



REPUBLIC OF KENYA



**Uathimo Farm Limited & another v Attorney General & 8 others (Environment & Land Petition 5 of 2017) [2023] KEELC 21084 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21084 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND PETITION 5 OF 2017  
TW MURIGI, J  
OCTOBER 18, 2023**

**BETWEEN**

**UATHIMO FARM LIMITED ..... 1<sup>ST</sup> PETITIONER**

**PETER KIILU ..... 2<sup>ND</sup> PETITIONER**

**AND**

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

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

**GOVERNOR PROF KIVUTHA KIBWANA ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MAKUENI ..... 4<sup>TH</sup> RESPONDENT**

**GEORGE ONYANGO THE OCS EMALI POLICE STATION .. 5<sup>TH</sup> RESPONDENT**

**NICK NTHOKA ..... 6<sup>TH</sup> RESPONDENT**

**ALOIS MUIA ..... 7<sup>TH</sup> RESPONDENT**

**MULANDI MBALU, NDETI LAVU, DAVID KIOKO (ALL SUED AS THE  
NAMED LEADERS AND/OR OFFICIALS OF MUKAAMBITA RANCHING  
COOPERATIVE SOCIETY/INVADERS) ..... 8<sup>TH</sup> RESPONDENT**

**STEPHEN MUTUKU ..... 9<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners herein, Uathmio Farm Limited and Peter Kiilu filed the Petition dated 24<sup>th</sup> October, 2017 seeking the following orders: -

1. A declaration that the implementation of the recommendation of the report by the taskforce requiring the Government to put in place mechanisms to compulsorily acquire LR No. 9731/2



for settlement of Mukaambita Co-operative members is unconstitutional and is therefore null and void.

2. A declaration that the invasion of the 1<sup>st</sup> Petitioner's property namely LR 9731/2 and subsequent destruction of the properties therein is a violation of the Petitioner's right to property and the freedom and security to the person.
3. A declaration that the 1<sup>st</sup> Petitioner or any other person deriving title from the 1<sup>st</sup> Petitioner is the bona fide owner of LR No. 9731/2 or any sub division or plots arising therefrom.
4. A declaration that the notice published by the County Executive Committee Member- Lands, Mining & Physical Planning dated 3<sup>rd</sup> February, 2017 is unconstitutional in so far as it purports to restrict the extent of enjoyment of the Petitioners right to property as enshrined under Article 40 of the Constitution of Kenya 2010.
5. A declaration that any promise or campaign pledge made by the 3<sup>rd</sup> and 6<sup>th</sup> Respondents in relation to the alienation or distribution of any of the Petitioners property or the implementation of any such promise without due process is a violation of the Petitioners right to a fair administrative process as enshrined under Article 47 of the Constitution of Kenya 2010.
6. An order for compensation for the damage to property on the 1<sup>st</sup> Petitioner's land parcel LR No. 9731/2.
7. A Conservatory order restraining any person claiming interest on any portion of the Petitioners land through membership of Mukaambita Ranching Co-operative Society or a promise by the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents from entering into or in any manner occupying any portion of the 1<sup>st</sup> Petitioner's land parcel LR No. 9731/2 whether by themselves, by agent(s), servant(s) or by any other description.
8. A judicial review order of Mandamus compelling the 5<sup>th</sup> 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. 9731/2.
9. Such other and/or further relief as this Court may deem fit.

### **The Petitioners' Case**

2. The Petition is supported by the affidavit of Serah Nzembi Nzyoka sworn on behalf of the Petitioners on even date.
3. The Deponent averred that she is a Co-Administrator of the Estate of Mrs Ruth Kalekye Muua and a Co-Guardian ad litem to Mr. James Kasyula Mutua, the Directors and shareholders of the 1<sup>st</sup> Petitioner herein. She averred that the 1<sup>st</sup> Petitioner was incorporated as a private limited company on 14<sup>th</sup> May, 1982 with the aim of carrying out horticultural and farming business.
4. That in furtherance of its business, the 1<sup>st</sup> Petitioner purchased land known as I.R 15765/8 (Land reference No. 9731/2) measuring approximately 1091 hectares from Agricultural Development Corporation.
5. That by reason of its ownership of the suit property, the 1<sup>st</sup> Petitioner issued licenses to the 2<sup>nd</sup> Petitioner and to a group of over 200 people who pursuant to agreements for sale are the beneficial owners of 266 plots comprised in the suit property. She went on to state that sometime in April 2006, the Government through the Land Adjudication and Settlement Trust approached the 1<sup>st</sup> Petitioner with



- a request to purchase a portion of the suit property with a view to settle Mukambita Co-operative Society members.
6. That the Directors of the 1<sup>st</sup> Petitioner vide a letter dated 18/04/2006, made a formal offer to the Director, Land Adjudication and Settlement Trust indicating their willingness to sell to the Government 1060 acres out of the suit property at a purchase price of Kshs. 70,000/= per acre.
  7. That vide a letter dated 09/06/2006, the Land Adjudication and Settlement Trust made a counter offer to purchase the suit property for Kshs. 33,000/= per acre.
  8. She stated that the 1<sup>st</sup> Petitioner notified the Settlement Trust that the counter offer was not acceptable and offered a proposal of Kshs. 55,000/= per acre. It was averred that the 1<sup>st</sup> Petitioner withdrew the offer when the Settlement Trust failed to respond to their offer.
  9. It was further averred that on 29<sup>th</sup> June 2007, the Government appointed a taskforce on Sultan Hamud land to establish whether the suit property together with land parcels Nos. 9730/2 and 9731/1 were available for purchase and to make recommendations thereof. That in its report dated 31<sup>st</sup> July 2007, the taskforce recommended that the Government should compulsorily acquire the suit property for purposes of settling Mukambita Ranching Society members. She contended that the taskforce did not invite the 1<sup>st</sup> Petitioner to air its views before it compiled its report.
  10. She further averred that the 1<sup>st</sup> Respondent advised the Permanent Secretary, Ministry of Lands that it was not within the law to compulsorily acquire the suit property together with the two neighbouring properties so as to settle squatters because they are private properties.
  11. She further averred that during his campaign trails in the year 2007, the 3<sup>rd</sup> Respondent promised the local community that if he was re-elected, he would find a way of negotiating with the owners of the land so as to settle them thereon.
  12. That when the 3<sup>rd</sup> Respondent was appointed as the acting Minister for Lands, he published a statement impugning the 1<sup>st</sup> Petitioner's title to the suit property and issued a veiled threat to the 1<sup>st</sup> Petitioner together with the owners of the neighbouring lands which was aimed at curtailing the sale of the suit property to non-residents of Makueni County.
  13. She went on to state that after obtaining approval to subdivide the suit property into 202 plots together with the proposed change of use, the 1<sup>st</sup> Petitioner entered into land sale agreements which resulted into 200 beneficial owners who have since taken possession of their plots as they await to be issued with titles for the same.
  14. It was further averred that on 3<sup>rd</sup> February 2017, the 4<sup>th</sup> Respondent through the County Executive Committee Member – Lands, Mining and Physical Planning issued a public notice in respect to the suit property, land parcel Nos. 9731/1 and 9731/2 indicating that the 3<sup>rd</sup> Respondent had met with the members of Mukambita Co-operative Society and had agreed to request the National Government to implement the recommendations in the report by the Taskforce.
  15. That in view of the said notice, the Petitioners as well as the beneficial owners of the plots are apprehensive that their properties are faced with imminent threat of invasion by the community and they may be subjected to violence at the instigation of the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents. That acting on the promise made by the 3<sup>rd</sup> Respondent, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents have since 17<sup>th</sup> October, 2017 been leading a group of invaders to the suit property and thereby causing wanton destruction of property therein.



16. It was further averred that the 5<sup>th</sup> Respondent had failed to act on the numerous complaints lodged by the Petitioners herein. The deponent asserted that the notice published on 03/02/2017 by the County Government of Makueni is unconstitutional because neither the Governor nor the County Government has power to alienate private land. She argued that the notice violates Article 40 of the Constitution because it purports to restrict the Petitioners from enjoying their own property. The deponent urged the court to allow the Petition as prayed.

### **The 1<sup>st</sup> and 5<sup>th</sup> Respondents Case**

17. The 1<sup>st</sup> and 5<sup>th</sup> Respondents opposed the Petition through the grounds of opposition dated 17<sup>th</sup> November, 2021 on the following grounds:-

1. That the Petitioners have not demonstrated how the Articles of the Constitution relied on the Petition have been infringed by the 1<sup>st</sup> and 5<sup>th</sup> Respondents.
2. That the Petition is frivolous, vexatious and misconceived as against the 1<sup>st</sup> and 5<sup>th</sup> Respondents.
3. That the Petition is an abuse of the court process.

18. In opposing the Petition, the 5<sup>th</sup> Respondent vide the replying affidavit sworn on 12<sup>th</sup> January, 2018 denied the allegations levelled by the Petitioners. He averred that between 29<sup>th</sup> October, 2017 and 4<sup>th</sup> November, 2017 several persons had been charged and convicted with the offence of trespass on the suit property. He contended that the Petitioners have not demonstrated how the 1<sup>st</sup> and 5<sup>th</sup> Respondents have violated the alleged provisions of the Constitution.

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

19. In opposing the Petition, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn by Silas Mburugu on 12<sup>th</sup> March, 2018. He gave a historical background of how the suit property was acquired by the 1<sup>st</sup> Petitioner. He stated that the suit property is a sub-plot from plot No. LR 9731 measuring 5146 acres which was surrendered to the government on 10<sup>th</sup> August, 1977. That in the year 1978, the suit property was transferred to Agricultural Development Corporation. He went on to state that in the year 1982, the land was subdivided into two portions namely LR No. 9731/1 and LR No. 9731/2 (the suit property herein). That in the same year, LR No. 9731/2 measuring 1091 hectares was sold and registered to the 1<sup>st</sup> Petitioner while LR No. 9731/1 measuring 1018 hectares was sold to Mulu Mutisya. He stated that in the year 2008 the suit property was subdivided into 212 plots.

20. He further averred that the County Government of Makueni vide a letter dated 27<sup>th</sup> January, 2017, requested the Chair to compulsorily acquire LR No. 9730/2 and 9731/2 on the basis of the recommendations made by the taskforce.

21. That in response to the request, the County Government of Makueni was advised to put everything on hold pending the determination of the instant Petition.

22. He averred that compulsory acquisition of land can only be for a public purpose. It was his position that the suit property can only be purchased by the Settlement Fund Trustees through the Director of Settlement, and not through the Chair of the 2<sup>nd</sup> Respondent.



### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondent's Case**

23. Opposing the Petition, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents through the replying affidavit sworn by Alex Nthiwa Advocate averred that the Governor and the County Government of Makueni do not hold any proprietary interest in the suit property or on the neighbouring properties. He gave a brief history of the suit property and stated that it was taken over by the colonial settlers during the colonial time and later in the year 1982 it was transferred to the 1<sup>st</sup> Petitioner from Agricultural Development Corporation.
24. He went on to state that Mukambita Farmers were in occupation of the suit property during the pre-colonial time. That with the support of the government, they managed to raise KShs. 5,000,000/= with the intention to acquire the land but it later transpired that the land had been subdivided into three portions and grants made in favour of three individuals.
25. According to him, the historical dispute between the members of Mukambita Farmers Society and the new owners of the land began when the grants were made in favour of the three individuals. He averred that a taskforce appointed by the government to inquire into the dispute over the suit property came up with recommendations over the same.
26. He went on to state that the County Government of Makueni has tried to resolve the dispute and believes that the 6<sup>th</sup> to 8<sup>th</sup> Respondents have a historical claim over the suit property.
27. The 6<sup>th</sup> Respondent did not file any response to the Petition.

### **The 7<sup>th</sup> Respondent's Case**

28. The 7<sup>th</sup> Respondent filed an answer to the Petition and a Cross Petition dated 20<sup>th</sup> July, 2022.
29. In his cross Petition the 7<sup>th</sup> Respondent seeks the following orders:-
  1. A declaration that the 2007 Task Force Report be implemented by both the National and the County Government for the settlement of Mukambita Ranching Co-operative Society members.
  2. A declaration that the parcel of land known as LR No. 9731/2 historically and legally belongs to the members of Mukambita Ranching and Farming Cooperative Society Limited.
  3. Any other further order that the Honourable Court may deem fit and just to grant.
  4. An order for payment of costs of this Cross Petition by the 7<sup>th</sup> Respondent.
30. the Petition is supported by the affidavit of Alois Muia sworn on even date. the deponent averred that he is a member of Mukambita Ranching and Co-operative Society whose primary objective is to undertake ranching activities similar to those of Agricultural Development Corporation. He averred that by December 1977, the Kenyatta administration had set up a committee and opened a bank account which had received KShs. 5.6 Million towards the purchase of the suit property from Agricultural Development Corporation. He further averred that after the exit of the colonial power in the year 1963, the suit property was awarded to Agricultural Development Corporation which later on awarded the suit property to the Society and that all the paid up members were permitted to utilise the suit property.
31. He averred that after President Moi took over power, he leased the public land to three individuals which prompted the Sacco to set up a committee to start the process of reclaiming back their land.



That in the process of reclaiming their land, some of their members were arrested and charged before the Makindu Law Courts but were later on acquitted. He urged the court to dismiss the Petition and allow the Cross Petition as prayed.

### **The 8<sup>th</sup> Respondent's Case**

32. the 8<sup>th</sup> Respondent opposed the Petition through the replying affidavit of Ndeti Lavu sworn on his own behalf and on behalf of the members of Mukaambita Ranching Co-operative Society.
33. He averred that the 8<sup>th</sup> Respondent is in occupation of the suit property. He further averred that during the pre-colonial time, the suit property was occupied by farmers from Mukaa and Mbitini locations but upon independence, it was taken over by Agricultural Development Corporation.
34. He further averred that Agricultural Development Corporation declined to sell the suit property on the grounds that it was holding the land in national interest. He averred that the 8<sup>th</sup> Respondent had leased the suit property and planted crops thereon.
35. He maintains that the Petitioners are not entitled to the orders sought because they are not the owners of the suit property. He urged the court to dismiss the Petition with costs.

### **The Response**

36. The 1<sup>st</sup> Petitioner filed a rejoinder to the 7<sup>th</sup> Respondent's answer to the Petition and Cross Petition on 2<sup>nd</sup> December, 2022 and reiterated the contents in the Petition. In addition, the 1<sup>st</sup> Petitioner averred that compulsory acquisition of land is governed by the Constitution and Part VIII of the Land Act. The deponent insisted that any memo or letter seeking to facilitate the occupation of the suit property is illegal, unlawful and a violation of the Constitution.
37. In answer to the 7<sup>th</sup> Respondent's Cross Petition, the 1<sup>st</sup> Petitioner averred that the Cross Petition does not meet the threshold set out in the case of Anarita Karimi Njeru v Republic. The Petitioners contended that the 7<sup>th</sup> Respondent is not entitled to the reliefs sought in the Cross Petition and urged the court to dismiss it with costs.
38. The Petition was canvassed by way of written submissions.

### **The Petitioner's Submissions**

39. The Petitioners submissions were filed on 14<sup>th</sup> November, 2018.
40. Counsel for the Petitioners outlined the following issues for the court's determination:-
  - i. Whether the suit property can be compulsorily acquired for settlement of Mukambita Co-operative members?
  - ii. Whether the Notice published by the County Executive Committee Member-Lands, Mining and Physical Planning dated 3<sup>rd</sup> February 2017 is Constitutional?
  - iii. Whether the Petitioner is entitled to the reliefs sought in the Petition dated 24<sup>th</sup> October 2017?
41. In answer to the first issue, Counsel submitted that Article 40(2)(a) of the Constitution expressly prohibits Parliament from enacting a law that permits the state to arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description. To buttress this point Counsel relied on the case of Mtana Lewa v Kabindi Ngala (2015) eKLR.



42. Counsel went on to submit that Part VIII and Sections 107 and 110 of the *Land Act* and Article 67(1), (3) of the Constitution sets out an elaborate process for compulsory acquisition of land. To buttress this point Counsel relied on the case of *Virendra Ramji Gudka and 3 Others v Attorney General* (2014) eKLR.
43. Counsel submitted that the process of compulsory acquisition of land was laid down in the case of *Commissioner of Lands & Another v Coastal Aquaculture Ltd* (1997) eKLR where the Court of Appeal set out the conditions to be complied with.
44. Counsel submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents failed to comply with the mandatory process for compulsory acquisition of land. Counsel contended that the court should uphold the 1<sup>st</sup> Petitioner's title.
45. On the second issue, Counsel submitted that the Constitution is the supreme law of the Republic and binds all persons and state organs. Counsel submitted that the County Executive Committee Member- Lands, Mining and Physical Planning published a public notice instead of submitting a request to the National Land Commission to acquire land on its behalf.
46. It was submitted that the Notice published by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents is inconsistent with the law because the 1<sup>st</sup> Petitioner's title is absolute and cannot be impeached without following the due process of the law. Counsel contended that the Petitioners can only be deprived from owning the suit property in accordance with the Constitution.
47. Counsel submitted that no evidence was led to demonstrate the historical occupation of the suit property by the 6<sup>th</sup>-8<sup>th</sup> Respondents and even if there was, those rights were extinguished when Agricultural Development Corporation became the registered owner of the suit property. To buttress this point Counsel relied on the case of *Esiroyo v Esiroyo* (1973) EA 388.
48. Counsel further submitted that the Petitioners were never invited to the sittings or the consultative meetings held by the taskforce whose recommendation the 4<sup>th</sup> Respondent now wants to implement contrary to Article 47 of the *Constitution* and Section 5 of the *Fair Administrative Action Act* which calls for participation by members of the public who are likely to be affected by an administrative action before a decision is taken.
49. Counsel submitted that the Petitioners are entitled to the orders sought because the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property. Counsel further submitted that the process of compulsory acquisition of the suit property is illegal, unlawful and void because the taskforce report violates the provisions of Article 40(3) of the *Constitution*. Counsel submitted that the 1<sup>st</sup> Petitioner has been deprived of its property and urged the court to grant the orders sought.
50. To buttress his submissions, Counsel relied on the list of authorities dated 7<sup>th</sup> December, 2020 and the supplementary list of authorities dated 6<sup>th</sup> March, 2023.

### **1<sup>st</sup> and 5<sup>th</sup> Respondents Submissions**

51. The 1<sup>st</sup> and 5<sup>th</sup> Respondents submissions were filed on 30<sup>th</sup> August, 2019.
52. On their behalf, the Learned State Counsel submitted that the only issue for determination is whether the Petitioners' claim against the 1<sup>st</sup> and 5<sup>th</sup> Respondent is valid.
53. It was submitted that pursuant to the complaints lodged by the Petitioners herein, some people were arrested, charged and convicted before Makindu law courts with the offence of trespass on the suit property. It was further submitted that the Petitioners have failed to demonstrate how the 1<sup>st</sup> and



5<sup>th</sup> Respondents have violated their constitutional rights. Learned State Counsel urged the Court to dismiss the Petition with costs to the 1<sup>st</sup> and 5<sup>th</sup> Respondents,

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Submissions**

54. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents submissions were filed on 30<sup>th</sup> January, 2020.
55. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents outlined the following issues for the court's determination:-
  - i. Whether the Petitioners are the lawful proprietors of the suit property and whether their acquisition of the property was procedural and legally valid.
  - ii. Whether the 8<sup>th</sup> Respondent and its members possess a legally valid claim over the suit property.
  - iii. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have violated any of the Petitioners right to property; and
  - iv. Whether the Petitioners have satisfied the legal criteria for grant of the orders sought.
56. On the first issue, Counsel submitted that the 1<sup>st</sup> Petitioner was registered as the proprietor of the suit property in the year 1982 having acquired the same from Agricultural Development Corporation. Counsel submitted that the 1<sup>st</sup> Petitioner acquired the suit property despite Agricultural Development Corporation having informed the 8<sup>th</sup> Respondent that it was holding the same in national interest. For those reasons, Counsel argued that the suit property could not be sold or transferred to private individuals.
57. Counsel submitted that the government appointed a taskforce in the year 2006 to address the historical land injustice claim by Mukaambita Farmers Society. Counsel urged the court not grant the orders sought because the 2<sup>nd</sup> Respondent was still engaged in the issue.
58. In addition, Counsel submitted that the jurisdiction of the National Land Commission may be deterred if the orders sought are granted. Counsel contended that the 8<sup>th</sup> Respondent has acquired a legitimate expectation that their historical claim over the suit property will be addressed through the relevant government agencies.
59. On the second issue, Counsel submitted that the 1<sup>st</sup> Petitioner has deliberately failed to explain how it acquired the suit property. Counsel maintains that the process of acquiring the suit property can only be interrogated in civil proceedings and not through a Petition.
60. On the third issue, Counsel argued that the Petition does not meet the threshold set out in the case of *Anarita Karimi Njeru v Republic*. Counsel submitted that the Petitioners have not offered any credible evidence on the infringement of their Constitutional rights by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. Counsel urged the court to dismiss the Petition with costs to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
61. The Petitioners filed supplementary submissions in opposition to the 7<sup>th</sup> Respondent's Cross-petition on 6<sup>th</sup> March, 2023. Counsel identified the following issues for the court's determination: -
  - i. Whether the Cross-petition meets the threshold of a constitutional petition?
  - ii. Whether the Cross-petitioner is deserving of the orders sought?
62. On the first issue, Counsel submitted that the Cross-petition does not meet the threshold set out in the case of *Anarita Karimi Njeru v Republic*. It was argued that the 7<sup>th</sup> Respondent has not demonstrated how the Petitioners have violated his fundamental rights and freedoms.



63. On the second issue, Counsel contended that the 7<sup>th</sup> Respondent must first prove the injury suffered before the orders sought are granted. Counsel submitted that the 7<sup>th</sup> Respondent has not adduced any evidence to demonstrate that either him or the 8<sup>th</sup> Respondents have any registrable interest in the suit property.
64. In response to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' submissions, Counsel contended that the issue of constitutional avoidance was not pleaded in the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' replying affidavit. It was argued that parties are bound by their pleadings and hence the 3<sup>rd</sup> and 4<sup>th</sup> Respondents cannot introduce new issues through their written submissions.
65. Counsel argued that the Petition herein impugns the attempts to compulsorily acquire the 1<sup>st</sup> Petitioner's property without adherence to the la. Counsel insisted that this Court has jurisdiction to determine the issues raised in the Petition in accordance with Section 13 (2) of the *Environment and Land Court Act*, 2011. Counsel urged the court to dismiss the Cross-petition with costs and allow the Petition as prayed.
66. As at the time of writing this Judgment, the 2<sup>nd</sup>, 6<sup>th</sup> - 8<sup>th</sup> Respondents had not filed their submissions.

### **Analysis and Determination**

67. Having considered the Petition, the respective affidavits and the rival submissions the following issues arise for determination:-
  - a. Who is the lawful proprietor of the suit property.
  - b. Whether the recommendation of the report by the taskforce requiring the government to put in place mechanisms to compulsorily acquire LR NO. 9731/2 for settlement of Mukaambita Co-operative members is unconstitutional.
  - c. Whether the Public Notice dated 3<sup>rd</sup> February, 2017 violates the Petitioners right to property.
  - d. Whether the Petitioners are entitled to the orders sought in the Petition.
  - e. Whether the 7<sup>th</sup> Respondent is entitled to the orders sought in the cross Petition.

### **Who is the Lawful Proprietor of the Suit Property**

68. The 1<sup>st</sup> Petitioner averred that it is the registered proprietor of the suit property measuring approximately 1091 hectares. It was averred that the 1<sup>st</sup> Petitioner purchased the suit property from Agricultural Development Corporation. In this regard, the deponent produced the certificate of title registered in its name as proof of ownership of the suit property (PEXD). Her evidence was corroborated by the 2<sup>nd</sup> Respondent who gave a historical background of the suit property.
69. The 2<sup>nd</sup> Respondent averred that the 1<sup>st</sup> Petitioner purchased the suit property from Agricultural Development Corporation in the year 1982. He produced the certificate of official search (EXSM1) to prove that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents admitted that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property.
70. On the other hand, the 7<sup>th</sup> and 8<sup>th</sup> Respondents contended that they are the owners of the suit property. They asserted that they have historically been in occupation of the suit property.
71. The 8<sup>th</sup> Respondent averred that Agricultural Development Corporation declined to sell the suit property to the Society on the grounds that it was holding the same in national interest.



72. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents averred that the suit property was historically occupied by members of Mukaambita Farmers Society. They insisted that the 6<sup>th</sup>-8<sup>th</sup> Respondents have a historical claim over the suit property.
73. According to the certificate of title, the 1<sup>st</sup> Petitioner was registered as the proprietor of the suit property on 4<sup>th</sup> November, 1982. The law is very clear on the position of a holder of a title in respect of land.
74. Section 24(a) of the *Land Registration Act* provides for the interest conferred upon registration. It states as follows;
- “Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”
75. Section 25 of the *Land Registration Act* provides for the rights of a proprietor. It states as follows;
- I. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by 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;...
76. These provisions vest on the registered owner of land with rights and privileges. The record shows that, the 1<sup>st</sup> Petitioner was registered as the proprietor of suit property pursuant to a sale and subsequent transfer from Agricultural Development Corporation.
77. While confirming that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents urged the court to inquire how the 1<sup>st</sup> Petitioner acquired the title before upholding the same. They argued that the suit property was not available for transfer to private individuals because Agricultural Development Corporation was holding the same in national interest.
78. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the process of acquiring the suit property can only be interrogated in civil proceedings and not in a petition.
79. Section 26(1) of the *Land Registration Act* provides for instances when a certificate of tile can be impeached. It provides as follows:-
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party or;
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
80. The Respondents did not adduce any evidence to show that the 1<sup>st</sup> Petitioner’s title to the suit property was obtained fraudulently, illegally, unprocedurally or through a corrupt scheme. The Certificate of Title issued to the 1<sup>st</sup> Petitioner has not been impeached and/or challenged. Until that is done, it is prima facie conclusive that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property.



81. The 7<sup>th</sup>, and 8<sup>th</sup> Respondent did not tender any evidence to show that they have historically been in occupation of the suit property. The allegations by 3<sup>rd</sup> and 4<sup>th</sup> Respondents that the 6<sup>th</sup>-8<sup>th</sup> Respondents have a historical claim over the suit property was not supported by any evidence.
82. It is the finding of this court that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property.

**Whether the Recommendation in the Report by the Taskforce Dated 31<sup>st</sup> July, 2007 is Unconstitutional**

83. The 1<sup>st</sup> Petitioner sought for a declaration that the implementation of the recommendation in the report by the taskforce requiring the government to put in place mechanisms to compulsorily acquire LR No. 9731/2 for settlement of Mukaambita Cooperative members is unconstitutional, null and void.
84. The Petitioners produced the report by the Taskforce as (PEXG). According to the report, the Government appointed a Taskforce on Sultan Hamud land on 29<sup>th</sup> June 2007 following the outstanding land dispute pitting Mukaambita Co-operative Society against Major (Rtd) Shadrack Muiu, Mulu Mutisya(deceased) and James Mutua, the owners of LR Nos. 9730/2, 9731/1 and 9731/2 respectively.
85. The terms of reference were:-
1. Revival of Mukaambita Co-operative Society.
  2. Establish financial status of Mukaambita Co-operative Society.
  3. Identity the land in dispute.
  4. Establish its status.
  5. Establish land available for purchase
  6. Make appropriate recommendations.
86. The task force headed by John Elungata, the District Commissioner Kibwezi District, was comprised of members drawn from the Provincial Administration and 10 members from Mukaambita Co-operative Society came up with the following recommendations:-
1. The government should enable the Mukaambita Co-operative Society now revived to purchase the 5947 acres available in these three parcels through a negotiated process since the members are still keen on settling on this land.
  2. The government should put in place mechanisms to compulsorily acquire LR Nos. 9730/2 and 9731/2 for settlement of Mukaambita Co-operative members.
  3. The government should immediately enter into negotiations with Mulu Mutisya family on LR No 9731/1 on the basis of requisite valuation.
  4. The Government should pursue the Society's accounts/assets and/or monies at the District Commissioner's office Machakos and at the K.C.B Machakos branch to determine their fate.
  5. The exercise of acquisition of this land should be fast tracked in order to ease the tension both security and political prevailing around this area.
87. The 1<sup>st</sup> Petitioner alleged that it was not invited to air its views before the taskforce compiled its report. The Petitioners alleged that the report offends the provisions of Article 47 of the Constitution and



Section 5 of the *Fair Administrative Act* which calls for publication of a notice inviting representations from members of the public who are likely to be affected by an administrative action before a decision is taken.

88. I have carefully read the report by the taskforce on Sultan Hamud Land. In one of its recommendations, the taskforce recommended as follows:-

“The government should put in place mechanisms to compulsorily acquire LR Nos. 9730/2 and 9731/2 for settlement of Mukaambita Cooperative Society members.”

The taskforce did not recommend that the government should compulsorily acquire the suit property. The report on the taskforce is a recommendation which has not been implemented or acted upon.

89. Should the government decide to implement the recommendations in the report by the taskforce, the same has to be within the provisions of the law. From the foregoing, I find that the recommendation in the report by the taskforce is not unconstitutional.

### **Whether The Public Notice Dated 3<sup>rd</sup> February, 2017 Violates The Petitioners Right To Property**

90. The Petitioners also sought for a declaration that the Notice published by the County Executive Committee Member - Lands, Mining and Physical Planning dated 3<sup>rd</sup> February, 2017 is unconstitutional is so far as it purports to restrict the extent of enjoyment of the Petitioners' right to property as enshrined under Article 40 of the Constitution.

91. The Petitioners alleged that the Public Notice sought to curtail the 1<sup>st</sup> Petitioner's right to own property. They contended that the 1<sup>st</sup> -4<sup>th</sup> Respondents have always been aware that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property. They asserted that the 1<sup>st</sup> Petitioner's title to the suit property is absolute and cannot be impeached without following the due process of the law.

92. On the other hand, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent alleged that their intervention in the matter was with a view to settle the historical dispute between the members of Mukaambita Society and the owners of the land.

93. Article 40 of the *Constitution* of Kenya provides that;

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person-
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-



- (a) results from an acquisition of land or an interest in land or a conversation of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:-
    - (i) requires prompt payment in full or just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
94. According to the public notice published by the County Executive Committee Member-Lands, Mining and Physical Planning (PEXN), the County Government of Makueni sought to clarify the ownership and status of LR Nos. 9730/2, 9731/1 and 9731/2. The notice gave a brief historical background of the said parcels of land. The public notice states as follows in part:-
- “However the County Government hereby notifies the general public that in view of the task force recommendation and the resolve by the members of the society to push for the implementation of the same without further delay, it is now unsafe for any third party to purchase land in any of these parcels. Any person who enters into any agreement for purchase of land in any of the above parcels does so at his/her own risk.”
95. By publishing the said notice, the County Government of Makueni was in essence warning members of the public not to purchase LR Nos 9730/2, 9731/1 and the suit property herein, for the reason that the task force had recommended that the government should acquire the same in addition to the resolve by the members of the Society to push for the implementation of the report.
96. From the record, it is crystal clear that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property.
97. In the case of *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR, the Court of Appeal aptly expressed itself as follows:-
- “As urged by Prof. Muigai on behalf of the appellants, the right to property as enshrined in Article 40 cannot be taken away whimsically. Article 40 (6) provides that “the rights under this Article do not extend to any property that has been found (emphasis added) to have been unlawfully acquired”. The wording of Article 40(6) is that there must be a ‘finding’. In the absence of a finding, it would be preposterous for the respondents to make such a ‘finding’ by themselves and proceed to forcefully take the appellant’s properties. If this were to be the case, every Kenyan would have every reason to be wary and fearful as no one would know the time and hour when he/she would be visited by a bulldozer purring like a tiger and raring to tear down their homes. If the forceful acquisition were to be sanctioned without any prior ‘finding’ being made, then the rule of law will be replaced by the rule of the jungle.



I find that in the absence of a “finding”, the respondents’ action of earmarking parts of the appellants’ properties for extension of the Northern By-pass is premature.”

98. The Court of Appeal went on to observe as follows: -

“The thrust of Article 40 is to protect proprietary rights which are lawfully acquired. The Supreme Court in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR, expressed this position thus:

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the *Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the *repealed Constitution*.”

99. It goes without saying that the Public Notice dated 3<sup>rd</sup> February, 2017 limits and/or restricts the Petitioners enjoyment of the suit property as contemplated under Article 40 (1) of the Constitution.

100. From the foregoing this Court finds and holds that the Public Notice dated 3<sup>rd</sup> February 2017 violates the Petitioners right to property as enshrined under Article 40 of the *Constitution*.

101. the Petitioners alleged that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents failed to comply with the law regarding the process of compulsory acquisition of land. they asserted that the *Constitution* and Part VIII of the *Land Act* sets out an elaborate process of compulsorily acquisition of land.

102. One of the recommendations by the taskforce was for the Government to put in place mechanisms to compulsorily acquire the suit property together with land parcel No. 9730/2 with a view to settle Mukaambita Cooperative Society members.

103. The dispute at the heart of the instant Petition is the legality of the process of compulsory acquisition of the suit property.

104. The law governing compulsory acquisition is founded on Part VIII and Section 107 to 133 of the *Land Act* 2012. Part VIII of the *Land Act* sets out an elaborate process of compulsory acquisition of land.

105. One of the mandates of the National Land Commission is to compulsorily acquire land for both the National and County Governments upon request.

106. The process of compulsory acquisition was laid down in the case of *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR where the court held as follows;

“Under Section 107 of the *Land Act*, the National Land Commission (the 1<sup>st</sup> Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the *Constitution*. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the *Land Act*, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. THE notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.



As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the *Land Act*.

the foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

the burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the *and Act*, the landowner's role is limited to that of a distant bystander with substantial interest.

Section 112 of the *Land Act* then involves the landowner directly for purposes of determining proprietary interest and compensation. the section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the *Land Act*.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the *Land Act*.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the *Land Act*. This is in line with the Constitutional requirement under Article 40(3) of the *Constitution* that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

The *Constitution* dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The *Constitution* itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.”



107. Section 107(1) of the *Land Act* No.6 of 2012, provides as follows:-

Whenever the National or County Government is satisfied that it may be necessary to acquire some particular land under Section 110, the respective Cabinet Secretary or County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.

108. It is clear from the above provision that the National or County Government must submit a request for acquisition of public land to the Commission to acquire land on its behalf.

109. Section 110(1) provides that;

“Land may be acquired compulsorily under this part if the commission certifies in writing that the land is required for public purposes or in the public interest as related to and necessary for fulfilment of the stated public purpose.”

110. Silas Mburugu averred that the 4<sup>th</sup> Respondent vide a letter dated 27<sup>th</sup> January 2017, requested the Chair of the 2<sup>nd</sup> Respondent to implement the report by the taskforce on Mukaambita Ranching Co-operative Society. That in response to the request, the 2<sup>nd</sup> Respondent advised that any further dealings be put on hold pending the determination of the instant Petition. He averred that compulsory acquisition of land must be for a public purpose. He asserted that the suit property should be purchased by the Settlement Fund Trustees, through the Director of Settlement and not through the Chair of the 2<sup>nd</sup> Respondent.

111. In the present case, the 4<sup>th</sup> Respondent did not submit a request to the 2<sup>nd</sup> Respondent to acquire land on its behalf. Even if the letter by the 4<sup>th</sup> Respondent requesting the 2<sup>nd</sup> Respondent to implement the recommendations in the report by the taskforce were to be deemed as a request which is not, the National Land Commission may accept or reject a request of an acquiring authority to undertake an acquisition. It is crystal clear that the National Land Commission did not approve the request by the 4<sup>th</sup> Respondent to implement the recommendations in the report by the taskforce.

112. Under section 107(5) provides as follows:-

Upon approval of a request under sub section (1), the commission shall publish a notice to that effect in the Gazette and county Gazette and shall deliver a copy of the notice to the land registrar and every person who appears to the commission to be interested in the land.

6. upon service of the notice, the registrar shall make entry in the register of the intended acquisition.

113. From the above provisions it is clear that the Commission must publish its intention to acquire land. In the present case the notice published by the 4<sup>th</sup> Respondent indicates its intention to have the 2<sup>nd</sup> Respondent implement the recommendations in the report by the task force. From the above provisions, it is clear that the Commission is the only body mandated to publish a notice indicating its approval of the request and the said notice can only be published in the Gazette and County Gazette.

114. The 2<sup>nd</sup> Respondent averred that the suit property can only be purchased by the Settlement Fund Trust through the Director of Settlement and not through its Chair. This court finds and holds that for land to be acquired it must be for a public purpose or public interest and in compliance with the law governing compulsory acquisition of land. Anything short of the process for compulsory acquisition of land is invalid and unconstitutional.



## Whether the Petitioners Are Entitled to the Orders Sought

115. The Petitioners sought for a declaration that the invasion of the 1<sup>st</sup> Petitioner's property namely LR No. 9731/2 and the subsequent destruction of the properties therein is a violation of the Petitioners right to property and the freedom and security to the person.
116. It was averred that in view of the notice published by the 4<sup>th</sup> Respondent, the Petitioners as well as the beneficial owners are apprehensive that their properties are in imminent threat of invasion by the community and they may be subjected to violence at the instigation of the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents.
117. That acting on the promise made by the 3<sup>rd</sup> Respondent, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents have since 17<sup>th</sup> October, 2017 been leading a group of invaders to the suit property who have destroyed a magnificent colonial home, farm property and thousands of orange trees thereby violating the 1<sup>st</sup> Petitioner's right to property.
118. In this regard, the deponent produced photographs marked as (PEXO). The photographs do not show the invasion complained of by the Petitioners or the destruction of the properties therein. The Petitioners did not adduce any evidence in support of the allegation. It is the finding of this court that the Petitioners are not entitled to this relief.
119. The Petitioners sought for a declaration that the 1<sup>st</sup> Petitioner or any other person deriving title from the 1<sup>st</sup> Petitioner is the bona fide owner of LR No. 9731/2 or any subdivision or plots arising therefrom.
120. The 1<sup>st</sup> Petitioner averred that it is the registered proprietor of the suit property. It was averred that after approval to subdivide the suit property into 202 plots was granted, the 1<sup>st</sup> Petitioner entered into land sale agreements which resulted in over 200 beneficial owners.
121. The approval and the land sale agreements were produced as (PEXK and L respectively). Having established that the 1<sup>st</sup> Petitioner is the registered proprietor of the suit property it follows that the purchasers of the plots arising from the subdivision of the suit property are the bona fide owners thereof. In light foregoing, I find that the Petitioners are entitled to the relief sought.
122. The Petitioners sought for a declaration that any promise or campaign pledge made by the 3<sup>rd</sup> and 6<sup>th</sup> Respondents in relation to alienation of the Petitioners property or implementation of such promise is a violation of the Petitioners right to a fair administrative process under Article 47 of the Constitution.
123. The Petitioners averred that during his campaign trail, the 3<sup>rd</sup> Respondent promised the local community that once re-elected he would negotiate with the owners of the land and settle them thereon. In this regard, the Petitioners produced a campaign leaflet dated 22/12/2007 (PEXI). I have carefully read the leaflet dated 22/12/2007 addressed to all Makeni Constituents by the 3<sup>rd</sup> Respondent. The leaflet states as follows in part:-

“.....That once re-elected I will revisit the issue and find a way of negotiating with the owners of the land for possible occupation.”

Those were pledges made during the campaign period. The 3<sup>rd</sup> Respondent did not promise his constituents that he would alienate the 1<sup>st</sup> Petitioner's land and settle them thereon. All he said was that he was going to negotiate with the owners of the land for possible occupation. Negotiations cannot be equated to alienation or occupation of land. There is nothing unconstitutional in the promise made by 3<sup>rd</sup> Respondent during his campaign trails. In light of the foregoing, I find that the Petitioners are not entitled to the relief sought.



124. The 1<sup>st</sup> Petitioner sought for an order for compensation for the damage on the suit property. Damages must be proved by evidence. The 1<sup>st</sup> Petitioner did not adduce any evidence in support of its claim. It therefore follows that the 1<sup>st</sup> Petitioner is not entitled to an order for compensation.
125. The Petitioners sought for a conservatory order to restrain any person claiming interest other than through the 1<sup>st</sup> Petitioner of any portion of the Petitioners land whether by themselves, by agent(s), servant(s) or by any other description from entering into or in any manner occupying any portion of the 1<sup>st</sup> Petitioner's land parcel LR No. 9731/2.
126. They also sought for a conservatory order restraining any person claiming interest on any portion of the 1<sup>st</sup> Petitioner's land through membership of Mukaambita Ranching Cooperative Society or a promise by the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents from entering into or in any manner occupying any portion of the 1<sup>st</sup> Petitioner's land parcel LR No. 9731/2 whether by themselves, by agent(s), servant(s) or by any other description.
127. the law on the issuance of conservatory orders is well settled. Conservatory orders were defined in the case of *Judicial Service Commission v Speaker of the National Assembly & Another* (2013) eKLR where the Court held that;
- “Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individuals against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
128. The issue for determination is whether the 1<sup>st</sup> Petitioner has established a prima facie case that warrants the grant of the conservatory orders. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues in a case alleging violation of rights.
129. A prima facie case was defined in the case of *Kevin K Mwiti & Others v Kenya School of Law & others* (2015) eKLR where the court stated:-
- “.....A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues.”
130. The 1<sup>st</sup> Petitioner's claim over the suit property is premised on the certificate of title issued on 4<sup>th</sup> August 1982. The 7<sup>th</sup> and 8<sup>th</sup> Respondents claim over the suit property is anchored on historical occupation of the suit property. The 7<sup>th</sup> – 8<sup>th</sup> Respondents did not tender any evidence in support of their claim. As the registered proprietor of the suit property, the 1<sup>st</sup> Petitioner has established a prima facie case for the grant of conservatory orders.
131. The Petitioners sought for a judicial review order of Mandamus compelling the 5<sup>th</sup> Respondent to evict or in any other manner supervise the eviction of all those persons who have invaded property known as LR No. 9731/2.
132. Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in the case of *Apotex Inc v Canada (Minister of Citizenship and Immigration)* as follows:-



1. There must be a public legal duty to act.
  2. The duty must be owed to the Applicants.
  3. There must be a clear right to the performance of that duty meaning that:
    - a. The Applicants have satisfied all conditions precedent; and
    - b. There must have been;
      - i. A reasonable time to comply with the demand unless there was outright refusal and;
      - ii. An express refusal or an implied refusal; through unreasonable delay
      - iii. No other adequate remedy is available to the Applicants.
      - iv. The orders sought must be of some practical value or effect.
      - v. There is no equitable bar to the relief sought.
      - vi. On a balance of convenience mandamus should lie.
133. It is therefore clear that a person seeking an order of mandamus must satisfy the court that the action he seeks to compel the Respondent to perform is a duty which the Respondent is under a duty whether at common law or by statute to perform.
134. Turning to this case the Petitioners alleged that despite making several complaints, the 5<sup>th</sup> Respondent failed to act on the same. The 5<sup>th</sup> Respondent on the other hand contended that between 29<sup>th</sup> October and 4<sup>th</sup> November 2017, several persons were arrested, charged and convicted with the offence of trespass on the suit property before the Makindu Law Courts. He produced charge sheets for several persons who were charged and convicted with the offence of trespass on the suit property. From the foregoing, it is clear that the 5<sup>th</sup> Respondent acted on the complaints lodged by the 1<sup>st</sup> Petitioner.
135. Before this court can compel the 5<sup>th</sup> Respondent to evict the people who are alleged to have invaded the suit property, the Petitioners must demonstrate that there are invaders on the suit property. The Petitioners did not present any evidence to show that they had lodged any complaints with the 5<sup>th</sup> Respondent that there are trespassers on the suit property. In the light of the foregoing, I find that that the order of mandamus is not merited and I decline to grant the same.

### **Whether The 7<sup>th</sup> Respondent Is Entitled to the Orders Sought Oin the Cross Petition**

136. The 7<sup>th</sup> Respondent filed a cross Petition and sought for a declaration that the 2007 taskforce Report be implemented by both the National and the County Governments for the settlement of Mukaambita Ranching and Farming Society. It is not in dispute that the government appointed a taskforce on Sultan Hamud land following the outstanding land dispute pitting Mukaambita Co-operative Society against the owners of LR Nos 9730/1, 9731/1 and 9731/2. It is also not in dispute that the taskforce came up with recommendations. It is not the place of the court to compel the government to implement the recommendations in the report by the taskforce. I find that the 7<sup>th</sup> Respondent is not entitled to the said relief.
137. The 7<sup>th</sup> Respondent sought for a declaration that land parcel No 9731/2 (the suit property herein) historically and legally belongs to the members of Mukaambita Ranching and Farming Co-operative Society. The 7<sup>th</sup> Respondent did not adduce any evidence in support of this prayer. The 7<sup>th</sup> Respondent



did not adduce any evidence in support of the cross petition. In light of the foregoing, the cross petition is hereby dismissed with no orders as to costs.

138. Accordingly, the Petitioners Petition dated 24<sup>th</sup> October, 2017 is allowed in the following terms;-

1. A declaration be and is hereby issued that the 1<sup>st</sup> Petitioner or any other person deriving title from the 1<sup>st</sup> Petitioner is the bona fide owner of LR No. 9731/2 or any subdivision or plots arising therefrom.
2. A declaration be and is hereby issued that the Notice published by the County Executive Committee Member, Lands, Mining and Physical Planning dated 3<sup>rd</sup> February, 2017 is unconstitutional in so far as it purports to restrict the extent of enjoyment of the Petitioners right to property as enshrined under Article 40 of the Constitution of Kenya 2010.
3. A conservatory order be and is hereby issued restraining any person claiming interest other than through the 1<sup>st</sup> Petitioner of any portion of the 1<sup>st</sup> Petitioners land whether by themselves, by agent(s), servant(s) or by any other description from entering into or in any other manner occupying any portion of the 1<sup>st</sup> Petitioner's land parcel LR No. 9731/2.
4. A Conservatory order be and is hereby issued restraining any person claiming interest of any portion of the Petitioner's land through membership of Mukaambita Ranching Co-operative Society or a promise by the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents from entering into or in any manner occupying any portion of the 1<sup>st</sup> Petitioner's land Parcel No. LR No. 9731/2 whether by themselves, by agent(s), servant(s) or by any other description.
5. Each party to bear its own costs.

.....  
**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023.**

In the presence of:-

Court assistant - Mr. Kwemboi.

Mung'ata for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

Kiluva holding brief for Makundi for the 7<sup>th</sup> and 8<sup>th</sup> Respondents.

