



REPUBLIC OF KENYA



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**Tikani & 18 others v Attorney General & 6 others (Environment and Land Constitutional
Petition 12 of 2017) [2022] KEELC 2486 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 12 OF 2017**

CG MBOGO, J

JULY 20, 2022

FORMERLY NAKURU PETITION NO. 7 OF 2013

IN THE MATTER OF ARTICLE 1,2,3,

10,19,20,21,22,23,35,40,43,47(1),50 60,63,165 3 (B), 258

AND 259 1 (B) OF THE CONSTITUTION

AND

**IN THE MATTER OF THE SUPREMACY OF THE
CONSTITUTION PURSUANT TO ARTICLE 2 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
INDIVIDUAL) HIGH COURT PRACTICE AND PRECEDURE
RULES 2006, RULES 1-23**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES
JUDGMENT ELC PETITION 12 OF 2017 DELIVERED VIA
EMAIL ON 20TH JULY, 2022**

**20,27,28,40,43,53,56 AND 57 O THE CONSTITUTION AND IN
THE MATTER OF TRESPASS OF CIS MARA SHEEP AND GOAT
PROJECT AT OLOPITO, OLOKERE LOONKISHU NAANYOKIE**



**AT PURKO MOTONYI FARM AND HOLDING GROUND LR NO.
ILMASHARIANI/MORIJO/60 BY THE MINISTRY OF LIVESTOCK
AND DEVELOPMENT, NAROK NORTH DISTRICT, NAROK
COUNTY**

BETWEEN

TURERE OLE TIKANI & 18 OTHERS PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

LIVESTOCK PRODUCTION OFFICER NAROK NORTH 2ND RESPONDENT

**PERMANENT SECRETARY, MINISTRY OF LIVESTOCK &
DEVELOPMENT 3RD RESPONDENT**

**DIRECTOR OF LIVESTOCK, MINISTRY OF LIVESTOCK &
DEVELOPMENT 4TH RESPONDENT**

MINISTRY OF LANDS 5TH RESPONDENT

NAROK COUNTY COUNCIL 6TH RESPONDENT

NAROK TOWN COUNCIL 7TH RESPONDENT

JUDGMENT

1. The petitioners filed a petition dated 6th March, 2013 seeking the following orders: -
 1. A conservatory order be issued by this honourable court restraining the respondents from demarcating, alienating, subdividing wasting or dealing in any other way with the sections of the 499 acres of Purko Motonyi farm, Cis Mara Sheep and Goat project at Olopito and the holding ground /LR No. Ilmashariani/Morijo/60.
 2. An order of declaration be issued in the terms that the members of Maasai Purko Community are entitled to have the subject parcels of land herein reverted back to them, so as to set up projects beneficial to the whole community as originally intended in the year 1958.
 3. The Ministry of Livestock and Development be and is hereby ordered to restrain from cultivating the petitioners' farm adjacent to the Narok Teachers Training College without their consent.
 4. The office of the Ministry of Lands in Nairobi be and is hereby restrained from processing title documents for Cis Mara Sheep and Goat Project at Olopito, Loonkishu Naanyokie at Purko Motonyi farm measuring approximately 499 acres, other than in the names of Purko Development Trust.
 5. The Narok Town Council be and is hereby ordered to revoke all allotment letters issued for the subject parcels herein to persons /institutions/corporate bodies for residential purpose and personal gain.



6. The respondents, be and are hereby ordered to do all that is legally bestowed upon them by law, in their official capacities to prevent the evolving injustices on the subject parcels of land.
 7. It is fair and just that any subdivision/demarcation or alienation of the subject parcel be stayed pending the hearing and determination of this application.
 8. That the orders sought in the interlocutory application to not only apply and bind the respondents herein, but also their successors in title, assigns and all other persons entrusted with the duty and/ or responsibility of securing the subject parcels of land in the Transitional National and devolved County Government.
2. The petition is predicated on the grounds inter alia that in the year 1957, the African District Council allocated 400 acres of land for the construction of Government Maasai Land which is now known as Ole Sankale Primary School which allocation was in addition to the already existing community land measuring approximately 200 acres but was not enough for conducting the intended purpose of the school which was to provide real demonstration of animal management and the manufacture of dairy products, encourage the Purko Maasai to take interest in the school farm and to provide practical work and demonstrations on the farm in a bid to promote modern animal husbandry. It followed thereafter in the year 1958, the Purko Maasai agreed to donate land adjacent to the Narok Township known as Purko Sheep Ranch as well as livestock for the said project. This was as per the minutes of the meeting held on 22nd August, 1958. This land was donated from a section of the Maasai reserves with the consent of the Purko Maasai elders. In particular, the section of the land hived off from Purko community land by the Narok Town Council was for 4 projects; Farmers Training Centre measuring 16.86 acres, Agricultural Machineries (A.M.S) measuring 3.75 acres, Teachers Training College measuring 50 acres and Purko Motonyi Farm measuring 499 acres.
 3. The petition is further predicated on the grounds that the said Purko Sheep Ranch was donated on the understanding that it would remain as Purko Community Land to revert back to the community once the project is completed. The African District Council was dissolved in the year 1963 and the Narok County Council took over the management of the Sheep Ranch on behalf of the Purko Community and that should the time come when members of the Purko Community would wish to manage the ranch by themselves, then it would be handed over back to them. On 9th November, 1999, the registered trustees of Purko Development Trust and representatives of the Purko General Assembly created a community based organization which was incorporated in the year 2000. It was pursuant to the objective of the incorporated trust, that members of the Purko Community entrusted the management of the Purko Sheep Ranch to Purko Development Trust which has never been registered in the name of the trust. Further that the Ministry of Livestock Development (as it then was) alleged that they were unable to sustain the project leading to the collapse of the Farmers Training Centre and the whole project of the Purko Sheep Ranch.
 4. The petition is supported by an affidavit in support of petition sworn on even date by the 3rd petitioner herein, Daniel Ole Nakola. The 3rd petitioner deposed that the section of land donated by the Purko Community is Olchampa Loonkineji Le Narok (Cis Mara Sheep and Goat Farm) at Olopito, measuring approximately 132 acres, Purko Motonyi Farm, Olokere Loonkishu Naanyokie measuring approximately 499 acres and Purko Holding Ground LR. No. Ilmashariani/Morijo/ 60 measuring 223.5 Ha and that despite handing over the management to Purko Development Trust, the assets and ultimate authority to determine disposition still remained in the hands of the Narok County Council in trust for the community who have breached the trust by subdividing and allotting sections of the Cis Mara Sheep and Goat project, allowing the Ministry of Agriculture Livestock, Fisheries and Development to graze its animals on Purko Motonyi farm, issuing allotment letter to Narok Teachers



- Training College and subdividing or permitting subdivision of LR. No. Ilmashariani/Moriyo/60 to other persons against the wishes of the Purko Community.
5. The 3rd petitioner deposed that it is on the basis of the acts and omissions of the Ministry of Livestock Development (as it then was) and the Narok Town Council that the parcels of land donated in the year 1959 be restored to the Purko Community since it has been subjected to misuse in violation of the Purko Maasai Community Land Rights as enshrined in *the Constitution*. Also that the numerous inquiries and requests to the Narok Town Council vide various written letters between the years 2005 and 2012 have not yielded much. Further that as a result of neglect by the town council to put Sheep and Goat Farm and the Farmers Training Centre for its intended, the Purko Development Trust sought to have the same transferred to the Trust so as to revert to its original intended purpose.
 6. The 3rd petitioner further deposed that the Ministry of Livestock Development (as it then was) has been using delaying tactics by claiming that they are in the process of obtaining titles to the land which title has not been processed to date and further by a letter dated 16th August, 2006 addressed to Purko Development Trust, the Ministry of Livestock Development was not cooperative. Further that it is based on this reluctance that they sought redress from the Narok District Commissioner. It is the 3rd petitioner's claim that numerous attempts to have this issues addressed have been futile.
 7. The 2nd respondent filed a replying affidavit in opposition to the petition which was sworn on 31st March, 2014 by Jamin K Ruto, the District Livestock Production Officer, Narok. The 2nd respondent deposed that the land in dispute is held in trust by the local authority for use by the Ministry of Livestock Development for the benefit of pastoralist communities which land comprises of Ilmashariani/Moriyo holding ground No. 60, 223.5 Ha, Narok Sheep and Goat Station, 63. 5 Ha and Narok Pastoral Training Centre, 163 Ha. The 2nd respondent further deposed that on 5th October, 2010, its land was invaded by persons alleging to be representatives of the Purko Development Trust who claimed allocation by the Narok Town Council and that the land was not donated from a section of the Maasai reserves with the consent of the Purko Maasai elders but it is land held in trust for the Maasai community by the Narok County Council and there has never been any misunderstanding between the Ministry of Livestock Development (as it then was) or any government ministry with the subject land reverting to the Purko clan upon completion of the project and that if the subject land is to revert back to the Purko clan, the entire pastoralist communities benefitting from the same will suffer irreparable damage.
 8. The 2nd respondent further deposed that there was no agreement between the Narok County Council that after dissolution of the African District Council in 1963 that the same will take over management of the sheep ranch on behalf of the Purko clan and that following a presidential decree of 2006, the president directed that all livestock holding grounds, outspans, farms and training institutions allocated or illegally acquired be repossessed and returned to the ministry for use in livestock development activities. That Narok Pastoral Training Centre serves all pastoralists in the Rift Valley region and Narok Holding ground has been identified as a strategic facility for the implementation of the South Rift Disease Free Zone and as such at no time have they been unable to sustain the project due to funding, in any case, the ministry has planted fodder and kept quality breed of cows and sheep. The 2nd respondent deposed that if indeed the suit land belonged to the Purko clan, there was no need to have written its letter dated 15th March, 2005 requesting for permission to lease the same. Also that the essence of Community Land as provided under Article 63 of *the Constitution* is that communities should fully benefit from the same and not a particular section of the community.
 9. The 6th respondent filed answer to petition dated 30th May, 2018. The 6th respondent stated that the petitioners have no locus standi to institute the suit as the suit property is vested in the 6th respondent



and the Government of Kenya and further that there is no documentary evidence of the 1957 allocation in the records at the Narok County Government and the defunct Narok Town Council. Instead on the ground, there are several public institutions occupying various sizes of land namely; Maasai Girls Secondary School, Agricultural Mechanisation Services, Narok Water and Sewerage Company, Narok Teachers College and Narok Farmers Training Centre. The 6th respondent further stated that the suit property is public trust land which vests with the Government of Kenya and the Purko maasai community cannot illegally lay proprietary rights over public land and that any discussions between the government authorities and the Purko community were for expediency and peaceful co-existence with the local residents and as such have no proprietorship rights over the same. Further, that the subject properties vest with the Government under different authority agencies. The 6th respondent also stated that the Sheep and Goat farm was established by the government and as such it a public institution and does not belong to the Purko community at all. In any case, it would be against public policy and discriminatory to other communities living within Narok town to hand over the land or its management to the Purko community. Further that there is no relationship between the Farmers Training Centre and the alleged Purko Sheep Ranch and that the Farmers Training Centre has never collapsed as it is fully functional and managed by the Narok County Government and for these reasons, there is absolutely no dispute as there is no trespass, misalienation or breach of trust over the same as alleged.

10. The 6th respondent further stated that the fact that the petitioners wrote an application letter to lease/rent the suit property is a clear indication that they knew well that the land was public land vested in the Narok Town Council and therefore the petitioners are estopped from claiming the same, and no titles can be issued to the petitioners. Further that it is a serious misapprehension of the rights and entitlement for the petitioners to state that the suit property is for the benefit of the Purko community alone and therefore the now defunct Narok Town Council cannot be compelled to transfer public land as it would be unlawful and unconstitutional and that the petitioners have no viable claim against the respondents and cannot suffer irreparable harm since the suit properties is not theirs.
11. The hearing of the petition proceeded *viva voce* on 6th December, 2021. Kamakei Ole Santi-(PW1) while adopting his witness statement dated 30th July, 2019 testified that the suit properties were owned by the Purko community that was set apart by his predecessors, the parcels being Mutonyi, Nkijjenik and Limanet which he claims that was taken by people without their consent. He also testified that the three parcels belong to the public for their benefit and at no time did the Purko community give away the land to other parties. On cross examination, he testified that the subject land is occupied by Narok Pastoralists Training Centre and the other for sheep rearing and that those in occupation did so illegally. He testified that they have documents to show the history and there is a register which can be viewed though he does not have the records with him. On further cross examination, he testified that he represents Narok Development Trust and that he is not aware that Purko Development Trust made an application dated 15th March, 2005 to Narok Town Council to be allowed to lease the suit property instead, the town council ought to have written to them so that they could give them the land. He testified that he was also not aware of the town council meeting on 12th April, 2005 which meeting is said to have allowed them to make use of the land. He further testified that he cannot confirm whether there is a title document for the subject parcels of land and he could also not tell whether there was any registration done on 1st March, 1972. He is aware that Cis Mara/ Ilmashariani/ Morijo/60 measuring 223.5 Hectares is registered under the County Council of Narok and that the Purko community are not happy because the land is not being used for its intended purposes. On re-examination, he testified that Narok Pastoral Training Centre is in Nkinjekik and Sheep and Goat farm is in Mau but he does not know which parcel of land the certificate of search was issued.



12. Daniel Ole Nakola-(PW2) while relying on his affidavit dated 6th March, 2013 and witness statement dated 30th July, 2019 testified that the suit properties belong to the Purko community and was left out during the demarcation process so that the Purko community could use it for grazing. That Olokere Lonkishu Nanyoike was used for grazing cows and students at Ole Sankale Maasai African School could make use of the milk from the cows grazing there. He further testified that the suit properties belonged to the Purko community and the chiefs set aside the land but the colonial officer sought to expand the land set aside but the community declined. This was as per minute 4 in the document marked DON 4. He testified that he is aware of the letter written by the community to the county council after the community realized that the properties were not being used for the original intention. That they held a meeting with the late Honourable Ntimama who stated that the trust land reverts back to the community and that in the said meeting, councillors from Narok Town Council were also present and it was resolved that the land be handed over to the Purko community. Further that as a community, they have held several meetings with government officers and as such there have been attempts to acquire land belonging to the sheep and goat rearing centre. PW2 further testified that the county council declined to release the suit properties to the Purko community nor follow directions issued by the Permanent Secretary. It is his testimony that they have no problem with the pastoralists training centre but the motonyi farm has been idle for some time which has a cattle dip that does not benefit the Purko community and Kenyans in general. By a meeting held on 7th June, 2012 it was resolved that allotment letters should not be issued by the town clerk in respect of the suit properties. He further testified that plots have been issued, a quarry is in operation where murrum is being excavated and other illegal activities and further that by a meeting held on 21st March, 2012 by the Public Health and Works Committee it was unanimously resolved that all trust land reverts back to the Purko community.
13. On cross examination, he testified that the Ministry of Livestock Development (as it then was) occupies Farmers Training Centre, Agricultural Machineries and Sheep and Goat which ministry said that they were unable to sustain the project due to insufficient funds. He testified that whereas he is not disputing that there is a farmers college, agricultural machineries and the 50 acres occupied by the teachers training college, he claims the 499 acres in Purko Motonyi farm which the Purko community acquired in 1958 and which they require a no objection letter so that they can process title deed to the said land. He further testified that there are minutes to show how they acquired that land which is in page 41 of their documents. It is his testimony that in a meeting held in December, 1958, the Purko community donated land for the farm school which was to be returned to the Maasai community and that the record of African District Council shows the same. In a meeting attended by the late Honourable Ntimama at page 132, the minutes of the meeting that was attended by officials of Narok Town Council does not give a directive that the land be reverted back to the Purko community it only indicates that the land donated by the community should not be allocated illegally. It is his testimony that the land has been subdivided and allocated to individuals illegally and that he has the maps showing the subdivision but has not brought them to court.
14. He further testified that Purko Development Trust has been cultivating the land near Maasai Girls Secondary Schools but is not aware of the particular parcel of land. He is also aware that sheep and goat farm is managed by the Ministry of Livestock Development (as it then was) but does not know how many sheep and goats on the farm are proportionate to the size of the land. He is aware that they wrote a letter in the year 2005 requesting to lease the land from the Ministry which was declined without reason. The reason for the request is because the African District Council had allocated the land to the county council and it is his prayer that the ministry vacates the suit properties.
15. On further cross examination, he testified that he wants the land that is not being used to revert to the Purko community and whereas there are other communities living in narok besides the Purko



community, the other persons will have to ask for the use of the land from the Purko community which is not discriminatory. He further testified that any member of the Purko community belongs to the Purko Development Trust which has a membership of about 50,000 plus and that it is the general assembly of the community that gave them the authority to move the court. Further that he does not have copies of allotment letters issued and the resolutions read in court are recommendations since the suit properties are mismanaged by the ministry and the county council. Whereas he complained to their area member of parliament, he did not produce the said complaint before court.

16. On re-examination, he testified that the role of the Ministry of Livestock Development (as it then was) in the suit properties is that of an intruder and that the letter by the Permanent Secretary, Ministry of Livestock Development (as it then was) shows that the land was donated by the Purko community and as such they have defied court order as the order was issued against the respondents. He testified that it is not discriminatory for the Purko community to make use of the land as they got authority from members of the community.
17. Hearing proceeded further on 8th March, 2022 where Maranga Ole Otuni-(PW3) while adopting his witness statement dated 30th July, 2019 testified that the suit properties was set aside by their forefathers for the benefit of the community and each parcel was for a particular purpose and this was done through minutes of a meeting held on 22nd August, 1958. Further that the suit properties were held in trust by the county council as they did not have titles and that whereas he does not know the size of the three parcels, he knows their respective boundaries. Further, that the Farmers Training Centre was established to teach the Maasai community about agriculture and is not comfortable with the same because it desires to take away the land from them.
18. On cross examination, he testified that Morijo/Ilmashariani/Cis Mara, Sheep and Goat and Farmers Training Centre was set apart in 1956 and no allotment letters were issued then and that currently there is no sheep being reared at the sheep and goat ranch now which is occupied by the ministry. He further testified that the land fell into the hands of the county council by operation of law with the mandate to hold in trust for the Purko community and whereas the Farmers Training Centre is still in existence, he does not know the acreage and they approached the Director of Survey who showed them the parcels of land which parcels do not have a title. He further testified that the Purko community and Narok Town Council did not enter into any agreement over the parcels of land.
19. On further cross examination, he testified that he would want an order that the parcels of land in dispute be declared Purko land and this will not affect other communities and no other community will be allowed to make use of the land if it reverts to the Purko community. Being aware of Article 40 of *the Constitution*, if the land reverts back to Purko community that would not be against *the Constitution*. He testified that it is the Purko community that set the land aside for itself in 1956 and that the African District Council only held the land in trust on their behalf and that Article 60 of *the Constitution* prohibits allocation of land to private persons which should only go back to the community. Whereas he does not know the acreage of the land they are claiming, he knows the beacons and the boundary and it is of his own knowledge that there are people who know the acreage and can assist. It is his evidence that those who have intermarried within the Purko community are entitled to a share of the land and further being aware that there are several government facilities in the suit properties, the government should continue in occupation and the land left unused should revert to them.
20. On re-examination, PW3 testified that the county council holds the land in trust for the Purko community which is community land and he is familiar with the boundaries of the same.
21. The respondents called two witnesses. Joseph Otieno Onyango (DW1) who adopted his written statement dated 15th June, 2021 as his evidence in chief. On cross examination testified that the land in



- dispute is held in trust by the local authority for the benefit of the local pastoralist communities which Purko is part of and that as long as they can access the facility like any other community, there will be no problem and that the holding of the land in trust does not exempt the Maasai community and any other Maasai can request to be allocated the land. Further that he has worked as a Farm Manager since 1986 and Ilmashariani/Morijo/60 holding ground is registered in trust by the Narok County Council on behalf of the community and people cannot just walk into the property and further he disagreed with the allegation that the sheep and goat land is not in use for the reason that the Farmers Training Centre has livestock and that the ministry is still making use of the land and for this reason they are not in contravention of the injunctive orders.
22. On further cross examination, he testified that the land in dispute is public land held by the Narok County Council and that the Farmers Training Centre is still carrying out projects for the benefit of the community which includes training of farmers and the sheep and goat farm is used for breeding of sheep for selling to the community and that by a search shown to him, the County Council of Narok is the registered owner.
 23. On re-examination, he testified that the Ministry acquired the land from Narok County Council and is used for the intended purpose and has not disposed the property to private individuals.
 24. Godfrey Kwena (DW2) testified that the various parcels of land are registered under the trusteeship of the county government of Narok which land does not belong to the Purko community and if at all the petitioners were the owners, they would not have asked for permission to utilize the same.
 25. On cross examination, he testified that having worked for the last 10 years, he is familiar with the suit properties in dispute and that based on the minutes shown to him by counsel for the petitioners, the parcels of land are not being put to use for the original purpose and that although he was not working for the county council in 2005, Purko Development Trust asked to be allowed to use the land which the county council approved as it holds public land in trust for the community. It was his testimony that the county council can allow a community to use land for purposes it was meant for and that the joint meeting between Narok Town Council and Hon. Ole Ntimama resolved that trust land reverts back to the community which minutes were not a council meeting because a council meeting is strictly for the members and officials of the town council.
 26. On further cross examination, DW2 testified that the suit properties are public land which are not owned by the Purko community and that Narok County Council only holds public land and has entrusted the same to public entities. That the said allocation to the entities have not been revoked and further the county council does not issue leases.
 27. On re-examination, DW2 testified that the purpose of the application resulting in the council meeting held on 12th April, 2005 was for rearing and settling farmers to better breed of sheep which does not amount to allocation of land and the meeting involving the late Hon. Ole Ntimama is not a council meeting as he was not a member of the county council.
 28. The petitioners filed written submissions dated 12th April, 2022. The petitioners submitted that Section 2 of the *Trust Lands Act* vests the trust land in the county council within whose area of jurisdiction the land is situated for the benefit of the inhabitants of the land and in the present case, Narok County Council was vested with the suit properties and in light of that, the county council owed a fiduciary duty to act in good faith for the benefit of the community and should the community observe and come to the realization that the county council has failed in its mandate, it then ought to assert its rights to ownership. The petitioners further submitted that the narrative coined by the respondents' counsel appertaining to discrimination is misconstrued and is a diversionary tactic from the real issue at hand which is the right to communal land ownership by the Purko community. The petitioners further



submitted that the Narok County Council was entrusted to hold the property on behalf of the Purko community and once it started subdividing and allocating parcels there was breach which amounts to trespass. While relying on Article 63 of *the Constitution*, the petitioners submitted that the land under the Purko Development Trust entails community land held by communities on the basis of ethnicity, culture or similar community of interest. The petitioners relied on the cases of *Mohammed Hussein Yakub & 5 Others versus County Government of Mandera & 5 Others* [2020]eKLR, *Babola Mkalindi Rbigo & 9 Others versus Michael Sheth Kaseme & Others* [2016]eKLR and further submitted that the role of Purko Development Trust with regard to the Purko Sheep Ranch is a matter that has already been addressed in Nakuru HCCC No. 277 of 2000 *Siameto Ole Sururu & 6 Others versus Kelenia Ole Nchoe & 18 Others* [2007] eKLR.

29. The 1st respondent filed written submissions dated 10th May, 2022. The 1st respondent raised 3 issues for determination as outlined below: -
1. Whether the land in dispute belongs to the Purko Community.
 2. Whether the Petitioners are entitled to have the suit parcel registered in favour of the Purko Development Trust.
 3. Whether the Petitioners are entitled to the prayers sought.
30. On the first issue, the 1st respondent submitted that the land in dispute was not donated from a section of the Maasi reserves with the consent of the Purko Maasai elders and with respect to Cis Mara/ Ilmashariani/Moriyo/60 the same is registered in the name of Narok County Council and is reserved for Narok Holding Ground. While relying on the case of *Kazungu Fondo Sbutu & Another versus Japhet Noti Charo & Another* [2021] eKLR the 1st respondent submitted that the petitioners have failed to provide evidence that the suit properties was trust land.
31. On the second issue, the 1st respondent submitted that the suit properties have never belonged to the Purko community as they have not demonstrated to this court on what basis the land will be registered in favour of the Purko community. On the third issue, the 1st respondent submitted that the standard of proof in civil cases is proof on the balance of probabilities as was in the case of *Mbutia Macharia versus Annah Mutua Ndwiga & Another* [2017] eKLR and as such, the petitioners have failed to demonstrate that the required standard of proof has been met.
32. The 6th respondent filed written submissions dated 12th May, 2022. The 6th respondent raised 4 issues for determination as follows: -
1. Whether all the land the subject matter of this suit is public land and is thus held and registered under the Narok County Council (now government) in trust for the public.
 2. Whether the petitioners and especially the amorphous, nebulous groups described as the “Purko Development Trust” and “Purko Community, Narok County” are entitled to claim public land as their own and demand that they be declared as the owners thereof?
 3. Whether the petitioners have established any cause of action known to law or their case ought to be dismissed with costs.
 4. Whether the petitioners claim as the Purko community to all public land within Narok county is discriminatory against all other members of the public and thus unconstitutional and repugnant to law equality, public interest and justice.
33. On the first issue, the 6th respondent submitted that the petitioners are laying claim over an undisclosed, vague and vast acreage of land in Narok County which they claim to have historically occupied and



owing to the pastoralist culture of the Maasai community, the land which they occupied is public land and not a specific community land and that public land is open for the use by all members of the public and cannot be allocated to any single individual or clan and that there is no evidence that the suit properties have ever been classified as Purko Community land under *the Constitution*. The 6th respondent further submitted that the baseless historical claim that the land belonged to the Purko Maasai elders in 1958 and it was agreed that it be donated to the government for setting up various government institutions does not meet the mandatory constitutional threshold that community land must be classified as Purko Community Land and, as such the suit properties being trust land rightfully vests in the Narok County Council in trust for the people resident in Narok and this court must protect public land from alienation by the petitioners for the Purko community alone. The 6th respondent relied on the case of *Kenya Anti-Corruption Commission versus Online Enterprises Limited & 4 Others*, Kisumu HC ELC Case No. 708 of 2015 and *Mureithi & 2 Others (For Mbari ya Murathimi clan) versus Attorney General & 5 Others*, Nairobi HCMCA No. 158 of 2005 (2006)1 KLR 443.

34. On the second issue, the 6th respondent submitted that PW2 and PW3 conceded that there is no defined group known as the Purko community and thus it is an amorphous tribe and cannot be described as consisting of pure Purkos only. The 6th respondent further submitted that the petitioners did not produce any document to show authority of the members of the Purko Development Trust and therefore they have no right to claim to be the owners of land belonging to the Purko community. On the third issue, the 6th respondent submitted that there is no reasonable or known cause of action established against the respondents.
35. On the fourth issue, the 6th respondent submitted that the claim by the petitioners that the land should revert back to the Purko community is selfish, misguided and ill-informed for the reasons that it is discriminatory, unconstitutional and repugnant to public interest and justice as enshrined under Article 27 (i) and Article 40 of *the Constitution*.
36. I have analysed the petition, the replies thereof and the written submissions filed by the parties and the issues for determination is as below: -
 1. Whether the suit properties is community land.
 2. Whether the petitioners are entitled to the orders sought.
37. The gist of this petition is that sometime in 1957 or thereabout, the petitioners forefathers donated land to the colonial administration for construction of a school currently known as Ole Sankale Primary School which allocation was in addition to the already existing community land measuring approximately 200 acres and further and in the spirit of enhancing new project, sometime in the year 1958, the Purko community agreed to donate land adjacent to Narok Township and the Purko Sheep Ranch as well. The petitioners claim 4 parcels of land hived off from the Purko community land as the Farmers Training Centre, Agricultural Machineries, Teachers Training College and Purko Motonyi farms. More importantly it was their understanding that once the project was completed, the land would revert back to the Purko community. The petitioners then set to form a trust whose objective was to alleviate poverty and members of the trust entrusted Purko Development Trust with the management of the Sheep Ranch. The parcels of land now in dispute is the Cis Mara Sheep and Goat Farm measuring 132, Purko Motonyi Farms measuring 499 acres and Purko Holding ground measuring 223.5 Hectares. The reasons why they seek the reversion of the suit properties is because the land has been subjected to misuse, subdivision for personal gain in violation of the community land rights.



38. There have been several letters written by Purko Development Trust to the Narok Town Council concerning the same. Several meetings have also been held. What has struck my attention is with respect to Cis Mara/Ilmashariani-Morijo/60 measuring 223.5 Ha registered under the County Council of Narok and reserved for Narok Holding Ground. A look at the search documents with respect to this property indicates that the same is unregistered community land. I have also looked at the minutes dated 12th April, 2005 and minutes of the Town Planning Committee meeting held on 12th April, 2005 which is signed by the town clerk and part of the minutes read as follows, “That Purko trust be given a portion of the fast f.t.c farm which portion had also been turned to crop growing.....That the town planning sub-committee be mandated to look for better ways of planning for the lands under its trusteeship including the sheep and goat, AMS, and FTC and any other land therein.” The minutes was as a result of application letters dated 15th March, 2005 the subject being ‘Sheep and Goat Plot-Narok’ and 21st September, 2006 the subject being ‘300 acres of FTC trust land’. In my view, there is nothing in the minutes to suggest that the Narok county Council (now County Government) has re-allocated land back to Purko Development Trust and what is clear is that the committee in charge needed better ways of planning under its trusteeship.
39. The question now is, are the subject properties community land as alleged by the petitioners? The petitioners testified that the subject properties are community land owned by their forefathers and were later donated to the African District Council for public benefit and part of the land was also hived off from the Maasai reserves. On the other hand, the respondents claim that the suit properties are public land held in trust for the community. The claim by the petitioners is not supported by any document whatsoever. What has come close to a community land is the Narok Holding ground which is registered in the name of the County Council of Narok whose area map reads that the same is unregistered community land.
40. Article 63 of *the Constitution* of Kenya 2010 states that all community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. The definition of community land is as follows:
- (2) Community land consists of—
- (a) land lawfully registered in the name of group representatives under the provisions of any law;
 - (b) land lawfully transferred to a specific community by any process of law;
 - (c) any other land declared to be community land by an Act of Parliament; and
 - (d) land that is—
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).



41. The custodian of unregistered community land is the County Government as set out under subsection 3 where it is stipulated as follows;

“(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held...”

42. Parliament enacted the Community Land Act to give effect to Article 63 (5) of the Constitution; to “provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.”

43. Section 6 of the Community Land Act No. 27 of 2016 provides for the role of county government as follow;

“1. County Governments shall hold in trust all unregistered Community Land on behalf of the communities for which it is held.

2. The respective County Government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered Community Land.

3. Upon registration of Community Land, the respective County Government shall promptly release to the community all such monies payable for compulsory acquisition

(6) Any transaction in relation to unregistered Community Land which the County shall be in accordance with the provisions of this Act and any other applicable law.....

(8) A County Government shall not sell, dispose, transfer convert for private purposes or in any other way dispose of any unregistered Community Land that it is holding in trust on behalf of the Communities for which it is held.”

44. Section 6(6) of the aforementioned Act also provides that;

“Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable Law. emphasize added”.

45. The Community Land Act has gone further to give an even more elaborate and broad manner of determination of rights and interests in community Land. Section 4 (3) of the Community Land Act provides that;

“Community land shall vest in the community and may be held under any of the following tenure system;

a) Customary

b) Freehold

c) Leasehold and

d) Such other tenure system recognized under this Act or other written law”.



46. Section 5 of the *Community Land Act* provides that;

“(1) Every person shall have the right, either individually or in association with others (emphasize added), to acquire and own properly, in accordance with Article 40 of *the Constitution*-

(a) of any description; and

(b) in any part of Kenya.

(2) Customary land rights shall be recognized, adjudicated for and documented for purposes of registration in accordance with this Act and any other written Law (emphasize added).

(3) Customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer”.

47. From the above provisions of law, the rights which every person is entitled to in community land is either individual rights or rights held in association with others. In this case, the petitioners want the land to revert to the Purko community who form part of the larger Maasai tribe. The reasons advanced for this is that the suit properties were owned by their forefathers. Article 10 (2) of *the Constitution* provides the national values and principles of governance include- “

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.”

48. Whereas the petitioners seek that land be reverted to the Purko community, I find the same to be discriminative and retrogressive and against the spirit of our constitution. The suit properties are situate in Narok which is home to other communities as well and it would be unfair, given the current age and era we live in to allow a clan of a tribe to manage the affairs of parcels of land held in trust on their behalf by the county government.

49. As such, I decline to grant the prayers sought in the petition dated 6th March, 2013 and the same is dismissed. The orders issued on 20th March, 2013 are hereby vacated. There are no orders as to costs. It is so ordered.

DATED, SIGNED and DELIVERED VIA EMAIL ON 20TH JULY, 2022.

Mbogo C.G

Judge

20/7/2022

In the presence of: -

CA: Timothy Chuma

