



Khayoni & 12 others v Talitia Medical Training College & 7 others (Environment & Land Petition 5 of 2013) [2022] KEHC 10280 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
ENVIRONMENT & LAND PETITION 5 OF 2013**

BN OLAO, J

JUNE 28, 2022

**IN THE MATTER OF ARTICLES 19.,20,21,22,23,25,27,29,39,40,47,48,67(E)
OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF ALLEGED
CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 40,47,48,61 (1) AND 67 (E) OF THE CONSTITUTION OF KENYA AND
IN THE MATTER OF SECTION 8 OF THE LAND ACQUISITION ACT CAP 295 AND
IN THE MATTER OF THE NATIONAL LAND COMMISSION
ACT NO. 5 OF 2012 SECTION 5 (1)(E)(F) AND 6 AND IN THE
MATTER OF RULE 10 AND 11 OF THE CONSTITUTION OF
KENYA (PROTECTION AND FUNDAMENTAL RIGHT AND FREEDOMS OF THE
INDIVIDUAL) PRACTICE AND PROCEDURES RULES 2006 READ TOGETHER WITH
RULE 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

**VINCENT BARASA KHAYONI 1ST PETITIONER
CHARLES BARASA WASIKE 2ND PETITIONER
CONCESITA KHAKUBI WASIKE 3RD PETITIONER
ISAAC SIMIYU MUREFU 4TH PETITIONER
CHRISTOPHER WANYONYI MUREFU 5TH PETITIONER
JACKTON SHICHENJULI MAKOKHA 6TH PETITIONER
PATRICK WESONGA MUREFU 7TH PETITIONER
CALISTUS KUNDU MUREFU 8TH PETITIONER
FLORENCE NABWOBA TENDEMWA 9TH PETITIONER
PIUS SIMIYU MILIMO 10TH PETITIONER**



VINCENT WANGILA TENDEMWA 11TH PETITIONER
DOUGLAS WANGILA MUKWANA 12TH PETITIONER
ZAINABU AKONGO OLANDO 13TH PETITIONER

AND

TALITIA MEDICAL TRAINING COLLEGE 1ST RESPONDENT
THE PRINCIPAL SECRETARY MINISTRY OF NATIONAL
TREASURY 2ND RESPONDENT
THE INTERIM CLERK TO THE COUNTY OF BUNGOMA 3RD RESPONDENT
THE MANAGER BUMULA CONSTITUENCY DEVELOPMENT FUND
COMMITTEE 4TH RESPONDENT
THE PRINCIPAL SECRETARY MINISTRY OF HEALTH 5TH RESPONDENT
THE SECRETARY NATIONAL LAND COMMISSION 6TH RESPONDENT
THE COMMISSION OF LANDS 7TH RESPONDENT
HON. ATTORNEY GENERAL 8TH RESPONDENT

JUDGMENT

1. By their amended petition dated July 18, 2019, the petitioners herein namely: -

1. Vincent Barasa Khayoni;
2. Charles Barasa Wasike;
3. Concesita Khakhubi Wasike;
4. Isaac Simiyu Murefu;
5. Christopher Wanyonyi Murefu;
6. Jackton Shichenjuli Makokha;
7. Patrick Wesonga Murefu;
8. Calistus Kundu Murefu;
9. Florence Nabwoba Tendemwa;
10. Pius Simiyu Milimo;
11. Vincent Wangila Tendemwa;
12. Douglas Wangila Mukwana; and
13. Zainabu Akongo Olando



hereinafter the 1st to 13th petitioners respectively sought various orders against: -

1. Talitia Medical Training College;
 2. The Principal Secretary Ministry of National Treasury;
 3. The County Government of Bungoma;
 4. The Manager Bumula Constituency Development Fund Committee;
 5. The Principal Secretary Ministry of Health;
 6. The Secretary National Land Commission;
 7. The Commissioner of Lands; and
 8. Hon Attorney General
- hereinafter the 1st to 8th respondents respectively .

2. The petition hinges on the ownership of the land parcel No West Bukusu/South Mateka/970 hereinafter the suit land and is supported by the affidavit of Charles Barasa Wasike the 2nd petitioner dated December 10, 2021 and also sworn with the authority of the 4th, 5th, 6th, 8th, 10th, 11th, 12th and 13th petitioners vide their authority also dated December 10, 2021. The 1st petitioner passed away in the course of these proceedings.

3. The petitioners pray for judgment in the following terms: -

1. The respondents have contravened the provisions of article 40 of *the Constitution* 2010.
2. The title number West Bukusu/South Mateka/970 be declared private land.
3. The names of the 1st and 2nd respondents be deleted as proprietors of the title number West Bukusu/South Mateka/970 or alternatively, this honourable court do order that the provisions of sections 6 and 8 of the *Land Acquisition Act* cap 295 be complied with.
4. The National Land Commission do investigate the circumstances under which the title number West Bukusu/South Mateka/970 was registered in the names of the 1st and 2nd respondents.
5. The 3rd respondent is under a duty to honour and uphold the recommendations it entered with the petitioners over the title number West Bukusu/South Mateka/970 to wit transferring 7 acres to the petitioners.
6. The 7th and 8th respondents faulted the law when they permitted the 1st and 2nd respondents to be registered as proprietors of the title number West Bukusu/South Mateka/970 while aware that the petitioners were occupying the same.
7. Title number West Bukusu/South Mateka/970 be transferred into the names of the petitioners.
8. An order restraining the respondents by themselves, their agents, servants and/or whosoever from evicting the petitioners by themselves, their agents, workers



and/or servants from the title number West Bukusu/South Mateka/970 and further, an order restraining the respondents by themselves, their agents, servants and/or whosoever from entering, interfering and/or carrying out any activities upon the title number West Bukusu/South Mateka/970.

9. The honourable court be pleased to issue such declarations, orders, writs and directions as may be necessary to safeguard and prevent violation of article 40 of the Constitution 2010.
10. That costs be borne by the respondents.

The petition is predicated on the grounds set out therein and supported by the affidavit of the 2nd petitioner as adopted by that of the 11th petitioner. The petitioners have also filed several documents in support of their petition.

4. The gist of the petition is that the petitioners all belong to the three families of Francis Wasike Lupao, Francis Murefu and Vincent Barasa Khayoni numbering over one hundred 100 members who have occupied the suit land for over eighty 80 years to – date being their ancestral land inherited from their fore fathers. In the year 1963, the County Council of Bungoma wanted to set up a camp for breeding exotic bulls within Talitia Village – Bumula and approached Francis Wasike Lupao, Francis Murefu and Vincent Barasa Khayoni to allow it set up the said project on the suit land. The parties then entered a lease agreement for a period of five 5 years for that purpose after which the suit land would revert back to the petitioners. In 1968 when the lease expired, the County Council of Bungoma returned the suit land back to the petitioners who, together with their families, are still in occupation thereof. That in 1999, representatives of the County Council of Bungoma visited the suit land and upon discovering that over fourty 40 families reside thereon, recommended that the petitioners be given 7 Hectares out of the suit land while 1 acre would remain with the said Council.
5. In March 2013, the petitioner noticed that the 1st, 2nd, 4th and 5th respondents were putting building materials on the suit land. At the same time, the 2nd respondent issued verbal threats to the petitioners that they would be evicted from the suit land without any regard that they have occupied it for over seventy 70 years. Following those threats, the petitioners did a search and discovered that the suit land had since February 5, 2013 been registered in the names of the 2nd respondent as trustee of the 1st respondent. That the said registration is suspect since the petitioners' occupation of the suit land is a matter of public knowledge and they ought to have been informed by the Commissioner of Land pursuant to section 6 (2) of the Land Acquisition Act and compensated in case of compulsory acquisition which was not the case.
6. That the National Land Commission has the mandate to investigate past, present and future land injustices and that the title to the suit land should be investigated as it is an infringement of the petitioners' constitutional rights. Since the petitioners and their families have been in occupation of the suit land for over seventy 70 years, this court should declare it to be private land and find that the transfer thereof to the 1st and 2nd respondents contravened article 40 of the Constitution. Further, that the petitioners and their families have no land to fall back to other than the suit land.
7. The petitioners also filed the statement by Maurice Makokha Makhanu dated April 4, 2014 in which he confirmed that he was the Member of Parliament MP for Kanduyi Constituency between 1988 to 1992. That in 1989, the residents of Talitia approached him seeking his assistance in having their land measuring 20 acres and which had been taken by the colonial Government to serve as a bull camp returned to them since it was no longer being used for those services. He therefore took up the matter in Parliament with the then Ministry of Agriculture and Livestock and it was agreed that the suit land



be returned to the owners since the bull camp had been discontinued and the owners of the land had not been compensated. He therefore informed the residents of Talitia to take the necessary measures to repossess their land. Some of them started selling portions of the suit land and among the purchases was one Dr Mulianga Ekesa and also the Bumula Community Development Fund (CDF) has put up a hospital on a portion measuring 2 acres. Later on, however, the witness learnt that the County Council of Bungoma officials had visited the suit land with the intention of repossessing it.

8. The petitioners also filed a list of documents dated May 31, 2013 containing the following: -
1. Minutes of the Bungoma County Council Special Works, Town Planning and Markets Committee held on October 27, 1999.
 2. Photographs.
 3. Green card to the suit land.
 4. Certificate of search for the suit land.
 5. Certificate of lease for the suit land.

The petition is opposed and on behalf of the 3rd respondent, Cleophas Wanyonyi Waswa it's Senior Land Surveyor deponed in his replying affidavit dated February 13, 2020 but filed on February 7, 2020 that must be an error that there is no evidence showing that the suit land was ever given out by any persons for the purposes of establishing a bull camp and that this petition is not only bad in law but is also misconceived and an abuse of the process of this court. He deponed further that the suit land was first registered in the name of the Bungoma County Council as per the annexed copy of register and it is therefore preposterous for the petitioners, who are strangers, to allege that there was any lease between Francis Wasike Lupao, Francis Okhalia, Vincent Barasa Khayoni and the Bungoma County Council over the suit land. That during the adjudication process, the suit land was set aside for public use but in 1999, it was discovered that some people had illegally encroached on it. That the recommendations of the Sub – Committee referred to be the petitioners were never approved by the full council. In 2012, the Bungoma County Council received an application from the Bumula Constituency for land to enable it put up a Medical Training College for the Community. The application was approved by the Special, Finance, Staff, Establishment and General Purposes Committee and was adopted by the full Council. Therefore, the petitioners are only trespassers.

9. Annexed to the replying affidavit are the following documents: -
1. Copy of the register to the suit land.
 2. Minutes of the Special, Finance, Staff, Establishment and General Purposes Committee Meeting held on April 13, 2012.
 3. Minutes of the Special Full Council Meeting held on April 13, 2021.
10. On behalf of the 1st and 4th respondents, Faddy Malaba DW 1 it's secretary swore a replying affidavit dated July 5, 2013 and filed on July 9, 2013 in which he deponed, *inter alia*, that in the 1960's the Government of Kenya compulsorily acquired the suit land for purposes of establishing a bull camp to up – grade the cattle breed in the locality. That the original owners were fully compensated but the project was disbanded in the early 1970's after the bulls died and the suit land remained un – occupied. That in 1973, the Bungoma County Council acquired title to the suit land and remains the absolute owner thereof to – date.
11. That in 2010, the community around Talitia area within Kabula Location Bumula Constituency desired through their Community Development Committee (CDF) to have a medical training facility



on the suit land and approached the Bungoma County Council which approved the project. The suit land was subsequently allocated to the Permanent Secretary Treasury to hold in trust for Talitia Medical Training College through the then Member of Parliament Hon Bifwoli Wakoli on behalf of the Bumula Constituency. The Ministry of Medical Services however advised that a medical training college would not survive on its own without a well-established hospital. It was therefore recommended that the Bumula CDF teams up with the Kanduyi CDF to build more classrooms at the Bungoma Kenya Medical Training College (KMTC) Campus so as to have at least two 2 students from each location in Bumula Constituency admitted to the KMTC during each intake. However, this proposal was turned down by the people of Talitia who instead opted to construct a District Hospital. In 2013, the Kabula Talitia District Hospital Project Committee requested the District Surveyor to establish the true boundaries and acreage of the suit land to enable it commence the construction of the hospital. That was done and the construction commenced but was objected to by the medical superintendent Dr Mulinga Ekesa who filed at Bungoma Court ELC Case No 135 of 2013 and who claimed to have bought the suit land from the squatters or original owners.

12. That whereas there were deliberations about re – allocating the suit land to the original owners, that did not materialize and it remained the property of the Government and the Bungoma County Council Minutes are not capable of transferring Government land to individual developers. That in 2012, the petitioners were summoned by the Clerk to Bungoma County Council regarding their occupation of Government land. That it is not true that the petitioners are in occupation of the suit land as they have sold it to another person who has planted trees on the whole land. That the petitioners lack the *locus standi* to file this suit and have no developments on the suit land nor have they proved ownership of the trees thereon.
13. Annexed to the replying affidavit are the following documents: -
 1. Certificate of official search for the suit land – FMI.
 2. Minutes of Kabula Locational Development Committee meeting held on March 14, 2011 – FM 2.
 3. Letter of allotment of the suit land in favour of Talitia Medical Training Centre – FM 3.
 4. Letter of acceptance of the allotment – FM 4.
 5. Certificate of lease issued to the Permanent Secretary Treasury as trustee of Talitia Medical Training College and certificate of search – FM 5 and FM 6.
 6. Letter by Dr Mulianga Ekesa – Medical Superintendent Bungoma Hospital dated August 1, 2012 and addressed to the chairman Bumula CDF – FM 7.
 7. Letter dated March 8, 2013 requesting the District Surveyor Bungoma to establish the boundaries and acreage of the suit land – FM 8.
 8. Report of the District Surveyor Bungoma confirming that the boundaries of the suit land are intact and the acreage is 8.4 hectares 20.7 acres – FM 9.
 9. Letter from the Bungoma County Council authorizing the Chairman Kabula Talitia District Hospital to commence construction on the suit land – FM 10.
 10. Letter dated April 10, 2013 by Dr Mulianga Ekesa and addressed to the Fund Manager Bumula CDF advising against putting up the hospital on the suit land and the response thereto by the Bumula CDF – FM 11 and FM 12.



11. Plaintiff in Bungoma ELC Case No 135 of 2013 filed by Dr Mulianga Ekesa against Talitia District Hospital & Faddy Malaba with regard to the suit land – FM 13.
12. Copies of sale agreements between Dr Mulianga Ekesa and the petitioners for various portions of the suit land – FM 14.
13. Letter dated June 27, 2012 from the Clerk to Council Bungoma County Council summoning Dr Mulinga Ekesa and others over the suit land – FM 15.
14. Photograph – FM 16.
14. The 1st, 2nd, 4th, 5th, 6th, 7th and 8th respondents also filed a replying affidavit by one George Obondo Ongutu The District Land Registrar Bungoma and Mt Elgon Districts dated March 26, 2014 in opposition to the petition. However, the said deponent did not testify during the plenary hearing. In any event, all he did was to confirm that the suit land is registered in the names of the Permanent Secretary Treasury as trustee for Talitia Medical Training College which is already a matter of public knowledge.
15. Also filed is a replying affidavit by one John Ongwao Mosongo the clerk to the County Assembly Bungoma but it is basically a response to an application for injunction. There is also a statement dated April 4, 2014 by one Boniface Nyongesa Nandwoli in support of the petition but he too did not testify during the hearing.
16. The plenary hearing commenced on January 31, 2022 when all the parties who had witnesses called them to testify. On behalf of the petitioners Charles Barasa Wasike (PW 1) and Maurice Wekesa Makhanu (PW 2) testified. They adopted as their evidence their respective affidavit and statement contents of which I have already summarized above. Charles Barasa Wasike (PW 1) who is the 2nd petitioner herein also produced as the petitioners' documentary evidence the list of documents which I have also already referred to above.
17. The 1st and 4th respondents called as their witness Faddy Malaba (DW 1). He too adopted as his evidence the replying affidavit dated July 5, 2013 and produced the annexures thereto as his documentary evidence. The 3rd respondent called as it's witness Cleophas Wanyonyi Waswa (DW 2) who also adopted as his testimony the replying affidavit dated February 13, 2020 and also produced as the 3rd respondent's documentary evidence the annexures thereto and which I have already referred to earlier in this judgment.
18. Mr Tarus Senior State Counsel did not call any witnesses on behalf of the 2nd, 5th, and 8th respondents while there was no appearance by the 6th respondent.
19. The parties were thereafter allowed 14 days each to file their submissions. However, only Mr Bwonchiri counsel for the petitioners and Mr Murunga counsel for the 3rd respondent filed their submissions.
20. I have considered the evidence by the petitioners, the 1st, 3rd and 4th respondents and the submissions by both Mr Bwonchiri and Mr Murunga.
21. The gist of the petitioners' case is that the respondents have violated the provisions of articles 19, 20, 21, 22, 23, 25, 29, 39, 40, 47, 48 and 67(e) of the Constitution as well as sections 6 and 8 of the repealed Land Acquisition Act in the manner in which they acquired ownership of the suit land which they claim to be their ancestral land. The respondents' case is that the suit land is public land and had never been ancestral land.



22. Before I delve into the merits or otherwise of the petition, there are some important legal and jurisdictional issues raised by the respondents which I must first address.
23. The first issue is the petitioners' *locus standi*. In his submissions on that issue, Mr Murunga counsel for the 3rd respondent has questioned the *locus standi* of the petitioners to file this suit because Charles Barasa Wasike PW 1 deponed in his supporting affidavit that he was acting on behalf of the three families of Francis Wasike Lupao, Francis Murefu and Vincent Barasa who are deceased yet he did not produce any letters of administration in respect to their estates. Counsel therefore submitted that the petition is incompetent for want of locus on the part of the petitioners. He cited the case of [Daniel Njuguna Mbugua v Peter Kiarie Njuguna & others](#) [2021] eKLR. The respondents did not make any submission on that issue.
24. The issue of *locus standi* is important because without it, a party cannot be heard and that will be the end of any suit. Indeed, it is a matter that ought to be raised as a preliminary objection at the earliest possible time. In the case of [Alfred Njau & others v City Council of Nairobi](#) [1982] KAR 229, the Court of Appeal held that: -

“The term *locus standi* means a right to appear in court and, conversely, as stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings.”

It is true that in his supporting affidavit, Charles Barasa Wasike (PW 1) deponed that he and the other petitioners belong to the families of Francis Wasike Lupao, Francis Murefu And Barasa Khayoni. During cross – examination by Mr Murungua, he confirmed that all the above named three persons are deceased and he had not obtained any grant of letters of administration prior to filing this suit. It is however clear from the title of the petition that it has not been filed on behalf of the estates of any deceased persons. The petitioners have approached this court in their own capacities as persons who reside on the suit land as family members of the above names three persons. This is what Charles Barasa Wasike (PW 1) has deponed in paragraphs 1, 2, 3, 4, 5 and 6 of his supporting affidavit: -

- 1: “That I am the 2nd petitioner herein and hence competent to swear this affidavit.”
 - 2: “That I have the consent also of the other petitioners to swear and plead on their behalf in this case as per the authority filed herewith.”
 - 3: “That I wish to state that all the petitioners and myself belong to the three families of Messrs Francis Wasike Lupao, Francis Murefu and Barasa Khayoni.”
 - 4: “That apart from the petitioners and myself, there are other family members who are residents of Talitia on title number West Bukusu/South Mateka/970.”
 - 5: “That the petitioners and myself and our families now number to over 100 members.”
 - 6: “That the petitioners, myself and our families have greatly developed parcel number West Bukusu/South Mateka/970 having occupied the same for over 80 years now.”
25. The Charles Barasa Wasike (PW 1) also annexed to his supporting affidavit the authority to swear signed by Isaac Simiyu Murefu, Christopher Wanyonyi Murefu, Jackton Shichenjuli Makokha, Calistus Kundu Muruefu, Pius Simiyu Milimo, Vincent Wangila Tendemwa, Douglas Wangila Mukhwana And Zainabu Akongo Olando the 4th, 5th, 6th, 10th, 11th, 12th and 13th petitioners respectively authorizing him to plead and swear on their behalf in this petition. There is nothing to suggest that those petitioners are deceased or that this petition has been filed by the petitioners as the legal representatives of deceased



persons. Rather, it is clear that they have filed this petition as persons who believe that they have an interest in the suit land. The interest of persons over ancestral land can be pursued either collectively or individually. The Constitution permits it. The case of Daniel Njuguna Mbugua (*supra*) cited by Mr Murunga is not helpful and can be distinguished because the plaintiff therein had moved to the court as a legal representative of a deceased person yet the grant of letters of administration had in fact already been revoked. That is not the position in this petition.

26. Most significantly, article 22(1) of the Constitution provides as follows: -

22(1) “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.” Emphasis added.

Charles Barasa Wasike (PW 1), is indeed such a person. I must therefore resolve the issue of *locus standi* in favour of the petitioners.

27. The other issue raised by the 2nd, 5th, 6th, 7th and 8th respondents in their response to the petition is that it is statute barred by virtue of the Limitation of Actions Act cap 22 laws of Kenya. Limitation is a key jurisdictional issue. However, as is clear from precedents, there is no time limitation in respect of filing constitutional petition but any delay should not be inordinate and should be explained – Wellington Nzioka Kioko v Attorney General [2018] KLR. Whether or not any delay is inordinate is a matter to be determined on the basis of the circumstances in each individual case. In this petition, and as is clear from paragraph 9, the petitioners only discovered in 2013 that the 1st and 2nd respondents had been registered as proprietors of the suit land following a “compulsory acquisition” thereof. There is evidence that even before then, some of the petitioners and respondents had been involved in discussions over the ownership of suit land. This petition was first filed on June 12, 2013 soon after the title to the suit land had been issued in the names of the Permanent Secretary Treasury in trust for Talitia Medical Training College. There was no delay in moving to court and therefore the claim that this petition is statute barred has no foundation and is for rejection.

28. It is also clear that the amended petition meets the threshold set out in the case of Anarita Karimi Njeru v R [1979] eKLR and as was reiterated in the case of Mumo Matemu v Trusted Society of Human Rights & Others [2013] eKLR. The petitioners have set out the constitutional provisions alleged to have been violated and the manner in which the respondents have violated them. The purpose of pleadings is to ensure that the other party understands the case which has to be met. I did not hear the respondents complain that they did not know what case they had to respond to.

29 I have identified the following issues for determination: -

1. Whether the petitioners and their forefathers have any interest in the suit land.
2. Whether those rights have been contravened by the respondents and in what manner.
3. If the petitioners have proved their case and if so, what remedies are available to them?
4. Which of the respondents should be held liable?
5. Who meets the costs?

30. That the suit land was first registered in the names of the Bungoma County Council on July 10, 1973 is not in doubt. On December 5, 2013, a lease was registered in the name of the Permanent Secretary Treasury as trustee for Talitia Medical Training College for a period of 99 years. It is the case of the 3rd



respondent, as deponed in paragraph 20 of the replying affidavit by Cleophas Wanyonyi Waswa (DW 2): -

"20. That the petitioners are only but trespassers on the suit land hence disentitling themselves on the orders sought."

However, it is the petitioners' case that even long before that registration, their forefathers had occupied it as their ancestral land before giving it out in 1963 for use as a bull camp. This is how the 2nd petitioner has deponed in paragraphs 7, 8, and 9 of his supporting affidavit: -

"7: That title number West Bukusu/South Mateka/970 was and is our ancestral land having inherited the same from our forefathers.

8: That in the year 1963, there arose need for a bull camp for modern bulls breeding exotic bulls within Talitia Village – Bumula and to which the County Council of Bungoma approached Messrs Francis Wasike Lupao, Francis Okhala and Vincent Barasa Khayoni for our land to enable them carry out such activity and indeed they entered into a lease agreement for a period of 5 years after which the land was to revert back to our family.

9: That in the year 1968 immediately the lease expired, the County Council Of Bungoma returned the parcel number West Bukusu/South Mateka/970 to our families and we are todate in occupation."

While there is no lease document produced by the petitioners to prove that their forefathers had leased the suit land to the Bungoma County Council, there is no doubt in my mind that the petitioners, and before them, their forefathers, were in occupation of the same long before 1973 when it was registered in the names of the said Bungoma County Council and thereafter in the name of the Permanent Secretary to the Treasury in trust for Talitia Medical Training College. That occupation is confirmed in paragraph 20 of the replying affidavit by Cleophas Wanyonyi Waswa DW 2 in which he refers to the petitioners as "trespassers on the suit land." Indeed, it is on account of their occupation and possession of the suit land that the petitioners were able to dispose their portions thereof to one Dr Mulianga Ekesa. If the petitioners and forefathers have always been trespassers on the suit land, it is strange that no attempts have been made to evict them therefrom. No evidence in the nature of an order of eviction was produced before this court to demonstrate that the respondents have moved to court to obtain eviction orders. There was also un-rebutted evidence by Charles Barasa Wasike (PW 1) that he buried his father on the suit land. And when he was cross – examined by Mr Bw'onchiri and also re – examined by his own counsel Mr Murunga, Cleophas Wanyonyi Waswa (DW 2) insisted that prior to the registration of the suit land in the name of 1st and 2nd respondents, it was community land. Such land, as per the provisions of article 63(2)(d)(11) of the Constitution, includes ancestral land. Notwithstanding the fact that the petitioners do not have a title to the suit land, that does not take away or diminish their interest therein. I am satisfied that the petitioners have an interest in the suit land and as will become clearer later on in this judgment, that interest was infact acknowledged by the 3rd respondent which is currently the lessor thereof.



31. The view I take of the matter is that prior to July 10, 1973 when the suit land was registered in the names of the then Bungoma County Council, it was public land as defined in article 62(1)(d) of the Constitution that is: -
- “Land in respect of which no individual or community ownership can be established by any legal process.” Emphasis mine.
32. In the circumstances, this court must be guided by the words of the Supreme Court in the case of Mitu-Bell Welfare Society v Kenya Airport Authority & others [2021] eKLR where it held, *inter alia*, that: -
- “The 2010 Constitution has radically transformed land tenure in this Country by declaring that all land in Kenya belongs to the people of Kenya collectively as a nation, communities and individuals. It also now creates a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable or however transient in public land.” Emphasis mine.
33. The Supreme Court in the Mitu-bell case *supra* was dealing with the right to housing. However, I take the view that the above proposition applies with equal force in the circumstance of this case. The petitioners and their forefathers have always occupied the suit land long before it’s registration in the names of the Bungoma County Council and thereafter, a certificate of lease issued in the names of the Principal Secretary Treasury in trust for Talitia Medical Training College, the 1st and 2nd respondents. Therefore, although neither the petitioners nor, before them, their forefathers, could establish ownership of the suit land through any “legal process” as per article 62(1)(d) of the Constitution, they had an interest therein even if it was “indescribable,” “unrecognizable” or “transient” – Mitu Bell *supra* .
34. As to whether the respondents have contravened the petitioners’ rights, it is clear that the 3rd respondent acknowledged the petitioners’ rights and interests in the suit land. In his replying affidavit dated July 5, 2013, Faddy Malaba (DW 1) the secretary to the 1st respondent and also acting on the authority of the 4th respondent has deponed in paragraph 3 as follows: -
3. “That land parcel number West Bukusu/South Mateka/970, the suit land, was compulsorily acquired by the Government of Kenya in the early 1960’s for purposes of establishing a bull camp to upgrade breed in the locality and the original owners were fully compensated for the same.” Emphasis added.
35. Whether or not the petitioners were “fully compensated” following the acquisition of the suit land is a matter to be addressed later in this judgment. However, what is clear is that the Government can only compulsorily acquire land from a person or persons who have an interest in the said land. Otherwise, there would be no need for any compulsory acquisition. The Government cannot compulsorily acquire what it already considers to be it’s own land.
36. Secondly, the 3rd respondent who are the lessors of the suit land did also acknowledge that the forefathers of the petitioners were in occupation and possession of the suit land as owners. That is why when the 3rd respondent intended to acquire a portion of the suit land for public use, it engaged the petitioners’ forefathers and negotiated with them for a portion measuring one 1 acre and even resolved that Francis Wasike Lupao be given two 2 acres in appreciation of the role he had played in those negotiations. The said Francis Wasike Lupao who is the deceased father of the 2nd petitioner herein and



who was buried on the suit land in 2000 was among the three forefathers of the petitioners herein. The other two are Francis Murefu and Barasa Khayoni.

37. That the 3rd respondent recognized the petitioners' interests and rights in the suit land is confirmed by the Minutes of it's Markets Sub – Committee Meeting held to discuss the suit land on July 1, 1999. In that meeting which was attended by Francis Wasike Lupao, his son Charles Barasa Wasike who is the 2nd petitioner herein as well as others, the following three 3 recommendations were made: -

- 1: “That the wish of the people on their proposal be accepted and therefore a fraction of 1 acre of land be taken or retained by the Council and that the rest of the remaining piece of land be given to the three squatters equally after Mr Francis Wasike Lupao getting two 2 acres on reasons of efforts he has made towards the whole exercise.”
- 2: “That the Council Surveyor moves to the site and demarcates the said piece of land into the four pieces of land as per sketch as appendix ‘B’.”
- 3: “That after accomplishment of resolution 2 here above, the land be formally sub – divided and title be issued to the four persons at each person's cost.”

38. The above three 3 recommendations were subsequently adopted by the 3rd respondent's Special Works Town Planning and Markets Committee in it's meeting held on October 27, 1999 where it was resolved as follows: -

- 1: “That the three recommendations of the report be adopted with the following amendments.
- 2: “That the word ‘fraction’ in the report be deleted and be replaced by ‘portion’.”
- 3: “That recommendation No 1 be re – written to read: -

‘That the Council be apportioned 2½ acres and the rest be equally divided among the three squatters after Mr Francis Wasike Lupao having been given one 1 acre.’”
- 4: “That the Council portion be fenced to curb any external encroachment after the necessary arrangements have been made.”

39. During the plenary hearing, Cleophas Wanyonyi Waswa (DW 2), the 3rd respondent's Senior Land Surveyor, insisted upon being cross – examined by Ms Wakoli Counsel for the 1st and 4th respondents and also upon re – examination by his own Counsel Mr Murunga, that those recommendations were never ratified by the full Council. Therefore, they remain mere recommendations which cannot be acted upon. Indeed, as part of it's documentary evidence, the 3rd respondent produced the Minutes of the full Council of the 3rd respondent as well as the Minutes of it's Special Finance Staff Establishment and General Purposes Committee meeting both held on April 13, 2012. The following main resolutions were made by the Committee and adopted by the full Council meeting with respect to the suit land: -

- 1: “That the request for allocation of a piece of land at Kabula Location plot No West Bukusu/ South Mateka/970 measuring 8.4 Ha to be used to construct a medical training centre be approved.”



- 2: “That the eviction letters be given to the private developers and squatters to vacate the land.”
- 3: “That the approval be sought from the Deputy Prime Minister and Minister for Local Government for the said allocation of Public Land for construction of a medical training centre.”
- 4: “That the Minister for Lands to issue title deed pursuant to this approval.”

These two meetings were held following a request from Hon Wakoli Bifwoli the then area Member of Parliament, seeking for land to set up a Kenya Medical Training Institute. It is however instructive to note that unlike in the previous meetings held in 1999, the petitioners were not represented in this meeting and no reference was made to the previous resolutions in relation to the suit land. Bearing in mind the very clear and un-ambiguous recommendations arrived at by the 3rd respondent in the presence of the petitioners’ representative on July 1, 1999 and adopted on October 27, 1999 and which affected the petitioners’ interest in the suit land, it would have been expected that the petitioners be notified and be represented during those deliberations. That is what the *audi alteram partem* rule is all about. It requires that those who are likely to be affected by any decision be notified of the action proposed to be taken and the place and time when that decision is contemplated so that they can attend and present their case. Article 47(1) of the Constitution provides that: -

47(1). “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” Emphasis added.

The above is replicated in section 4(1) of the Fair Administrative Action Act. Having previously acknowledged the petitioners’ interest in the suit land, surely it would not be asking for too much of the 3rd respondent to give the petitioners an opportunity to be heard before vacating its previous decision. That is what the rule of natural justice is all about. It must be remembered that even as the 3rd respondent was resolving in 2012 to give up the suit land for the establishment of a training college, the petitioners, buoyed by the same 3rd respondent’s own recommendations made in 1999, had already sold part of their portions of the suit land to a third party, one Dr Mulianga Ekesa, as per the copies of sale agreements produced herein. Clearly, that was a violation of article 47(1) of the Constitution. The petitioners no doubt had no title over the suit land. However, as persons in occupation and possession thereof, they were entitled to be treated with some dignity more so taken in the context of what had transpired previously between them and the 3rd respondent with respect to the suit land. That did not happen. A clear violation of article 28 of the Constitution.

40. The petitioners allege that the suit land was compulsorily acquired by the respondents without payment to them of full compensation contrary to section 8 of the repealed Land Acquisition Act. Article 40(3)(b)(1) of the Constitution provides for the “prompt payment in full of just compensation to the person” whose land is acquired by the State. And “any person who has an interest in or right over” such property has “a right of access to a court of law.”
41. The respondents’ response on the issue of the compulsory acquisition of the suit land was, in my view, mere prevarication. As already pointed out above, Faddy Malaba the 1st respondent’s secretary was emphatic in paragraph 3 of his replying affidavit that the suit land was “compulsorily acquired” by the Government for purposes of establishing a bull camp and that “the original owners were fully compensated for the same.” However, when he was re – examined by Mr Murunga, he said: -

“There is no evidence that the land in dispute was compulsorily acquired from anybody. It was community land.”



If the petitioners or their forefathers were compensated for the suit land, no tangible evidence was placed before this court to prove that fact. The onus to prove that any compensation was paid lay with the respondents by virtue of the provisions of section 109 of the Evidence Act. And nothing would have been easier than to avail records of who of the petitioners or their forefathers was paid and how much.

42. Articles 19 and 20 of the Constitution which has also been cited by the petitioners seeks to preserve the dignity of individuals and communities, promote social justice as well as equality and equity. Counsel for the petitioners, citing the decision of Ombwayo J in the case of Sirikwa Squatters Group v Commissioner of Lands & 9 others [2017] eKLR, dwelt at length on the doctrine of legitimate expectation. However, citing the same authority, counsel for the 3rd respondent took the view that the petitioners were never registered as owners of the suit land and neither did Francis Wasike Lupao, Francis Murefu and Barasa Khayoni ever lodge any claim against the Bungoma County Council in respect of the suit land during their life time. Further, that any such expectation must be shown to be legitimate.
43. In the case of Kenya Revenue Authority v Universal Corporation Ltd CA Civil Appeal No 150 of 2018 [2020] eKLR, the Court of Appeal had the following to say on the principles that guide a court applying the principle of legitimate expectation: -

“..... legitimate expectation arises where there is a demonstration that; a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the public authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fall within the class of persons who were entitled to rely upon the representations made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker’s action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.”

44. As is now clear, the 3rd respondent has since October 1, 1973 been the registered proprietor of the suit land as per the documents produced herein. However, the petitioners and their forefathers have always been in occupation and possession of the suit land long before 1973. On July 1, 1999 following a meeting chaired by the 3rd respondent’s Councillor Isaya Machio Wanyonyi and attended by the 3rd respondent’s administrative officers, the 2nd petitioner and others, the recommendations which I have already referred to earlier in this judgment were made with respect to the suit land. In brief, the 3rd respondent agreed to retain only one 1 acre out of the 8.4 hectares comprised in the suit land and to give titles to the rest of the land to the squatters in occupation. Francis Wasike Lupao the 2nd petitioner’s father was in fact allocated “two 2 acres on reasons of efforts he made towards the whole exercise.” In making that decision, the Minutes of the meeting held on July 1, 1999 show that the 3rd respondent appreciated and took into account the fact that the petitioner had by then been in occupation and



possession of the suit land for over twelve 12 years. Perhaps it is important at this point to repeat what Francis Wasike Lupao informed the meeting as captured at page two 2 of those Minutes: -

“Mzee Francis Wasike Lupao thanked the Council through the Sub–Committee for having heard their cry and come to listen to them.

He informed the Sub–Committee that he used to stay in the land which was his from the year dating back to 1960’s.

In the year 1963, there arose a need to have Bull Camp for modern bulls for breeding exotic bulls and as a result he was approached and after a long discussion and consultation with the then Chief Nabutola and Sylvester Namachanja, he accepted to give out the land for 5 years.

He went on to say that since his own land was small according to the Veterinary and the Local Council’s requirement for an establishment for such a bull camp, his two neighbours *ie* Francis Okhalia and Barasa Khayoni were approached and they also gave out their share of the land.”

The Minutes go further to show that subsequently, the bull camp project collapsed around 1971 and Francis Wasike Lupao approached the 3rd respondent to “look at his fate with human heart of kindness” as he had no other land to go to. The 3rd respondent agreed with his request since by that time, there were over 40 families on the suit land and it was agreed that the 3rd respondent would only retain one 1 acre. At that time, the 3rd respondent was not only the proprietor of the suit land but as the decision maker, it made the petitioners and their families believe that they would retain the benefit of keeping the suit land. There can be no clearer and unambiguous representation than one made by the party who holds the title to the land in dispute. It was not only a reasonable representation made by a public body with the authority to do so but it was also fair and legal in the circumstances. Indeed, arising out of those deliberations, the 3rd respondent resolved that the suit land be sub–divided and title deeds be issued to those in occupation and possession of the suit land. It is common ground that some of those persons proceeded to sell their portions to a third party and there is no evidence that to – date, the respondents have sought and obtained any court orders to evict the petitioners from the suit land. If anything, it is the said third party Dr Mulianga Ekesa who has moved to court vide Bungoma ELC Case No 135 of 2013 seeking orders to restrain the 1st respondent and Faddy Malaba (DW 1) from entering the suit land or cutting down his trees. That suit is still pending. It is obvious to me, therefore, that there was a legitimate expectation by the petitioners that not only would the 3rd respondent keep it’s part of the bargain with respect to the suit land but also, that they would be involved in any subsequent discussions with respect to the ownership and use of the suit land because their interest therein had been recognized and acknowledged in the resolutions made in 1999. However, as is now clear, some thirteen 13 years later on April 13, 2012, the 3rd respondent, without even the courtesy of a notice to the petitioners, met and allocated the suit land to the 1st respondent. Clearly, and in keeping with *Kenya Revenue Authority v Universal Copporation Ltd supra*, not only did the petitioners rely upon those representations to their detriment but further, the 3rd respondent did not “demonstrate regularity, predictability and certainty” in it’s dealing with the petitioners as persons “likely to be affected by their it’s action in the discharge of their public mandate.” It is doubtful if the petitioners would have proceeded to sell their portion of the suit land to Dr Mulianga Ekesa, as they did, if the 3rd respondent had not promised them that only one 1 acre out of the 8.4 hectares comprised in the suit land would be allocated to the 1st respondent and the rest surveyed and titles issued in their respective names.



45. Given the above circumstances and cognizant of the fact that the petitioners and their forefathers were in occupation and possession of the suit land long before the 3rd respondent obtained the lease thereto, I am persuaded that the plea of legitimate expectation has been properly invoked and is well founded.
46. What remedies should this court grant the petitioners?
47. Having found that the 3rd respondent contravened the provisions of the Constitution and the repealed Land Acquisition Act, I must now determine what disposal orders to make in this petition.
48. The first prayer is that this court do declare the suit land to be private land. Obviously this prayer is sought in favour of the petitioners. Private land is defined as follows in article 64 of the Constitution: -

64: “Private land consists of –

- a. registered land held by any person under any freehold tenure;
- b. land held by any person under leasehold tenure; and
- c. any other land declared private land under an Act of Parliament.”

The suit land was first registered in the name of the Bungoma County Council on July 10, 1973. That was long after the families of Francis Wasike Lupao, Francis Murefu and Barasa Khayoni who are the forefathers of the petitioners had already settled thereon. By dint of the provisions of article 64 of the Constitution, it cannot now be described as private land belonging to the petitioner. That would amount to cancelling the title to the suit land which is best prosecuted in an ordinary civil suit but not in a petition. I am however satisfied that prior to July 10, 1973, the suit land was ancestral land occupied by the petitioners and their forefathers, a fact fully acknowledged by the 3rd respondent.

49. This court has been asked to delete the names of the 1st and 2nd respondents as proprietors of the suit land and in the alternative, to order that the provisions of sections 6 and 8 of the repealed Land Acquisition Act be complied with.
50. With regard to the cancellation of the names of the 1st and 2nd respondent as proprietors of the suit land, a constitutional petition such as this one is not the correct forum to interrogate the legality or otherwise of the title to the suit land. A title to land is of course only “*prima facie* evidence” of ownership of the land in dispute as provided under section 26(1) of the Land Registration Act which also sets out how such title can be challenged. However, that process, as I have already stated, is within the domain of a court handling an ordinary civil suit.
51. The prayer seeking orders that the provisions of sections 6 and 8 of the repealed Land Acquisition Act be complied with is, in my view, well founded. Following the repeal of the said Act, the process of compulsory acquisition of land is now set out in the provisions of Sections 107 to 133 of the new Land Act 2012 as well as article 40(1)(2) and (3) of the Constitution. It is clear from section 107 of the Land Act 2012 that the process of acquisition of any land is ordinarily commenced when the National or County Government requests the National Land Commission that a particular parcel of land is required for a public purpose as in public interest. The National Land Commission may reject a request if satisfied that it does not meet the requirements prescribed under sub-section 21 of the Act or article 40(3) of the Constitution. Elaborate procedures have been laid down in the Act with regard to entry and inspection of the land sought to be acquired section 108, payment for damage caused by such entry (section 109), notice of acquisition (section 110), payment of compensation (section 111) *etc.*
52. Section 6 of the repealed Land Acquisition Act also provided that where the Minister was satisfied that any land was required for a public purpose such as safety, public order or morality health, town and



public planning etc, he would direct in writing the Commissioner of Land to compulsorily acquire the said land. Upon receiving such direction, the Commissioner of Land would then cause a notice to be issued to that effect and serve the same on every person who appears “to be interested in the land.”

53. I have elsewhere in this judgment made reference to paragraph 3 of the replying affidavit of Faddy Malaba (DW 1 the Secretary to the 1st respondent and also sworn on behalf of the 4th respondent in which he deponed, *inter alia*, that the suit land was “compulsorily acquired” by the Government of Kenya in the 1960’s for the establishment of a bull camp for which “the original owners were fully compensated for the same.” However, when he was re – examined by Mr Murunga, Cleophas Wanyonyi Waswa (DW 2) and who is a senior land surveyor with the Bungoma County Council denied that there was any compulsory acquisition of the suit land. The respondents cannot approbate and reprobate at the same time. I have already found that the Bungoma County Council recognized the petitioners’ interests in the suit land and even resolved to retain only one 1 acre thereof and to allocate the remainder to the petitioners who were in occupation and possession thereof. Section 107(7) of the [Land Act](#) provides that: -

107(7): “For purposes of sections 107 to 133, interested person 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.” Emphasis added.

The petitioners and their forefathers were never registered as proprietors of the suit land as Mr Murunga has correctly submitted. However, not only did the Bungoma County Council recognize their interests therein but as in also now clear, as persons in occupation and possession of the suit land, they are “interested persons” in terms of the [Act](#). The fact that they do not hold any title to the suit land does not take away their right to compensation. Further, article 40(4) of the [Constitution](#) states thus: -

40(4) “Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause 3 who may not hold title to the land” Emphasis added.

Therefore, if the suit land was “compulsorily acquired,” then it was important that the procedures set out in the [Land Act](#) 2012 and also the repealed law and the [Constitution](#) are scrupulously adhered to. That was not done. There was a clear violation of article 40(3) of the [Constitution](#) which provides that: -

40(3) “The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –

- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.”



As is now clear, there was no compliance with the basic requirements prescribed under the repealed Land Acquisition Act or the Land Act 2012 such as a request by the County Government to the National Land Commission, the publication of notices in the Gazette with copies to the Registrar and every person who has an interest in the suit land, inspection of the suit land and prompt payment in full of just compensation to the petitioners.

54. In light of all the foregoing, I have no hesitation in making a finding that the requirements of the relevant laws were not complied with in the manner in which the suit land was acquired. The petitioners were therefore not only deprived of their right to property but also of their right to lawful and fair administrative action as guaranteed under the Constitution. The compulsory acquisition of the suit land was arbitrary, unlawful and un-constitutional. This court must therefore intervene and make appropriate orders.
55. The court has also been requested to direct the National Land Commission to investigate the circumstances under which the 1st and 2nd respondents obtained the registration of the suit land in their names. However, from what I have already stated above, I do not think that that would be the most efficacious remedy in the circumstances. I take note of article 20(3) b of the Constitution which provides that: -

- 20 “In applying a provision of the Bill of Rights, a court shall –
3
b : a. –
b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

The National Land Commission is itself a party in these proceedings being the 6th respondent. To direct it to institute any investigations as to how the 1st and 2nd respondents became the registered proprietors of the suit land would be asking it to be a judge in it’s own cause as captured in the Latin dictum – *nemo iudex in causa sua* which translates to “no one should be a judge in his own cause.” It would also be in breach of the Cardinal Principle of Natural Justice which has as among it’s minimum requirements that the decision maker must act impartially, fairly without prejudice or bias. In the circumstances of this case, it would be an affront to all the norms of Natural Justice to direct the National Land Commission to investigate a matter in which it is a party.

56. Further, in as much as the National Land Commission has the mandate under article 68 of the Constitution to, *inter alia*, investigate and recommend appropriate redress for any present or historical injustice, this court cannot oust it’s own jurisdiction to determine this dispute. To grant that remedy would, in my view, amount to this court improperly downing its tools. I must decline the invitation to do so.
57. There is no doubt in my mind, as pleaded by the petitioners, that the 7th and 8th respondents flouted the law in permitting the 1st and 2nd respondents to be registered as the proprietors of the suit land. It is significant to note that this petition was heard by way of *viva voce* evidence but the 2nd, 5th, 6th, 7th and 8th respondents did not call any witnesses in support of their cases.
58. With regard to the prayer that an order be made transferring the title to the suit land into the names of the petitioners, my answer to that is similar to what I have already stated above about deleting the names of the 1st and 2nd respondents as proprietors thereof. That is a remedy best determined in an ordinary civil suit. That prayer is denied.



59. The petitioners have also sought an order restraining the respondents by themselves, their agents, servants and/or whosoever from evicting the petitioners by themselves, their agents, workers and/or servants from the suit land and a further order restraining the respondents by themselves, their agents, servants and/or whosoever from entering, interfering and/or carrying out any activities on the suit land.
60. The record shows that simultaneously with the filing of this petition on June 12, 2013, the petitioners filed a chamber summons application under certificate of urgency seeking a temporary prohibitory order of injunction restraining the 1st, 2nd, 4th and 5th respondents by themselves, their agents servants, workers or otherwise from interfering in any manner with the suit land and further, from evicting the petitioners by themselves, their servants and/or agents from the suit land pending the hearing and determination of this petition. When that application was placed before Omollo J on June 20, 2013, Ms Wakoli counsel for the 1st and 4th respondents addressed the court as follows: -

“I have objection to granting prayer 2 as the applicants are not in occupation of the suit sic . There is a pending suit No 135 of 2013 in regard to the same subject matter.”

The judge made the following order: -

“The application is adjourned. The defendants granted leave to file their response to the application. Prayer 2 of the application is granted in part to the extent that the defendants by themselves or agents are restrained from evicting the petitioners from the said land pending determination of this application interparties. The Petitioner is granted corresponding leave if need be to put in a supporting affidavit. The application be heard on 9th July 2013.”

The application was not heard on July 9, 2013. Instead, on February 3, 2014, the following consent order was recorded in the presence of counsel of all the parties:-

- “ 1: *Status quo* be maintained.
- 2: The petitioners’ application dated June 12, 2013 be marked as spent with no orders on costs.
- 3: A – G is granted leave to put in response to the petition within 14 days from date hereof.
- 4: Other parties be at liberty to file further affidavit within 14 days upon service by A – G.
- 5: The matter be mentioned to confirm filing of documents.”

My interpretation of the above consent order as read together with the order of June 20, 2013 is that the petitioners were in occupation of the suit land. That state of affairs was un – contested and the parties agreed that it be preserved until the petition is heard and determined. There is nothing to suggest that the consent order was ever vacated. And as already stated above, no orders have been obtained to – date for the eviction of the petitioners from the suit land. The petitioners’ occupation of the suit land is confirmed in the replying affidavit of Clephas Wanyonyi Waswa (DW 2) dated February 13, 2020 wherein he has deponed at paragraphs 12, 13 and 20 as follows: -

- 12: “That in the year 1999, the County Council of Bungoma formed a Sub– Committee whose mandate was to visit land parcel No West Bukusu/



South Mateka/970, ascertain the extent of encroachment and make necessary recommendations.”

- 13: “That upon visit by the Sub – Committee on the said parcel of land, it was confirmed that people had illegally encroached on the land.”
- 20: “That the petitioners are only but trespassers on the suit land hence disentiing themselves on the orders sought.” Emphasis added.

On his part, Faddy Malaba (DW 1) deponed as follows in paragraph 23 of his replying affidavit dated July 5, 2013 filed in response to this petition and contents whereof he adopted during the plenary hearing: -

- 23: “That the petitioners and other people were once summoned by the Clerk to Bungoma County Council in mid-2012 over their private occupation of the land yet it was Government land. Attached herewith and marked FM 15 is a copy of the letter dated June 27, 2012.” Emphasis added.

The occupation of the suit land by the petitioners and those claiming through them is therefore a fact that is not contested. Indeed, that is why in their meeting of July 1, 1999, the 3rd respondent’s Sub–Committee made the resolution to retain only one 1 acre out of the suit land and allocate the rest to Francis Wasike Lupao and the others who had settled thereon. The remedy for a restraining order is therefore well merited in the circumstances. This court will therefore make an appropriate order in that regard.

61. On the issue of culpability. I have already made a finding that the suit land was compulsorily acquired in violation of the then Land Acquisition Act and the Constitution. In my view, that acquisition commenced way back in 1973 during the regime of the repealed Land Acquisition Act and the retired Constitution and continued in 2013 during the regime of the Land Act 2012 and Constitution 2010. The mandate to carry out compulsory acquisition of land is bestowed upon the County Government where the land sought to be compulsorily acquired is situated, the National Land Commission and the Attorney – General representing the relevant ministries. The office of Commissioner of Lands the 7th respondent no longer exists. It was therefore wrongly impleaded in this petition. The Talitia Medical Training College, the Bumula Constituency Development Fund, the National Treasury and the Ministry of Health the 1st, 2nd, 4th and 5th respondents respectively have no direct role to play in the process of compulsory acquisition of land.
62. Having considered all the evidence herein, there shall be judgment for the petitioners as against the 3rd, 6th and 8th respondents in the following terms: -
1. A declaration be and is hereby issued that the 3rd, 6th and 8th respondents violated the petitioners’ rights enshrined under article 40(1)(2) and (3) of the Constitution and part VIII of the Land Act by compulsorily acquiring the land parcel No West Bukusu/South Mateka/970 without any form of hearing or paying any compensation to the petitioners.
 2. A declaration be and is hereby issued that the 3rd, 6th and 8th respondents violated the petitioners’ right to fair and administrative action enshrined under article 47 of the Constitution.
 3. A declaration be and is hereby issued that the 3rd, 6th and 8th respondents violated the petitioners’ right to be treated with human dignity, equality and equity as enshrined under article 20(4) of the Constitution.



4. An order is hereby issued directing the 3rd, 6th and 8th respondents, if they are still desirous of compulsorily acquiring the land parcel No West Bukusu/South Mateka/970, to promptly negotiate with petitioners and other interested parties in possession, on the appropriate compensation at a fair market value and make prompt and full payment.
5. Pending full compliance with 4 above, an order of permanent injunction is hereby issued restraining the respondents by themselves, their agents, servants and whosoever acting through them from evicting the petitioners by themselves, their agents, workers, servants or any persons claiming through them from the land parcel No West Bukusu/South Mateka/970.
6. A further order is hereby issued restraining the respondents by themselves, their agents, servants and whomsoever acting through them from entering, interfering and/or carrying out any activities on title number West Bukusu/South Mateka/970 pending full compliance with 4 above.
7. Upon compliance with 4 above, the petitioners, their agents, workers, servants, assignees or any persons claiming through them shall immediately vacate the land parcel No West Bukusu/South Mateka/970 or be evicted therefrom in accordance with the law.
8. With regard to costs, it was the conduct of the 3rd respondent which precipitated the filing of this petition. They shall therefore meet the petitioners costs.

Right of appeal explained.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 28TH DAY OF JUNE 2022 BY WAY OF ELECTRONIC MAIL.

BOAZ N OLAO

JUDGE

June 28, 2022.

