



REPUBLIC OF KENYA



**Masyuki & 13 others (On behalf of themselves and 396 persons) v  
County Government of Kitui & 7 others (Environment & Land Petition  
12 of 2021) [2023] KEELC 20347 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20347 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND PETITION 12 OF 2021  
LG KIMANI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**FRANCIS MUSYIMI MASYUKI ..... 1<sup>ST</sup> PETITIONER  
STEPHEN M JAMES ..... 2<sup>ND</sup> PETITIONER  
PHILIP MUSYOKI KITHIKII ..... 3<sup>RD</sup> PETITIONER  
BENSON MATOI KINYENZE ..... 4<sup>TH</sup> PETITIONER  
SHADRACK KYALO KAMENDE ..... 5<sup>TH</sup> PETITIONER  
GEORGE ITHANZU MWENDWA ..... 6<sup>TH</sup> PETITIONER  
PATRICK MAKAU SIMON ..... 7<sup>TH</sup> PETITIONER  
JOSEPHAT MAINGI MATITI ..... 8<sup>TH</sup> PETITIONER  
SIMON KILONZI ..... 9<sup>TH</sup> PETITIONER  
JAMES MBETI NZELU ..... 10<sup>TH</sup> PETITIONER  
ALEXANDER MWANIA MUSYA ..... 11<sup>TH</sup> PETITIONER  
MESHACK KYALO KAVULU ..... 12<sup>TH</sup> PETITIONER  
VUNDI MUTUA ..... 13<sup>TH</sup> PETITIONER  
MAURICE EMMANUEL KAVITI ..... 14<sup>TH</sup> PETITIONER  
ON BEHALF OF THEMSELVES AND 396 PERSONS**

**AND**

**THE COUNTY GOVERNMENT OF KITUI ..... 1<sup>ST</sup> RESPONDENT  
B2 YATTA RANCHING CO-OPERATIVE SOCIETY LIMITED .... 2<sup>ND</sup>  
RESPONDENT**



<b>KATOTENI NGUAMUKA FARMERS ENVIRONMENTAL CONSERVATION .....</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>MWENE MUUNDA WELFARE ASSOCIATION .....</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>THE COUNTY COMMANDER, KENYA POLICE SERVICE MACHAKOS COUNTY .....</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>THE COUNTY COMMANDER, KENYA POLICE SERVICE KITUI COUNTY .....</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>THE COUNTY COMMISSIONER, MACHAKOS COUNTY ..</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>THE COUNTY COMMISSIONER, KITUI COUNTY .....</b>	<b>8<sup>TH</sup> RESPONDENT</b>

## JUDGMENT

1. The Petitioners claim that they are residents of the County of Kitui who bring this petition on behalf of 396 persons whose names and identities are contained in a register attached to the petition. The Petitioners state that they were born in an area previously known as Mutonguni location which now comprises Kauwi and Mutonguni wards bordering the current Kitui Rural and Kitui West Constituencies. They claim that the 1<sup>st</sup> Respondent holds as trustee for the people of Kitui especially those resident in the area on or near land parcel numbers L. R. No. 12010 and L.R. No. 11802.
2. The Petitioners state that the 1<sup>st</sup> Respondent's predecessor, the County Council of Kitui, granted a lease over land parcel L.R. 11802 Kitui to Kitui Yatta Kanyonyoo Co-operative Society on 1<sup>st</sup> January 1965 for a term of 99 years with effect from 1<sup>st</sup> January 1965. Another lease was granted for L.R. 12010 on 17<sup>th</sup> January, 1967 to Katoteni Ranching Society for a term of 20 years with effect from 17<sup>th</sup> August, 1967. The lease for LR 12010 expired on 16<sup>th</sup> August, 1987 and was never renewed or the land leased to any person or entity. On or about 12<sup>th</sup> July, 1974, Kitui Yatta Kanyonyoo Co-operative Society Ltd and Katoteni Ranching Society Ltd merged into one entity and adopted the name B2 Yatta Ranching Co-operative Society the 2<sup>nd</sup> Respondent herein.
3. According to the Petitioners, their parents and grandparents who were members of the 2<sup>nd</sup> Respondent used to graze their livestock, fetch firewood from, use and work on the two parcels of land without hindrance and were very active in conserving the resources in the two parcels of land. In the mid-1990s, the 2<sup>nd</sup> Respondent became insolvent and abandoned its use of the two parcels of land and allowed its members who had lost profits, dividends and benefits derived from the 2<sup>nd</sup> Respondent, to occupy and use the land for their benefit.
4. The Petitioners aver that the land was their generational heritage and thus they had developed legitimate expectation that if it became available for adjudication to individuals they would be given priority together with other persons in need of settlement. The Petitioners claim that their parents and grandparents took possession of part of the suit land measuring 4,000 acres and that the 1<sup>st</sup> Respondent was aware of their presence since the year 1999 and consequently they have acquired title to the unexpired term of the lease for LR 11802 by way of adverse possession.
5. It is the Petitioners' claim that some political leaders from far flung areas of Kitui hatched a plan to evict them from the land to pave way for them to settle their constituents. Threats of eviction intensified when constituencies boundaries were reviewed in the year 2012 and the area was put under Kitui Rural constituency where they were treated as minorities and outsiders. This also opened doors for people



from very far flung areas to access the land. This led to members of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents moving onto the land and occupying areas of 17,000 acres 3,000 acres respectively.

6. The Petitioners claim that in spite of having lived on the suit land as stated above, the 3<sup>rd</sup> and 4<sup>th</sup> respondents with the tacit approval, connivance and conspiracy of police and other national government officers under the command of the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents particularly officers from Yatta, Matuu, Ikombe, Kanyonyoo, Kyusyani, Kwa Vonza stations have harassed and intimidated them in order to force them to vacate the suit land.
7. The Petitioners gave various instances of what they deemed to be examples of harassment. They state that they have been threatened with arrest if they did not leave the area for good, have had their houses burned, live bullets have been fired at them and they have been tear-gassed and formed the opinion that they can only get protection from this court since the 5<sup>th</sup>- 8<sup>th</sup> Respondents who are meant to enforce law and order as a neutral party have taken sides with the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
8. The Petitioners state that they have discovered that the 3<sup>rd</sup> Respondents moved to this Court vide Petition 18 of 2019 and obtained orders restraining the 1<sup>st</sup> Respondent from evicting them and have used these orders to expand their territory to occupy the portion occupied by the petitioners.
9. It is the Petitioners' claim that their constitutional rights have been violated by being arrested without any charges being preferred, illegal eviction from the suit land without following due process threatening their right under Article 39(3) of *the Constitution*, shooting live bullets and endangering their lives contrary to Article 26 of *the Constitution*, burning the Petitioners' houses and structures and preventing them from reconstructing which is inhumane and degrading and a violation of Article 26 of *the Constitution*, that the 1<sup>st</sup> and 5-8<sup>th</sup> Respondents have abused their public offices and powers and they pray for the following orders:
  1. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents either by themselves or through their agents, servants, employees, subordinates or anyone acting under their command from harassing, arresting, incarcerating, intimidating, threatening to evict or interfering with the petitioners and their families' quiet possession, use and occupation of all that portion measuring 4000 acres of parcels of land known as LR numbers 12010 and 11802 situated in the westward side of Kitui County and bordering Machakos County near Mwitwa Syano river.
  2. A declaration that the respondents have by their conduct and acts complained of violated their constitutional rights to life, human dignity, equality and freedom from discrimination, freedom and security to their persons, freedom of movement and residence, protection of property, freedom from hunger and to have adequate food of acceptable quality and fair administrative action of the petitioners and their family members.
  3. A declaration that the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents have by their conducts and acts complained of violated Article 10 of *the Constitution* and as such should be sanctioned and declared unfit to hold public office.
  4. A declaration that the petitioners have acquired 4,000 acres of those two parcels of land known as Land Reference numbers 12010 and 11802 situated westwards of Kitui County and bordering Machakos County near Mwitwa Syano river by way of adverse possession and they should be registered as the proprietors of the said portion of land and an order do issue directing the Chief Lands Registrar to register the petitioners as the proprietors thereof and issue them with certificate of title to that effect.



5. A declaration that the petitioners have acquired the remainder of the unexpired term of 99 years lease by the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent of a portion measuring 4000 acres of parcel of land known as Land Reference number 11802 situated westwards of Kitui County and bordering Machakos County near Mwitwa Syano river by way of adverse possession and they should be registered as the proprietors of the said portion of land and an order do issue directing the Chief Lands Registrar to register the petitioners as the proprietors thereof and issue them with certificate of title to that effect.
6. The Respondents do pay damages to Petitioners for violation and threats to violation of their constitutional rights.
7. The Respondents do pay the costs of the Petition.
10. In the affidavit in support of the Petition, it is deposed by the Petitioner that at no time since they entered and actively occupied and possessed the portions of the lands have the respondents ever interrupted them or interfered with their occupation, possession and use. Further, the 1<sup>st</sup> Petitioner deposed that apart from the area that they occupy, there are another 29,000 acres which have not been occupied and thus there is no reason why the Respondents want to evict them.
11. Regarding the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Petitioner deposed that the 1<sup>st</sup> Respondent should follow due process of the law if they wish to evict them and since they are holding the land in trust of the people of Kitui, they cannot make a unilateral decision on who should benefit from the land.

#### **The 1<sup>st</sup> Respondent's Replying Affidavit**

12. Samson Nyamai Masila swore a Replying Affidavit on behalf of the 1<sup>st</sup> Respondent as the County Executive Committee member in charge of lands and Physical Planning in the County Government of Kitui, deposing that the 1<sup>st</sup> Respondent is registered as the Trustee of all those parcels of Land known as L.R. NO. 12010 measuring approximately 30,200 acres and L.R. NO. 11802 measuring approximately 23,109 acres situate in Kitui County.
13. He confirmed that the 1<sup>st</sup> Respondent granted lease over L.R. No. 11802 to the 2<sup>nd</sup> Respondent on 1<sup>st</sup> January, 1965 and L.R. No. 12010 to Katoteni Ranching Society Ltd on 17<sup>th</sup> August, 1967 for a term of 99 years for purposes of ranching. According to the 1<sup>st</sup> Respondent, the lease granted to Katoteni Ranching Society Ltd in respect of L.R. 12010 expired in 1985 and the same was never renewed and thus naturally the land reverted back to it as the custodian and trustee.
14. It is upon expiry of the lease that groups, including the Petitioners herein invaded the land and have used crude means and violence to claim ownership. The 1<sup>st</sup> Respondent claims to be the only one with the legal mandate to commence the process of ascertaining/allocating the rights over the suit properties and that the Petitioners are merely land grabbers and it will, at the appropriate time, seek removal and/eviction of all the Petitioners from the suit land. They therefore pray that the Petition be dismissed for lacking in merit and being an abuse of the court process.

#### **The 2<sup>nd</sup> Respondents' Response to the Petition**

15. Francis Nduu, John Malinga, and Kimanzi Vundi, the Chairman, treasurer and secretary of B2 Yatta Ranching Co-operative Society Limited respectively filed responses to the petition and replying affidavits. They reiterated the history of the land as narrated by the Petitioners with regard to the leases granted to the 2<sup>nd</sup> Respondent over land parcels L.R. No. 11802 and L.R. No. 12010.



16. They state that after the two societies, Katoteni Ranching Society Ltd and Kitui Yatta Kanyonyoo Co-operative Society were amalgamated on 12<sup>th</sup> September, 1974 and became B2 Yatta Ranching Co-operative Society all their assets and liabilities vested in the new society. Their principal business is ranching whereby the society breeds, fattens and sells cattle, sheep, goats and donkeys. They state that the society is the proprietor of all the parcels of land known as L.R. No. 12010 and L.R. No. 11802 and is entitled to enjoy all the rights and privileges of occupation and user to the exclusion of any other person.
17. The 2<sup>nd</sup> Respondent states that the Petitioners are not known to them and are not members of their society and that contrary to the averments in the Petition, the society has never been mismanaged or run down and neither is it insolvent. The 2<sup>nd</sup> Respondent states that they have offices on the land and a cattle dip and is seeking renewal of the lease for L. R. No. 12010.

### **The 3<sup>rd</sup> Respondents Replying Affidavit**

18. Josphat Nguu Ndonga swore a replying affidavit on behalf of the 3<sup>rd</sup> Respondent with authority from the Benson Kyalo Nguthu and Josphat Mwove Minda the patron and Chairman of the 3<sup>rd</sup> Respondent respectively. He stated that the Petition is fatally defective and does not disclose any reasonable cause of action. The 3<sup>rd</sup> Respondent claims that the entity known as the 3<sup>rd</sup> Respondent is not legally cognizable and no claim can be legally made against the it as instituted.
19. The deponent further stated that it has no interests in and its members have never occupied land parcel L. R. 11802. and their interests only lie in land parcel No. 12010. He confirmed that there were proceedings filed in Machakos HCCC No. 9 of 2008 (ELC 109 of 2018) where Yatta B2 Ranching Co-operative Society filed a suit against the County Government of Kitui seeking several reliefs in respect of L. R. 12010 where the 3<sup>rd</sup> Respondent applied to be joined in the suit and the court ordered that the status quo touching on the suit land be maintained.
20. That since the orders of status quo were granted its members have resided on the land peacefully and in harmony without any intruders. He further confirmed that in the above mentioned suit a consent order was filed where a portion of land measuring 300 acres was excised for surrender to the Government department in charge Administration Police.
21. He further stated that on 17<sup>th</sup> October, 2018 a group of people sued under the name of Mwene Munda Welfare Association suing the County Government of Kitui, B2 Yatta Ranching Co-operative Society Ltd and Katoteni Nguamuka Farmers Environment Conservation seeking injunctive reliefs in Machakos ELC No. 200 of 2018 and when an application filed was dismissed on 20<sup>th</sup> September, 2018, the Plaintiffs withdrew the suit. The deponent states that the pleadings in this suit are very similar to those in ELC No. 200 of 2018.
22. The 3<sup>rd</sup> Respondent states that no claim has been made against it and no particulars given of its members who are said to have entered and occupied the portion claimed by the Petitioners. And no year or dates of intrusion are provided. Further no evidence of report to police of the matters complained of has been provided.
23. Further the 3<sup>rd</sup> Respondent has challenged authenticity of the attached register of members alleged to be represented by the petitioners herein for the reasons that the signatures of the members seem like they were made by the same hand, massive duplication of names and that some of the names appearing are members of the 3<sup>rd</sup> Respondent.



### **The 4<sup>th</sup> Respondent's Replying Affidavit**

24. Duncan Kamba, swore a Replying Affidavit on behalf of the 4<sup>th</sup> Respondent as the chairman thereof with authority from the Secretary and organizing secretary stating that the 4<sup>th</sup> Respondent is a welfare group with a membership of over 3,000 members residents of Kitui County Kauwi and Mutonguni wards. He denied that the group is based in Wikililye sub-location in Kitui as claimed or that their members are operating outside their registered areas.
25. It is their averment that since August 2006, the members of the 4<sup>th</sup> Respondent have been in actual, open, physical and uninterrupted possession of the 3,000 acres of L.R 12010 specifically the portion situated at the intersection between Katoteni River and Mwitwa Syano River and that they have become entitled and should be registered as proprietors of the said land.
26. The 4<sup>th</sup> Respondent denies that it has used the orders issued in Machakos Petition 18 of 2020 to expand their territory and state that the portion they occupy is different and they have no interest and claim to the portion occupied by the Petitioners.

### **The Petitioners' Written Submissions.**

27. Parties agreed to dispense with the Petition by way of written submissions. Counsel for the Petitioners submitted that the suit parcels of land are trust lands held by the 1<sup>st</sup> Respondent in trust for the people of Kitui. It is their submission that the suit parcels of land are not government land since they not been set aside for public use. They relied on the case of Bahola Mkalindi v Michael Seth Kaseme (2013) eKLR where Angote J held that trust lands are neither owned by the Government nor the County councils within the area the land falls but is held on behalf of the local inhabitants. They also cited the case of County Government of Tana River v Mohamed Gore Bulale & 3 others (2-21) eKLR.
28. The Petitioner's position is that land under customary trust is open for consideration of ownership and can be registered. He relied on the cases of Isack M'inanga vs Isaya Theuri M'lintari & another (2018) eKLR and Athman Mboeso Mwakulu & another vs National Land Commission & 4 others (2021) eKLR, stating that it is wrong for the 1<sup>st</sup> Respondent to claim exclusive rights over L.R. 11802 when the lease has not yet expired without involving the public.
29. Regarding Land Parcel 11802, the Petitioners' submitted that because the lease has not expired the dispute is between them and the 2<sup>nd</sup> Respondent and pointed out that the 3<sup>rd</sup> Respondent deposed that they are not interested in the said parcel of land.
30. Regarding Land Parcel 12010 they argue that since the Lease has expired the 2<sup>nd</sup> Respondent does not have a right to evict the Petitioners. They termed their attempted eviction as discrimination since the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are also on the suit lands. The Petitioners accused the 1<sup>st</sup> Respondent and the 5<sup>th</sup>-8<sup>th</sup> Respondents of attempting to evict them without following due process of the law and without giving them a hearing.
31. Quoting from Section 38(1) of the *Limitation of Actions Act*, the Petitioners claim adverse possession over leases to the suit land. Their submission is that there is no evidence that the 2<sup>nd</sup> Respondent never made any attempt or filed any suit in a bid to evict the Petitioners from the land while 12 years lapsed in 2011 from 1999. They therefore state that all the ingredients of adverse possession have been satisfied.
32. It is the Petitioners' submission that the police and the national government administration have no mandate to adjudicate over the ownership of land but rather to keep peace and protect lives and property.



33. The Petitioners further contend that it is wrong for the 1<sup>st</sup> Respondent to purport to allocate land without public participation by the people resident in the area- as such acts would violate rights under Article 10 of *the Constitution* of Kenya.

#### **The 1<sup>st</sup> Respondent's Written Submissions**

34. The 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent did not own the suit parcels of land but leased them from the 1<sup>st</sup> Respondent who is the ultimate owner.
35. Further, they submitted that the Petitioners have not established the rights under which they invaded the land and in fact admit that they were land grabbers. It is their submission that the Petitioners should have approached the 1<sup>st</sup> Respondent which is mandated in conjunction with the National Land Commission to consider issues of landlessness and make necessary amends.
36. It is the 1<sup>st</sup> Respondent's submission that the Petition is an abuse of the court process and is calculated at attacking public property using the Court's powers and urged the Court to find that the Petitioners have not established any violation of *the Constitution* by the Respondent or at all.

#### **The 2<sup>nd</sup> Respondent's Written Submissions**

37. The 2<sup>nd</sup> Respondent reiterated that the Petitioners are not known to them and are not members of their society and that it has never been mismanaged, run down nor become insolvent. Their submission is that the claim of adverse possession cannot lie because the society is still occupying and using the suit parcels of land.
38. Counsel relied on the holding in the case of *Mwene Munda Welfare Association v Kitui County Government & 2 others* (2019) eKLR for the submission that a claim of adverse possession cannot succeed against a county council and by extension a county government. He further relied on Section 41 of the *Limitation of Actions Act* and submitted that the reading of the said section protects the County Councils from being sued over claims of adverse possession and termed the Petition as a non-starter.

#### **The 5<sup>th</sup> -8<sup>th</sup> Respondents' Written Submissions**

39. State Counsel Motari Matunda for the 5<sup>th</sup> -8<sup>th</sup> Respondents objected to the Petition, stating that they filed Grounds of Opposition on 23.11.2022 but the same cannot be traced from the Court file and from the registry.
40. Their submission is that the reliefs of adverse possession do not apply to public land and that since the invasion of the suit lands became a breach of peace and caused insecurity within Kanyonyoo, the response from the police unit was appropriate.
41. Relying on the *Anarita Karimi Case* and the holding by the Court of Appeal in *Mohammed Fugicha v Methodist Church in Kenya*(suing through its registered trustees)& 3 others(2016)eKLR, state counsel submitted that the Petitioners herein have not pleaded with precision the violation or threatened violation of their rights and the provisions of *the Constitution* and have not particularized them save as to point to irrelevant provisions of *the Constitution*.
42. Secondly, they submitted that trust lands are neither owned by the government nor the county councils under the repealed Constitution. That for as long as it remained un-adjudicated and unregistered, the land belonged to the locals within the area. They submit that LR 11802 was adjudicated upon and registered and an individual title issued under Article 116 of the repealed constitution, with an active



lease expiring in 2064, hence it is not available as alleged by the Petitioners. They also quoted from Sections 24(1) and 26(1) of the [Land Registration Act](#) on the effect of registration of title.

43. They submitted that title can only be impugned if it is proven that it was obtained illegally, unprocedurally or through a corrupt scheme as provided by the Act and relied on the case of Elijah Makeri Nyagw'ra-vs Stephen Mungai Njuguna & Another (2013) eKLR.
44. State counsel further submitted that there is no evidence that the Petitioners are in occupation of the suit land since 1999 as claimed. It was stated that some identity cards produced in the supporting affidavit were for alleged members who were born outside the suit land and are from 2005 while they allege occupation since 1999. They submit that the Petitioners have not satisfied the conditions for grant of adverse possessory rights. State counsel quoted Section 41 of the [Limitation of Actions Act](#) on the exclusion of government public land from such claims and prayed that the petition be dismissed with costs.
45. During highlighting of submissions on 3<sup>rd</sup> May, 2023, counsel for the 2<sup>nd</sup> submitted that a claim of adverse possession cannot lie to land that has been leased by the government.
46. State Counsel for the 5<sup>th</sup> - 8<sup>th</sup> Respondents highlighted that the Petitioners have not tabled any evidence delineating the portion of the suit lands that they claim to occupy and that they claim they are 396 members, yet there is only one structure exhibited. He also added that a claim of adverse possession cannot lie on land whose lease has expired and title has reverted back to the County Government as is the case with Land Parcel LR 12010. He also stated that the OCS and police were only calling to maintain law and order.

### **Analysis and Determination**

47. The Court has considered the Petition herein, response to petition, the replying affidavits filed and submissions by Counsel. The Petitioners claim that their Constitutional rights and freedoms have been infringed upon and seek enforcement of fundamental rights and freedoms under articles 2,10,26, 27, 28, 29, 40, 43 and 47 of [the constitution](#) of Kenya 2010.
48. The Court considers the following issues as arising for determination in this petition;
  - A. Whether the Petitioners' have clearly stated which of their Constitutional rights were violated?
  - B. Whether the Petitioners are entitled to a declaration that they have acquired through adverse possession rights of ownership to land parcels L.R. No. 12010 and L. R. No. 11802.
  - C. What is the legal status of the suit parcels of land LR No. 12010 and 11802?
  - D. Are the Petitioners entitled to possession occupation and use of the suit parcels of land?
  - E. Were the Petitioners Constitutional rights under Articles 2,10,26, 27, 28, 29, 40, 43 and 47 of [the constitution](#) of Kenya 2010 violated?
  - F. What orders should the court make?
49. Constitutional Petitions are premised on Article 22, 23 and 165 of [the Constitution](#) of Kenya. Article 22(1) provides as follows:

“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.”



50. Counsels for the 1<sup>st</sup> and the 5<sup>th</sup> - 8<sup>th</sup> Respondents contend that the Petitioners have not set out with precision the constitutional rights they allege to have been infringed as required by the law and as was observed by the Court in the case of Anarita Karimi Njeru v Republic [1979] eKLR where the High Court held:

“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.”

51. Paragraph 37(a to l) of the Petition enumerates the manner in which and the instances when the Petitioners consider their constitutional rights to have been infringed upon. They have alleged violations of Articles 10, 27, 29,40, 47 and 159(2) of *the Constitution*.

52. State Counsel for the 5<sup>th</sup> -8<sup>th</sup> Respondents relied on the Court of Appeal case of Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR where it was stated with regard to consideration of formalism in constitutional petitions that:

“We are quite clear in our minds that whereas the Hon. the Chief Justice in making the Rules did set out what a petition ought to contain, it cannot have been his intention, and nor could it be, in the face of express constitutional pronouncement, to invest those rules with a stone cast rigidity they cannot possibly possess. It seems to us unacceptable in principle that a creeping formalism should be allowed to claw back and constrict the door to access to justice flung open by *the Constitution* when it removed the strictures of standing and formality that formerly held sway. We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer. Within that general rubric of notification to court and respondent, *the Constitution*, if it says anything at all on this subject, clearly does not lionize form over substance.

Thus, while ANARITA and other cases decided prior to *the Constitution* of 2010 were decided correctly in their context with their insistence on specificity, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. We are satisfied that there was no doubt at all as to what Fugicha’s complaints were, against whom they were, and the provision of *the Constitution* he alleged had been violated or contravened.”

53. The Petitioners have invoked the specific constitutional provisions they consider to have been infringed upon. They have also given details of the Respondents acts they consider to constitute constitutional violations. From a general reading of the petition and the supporting affidavit, the court is satisfied and has no doubt at all as to what the Petitioners complaints are, against whom the complaints are, and the provision of *the Constitution* they allege were violated or contravened. Whether or not the stated violations have been proved are the subject of this petition and will be discussed in the course of this judgement.



**B. Whether the Petitioners are entitled to a declaration that they have acquired through adverse possession rights of ownership to land parcels L.R. No. 12010 and L. R. No. 11802.**

54. The Petitioners pray for a declaration that they have acquired 4,000 acres out of the two parcels of land known as Land Reference numbers 12010 and 11802 situated westwards of Kitui County and bordering Machakos County near Mwita Syano River by way of adverse possession.

55. Adverse possession is a claim anchored under the provisions of the *Limitation of Actions Act* Cap 22 Laws of Kenya. Section 7 provides that:

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

56. Section 13 further provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run. The procedure for making a claim for adverse possession is set out under Order 37 Rule 7 of the Civil Procedure Rules (2010) which provides that:

“An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

57. Under Section 38(1) of the *Limitation of Actions Act*, CAP 22, where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. From the foregoing, the procedure for raising a claim for adverse possession is clearly set out in law under Order 37 of the Civil Procedure Rules.

58. Courts have variously held that not every ill in society should attract a constitutional sanction and where an established practice exists where a matter can be disposed of without recourse to *the Constitution*, *the Constitution* should not be invoked at all. In the case of John Harun Mwau vs. Peter Gastrow & 3 Others [2014] eKLR the court held that *the Constitution* ought to be invoked only when there is no other recourse for disposing of the matter. The Court expressed itself in the following terms:

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

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

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional



sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

60. It is the Court’s view that there exists an elaborate procedure for filing a claim for adverse possession under the Civil Procedure Rules which the Petitioners are aware of and should have invoked instead of filing a constitutional petition. In the case of Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others [2015] eKLR the court held that: -

“I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with this argument. Claims for adverse possession are adequately addressed by the *Limitation of Actions Act*, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the petitioners can assert a claim for adverse possession, a purely private law claim, through a constitutional petition. Indeed, I doubt if there is a constitutional violation which one will point at, when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession on behalf of the same parties herein has previously been litigated, the aspect of this Petition, that relates to pursuance of a right over land by dint of adverse possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.”

61. Further, it is the court’s view that the provisions of Article 22 of *the constitution* are not intended to bypass or undermine the usual dispute resolution process and established procedures for ventilation of disputes. This position has been taken in various cases where it has been stated that constitutional petitions ought not to be used as a substitute for normal established procedure. This was held in the case of Industrial Court of Kenya at Nairobi Petition No 19 of 2014 - John Miriti Mbarire v the Attorney General where it was stated that;

“In the case of Kemraj Harrikissoon Vs the Attorney General of Trinidad and Tobago [1979] UKPC 3 the Court held that the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is misused as a general substitute for the normal procedures for invoking judicial control of administrative action. I am persuaded that this is the correct interpretation of our jurisprudence even against the backdrop of the current Constitution which elevates labour rights to the Bill of Rights. I do not think that this elevation jettisons the applicable substantive and procedural law on employment and labour relations.”

62. In the case of Tony Munene Commissioner Of Lands & 5 Others[2012]eKLR the High Court stated that:

“It is correct and proper that every litigant is granted unhindered access to relief to protect guaranteed rights under *the Constitution* but it has been said time and again that the provisions of Article 22 are not intended to bypass or undermine the usual dispute resolution process and established procedures for ventilation of disputes.”

63. Even if perchance the court was to entertain a claim for adverse possession, it would be expected of the claimant proof of occupation, possession and use of the suit parcels of land by all the 396 Petitioners. The Petitioners claim that they occupy 4,000 acres of the suit land yet they attached to the petition



one photograph of a temporary structure, growing vegetables and a few cows, goats and donkeys. The Petitioners also exhibited areas of land on which it is evident of a fire. It is not explained who among the Petitioners own the house, the animals and the growing crops. It is the court's view that what is exhibited by the Petitioners does not support the claim for possession, occupation and use of the 4,000 acres of land by 469 persons. Without sufficient evidence of occupation, possession and/or use the necessary ingredients for a claim for adverse possession, the claim cannot be proven. In support of this position, the court follows the decision in *M'Mbaoni M'Ithara v James Mbaka* [2019] eKLR, where the court referred to the case of *Kweyu Vs Omutut* [1990] KLR 709 where this Court (Gicheru JA stated at page 716: -

“The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued.

And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right.

A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously.”

64. From the foregoing, the court finds that the Petitioner's claim for adverse possession against parcels numbers L.R. 11802 and L. R. 12010 is misconceived, clearly erroneous, mistaken and/or otherwise an abuse of the due process of the court.

**(C ) What is the legal status of the suit parcels of land L.R. No. 12010 and L.R. No. 11802.**

65. The Petitioners argue that the suit parcels of land are held by the 1<sup>st</sup> Respondent in trust for the people ordinarily resident in the area and are not public land. They argue that land adjudication has not been carried out in the area and no act of parliament has been applied to them. The Petitioners claim that the 1<sup>st</sup> Respondent is under a misconception that it owns the parcels of land.
66. It is common ground and accepted by all parties to this suit that the 1<sup>st</sup> Respondent's predecessor, the County council of Kitui, granted a lease over LR 11802 Kitui to Kitui Yatta Kanyonyoo Co-operative Society on 1<sup>st</sup> January, 1965 for a term of 99 years with effect from 1<sup>st</sup> January, 1965. The said lease has thus not expired to date. Further, the 1<sup>st</sup> Respondent also leased LR. 12010 on 17<sup>th</sup> January, 1967 to Katoteni Ranching Society for a term of 20 years with effect from 17<sup>th</sup> August, 1967 and the same expired on 16<sup>th</sup> August, 1987. The two co-operative societies were amalgamated in 1974 and according to the 2<sup>nd</sup> Respondent the assets including the two suit parcels of land and liabilities of the two societies were taken over by the new entity, the 2<sup>nd</sup> Respondent, under registration number 2253.
67. It is also not in dispute that two parcels of land were at the time of granting the leases, trust land held by the County Council of Kitui. From the outset it is necessary to be clear that at the moment the two parcels of land are governed by two different regimes of law for the reason that the lease for land parcel L. R. 12010 has expired and the other for land parcel 11802 has not expired. This will become clear as the provisions of the law with regard to the two positions are explored.
68. The legal regime for regulation of trust land at the time when the leases to the two suit lands was the Repealed Constitution of Kenya, the [Land Adjudication Act](#) CAP 283 and the Repealed Trust



Land Act CAP 290 Laws of Kenya. Section 114 of the Repealed Constitution dealt with trust land and describes what trust land are. Section 115 provides that;

“(1) All Trust Land shall vest in the County Council within whose area of jurisdiction it is situated.”

2. Each County Council shall hold in trust land vested in if for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests and other benefits in respect of the land as may, under the African Customary Law for the time being in force and applicable thereto, vested in any tribe, group, family or individual.”

Subject to this chapter, provision may be made by or under an Act of Parliament with respect to the administration of Trust land by a County Council.”

69. The court agrees with the submission by the Petitioners Counsel that under the repealed constitution under which the leases in the suit parcels of land were issued, trust land was vested in the county council in trust for the people ordinarily resident on the land.
70. Section 116 of the Repealed Constitution provides for application of the Land Consolidation Act and Land Adjudication Act on trust land and specifically states that when the said acts are applied to any specific land the said land shall cease to be Trust land.
71. It has been stated categorically that the suit parcels of land have never been adjudicated neither has the Land Consolidation Act been applied to them. It has however, been admitted that the two parcels of land were set apart for use by the 1<sup>st</sup> Respondent and given to the 2<sup>nd</sup> Respondent. The court has perused the documents provided by the parties hereto and according to the Letter of Allotment issued by the Commissioner of Lands and dated 17<sup>th</sup> August, 1967 to Katoteni Ranching Co-op Society Ltd and Gazette notice number 183 of 17<sup>th</sup> January, 1967 under the Trust Land Act, it is clear that a parcel of land measuring approximately 30,200 acres at Kitui Yatta B2 (Katoteni), Kitui District was set apart for the purpose of a ranching scheme. Details of the situation of the land are given in the said gazette notice.
72. The 2<sup>nd</sup> Respondent in the Response to Petition and Replying Affidavits confirmed that the suit parcels of land were set apart vide gazette notice numbers 183 and 184 in the 1<sup>st</sup> Respondents exercise of powers conferred under part IV of the Trust Land Act Chapter 288 Laws of Kenya (repealed) where the two blocks of land were set apart and leased to the 2<sup>nd</sup> Respondent.
73. The legal regime for setting apart of trust land under the repealed constitution starts with Section 117 of the repealed Constitution of Kenya. The said section deals with setting apart of trust land by county councils and reserving the same for use and further provides the formal process. The said process ends up creating new rights and extinguishing the rights and interests of the occupants of the land and any other persons with rights and interest in the land proposed to be set apart. The said process was strictly regulated and controlled by statute. The entire section states as follows;

“

- “(1) Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation -



- a. by a public body or authority for public purposes; or
- b. for the purpose of the prospecting for or the extraction of minerals or mineral oils; or
- c. by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof,

and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

1. Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.
2. Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.
3. No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who -
  - a. under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or
  - b. (b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.
- (5) No right, interest or other benefit under African customary law shall have effect for the purposes of subsection (4) so far as it is repugnant to any written law.”

74. Pursuant to the provisions of section 117 of the repealed Constitution, Section 13 of the repealed Trust *Land Act* provided for the detailed and elaborate procedure for setting apart land which involves notification to persons in the areas concerned and recording representations of concerned persons. The section provided that gazette notice was published specifying the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and also specifies a date before which applications for compensation are to be made to the District Commissioner.

75. Further, the law provided for compensation to be paid to any resident of the area of land set apart and the procedure for such compensation was clearly set out including appeals against a decision rejecting an application for compensation or quantum of any compensation awarded. Section 8 of the repealed Trust *Land Act* provided that;

“



“(1) Where land is set apart under section 7 of this Act, full compensation shall be promptly paid by the Government to any resident of the area of land set apart who—

- a. under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof; or
- b. is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.

76. Section 12 provided for the right of access to High Court and stated that;

“Notwithstanding anything in this Act, any person claiming a right or interest in land set apart under this Act shall have access to the High Court for—

- a. the determination of the legality of the setting apart; and
- b. the purpose of obtaining prompt payment of any compensation awarded.”

77. The Petitioners herein do not challenge the setting a part of the suit land and the award to the 2<sup>nd</sup> Respondent of the leases to the two parcels of land. Indeed, they have stated that at some point when the 2<sup>nd</sup> Respondent’s business was profitable, the Petitioners, their parents and grandparents benefited from the said business which was considered profitable to them and their future generations.

78. The Petitioners issues with the 2<sup>nd</sup> Respondent seem to have started when according to them in the 1990s the 2<sup>nd</sup> Respondent’s office bearers ran it down making it “broke, insolvent, moribund and unprofitable and as a result abandoned the land.” The petitioners further claimed that themselves, their parents and grandparents lost profits, dividends and benefits which they were deriving from the 2<sup>nd</sup> Respondent. They further stated that the only benefit left that they could enjoy from the land was to use the same.

79. After expiry of the lease for land parcel No. 12010 the Petitioners consider that the land reverted to the way it was before the setting apart ostensibly as trust land under the provisions of Section 114 and 115 of the repealed constitution. This position is the same one taken by the 1<sup>st</sup> Respondent who contends that the said land parcel No. 12010 reverted to the 1<sup>st</sup> Respondent with the Petitioners claiming that such reversion did not confer absolute rights but was in trust. The 5<sup>th</sup> to 8<sup>th</sup> Respondents hold a different position and claim that after the lease expired the land became public land.

80. It is the courts understanding of the express provisions of the repealed constitution of Kenya that as a result of setting apart of trust land under the repealed constitution and the repealed Trust *Land Act*, rights, interests and/or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law were extinguished. The said land was thus no longer trust land as defined under the repealed constitution of Kenya and the Trust *Land Act*. This was expressly provided under Section 117 (4) of the repealed constitution as set out above. The position was restated by the Court of Appeal in the case cited by the Petitioners Athman Mbosio Mwakulu & another v National Land Commission & 4 others [2021] eKLR where the Court stated as hereunder with regard to extinguishing of African customary rights when trust land was set apart for use:

“The 3rd and 4th respondents point out that there was no challenge by the appellants or any other person to the process of setting apart the suit property, even after the publication of the Gazette Notice. Be that as it may, as of 27th February 2008, more than two years before



the declaration of the Kawala B Adjudication Section, the process of setting apart the suit property was complete and the public notified accordingly. By dint of section 117(2) of the former Constitution, the effect of setting apart the suit property, even before issuance of the allotment letter or the grant to the 3rd and 4th respondents, was to extinguish all customary law rights, interest or benefits over the suit property.

This then raises the fundamental question which the appellants must, and in our view have spectacularly failed to answer: how could rights and interest which had been extinguished by operation of the law by dint of section 117(2) of the former Constitution still be ascertained and recorded subsequently under the *Land Adjudication Act*? The appellant's argument does not, in our view, make any legal sense. Once land has been set apart, it cannot subsequently be the subject to a process of adjudication because there are no longer any rights and benefits to ascertain and record over that same land."

81. It is further the courts understanding that when the lease for land parcel number L.R. 12010 expired in 1987 and the same was not extended or renewed, the said land reverted to the lessor, the County Council of Kitui. It is the Courts view that under *the Constitution* of Kenya 2010 land parcel L.R. 12010 is now public land as defined under Article 62 of *the Constitution* of Kenya 2010 since the same reverted to the County Government at the expiry of a lease. Article 62 states that;

- 1) Public land is—
  - (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
  - c. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
  - d. land transferred to the State by way of sale, reversion or surrender;
  - e. land in respect of which no individual or community ownership can be established by any legal process;"

82. Public land is vested in and held by the county government in trust for the people resident in the county under Article 62 (2) of *the Constitution* of Kenya 2010. The said Article states that;

Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

clause (1) (a), (c), (d) or (e); and

clause (1) (b), other than land held, used or occupied by a national State organ"

83. It is the Court's view that the Petitioners claim that they are entitled to the suit parcels of land arising from the fact that their parents and grandparents used to graze their livestock, use, work and occupy the two parcels of land as their generational heritage with the expectation that the land would be allocated to them is as a result of misconception of the law.

84. Further to this, even if the Petitioners were entitled to use and occupation of the land herein by virtue of being residents of Kitui County and the areas where the suit land is located, the law as stated above shows that the land in question is held by the County government in trust for the people resident in the county and is to be administered on their behalf by the National Land Commission.



85. The court’s interpretation of the position of the law is that where *the Constitution* has reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates. This position has been upheld in various cases. The Court of Appeal in the case of *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR held as follows:

“Where *the Constitution* had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have. We must accordingly shun invitation to dabble in matters of national economic policy, when what is placed before us are the views of only two players in one industry.”

86. Similarly, the Supreme Court in the case of: *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017]eKLR was of the view that a the Court should exercise restraint where a specific mandate is designated to another agency.

Notwithstanding the conventional judicial perception of ultimacy in judicial Orders, a question remains: what is the tenability of such Orders that directly abrogate the discharge of commanded legislative-agency process?

From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of *the Constitution* allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under *the Constitution*, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.

87. With regard to land parcel number 11802 whose lease has not expired the legal position in the courts view is as provided under Article 64 (b) of the Coinstitution of Kenya 2010. The entire Article 64 provides for Private land as follows;

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.



88. With registration of the 2<sup>nd</sup> Respondent and issuance of the grant over the land parcel L.R. 11802, the 2<sup>nd</sup> Respondent was conferred interest in the land as provided under Section 24 of the [Land Registration Act](#) No. 3 of 2012. Section 24 (b) states that;

“the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

89. Section 25 provides for the rights of a proprietor and states that;

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register”

90. Legal ownership of land includes a right to possession of the same. In the case of *Kamataka Board of Wakf –vs- Government of India & Others* [2004] 10 SCC 779 quoted in the Court of Appeal case of *Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui* [2017] e KLR the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner.”

91. It is the court’s view that the Petitioners are trespassers on the land belonging to the 2<sup>nd</sup> Respondent who has a valid and subsisting leasehold. The term “Trespass” is described by the Black’s Law Dictionary, 10th Edition. And in *Clerk and Lindsell on Torts* (18th Edition) to mean:

“An unjustifiable entry by one person upon the land in possession of another.”

92. In the courts view the entry of the Petitioners onto the 2<sup>nd</sup> Respondents land parcel No. 11802 is unjustifiable notwithstanding that the business for which the land was leased was no longer as profitable as when it commenced. Further, the filing of this petition is with a view of obtaining legitimacy for the said unjustifiable and illegal entry. Indeed, such an entry is in violation of the Constitutional rights of the said 2<sup>nd</sup> Respondent to own property under Article 40 of [the constitution](#) of Kenya 2010.



**B. Were the Petitioners Constitutional rights under Articles 2,10,26, 27, 28, 29, 40, 43 and 47 of the constitution of Kenya 2010 violated?**

93. The Petitioners claim that their constitutional rights as enumerated above were violated by being arrested without any charges being preferred and being illegally evicted from the suit land without following due process. They were also threatened with having their right under Article 39(3) of the Constitution being violated, having live bullets shot at them and endangering their lives contrary to Article 26 of the Constitution. The accused the Respondents of burning their houses and structures and preventing them from reconstructing conduct that was inhumane and degrading and a violation of Article 26 of the Constitution. In the Petitioners' view the 1<sup>st</sup> and 5-8<sup>th</sup> Respondents have abused their public offices and powers.
94. The Court has perused the petition herein and in particular the paragraphs 32 to 35 which contain the "cause of action" and particularizes the instances of violation of the Petitioners rights with the intention of evicting them from the suit parcels of land. It is noted that the acts complained of were mainly said to have been committed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents with the tacit approval, connivance, conspiracy and cahoots with police and other government officers under the command of the 5<sup>th</sup> to 8<sup>th</sup> Respondents particularly officers from Yatta, Matuu, Ikombe, Kanyonyoo. Ikusyani and Kwa Vonza stations.
95. Further, to this the Petitioners provided photographs of what they stated were the burnt structures, the bullets and a photograph of one of the police officers said to have been injured during one of the instances of attempted evictions.
96. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents denied the Petitioner's claims and in particular the 3<sup>rd</sup> Respondent stated that the Petitioners have never resided on L. R 12010 and that its members have lived in harmony and without interruption from anyone. They stated that no allegations were made against their members and no particulars were given of its members who are said to have entered and occupied the portion claimed by the Petitioners. Further that no year or dates of intrusion are provided. Further, no evidence of report to police of the matters complained of has been provided.
97. The 3<sup>rd</sup> Respondent denied allegations of arrest of the Petitioners stating that they have no powers to arrest anyone
98. The 4<sup>th</sup> Respondent also responded to the petition and stated that its members only occupy a portion of L. R. 12010 measuring 3,000 acres in exclusion of everyone else. They stated that indeed more than half of the members of the Petitioners were their members who actuated by greed formed a sprinter group. They claim that they have also suffered continued harassment from the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> , and 8<sup>th</sup> Respondents with tacit approval of members of the 3<sup>rd</sup> Respondent.
99. The 5<sup>th</sup> to 8<sup>th</sup> Respondent did not answer to the allegations made against them.
100. The Court notes from the pleadings that the 3<sup>rd</sup> Respondent is said to have a membership that resides on 17,000 acres out of land parcel No. 12010 while the 4<sup>th</sup> Respondent has a membership that resides on 3,000 acres out of the same land. The Court notes that the Petitioners claim that certain acts as stipulated above were committed by members of the said 3<sup>rd</sup> and 4<sup>th</sup> Respondents yet no names of the said members or representatives of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have been given. These particulars would have given the said Respondents an opportunity to investigate and state whether the said persons are indeed members of their groups and whether they committed the acts complained of by giving tacit approval.



101. Again no names of victims of the violence claimed are given. The Petitioners did not for example give names of the people said to have been confronted when grazing livestock and threatened with arrest if they did not leave the area for good. The Petitioners did not state which of them and the 369 people they represent had their houses burned and who were prevented from rebuilding their houses.
102. In the court's view it was necessary for the Petitioners to identify the persons they claim represented the 3<sup>rd</sup> or 4<sup>th</sup> Respondents carried out certain acts. The court is satisfied that there is proof that officers from various police stations under the command of the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents particularly officers from Yatta, Matuu, Ikombe, Kanyonyoo, Kyusyuni, Kwa Vonza stations did enter onto the land occupied by members of the Petitioners and harassed and intimidated them in order to force them to vacate the portion of the suit land that they occupy. Particulars of the acts committed by the said officers are given under paragraph 33 of the petition and dates given when the acts were committed are also given. Whether this was with approval or instructions from the 3<sup>rd</sup> and 4<sup>th</sup> Respondents has not been proved.
103. The Petitioners also provided photographs which included some of the spent cartridges and tear gas canisters obtained from the scenes of confrontation with police. The photographs also include one of a police officer injured during one of the confrontations. In absence of a reply to the claims made by the Petitioners this court finds that the claim against the 5<sup>th</sup> to 8<sup>th</sup> Respondents have been made.
104. The Court wishes to point out that legal provisions exist that guide the due process of eviction by a person who believes that another person has unlawfully occupied their land. The said provisions are Section 152 (A) to (I) of the *Land Act* No. 6 of 2012. Section 152 (A) and (B) prohibits the unlawful occupation of private, community or public land and gives a right to evict the unlawful occupant of the land but only in accordance with the Act.
105. Section 152 C provides that an eviction notice to unlawful occupiers of public land is issued by the National Land Commission while under Section 152 E the owner or the person in charge of private land issues notice of eviction of not less than three months to the unlawful occupant of land.
106. Section 152 (G) provides for the detailed mandatory procedures to be followed during eviction and states as follows;
- “(1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures-
- a. be preceded by the proper identification of those taking part in the eviction or demolitions;
  - b. be preceded by the presentation of the formal authorizations for the action;
  - c. where groups of people are involved, government officials or their representatives to be present during an eviction;
  - d. be carried out in a manner that respects the dignity, right to life and security of those affected;
  - e. include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;



- f. include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
- g. include mechanisms to protect property and possessions left behind involuntarily from destruction;
- h. respect the principles of necessity and proportionality during the use of force; and
- i. give the affected persons the first priority to demolish and salvage their property.

(2) The Cabinet Secretary shall prescribe regulations to give effect to this section.”

107. It is the finding of the court that the 5<sup>th</sup> to 8<sup>th</sup> Respondents did not follow the due process of the law in trying to evict the Petitioners. In the case of William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR the Supreme court issued various declarations arising out of forceful eviction of the Petitioners in that case and held as follows;

“In that regard, it is an undeniable fact that forced evictions generally constitute a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under Article 43 of *the Constitution*, including, but not limited to, the right to the highest attainable standards of health and healthcare services, accessible and adequate housing, freedom from hunger and to adequate food, clean and safe water, social security and education. The onus of ensuring that these rights and freedoms are attained and provided for falls squarely under the ambit of the State; and that it is the obligation of the State to ensure that these rights and freedoms are not limited without reasonable justification in an open and democratic society based on human dignity, equality and freedom as provided for under Article 24(1) of *the Constitution*.”

108. On the claim for damages, the court observes that there was no proof by individual Petitioners of the loss and damage that they suffered, if at all, as a result of the attempted forceful evictions. From the evidence adduced, the court cannot say with certainty which specific persons among the Petitioners herein and the 369 persons they represent suffered any of the specific acts complained of. This is so especially considering the number of people that constitute the Petitioners and the vastness of the area they claim to occupy. It is also noted that even the deponents of the supporting affidavits Francis Musyimi Masyuki and Alexander Mwanja Musyimi do not claim to be victims of any specific acts or to have had their own houses demolished. It is also not stated in the petition that all the Petitioners and the 369 persons they represent had their houses demolished.

109. The Supreme Court of Kenya in William Musembi case (supra) expressed itself on the difficulties encountered in providing proof of loss and damage while deciding on whether or not to make an award of damages in constitutional matters and stated as follows;

“We agree with the learned Judge and would add that, what the Court of Appeal failed to consider, in our opinion, was that the questions and issues that a Court has to consider in order to make an award of damages with regards to constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present



an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries.”

**E. What orders should the Court make?**

110. For the reasons given herein above the Court finds that prayer a), c), d), e) and f) of the petition dated 18<sup>th</sup> August 2020 have not been proved or are not properly before this court lack merit and are hereby dismissed.

111. The court allows prayer b) of the petition and makes declaration in the following terms;

“A declaration that the demolition of some of the Petitioners’ houses and property by the 5<sup>th</sup> to 8<sup>th</sup> Respondents and the attempted eviction of the Petitioners without following due process is a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing guaranteed under Article 43 of *the Constitution*.”

112. The Court has considered that the Petition has succeeded partly and orders that each party shall bear its costs of the petition.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgement read in open court and virtually in the presence of;

Musyoki - Court Assistant

B. M. Musyoki for Petitioners

Musyoki K. for the 1<sup>st</sup> Respondent

Odhiambo Odhim for the 2<sup>nd</sup> Respondent

M/S Wanyonyi for the 3<sup>rd</sup> Respondent

No attendance for the 4<sup>th</sup> to 8<sup>th</sup> Respondents

