



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION NO. E014 OF 2021

IN THE MATTER OF

ARTICLES 22(1) 23 AND 162 (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOM

UNDER ARTICLES 35, 40, 47 (1) 67 AND 68 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

THE COMMUNITY LAND ACT, ACT NO. 27 OF 2016

AND

IN THE MATTER OF

THE LAND ACT (ACT NO. 6 OF 2012)

AND

IN THE MATTER OF

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS) PRACTICE

AND PROCEDURE RULES, 2013

BETWEEN

LAWRENCE KANYI NDEWA.....1ST PETITIONER

MWENDA THIRIBI2ND PETITIONER

DR. THIAKUNU MWIRABUA3RD PETITIONER

JEREMIAH KORONYA MAILUTHA4TH PETITIONER

CHARLES MWITI MUGAMBI5TH PETITIONER

RICHARD KIAMBI.....6TH PETITIONER
VINCENT MURANGIRI7TH PETITIONER
MURIITHI MARTIN KAINDIO.....8TH PETITIONER
MUTEMBEI IKIAO9TH PETITIONER
PHILIP IGWETA10TH PETITIONER
BERNARD M. NJOGI11TH PETITIONER
SAMUEL GITILE12TH PETITIONER
PETER KABERIA13TH PETITIONER

VERSUS

KENYA DEFENCE FORCES1ST RESPONDENT
THE CABINET SECRETARY,
MINISTRY OF DEFENCE2ND RESPONDENT
THE CABINET SECRETARY, MINISTRY OF LANDS AND
PHYSICAL PLANNING.....3RD RESPONDENT
THE HON. ATTORNEY GENERAL4TH RESPONDENT
THE COUNTY GOVERNMENT OF MERU.....1ST INTERESTED PARTY
NATIONAL LAND COMMISSION.....2ND INTERESTED PARTY

RULING

1. The ruling relates to the application dated 11.5.2021 and the preliminary objection brought by the 3rd and 4th respondents and filed on 10.2.2022.
2. By a notice of motion dated 11.5.2021, the petitioners sought for orders for the maintenance of status quo by directing the petitioners to continue occupying and using **L.R Ngaremara/Gambella Adjudication Section, L.R. 7019**, pending the hearing and determination of this petition.
3. The second prayer sought pending the hearing and determination of this petition is, an order of temporary injunction restraining the 1st, 2nd and 3rd respondents either by themselves or through their officers, agents and or servants from digging trenches, laying beacons, blocking roads access, carrying out any demolitions, evicting the petitioners from the suit land, alienating, transferring or in any other manner dealing with **L.R No. Ngaremara/Gambella Adjudication Section L.R No. 7019**.
4. The application is based on the grounds on the face of it and the supporting affidavit sworn by Lawrence Kanyi Ndewa on 11.5.2021.
5. The grounds upon which the application is made are that; the Ameru community have been on the land since 1900 with permanent settlements; 7,500 families live therein, the 1st respondent has moved to occupy the land by digging trenches for use, laid in new beacons and cut off access roads to the suit land; verbal or oral notices to vacate have been issued; there was imminent danger of eviction and demolition; petitioners are unable to access their residences; the land is community land; **L.R 27098** was reserved for Meru Ranching Cooperative; **L.R 7019** was reserved for Nyambene National Reserve; the land measures 17,553 acres and is known as Northern Grazing area belonging to Ameru community; the suit land was in 1977 taken over by 78 Tank Battalion Barracks in 1977 and were issued with a title deed in 2020 and unless orders are issued, the applicants shall suffer grave loss and damage.
6. The petitioners have attached annexures marked **LKN -01** and **LKN – 02** the maps for **L.R 27098 and L.R. 7019** allegedly reserved for Meru Ranching Cooperative and Nyambene National reserve otherwise known as Northern Grazing area, photographs showing private and public institutions marked as **LKN – 04, and LKN – 05** being photographs showing the erected beacons and trenches.
7. Further, it was averred that, at the time the 1st respondent allegedly acquired the suit land, the petitioners had made various developments

on the land including farming activities, nursery schools, primary schools, churches and mosques.

8. Through the amended petition dated 8.6.2021, the petitioners as residents of Meru County have sued on their behalf and on behalf of the people of the County Government of Meru residing in or around Tigania East Sub-county over land known as **Ngaremara/Gambella Adjudication Section L.R. No. 27098 and L.R. No. 7019** in Tigania East said to be community land and previously reserved for both Meru Ranching Cooperatives and Nyambene National Reserve. The land is said to be approximately 17,553 acres and commonly known as Northern Grazing area.

9. It is averred in 1972 the land was gazetted vide Gazette Notice No. 3210 dated 31.10.1977 and set apart for the use by the Kenya Armed Forces.

10. The petitioners aver the 1st respondents moved into and occupied the subject land at the border of Isiolo and Meru County, installed their equipment and training facilities named as 78 Tank Battalion Barracks contrary to the principles of public participation, community trust land, adjudication and the Constitution.

11. It was pleaded in 2009, the 3rd respondent declared the subject land as Tigania East adjudication section and started ascertaining the rights and interests of the Ameru community then in occupation. The petitioners averred 3rd respondents' adjudication officers started conducting a survey and issued reference numbers to some of them. Annexed to the amended petition was an unverified map with assorted parcel numbers marked **LKN – 06**.

12. Further, it was averred that on 10th June 2008, the then Commissioner of Lands had written to the defunct Nyambene County Council informing them the suit land had been set apart as trust land for use by the 1st respondent and that the county council objected to the request on the basis that the land belonged to the community. The county council instead requested for a joint meeting to consider the possibility of the proposed compulsory acquisition as per letters annexed as **LKN – 07 and 8**. Further objections were raised by elected leaders citing massive displacement. It was averred the aforesaid proposed meeting never took place at all.

13. Consequently, the petitioners averred that there was no public participation before the setting apart hence making any takeover, use and occupation by the 1st and 2nd unconstitutional and illegal.

14. Regarding **L.R No. 7019** initially reserved for the Nyambene National Reserve, the petitioners averred that the 1st respondent moved into the land in 1984, excised 200 acres, set up its training barracks known as the School of Artillery and started its operation without the consent or approval of the petitioners.

15. Further, it was averred the aforesaid land having been initially reserved for a National park, it ought to be under the exclusive control of the 1st interested party for the preservation of natural resources and wildlife at large.

16. The petitioners averred in 2020, the 1st respondent was allegedly issued with two title deeds for the entire two parcels of the suit land to the exclusion and detriment of the people of the Ameru community who are likely to be arbitrarily denied their only source of livelihood and the economic advancement associated with issuance of title deeds.

17. It was averred the suit land formed part of the entire Ngaremara location which had a chief, two assistant chiefs; primary schools, dispensaries, police station, secondary schools and a proposed conservatory with an approximated population of 7,500 people, yet there has been no compensation or an offer for an alternative land to settle or relocate them.

18. Additionally, the petitioners averred the LAPSSET corridor specifically Lamu-Isiolo-Lodwar-Juba Highway passed and or was set to pass through and or occupy part of the suit land whose take over by the 1st respondent shall prejudice and or deny the Ameru people of its economic benefit.

19. The petitioners averred the actions by the 1st, 2nd and 3rd respondents were unlawful, unconstitutional and amounted to the denial and infringement of their constitutional rights and freedoms under **Articles 22, 23, 28, 35, 40, 47, 65, 162, 120** as read together with Sections **(8), 212, 28, 43 and 46 of the Community Land Act**.

20. The petitioners prayed for declaration that their constitutional rights to own land had been violated; declaration the occupation by 1st and 2nd respondents was unconstitutional and unlawful; declaration that the registration and the issuance of title deeds to 1st and 2nd respondents was unconstitutional, unlawful, void and null and should be revoked; an order that the 3rd respondent do effect the transfers and registration of titles in the **Adjudication Section/27098 and 7019** in the name of the Ameru community to be held by the 1st interested party in trust for the Ameru community; perpetual and permanent injunction against the respondents from claiming ownership of **L.R No. 27098 and 7019** and in the alternative that the Ameru community be compensated for the subject land and or given an alternative land.

21. In a further affidavit in support of the amended petition sworn by Lawrence Ndewa on 8.6.2021, the petitioners attached the letter dated 10.6.2008 from the Commissioner of Lands to the defunct Nyambene county Council as annexure **LKN – 07**, a response thereof by the Council dated 7.7.2008 as annexures **LKN – 08**, Area member of Parliaments letter dated 15.7.2008 as annexures **LKN – 09**, a letter from the Permanent Secretary, Ministry of Defense for the meeting scheduled for 24.9.2008, a letter dated 18.9.2008 as **annexures LKN - 010**, photographs showing disturbances over the residential homes as annexures **LKN – 011**, status report of the subject land as annexure **LKN – 012** and a newspaper extract of 23.12.2019 as annexures **LKN – 013**.

22. The petition was also supported by the 1st interested party through an affidavit sworn on 17.6.2021 by Jeremy Leenya M'Eringo giving

an historical background of the subject matter starting with the reservation for Nyambene National Reserve through Gazette Notice No. 86 of 2000, proposed part development plans, letter dated 10.6.2007 and the response thereof, protest against the part development plans by the defunct County Council dated 2.7.2011 to the Permanent Secretary, Ministry of Defence, declaration of an adjudication section by the Lands Ministry dated 24.2.2016, County Assembly resolutions Meru for the land as community land, adjudication record extract and Gazettement of 30.7.2009 for the planned towns marked as annexure **JLM 1 – 10** respectively to his affidavit .

23. Mr. Abop Michael on behalf of the 4th interested party replied to the amended petition through an affidavit sworn on 13.10.2021 confirming that the LAPSET corridor was gazette by the National Land Commission on behalf of the Lapsset Corridor Development Authority (LCDA) vide Gazette Notice Serial No. 8676 and 1553 of 21.10.2016 and 15.2.2019 respectively consisting 500 meter wide infrastructure where the road, railway, pipelines, power transmission and other projects will be carried out on the highways but were yet to reach the disputed area.

24. On behalf of the 1st and 2nd respondents, Captain Julius Meso through a sworn affidavit on 4.11.2021 opposed the petition.

25. The 1st ground was that the cause of action arose in 1970's and 1980's when 78 Tank Battalion and the school of Artillery was established on the suit land hence the petition was time barred, the delay was prejudicial to them in procuring substantive witnesses some who had retired and others were dead.

26. Secondly, it was averred the issues raised in the petition were improperly framed as a constitutional petition to prejudice the respondents since they would require substantive evidence.

27. Thirdly, it was averred the petition was an abuse of the court process filed three decades down the line and the inordinate delay had not explained at all.

28. Fourthly, the respondents denied that the suit land was community land in nature or private ,and maintained that the process leading to acquisition, registration and issuance of title deeds followed the law up to the time a leasehold was issued on 1.11.2000 for 99 years as title IR 213242 where the 78 Tank Battalion was situated as per the certificate of title issued on 14.10.2019 and attached as **JM "1"** .That a Deed Plan was issued on 30.11.2020 subsequent to which a lease was issued in 2021 for the School of Artillery .The two were annexed as **JM "2" and "3"** respectively.

29. It was averred by Captain Meso that the Ministry of Defence interests in the parcels of land pre-existed the titling and survey and that the current exercise of survey, beaconing, fencing, titling or regulation of the suit premises was only aimed at ensuring their existing rights and interests in the suit premises were safeguarded to ward off illegal grabbers and that there had been no objection from anybody including the 1st interested party.

30. The 1st and 2nd respondents averred the parcels of land were public land which had been in possession of Kenya Defence Forces since 1970's and was factually used for public purposes, training and preparation the Defence Forces to execute their constitutional mandate of defending the sovereignty and territorial integrity of the Republic of Kenya under **Article 241 of the Constitution**.

31. It was averred the suit land had been duly reserved vide **Gazette Notice No. 3210** with requisite co-ordinates and physical features as per annexure **JM "4"** hence the entry into, use and occupation of the suit property by the 1st respondent was lawful and constitutionally sanctioned under **Articles 62(1) (a) and (1) (b) of the Constitution**.

32. The 1st and 2nd respondents averred that given its occupation, use, reservation, survey, acquisition, registration and issuance of title deeds , the alleged declaration of an adjudication section over the land was void, ab initio, illegal, a mistake and unconstitutional which move was resisted by the 1st and 2nd respondents leading to the suspension of the purported exercise hence no proprietary rights of either private or community nature could be created in an illegal process when the same were extinguished upon the reservation of the land for public purposes.

33. The 1st and 2nd respondents averred that they were not opposed to any adjudication so long as the same did not include the area set apart for military use and subsequently documented, surveyed and titled as such, and that the petitioners had no right to occupy and use the suit land by wrongly deeming it vacant land or abandoned land up for grabbers. Further it was averred that any illegal occupation of a portion by the petitioners put the national security and safety in jeopardy as it would affect a critical military training grounds requiring courts intervention.

34. Regarding the **Community Land Act**, the 1st and 2nd respondents averred it was a recent legislation inapplicable to the circumstances of the case where the 1st and 2nd respondents' rights accrued in 1970's and which rights could not be invalidated on account of public participation arising after 2010.

35. Concerning socio-economic rights, the 1st and 2nd respondents averred such were progressive in nature and subject to availability of funds, and that the petitioners were the authors of their own predicament seeking to reap where they had not sowed.

36. Further, the 1st and 2nd respondents averred the 1st respondent had a right to protect its rights and interests in the suit land which could not be termed as unconstitutional and does not in any way disposes the petitioners who will neither suffer any dispossession as alleged or at all for they had been in unlawful and illegal possession of what rightfully belonged to the 1st respondent hence **Articles 22, 23, 28, 35, 40 and 47 of the Constitution** could not be invoked to aid the petitioners who possessed no rights to or interest in the suit land so as to invoke the courts protection.

37. With regard to paragraphs 60, 61, 62, 63 and 64 of the amended petitions, the 1st and 2nd respondents averred the invoked laws were enacted after the subject land was set apart and acquired under the then laws and procedures and if at all the petitioners had any claims then, they had failed to participate or raise any objections which were now time barred.

38. Further, the 1st and 2nd respondents averred the fencing and trenching was not unlawful but was being done in the interests of the larger public by preserving public land for the use of the Defence Forces and that the alleged existence of schools, gazettelement of **L.R 7019** as Nyambene National Reserve postdated the reservation and setting apart for public and military purpose.

39. Lastly, the 1st and 2nd respondents averred the alleged Northern Grazing Area was not legally recognized and the alleged Ameru community was as a result of the illegal encroachment of the land reserved for public and military purposes already titled for the 2nd respondent.

THE PRELIMINARY OBJECTION

40. On the part of the 3rd and 4th respondents and the 3rd interested party, a notice of preliminary objection was filed on 10.2.2022 on the grounds that: -

1) The petition was an intergovernmental land dispute between the Ministry of Lands, Ministry of Defence and County Government of Meru on ownership of L.R No. 27098 and 7019 falling under Articles 6 (2), 189 (4) and Sections (3), 30 – 35 of the Intergovernmental Relations Act hence the petition negated the principle of exhaustion in the aforesaid Act and the Land Adjudication Act.

2) The court lacked the mandate to issue prayers (f) (g) and (h) of the petition by way of permanent injunction against the various government departments of the respondents.

41. With leave, parties were directed to file written submissions to both the application and the preliminary objection.

42. In the written submissions by the petitioners dated 14.11.2021, it was stated the petitioners had met the threshold set out in *Giella –vs- Cassman Brown [1973] E.A 358*. Reliance was placed on *Panari Enterprises Ltd –vs- Lijoodi & 2 Others [2014] eKLR*, *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR*.

43. The petitioners submitted that they had a right to the suit land out of long occupation, the titles held by the respondents were illegally and fraudulently obtained, eviction will lead to loss of property, lives and livelihood, any injury or loss of lives may not be repaired or compensated and that the balance of convenience tilts in favour of granting the orders sought.

44. The 4th interested party in their written submissions dated 24.11.2021 submitted that the petitioners had failed to furnish any shred of evidence of threats to evict or demolish their homes, schools and other public facilities. The 4th interested party took the view that other than the petitioners' mere allegations which did not translate into issues or evidence of infringement of any rights, there was nothing else to show the petition was capable of success at the trial as held in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR*.

45. Secondly, it was submitted no irretrievable injury and damage had been demonstrated and if any the same was quantifiable. Reliance was placed on *Charles Muthungu Wairagu –vs- Geoffrey Wambugu Kagundu & Another [2012] eKLR*.

46. As concerns the balance of convenience, it was submitted since there had been no prove of a prima facie case and irreparable loss and damage, the balance of convenience would shift against the applicants as held in *Paul Gitonga Wanjau –vs- Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR* and *Progress Welfare Association of Malindi & 3 Others –vs- County Government of Kilifi & 4 Others [2020] eKLR*.

47. In the application dated 11.5.2021, the petitioners are seeking temporary orders of injunction against the respondents herein which fall under prayer (h) in the amended petition. Therefore, in determining whether or not the court can grant an injunction against a government department, it is apparent the court will also be determining the application dated 11.5.2021.

48. **Rule 10 of the Mutunga Rules 2013** provides a constitutional petition must clearly set out the facts, the constitutional rights and freedoms infringed or violated, the nature of injury or loss, details of pending or previous civil or criminal cases relating to the issues, capacity to bring or institute the petition and the reliefs sought.

49. In Anarita *Karimi Njeru –vs- Republic [1979] eKLR* and *Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 others [2015]*, the court set out what amounts to a constitutional petition and the manner in which it has to be pleaded with precision and specificity. Similarly, courts have held that a petition must demonstrate a constitutional question or controversy and that not every statutory breach amount to a constitutional breach.

50. In this petition, the petitioners aver their communal land ownership rights have been infringed by the 1st and 2nd respondents through purported acquisition, registration, occupation, use and threatened enforcement of their land ownership rights which actions have blocked the petitioners use and access of the aforesaid parcels of land.

51. On the other hand, the 1st and 2nd respondents aver they hold valid title deeds on top of having acquired the land through setting apart and long occupation since 1970's and specifically after the gazettelement in 1977, the follow up legal processes and procedures culminating into the issuance of title deeds in 2020 and 2021 respectively with regard to **L.R 27098 and 7019**.

52. Turning to the 1st limb of the preliminary objection, it is submitted the dispute is with regard to intergovernmental land dispute between the Ministry of Lands, Ministry of Defence and County Government of Meru on ownership of **Ngaremara/Gambella Adjudication Section, L.R No. 27098 and L.R No. 7019**.

53. A preliminary objection has been termed as a pure point of law which is raised on the assumption that the facts as raised by one party were admitted by the other and which if argued as a preliminary point may dispose of the suit as held in *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E.A 696*.

54. Looking at the petition herein, the petitioners as described in the amended petition dated 8.6.2021 at paragraph one are adult Kenyan citizens residing and working for gain within Meru County bringing the petition on their own behalf and on behalf of the Meru residents of the suit land in and around Tigania East Sub-County within the Republic of Kenya, land otherwise known as **Ngaremara/Gambella** covering Ngaremara location which is alleged to be community land.

55. The County Government of Meru is a mere interested party in line with **Rule 7 of Mutunga Rules 2013** which is supporting the petition. It is not a co-petitioner since it has not brought any cross-petition.

56. The petitioners have clearly stated that they bring the petition on their behalf and on behalf of defined residents of Tigania East. The 1st, 2nd and 3rd respondents are sued in their defined capacities and roles under paragraphs 2, 3 and 4 of the amended petition.

57. The 1st and 2nd respondents have admitted in their response that they own and occupy the suit lands which the petitioners allege were acquired illegally and or unprocedurally in disregard to statutes and their constitutional rights and freedoms. So, in my view, the dispute is between two claimants and not between government departments and or entities.

58. It is also not lost to this court that the 3rd and 4th respondents have not filed a response to the petition setting out any facts or denying the facts and or legal issues raised by both the petitioners and the 1st and 2nd interested party. If anything, the 3rd, 4th respondents and the 3rd interested party should be the ones explaining the manner in which the subject land was set apart and acquired by the 1st and 2nd respondents.

59. Consequently, my finding is that the land dispute herein does not fall under **Articles 6 (2) and 189 (c) of the Constitution and Sections (3), 30-35 of the Intergovernmental Relations Act 2012**.

60. As regards the **Land Adjudication Act**, the petitioners have admitted the 1st and 2nd respondents acquired their title deeds under the law other than through the land adjudication process. The 1st and 2nd respondents have displayed a lease certificate of title with effect from 1.11.2000 and sealed on 14.10.2019 and a lease for **Parcel No. 32634** with effect from 1.7.2018.

61. The two title documents under **Sections 25 and 26 of the Land Registration Act 2012** are prima facie evidence of ownership and hence my finding is that there is nothing brought by either the 3rd and 4th respondents or the petitioners to indicate the subject land falls under an adjudication section where any proceedings have been stayed and or could not be continued without a consent under **Sections 8 and 30 of the Land Consolidation Act and Land Adjudication Act respectively**.

62. **Section 16 (1) of the Government Proceedings Act** forbids the court from issuing an injunction or specific performance against the government to the land or property.

63. **Order 29 Rules (2) (2) (3) of the Civil Procedure Rules** also provides no order of injunction shall be made against the government. See *Josaphat Karaine N'abatu & another –vs- Josaphat M'nchebere M'ithae & another [2022] eKLR, James Muigai Thungu –vs- County Government of Trans-Nzoia & 2 others. [2015] eKLR*.

64. The notice of motion dated 11.5.2021 seeks for temporary orders of injunction against the respondents who as described in the amended petition are government entities. **Order 29 of the Civil Procedure Rules and Section 16 (1) Government Proceedings Act outlaws an injunction against such government entities**

65. This court in **Meru ELC Constitutional Petition No. E013 of 2021** sought by different petitioners against the same respondents herein except the 2nd respondents and 3rd and 4th respondents held the titles for suit land by the 1st and 2nd respondents are valid in line with **Section 24, 25 and 26 of the Land Registration Act** until impeached. The court held if the 1st and 2nd respondents were desirous of evicting any illegal occupants, **Sections 152 (C), (D), (E) and (G) of the Land Act as read together with Section 155 (10) thereof and Rules 63 – 70 of the Land Registration Act 2017 were clear on the procedure to be followed**.

66. In this application, the petitioners have not demonstrated that they have made any complaints to the 2nd interested party over the threatened eviction and or destruction of their properties or to any other relevant body statutory mandated to investigate such claims.

67. Given the 1st and 2nd respondents have valid title deeds the real damage or loss by the petitioners must be balanced against the public interest and security considerations pertaining to the 1st and 2nd respondents' parcels of land who hold a superior title.

68. In the premises, I uphold the preliminary objection in so far as the application dated 11.5.2021 is offensive to **Order 29 of the Civil Procedure Rules and Section 16 (1) of the Government Proceedings Act Act**.

69. The application is dismissed with costs and the orders for status quo vacated.

70. The parties to comply with **Order 11** and set down the petition for hearing **within 60 days**.

71. This petition shall also be mentioned alongside **Meru ELC Constitutional Petition No. E013 of 2021** on 10.5.2022.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF MARCH, 2022

In presence of:

Miss Kyalo for applicant

Kieti for 3rd and 4th respondents and 3rd interested party

Oduor for 4th interested party

Miss Materi for Ikioo for 1st Interested party

HON. C.K. NZILI

ELC JUDGE