



**Mutua & 2 others v Attorney General & 5 others (Environment & Land
Petition 10 of 2020) [2023] KEELC 18346 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 10 OF 2020**

TW MURIGI, J

JUNE 14, 2023

BETWEEN

**TIMOTHY KIKOMI MUTUA 1ST PETITIONER
PETER MUTINDA MUTUA 2ND PETITIONER
JOSEPHINE NTHOKI WANGOMBE 3RD PETITIONER**

AND

**THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
PROF KIVUTHA KIBWANA 3RD RESPONDENT
THE COUNTY GOVERNMENT OF MAKUENI 4TH RESPONDENT
THE OCS EMALI POLICE STATION 5TH RESPONDENT
STEPHEN MBATHA MUEKE WALTER WAMBUA KILUNDO CHRISTOPHER
MAWEU NDETEI MARTIN MUTUNGA MUTISYA (SUED AS THE NAMED
OFFICIALS OF MUUONI FARMERS COMMUNITY) 6TH RESPONDENT**

JUDGMENT

1. The Petitioners Timothy Kikomi Mutua, Peter Mutinda Mutua and Josephine Nthoki Wangómbe filed this Petition against the Respondents seeking the following orders: -
 - a) A declaration do issue that the Petitioners or any person deriving title from them are the bona fide owners of LR No 12969 West Emali Town Makueni or any subdivision or plots arising therefrom.



- b) The Honourable Court be pleased to declare that the invasion of the Petitioners property namely LR No 12969 West Emali Town Makueni and subsequent destructions of any of the properties contained therein is a violation of the Petitioners right to property and the freedom and security to the person.
 - c) A declaration that any promise or campaign pledge made by the 3rd Respondent in relation to the alienation or distribution of any of the Petitioner's property known as LR No 12969 West Emali Town Makueni or the implementation of any such promise without due process is a violation of the Petitioners right to fair administrative process as enshrined under Article 47 of the *Constitution of Kenya*.
 - d) A mandatory injunction order do issue compelling the 3rd, 5th and 6th Respondent to exhume the body of the stranger from the community that is buried on the Petitioners property known as LR No 12969 West Emali Town Makueni or in the alternative for the Petitioners to undertake the exhumation by themselves at the Respondents costs.
 - e) An order for compensation for the damage to the Petitioners property LR No 12969 West Emali Town Makueni.
 - f) An order compelling the 3rd, 5th and 6th Respondents to exhume the body of the stranger from the community that is buried on the Petitioners property known as LR No 12969 West Emali Town Makueni or in the alternative to undertake the exhumation by themselves at the Respondents costs.
 - g) A Conservatory order restraining any person claiming interest other than through the Petitioners, of any portion of the Petitioners property known as LR No 12969 West Emali Town Makueni whether by themselves, by their agent(s), their servant(s) or by any other description from entering into or in any manner occupying any portion of the Petitioners' property known as LR No 12969 West Emali Town Makueni.
 - h) A Conservatory order restraining any person claiming interest on any portion of the Petitioners' property known as LR No West Emali Town Makueni through Membership of Muuoni Farmers Community or a promise by the 3rd, 4th and 6th Respondents or otherwise on this basis from entering into or in any other manner occupying any portion of the Petitioners' property known as LR No 12969 West Emali Town Makueni whether by themselves, by their agent(s), servant(s) or any other description.
 - i) A judicial review order of Mandamus compelling the 5th Respondent and his office to evict or in any other manner direct or supervise the eviction of all those persons who have invaded the Petitioners property known as LR No 12969 West Emali Town Makueni.
 - j) Such other and/or further relief as this Court may deem fit.
2. The Petition is supported by the affidavit of Peter Mutinda Mutua sworn on May 11, 2020.
 3. The 1st and 5th Respondents opposed the Petition through the replying affidavit sworn by RJ Simiyu on November 18, 2020.
 4. The 2nd Respondent did not file a response to the Petition.
 5. The 3rd and 4th Respondents opposed the Petition through the replying affidavit sworn by Professor Kivutha Kibwana on June 23, 2020.



6. The 6th Respondent opposed the Petition through the replying affidavits sworn by Stephen Mbatha Mweke on June 15, 2020 and by Christopher Maweu Ndeti sworn on November 15, 2020.
7. The Petition proceeded by way of viva voce evidence.

The Petitioners' Case

8. At the trial the 2nd Petitioner testified as the sole witness in support of their case.
9. He adopted his affidavit in support of the Petition and application sworn on May 11, 2020 and his further affidavit sworn on November 20, 2020 as his evidence in chief. He also produced the documents annexed in his supporting affidavit as exhibits in support of his case.
10. The Petitioner testified that he is one of the joint owners of the suit property known as LR No 12969 situated within Emali town Makueni County having acquired the same as the beneficiaries of the Estate of Reuben Nzioka Mutua deceased.
11. It was his testimony that sometime in the year 1982, his late father Reuben Nzioka Mutua applied to the Government to be allocated land. That upon consideration, the Commissioner of Lands, vide the letter dated July 12, 1983 informed his late father that the Government had approved his application to be allocated land. He went on to state that his late father was allocated 800 acres of land.
12. That upon confirmation and payment of the consideration, his late father was issued with a letter of allotment dated August 15, 1983. That in the year 1983, his late father took possession of the suit property and constructed a permanent house thereon.
13. That pending the issuance of the title, his late father sought to have the beacons fixed on the suit property but passed away in the year 1986 before the beacons were fixed. He informed the court that his late father, his wife, his daughter and daughter in law are buried on the suit property.
14. It was his testimony that on September 17, 2018, one Peter Paul Wambua Mbote a member of Muuoni Farmers Community encroached on the suit property but was evicted and detained by the OCS Emali Police Station for questioning. That immediately thereafter, they started receiving threatening letters which prompted them to report the matter to the 5th Respondent who failed to act on their report.
15. That on October 6, 2018, the 3rd Respondent held a meeting on the suit property where he promised the invaders that he would give them the title to the suit property.
16. It was his testimony that on October 22, 2019, he discovered that there were unauthorised people cultivating on the suit property. That despite making numerous reports to the 5th Respondent and to the County Commissioner to remove the trespassers from the suit property, they failed to act on the same.
17. He further testified that after they complained to the Assistant County Commissioner about the encroachment and burial of a stranger on the suit property, P.M Mulwa (the Chief, Emali) confirmed to them that the burial permit for the unknown person was issued at the command of the 3rd Respondent with the assistance of the 6th Respondent. He testified that the County Government of Makueni declined to grant the requisite approvals to sub divided the suit property amongst the beneficiaries of the Estate of Reuben Nzioka Mutua.
18. He went on to state that they fenced off the suit property but the same was vandalised by the people who put up structures thereon. It was his testimony that they tried to evict the invaders from the suit property and sought assistance from the Inspector General, the County Commissioner and the



- Ministry of Interior to no avail. He maintains that the OCS Emali Police Station failed to provide them with security when the 6th Respondent forcefully removed them from the suit property.
19. It was his testimony that the 6th Respondent has no historical injustice claim over the suit property. According to him, the 5th Respondent violated their right to security of the person by failing to provide security. He urged the court to grant the orders sought in the Petition.
 20. In cross examination by Ms Ndundu, he testified that his late father accepted the terms and conditions of the letter of allotment even though the letter does not indicate that he attached a cheque of Kshs 219 840/=. He stated that he did not have any document to demonstrate that payment of Kshs 219,840/= was made within 30 days from the date of the letter of allotment.
 21. It was his testimony that after they applied to be issued with a title for the suit property vide the letter dated November 9, 2018, the land officials informed them that the title would be issued in the names of the Administrators of the Estate of Reuben Nzioka Mutua and not in the name of the deceased. He informed the court that he was not aware that the National Land Commission was the only body mandated to issue a title upon the expiry of a letter of allotment. It was his testimony that they were not issued with a new letter of allotment in the names of the Administrators of the Estate of Reuben Nzioka Mutua.
 22. In cross examination by Mr Mung'ata, he testified that the 3rd Respondent held a meeting on the suit property where he promised to give the invaders the suit property. That although the 3rd Respondent was not claiming ownership over the suit property, he wrote the letter dated January 4, 2016 to the Cabinet Secretary in charge of Ministry of Lands in his personal and official capacity with regards to the suit property. He testified that he sued the 4th Respondent because it had declined to grant the requisite approvals to subdivide the suit property amongst the beneficiaries. He testified that the photographs attached to his supporting affidavit represent the day when the 3rd Respondent held a meeting on the suit property to raise funds for an illegal structure that had been demolished.
 23. He further testified that his late father had complied with the terms and conditions set out in the letter of allotment by making cheque payment for the suit property. He stated that upon the demise of his father, the suit property formed part of his of Estate and was listed in the first certificate of confirmation of grant.
 24. He went on to state that the Ministry of Lands vide the letter dated February 25, 1985, acknowledged receipt of the application for issuance of the title for suit property. He denied the allegations by the Respondents that his late father was allocated the suit property because he was the Commissioner of Prisons. It was his testimony that prior to the year 1983, the County Council owned a portion of the suit property while the rest of the land was owned by the Government.
 25. He contended that the suit property was inspected even though he did not have the inspection report.
 26. In cross examination by Mr Muya, he testified that his former Advocate vide the letter dated March 15, 2002 terminated the lease granted by his family to all the people on the suit property. He stated that the suit property, like other properties belonging to his deceased father, was not listed in his father's will dated April 1, 1987.
 27. He went on to state that he resides on the suit property though he does not carry out farming activities thereon. He testified that he reported the burial of an unknown person on the suit property that occurred on February 20, 2020 to the police. It was his testimony that he would not know if there were other people buried on the suit property.



28. He denied the allegations by the 6th Respondent that they were in possession of the suit property. He reiterated that he did not have the inspection report for the suit property.
29. In cross examination by Mr Makundi, he testified that he obtained the title for the suit property in the year 2019. He further testified that although his late father paid fees for the survey to be undertaken on the suit property, he did not have a letter by his late father making reference to payment for the suit property.
30. In re-examination, he stated that although his father made payment for the suit property, the document to demonstrate the payment was missing from their documentation. That after the demise of his father, communication with the Ministry of Lands continued for three years. He testified that they were issued with the title for the suit property after land officials confirmed that they had all the documents required for the issuance of a title.
31. That moreover, the Respondents did not file a counter claim to dispute the validity of their title to the suit property. He went on to state that the 6th Respondents have not filed a historical claim with the National Land Commission. He testified that the suit property was not included in his late father's will for the reason that his late father had not obtained a title to the same. He testified that he came to court because there are people who want to dispossess them of the suit property

1st and 5th Respondents Case

32. The 1st and 5th Respondent called one witness in support of their case.
33. Robert Simiyu, an Assistant Director of Land Administration, Ministry of Lands, Physical Planning adopted his replying affidavit sworn on November 18, 2020 as his evidence in chief. He also produced the documents annexed to his replying affidavit as evidence in support of their case.
34. He testified that according to the records held by the Ministry of Lands, RN Mutua was allocated LR No 12969 measuring 325.3 Ha (approximately 800 acres) vide the letter of allotment dated August 15, 1983. He further testified that the letter of allotment expressly provided that the allottee was to accept the terms and conditions set out in the letter and issue a cheque of Kshs 219,840/= being payment of the standard premium and other fees.
35. That it was a condition of the letter of allotment that if acceptance and payment is not received within 30 days from the date of the letter, the offer would be considered to have lapsed. He further testified that vide a letter dated August 18, 1983, RN Mutua acknowledged receipt of the letter of offer but did not make payment of Kshs 219,814/= within 30 days as required.
36. It was his testimony that according to the correspondence file, the Petitioners accepted the terms and conditions of the letter of allotment dated August 15, 1983 vide the letter dated November 9, 2018. He stated that the offer was accepted 37 years after the allocation was done. According to him, no interest could be transferred to the Administrators of the Estate of Reuben Nzioka Mutua after the expiry of the allocation.
37. It was his further testimony that upon the lapse of the offer to Reuben Mutua, the Petitioners ought to have made an application to renew the letter of allotment to the National Land Commission which is mandated to renew expired letters of allotment which was not done. He stated that the grant for the suit property was issued on October 14, 2019 in favour of the Petitioners. He went on to state that the grant was for 800 acres yet the allottee had vide a letter dated November 28, 1985 requested to be issued with a title for 500 acres.



38. In cross examination by Mr Kuyo, he testified that his office is the custodian of the parcel and correspondence file. He stated that not all the documents contained in the correspondence file were filed in court. He went on to state that sometimes, documents can go missing from the file. He stated that there was nothing in the correspondence file to indicate that the offer issued to Reuben Nzioka Mutua had lapsed.
39. In cross examination by Mr Mung'ata, he testified that there was no consistency in the correspondence file. He told the court that upon reviewing the file, he could not state what parts of the file were missing. He further testified that he did not see a letter of acceptance by Reuben Mutua, the allottee, but saw a letter by Peter Mutua, accepting the offer 37 years after the letter of allotment was issued.
40. He further testified that he did not see an acceptance of payment by RN Mutua. In addition, he testified that the only payment receipt is dated January 17, 2019, for Kshs 210,840/=, issued in the name of Peter Mutua, being payment for legal fees for the letter of allotment. He testified that the letter of offer issued to Reuben Mutua lapsed automatically after 30 days, after he failed to comply with the terms and conditions of the letter of allotment. That according to the correspondence file, a ground report indicating the status of the suit property was not issued.
41. He further testified that according to the correspondence file, the title for the suit property was issued irregularly because the offer had lapsed, there was no evidence that the deed plan was received or requested from the director of survey and that payment for the plot was never received.
42. In cross examination by Mr Muya, he testified that the correct procedure in issuing the title for the suit property was not followed as the receipt of Kshs 214,840/- did not reflect in the accounts.
43. In cross examination by Mr Makundi, he testified that the National Land Commission did not issue a fresh letter of allotment in favour of the Petitioners. He testified that he carried out due diligence in the accounts department and established that RN Mutua did not make payment for the suit property.
44. In re-examination, he informed the court that the Commissioner of Lands does not communicate with the allottee once an offer lapses. He reiterated that Peter Mutua paid for the suit property vide cheque No 00332 though he did not quote it in the letter of acceptance.
45. According to him, the title to the suit property should be revoked because it was irregularly issued to the Petitioners.

The 3rd Respondent's Case

46. The 3rd Respondent, the Governor of the County Government of Makueni testified as the sole witness in support of his case.
47. He adopted his replying affidavit sworn on June 23, 2020 as his evidence in chief. He also produced the documents attached to his replying affidavit as evidence in support of his case. He testified that the dispute revolving around the suit property arose in the 1930s when the Colonial Government forcefully confiscated the land from the local community for use by the settlers.
48. That before the forceful take over, the suit property was part of a larger parcel occupied by the local community as their ancestral land. That after the colonialist left, the suit property was taken over by the independent Government and allocated to Agricultural Development Corporation instead of reverting back to the community.
49. According to him, the local community has never abandoned their claim over the suit property from the time it was taken over by the white settlers up to the independence period.



50. It was his testimony that during his tenure as the acting and substantive Minister of Lands between February 16, 2006 to July 29, 2007, he was made aware of the dispute between Muuoni Farmers Community and the family of Reuben Nzioka Mutua.
51. That in the year 2006, he perused, reviewed and familiarized himself with the original correspondence file for LR No 12969 and established that no letter of allotment was issued in favour of Reuben Nzioka Mutua or to any other person for that matter. In addition, he stated that no payment was received for the suit property. According to him, there was correspondence dating back from the year 1982 between the Commissioner of Lands and Reuben Nzioka Mutua who had sought to be allocated land but the process of allocation had not been concluded. That at the time of his demise, no grant or allotment of the suit property had been issued, hence the suit property did not form part of his Estate.
52. He testified that upon reviewing the file, he never saw a receipt to confirm that payment was made for the suit property which is a mandatory condition in allotment of public land. It was his testimony that the suit property herein is community land and has not been vacant at any point in time.
53. It was his further testimony that in allocation of public land, an inspection must be carried out to determine the status of the land before it is allocated. According to him, no inspection was carried out to ascertain the status of the suit property and hence the purported allocation to Reuben Nzioka Mutua or his personal representatives is irregular and invalid. He testified that the allotment of the suit property to Reuben Mutua lapsed automatically after he failed to comply with the terms and conditions set out in the letter of allotment. It was his testimony that due process was not followed in the issuance of the title to the Petitioners herein.
54. He further testified that upon receiving a Petition in December, 2015 from Muuoni Farmers Community seeking to be allocated the suit property, he forwarded the same together with recommendations to the Cabinet Secretary, Ministry of Lands and to the National Land Commission so as to plan, consolidate and survey the claims by Muuoni Farmers Community who upon follow up assured them that the matter was still under consideration.
55. He informed the court that he was surprised to learn that the grant and certificate of title for land measuring 800 acres was issued for the benefit of one family against the historical claims of hundreds of people. According to him, the grant was issued in error without considering the historical injustice claims over the suit property.
56. He denied the Petitioners allegations that he incited Muuoni Farmers Community to invade the suit property and stated that his Government and other agencies held several forums with the community leaders in order to address their genuine grievances in accordance with the law. He denied the allegations made by the Petitioners that he issued a burial permit for the unknown person buried on the suit property and stated that he was aware that there are many people buried on the suit property.
57. In cross examination by Mr Kuyo, he testified that according to available history, the local community settled on the suit property in the 1930s. That in the year 1939, there were clashes over the suit property because the colonialists had confiscated the larger portion of land from the local community. He reiterated that the suit property was allocated to non-community members and to the Agricultural Development Corporation.
58. According to him, the issuance of the title for the suit property did not adhere to legal process because there was no letter of allotment that had been issued to Reuben Mutua or evidence that he paid the requisite fees within 30 days from the date of the letter of offer.



59. He reiterated that he did not see a letter of allotment issued in favour of Reuben Mutua or to any other person in the correspondence file. He maintains that the suit property is trust land because there were people who were residing thereon before the colonialists took over the land.
60. He further testified that he was not aware of what the National Land Commission did after the community Petitioned it on the grounds of historical injustices.
61. In cross examination by Ms. Ndundu, he testified that an inspection report was not availed to determine whether the suit property was available for allocation. He reiterated that during his tenure as the Minister for Lands, he did not come across a letter of allotment issued in favour of Reuben Mutua or proof of payment for the same in the correspondence file.
62. He denied the allegations by the Petitioners that the County Government had declined to grant approvals to sub divide the suit property and maintains that the application was not made. He told the Court that he doubted the authenticity of the letter of allotment because the acreage of the suit property was indicated as 325.3 Acres while in other documents the acreage is indicated as 500 acres. According to him, the letter of allotment was backdated because it was not in the file when he perused the same. In addition, he stated that the letter of allotment could not have been the first document in the file.
63. In cross examination by Mr Muya, he testified that Muuoni Farmers Community are in possession of the suit property since time immemorial. That their grandparents were born there and the residents are buried on the suit property since the colonial times. He stated that the late Reuben Mutua was not a member of Muuoni Farmers Community.
64. According to him, the Petitioners title to the suit property was irregularly acquired. He denied the allegations made by the Petitioners that he incited the community to invade the suit property and added that he advised them to make a claim on historical injustice to the National Land Commission.
65. In cross examination by Mr Makundi, he testified that the Petitioners had sought to sub divide the suit property without obtaining the necessary approvals from the County Government of Makueni. He reiterated that he did not come across the letter of offer or acceptance by Reuben Mutua or an inspection report in the correspondence file. He added that he did not see any consent from Masaku County Council.

The 6th Respondent's Case

66. The 6th Respondent called two witnesses in support of its case.
67. Stephen Mbatha Mueke adopted his replying affidavit sworn on June 15, 2020 as his evidence in chief. He also produced the documents attached to his affidavit as exhibits in support of his case. He testified that Muuoni Farmers Community occupied the suit property during the 1st world war and before the colonialist came to Kenya. He went on to state that their parents and grandparents are buried on the suit property.
68. He further testified that the Petitioners are not the owners of the suit property as the title was irregularly acquired. It was his testimony that the suit property was trust land held by the defunct Masaku County Council.
69. He went on to state that they presented their complaint to the National Land Commission vide the letter dated March 30, 2020 and to the County Government of Makueni but their case is yet to be concluded.



70. He testified that in the year 1983, the late Reuben Mutua in the company of police officers, invaded and forcefully evicted them from the suit property. He went on to state that the family of Reuben Mutua does not reside on the suit property, though they usually bury their kin on the suit property.
71. He denied the allegations made by the Petitioners that Muuoni members had encroached and invaded the suit property and contended that the Petitioners were trying to deprive them of their ancestral land. He asserted that the documents relied upon by the Petitioners were acquired fraudulently since the late Reuben Mutua's application to be allocated the suit property was never approved.
72. In cross examination by Mr Kuyo he testified that he is the Chairman of Muuoni Farmers Community group. He went on to state that he did state how many members are comprised in the group. He testified that they did not report to the police when Reuben Mutua invaded the suit property as it would amount to reporting a police officer to another officer.
73. He informed the court that the suit property belonged to the community even prior to the year 1983. It was his testimony that Reuben Mutua forcefully constructed a house on the suit property even though they have no evidence that they reported the matter to the police. He confirmed that the photographs attached to the Petitioners supporting affidavit depict the suit property. He testified that he was born on the suit .He stated that the list of the members had not been presented in court.
74. In cross examination by Ms Mwalozi, he testified that Mutua's family invaded the suit property in the year 1983. He admitted that Reuben Mutua as well as some members of his family are buried on the suit property.
75. He stated that they filed a complaint with the National Land Commission but would not know the action that was taken.
76. In cross examination by Mr Mungáta, he testified that the 3rd Respondent does not have any land on the suit property. He reiterated that his father and his grandparents are buried on the suit property.
77. In re-examination, he testified that the PEX 7 comprises of the list of Muuoni Community members.
78. Christopher Maweu Ndeti a member of Muuoni Farmers Community adopted his replying affidavit sworn on November 15, 2020 as his evidence in chief. It was his testimony that the suit property belongs to the community who are in possession of the land. He informed the court that Kilili hill situated within the suit property is named after his grandfather. It was his testimony that his father and his grandfather are buried on the suit property. He went on to state that members of Muuoni Community have been in possession of the suit property and have been fighting historical injustices meted against them.
79. He further testified that the late Reuben Mutua invaded the suit property in the year 1983 and built a house thereon and that upon his demise, his son Stanley moved in for a short while but later left. He maintains that the allocation of the suit property to the Petitioners is illegal since the property is trust land.
80. In cross examination by Mr Kuyo, he testified that he is the treasurer of the group since the year 2002. He reiterated that Kilili hill is named after his grandfather who together with his father are buried on the suit property. He testified that the community has been fighting against historical land injustice.
81. Upon the close of the hearing, the parties herein sought time to file and exchange their respective submissions.



The Petitioners Submissions

82. The Petitioners submissions were filed on July 6, 2022. Counsel for the Petitioners submitted that the suit property is registered in the names of the Petitioners as the joint proprietors thereof. That the Petitioners have been in possession of the suit property since 1983. Counsel identified the following issues for the Court's determination: -
- i. Whether the title in the suit property was lawfully acquired by the Petitioners;
 - ii. Whether the 6th Respondent has established their claim of historical injustice to override the Petitioners' ownership of the suit property;
 - iii. Whether the Petitioners are entitled to damages for breach of their constitutional right to the suit property; and
 - iv. Who bears the costs.
83. On the first issue, Counsel submitted that Article 40 of the Constitution provides that every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya. It was further submitted that Section 26 of the Land Registration Act provides that a certificate of title issued by the Registrar upon registration is to be deemed by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.
84. That the title of that proprietor shall not be subject to challenge except where the proprietor has obtained the title through fraud or misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
85. Counsel contended that no evidence was presented at the trial to demonstrate that the Petitioners were party to any fraud or irregularity in the acquisition of the suit property.
86. Counsel further submitted that the Government accepted payment of the allotment fees even if the argument was that the payment was made after the 30-days period had lapsed. Counsel argued that the allotment of the suit property to the Petitioners' deceased father cannot be declared invalid as to impugn the validity of the title held by the Petitioners simply by dint of the payment being made outside the 30 day period. That in any event, the interest in the suit property was never allocated to anyone else.
87. In addition, Counsel contended that there was no cross-petition filed in the Petitioners' claim in which the Respondents have sought to cancel the Petitioners' title to the suit property. Counsel argued that the Respondents are bound by Section 107 of the Evidence Act to establish fraud or foul play on the part of the Petitioners that the interest in the suit property was irregularly acquired.
88. On the second issue, Counsel contended that the 6th Respondent bore the burden of proving the existence of its claim of historical injustice. Counsel argued that save for hearsay evidence which cannot be relied upon, there was no cogent evidence that the 6th Respondent's forefathers were displaced from the suit property. Counsel argued that no cross-Petition was filed by the 6th Respondent providing the basis of its claim of historical land injustice.
89. On the third issue, Counsel contended that the actions of the 3rd and 6th Respondents which led to destruction of property and violence against the Petitioners pointed to a breach of their constitutional right to own the suit property.



90. For the said breach of their constitutional rights, Counsel urged this Court to award the Petitioners a ballpark figure in damages for the trespass that was admitted by the 6th Respondents during the trial.
91. On the last issue, Counsel submitted that the Petitioners had established the prayers sought in the Petition. Counsel urged Court to award the costs of lodging and prosecuting the Petition in favour of the Petitioners. To buttress their submissions, Counsel for the Petitioners relied on the cases cited in the list and bundle of authorities filed in Court on July 6, 2022.

The 1st and 5th Respondents Submissions

92. The 1st and 5th Respondents' submissions were filed on November 9, 2022 through the office of the Attorney General. On their behalf, Learned State Counsel identified the following issues for the court's determination: -
- i. Whether the Petitioners had pleaded the Petition with reasonable precision as per the required standards;
 - ii. Whether the title to the suit property was lawfully acquired by the Petitioners;
 - iii. Whether the Respondents were in breach of the Petitioners' rights;
 - iv. Whether the 5th Respondent had failed/neglected to provide security to the Petitioners; and
 - v) Whether the Petitioners are entitled to the reliefs sought
93. On the first issue, Learned State Counsel submitted that a constitutional petition ought to state clearly the alleged violations as was stated in the case of *Anarita Karimi Njeru vs Attorney General* [1979] KLR 154.
94. Learned State Counsel contended that it was not enough for the Petitioners to cite articles of the *Constitution* without relating them to the infringements complained of.
95. On the second issue, it was contended that the Petitioners had failed to demonstrate that they met the conditions for payment as provided in the letter of allotment which demanded that the allottee must pay Kshs 219,840/= within 30 days and therefore, the letter of allotment had lapsed.
96. It was submitted that the Court has powers to order for rectification of the register by directing that the registration be cancelled if it is satisfied that the registration was obtained by fraud or mistake. Learned State Counsel submitted that the Petitioners had failed to demonstrate that they lawfully acquired the suit property.
97. On the third issue, the Learned State Counsel contended that the Petitioners had failed to demonstrate, with reasonable precision, how the 1st and 5th Respondents had violated their constitutional rights.
98. On the fourth issue, the learned State Counsel argued that the Petitioners did not adduce evidence to demonstrate that they raised complaints with the 5th Respondent and that the 5th Respondent failed to act.
99. On the last issue, the learned State Counsel argued that the Petitioners had failed to prove their case to the required standard and hence, they are not entitled to the reliefs sought. It was urged that the Petition be dismissed with costs. Learned State Counsel relied on the authorities annexed to their submissions in support of the 1st and 5th Respondents' case.



100. Vide the submissions filed in Court on January 16, 2023, Counsel for the Petitioners filed a rejoinder to the 1st and 5th Respondents' submissions.
101. Counsel argued that the Petition was pleaded with reasonable precision in accordance with Rule 10 of the Mutunga Rules. It was further argued that the particulars of the alleged violations to the Constitution were provided as shown under paragraphs 30 to 38 in their grounds for relief.
102. In justification of their bona fide ownership to the suit property, Counsel submitted that the un-contradicted evidence was that the allotment fee was paid, the payment was accepted by the Government and a valid title deed was issued thereafter.
103. Again, it was submitted that there was no evidence to demonstrate that the suit property had been allocated to any other person since it has been in possession and use by the Petitioners.
104. Learned Counsel for the Petitioners went on to reiterate the submissions made earlier in support of the Petition while also relying on the annexed authority filed with the list of authorities dated January 12, 2023.

The 6th Respondent's Submissions

105. The 6th Respondent filed their submissions on January 20, 2023. On their behalf, Counsel submitted that the Petitioners' certificate of title was irregularly, fraudulently and illegally acquired. Counsel submitted that it was the 6th Respondent's contention that they have been in possession and occupation of the suit property since time immemorial and that it is their ancestral land.
106. Counsel outlined the following issues for the court's determination: -
 - i. Whether the Petitioners' Certificate was irregularly, unlawfully and fraudulently obtained;
 - ii. Whether the 6th Respondent has been in occupation and possession at all material times;
 - iii. Whether there have been historical injustices against the 6th Respondent and if so whether the Court can issue the orders sought by the Petitioners against the 6th Respondent; and
 - iv. Who bears the costs of the Petition.
107. On the first issue, Counsel submitted that the Petitioners did not produce the application letter for allocation of the suit property. That all that was presented by the Petitioners was a letter dated July 12, 1982 approving the application for allotment and a letter of allotment dated August 15, 1983. Counsel further submitted that there was no evidence of payment of consideration and therefore, the suit property was irregularly and unlawfully acquired.
108. On the second issue, Counsel submitted that that the 6th Respondent's evidence comprised in the photographic evidence confirmed that the 6th Respondent has been in occupation of the suit property. Counsel further contended that the fact that eviction orders were being sought against the 6th Respondent was enough evidence confirming that they were in occupation of the suit property. Counsel submitted that by virtue of the said occupation, the 6th Respondent has interests and rights over the suit property which require protection under the Constitution.



109. On the third issue, Counsel contended that the Petitioners' fathers' use of force to alienate and fence the land using prison warders in addition to the use of police to evict them demonstrated their claim for historical injustice. While urging the Court to dismiss the Petition with costs, Counsel also urged the Court to declare that there has been historical injustice against the 6th Respondent as members of the community living in the suit property.
110. To buttress the 6th Respondents' submissions, Counsel cited and annexed two authorities namely: -
- i. *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR.
 - ii. *Khayoni & 12 others v Talitia Medical Training College & 7 others* (Environment & Land Petition 5 of 2013 [2022] KEHC 10280 (KLR) (28 June 2022) (Judgment).
111. In another set of submissions filed on 10th February, 2023, Counsel cited and annexed four cases in the 6th Respondents' bundle of authorities to further fortify their submissions.
112. To counter the 6th Respondents' submissions, Counsel for the Petitioners filed rejoinder submissions on 20th February, 2023. It was submitted that the 6th Respondent had not availed documentation in proof of the claims that the Petitioners' Certificate of Title was illegally obtained. Counsel further reiterated the contents of the Petitioners' submissions dated 1st July, 2022 to buttress their rejoinder. Counsel urged the Court to dismiss the 6th Respondents' claims in their entirety.
113. By the time of writing this judgment, the 3rd and 4th Respondents had not filed their written submissions.

Analysis and Determination

114. Having considered the Petition, the affidavits, the evidence on record and the respective submissions, the following issues arise for determination:-
- i. Whether the allottee complied with the terms and conditions set out in the letter of allotment dated August 15, 1983.
 - ii. Whether the Petitioners are entitled to the orders sought.
 - iii. Who is to bear the costs of the Petition.
115. The Petitioners testified that they are the Legal Administrators of the Estate of Reuben Nzioka Mutua and the bona fide joint registered owners of the suit property having acquired the same by way of a grant in HCCC Succession Cause No 0843 of 1986. He went on to state that after they applied to the Director of Land Administration to be issued with a title for the suit property, the land officials confirmed that they had all the necessary documents required for the issuance of a title.
116. It was his testimony that they were informed by the land officials that the title for the suit property would be issued in the names of the Administrators of the Estate of Reuben Nzioka Mutua and not in the name of the deceased. In this regard, he produced a certificate of title and grant of lease for the suit property (PEX1).
117. It is not in dispute that the Petitioners are the registered owners of the suit property. The 1st, 3rd, 5th and 6th Respondents case is that the Petitioners title to the suit property was irregularly acquired because the terms and conditions set out in the letter of allotment were not complied with.
118. From the evidence on record it is crystal clear that the Petition herein revolves around the letter of allotment dated August 15, 1983.



119. At this juncture, this Court is called upon to determine whether the terms and conditions set out in the letter of allotment dated 15th August, 1983 were complied with.
120. The Petitioner testified that his late father applied to the Commissioner of Lands to be allocated land. In this regard, he produced the letter dated 12th July, 1983 from the Commissioner of Lands addressed to his late father (PEX 3). In the letter, the Commissioner of Lands informed the late Reuben Nzioka Mutua that the Government had approved his allocation of 800 acres of land.
121. In addition, the letter also informed him that a letter of allotment would be sent to him as soon as the necessary formalities were completed. That upon application, his late father was issued with a letter of allotment for the suit property and proceeded to take possession thereof. In this regard he produced the letter of allotment dated August 15, 1983 (PEX2).
122. It was his testimony that his father complied with the terms and conditions set out in the letter of allotment. He went on to state that the issuance of title was irrevocable proof that payment of the consideration under the letter of allotment was made.
123. On the other hand, the 3rd Respondent testified that during his tenure as the acting and substantive Minister of Lands, he had the occasion to peruse and familiarize himself with the correspondence file for the suit property. It was his testimony that he never came across a letter of allotment issued in favour of Reuben Mutua or to any other person. He added that no payment was received for the suit property.
124. The 1st and 5th Respondents called one witness in support of their case. Robert Simiyu the Assistant Director of Land Administration testified that the late Reuben Mutua did not comply with the terms and conditions set out in the letter of allotment since he did not accept and pay the standard premium for the suit property. He testified that the Petitioner accepted the terms and conditions of the letter of allotment vide his letter dated November 9, 2018.
125. The 1st, 3rd, 5th and 6th Respondents case is that the correct procedure was not followed in the issuance of the title to the suit property as the acceptance of offer and payment for the suit property was not received.
126. At this juncture this Court is called upon to examine the terms and conditions set out in the letter allotment dated August 15, 1983.
127. I have carefully read the letter of allotment dated August 15, 1983 issued to RN Mutua by the Commissioner of Lands (PEX2). According to the letter of allotment, the suit property measuring 325.3 hectares was allocated to the late Reuben Nzioka Mutua on August 15, 1983.
128. The letter of allotment states as follows in part:-
- “
- “ 1. I have the honour to inform you that the Government hereby offers you a grant of the above plot.....
2. I should be glad to receive your acceptance of the attached conditions together with your cheque for the amount of Kshs 219,840/=.
- If acceptance and payment respectively are not received within 30 days from the date hereof the offer contained will be considered to have lapsed.”
129. It is clear from the letter of allotment that the late Reuben Mutua was required to meet the following conditions:-



1. Acceptance of the attached conditions.
 2. A cheque for the amount of Kshs 219,840/-.
130. On the condition of acceptance, it required the allottee to make a formal acceptance of the conditions of the allotment and to effect payment of the requisite charges thereof within thirty (30) days from the date of the letter.
131. Robert Simiyu testified that the allottee (Reuben Mutua) did not tender a written acceptance of the offer or make payment for the suit property. It was his testimony that the Petitioner accepted the offer 37 years after the offer to the late Reuben Mutua had lapsed.
132. The Petitioner on the hand testified that his late father had accepted the offer as early as July 25, 1984 when he requested to be issued with a title for the suit property. In this regard he produced the letter dated July 25, 1984 (PEX5).
133. On the condition of payment of the standard premium and other fees amounting to of Kshs 219,840/=, the Petitioner testified that his late father complied with the terms of the letter of allotment by making cheque payment though proof of the same was missing from their documentation. The 3rd Respondent on the other hand testified that during his tenure as the acting and substantive Minister for lands, he never came across any payment receipt for the suit property. Robert Simiyu testified that the allottee did not make any payment towards the allotment of the suit property.
134. It was his evidence that he carried out due diligence in the accounts office and confirmed that payment for the suit property was not received from the late Reuben Mutua. He further testified that he confirmed that a payment was made vide cheque No 00332.
135. I have looked at the letter dated November 9, 2018, by Peter M. Mutua addressed to the Director Land Administration which states as follows in part:-
- “We accept the terms and conditions in the letter of allotment. Kindly provide us with the consent to pay in order that we may process the title.”
136. The letter of allotment provided that the offer would lapse within 30 days from the date of the offer. The effect of the offer of allotment had to be accepted within a specified period otherwise it would lapse by effluxion of time.
137. In the case of *Philma Farm Produce and Supplies & 4 others vs Attorney General & 6 others* (2012) eKLR Justice John Mutungi while face with a similar case held as follows:-
- “The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract.”
138. It was incumbent on the Petitioners to satisfy the court that their late father accepted the allotment and made payment within the specified period. The Petitioners did not produce any evidence to demonstrate that the late Reuben Mutua made a written acceptance of the offer and/or made payment within 30 days from the date of the letter of offer.
139. They equally did not produce any evidence to demonstrate that their deceased father paid the standard premium fees. Those were express conditions that the allottee was required to meet. The offer lapsed automatically after he fails to meet the terms and conditions within 30 days from the date of the letter of allotment after he failed to meet the said conditions.



140. In the case of *Bukaki Investment Company Ltd vs the National Land Commission & 2 others* (2015) eKLR the court held as follows:-

“where an offer has a specified time within which it has to be accepted, no communication of the revocation would be necessary as it simply would stand revoked on the expiry of the specified period. A time extension and/or a fresh offer would be necessary to reactivate the offer.”

141. In view of the clear terms of the letter of allotment, it was not necessary for the Commissioner of Lands to inform Reuben Mutua that the offer had lapsed.

142. Robert Simiyu testified that the payment was made vide cheque No 00332 though it was not indicated in the letter as required. From the record it is crystal clear that payment for the offer was made on January 17, 2019. The letter of allotment carried a specific time frame within which a written acceptance of the offer and payment of the charges thereto were to be made.

143. The Petitioners did not demonstrate that the late Reuben Mutua complied with the terms and conditions set out in the letter of allotment dated August 15, 1983. Although the Petitioner testified that his late father accepted the offer as early as July 25, 1984, his letter dated November 9, 2018 clearly confirms that the acceptance of the offer was received on November 9, 2018 long after the offer had lapsed.

144. This court finds and holds that the offer, as contained in the letter of allotment could not be revived 37 years later by accepting the terms and conditions and making payment for the same. By making the payment for the offer, the Petitioners were substituting the offer in the letter of allotment after the offer had lapsed.

145. Robert Simiyu testified that the Petitioners ought to have renewed the letter of allotment with the National Land Commission. It was his testimony that there was no letter of allotment issued to the Administrators of the Estate of Reuben Mutua.

146. Indeed, the Petitioners have not demonstrated that they applied to the National Land Commission to renew the offer for the suit property. It is crystal clear that the Petitioners were not issued with a fresh letter of allotment by the National Land Commission. . This Court finds and holds that the late Reuben Mutua did comply with the terms and conditions of the letter of allotment and therefore the payment made thereafter was not in accordance with the letter of allotment.

Whether The Petitioners are Entitled to The Orders Sought.

147. The Petitioners sought for a declaration that they are the bona fide owners of the suit property, a mandatory injunction to compel the 3rd 5th and 6th Respondents to exhume the body of the stranger from the suit property amongst other reliefs. In my view these issues are of a private nature and do not raise constitutional issues. They ought to have been ventilated in a civil suit.

148. From the evidence on record the main issue for determination was whether the late Reuben Nzioka Mutua had complied with the terms and conditions set out in the letter of allotment dated August 15, 1983.



149. In the case of *Anarita Karimi Njeru vs The Republic* (1976-1980) the court laid down the substantive test to be applied when making a finding on whether the alleged violation formed the basis of the Petitioner's complaint as follows: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

150. In the case before me, the Petitioners have failed to prove any infringement or contravention of their constitutional rights.

151. The upshot of the foregoing is that this Petition is devoid of merit and the same is dismissed with no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THI 14TH DAY OF JUNE, 2023.

.....

HON. T. MURIGI

JUDGE

In The Presence Of:-

Ms. Mutungi for the Petitioners

Ms. Ndundu for the 1st and 5th Respondent.

Kiluva holding brief for Makundi for the 6th Respondent.

Muia appearing together with Makundi for the 6th Respondent.

