their favour.

36. As to whether by publication of gazette notice No 925 of February 1, 2019, the respondents violated or threatened the petitioner's constitutional rights with violation, the issue is raised vide paragraphs 8 and 9 thus:-

> " 8. the petitioners contend that the entire Keiyo South Eastwards towards Baringo County from Keiyo Escarpment to river Cheploch and Soy area has been set apart for an irrigation plan to be undertaken by the second Respondent, Kerio Valley Development Authority, without the participation of the petitioners who are the inhabitants with a communal claim over it.
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> 9. The stretch earmarked for acquisition by the 1st and 2nd respondents comprise virgin land which has not been adjudicated, surveyed, mapped or parceled and ordinarily belongs to the Keiyo Community represented by the petitioners and the acquisition is meant to displace them and render them destitute".

37. In response to that allegation, which I consider to be a different cause of action to that pleaded in paragraphs 7 of the Petition and addressed through issues number (i) and (ii) herein above, the 2nd and the 5th respondent through the replying affidavit of Francis Kipkech, aforementioned have stated as follows:-

> " 4. That impugned Gazette Notice 925 of February 1, 2019 intimating an intention to acquire land for Arrow and Kimwarer Multi-Purpose Dam Projects was lawfully issued under section 107 of the *Land Act, 2012* and the acquisition is purely for public purpose and the public body at whose instance notice of intention to acquire was issued has been identified.
>
> .....
>
> 10. That even before publication of notice of intention to acquire the 2nd respondent engaged project stakeholders including local communities who are beneficiaries but also likely to be affected by the project. Community Project Committees, Elgeyo Marakwet County, Kenya Forest Service (KFS), National Environment Management Authority (NEMA) and National Land Commission (NLC) and members of public were sensitized and it cannot be true no public participation was ever conducted, copies of minutes for meeting

of 24-10-2018 at Kabiemit Resource Centre and 6-11-2018 at Kimwongo ECDE marked FK 5a and FK 5b."

38. In a rejoinder, the petitioners through the supplementary affidavit of Mathew Sawe Chuma sworn on May 15, 2019 have deponed that: -

> "3. Besides publication in the Kenya Gazette of Gazette Notice No 925 of February 1, 2019 the 2nd and 5th Respondents have never conducted public participation with the people likely to be affected by the proposed development."

39. Arguing that Kenya Gazette notices are in their very nature announcements of decisions to proceed in a particular manner and not an end in themselves, the petitioners contend that the replying affidavit is couched in a manner to hoodwink the court that the 2nd respondent complied with the law in acquisition of public and private land in the project area.

40. Terming the exhibits annexed to the affidavit sworn in support of the Petition communication between the 2nd respondent, the Treasury and the 4th respondent, the petitioners contend that the replying affidavit is silent on the actual implementation of the project. They reiterate their contention that the whole process is shrouded in mystery contrary to Article 35 of the *Constitution*. They further contend that the implementation is shrouded by secrecy, lack of public participation and intended displacement of huge populations from their ancestral lands without compensation. They allege that corruption has impended the project and its implementation.

41. In their submissions, the petitioners have reiterated the averments on the face of the Petition and the affidavits sworn in support thereof and submitted that the actions of the 1st, 2nd and 3rd respondents complained about are a gross violation of their right to property as they intend to alienate their community land without compensation contrary to the provisions of Article 40(3) of the *Constitution*.

42. Based on Article 47(1) of the *Constitution*; sections 4(1)(2)(3) and section 12 of the *Fair Administrative Action Act*, No 4 of 2015 and the cases of *Baker v Canada (Minister of Citizenship & Immigration)* 2 S.C.R.817 6 cited in *Republic v. National Land Commission & 2 others ex parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West* (2018) e KLR; the case of *Mandeep Chauhan v. Kenyatta National Hospital & 2 others* (2013) eKLR and the case of *Council of Civil Service v Minister for civil Service* (1984) 3 ALL ER 935 cited in the case of *Kuria Greens Limited v. Registrar of Titles & another* (2011) e KLR, the petitioners have submitted that they ought to have been given an opportunity to be heard considering that they had been the inhabitants of the suit land.

43. As to whether the petitioners' right to access of information was violated, reference is made to Article 35(1) and Section 4(1) of the *Access to Information Act* No 31 of 2016; the case of *Famy Care Limited v. Public Procurement Administrative Review Board & another* (2012) e KLR and submitted that the alleged intention of the respondents to secretly appropriate the suit land to individuals and organizations as private land is a violation of the petitioners' right to access to information.

44. On whether there was sufficient public participation as required under Article 10 of the *Constitution*, the petitioners maintain that through gazette notice No 925 of February 1, 2019, the 1st, 2nd and 3rd respondents came up with a bogus list of beneficiaries of the suit land, excluding locals and including impostors and fictitious names to benefit from their community land. Based on the provisions of Articles 10, 63(3) Sections 6(1) and 87 of the *County Government Act*, Sections 107 and 110 of the *Land Act, 2012* and the case of *Mohammed Ali Baadi and others v Attorney General & 11 others* (2018)

eKLR, the Petitioner contend that the 3rd respondent failed to protect their interest when it failed to notify them of its intention to set apart their property for public use.

45. It is reiterated that the actions of the 1st, the 2nd, 3rd and 4th respondents violated the petitioners' rights and were contrary to the petitioners' legitimate expectation that they would be heard before the decision to alienate their land was made.

46. In their submissions, the 2nd and 5th respondents have submitted that gazette notice No 925 of 2019 was an expression of intention to acquire land for Kimwarer and Arror multi-purpose projects. It is further submitted that the actual notice of acquisition is issued under Section 110 of the *Land Act* after which an inquiry as to compensation shall be made under Section 112 of the Act.

47. Arising from the foregoing, it is submitted that the petitioners challenge to gazette notice No 925 of 2019 was premature as it was issued under Section 107 of the *Land Act* which is a normal preliminary process. In that regard, reliance is placed on the ruling of Kibunja J delivered in this case in respect of the petitioners' prayer for conservatory reliefs and on the case of *Henry Wainaina Wakihoro & Another v. National Land Commission & 2 others* (2018) e KLR, where the court held that the suit was prematurely instituted as no dispute was in existence yet.

48. On whether the Petitioners expectation of public participation was violated, it is submitted that the allegation has not been substantiated and based on the affidavit evidence annexed to the replying affidavit of Francis Kipkech, submitted that the respondents facilitated sufficient public participation as per the decision in the case of *Kiambu County Government v. Robert N. Gakuru & Others* (2017) e KLR.

49. As to whether the petitioners' rights and fundamental freedoms were violated it is submitted that the petitioners did not offer any viable evidence to prove their allegations that the respondents violated, their right to property, fair administrative action and access to information. The respondents are said to not only have disputed the allegations but to also have offered plausible explanation why the petitioners' case has no merit.

50. Concerning the petitioners' contention that their rights to access of information and fair administrative action under Articles 35 and 47 of the *Constitution* was violated, it is reiterated that the respondents demonstrated by way of evidence that the petitioners were notified of each and every stage of project implementation. The petitioners are said to have failed to prove compliance with the provisions of the *Access to Information Act* and the Fair Administrative Actions Act which requires them to prove that they requested for information and their request was declined.

51. From the pleadings, affidavit evidence and submissions, it is common ground that through Kenya Gazette notice No 925 of 2019 of 1st February, 2019 the 4th respondent issued a notice of intention to acquire land. Although the notice is not part of the court record, cognizance of the fact that the notice is one of the matters that this court can take judicial notice of under Section 60 of the *Evidence Act*, Cap 80 Laws of Kenya, I have looked up the Gazette notice. Its contents are as follows:-

> " Gazette Notice No 925
>
> The *Land Act* (No 6 of 2012)
>
> Elgeyo Marakwet County
>
> Arror And Kimwarer Multi-purpose Dam Projects
>
> Intention To Acquire Land

In Pursuance of section 112 and 162(2) of the *Land Act, 2012*, the National Land Commission gives notice that the Government intends to acquire the following parcels of land on behalf of the Ministry of East African Community (EAC) and Regional Development for the Construction of the Arror and Kimwarer Multi-purpose Dams in Elgeyo Marakwet County;

The Schedule

....." (The schedule contains details of the plots intended to be acquired and their owners).

52. The notice also indicates that plans for the affected land may be inspected during office hours at the office of the National Land Commission, Ardhi House, 3rd Floor, Room 305, 1st Ngong Avenue, Nairobi and the National Land Commission, Elgeyo Marakwet County offices and at Elgeyo Marakwet County Lands offices.

53. As pointed out above, the impugned notice was issued pursuant to Section 112 of the *Land Act* and 162(2) of the *Land Act, 2012* and not under Section 107 as contended by the 2nd and the 5th respondent. However, its contents indicate that it was for all intents and purposes a notice under Section 107(5) of the *Land Act, 2012* and not under Section 112 of the Act.

54. It is not in dispute or even in contention that the 4th respondent has power to compulsorily acquire land, be it private or community for public purpose. The question that begs for an answer is whether by issuance of the impugned gazette notice, the 4th respondent violated and/or threatened to violate the rights of the petitioners.

55. It is my considered opinion that what the 4th respondent published was merely an intention to acquire the parcels of land listed in the schedule to the notice. Whether the persons listed in the schedule are the actual owners or beneficiaries of the land to be compulsorily acquired, hence the persons entitled to compensation is, in my view, an issue to be determined through the process contemplated under Section 107(7) of the *Land Act, 2012*. In that regard see the said section of the law which provides as follows:-

> " 107(7) For purposes of sections 110 to 143 (the sections deal with the actual acquisition and compensation) interested persons shall include any person whose interest appear in the land registry and the spouse or spouses of any such person, as well as any person actually occupying the land and the spouse or spouses of such person."

56. Whilst the petitioners vide paragraphs 10, 11 and 13 of the Petition claimed that they had information that the respondents intended to survey, parcel and allocate the land comprised in KMA to individuals and organizations as private land and to disregard their interest as occupiers of the suit land, they neither substantiated that claim nor provided any evidence capable of proving that claim. They also failed to substantiate their contention that the respondents had compiled a list of beneficiaries of the allocations comprising of people sourced from outside the mining area and excluding them.

57. As pointed out herein above, the 4th respondent had in discharge of the obligations imposed on it under Section 107 of the *Land Act, 2012* issued a notice of intention to compulsorily acquire specific parcels of land. Despite having addressed the notice in their response to the response by the 2nd and 5th respondent, the petitioners did not provide at least one name of the persons allegedly wrongly listed as beneficiaries of the suit land.

58. It is trite law that he who alleges has a duty to prove that which he alleges (section 107 of the *Evidence Act*). The petitioners miserably failed to prove that which they alleged concerning existence of an intention to appropriate the land comprised in KMA to private individuals and companies. They also failed to prove existence of beneficiaries of the impugned allocations from the suit land which the respondents intended to compensate. The respondents, on their part proved by way of evidence that KMA is public land and not community land as contended by the petitioners.

59. The totality of the evidence adduced in this case shows that the 2nd respondent complied with the law in its bid to compulsorily acquire the subject matter of the petitioners' second limb of the Petition.

60. Whereas admittedly there are challenges facing the implementation of the projects, in my view, those challenges cannot found a basis of allowing the petitioners claim.

61. The upshot of the foregoing is that the petitioners have not made up a case for being granted the orders sought or any of them. Consequently, I dismiss the Petition with costs to the respondents.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 17TH DAY OF APRIL 2023

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the absence of:-

The petitioners and the respondents

Thomas Motachi – Court Assistant