



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 35 OF 2016

JOHNSON MBAABU MBURUGU.....1ST PETITIONER

CATHERINE GAKII MBAABU.....2ND PETITIONER

VERSUS

MATHEW NABEA ALIAS MATHIU M'NABEA.....1ST RESPONDENT

KARAMBU NKONGE.....2ND RESPONDENT

PURITY NKATHA JAPHET.....3RD RESPONDENT

MURITHI MATHEW MINYORI.....4TH RESPONDENT

JANE MWENDE MUTHEE Alias JUNE MWENDWA MUTEE...5TH RESPONDENT

ZAKI KANGI MWANGI.....6TH RESPONDENT

ISAAK GICHURU MAGAMBO.....7TH RESPONDENT

PETER KOOME MWANGI & EVANS MACHARIA MWANGI

(Legal Rep. of Estate of JEVASIO MWANGI alias JEREVANCY

MWANGI MUGANE (Deceased)..... 8TH RESPONDENT

JOSHUA NGORE.....9TH RESPONDENT

JOHN KATHURE MAMECHU.....10TH RESPONDENT

NANCY KARAMBU NKONGE.....11TH RESPONDENT

ROSE KAYUYU M'NAMPIU.....12TH RESPONDENT

HELLEN KIMATHI.....13TH RESPONDENT

HENRY KIMATHI.....14TH RESPONDENT

RACHEL MUTHONI IMIRONGO.....15TH RESPONDENT

ROSALIA KENDI KAUNYANGI.....16TH RESPONDENT

ELIUD MURIUNGI.....	17 TH RESPONDENT
IBRAHIM WASIKE.....	18 TH RESPONDENT
LAWRENCE MWONGERA.....	19 TH RESPONDENT
DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER	
TIGANIA WEST SUB-COUNTY.....	20 TH RESPONDENT
ATTORNEY GENERAL.....	21 ST RESPONDENT

JUDGMENT

1. By an amended petition dated 28.7.2020 brought under **Articles 22, 23, 2, 10, 19, 20, 21, 22, 23, 24, 27, 40, 47, 50, 159, 232 and 259 of the Constitution**, the petitioners state they are recorded owners of **Parcels No. 1079 and 5165 measuring 5 acres** being part of **Mbwaa adjudication section** formerly **Ruiri Rwarera adjudication section**.

2. It is averred the 20th respondent on 13.2.2016 arbitrarily, illegally, unreasonably and unprocedurally made an administrative decision declaring part of the former Ruiri Rwarera adjudication section a new adjudication section known as Mbwaa 1 without involving the petitioners.

3. The petitioners claim the aforesaid decision shifted part of former Ruiri Rwarera adjudication to the new entity thus depriving them their parcels of land. It is averred it was secretly and fraudulently done with intent to defeat justice regarding the petitioners' parcels of land. Further the petitioners state that in June 2016, the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th and 20th respondents trespassed into their parcels of land, annexed, excised and forcibly subdivided it into 21 portions known as **Parcel No's 1485, 1486, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1590, 1591 and 1592 hereinafter the new parcels** and recorded them in favour of 1st to 19th respondents.

4. The petitioners aver the annexation and forceful subdivision was illegal, unlawful and offended the **Constitution** for lack of notice, public participation, transparency, accountability, was against the rule of law.

5. Additionally the petitioners aver the 1st respondent had previously been charged and convicted for forcible detainer in **Meru Chief Magistrate Criminal Case No. 1089 of 2011, over the subject land hence had no basis in law to be allocated the land in the first instance and transfer it to the 2-19 respondents**.

6. The petitioners further aver efforts to have their land registered during the re-demarcation in the new adjudication section has hit a deadlock hence this constitutional petition.

7. The petitioners' seek for:-

1. Declaration that their rights to own Parcel No. 1079 & 5165 formerly Ruiri Rwarera adjudication which is now Mbwaa I adjudication section have been breached, denied, violated and infringed by the respondents.

2. Declaration that the petitioners are the legal owners of parcels formerly designated as Parcel No's 1079 and 5165 Ruiri Rwarera adjudication section and currently in Mbwaa I adjudication section.

3. An order of certiorari directed to the 20th respondent to remove into this court the 20th respondent's decisions and to quash any subdivisions and the resultant numbers, 1480, 1481, 1482, 1483, 1484, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1590, 1591 and 1592 and the entry therein in the adjudication register for Mbwaa I adjudication section in favour of 1st – 19th respondents.

4. Orders of certiorari to issue to remove into this court and quash the administrative decision by the 20th respondent to hive out Mbwaa I adjudication section from Ruiri Rwarera adjudication section.

5. An order directing the 20th respondent to reinstate to the petitioners land measuring 5 acres designated as Land Parcel No. 1079 and 5165 formerly in Ruiri-Rwarera adjudication section as they were on the ground prior to the illegal and unlawful actions of annexing, subdividing, registering interfering and alienating the petitioners' said land and appropriately record the same in the adjudication register in the names of the petitioners.

6. A judicial review order of prohibition directed against the 20th respondent prohibiting him from alienating, giving away, registering and or moving away from its present location to the petitioners' parcels No. 1079 and 5165 situated in formerly Ruiri Rwarera adjudication section.

7. Judicial review order of prohibition directed against the 20th respondent, its agents, representatives, servants, employees, assignees and or anybody else whatsoever claiming prohibiting it from issuing new land numbers in respect of the aforesaid

land except to the benefit of the petitioners.

IN THE ALTERNATIVE

a. If the court is of the view that Mbwa I adjudication section should remain in place of Ruiru Rwarera adjudication section, the petitioners pray that their parcels No. 1079 and 5165 measuring five (5) acres should be demarcated on the ground in the spot where they have always been and they be issued with new numbers respectively as they were prior to the 1st to 20th respondent's interference.

b. Declaration that the illegal and unlawful alienation and or seizure and subsequent subdivision of Parcel No's 1079 and 5165 into 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1590, 1591 and 1592 by the 20th respondent and allocating them to 1st to 19th respondents is illegal, unlawful, null and void ab initio.

c. Cancellation of land Parcel No's 1480, 1481, 1483, 1484, 1485, 1486, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1590, 1591 and 1592 in Mbwa I adjudication section which are currently allocated and registered in the name of the 1st to 19th respondents.

8. An order for eviction of 1st – 19th respondents from land Parcel No. 1079 and 5165 formerly situated in Ruiru Rwarera adjudication section, ow Mbwa I adjudication section.

9. An order of permanent injunction restraining the 1st – 20th respondents by themselves, their servants, employees, agents, assignees and or anybody else acting on their behalf from howsoever trespassing, developing, constructing, cultivating, alienating, annexing or in any way interfering with the petitioners' use and enjoyment of the suit land.

10. Conservatory orders to protect and preserve the petitioners' Parcel No's 1079 and 5165 formerly Ruiru/Rwarera adjudications section now designated as Land Parcel No's 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1590, 1591, 1592 and any way other portions emanating from the said parcels in Mbwa I adjudication section except to the benefit of the petitioners.

11. Payment of general damages for violation of the petitioners' constitutional rights.

12. Such further or other orders in the interest of justice of the petitioners.

13. Costs.

8. The petition is supported by an affidavit of Johnson Mbaabu Mburugu sworn on 28.7.2020 attaching copies of letters confirming ownership of the two parcels of land dated 8.4.2009 from the 20th respondent, a letter dated 20.12.2012, copy of a sketch map all marked as **JMM 1 (I) (a) (b) and JMM 2 (a)** respectively.

9. Similarly the petitioners has attached a copy of judgment against the 1st respondent in **Meru CMCC Case No. 393/2011** as **JMM 3 (a) and (b)** and **JMM 5-6** and a copy of the defence by 1st, 8th, 15th, 17th, 18th respondents thereof.

10. The petitioners aver that while **Meru CMCC No. 393 of 2011** was transferred to the ELC, orders of maintenance of status quo were made but eventually the file was returned to the Chief Magistrate's court for disposal .

11. In support of the petition the petitioners have attached a copy of the notice establishing Mbwa adjudication section dated 13.2.2016 marked as **JMM "7"**, the withdrawal notice of the Meru **CMCC Suit No. 393 of 2011** dated 5.9.2017 as annexure **JMM "8"**, a demand notice dated 31.5.2016 as annexure marked **JMM "9"**, a sketch map showing the subdivisions in favour of the 1-19 respondents marked **JMM "10"** (a) and (b) dated 19.4.2018, a further demand notice dated 8.8.2016 and 17.9.2016 marked as **JMM "11" (a) JMM "12"** and an affidavit marked as **JMM "13"** respectively.

12. The 1st, 2nd, 3rd, 4th and 5th respondents opposed the petition through a replying affidavit sworn by Murithi Mathew on 9.2.2017.

13. The grounds of opposition are that the petitioners were seeking eviction orders since the respondents were in possession in the lower court; the Court of Appeal had quashed and nullified the former adjudication numbers with effect from 10.10.2014 hence the petitioners alleged **Parcel No's 1079 and 5165** had ceased to exist; that the former Ruiru Rwarera adjudication section was divided into two portions ; the petitioners failed to refer their grievances to the overseer adjudication committee; the confirmation letters attached to the petition are dated 8.4.2009, 6.5.2011 and 20.12.2012 prior to the Court of Appeal consent nullifying the numbers dated 10.10.2014; there were no recent confirmation letters after 2014 from the 20th respondent ; Charles Meru never owned the alleged parcels and the attached maps the and confirmation letters were not genuine; the 1st respondent was a target since he had gathered the land, was elderly and illiterate and the petitioners were powerful, educated and influential persons; due process was followed in establishing the adjudication section; if the petitioners had any justifiable grievance they would have filed A/R objection cases in line with the clause **No. 6 (iii) and (IV) of the consent** ; the petitioners have not illustrated the breach of constitutional rights given they had not impugned the consent order in the lower court and that the petitioners were forum shopping after their application for injunction in the lower court suit was denied hence the petition was an abuse of the court process.

14. The 7th respondent opposed the petition through a replying affidavit sworn on 13.2.2017. He stated he bought Parcel No. 1498 from one Wilson Kinyua Mutai in 2008 and had been in occupation throughout.

15. The 8th respondent opposed the petition vide a replying affidavit sworn on 1.2.2017. He denied he had trespassed into the petitioners' land for he had been in occupation since 1977; had not committed any alleged fraud or subdivision; he was not answerable for the acts of the 19th respondent; the process was open, transparent and was done in line with the land adjudication process.

16. In a rejoinder to the replying affidavits, the 1st petitioner swore another affidavit on 21.2.2019 containing 107 paragraphs. The gist of the reply was that the petitioners were not party to the Court of Appeal consent order; the consent order was not binding over the court and should not be considered in this petition; the consent was alive to the existence of criminal and civil cases pending in other courts hence the need for a settlement; the consent did not state those who had parcels in Ruiru Rwarera adjudication section to lose to trespassers; the petitioners' land was well known on the ground; the consent could not favour the 1st – 8th respondents; the consent recognized the provisions of **Land Adjudication Act** which the 1st – 8th respondents chose not to follow; the consent did not state pending matters in court were to be stopped or withdrawn or struck out; the consent was not conclusive in clause 7 (e); parties could not make a consent contrary to **Articles 27, 40, 50, 64, 159 and 160** of the **Constitution**; the Court of Appeal order was only enforceable to the extent that it did not infringe the rights of the petitioners; the consent was only binding to those parties who subscribed to it and not those parties who were not involved at all; the consent did not stop the petitioners from applying before the court for any constitutional redress and lastly the consent did not oust or usurp the jurisdiction of this court.

17. Further the petitioners aver **Parcel No's 1079 and 5165** did not cease to exist from 10.10.2014 and that even if a new adjudication section was created, their parcels on the ground remained as a permanent fixture; that if the 1st respondent was on the land as alleged since 1976 he should have stated which parcel of land he was allocated prior to 10.10.2014 in the former Ruiru Rwarera adjudication section and which parcel number should be appearing in the sale agreements to the respondents; the genuineness of the confirmation letters had not been denied by the 20th respondent; the overseer land adjudication committee had no legality in law; the petitioners came to court after the 19th respondent failed to grant any status quo and after efforts to intervene as per **JMM 7, 8 (a) and 9** failed and that they could not file any A/R objections.

18. The 20th respondent, has opposed the petition through a replying affidavit of Ali Hussein Chemasuet sworn on 9.2.2018.

19. Whereas he admits that **Parcel No's 1079 and 5165** were formerly in Ruiru Rwarera adjudication section Imenti North, he states in line with the Court of Appeal consent order made on 10.10.2014, a portion of former Ruiru Rwarera adjudication was hived off and became part of the newly created Mbwaai adjudication section which fell within Tigania West District.

20. Secondly the 20th respondent admits whereas the two parcels were in the names of the petitioners, existed both on the ground and on the map, there was nothing to show the 1st to 19th respondents owned any land in the former Ruiru Rwarera adjudication section before Mbwaai adjudication was created. He indeed admitted there were pending cases between the petitioners and some of the respondents in court prior to 10.10.2014.

21. Thirdly, the 20th respondent states there were no A/R objections over **Parcel No's 1079 and 5165** brought by any of the respondent's in the former Ruiru Rwarera adjudication section before it was hived off to create the new adjudication section.

22. Fourthly, the 20th respondent stated after Mbwaai 'A' adjudication was created, it was the demarcation officer, the land adjudication committee and the land adjudication and settlement officer Tigania West District who had the mandate to deal with any disputes arising from the said adjudication section and that as at the time Mbwaai adjudication section was created in which area parcels No's 1079 and 5165 were situated, the petitioners had appointed one Washington Kibiti M'Nairobi to represent their interests and that the said agent was one of the land adjudication committee members in Mbwaai I adjudication section when the process of demarcation was taking place.

23. Further the 20th respondent states the said Washington Kibiti M'Nairobi had raised objections over the petitioners' disputed land being recorded in favour of the 1st to 19th respondents and other third parties who were issued with parcel numbers of the land but was overruled by other members of the adjudication committee. Consequently the demarcation officer had no option but to proceed with the subdivision of the petitioners land.

24. The 20th respondent averred the petitioners reported to his office over their frustrations by the adjudication committee regarding their land to which he advised them to follow the procedures laid down under the Land Adjudication Act **Cap 284**.

25. The petitioners in compliance with the directive of the 20th respondent filed objection committee cases numbers 127/16/2017 and 128/16/2017 but before the objections could be heard, the 20th respondent was served with a court order and the petition herein. He denied that there was any fraud or illegal subdivisions and breach of the petitioners' Constitutional or statutory rights and freedoms as alleged or at all.

26. The 20th respondent further clarified the petitioners were recorded original owners of **Parcel No. 1079 and 5165** formerly in Ruiru Rwarera adjudication section now situated in Mbwaai I adjudication section and urged the court to allow the adjudication process to continue under **Cap 284** and any aggrieved party thereafter would have an opportunity to move to court for redress.

27. Meantime by consent of the parties, a scene visit was undertaken on 2.10.2020 and a report filed by the Deputy Registrar of this court.

28. Following the filing of an amended petition on 28.7.2020, the 1st – 19th respondents filed replying affidavits sworn on 30.3.2021.

29. The 1st respondent stated he had been in occupation of his portion since 1970, drilled a borehole thereon and built residential houses as evidenced by the scene visit report. He denied any alleged trespass in 2011 and stated whatever portion of his land he had sold to 2nd to 19th respondents took place in 1999.
30. The 2nd respondent claimed she was a bonafide purchaser since 2014 from the 1st respondent and had been in occupation of her portion hence denied any alleged trespass.
31. The 3rd respondent stated he owned a portion measuring 50ft by 80ft bought from the 1st respondent in 2010 and had been in occupation thereon.
32. Concerning the 4th – 18th respondents, they stated they were bonafide purchasers from the 1st respondent for value between 2010 – 2014 and have been in occupation of their respective portions. They denied any alleged trespass or breach of the petitioners' rights and freedoms.
33. The 19th respondent denied being related to the respondents or to have had any interest in the suit land since he was neither in actual or legal possession hence he was improperly sued in this petition. He requested to be removed from the proceedings otherwise his rights were being violated.
34. The 1st to 19th respondents rely on the list of documents dated 21.9.2021.
35. With leave of the court the petitioners filed a further affidavit sworn by Johnson Mbaabu Mburugu on 21.10.2021 to counter the 1st – 19th respondents' replying affidavits aforementioned. It is averred that the 1st respondent had not indicated any parcel numbers either issued in the former Ruiru Rwarera adjudication section prior to 2014 or subsequently thereafter after the Mbwa 'A' adjudication section was established and if anything, the 1st respondent only forcibly entered into the suit land in 2011 and purported to subdivide and dispose of the land without any ownership documents hence he had no title which he could pass to the 2nd – 19th respondents.
36. Secondly the petitioners averred the attached sale agreements were an afterthought or forged or backdated and in the alternative made during the pendency of the petition since none were attached to the initial responses to the petition, otherwise the 2nd – 19th respondents were sold non-existent and unregistered land.
37. Additionally, the petitioners attached the register for **Parcel No's 1079 and 5165 formerly Ruiru Rwarera** adjudication section as annexure **JMM "3"** clearly indicating the said parcels existed hence it was not available to the 1st respondent so as to dispose of the 2nd – 19th respondents.
38. The petitioners rely on their complied list of documents dated 21.10.2021 serialized as 1-20, while the 20th – 21st respondents rely on their list of annexures as per the 20th and 21st respondents' replying affidavits dated 9.4.2018 and the 4th respondent's replying affidavit dated 9.2.2017 and the notice dated 29.9.2021.
39. With leave of court and following directions, parties agreed to dispose of the petition by way of written submissions dated 24.10.2021 for the petitioners and the 20th and 21st respondents' submissions dated 25.11.2021. The 1st – 19th respondents did not comply and file their submissions by the set deadline.
40. The petitioners submit there were pending orders of status quo to be maintained in the lower court up to the filing of the petition which was triggered by the events of notice dated 13.2.2016, making the lower court case untenable.
41. They submit they ought to have been notified, consulted and or involved by the 20th and 21st respondents hence were condemned against the rules of natural justice and in violation of their constitutional rights and freedoms.
42. The petitioners take the view the moment their parcels of land were adjudicated prior to 2014 they could not have been subjected to another fresh adjudication process and by so doing it amounted to infringement of their constitutional rights and freedoms.
43. The petitioners submit the earlier adjudication section was never quashed, nullified and that any hiving off a portion as Mbwa 'A' adjudication section from the earlier adjudication section was illegal, and unconstitutional.
44. The petitioners submit efforts to intervene through demand letters to the 20th and 21st respondents were in vain hence the only recourse available to them was to file a petition as clearly indicated by the 20th respondent's letter dated 18.7.2016 which he intentionally and wrongly quoted the wrong parcels of land which came into existence after the illegal subdivisions so as to justify alienations of their land in favour of the 1st – 19th respondents.
45. The petitioners submit the 20th respondent has admitted the petitioners' raised objections and complaints but the same were disregarded and the 20th respondent proceeded to effect the sub-divisions contrary to the law and constitution.
46. The petitioners submit the creation of Mbwa 'A' adjudication section out of the Court of Appeal consent order would not have been intended to lead to loss of land rights prior to and afterwards and that the respondents colluded and or continued to alienate their parcels contrary to law and the **Constitution**.

47. As regards the responses by the 1st – 19th respondents, the petitioners submit the said responses do not dispute that Parcels **No's 1079 and 5165** were initially part of the former Ruiru Rwarera adjudication Section.

48. Further the petitioners submit the 1st respondent has not denied the existence of both civil and criminal cases prior to the alienation and in which there were existing orders and a conviction, but nevertheless proceeded to alienate and or dispose of the land to the 2nd – 18th respondents in flagrant disregard of those orders.

49. With respect to the 20th and 21st respondents' case, the petitioners submit the 2nd – 19th respondents' did not deny the contents of the 20th respondent's affidavit in reply to the petition.

50. The petitioners urged the court to find their title to the suit land as first in time which is superior and valid as admitted by the 20th respondent. For that proposition, the petitioners urge the court to be guided by **Ongeri –vs- Greenbags Holdings & 2 Others [2011] 1 KLR 108.**

51. As regards the prayers sought, the petitioners submit the documentary evidence produced and pleadings hereof support the said prayers. Further the petitioners submit the Court of Appeal consent order did not expect the respondents disregard the law, Constitution, its values and principles.

52. Again it is submitted as at the time the Court of Appeal consent order was being signed, the **Meru Criminal Case No. 1087 of 2011** had already been heard and determined and could not be subjected to paragraph 7 (b) of the consent order.

53. Equally, it is submitted a consent order could not be entered so as to give legality over illegal occupation, dispossession and subsequent alienation of the petitioners' land by the 20th respondent by allocating it to the 1st – 19th respondents.

54. Moreover, the petitioners submit the buck stops with the 20th respondent. He could not pass it over to the officers working under him for he is the one mandated to ensure that they follow the law in the adjudication process especially after the petitioners lodged a complaint to him.

55. The petitioners urge the court to be guided by the holding in **Independent Policing Oversight Authority & Another –vs- Attorney General & Others [2015] 1 E.A 185 on the right to be heard, Muhammed Sheria & 2 Others –vs- Simon Kipkorir Sang & 5 Others eKLR and Kenya Human Rights Commission –vs- Non-Governmental Organization Co-ordination Board [2016] eKLR** on the violation of **Article 47**.

56. On whether the petitioners are entitled to the alternative prayers, since they believe they have proved violation of constitutional rights, they urge the court find they are entitled to compensation based on the holding in **Alex Wainaina T/A John Commercial Agencies [2015] eKLR –vs- Jason Mwangi Wanjihia [2015] eKLR on whether to grant main relief or alternative, Olive Mwhaki Mugenda & Another –vs- Okiya Omtata Okoitii & 4 Others [2016] eKLR and National Bank of Kenya –vs- Nguru Mutonya [2019] eKLR.**

57. In sum the petitioners urge the court to find it has jurisdiction to hear and determine the petition, and have met the test in **Anarita Karimi Njeru –vs- Republic [1976-1979] eKLR, Mumo Matemo –vs- Trusted Society of Human Rights alliance & 5 Others [2013] eKLR, Samson Muriungi Mwirebua –vs- Silas Kimathi Mutonga & another [2019] eKLR.**

58. On the part of the 20th – 21st respondents, Mr. John Kiogo principal litigation counsel submits at time the petitioners stopped the adjudication process, Mbwaa adjudication section was at the stage of hearing the petitioners' objection committee cases hence they are not entitled to Judicial Review orders since this offends **Section 9 (2)** of the **Fair Administrative Actions Act 2015**.

59. The 20th and 21st respondents submit none of the 1st – 19th respondents produced any documents to prove ownership either in the previous adjudication section or in the new Mbwaa adjudication section hence the court should find the 1st respondent to have had no valid title worthy selling, transferring and or adjudicated in his favour.

60. Counsel for the 20th and 21st respondents submits the adjudication process under the new adjudication section has not been completed hence no final orders can issue as prayed save for what already existed before the creation of the new section otherwise the court would be pre-empting the adjudication process contrary to the doctrine of exhaustion.

61. Counsel submits it is not disputed the petitioners had acquired interests in the suit parcels that were already recognized and documented as **Land Parcel No. 1079 and 5165** in the former Ruiru Rwaera adjudication section and that the respondents have not demonstrated any interests in the suit parcels save for sale agreements.

62. Further, counsel submits the Court of Appeal decision in No. 129 of 2005 set out the mandate of the adjudication process and was very instructive.

63. Having gone through the pleadings, affidavits for and against the petition, the list of documents and rival submissions, the issues for determination are:-

1. If the petition has met the constitutional threshold.

2. If the acts of the respondents violated, infringed and or threatened the petitioners constitutional rights and freedoms.

3. If the petitioners are entitle to the prayers sought.

4. If the requests and or prayers by the respondents are merited.

5. What is the order as to costs.

64. It is trite law that parties are bound by their pleadings and that issues flow from pleadings. The jurisdiction of the court to entertain constitutional petitions is to be found under **Article 165 3 (b) of the Constitution**.

65. The petition before the court invokes **Articles 2, 10, 23, 24, 27, 40, 47, 159 (1) 2 (a), (d) & (e), 232 (a), (b), (c), (d), (e), (f), 258 (I) and 259 (I) (a), (b) & (c) and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**.

66. The quoted **Articles** relate to supremacy of the **Constitution** national values and principles of governance, rights and freedoms; application of the bills of rights and freedoms; authority of the court to uphold and enforce the bill of rights, limitation of fundamental rights, equality and freedom from discrimination; protection of right to property; fair administrative action; judicial authority; values and principles of public service; enforcement of this **Constitution** and the interpretation of the **Constitution**.

67. Rule 10 of the 2013 Rules requires the petitioners to state the facts relied upon, constitutional provisions violated; nature of the injury caused or likely to be caused; details regarding any civil or criminal cases involving the petitioners related to the matters in issue in the petition and the reliefs sought.

68. Rule 11 requires a petitioner to annex any documents to rely upon to the supporting affidavit or to the petition if there is no supporting affidavit.

69. Further under **Rule 15**, the Attorney General or any state organ must within 15 days respond to the petition by way of a replying affidavit and annex any document to rely upon to the replying affidavit.

70. The complaint before the court is directed at the 20th and the 21st respondents as state organs who the petitioners have described at paragraph 5 and 6 of the amended petition as established under the **Land Adjudication Act Cap 284 and Article 156 (4) of the Constitution** respectively.

71. The petitioners describe themselves as registered owners of **Parcels No's 1079 and 5165** measuring 5 acres situated within the former Ruiru Rwarera adjudication section currently part of Mbwa I adjudication section which they alleged to have been in exclusive ownership, possession and occupation.

72. The constitutional complaint is that the respondents on 13.3.2016 without notice fraudulently, secretly, arbitrarily, illegally, unprocedurally, unreasonably and against rules of natural justice and the rule of law made an administrative decision to declare part of the former Ruiru Rwarera adjudication section as Mbwa I adjudication section despite prior demarcation in favour of the petitioners as recorded owners of **Parcel No's 1079 and 5165** in Ruiru Rwarera adjudication section. This in effect shifted the parcels of land to the new entity with the intent to defeat justice and deny the petitioners proprietary rights.

73. Further the petitioners aver in June 2016, 1st – 21st respondents without any colour of right, or justification trespassed into their former **Parcel No's 1079 and 5165**, annexed, excised and or forcibly subdivided them into new numbers, and registered them in favour of 1st – 19th respondents now as Mbwa adjudication section contrary to **Constitution**.

74. In paragraph 17 A of the amended petition, the petitioners admit whereas the Mbwa adjudication section may have been declared pursuant to the decision in **Nairobi Court of Appeal Civil Appeal No. 129 of 2005** as deposed in replying affidavit of Ali Hussein Chemasuet, sworn on 9.2.2018, nowhere in the said decision did the court make an order that those persons and particularly the petitioners who owned land in the former Ruiru Rwarera adjudication which was to be hived out should lose their respective portions of land to the respondents.

75. In paragraph 17 B, C and D of the amended petition, the petitioners aver there is no evidence the conditions set out in the Court of Approval consent order were adhered to and took account of the petitioners' constitutional rights as to protection of the right to property; that the **Constitution** does not sanction illegal eviction or unlawful taking away of petitioners' parcel of land and re-allocation of the same to the 1st – 19th respondents by the 20th respondent. Further it is averred the 20th respondent declined contrary to **Article 47 of the Constitution** to hear and determine the petitioners' complaint over arbitrary taking away of their parcels.

76. It is averred the actions of the 20th respondent were not only ultravires but also in breach of the petitioners' legitimate expectation and amounted to denial of their constitutional rights which this court ought to protect under **Articles 22, 23 and 159 of the Constitution**.

77. By a ruling delivered on 26.2.2020 the court found the petition to have met the threshold of a constitutional petition as set out in **Anarita Karimi Njeru –vs- Attorney General [1979] eKLR and Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others [2014] eKLR** hence the first issue is answered in the affirmative.

78. Moving on to the second issue, there is already an admission at paragraphs 17 A, B, C & D of the amended petition that the events leading to the creation of Mbwa adjudication section. The response of the 20th respondent to the petition has also confirmed the establishments of Mbwa 'A' adjudication section was as a result of a Court of Appeal consent order dated 10.10.2014.

79. The bone of contention is whether the petitioners were aware, or notified in the first instance of the impending creation of Mbwaa adjudication section and thereafter the entire adjudication process.

80. Secondly is whether the petitioners have discharged the burden through evidence that the acts of the 20th and 21st respondents were illegal; unprocedural; unreasonable; against Constitutional principles and values; were in secrecy; fraudulent; and amounted to the breach of their Constitutional rights and freedoms as set out in the amended petition.

81. It is trite law that he who alleges must prove as provided under **Section 107 (1) of the Evidence Act**. It falls on the shoulders of the petitioners to prove each of the propositions set out in the petition right from the events leading to the administrative decision to the filing of the petition herein so as to halt the process which was being undertaken by the 20th and 21st respondents.

82. In *Edward Akong'o Oyugi & 2 Others –vs- Attorney General [2019] eKLR* it was held that court's decision cannot be made in factual vacuum, otherwise to do so would be to trivialize the Constitution and the use of the judicial authority and discretion.

83. The starting point by the petitioners is that they were and are registered owners of **Parcel No's 1079 and 5165** measuring 5 acres formerly in Ruiru Rwarera adjudication section which the 20th respondent allegedly unconstitutionally hived off, declared a new adjudication section known as Mbwaa adjudication section and proceeded to allocate the parcels to 1st – 19th respondents hence grossly breaching the petitioner's rights and freedoms.

84. Whereas in the initial petition the petitioners pleaded illegality, arbitrariness and unconstitutionality of the 20th respondent's administrative decision, following the replying affidavit by the 20th respondent, the petitioners changed their position and admitted the existence of the Court of Appeal consent order, which informed and was the bedrock of the acts of the 20th to 21st respondents.

85. The petitioners however though not questioning the constitutional and legal implications of the consent order thereof aver the intention of the consent was not to imply the genuine holders of the land were to lose out to the 1st – 19th respondents in the new adjudication section. They claim there is no evidence that the 20th and 21st respondents adhered to the letter and the spirit of the consent and the Constitution especially regarding the petitioners' rights to land and that the 20th respondent denied them an opportunity to ventilate their complaints hence leaving them with no option but to move to court for a constitutional orders.

86. In my considered view the petitioners appear to be shifting the burden of proof to the 20th and 21st respondents.

87. After the 20th and 21st respondents were served with the petition they pleaded four key defences:-

a. Justification and reasonability of their actions.

b. Legality and fairness.

c. Constitutionality of their actions.

d. Non-exhaustion of internal mechanism under the Land Adjudication Act Cap 284 as read together with Section 9 of the Fair Administrative Action Act 2015

e. Doctrine of ripeness.

88. There is no dispute there was an administrative decision made creating Mbwaa adjudication section. The 20th and 21st respondents aver the notice dated 13th February 2016 was published both under the enabling statute and the Constitution.

89. The petitioners have produced no evidence that the aforesaid notice was contrary to both **Cap 284 and the Constitution**. Looking at the notice, it defines the area to be covered, it states the date, time and place and requests persons with any rights or interests over land in the defined area to lay their claims before the recording officer not later than 23rd February 2016 either in person or through an authorized agent in line with **Section 5 of the Land Adjudication Act**.

90. In the same notice, the 20th and 21st respondents explains the implications of all the pending proceedings in courts of law until the section has become final in all aspects under **Cap 284**.

91. The petitioners have not pleaded particulars of any illegalities, fraud, arbitrariness, unprocedureness and unreasonableness of the aforesaid notice in line with **Order 2 rules 1 – 10 of the Civil Procedure Rules**.

92. Similarly there is no evidence which has been tendered before this court to make and reach a finding that the notice made on 13.2.2016 fails both the statute and Constitutional test.

93. As to whether the petitioners were aware of the declaration and they took advantage of the new developments, the letter of authority dated 9.6.2016 issued to one Washington Kimathi M'Nairobi by the petitioners to stand in for them over Mbwaa adjudication section formerly Ruiru Rwarera adjudication section and which is subsequently confirmed by the said Washington M'Nairobi in an affidavit sworn on 25.7.2020 clearly confirms the petitioners were aware of the declaration or decision. The letter of authority shows the petitioners knew their parcels of land were now falling on the new Mbwaa adjudication section. They actively participated in the process through the

authorized agent and or representative who was also a land committee member in line with **Section 20 of the Land Adjudication Act**.

94. The 20th respondent has also confirmed these facts to the extent that the petitioners lodged A/R objection No's 127/128/16/2017 which would have been determined one way or the other had the petitioners his advice. Instead the petitioners moved to court allegedly claiming their complaints were not factored in, registered and or determined, and hence there was violation of their Constitutional rights and freedoms.

95. In my considered view, the petitioners have deliberately ignored to respond to that piece of evidence since 2018. Strangely, they did not address it in the amended petition nor have they made any submissions over the implications of the pending A/R objections vis a vis the prayers they are seeking before this court.

96. Additionally the petitioners admit they withdrew the pending suits before the Chief Magistrate's Court Meru since it had become untenable after the subject land was declared a new adjudication section.

97. The petitioners aver the parcel numbers they were issued in the former Ruiru Rwarera adjudication section were not vacated by the consent of the Court of Appeal and hence base the entire petition on those parcel numbers.

98. That is far from the truth. The Court of Appeal consent order at clause 6 is clear of what was going to be declared as forming part of the new adjudication section. This is where the petitioners' land is allegedly situated. **Clause 6 (i) and (ii)** of the consent is categorical that the issue of the land adjudication numbers in the former Ruiru Rwarera adjudication section falling under the new adjudication section were to be set aside and those persons who were already settled on the said portions shall have their land adjudicated afresh.

99. The petitioners could only have withdrawn the pending suits after the area was declared an adjudication section because the parcel numbers they were holding were no more and hence the reason they complied the notice dated 13.2.2016 by sending an agent by the name Washington M'Nairobi to take care of their interests/rights. The said parcel numbers in my considered view became invalid by operation of law through the publication of the notice in line with the binding Court of Appeal decision.

100. Consequently, it did not matter at all in law if there existed previous numbers in the former Ruiru Rwarera adjudication sections as far as the new adjudication section was concerned. Under the **Land Adjudication Act**, the process in Mbwaa adjudication section was starting from the scratch with the issuance of new numbers to all persons raising claims and interests. The said former numbers and adjudication registers for the old Ruiru Rwarera could not be imported into and used in the new adjudication section as per **Section 23 of Cap 284**.

101. The petitioners have raised issues as to whether the consent order was followed to the letter by the 20th respondent, if it was constitutional and could be used to sanction illegalities, evictions and denial of their land rights.

102. In other words the petitioners' case is that since they were first in time claiming the suit land once the new adjudication section they should have been prioritized in the issuance of the new parcel numbers. Unfortunately the onus is on the petitioners to prove they were available at the onset and were denied an opportunity to present and stake their claims under the new adjudication section more so now that they had parcel numbers in the defunct Ruiru/Rwarera adjudication section. **Section 13 of the Land Adjudication Act** provides the answer. It is mandatory for whoever claims or has interests to present his stake before the recording officer and point out his boundaries.

103. The consent was clear that there would be public participation and publication of the exercise in various ways. The petitioners have not brought any evidence that there was no publication or publicity of the exercise. Instead they have alleged the exercise was done in secrecy and without notice. My considered view and finding is that that allegation is not factual and lacks merits. The reason is that the petitioners authorized agent was not only a close relative to the petitioners but also a member of the land adjudication committee right from the inception. He was therefore a confidant of the petitioners and a trusted one to an extent that he was given the mandate to lodge A/R objections which are still pending determination. He was also privy to the old parcel numbers in former Ruiru Rwarera adjudication as well as a resident of the area in question. One would therefore be expected to have kept his principal updated of the day to day happenings during the adjudication process.

104. The petitioners cannot therefore deny they were not privy to the happenings yet they had a representative on the ground since issuing him with an authority to act on their behalf in June 2016 whole the process was underway.

105. Once the notice was published and parties given timeframes within which to lodge their claims, the process now fell under the **Land Adjudication Act** and all persons had the obligation to adhere to the processes and procedures set out under the **Act**.

106. The ascertainment of interests and rights is undertaken through various processes. This includes but are not limited to committee cases, arbitration board, adjudication register, objections, appeal to the Minister and last not the least judicial review proceedings and or constitutional petitions to the Environment and Land Court.

107. Under **Section 9 of the Fair Administrative Action Act**, a court may only admit a judicial review or a constitutional petition questioning an administrative action where there are exceptional circumstances why a party has not resorted to and exhausted all available remedies under that written law.

108. The petitioners lodged A/R objections which are still pending determination. The basis of the A/R objections and the grounds thereof have not been disclosed at all. The court therefore does not know if they are any different from the grounds raised in this petition. The petitioners have deliberately withheld that information and especially the fact that they have a pending A/R objections. Moreover, the petitioners are the ones obliged to demonstrate there are exceptional circumstances why this court should determine the issues in the petition instead of the process and systems set out under **Sections 6, 8, 9, 10, 12, 13, 15, 17, 18, 19, 20, 21, 22, 26 and 27** of the **Land Adjudication Act**.

109. **Article 159 2 (c)** under which this petition is brought mandates this court to encourage and promote alternative disputes resolutions mechanisms, such as those set out by the **Land Adjudication Act**.

110. In **Gabriel Mutava & 2 Others –vs- Kenya Ports Authority & Another [2016] eKLR**, the court held where there exists other sufficient and adequate avenues to resolve a dispute, a party ought not trivialize the jurisdiction of a constitutional court by bringing actions that could very well and effectively be dealt with in that other forum.

111. In **Communications Commission of Kenya & 5 Others –vs- Royal Media Services & 5 Others [2014] eKLR** the court encouraged the doctrine of constitutional avoidance if and where there are alternative ways of determining the issues.

112. In my view the petitioners are yet to be issued with any parcel numbers under the **Land Adjudication Act** so as to get a semblance of ascertainable interests and rights over the alleged land so as to set a motion towards registrable and protectable rights under **Article 40 of the Constitution**.

113. Until the petitioners subject themselves to that process and acquire new numbers on interests and rights on the alleged land, it would be premature and against the doctrine of precedent for this court to ignore a consent order made by the Court of Appeal whose implications was to declare **Parcel No's 1059 and 5165** invalid. The said consent order has not been appealed against, reviewed or set aside, on an application by the petitioners if at all they were aggrieved by it. See **Flora Wasike –vs- Destimo Wamboke [1988] 1 KAR 625 and Brooke Bond Leibig (T) Ltd –vs- Mallya [1975] E.A.**

114. With greatest respect to the parties therefore, there cannot be two ways about the consent order binding this court as submitted by Mr. J.M. Kiongo the principal litigation counsel on behalf of the 20th and 21st respondents to find the petitioners' rights and interests on the suit parcels recognized and documented as land **Parcels No.'s 1079 and 5165** and which were not objected to by 1st – 19th respondents. Those parcel of numbers no longer exist in law in view of the consent dated 24.9.2014 which the Hon. Attorney General appended a signature thereto. The Hon. Attorney General cannot walk away from that consent and its implications.

115. There is no evidence which has been brought by the petitioners to demonstrate that the 20th respondent as a matter of fact and law has issued new numbers as pleaded herein in favour of the 1st – 19th respondents. This court cannot be asked to make declarations based on non-factual evidence. The petitioners had the duty to bring before this court, proceedings and or records to show there now exists Parcel No's 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1590, 1591 and 1592 Mbwa I adjudication section issued by the 20th respondent in favour of 1st – 19th respondents. Annexures marked JMM 10 (a) and (b) have not been authenticated or certified by the 20th respondent. The 20th and 21st respondents did not produce any such records. The court cannot therefore quash a decision or proceedings which are not before it as required under **Order 53 Rule 7** of the **Civil Procedure Rules**.

116. This court cannot therefore base its findings in a constitutional petition on factual vacuum and be expected to issue orders under **Article 23 (3)** of the **Constitution** where there is no nexus between the facts, evidence and the prayers sought.

117. The intention of the parties and Court of Appeal consent order were clear and binding. This court will be abdicating its constitutional duties and obligations to hold otherwise where the consent is binding on it and a notification was issued in line with **Section 5 of the land Adjudication Act**.

118. In sum my finding is the petition herein lacks merit and is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF JANUARY, 2022

In presence of:

Gitonga for petitioners

Miss Mwiti for Mutuma for 1st to 19th respondents

Kieti for 20th and 21st respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE