



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC PETITION NO. 5 OF 2019**

**IN THE MATTER OF**

**ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER**

**THE BILL OF RIGHTS OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF**

**ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER A**

**RTICLES 19, 20, 21, 22 (1), (2), (4), 23, 24, 28, 29(C), 40, 43(B) AND 63 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF**

**ARTICLES 2 (5), (6) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF**

**ARTICLES 1, 8(2) (B), 9, 10, 18, 26, 28, 33, 37, 42, 43 AND 46 OF THE UNITED NATIONS DECLARATION ON**

**THE RIGHTS OF INDIGENOUS PEOPLE (UNDRIP)**

**AND**

**IN THE MATTER OF**

**HISTORICAL AND CURRENT INFRINGEMENT OF THE CULTURAL AND ECONOMIC**

**RIGHTS OF THE MUTHARA, AMUTHUMBA/NGAREMARA PASTORISTS**

**AS INDIGENOUS PEOPLE WITHIN THE MEANING OF THE UNITED**

**NATIONS DECLARATION ON THE RIGHTS**

**OF INDIGENOUS PEOPLE (UNDRIP)**

**AND**

**IN THE MATTER OF**

**THE COMMUNITY LAND ACT NO. 27 OF 2016**

**AND**

**IN THE MATTER OF**

**LAND (GROUP REPRESENTATIVES) ACT, 1968**

**AND**

**IN THE MATTER OF**

**LAND ADJUDICATION ACT**

**AND**

**IN THE MATTER OF**

**PROTECTION FROM DEPRIVATION OF PROPERTY AND THEIR ANCESTRAL LAND**

**BETWEEN**

**MUTHARA NJURI NCHEKE**

**COUNCIL OF ELDERS ..... 1<sup>ST</sup> PETITIONER**

**THE AMUTHUMBA/NGAREMARA PASTORALISTS**

**COMMUNITY BASED ORGANIZATION ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE COMMITTEE OF NGAREMARA/GAMBELLA ADJUDICATION SECTION**

**THRO’**

**THE CHAIRMAN CYPRIAN KAUME MUKIRA ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND ADJUDICATION &**

**SETTLEMENT OFFICER TIGANIA**

**EAST SUB-COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**A. THE PETITION**

1. Through a petition dated 8.4.2019, the petitioners describing themselves as a community based organization and Muthara Njuri Ncheke council of elders filed the petition for and on behalf of residents and indigenous people of Muthara, Amuthumba and Ngaremara comprised of over 10,000 persons who are said to be in communal occupation of the suit land, initially, known as Northern Grazing area of Tigania East Sub-County, Meru County.
2. The petitioners aver their ranching area measures approximately 43 Ha. neighbouring Ngaremara/Gambella adjudication section, situated in North of Isiolo-Garbatula road stretching from Waso-Nyiru river to North Igembe all the way to Igembe East and Samburu County to the North East which they have occupied and settled since 1950.
3. It is averred on 11.3.2016, Tigania East Sub-County land adjudication and settlement officer declared Ngaremara/Gambella as an adjudication section pursuant to **Section 5 of the Land Adjudication Act Cap 284** in response to a petition and consultations with the locals and the relevant government departments including the sending of a world view imagery of the area to the Director of survey as per the approval mapped coordinates which did not include the ranching area within Muthara/Amuthumba Ngaremara ranching area.
4. The petitioners aver prior to the declaration of the adjudication section, there was public participation and transparency, the District land adjudication and settlement officer wrote to the area chiefs, publicized the declaration and the description of the boundaries for the proposed adjudication area. A public baraza was eventually held in the presence of District County Commissioner and ministry officials where it was

unanimously agreed the declaration be made and the process to commence with speed.

5. Following the meeting, the 2<sup>nd</sup> respondent advertised widely for locals to turn up to elect committee members for all the units of that area in consultation with the 1<sup>st</sup> respondent whereby one Cyprian Kaume Mukira was elected the chairman of the committee on 11.3.2016 leading to the commencement of the exercise in 2017.

6. The petitioners aver whereas the adjudication process that was approved and gazetted was strictly for Ngaremara/Gambella adjudication section as per the world view imagery and survey map coordinates the 1<sup>st</sup> and 2<sup>nd</sup> respondents without any colour of right, public participation and in blatant breach of the Constitution and Land Law unilaterally extended the adjudication process to include the ranching area and allegedly started the demarcation of an ungazetted area by dishing out demarcation portions to foreigners and their cronies to the detriment of the petitioners and bonafide residents of the said area.

7. The petitioners aver as indigenous people, they are entitled to their constitutional rights and that by extending the adjudication area to include the ranching area which they commonly occupy without first establishing an adjudication section and having public participation was tantamount to alienating their indigenous parcels of land and disfranchising them as a community contrary to their fundamental rights and freedoms.

8. Further, it is averred by using an illegal adjudication process, the respondents shall deprive the legitimate community members of their land by taking dominion of the same then convert in the land for use so that they can sell it to the highest bidder and pocket the proceeds to the detriment of the petitioners who shall be left landless.

9. The petitioners aver the ranching area has been earmarked as the portion where the lucrative LAPSET corridor traverses through hence the 1<sup>st</sup> and 2<sup>nd</sup> respondents are keen on shortchanging the petitioners by alienating the said land from them so that they can unprocedurally and hurriedly dish out title deeds of the said land to cronies and other cartels who will gain eligibility to claim compensation under the compulsory compensation scheme.

10. The petitioners aver whereas the journey to issuance of title deeds for the legitimate residents of the ranching area has been long overdue, bumpy, long and tasking, their families in occupation since 1950's have been lobbying for it but the respondents are keen on hijacking the process through an illegal adjudication process by demarcating and subdividing their land and selling it to strangers who have invaded the area to the detriment of the petitioners who are the rightful owners.

11. The petitioners aver the extension of the declared adjudication area to cover the ranching area is illegal, ultra vires, void **ab initio** in that: there was no notice to establish it given or gazetted; no definition of the area was done, in line with the law; there has been no appointment of committee members by the petitioners as per **Article 10 of the Constitution** and the **Act**; no public participation by way of barazas to endorse the adjudication process; the community has been sidelined; the 2<sup>nd</sup> respondent was specifically constituted for the area without the adjudication section and cannot extend their mandate to the region covering the ranching area for lack of public participation involving the petitioners.

12. The petitioners therefore aver they are entitled to bring the petition under **Article 22(2) (d)** and insist that their rights and freedoms under **Articles 19(1) and (2), 27, 28, 40 and 43** are being violated, threatened or infringed despite the fact that they are pastoralists and in total disregard of clear provisions of **Articles 61(1), 63(1), 63(2) of the Constitution** as regards community land more so where they initially had a lease in the name of the Trustees of Muthara/Amuthumba/Ngaremara Pastoralists issued by the defunct County Council, hence the land remains community land traditionally occupied by pastoralists and or reserved for grazing purposes.

## **B. THE PRAYERS**

13. The positioners therefore seek for:

**a) Declaration that the area as described is distinct and separate from the Ngaremara' Gambella adjudication section which is community land exclusively reserved for the petitioners under Article 63 of the Constitution.**

**b) Declaration that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents of extending the declared adjudication process to cover the ranching area as described above was fraudulent, illegal, ultra vires, null, void, unconstitutional and infringed the rights and freedoms of the petitioners.**

**c) Nullification and cancellation of any adjudication process, demarcation, subdivision of the parcels of land within the ranching area as described at paragraphs 2, 3 and 4 of the petition and an order that fresh adjudication process to be commenced in line with the law.**

14. The petition is supported by an affidavit sworn by Justus Mugaa M'Impwi attaching a certificate of registration and the constitution of the 2<sup>nd</sup> petitioner, limited liability certificate, list of community members, letter of allotment dated 1.3.1970, copy of a notice of declaration of an adjudication area, copy of the approved map, copy of an appointment letter for committee members marked as annexures **JMM )1) (a) (b), JMM (2), (3), (4) and (5)** respectively.

15. The deponent adds that any inclusion of the said area to the actual mapping was a creature of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as an act of impunity and was contrary to **Article 10 (2), 60 (1), 63 (3), 189 (1) and part II of the 4<sup>th</sup> Schedule to the Constitution** as read together with **Section 3 of the Cap 284 and Section 8 of the Community Land Act 2015.**

16. Further, the petition is supported by the 1<sup>st</sup> petitioner's affidavit sworn on the 8.4.2019 attaching a copy of an appointment of Cyprian Kaume Mukira as the chairman of the 1<sup>st</sup> respondent and a bundle of letters, minute marked as **annextures DM 1** and **DM 2** respectively.

17. By an application dated 8.4.2019, the petitioners sought for conservatory orders leading to a ruling delivered on 24.5.2019 in which the court held that the adjudication process should proceed only in respect of the areas covered by the initial gazette notice. The court issued a conservatory order stopping the adjudication process over areas added in the corrigendum notice dated 29.6.2018 until the final determination of the petition.

18. Through a ruling dated 30.4.2020, Mula community were allowed to join as an interested party to the petition.

19. The respondents were duly served with the petition and an affidavit of service duly filed on 6.5.2019.

### **C. RESPONSES BY THE RESPONDENTS**

20. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 3.5.2019, a further supplementary affidavit sworn on 21.5.2019.

21. The 1<sup>st</sup> respondent admits he was duly elected by the public in an open, transparent and credible process but was allegedly sacked by word of mouth by the 2<sup>nd</sup> respondent for raising illegalities, irregularities and malpractices in the adjudication process vide his letter attached as **annexture "KM1"**.

22. Further, the 1<sup>st</sup> respondent averred that their mandate was to cover the area as per the gazette notice but not beyond into the disputed area which was not initially mapped for the purposes of adjudication. He avers the committee was working well until another District land adjudication & settlement officer was posted who allegedly made an addendum and elected a parallel adjudication committee to undertake the adjudication process without any public participation.

23. Further, it is averred in March 2019, some 25 land surveyors came to complete the process but were re-routed to work on the ungazetted area known as Isiolohifer which was part of the community land in Tigania East District previously used as a grazing ground by the community.

24. The 1<sup>st</sup> respondent averred he was allegedly sacked through an instigation by the District land adjudication & settlement officer the 2<sup>nd</sup> respondent and maintained that 9901 of the allottees in the ungazetted area were strangers and speculators and despite protests and advise, the 4<sup>th</sup> respondent had allegedly been undertaking the work irregularly and unlawfully to an extent of sidelining him and making the work difficult.

25. In the further replying affidavit, the 1<sup>st</sup> respondent admits the area was declared an adjudication by notice dated 11.3.2016 and that the corrigendum could not validate illegalities to cover an area initially gazetted vide **No. 43 of 30.6.2000** as Nyambene National Conservancy.

26. The 2<sup>nd</sup> respondent opposed the petition through an affidavit sworn by Eliab Kamaru filed on 7.5.2019 annexing two notices as **EMK "1"** and **EMK "2"** for 11.3.2016 and 29.6.2019 respectively.

27. The 2<sup>nd</sup> respondent stated there was intention to delay the adjudication process by denying other communities resident in the adjudication section an opportunity to have their land adjudicated and to serve selfish interests of the alleged petitioners and the 1<sup>st</sup> respondent who were not the sole residents in the suit land.

28. He stated there was no defined area known as Muthara, Amuthumba/Ngaremara ranching with distinct, boundaries and beacons and occupied by the petitioners.

29. He stated the annexures to the petition as **JMM "6"** are all extracts from a topographical sheet which did not specify the area of their interest, and that the land adjudication office and the County Government of Meru had held various consultative meetings and public barazas to sensitize the locals culminating in the appointment of an all-inclusive land adjudication committee who were duly appointed by the land adjudication officer. He attached **annextures marked EMK 3, 4(a), (b), (c) and 5** as a demonstration that there was public participation.

30. Further, the 2<sup>nd</sup> respondent averred the 1<sup>st</sup> respondent had not provided any list of the alleged foreigners and cronies benefiting from the adjudication section at the expense of the alleged bonafide residents of the area.

31. The 2<sup>nd</sup> respondent went on to state that the adjudication process provided every person an opportunity to have his or her rights and interests on land ascertained and that any aggrieved party had an opportunity to file a claim which would be addressed at any of the four tribunal/stages as provided by the **Act**; which the petitioners had deliberately ignored and or avoided but were now seeking that the court stops or halts the noble process even when no provision of the law or constitution had been flouted or breached in the process of safeguarding the interests in property of all occupants/respondents that will be defined with the process of registration that follows thereafter.

32. The 1<sup>st</sup> respondent stated the adjudication process contrary to the petitioner's claim out of ignorance did not intend to deprive the community of their land and urged the court to find the petition contradictory, baseless and made out of ignorance of the law, which defines the role and powers of each of the officer under **Cap 284**.

33. The 2<sup>nd</sup> respondent further stated the establishment of an adjudication section, the description of its boundaries, the issuance of notices

for the filing of petition, objections and or cases were functions of the 2<sup>nd</sup> respondent and not of the 1<sup>st</sup> respondent as alleged by the petitioners and that the land adjudication officer had already discharged/fulfilled those functions prior to the announcement of the demarcation of land in that adjudication section and that the process of appointing land adjudication committee was clearly addressed to the satisfaction of the residents in line with **Section 10 of Land Adjudication Act** through the office of District County Commissioner and the County Government who held regular public meetings for the sensitization and updates on emerging issues as per the annexure he produced marked as **EMK “6”**.

34. Additionally, the 2<sup>nd</sup> respondent averred the 1<sup>st</sup> respondent ceased being a member and chairman on 4.3.2019 since he was working in cahoots with the petitioners to derail, instigate and scuttle or disrupt the process as per his **annexures marked EMK “7”**.

35. Lastly, the 2<sup>nd</sup> respondent averred the ministry of land had endeavored to hasten the adjudication process so as to issue title deeds by December 2019 hence, the petition would gravely breach the community rights in adjudication contrary to **Articles 20, 27, 28, 40, 53, 56 and 57 of the Constitution**.

#### **D. WRITTEN SUBMISSIONS**

36. With leave of court, parties were directed to file written submission by 30.1.2022.

37. The petitioners submitted the issues for determination were whether the dispute at hand ought to be resolved using the internal mechanism set out in the **Land Adjudication Act** and secondly, whether the corrigendum adjudication notice issued on 29.6.2018 was constitutionally and or statutory valid.

38. The petitioners urged the court to be guided by the ruling dated 24.5.2019 and find that the process was illegitimate and hence the dispute herein was falling for determination before this court and not through **Cap 284 Laws of Kenya**.

39. Secondly, on the issue of the corrigendum dated 29.6.2018 and coming two years after the demarcation notice, the court was urged to find the same irregular as defined by the **Black Laws Dictionary**.

40. Further, the petitioners averred the 2<sup>nd</sup> respondent through his replying affidavit was under an obligation to demonstrate to this court what error needed to be corrected in the earlier notice dated 21.3.2016. In their submissions, the petitioners took the view the corrigendum was done clandestinely, with no consultations and was a conspiracy between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents so as to defeat the rights and freedoms of the petitioners with regard to their parcels of land in the area.

41. The petitioners urged the court to find the replying affidavits of the 1<sup>st</sup> respondent valid and a clear demonstration that the community was not aware of the corrigendum notice, it was not issued without consultation and the committee appointed to undertake the exercise in furtherance of the addendum was not done in open and transparent manner as envisaged by **Section 5 of the Land Adjudication Act and Article 10 of the Constitution**.

42. Further, it was submitted the corrigendum did not define the area to be covered in line with **Section 5 (2) (a) of the Land Adjudication Act**; that the annexures to the 2<sup>nd</sup> respondent's replying affidavit referred to the notice dated 11.3.2016 and yet none for the notice dated 29.6.2018. In any event all of them make reference to a section known as Ngaremara/Gambella adjudication section. Reliance was placed on **Kenya Human Rights Commission –vs- Attorney General & Another Nairobi Petition 87 of 2017, Robert N. Gakuru & Others –vs- Kiambu County Government & 3 Others [2017] eKLR**.

43. The petitioners submit that they had established a clear breach of their constitutional rights on public participation, lack of gazettment and non-adherence to national values and principles of governance.

#### **E. ISSUES FOR DETERMINATION**

44. The respondent's did not file any written submissions within the timelines given by the court.

45. The issues commending themselves for the determination by the court are:-

**1) If the corrigendum was published in line with the law and the Constitution.**

**2) If the publication and gazettment of (a) above involved the petitioners herein and other members of public with rights and interests on land over the targeted area.**

**3) If the merger of the new adjudication section with the existing adjudication section infringed on the rights and freedoms of the petitioners.**

**4) Whether the petitioners have proved any breach of their constitutional rights and freedoms so as to be entitled to any constitutional reliefs.**

**5) What is the order to costs.**

#### **F. CONSTITUTIONAL THRESHOLD**

46. A party seeking the enforcement for constitutional rights and freedoms which have been threatened, infringed and or breached has to comply with the provisions of the **Constitution of Kenya (Protection and Enforcement of Fundamental Rights and Freedoms) Practice Directions 2013** hereinafter the **(Rules)** which were promulgated in line with **Article 22 (3) of the Constitution of Kenya**.

47. Under **Rule 10** thereof, a constitutional petition must describe the particulars of the parties and in which capacity he or she brings the petition describe the facts, details and nature of the alleged infringed rights and freedoms, the reliefs sought and particulars of any existing or past civil or criminal cases touching on the issues and the parties.

48. **Article 22 (4) of the Constitution** has a rider however that the absence of rules of procedure expected in **Article 22 (3)** shall not limit the right of any person(s) to commence court proceedings under the Article and to have the matter heard and determined including the entertainment of proceedings brought through informal documentation.

49. As regards capacity, **Article 22 (3) of the Constitution** allows a party approaching the court to act in person or on behalf of or in the interest of a group or class of persons in which he is a member or in the public interest.

50. Similarly, under **Article 258**, every court proceedings a person claiming that the Constitution had been contravened or was threatened with contravention either in person or on behalf of another person or as a member of a group, class of persons or an association or in the public interest. May bring forth and lodge such proceedings.

51. In this petition, the petitioners have brought the petition on their own behalf and on behalf of members and residents of the area known as the ranching area situated in Muthara, Amuthumba/Mula location of Tigania East Meru County who occupy a communal land. They allege the process of adjudication of their parcels was being undertaken in contravention of the Constitution and the statute for lack of public participation and in disregard to their rights to own community land.

52. It is my finding the petitioners have the capacity and fit within the constitutional parameters aforesaid hence the petition is brought by persons clothed with capacity and who have demonstrated both private as well as public interest to the suit land.

53. Turning to the other procedural requirements, the petition was based on **Articles 10, 20, 21, 22, 23, 24, 35, 37, 40, 42, 43, 47, 60, 61, 63, 64, 68 and 69 of the Constitution**. The petitioners have specified the particular **Articles of the Constitution** allegedly breached, or threatened or likely to be infringed by the respondents in their impugned acts of omissions and commission.

54. In *Anarita Karimi Njeru –vs- Attorney General [1979] eKLR*, the court held a party seeking to enforce threatened or infringed constitutional rights and freedoms must plead with specificity and precision the particular constitutional claim(s), question(s) or controversies in issue.

55. The petitioners claim is that by notice dated 11.3.2016 for Ngaremara/Gambella adjudication section over Gambella area and its sub-units, the grazing area known as Muthara region was never included. However, it is averred through an alleged corrigendum dated 29.6.2018, the 1<sup>st</sup> and 2<sup>nd</sup> respondents purportedly tried to include the grazing area which had initially been left out as part of Ngaremara/Gambella adjudication section without consultation or public participation yet the land was commonly owned by the community.

#### **G. THE LAW ON ESTABLISHMENT OF AN ADJUDICATION SECTION**

56. The process of land adjudication in a given area commences with the declaration of an adjudication section under **Section 3 of the Land Adjudication Act Cap 284** and **Section 3 and 7 of the Land Consolidation Act** respectively.

57. Under the two **Acts**, the power to declare an adjudication section reposes with the Minister who by an order can direct the two Acts to apply to such a defined area to which it relates either by description or by reference to a plan or both.

58. Under **Section 4 of Land Adjudication Act** and **6 of Land Consolidation Act**, the Minister upon making the **Order** and governed by **Sections 3 and 7**, shall appoint an adjudication officer for the adjudication area with mandate to appoint demarcation officers and recording officers to assist him to carry out the adjudication, demarcation and registration of rights and interests on land in the adjudication area.

59. The powers of an adjudication officer include to publish by notice the establishment of the adjudication section with the adjudication area for each section in a language (3) understood by the persons affected thereby, defining as clearly as possible the area of adjudication section, declaring the interests in land to be ascertained and recorded in accordance with the **Act**, indicating the timelines for making claims and duties of the claimants in identifying their land and boundaries.

60. The power of the adjudication officer also includes the exercise of general control and supervision over the adjudication and registration of the adjudication area and may issue such general and special directions.

61. As regards the **Land Adjudication Act**, the adjudication officer has the mandate to, in consultation with the District Commissioner or Regional government agent to push and publicize the notice or exercise through public barazas and the appointment of an adjudication committee, arbitration board, each with an executive officer for each adjudication section.

62. The roles and duties of an adjudication committee are inter alia to adjudicate upon and decide in accordance with recognized customary law any question(s) referred to it by the demarcation officer or the recording officer, advise the adjudication officer on any question(s) of recognized customary law as to which he has sought its guidelines, safeguard the interests of absent persons and persons under disability, bring to the attention of officers engaged in the adjudication any interest in respect of which any reasons, no claim has been made and lastly assist generally in the adjudication section.

63. The decisions of the adjudication committee are that if it is unable to reach a decision on a matter before it, to refer the matter to the arbitration board, the adjudication officer may also reconsider any decision made by the committee; any aggrieved party to the adjudication committee may complain to the executive officer in 14 days.

64. As regards the arbitration board, its functions are to hear all complaints referred to it or made from the decisions of the adjudication committee. Any person(s) claiming any right or interest in any land within an adjudication section has rights to attend such committee and arbitration board meetings.

65. The power to prepare an adjudication record reposes with the recording officer if he is satisfied any person has, under recognized customary law expressed his rights in or over the land, which should be recognized as ownership and shall determine that person to be the owner of that land provided. Under **Section 23 (2) of Land Adjudication Act** the recording officer shall determine that if the land adjoins land of which a group is determined under paragraph (b), the recording officer shall determine that group to be the owner of all that land; that any group has under recognized customary law, exercised rights or over land which should be recognized as ownership, shall determine that group to be the owner of that land and provided that if land has been set apart under the constitution, shall determine the person in whom the land is vested to be the owner of the land set apart. (d) If land is free from any private rights, or all private rights, on or over the land have been relinquished in favour of the County government shall determine the County government to be the owner of the land and (e) any person or group is entitled to any interest in land not amounting to ownership, including any lease, right of occupation, charge or other encumbrance, whether by virtue of recognized customary law or otherwise, shall determine the nature, incidents and extent of the right to enable it to be recorded in the name of the person or group entitled to the benefit of it.

66. The adjudication record therefore contains information on the number of parcel on the demarcation map and its approximated area, name and description of the owner with any restriction thereof, where land is set apart, the year and number of gazette notice, the purpose for which it was set apart, particulars of such right, owner under disability and the date the form was completed.

67. Where there are two or more owners, the recording officer shall determine and record whether they own or are entitled to the land jointly or in common and each of their shares.

68. As regards a group, recorded as the owner of land or entitled to interest not amounting to ownership, the adjudication officer shall cause the group to be advised to apply for group representations to be incorporated under the **(Land (Group Representatives Act) (Cap 287)** now repealed by **the Community Land Act** and cause the recording officer to record that the group has been so advised and notify the Registrar of Group Representatives that the group has been so advised.

69. Once the form has been completed, it shall be signed by the chairman and the executive officer and the committees and by the owner of each interest in the parcel or his authorized agent and the signature of the owner shall be witnessed. After the form has been signed, no alterations shall be made in it except as provided by **Section 27 (1) and 29 (3) of the Act**.

70. Ideally, the demarcation map and the adjudication record forms, what is commonly known as the adjudication register, which once complete and certified by the adjudication officer is delivered in duplicate to the Director of Land Adjudication at a convenient place and a notice given for its completion and inspection at a place during a period of 60 days from the date of notice.

71. Any party aggrieved by the adjudication register and considering it incorrect or incompetent has a right to object to the adjudication officer in writing which objection is determined by the adjudication officer further consultation and inquiries. Once the 60 days are over, a no objection register is prepared by the adjudication officer and delivered to the Director of Land Adjudication who shall certify thereof and on the duplicate adjudication register that the adjudication of the land has become final and forward the no objection register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under **Section 28**.

72. Under **Section 27**, the adjudication officer may, alter the adjudication register to confirm any determination of objection under **Section 26** and when all objections have been determined and the time for appeal under **Section 29** expired, the adjudication officer shall send the adjudication register to the Director together with particulars of all determined objections.

73. Once the Chief Land Registrar receives the adjudication register, he shall cause the registration in accordance with the registration register except where there is a pending Minister's appeal, in which case a restriction is placed until the appeal is heard and determined under **Section 29 of the Act**.

74. Under **Section 31 of the Act**, whenever a notice is to be given under the Act, it is to be given and the adjudication officer shall publish it at the office of the Provincial Commissioner of the Province concerned, office of the District Commissioner of the District concerned and elsewhere and in such a manner as he considers appropriate. The District Commissioner shall cause the purport of every notice to be published at barazas through the area concerned and as such other ways and on such other occasions as after consultation with the adjudication officer he considers appropriate.

75. Further, the notices shall be published and the purported promulgated in such language as the District Commissioner considers most likely to be understood by the persons whom they affect.

76. In line with **Section 35 of the Act**, the Minister published the **Land Adjudication Regulations 1970** regarding the manner of assessing costs of demarcation of boundaries, appeals to the Minister, adjudication fees, committee and board hearing fees, allowance for the members for committee, allowances for board members, appointment of interpreters and assessors.

## **H. FINDINGS**

77. In this petition, the petitioners are not complaining over the publication of the notice issued in 2013, but the corrigendum hereof in the

basis that it was unconstitutional and ultra vires.

78. Further, they complain that the respondents have embarked on the demarcation process in the added area in dispute contrary to the Constitution and with the aim of denying the rightful owners their constitutional rights and freedoms.

79. **Article 10 of the Constitution** sets out the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever they apply or interpret, enact or apply or makes, or implements government policies and law. Among the values is the participation of the people popularly known as public participation as one of the ideals and aspiration of our democratic cultures as a nation. If not attained, individuals may challenge any action for inadequacy of public participation.

80. The nature, contents, standards and extent of public participation has been a subject of litigation. In *Coalition for Reform & Democracy & 2 Others –vs- Republic & 10 Others [2015] eKLR*, the court held the test of what is public participation. Its nature and degree is what is reasonable in a given case depending on the nature importance and intensity of the activity while in *Abdi Ahmed Abdi –vs- Cabinet Secretary for Interior & Coordination & National Government and 7 Others [2017] eKLR*, the court's view was public participation calls for innovation and malleability depending on the nature of the subject matter.

81. Both parties in this petition are in agreement that prior to 11.3.2016, the issue of Ngaremara adjudication section had been extensively discussed through public rallies among other ways and means.

82. Subsequent to the publication, it is also not disputed that the land adjudication committee was constituted. The 1<sup>st</sup> respondent has admitted his replying affidavit that all was going on well until the issue of the corrigendum came up in which 2<sup>nd</sup> respondent without consultation and justification allegedly created the adjudication section, unprocedurally established a parallel adjudication committee, and board without involving the 1<sup>st</sup> respondent and the petitioners.

83. Further, the petitioners aver the area known as Muthara remains communal land which falls under **Sections 8 and 48 of the Community Land Act** which even if it was to be declared an adjudication section, the procedure of land adjudication would be different from the **Land Adjudication Act** since it was initially being held by the defunct County Council of Nyambene now County Government of Meru in trust for the community. As indicated above, **Section 23 (2) of the Land Adjudication Act** is clear on the procedure to be undertaken where a community or group land falls under any adjudication section.

84. The commencement of the **Community Land Act** started on 21.9.2016 after it was assented on 31.8.2016.

85. In *County Government of Meru & Another –vs- District Land Adjudication & Settlement Officer Tigania East Sub-County & 18 Others [2018] eKLR*, this court held that at the time of the publication of the notice dated 11.3.2013, no land had been declared a community land by an **Act of Parliament** in the adjudication area and that the **Community Land Act** could not act retrospectively and hence the laws applicable at the time the declaration was made was **Cap 283 and 284** respectively which law does not conflict with the **Land Adjudication Act** and **Land Consolidation Act**. In my view therefore given the contents of **Section 23 (3) of the Land Adjudication Act** and the **Community Land Act**, the two are to be purposely interpreted as complimenting each other. See *County Government of Kiambu –vs- The Senate & Others [2017] eKLR*, *Rotich Samuel Kimutai –vs- Ezekiel Lenyongopeta & 2 others [2005] eKLR*.

86. Coming to the corrigendum dated 29.6.2018, the same was published under **Section 5 of the Land Adjudication Act Cap 284 Laws of Kenya**.

87. Under the **Community Land Act and Rules** made thereunder by the Minister on 24.11.2017, **Rule 12 of the Community Land Rules 2017** stipulates that within 18 months of coming into operation every County Government shall in consultation with communities prepare and submit to the Cabinet Secretary an inventory of all unregistered community land within the County.

88. The preamble of the **Community Land Act** is an act of Parliament to provide for the ascertainment and recording of rights and interests in Community Land. **Section 4 (3) (d)** defines community land as such other tenure system recognized by this **Act** or any other written law and under **Section 6 (6) and 8 (1)** adjudication of such land shall be done through the Cabinet Secretary consulting with the respective County government to develop and publish in the gazette a comprehensive adjudication program for purposes of registration of community land.

89. **Section 4 (3)** thereof states that community land may be held as customary, freehold, leasehold or such other system recognized by law which under **Section 5**, any person may individually or in association with others acquire or own land and that customary land shall have equal force and affect in the law. The petitioners aver the subject area falls under the community land whereas the 2<sup>nd</sup> respondent denies there exists such community land.

90. Looking at the legality of the corrigendum, there is no indication that the 2<sup>nd</sup> respondent engaged the County Executive Member in charge of land, County Government of Meru before the publication and sought for its input. **Annexure marked EMK “3” 4(a) (b), 4(c)** does not specifically refer to the notice given on 29.6.2018. On the contrary, all the details therein to activities allegedly conducted before the notice was published. In my considered view therefore, the corrigendum could not possibly operate retrospectively.

91. Similarly, the annexures the 2<sup>nd</sup> respondent's affidavit are not authenticated by the Deputy County Commissioner for the area in issue who under **Section 10 of Cap 284** alluded above has the statutory mandate to ensure that the corrigendum and information thereof reaches a wide area and the largest population in line with **Article 10 of the Constitution**.

92. The 2<sup>nd</sup> respondent has not attached any minutes showing the petitioners and other members of the community were involved in the conception, planning, announcement and subsequent roll out of the adjudication process prior to and after the publication of the corrigendum.

93. Further, there is no indication the 2<sup>nd</sup> and 3<sup>rd</sup> respondents addressed the locals on how the exercise would play out given the operationalization of the **Community Land Act 2016**.

94. Under **Section 3 (1) of the Land Adjudication Act**, the notice had to include the element of the community land. Similarly, **Sections 5 (1) and 1 (a) of the Land Adjudication Act** does not refer to a corrigendum but a separate notice defining as clearly as possible an area of the adjudication section.

95. This court in its ruling while granting conservatory orders held that the corrigendum was wanting in definition of the area. Since then nothing has been brought before this court by way of a supplementary evidence or explanation by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent for this court to change its mind that the alleged corrigendum falls short of the law under which it was published.

96. In *Fatuma Adan Dullo & 4 others –vs- Cabinet Secretary Ministry of Lands and Physical Planning & 2 others [2020] eKLR*, the court had occasion to determine an amendment to a statutory notice under both the **Land Adjudication Act** and the **Community Land Act** as well as the threshold of public participation preceding the declaration of an adjudication process including the role of the County government in the process as the custodian of unregistered community land.

97. In that case the court found there had been substantial compliance with **Regulation 12 of the Community Land Regulations 2017** and the **Land Adjudication Act** before embarking on the exercise of issuance of notices.

98. Further, the court held there was evidence of records to attain a participatory approach in the land adjudication process.

99. In *Silverio Akubu & 4 others –vs- Charles Baariu Salesio & 3 others [2019] eKLR*, the court held the committee members to the adjudication section are normally appointed from the area residents so that they can be the ears and eyes of the community.

100. In the instant case, the 1<sup>st</sup> respondent has categorically stated that the respondents have thrown caution to the wind and embarked with the adjudication process without involving the area residents in shepherding the process. In my view, public participation must be involved at every step of the adjudication process to ensure that the end product is not only credible, legal but also participatory in nature.

101. In *Commissioner Of Lands & Another –vs- Coastal Aquaculture Limited [1997] eKLR*, the court was looking at a gazette notice of intention to acquire land given pursuant **Section 9 (1) of the Land Acquisition Act** alleged which did not state the public body which was acquiring the land and the public purpose for which the land was being acquired.

102. The commissioner merely published a corrigendum gazette notice giving a fresh hearing date without addressing the complaints on the illegality of the notice. The matter went before court and a consent was recorded to re-gazette the notices afresh. However, the fresh notice gazette did not correct the illegalities.

103. The issue before the court was whether the process after the gazette was being conducted constitutionally.

104. The court held the notice had to contain the requisite details for its prima facie validity and that the test of validity must be judged on the content of the notice at the outset and not with the aid of subsequent evidence which cannot be used to cure defects apparent on the face of the notice. See also *Electrical Options Ltd –vs- Attorney General & Another [2012] eKLR*, *Republic –vs- Land Adjudication Officer Embu District Ex parte Kirinyaga Mhiriga Kenda [2012] eKLR*.

## **I. CONCLUSION**

105. Given the foregoing, it is my conclusion that the petitioners have proved breach of their constitutional rights and freedoms as regards the corrigendum published and dated 29.6.2018 and the subsequent commencement of the adjudication process on the defined area and hence are entitled to the reliefs sought. See *Reuben Mwangela M'itelekwa (suing as the Legal Representative of the M'itelekwa M'Mucheke) –vs- Paul Kigea Nabea & 2 others [2019] eKLR*.

106. Consequently, I issue the following declaration:-

i. All the chunk of land to wit Muthara, Amuthumba/Ngaremara ranching area which is situated north of the Isiolo-Garbatula road stretching to Waso-Nyiru river to North Igembe all the way to Igembe East and Samburu County to the North West, is separate and distinct from the Ngaremara/Gambella adjudication section.

ii. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents actions of extending the Ngaremara/Gambella adjudication process to include the Muthara/Amuthumba/Ngaremara ranching area of which is situated North of the Garbatula-Isiolo road, stretching to Waso-Nyiru, river to North Igembe all the way to Igembe East and Samburu County to the North West through the corrigendum issued and published on 29.6.2018 was illegal, ultra vires, unconstitutional, null and void and infringed on the petitioners' rights under **Articles 40(1), 40(3), 43, 60, 61, 62, and 63 of the Constitution**.

iii. The adjudication process, demarcations, subdivisions of the suit land being land within Muthara, Amuthumba/Ngaremara ranching area which is situated North of the Garbatula-Isiolo road stretching to Waso-Nyiru river to North Igembe all the way to Igembe East and Samburu County to the North West following the corrigendum published and dated 29.6.2018 are nullified and cancelled and a fresh adjudication process to be commenced with public participation of the legitimate members of the Muthara, Amuthumba/Ngaremara pastoralists community in strict adherence with the provisions and mechanisms established under the Land Adjudication Act.

iv. No orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**

**THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Miss Mwitii for Mutuma for petitioners – present

1<sup>st</sup> respondent – present

Mr. Anampiu – present

Kieti for 2<sup>nd</sup> and 3<sup>rd</sup> respondents - present

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**