Taireni Association of Mijikenda v Mwambeja Ranching Company Limited & 7 others (Petition 12 of 2021) [2022] KEELC 4882 (KLR) (15 July 2022) (Judgment)

Neutral citation: [2022] KEELC 4882 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

PETITION 12 OF 2021

AE DENA, J

JULY 15, 2022

BETWEEN

TAIRENI ASSOCIATION OF MIJIKENDA ..... PETITIONER

AND

MWAMBEJA RANCHING COMPANY LIMITED ..... 1ST RESPONDENT

SHIMBALAND RANCHING COMPANY LIMITED ..... 2ND RESPONDENT

KWALE COUNTY GOVERNMENT ..... 3RD RESPONDENT

NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

CHIEF LAND REGISTRAR ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 7TH RESPONDENT

NATIONAL BANK OF KENYA ..... 8TH RESPONDENT

JUDGMENT

1. The petitioners Taireni Association of Mijikenda describe themselves as a national association registered specifically for the purpose of empowering the Mijikenda community, advocacy, organizing and educating the community. The subject of this petition is land registered as LR 16659- formerly registered as LR No 14209 (herein the suit property. It is said to be situated in Kinango sub county Puma Ward within Kwale county. It is alleged that the Duruma community mostly the Mwambeja clan and other communities which joined them later have been in continuous occupation of the same for more than a century. The petition is also instituted on behalf of these communities.

2. The petitioners contend that the suit land was on March 1, 1977 unlawfully allocated to the 1st respondent by way of grant by the then president of the Republic of Kenya. That the land was thereafter charged as a security for a loan to the National Bank of Kenya, the 8th respondent and upon default the bank sold it to Shimbaland ranching company limited the 2nd respondent. A fresh title deed LR 16659-Voi was then issued to the 2nd respondent on May 1, 1992.

3. The history of the suit land as narrated in the pleading's dates back to the year 1943 when the petitioner's forefathers are said to have migrated to the area. It is believed that they were hunters, gatherers and farmers looking for arable land that would be suitable for their farming activities. That in the years that followed other communities further inhabited the land and those include the Kamba and Maasai communities. The petitioners state that in 1975 the Mwambeja ranching company limited took occupation of part of the land for purposes of rearing cows and goats but collapsed three years later. The community then decided to develop boundaries to the suit land as described in the petition.

4. The petitioners classify the suit land as community land and aver that the 2nd respondent in a move to occupy the land moved to evict the residents. The petitioner's case is that the land was compulsorily acquired by the government in favor of the 1st respondent without public participation and compensation as required by law. That the president's power to issue land is limited to public land owned by the government and not community or private land consequently the title held by the 1st respondent and subsequently the 2nd respondents were invalid.

5. Other grounds are captured in the affidavit of Peter Ponda Kadzeha of March 16, 2020. These include the acquisition of the land by the 1st respondent for speculative purposes, failure to use the land, failure to use the loan proceeds for the intended purpose, registering the suit property as having been located in Taveta and later in Voi to perpetrate their fraudulent plans, undervaluation of the suit property during the public auction, forceful evictions, harassment and irregular subdivisions. The grounds will become clearer in the various responses and submissions filed by the parties as well as this judgement.

6. The petitioners state that in the event that this court finds that the 2nd respondent is the *bonafide* owner of the suit land, they then qualify to lawfully own the same by operation of the *Limitation of Actions Act* chapter 22 of the laws of Kenya as they have been in occupation for more than 12 years.

7. The petition seeks the following prayers; -

    a. A declaration does issue that the first generation in occupation of the south coast of the coastal area within the Republic of Kenya, now in Kwale County were the Duruma and Wattha and including the suit land registered as no LR 16659-voi[formerly 14209-taita],herein and the area or region remain bonafide community or ancestral lands and they have remained in continuous occupation of the suit land and unless under any written law limiting such right ,none of its members shall be deemed as squatters, when he or she is can be proven to be a member of those communities and his or her lineage within those communities can be determined.

    b. A declaration does issue that the issuance of the grant to the 1st respondent as a private person on March 1, 1977 by his excellency the president of the Republic of Kenya, while there was existence of communities on the suit land registered as No LR 16659-Voi [formerly 14209-Taita] and disregarding their rights to own the suit land individually and or as a community was both unlawful and unconstitutional

    c. An order of permanent injunction does issue restraining the 2nd respondent either by themselves, servants or agents or any other person acting for them or in their names or advancing any of their connected interests, from demolishing or removing any of the structures

build, installed, maintained by community in occupation of the suit land, and or trespassing on the suit land registered as No LR 16659-Voi [formerly 14209- Taita]

d. An order of permanent injunction does issue restraining the 1st and 2nd respondents either by themselves, servants or agents or any other person acting for them or in their names or advancing any of their connected interests, from selling, transferring, mortgaging, leasing, sub dividing and or doing anything prejudicial to the interests of the community in occupation of the suit land registered as No LR 16659-Voi [formerly 14209- Taita].

e. An order of permanent injunction does issue restraining the 2nd respondent, either by themselves, servants or agents or any other person acting for them or in their names or advancing any of their connected interests from setting their feet on the suit land registered as No LR 16659-Voi [formerly 14209- Taita].

f. An order of judicial review does issue

g. An order of prohibition does issue to stop the 3rd,4th,5th,6th and 7th respondents either by themselves, servants or agents or any other person acting for them or in their names, their accomplices or advancing any of their connected interests from further doing anything prejudicial to the interests of the community occupation of the suit land registered as no LR 16659-Voi [formerly 14209- Taita]

h. An order of *certiorari* do issue to quash the title deed issued to the 1st respondent and now registered in the name of the 2nd respondent for the suit land registered as title deed no LR 16659-Voi [formerly 14209- Taita]

i. An order of *mandamus* does issue to compel the 5th respondent to convert and register the suit land, registered as no LR 16659-Voi [formerly 14209- Taita] to community land and placed as a community land under the watch of the 3rd respondent.

j. Any other relief the court deems fit to grant.

RESPONSES TO THE PETITION

8. The 1st and 3rd respondents did not participate in the petition despite service.

2ND RESPONDENT RESPONSE

9. The petition is highly contested by the 2nd respondent who filed its response on June 9, 2021. It is stated that provisions of the constitution cited by the petitioner as having been contravened had not been specifically pleaded. Other grounds are reiterated in the 2nd respondents' submissions and cross petition.

10. It is the 2nd respondent's case that the 1st respondent Mwambeja ranching company limited was initially issued with a certificate of title in the year 1977 under LR 14209 and later registered under grant no CR 18438. The grant was surrendered to the government for purposes of extension of lease and change of user whereupon a new grant was issued on May 1, 1992 as LR No 16659. The suit property was then charged to the Kenya National Capital Corporation Limited by the 1st respondent securing a loan of kshs 30,000,000/- [read thirty million]. That the 1st respondent failed to service the said loan leading to several notices of sale (under the *Auctioneer's Rules 1997*) of the suit land through various newspapers listed in the country. That consequently the Kenya National Capital Corporation Limited exercised its statutory power of sale on June 11, 2012 and the land was sold to the 2nd respondent at a public auction on June 11, 2012 and a sale agreement was thereafter executed between the 2nd respondent and the 8th

respondent. Further that the 8th respondent executed a transfer by charge under the statutory power of sale dated December 24, 2012 in favour of the 2nd respondent. That the 2nd respondent obtained a letter of consent for transfer from the Kwale Land Control Board and paid stamp duty on December 31, 2012. As a result, the suit property was then registered in favour of the 2nd respondent as CR 22929/4 on 4th January 2012.

11. The 2nd respondent also filed an affidavit in support of its response to the petition sworn by Hussein Unshur Mohamed its director on June 7, 2021 and filed on June 9, 2021 with their authority. It reiterated the averments in the response to the petition. He stated further that the petitioner's constitution did not confer to them the legal capacity to sue the 2nd respondent. In response to the petitioners allegations that a former chief one Mzee Murondo was the proprietor of the 1st respondent the 2nd respondent presented the list of directors of the 1st respondent as of September 1991 and January 1992. In response to the suit property's location, it was averred that the direction given as south west of Voi in Taita district was the director of surveys way of describing the location of the land and it had nothing to do with the county where the suit land was located.

12. The 2nd respondent confirmed that the 1st respondent was the first registered owner of the suit land that the 1st respondent obtained a change of user of the suit property from LR No 14209 to LR No 16659[CR 18438]. That the 1st respondent sought the change of user and extension of the lease in order to obtain a loan facility through several correspondences that were brought to the attention of the court. It was averred that the suit land was charged by the Kenya National Capital Corporation Limited which later merged with the National Bank of Kenya *vide* a Gazette Notice No 3481 of June 18, 1999. It is also stated that the change of user in the suit land was advertised in the newspapers as required by the relevant physical planning laws and notices issued inviting any person with an interest to record the same with the county offices in charge of planning in line with the tenets of public participation. It is deposed that the issues regarding developmental approvals and other planning matters ought to be raised with the appropriate forum.

13. The 2nd respondent stated that the suit land is private land and not community land as contended by the petitioners. That other than the myriad newspaper adverts placed over sale of the suit land by way of auction, several valuation exercises were carried out to ascertain the value of the land before the auction. That the firm of Watts enterprises who are licensed auctioneers sent a letter dated May 5, 1995 to the then district commissioner Kwale district notifying him of the intention to sell the suit property by way of public auction. The 2nd respondent denied the allegations of displacement of persons and forceful evictions, use of police to threaten the people with regards to taking occupation of the suit land. The other grounds shall be referred to in the 2nd respondents' submissions. They prayed for the petition to be dismissed.

2ND RESPONDENTS CROSS PETITION

14. In further response to the petition, the 2nd respondent filed a cross petition on June 9, 2021 against the 5th, 7th and 8th respondents. That they have undertaken several developmental activities on the suit land in readiness for investment on the same at an estimated cost of kshs Two Billion, Eight Hundred and eighty-nine million, eight hundred and thirty-three thousand, two hundred and forty shillings [kshs 2,889,833,240/-]. The cross petition is supported by an affidavit sworn by Mohammed Abdikadir on June 7, 2021. He reiterated the averments as raised in the cross petition. He deposed that the 8th respondent in exercise of its statutory power of sale has been subject to several court cases namely High Court Civil Suit No 225 of 1998, Civil Suit No 566 of 2013 and Court of Appeal Nairobi, Civil Appeal No 30/2018. That the courts in all the cited cases held that the statutory power of sale had been procedurally and legally exercised. That as such the suit land remains private land. The deponent

further stated that issues regarding the statutory power of sale and utilization of loan monies were res judicata as the same had already been dealt with by the court. The 2nd respondent seeks compensation in damages of the said amount from the 8th respondent and indemnity from the 5th and 7th respondents as hereunder; -

a. An order compelling the 8th respondent to pay Kenya shillings two billion, eight hundred and eighty-nine million, eight hundred and thirty-three thousand, two hundred and forty shillings [kshs 2,889,833,240/-] in damages being the current market value of the suit property together with costs for stamp duty to the 2nd respondent should the 2nd respondents title to the suit property for any reason be nullified by the honourable court.

b. In the alternative, a declaration that the 5th and 7th respondents are bound to indemnify the 2nd respondent in respect of all losses should the 2nd respondents title to the suit property for any reason be nullified by the honourable court.

c. Costs of the suit

d. Interests on prayers [a] and [b] above at commercial rates from the date of filing the suit herein to settlement in full

e. Any other relief that the court may deem just in the circumstances.

4TH RESPONDENT'S RESPONSE

15. In response to the petition, the 4th respondent the National Land Commission on March 3, 2022 filed a replying affidavit sworn by its chief land officer Zachary Ndege. He stated that from the available records the suit property has never constituted community land or trust land. That it is unalienated government land which was alienated by way of allocation by the President under the repealed Government Land Act to the 1st respondent. It is averred that was allocated to the 1st respondent for a term of 45 years from March 1, 1977. That the standard premium payable was nil, a survey was undertaken and a Deed Plan No130245 prepared and approved on October 23, 1987. Thereafter the 1st respondent was issued with a grant for LR No 14209[CR No 18438].

16. The 4th respondent further states that the 1st respondent is distinct from the ordinary group ranches that would be declared under chapter 284 of the laws of Kenya and managed under the provisions of chapter 288 -Trust Lands Act (repealed) pursuant to an adjudication and registration process. That the 1st respondent constitutes 'agriculture directed ranches' where the ownership and use of the land is limited to registered members only and not the community. That the land reserved as agricultural directed ranches is mostly allocated by the government through the commissioner of lands by then on a lease basis limited to 45 years pursuant to a process of setting apart evidenced by survey and minutes of the respective municipal councils. That upon issuance of the lease the land becomes private land as enshrined under article 63 of the *Constitution* and the *Land Registration Act*. That once the lease or grant expires, the land reverts to the county government and renewal of the same is done by the National Land Commission on behalf of the county government under article 62 of the *Constitution* and section 13 of the *Land Act*.

17. It is also deponed that the lease was extended for a term of 50 years from May 1, 1992 following a surrender of the old lease on July 6, 1992 that was duly registered on July 9, 1992. The deponent also narrates the property number was changed to LR No 16659 and a new grant CR 22939 issued, the charging of the same and the subsequent sale under statutory power of sale to the 2nd respondent as earlier narrated in the 2nd respondent's response. It was reiterated that the 2nd respondent is the bonafide

purchaser for value of the suit property duly protected by section 99 of the *Land Act* and no grounds have been laid by the petitioners to warrant cancellation of the title held by the 2nd respondent.

18. The 4th respondent further stated that in their report dated January 21, 2019 it was concluded that the suit land is private and has never been community or trust land. That the petitioners did not challenge the said report but have opted to file the instant petition. Lastly the 4th respondent averred that the petition does not raise any constitutional issues and hence failed the test as was set out in Annarita Karimi Versus Republic (supra). It is the 4th respondent's contention that the petition before court is premature as it raises issues of historical injustices which ought to be handled by the 4th respondent pursuant to section 15 of the *National Land Commission Act*. It is noteworthy that the deponent did not attach any evidence to the affidavits.

5TH, 6TH AND 7TH RESPONDENT'S RESPONSE.**

19. The 5th, 6th and 7th respondents filed a replying affidavit to the petition on November 24, 2021 sworn by Josephine Rama, land registrar Mombasa. It is averred that the suit land was unalienated government land which was allocated to the 1st respondent by the president in 1977. That upon acceptance of such allotment the requisite fees were paid and the land registered in favour of the 1st respondent in 1977 and a title was issued as Land Reference No 14209[CR No 18438]. That the 1st respondent sought and obtained a change of user and the land was registered as Land Reference No 16659 on 1st May 1992. That the same was surrendered to government and registered as CR 18348/2 on July 9, 1992. The history of how the property was charged and the subsequent sale under statutory power of sale culminating into certificate of title issued to the 2nd respondent was also highlighted. The copies of the documents were exhibited as bundle 'JR2'

20. It was further stated that the suit property has never been community land. That it was unalienated government land until it was alienated in favour of the 1st respondent through a grant by the president in 1977. That as such community land rights could not accrue to the community. It is also averred that upon registration of the 2nd respondent as owner of the suit property, the 2nd respondent became the absolute owner of the property with all the rights and privileges appurtenant thereto. Further that the petitioner was guilty of material non-disclosure and misrepresentation of facts.

21. It is further stated that a cross petition by law can only be brought by a respondent against a petitioner and not respondents and the same ought to be dismissed. The averments of the replying affidavit were pleaded to serve as response to the cross petition. This court was also urged that there is no violation of rights and of threat of violation of rights by the 5th, 6th and 7th respondent to warrant grant of order sought in the petition and cross petition against them.

8TH RESPONDENTS RESPONSE

22. The 8th respondent opposed the cross petition through the replying affidavit of its recoveries manager Paul K Chelanga filed on September 16, 2021. It is averred that rule 15(2) the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 Legal Notice No 117 (The Mutunga Rules) which provides for responses to petitions, do not permit a response by way of a cross petition against another respondent. That the allegations on the cross petition being founded on a sale agreement over the suit property which is claimed to have been breached by the 8th respondent is private commercial contract cannot be enforced in a constitutional petition. That the allegations do not raise any constitutional issues relating to interpretation of the bill of rights. It is also stated that the 2nd respondents claim is time barred the agreement having been entered into on December 24, 2012

a period of 9 years ago. That the claim was disguised under the constitutional petition to circumvent the law on limitation.

23. The 8th respondent stated that it legally exercised its statutory power of sale over the suit property which was the finding of the court in Nairobi HCC No 566 of 2013 *Mwambeja Ranching Company Limited v Kenya National Capital Corporation Limited & another* and exhibited the same – 'NBK1'. According the bank entered into the agreement in good faith and willingness to transfer a good title. That the transfer from the bank to the 2nd respondent conferred absolute ownership thereof with all the rights and privileged appurtenant thereto. Further that the 2nd respondent had failed to lead any evidence to demonstrate that the 8th respondent acted illegally or in contravention of the Constitution. This court was urged to strike out the cross petition.

SUBMISSIONS BY THE PARTIES

24. The parties agreed to canvass the petition by way of written submissions. Counsel representing the parties highlighted the submissions before me on March 3, 2022 which have been considered in this judgement. Mr Oduor submitted for the petitioners, Mr Sagana for the 2nd respondent, Mr Makuto on behalf of the 5th 6th and 7th respondents and Mr Munyao for the 8th respondent. There was no appearance for the 4th respondent.

PETITIONERS SUBMISSIONS

25. The petitioner to further buttress its case filed submissions dated November 17, 2021 and supplementary submissions together with a list of authorities dated November 17, 2021. The petitioner elected not to submit or respond to the cross petition as it did not affect the petitioners. Counsel narrated the facts as pleaded in the petition and the supporting affidavit. It was contended that the suit was community land and community settlement was evidenced by existence of residential houses, former homes (dating to 1961) farms, graves (dating to 1959 and 1971, physical and social amenities such as schools, dispensaries, markets, water points developed by the national and county governments and all this had not been controverted. The petitioner relied on the findings of an audit report commissioned by the 3rd respondent in the year 2014 dated January 21, 2019. Key findings relied upon were that the report placed the members of the communities in occupation of the suit land long before (nearly 600 years) any government was established and before the grant was issued to the 1st respondent in 1977; as at the time the 1st respondent was registered the community was also in the process of establishing the Duruma group ranch; that all the ranches audited were acquired fraudulently and it was difficult to obtain information on how the suit land was transferred from the community to the government. It was submitted that there were no records in the certificate of postal search showing the suit land to have been registered in the name of the state or any of its departments, institutions or corporations.

26. A summary of the legal issues highlighted in the petitioners submissions supported by the facts and evidence presented are listed and summarized as follows; -

a. Locus standi to institute this petition

27. This was in response to the 2nd and 8th respondent's contention that the petitioner had not given its beneficial and legal rights. Citing article 3(1) of the *Constitution of Kenya* counsel urged that it was the petitioner's obligation to defend and uphold the Constitution which was being violated by the 3rd respondent, the President through the 7th respondent by infringement, continued threats to the bill of rights of the communities in continuous occupation of the suit property. Reliance was placed on the case of *Mumo Matemo -v- Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.

b. Whether this petition is time barred by the Limitation of Action Act

28. It was submitted on behalf of the petitioners that the rights under property or life have no bar since such rights are never conferred by the state or any other person. That such a bar could only be by an act of parliament which provision had not been disclosed to the court. That there was lack of exhaustion to the procedural requirements of the repealed constitution (section 117 (4) as to compensation of all the persons that claimed legal interest thus the setting apart had not taken effect. Counsel relied on *Otieno Mak'Onyango v Attorney General & another* (2012) eKLR and *Kenneth Stanley Njindo Matiba v Attorney General* (2017) eKLR.

c. Whether Customary law on land is recognized and applicable under the current constitution.

29. It was submitted that section 117 (4) of the repealed constitution recognized land rights accruing from customary law of the community. Further that clause 4.7.6 of Kwale district and Mombasa mainland south regional physical development plan, 2004 – 2034 recognized the customary law of the Duruma community in relation to land rights where land is considered the basic source of livelihood. That such rights were only extinguishable after the provisions of section 117(4) of the repealed constitution have taken effect. Counsel relied on the case of *Isack M'Inanga Keibia v Isaaya Theuri M'Lintari & another* (2018) eKLR where the Supreme court rendered itself on recognition of customary land rights which are never conferred by registration or occupation. Counsel urged that this finding was in tandem with section 117 (4) (a) of the repealed constitution that such rights could only be extinguished subject to the provisions of section 117(5).

d. Whether the county council contravened section 75 (1) (c) and 117 (1) (c) of the constitution 1969 in setting apart the land for government use.

30. It was urged that the president had no authority to exercise power donated to the county council under section 117 (1) of the repealed constitution. Only the county council was given power to set apart trust land for occupation and use by any other person other than public entities. it was contended that since the 1st respondent is not a public entity, the grant ought to have been subjected to the opinion of county council pursuant to section 117 (1) (c). Counsel reiterated that the President could only set apart land for purposes of a government institution which the 1st respondent was not. The president therefore contravened the constitution also contravened the bill of rights. Further that as result 2nd and 8th respondents were conferred upon a bad title. That in addition the certificate held by the 2nd respondent could under section 26 of the *Land Registration Act* be impeached on grounds of fraud, mistake or by misrepresentation counsel cited the case of *Martha Chelai & another v Elijah Kipkemoi Boiywo & 2 others* (2019) where the court relied on Sila Munyao J judgement in *Elijah Mukeri Nyangwara v Stephen Mungai Njuguna & another*, Eldoret ELC Case No 609B of 2012 to buttress the point that the effect of the said section 26 is to remove the protection of an innocent purchaser or innocent title holder and protect the real title holders from being deprived of their titles by subsequent transactions.

e. Whether the president contravened section 118(1) and (2) of constitution 1969 when he granted the suit land to the 1st respondent.

31. Based on the submissions above it was contended that since the president failed to ensure that persons with interests on the suit property were promptly compensated, the president breached the bill of rights of the said people -see section 118(2) (b) of repealed constitution. It was pointed that in *National Land Commission v The Attorney General & 7 others* Advisory opinion Reference No 2 of 2014 Supreme

Court of Kenya, the state was faulted for not complying with the constitution and the law in dealing with public and community lands.

f. Whether the claim by the 2nd and 8th respondents that the suit belonged to the state without proof or such evidence can amount to defence.

32. It was submitted that the 2nd and 8th respondents had failed to adduce evidence in support of the allegation that the suit was unalienated land belonging to the state. Counsel urged that the burden of proof shifted to the said respondents as was the holding in *Fatuma Hamisi Bilai & 6 Others v Kenya Railways Corporation & 6 others* ELC court at Kisumu Petition No E004 of 2021 where the Nubians were able to produce evidence of their grant by the British Government. *Dock Workers Union & 2 Others v Attorney General & 7 others* in Mombasa Constitutional Petition No 82 of 2019 was also cited. It was pointed that the registration of the grant in Taita Taveta district contravened the requirements of section 21(1) of the *Registration of titles Act (repealed)* that every grant shall be delivered out of the land office to the registrar of the registration district in which the land is situated. That this was calculated to put the communities in darkness. Further that the swynerton plan removed the property from the crown lands that were under the British protectorate and it was not to suffer succession after independence. That the suit property was sold under private treaty contrary to requirements of sections 90 and 96 of the *Land Registration Act* 2012 which applied to the suit property.

33. It was stated that by dint of article 61 of the *Constitution* communities are one of the owners of land within the republic of Kenya therefore, the arbitrary takeover of the suit property should be declared unconstitutional. Other alleged infringements were pointed as article 47 on fair administration action for failure to notify the community on the intention to place beacons for subdivision and displacement without justifiable cause. *Severine Luyali v Ministry of Foreign Affairs and International Trade and 3 others* (2014) eKLR.

34. Counsel urged that the court must step in to grant appropriate relief including declaration of rights, injunction and conservatory orders to enforce the bill of rights in accordance to article 23(3) and relied on *Diana Kethi Kilonzo v Independence Electoral and Boundaries Commission and 10 others* (2013) eKLR. Lastly it was urged that the petitioners have demonstrated that their rights had been infringed by the respondents in contravention of the Constitution which calls for rebuttal or explanation from the respondents within the meaning of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125 and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR. That the petitioner has established a case and proved the contravention of the Constitution and the law in granting lease to the 1st respondent and violations of the bill of rights of the communities who have legal customary rights over the suit land. That the 2nd and 8th respondents cannot benefit from what was procured illegally and unconstitutionally. This court was urged to consider the petitioners case in totality and grant the reliefs sought.

35. It was further contended that it is not plausible for the suit land to have been alienated from un alienated government land as deposed by the 2nd respondent when it is surrounded by private ranches which are non-government lands. Further that the acquisition of the suit land was with ulterior motive, speculative and fraudulent for the reasons that the speed and intervals and subsequent grant of the loan facility for the sisal plantation was out of the ordinary considering that the plantation was never undertaken. The petitioner tied this up to the surrender of the grant, reissuance of a new one registered at Voi instead of Taita which was also alleged to be suspect and illegal.

36. The Petitioner accuses the 4th respondent National Land Commission of bias in handling the question of historical injustices for producing its report to counter the findings of the audit that the suit land may have been acquired unlawfully to shield the 2nd and 8th respondent from culpability. That the 4th

respondent escalated the problem in this regard as well as in aiding the change of user when it had no jurisdiction over private land and by further rejecting the 3rd respondents audit report. That the finding by the 4th respondent that the suit property is private land has rendered over 30,000 residents' squatters and landless.

37. It was further contended that the 2nd respondent has been seeking to evict the residents in very inhumane ways in complete of established guidelines on evictions. It is stated no mitigating measures such as alternative settlement have been put in place by either the state or the 2nd respondent for those targeted for eviction. This court was referred to clause J of the sale agreement between the 2nd and 8th respondent where 13,000 acres did not form part of the sale agreement, yet the 2nd respondent had moved into the entire suit land. That at the same time the 3rd to 7th defendants have abdicated their statutory responsibilities by failing to protect the community. Counsel emphasised that the 1st 2nd and 8th had failed to identify when the current occupants entered the suit land neither had they filed any suit to evict them.

38. Counsel submitted that despite the 8th respondent stating that having exercised its statutory power of sale, recovered its loan proceeds and that by dint of judgement in HCC 566 of 2013 they were not a necessary party to the suit, the 8th respondent had not urged this court for any remedy in this regard. Counsel urged that by operation clause 5 of the sale agreement between the 2nd and 8th respondent, the 8th respondent agreed to enjoin to the present and any future suit which would attempt to invalidate the title to the suit land. That HCC 566 of 2013 did not deal with how the suit land was leased to the 1st defendant but dealt with the value of the suit land.

2ND RESPONDENT'S SUBMISSIONS

39. The 2nd respondent submissions were filed by the firm of Sagana Biriq & Co Advocates on January 14, 2022. Firstly, it was urged that the petition did not meet the jurisprudential threshold for public interest litigation. That the number of individuals being represented as petitioners was unknown, no list of members furnished, no resolution of members or the board/trustees had been signed to institute the petition and no affidavit had been filed in support of the petition. It was contended that petitioners had not used the established mechanism to lodge claims against historical land injustices at the National Land Commission and were in contravention of the doctrine of exhaustion as held *Speaker of National Assembly V Karume* [1992] KLR 21

40. It was submitted that the alleged representative of the petitioners one Peter Ponda Kadzeha had not attached any document and identified himself even though he claimed to be a member of the Mwambeja Clan. No authority had been signed by the rest of the petitioners authorising him to swear the affidavit on their behalf and referred to Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & others where justice Sila Munyao deemed petitioners to be those that had signed a letter authorizing the lead petitioner to plead and sign affidavit in support of the suit. That the petition contravened the principles established in *Anarita Karimi Njeru v Republic* [1979] KLR, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others, Parkshire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others and *The Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013*.

41. It is contended that the petitioner lacks locus standi to institute the proceedings for public interest because he was motivated by ulterior motives and had not followed the process of instituting a representative suit. The petition failed to fully disclose the identity of the persons it claims to represent as no evidence was produced of existence of any registered members of Taireni Association. It failed to show the said persons were aware as the petitioner avoided to advertise as required under order 1

rule 8 of the *Civil Procedure Rules*. Failed to show that the petitioners supported it and why they could not file on their own behalf. Counsel urged that these pointed that the petitioner lacked bonafide and was acting for personal gain including political motivation and referred this court to *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. It was also argued that there is no relief that can flow from the petitioner's pleadings that had not substantiated the claims with precision – see *Anarita Karimi Njeru v the Republic* (1980) KLR 1272, an omnibus claim that ought to be dismissed.

42. The second preliminary point is that the subject matter is not sufficiently and adequately described. On this it was submitted that the suit property has not been sufficiently, adequately and accurately described by the petitioner. That the land has been equated to swatches of land straddling along and located between the Mombasa road and the Kenya-Tanzania border. The land does not cover the huge area presented by the Petitioner. That the petitioner has offered three different descriptions of the suit property and none resembles the property owned by the 2nd respondent. Further that the parcels described by the petitioner do not measure 32,854 Ha. The 2nd respondent then highlighted eight issues for determination as here below;

a. Whether the suit property is community or ancestral land

43. It is submitted that section 2 of the Government Lands Act [now repealed] provided for unalienated land as government land which is not for the time being leased to any other person or in respect of which the Commission has not issued any letter of allotment. In relation to the suit property counsel stated that a grant was issued by the then president of in March 1977. Under section 26 of the *Land Registration Act* the grant is incontrovertible evidence that the suit property was un alienated government land available for allocation by the president in exercise of his power under section 3 of the *Government Lands Act* [now repealed].

44. It was submitted that the 5th and 7th respondents who are tasked with keeping of all land records in Kenya were emphatic that the suit property was government land that was un alienated when grant was issued to the 1st respondent. Further that the 4th respondents report titled "determination for review of grants and disposal of public land kwale county" and the audit report by the county government of Kwale both categorised the suit property as privately-owned land which was successfully registered as private land in the year 1977. Further that the petitioner calling for a return of the suit property to the government was an acknowledgement that the land was un alienated government land. Other admissions in this regard were identified in paragraphs 36, 34 and 35 of the petitioners submissions.

45. The court was referred to the holding in Henry Wambega & 733 others v Attorney General & 9 others [2020] eKLR where in dismissing a similar claim the court stated that an invasion of land on the claim that the same belonged to forefathers of a particular people would result to a total negation of the constitutional right to property. Counsel pointed that like in *Fatuma Khamisi Bilai & 6 others v The Kenya Railways Corporation & 6 others* [2021]eKLR. where the Nubians produced a grant from the colonial government which the court relied upon to grant them the reliefs they sought, the 2nd respondent had likewise presented a grant or certificate of title as evidence of exclusive proprietary rights which were also annexed as part of the petitioners evidence. The 2nd respondent submitted on the presumption of regularity and stated that the actions of the president, the 5th, 6th and 7th in allocation of the suit property are presumed to have been lawful and all procedures are taken to have been followed. Reference was made to Civil Appeal No 113 Of 2015 *Teresia Kamene Kingóo Harun Edward Mwangi* [2019] eKLR and *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* (2020) eKLR where it was held that presumption of regularity can only be rebutted with clear, cogent and undisputed factual evidence or uncontroverted evidence which the petitioner had failed

to lead. Citing Robinson Nalengeyo Ole Torome & 7 others v Kedong Ranch Limited & 3 others [2021] eKLR it was posited that courts have shunned granting claims said to arise from ancestral, customary or historical connection to such land. Further that registration guarantees protection under the constitution unless fraud is proven. That the petitioner had not demonstrated any right over the suit property which can be protected.

a. Whether the 2nd respondents title can be impugned by the alleged irregularity in 1st allocation of the suit property by the president in the absence of any proof of fraud or misrepresentation by the 2nd respondent.

46. It is submitted that no claim of fraud had so far been laid against the 2nd respondent by the petitioner. Further that the petitioner had not tendered any evidence to show that the president in allocating the land had been misled or violated the repealed constitution or that the 5th, 6th and 7th respondents were engaged in a corrupt scheme in the issuance of the grant to the 1st respondent and the 2nd respondents title cannot be vitiated. The court was referred to Shimoni Resort versus Registrar of Titles & 5 others to support to support applicability of the Torrens system in Kenya and the position that the title of a bonafide purchaser cannot be impeached unless by proof of fraud or misrepresentation which the buyer himself is involved.

a. Whether the 2nd respondent is protected under section 99 of the Land Act 2012.

47. Citing *Josephat Mwangi Moracha & another versus HFC Limited* [2021] eKLR. Counsel urged that the 2nd respondent was protected in law (section 99 of the *Land Act* 2012) having purchased the suit property pursuant exercise of statutory power of sale by the 8th respondent. That the sale of the suit property to the 2nd respondent was res judicata having been determined in Nairobi High Court Civil Suit No 566 of 2013 and Nairobi Court of Appeal Civil Appeal No 30 of 2018.

a. Whether the petition meets the legal threshold for a Constitutional Petition.

48. It is submitted that the petitioner has failed to meet the legal threshold for a constitutional petition by failing to outline with precision the provisions of the constitution that have been offended in abuse of their rights. That the provisions were merely listed in paragraphs 71 – 99 of the petition without stating the manner in which the infringement has occurred or threatened to occur. Reliance was placed on *Anarita Karimi Njeru Versus Republic* [1979] eKLR and *Ahmed Abdulahi Adan Versus Attorney General & 2 others* [2021] eKLR.

a. Whether the petition is a suit on historical land injustices guised as a constitutional petition.

49. It was submitted that no evidence has been tendered to show that a complaint has ever been lodged before the National Land Commission who is mandated with investigating and dealing with land historical injustices. That the petition recognised the claim as one of historical injustice. Counsel referred this court to *Ledidi Ole Tauta & others v Attorney General & 2 others* (2015) eKLR where in a similar claim by the Masai community the court found that the best forum for dealing with claims of historical land injustices was the National Land Commission under by dint of article 62 (2)(e) of the *Constitution*. That the Swynerton Plan 1955 relied upon does not contain any evidence that the suit property LR No 16659 was ever owned by the petitioner or that the same is not un alienated government land.

a. Whether the 1st and 2nd respondents have been in occupation of the suit parcel of land.

50. The 2nd respondent emphasised that the petitioners had not presented any document is support of their occupation of the suit property. That the petitioners admit that no party has traced or demonstrated when the current occupants of the suit property moved into the same. That the 1st and 2nd respondents have been in occupation of the property since 1975 which is confirmed in the petitioner's submissions (see paragraphs 39 & 40), undertaken several development projects thereon which were listed, placed at every entrance of the suit property notice of impending prosecution of trespassers and had attached photographs in evidence. That reference by the petitioners to existence of beacons on the suit property is an affirmation that the property was previously private land since the same could only have been placed in or before 1977. That the change of user obtained by the 2nd respondent, the charge to the bank in 1992, the various notices to effect sale spanning the year 1995 – to September 2011, the valuations that necessitated visit to the suit property was overwhelming evidence there was no secrecy surrounding the acquisition of the suit property by the 2nd respondents. Citing Justice Munyao's *dictum* in the Kedong ranch case it was contended that the petitioners were in occupation of the suit property as squatters since they had not demonstrated any right over the property.

a. Whether the petition is based on facts and not hearsay.

51. It was pointed that the petition was based on speculation, hearsays, personal opinion and fabricated stories which averments had not been confirmed by affidavit. The courts attention was drawn to paragraphs 3, 24, 25, 32, 34, 38 of the petitioner's submissions and paragraphs 4, 5, 13, 14, 22 and 41 of Peter Ponda's affidavit of March 16, 2020.

a. Whether the allegation of eviction forceful displacement, arbitrary arrests or demolition of properties are true.

52. It was submitted no evidence has been tendered to support the eviction allegations. That the petitioners had not given photographic evidence and what was before court was based on speculation only. It was stated that the petitioner had failed to demonstrate the allegation of forceful eviction, torture and demolition of property or displacement of population. That names, number of people evicted, tortured, arrested as well houses demolished had not been stated. In response to the petitioners claim on infringement of the right to fair administrative action by failing to notify them of the subdivisions it is pointed that the plaintiff is not a state entity and the authorities cited were of no consequence. This court was urged that the petitioners were not entitled to the orders prayed.

THE 5TH, 6TH AND 7TH RESPONDENTS SUBMISION

53. The chief land registrar, attorney general, the cabinet secretary Ministry of Lands & Physical Planning filed submissions through Mr Makuto state counsel on March 1, 2022. Rehashing the history of the suit property culminating into its registration to the 2nd respondent as stated in the affidavit of Josephine Rama by land registrar it was submitted that the title issued was conclusive evidence that the 2nd respondent was the absolute owner of the suit property. Reference was also made to sections 26 of the *Land Registration Act* which replicates the said provisions. That in the absence of proof of fraud in the acquisition of the said title, the same was good title that cannot be impeached. Counsel enumerated the definitions of public land, community land and private as defined in articles 62 to 64 of the *Constitution* 2010 and submitted that the suit property is private land since it was registered and held by a person under leasehold tenure which was backed affidavit of Josephine Rama the land registrar.

54. It was contended that the petitioner had failed to demonstrate and relationship between the community and the suit property since no cogent evidence had been tendered with regard to their ancestry except folklore which cannot be proved. There was no evidence to show occupation by their forefathers and even if they did, this did not grant them proprietary interest in the suit property. Counsel contended that the claim for ancestral rights has no constitutional or statutory backing. Reliance was placed on Henry Wambega & 733 Others v Attorney General & 9 others (2020) eKLR *Federation of Women Lawyers (FIDA Kenya) & 4 others v The Attorney General & 2 others* (2016) eKLR, *Charo Kazungu Matsere & 273 others v Kencent Holdings Limited & another* (2012) eKLR and Robinson Nalengeyo Ole Torome & 7 others v Kedong Ranch Limited & 3 others (2021).

55. It was pointed that the 4th respondent having reached a determination that the suit parcel of land was private land the court ought to protect the 2nd respondents right to property. It was further posited that the petitioners have not discharged the burden proof as the petition only raised allegations without providing evidence of fraud, illegality or corruption in the acquisition of property by the 1st and 2nd respondent or the ancestral rights and the alleged harassment.

56. On the cross petition filed by the 2nd respondent refereeing to section 41 of the *Limitation of Actions Act*, it is contended that no one could acquire government land by way of adverse possession. That the protection also lapsed upon registration to the 1st respondent in 1977. Further that the 5th 6th and 7th respondents cannot be held liable for acts and omissions of the 1st 2nd and 8th respondents if any claim for adverse possession is upheld by this court. The court is urged to dismiss both the petition and cross petition with costs.

4TH RESPONDENTS SUBMISIONS

57. The 4th respondent National Land Commission filed its submissions on 3rd March 2022 through Mr S. Mbuthia Advocate. It was submitted that the petition had been camouflaged as such yet it was clear that the dispute before court was based on a historical injustice claim and ought to have been filed in the first instance before the 4th respondent herein pursuant to section 15 of the *National Land Commission Act*. That upon dissatisfaction with the Commission's decision then a party would move the ELC on appeal or judicial review. That it did not raise pure constitutional issues. That mere quoting of constitutional provisions does not make it a petition that discloses pure constitutional issues. Further that constitutional litigation is not open for every claim which may be properly be dealt with under alternative existing mechanisms for redress in civil or criminal law. The South African case of Fredricks & Others v MEC for Education and Training *Eastern Cape & others* (2002)23 ILJ 81(CC) and *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority* (2016)eKLR were relied upon to buttress these arguments. Counsel further urged in tandem with the decision in *Communications Commission of Kenya & 5 others v Royal Media Service Limited & 5 others* (2014) eKLR that where it is possible to decide any case civil or criminal without reaching a constitutional issue that course should be followed.

58. It was pointed that the petitioners having admitted that their claim was one for historical injustice dating back to 1943 should have exhausted the available mechanism under the 4th respondent before moving this court. The petition was therefore premature. It is submitted that jurisdiction lies with the National Land Commission under article 67(e) and the court was invited to down its tools. Numerous authorities were relied upon including *Owners of Motor Vessel Lilian S versus Caltex Oil[K] Limited* 1989 eKLR; *George Kamau Macharia v Dexka Limited* (2019) eKLR; *Speaker of National Assembly v James Njenga Karume* (1992) EKLR and *International Center for Policy, Conflict & 5 others v The Attorney General & 4 others* (2013) eKLR and *Geoffrey Muthinja & another v Samuel Muguna Henry*

& others (2015) eKLR reliance was also placed on section 9(2)(3) of the *Fair Administrative Action Act* on the principle of exhaustion.

59. It was further submitted that the 2nd plaintiff title which had not been disputed as having been obtained fraudulently enjoys the protection of section 23(1) of the *Registration of Titles Act* chapter 281 (repealed) which applies by dint of section 107 of the *Land Registration Act* 2012. Further that the 2nd respondent was a bonafide purchaser who acquired good title regardless of the allegations raised against the seller. The Court of appeal decision in Charles Karathe Kiarie & 2 others v Administrators of Estate of John Wallace Muthare (deceased) and 5 others and *Peterson Kiengo & 2 others v Kariuki Thuo* (2012) was relied upon. That for the petitioner to claim a breach of fundamental rights they must establish the right of ownership over the suit property. That having failed to so demonstrate then article 40 was not available for their protection.

60. Lastly it was submitted that the suit property is private property having been registered in the name of the 2nd respondent within the meaning of article 63 of the *Constitution*. That after expiry of the lease tenure the suit property will revert to the County government and extension or renewal will be undertaken by the 4th respondent on behalf of the county government. Counsel adopted the holding in Robinson Nalengeyo Ole Torome & 7 others v Kedong Ranch Limited & 3 others (2021) and Henry Wambega & 733 others v Attorney General & 9 others (2020) eKLR to discredit the petitioners claim that the suit property is community ancestral land. That the petitioner had failed to demonstrate with specificity how the 4th respondent has violated any of their constitutional rights. This court was urged to dismiss the petition in limine.

8TH RESPONDENT'S SUBMISSIONS

61. The firm of Munyao Muthama & Kashindi Advocates for the 8th respondent filed its submissions on February 16, 2022. Three issues for determination were identified as summarized here below; -

    a. Whether the petitioner is entitled to the prayers sought in the petition

    Counsel also submitted on the issue of failure by the petitioner to with precision set the provisions of the constitution said to have been infringed and the manner in which the infringement has occurred. That while several articles have been listed the petitioner fails to discharge the burden of proof on the alleged infringement. Reliance was placed on the case of *Leonard Otieno versus Airtel Kenya Limited* [2018] eKLR where Justice Mativo observed that a litigant bears the burden of proof in asserting his claim and more so in violation of constitutional rights. It is stated that the Petitioner has therefore fallen short of demonstrating to the required standard how the 8th respondent has violated the petitioner's constitutional rights.

    The 8th respondent averred that the petitioner had failed to plead with precision and raise clear legal issues visited upon it by the actions or inactions of another party. That there was no evidence adduced to demonstrate contravention of the law by the Bank neither were any orders sought against the Bank. It was stated that the court cannot justly deal with a matter before it unless the issues in the said matter are rightly and aptly put before it. Counsel referred to an excerpt from *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and in *Ahmed Abdullahi Adan V Attorney General & 2 others* [2021] eKLR which substantively relied on the Court of Appeal holding in the *Anarita Karimi Njeru v the Republic* [1976-1980] KLR 1272 case on redress of violation of fundamental rights and freedoms as well as proper drafting of constitutional petition pleadings. Counsel stated that

the petition is not only bad in law but also fatally flawed and defective. The court was asked to dismiss the same against the bank.

b. Whether the bank is a proper party to the petition

Counsel invited this court to make a finding that the Bank 8th respondent was not a proper party to this petition for failure to meet the requirements of a respondent as defined in rule 2 of The *Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013*. A respondent is defined to mean a person who is alleged to have denied, violated or infringed or threatened to deny, violate or infringe a right or fundamental freedom. It was pointed out that the only nexus between the bank and the suit property is the history of the banks involvement in the sale of the property to the 2nd respondent and the ensuing litigation in the High Court and Court of Appeal. That the banks interest as chargee ceased on November 1, 2012 when the suit property was sold to the 1st defendant under statutory power of sale. Consequently, there was no other connection between the bank, the 1st respondent and the petitioner.

62. It was also stated that the dealings between the 8th respondent and the 1st respondent arose from a private contractual and commercial transaction s and which are a realm of private law and not public law. Reliance was placed on the holding in *Patrick Mabau Karanja v Kenyatta University* [2012] eKLR where Lenaola J stated that rights and duties of individuals and between individuals are regulated by private laws. That an individual or group of individuals cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals.

63. It was the 8th respondent's submission that the questions arising from the petition can be settled effectively without the bank as a party. It was pointed that since the dispute relates to unconstitutional disposition of community land and whether the suit property is community land, how the same was acquired and whether the rights of the communities on it are effected can be resolved without the 8th as a party to the suit. The 8th respondent was not concerned with the 1st respondents' affairs after advancing them the loan. That the notion that the bank should have followed up on the use of the use of the loan advanced had no legal basis as the 8th respondent is not involved in the running of the business affairs of the 1st respondent.

64. It was also stated that unlike what is alleged by the petitioners on service of statutory notices on the inhabitants of the suit property, the 8th respondent had no contractual obligation with them and hence it was not to serve them with the said notices. Further that the sale subject of the notices had been upheld by the court. Citing the case of *Daima Bank Limited [In Liquidation] versus David Musyimi Ndetei*[2018]eKLR this court was urged to uphold the sanctity of commercial contracts. That it would be a travesty of justice for the bank to continue being called to defending a cause where it exercised its rights and obligations under a commercial contract. Further reference was made to *John Henry Kariuki & 11 others v County Government of Nyeri & another* [2021]eKLR where the court adopted the decision in *Pizza Harvest Limited v Felix Midigo* [2013] eKLR. The court was asked to invoke rule 5(d) (1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* Legal Notice No 117 to strike out the 8th respondent with costs for having been improperly joined in the petition.

65. On the cross petition, it is submitted that a respondent cannot sustain a cross petition as against another respondent. That this court does not have the jurisdiction to dispose of the issues raised in the cross petition as the same were purely contractual and do not warrant the intervention of the constitutional court. It is submitted further that the 2nd respondent concedes that the 8th respondent met all that

was necessary and required in exercising its statutory power of sale over the suit property. This court was urged to strike out the cross petition with costs to the 8th respondents for being unsustainable, incompetent, bad in law and constitutes an abuse of the court process.

ANALYSIS AND DETERMINATION

66. I have considered the petition, the cross petition, material in support thereof and the responses by the parties, submissions both written and oral, the law and case law cited in support of the various positions in this petition.

ISSUES FOR DETERMINATION

67. I have curved out the following issues for determination;

    a. Whether the petition meets the threshold for a Constitutional Petition.

    b. Whether the petitioners are entitled to the land by way of adverse possession.

    c. Whether the court has jurisdiction to entertain the petition.

    d. What was the classification or status of the suit property and did the President have the power to allocate the suit property to the 1st respondent?

    e. Whether the cross petition is competent.

    f. Whether the 8th respondent is a proper party in this petition

    g. Whether the petitioners rights have been violated and what orders should issue.

    h. Who should bear the costs of this petition?

    i. Whether the petition meets the threshold for a Constitutional petition.

68. This is a preliminary issue raised by all the respondents participating in this petition. It has been stated that the petitioner has not satisfied the legal threshold for a constitutional petition by failing to outline with precision the provisions of the Constitution that have been offended in abuse of their rights. That the petition is an omnibus claim and there is no relief that can flow from it for want of precision. The 2nd respondent made robust submissions on this point including the petitions failure to meet jurisprudential threshold for public interest litigation.

69. Constitutional litigation serves to protect fundamental rights and freedom both under article 22 and 258 of the *Constitution of Kenya* 2010. The filing is regulated under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 10 (1) sets out content which includes the facts relied upon, the constitutional provision violated, the nature of the injury caused or likely to be caused. Indeed, the courts have rendered that a petitioner must set out with a reasonable degree of precision the nature of the alleged violations, the person or institution responsible for the violation, the manner of the violation and the provision of the constitution which creates and gives the constitutional right that is under violation or threatened violation. The case in point is Anarita Karimi Njeru versus Republic [1979] KLR which this court has been referred to.

70. I have read the petition and observed that the same has not been drafted with the precision expected in terms of consolidation of the grounds. Let me say in spite of everything pointed in this regard, within the petition there are some constitutional provisions that have been quoted which based on the facts pleaded can be gleaned to the violations attached to them and the violators. The petitioners seek to enforce the bill of rights, it is contended their right to property has been infringed upon following

the irregular setting apart and alienation of the suit land to the 1st respondent without their consent, involvement and compensation. The alleged violators have also been shown in the pleadings including the then President through the Ministry of Lands, the National Land Commission and the County government of Kwale. It is not a hopeless petition in this regard as counsels would want this court to find. To me this is not a plain case of frivolous, vexatious pleadings. It is a matter raising constitutional issues which behove this court to exercise even greater caution so as to avoid impeding the course of justice since courts are the custodians of the Constitution and defenders of rights. In this regard I'm guided by the Court of Appeal in the case of *Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others* (2016) eKLR. This decision also speaks to the issue of locus standi where the court found that the intention of the framers of the Constitution from which the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are derived, was to allow any person who genuinely believed that there was a violation of fundamental freedoms and constitutional rights to approach the court for redress as envisaged under article 22 of the *Constitution* 2010. Also see *Nation Media Group Ltd v Attorney General* (2007) eKLR and the ruling of Justice Mativo J in *Disney Insurance Brokers Ltd v Joho & 4 others* (Petition 37 of 2020) [2021] KEHC 353 (KLR) (17 December 2021).

71. One of the issues that has been pointed as lacking precision in this petition is that the subject matter is not sufficiently and adequately described. That the land has been equated to swatches of land straddling along and located between the Mombasa road and the Kenya-Tanzania border. The land does not cover the huge area presented by the Petitioner. That the petitioner has offered three different descriptions of the suit property and none resembles the property owned by the 2nd respondent. I deem it necessary to resolve this contest early enough in this judgement. For me the contest is the allocation of the grant to the 1st respondent in 1977. The best way of resolving this is to simply confine ourselves to the description of the land in the Grant CR 22939 and attendant Deed Plan No 164333 annexed as 'HUM2' in the affidavit of Hussein Unshur Mohamed in support of the 2nd respondent's response to the petition. My decision is further supported by the report and valuation by Premier Valuers Limited dated October 25, 2011 annexed to the same affidavit which describes the location as; -

> a) 'The property is situated adjacent to Kilibasi shopping center and primary school within Busa and Kilibasi Sub locations of Mackinon road and Vigurugani locations in Samburu division, Kinango District. It borders Taita Taveta district to the north and lies approximately 35 kilometres of and to the East of the main Mombasa Nairobi highway turning via the Mackinon road – Kilibasi murrum road at the southern fringes of Mackinon road trading centre'

A location plan is included at page 340 of the 2nd respondents affidavit in response to the petition. I have no reasons to doubt this description which is given by an expert professional.

72. Based on the above authorities and issues I will disregard the rest of the points raised on want of verifying affidavit, failure to meet threshold for a public interest ligation and proceed to consider this petition on merits so that its judicial effects are known. This in my view will achieve justice for all the parties involved in this petition.

Whether the petitioners are entitled to the land by way of adverse possession

73. The petitioners also claim the suit property by way of adverse possession having been in occupation for more than 12 years. This is by dint of the *Limitation of Actions Act*. Though I cannot specifically attach this claim to any of the specific prayers in the petition I will nevertheless render myself on the same. A claim for adverse possession in my view does not raise a constitutional issue. Infact the procedure for

commencing a claim on adverse possession is by way of an originating summons. Justice Sila Munyao in the case of Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & others while delivering a ruling on whether a constitutional petition was a proper procedure for pursuing a claim for adverse possession, made a finding that the aspects of the petition that attempted to agitate for a claim for adverse possession should be struck out for being wrongfully pursued under a constitutional petition. I'm fully persuaded.

Whether the court has jurisdiction to entertain the petition

74. This court has been urged to down its tools for want of jurisdiction for reasons that the petition raises historical injustices claim, that jurisdiction lay with the National Land Commission by dint of section 15 of the *National Land Commission Act*. The principal of exhaustion was also mooted. Indeed, I noted several instances where the petitioners allude to historical injustices. For instance the petitioner accuses the 4th respondent of bias in handling the question of historical injustices for producing its report to counter the findings of the audit by the Kwale county to shield the 2nd and 8th respondent from culpability. The audit report also pointed that many perceive this whole question as a form of historical injustice.

75. This court finds it has jurisdiction to entertain the present petition with regard to historical injustices. However, the court will not dwell on determining this particular issue as the petition is not purely on historical injustices alone but raises constitutional issues on violation of bill of rights, infringement and by continued threats to the bill of rights of the communities in continuous occupation of the suit property which the court will determine. I'm persuaded by Justice Sila Munyao's finding in Robinson Nalengeyo Ole Torome & 7 Others versus Kedong Ranch Limited & 3 others (supra) when he stated; -

> 'I think the issue of jurisdiction is settled. This court has jurisdiction to hear claims even those on historical injustices. What we need to have in mind here is that just because a court is vested with jurisdiction, does not mean that in all cases the court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words depending on the facts and circumstances surrounding the case, the court can defer jurisdiction to another body or decline to take up the matter altogether, and this would not be because it has no jurisdiction but because given the surrounding circumstances, it would be best for the court not to exercise its jurisdiction.'

What was the classification or status of the suit property and did the President have the power to allocate the suit property to the 1st respondent?

76. In addressing this issue, I will also be seeking to speak to whether the suit property was land held in trust for the community by the 1st respondent as it is alleged to be ancestral land. The court will further interrogate whether the suit property was unalienated government land as argued by the respondents and which was later alienated to private land as currently held by the 2nd respondent. The petitioner's claim is that going by the history earlier stated the suit property is both community and ancestral land of Duruma dialect of the Mijikenda who moved into the same around 1943 and who it is alleged have remained in continuous occupation of the suit land.

77. To support the claim that the suit property is ancestral land, the petitioners state that their forefathers migrated into the land in the year 1943, that they were joined by other communities who took part in various economic activities for their subsistence and which included trade and farming. It is stated in paragraph 14 of Peter Ponda's affidavit that Bora Kainga Bora born in 1950, Chikophe Mwaruma Kizao born in 1962, Ali Mwangolo Mwangale born 1962, Chilabu Mwangolo Kidzao in 1973, Mwangolo Kidzao Mwangolo born in 1977 were members of the Mwabeja clan. That they

informed the deponent they were allegedly born on the suit land, buried their parents therein and have nowhere known to them as home. That their late father's grave yards were permanent features they will remember. It was the expectation of this court that the said Bora Mainga born in the year 1950 would swear an affidavit to narrate the family history of how their fore fathers came to live in the suit property and when. His evidence would be preferred as a repository of such history compared to the rest of the named clan members given his year of birth. No photos of the graves were exhibited and even if they were an expert report would have to accompany them to authenticate their medieval age. In my view there is nothing on record to support the ancestral lineage of the petitioners to the said mwabeja clan. The identification cards of the aforementioned persons as annexed in the said affidavit "see PP-5" in my view do not bear any evidentiary value with regards to the ancestral claims and occupation.

78. The petitioners state that in the year 1975, the land was unlawfully given to the 1st respondent whereas it belonged to the mwabeja clan of the Duruma who were at the same time in the process of forming their own group ranch. This seems to bring in the argument that the 1st respondent therefore held the land in trust for the mwabeja clan. The petitioner's arguments seem to have taken cue from the Supreme Court decision in *Isack M'Inanga Keibia v Isaaya Theuri M'Lintari & another* (2018) eKLR (see paragraph 42. 43). Infact, having keenly read the decision concurrently with this petition I must say the petitioners borrowed heavily from the dictum of the Supreme Court. The said decision is pegged on the customary trust concept which the Supreme Court held that the same cannot be extinguished even upon first registration. It is noteworthy that the parties in that case had given a detailed narration of the ownership history of the land therein. That the land belonged to their clan and after the land adjudication process in the year 1963, it was decided after meetings between the clan members that the land was to be registered in the names of appointed members who would hold the same in trust for the specific households. The parties in the said suit were able to demonstrate to the court that the land was under customary trust as after adjudication it remained to be part of community land to be vested upon individual members of the said community. The parties further gave sufficient evidence that they had been in occupation of the land having been born and raised there.

79. The court is tasked with establishing whether from the Petitioner's narration of the history of the land, qualifies to be termed as customary trust. The burden of proving that there was a customary trust is placed on the petitioner as affirmed by the Court of Appeal in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR where it was held:

> i. "It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -
>
> ii. "The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

80. Unfortunately, the petitioners have failed to discharge the burden. They have not led any proof that there were arrangements or such understanding between the mwabeja clan and the 1st respondent so as to lead to a customary trust. There is clear distinction between the set of facts as presented in Supreme Court Isack M'inanga Kiebia case [supra] and the instant petition and especially with regards to the evidence on ownership of the land and the same being under customary trust. It is apparent that the petitioners have not buttressed before court any evidence on any legal steps that were taken in defeating the president's award of the suit property to the 1st respondent. All that is stated is the mwabeja clan members earlier mentioned informed the deponent that the move to allocate the land was opposed by the community because the 1st respondent company did not involve the community

in their activities. They then sought the help of a magician to aid in helping them recover the land from the company leading to the collapse of company's operations after 3 years whereupon the clan marked the boundaries to the land. No affidavit has been sworn in this regard. The allocation was not contested in a court of law or through any structures that had then been set up like the adjudication committees, if anything, the *Land Adjudication Act* was enacted in 1968, the Petitioner had an avenue to ascertain its rights and interests in the suit land. They clearly slept on their rights in my view.

81. The petitioner herein has not annexed an affidavit by any member of the community and who has given the history of the suit property to distinguish whether the same was community trust land or unalienated government land. For me this issue is further compounded by the National Land Commission report on review of grants earlier cited. From the report which also took cognizance of the 1st respondent as neighbouring other ranches it is very clear there are various communities that have invaded the land and to attribute ownership to the petitioners alone or the Mijikenda of the Duruma dialect would in my view be wrong. This court places reliance on this report because it is clear that the 4th respondent is also seized of a lot of information on the history of the suit property following the review of the grants that neighbour the Mwambeja ranch. The petitioner has failed to prove that before registration of the suit property to the 1st respondent the same belonged to them as a community.

82. Based on the foregoing claims that the land belonged to the community the petitioners then alleged it is only the county council that had authority under sections 115 and 117 of the repealed constitution to set apart community land and if it had to set apart, it ought to have been for a public purpose which purpose ought to have been for the benefit of the community and the people must have been compensated. That as long as this did not happen then the customary land rights were never extinguished. I proceeded to interrogate this claim from the point when the land was allocated in 1977 which was before the promulgation of the Constitution of Kenya 2010. The law relating to Trust Land under the repealed Constitution was aptly stated by Angote J in *Bahola Mkalindi Rhigho & 9 others v Michael Seth Kaseme & 3 others* [2016] eKLR thus; -

> i. 'Under the repealed Constitution and the Trust Land Act, Trust land was neither owned by the Government nor by the county councils within whose area the land fell under. The county council simply held such land on behalf of the local inhabitants of the area.
>
> ii. For as long as Trust land remained unadjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land was transformed into private land. That is what the provisions of sections 114, 115 and 116 of the repealed *Constitution* provided.
>
> iii. Indeed, section 115(2) of the repealed *Constitution* provided that Trust land could only be dealt with in accordance with the african customary law vested in any tribe, group, family or individual.
>
> iv. The Constitution also provided that the only way Trust land could be legally removed from the purview of communal ownership of the people was through adjudication and registration or setting apart.
>
> v. Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership while setting apart removed the Trust land from the dominion of community ownership and placed it under the dominion of public ownership.
>
> vi. Trust land could only be allocated legally pursuant to the provisions of the Constitution, the Trust Land Act and the *Land Adjudication Act*.

vii. The repealed Constitution, at section 115(4) mandated parliament to make provisions under an act of parliament with respect to the administration of trust land by a county council.

viii. Consequently, parliament enacted the Trust Land Act, the *Local Government Act* (repealed) and the *Town Planning Act* which was repealed and replaced with the *Physical Planning Act* in 1996. These statutes, amongst others, allowed County Councils to deal and administer Trust land on behalf of the residents of their respective areas.

ix. Section 117(1) of the repealed *Constitution* allowed, through an act of parliament, county councils to set apart any area of trust land vested in a county council for use and occupation by a public body; or for purpose of the prospecting for or for the extraction of minerals or by any person for a purpose which in the opinion of the county council is likely to benefit the person ordinarily resident in that area or any other area of trust land vested in that county council either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof.

x. Where an area of Trust land has been set apart by the county council for the purposes that i have enumerated above, section 117(2) of the repealed *Constitution* provided that any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

xi. However, under section 117 (4) of the repealed *Constitution*, the setting apart of Trust land was of no effect unless prompt payment of full compensation of any resident of the land set apart who under the African customary law had a right to occupy any part or was in some other way prejudicially affected by the setting apart.

xii. Trust land could also be set apart for Government purposes. Under section 118(1) of the repealed *Constitution*, if the president was satisfied that the use and occupation of an area of Trust land was required for the purpose of the Government of Kenya or for a body corporate or for the purpose of the prospecting for or the extraction of minerals, such land would be set apart accordingly and was vested in the Government of Kenya or such other person or authority.

xiii. If Trust land is set apart for the purpose of the government, the government was required to make prompt payment of full compensation if the setting apart extinguished any estate, interest or right in or over the land that would have been vested in any person or authority.

83. It is noteworthy that the above provisions have been extensively cited and relied upon by the petitioners in buttressing their claim. Evidence and proof that the allocation was undertaken under the provisions cited by the petitioner has not been presented before court. To that end it is clear that the land was not trust land. It would therefore not be set apart as provided above for any purposes as stated. The fact that the community claim this to be their ancestral land does not make it trust land. On the contrary evidence has been placed before this court on how the land was allocated to the 1st respondent as a grant from unalienated government land. That information has been provided by the 2nd respondent, the Land registrar and the 4th respondent affidavits filed before court.

84. The court is then tasked with establishing whether the suit property was unalienated government land as contended by the respondents and which later became private land as currently held by the 2nd respondent. I then considered the evidence placed before this court by the 2nd respondent, the land registrar and the 4th respondent as well. The 1st respondent in whose name the suit property was

allocated ab initio did not enter appearance to defend its position. The 2nd respondent enumerated in the affidavit in response to the petition sworn by Hussein Unshur how the suit property was allocated initially to the 1st defendant culminating to the sale to them and has already been set elsewhere in this petition. They annexed as part of the evidence a copy of the grant. The same history is given in the cross petition as well. I do not want to fault the 2nd respondent considering that they bought the land as already enumerated and may not know how it was acquired by the 1st respondent.

85. I will concentrate more on the land registrar's deposition as the custodian of all the records in respect of the suit property (see the affidavit of November 24, 2021 sworn by Josephine Rama). Her evidence is that the suit land was unalienated government land which was allocated through a grant by the president to the 1st respondent. That upon acceptance of such allotment the requisite fees were paid and the land registered in favour of the 1st respondent in 1977. She also highlighted on the change of user and the subsequent sale to the 2nd respondent. At paragraph 23 of the affidavit the registrar is very emphatic and states; -

> 'the 5th 6th and 7th respondents reiterate that the suit parcel of land was never community land at any one time. The suit parcel of land was unalienated government land until it was alienated in favour of the 1st respondent through a grant by the President 1977. As such community land rights could not accrue to the community'.

86. The above statement has also been referred to by the 2nd respondent to emphasise it was unalienated government land which became private land. Public land and which was commonly referred to as government land was vested in the government of Kenya through sections 204 and 205 of the then *constitution* being the Kenya Independence Order in Council of 1963. The same position was further captured under sections 21, 22, 25 and 26 of the *Constitution of Kenya [Amendment] Act* 1964. The suit land herein is referred to as unalienated government land. In plain language it means land which had not been leased to anyone and no letter of allotment had been issued over it. Unalienated government land was regulated by the Government Land Act [Cap 280] laws of Kenya. Section 2 of the said *Government Land Act* defines Government land as follows;

> "Government land" means land for the time being vested in the government by virtue of sections 204 and 205 of the *Constitution* (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the *Constitution of Kenya (Amendment) Act, 1964*;"

87. It is the president that was vested with the power to issue all documents granting title over government land. Section 3 of the said act provided thus;

> 3. The president, in addition to, but without limiting, any other right, power or authority vested in him under this act, may—
>
> a. (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land

88. The Act further defines unalienated government land as; -

> i. "Unalienated government land" means government land which is not for the time being leased to any other person, or in respect of which the commissioner has not issued any letter of allotment"

89. I will also look at the deposition by chief land officer of the 4th respondent Mr Zachary Ndege. He states that from the available records the suit property has never constituted community land or trust land, that it is unalienated government land which was alienated by way of allocation by the President under the repealed Government Land Act to the 1st respondent. This is then followed by averments as to the parcel file and the information contained therein, allocation in 1977 to the 1st respondent culminating into the grant. Of particular interest is that he states the 1st respondent constitutes 'agriculture directed ranches' where the ownership and use of the land is limited to registered members only and not the community. Based on the provisions of the law in definition of unalienated government land and the process through which the same would be allocated, it is my finding that the land was unalienated government land and therefore the allocation to the 1st respondent was procedural and as per the confines of the provisions of the law back then. The court places reliance on the evidence adduced by the witnesses with regards to the process through which the land was allocated.

90. The land has also been referred to as private land having been transferred by sale to the 2nd respondent, they are bonafide purchasers for value and became the absolute owner of the property. The 2nd respondent is protected under section 25 of the *Land Registration Act* and section 99 of the *Land Act* 2012. This title can only be impeached on the basis of fraud for which the 2nd respondent is proved to have been aware of or party to. There are no allegations of fraud that have been specifically pleaded and particularised as against the 2nd respondent to the required standard which is also higher than that of a balance of probabilities as was the holding in *Ratil Patel v Lalji Makanji EA* (1957) and *Virjay Marjaria v Nansigh Darbar & another* (2000) eKLR.

91. I agree the 2nd respondent must also be protected on its right to own property and which it has demonstrated was procedurally acquired. The matter has already been dealt with conclusively in Nairobi HCC No 566 of 2013 Mwambeja Ranching Company Limited V Kenya National Corporation & another and in *Mwambeja Ranching Company Limited & another V Kenya National Capital Corporation* [2019] eKLR. I will not disturb the finding as I have no such jurisdiction it is actually res judicata. Having made this finding, the only jurisdiction is to deal with the constitutional issue on whether the rights of the communities have been infringed upon which I have found in the negative.

92. In addition to the proved ownership, the 2nd respondent has also demonstrated several improvements made on the land after acquisition of the same. They are listed under paragraph 30 of the supporting affidavit sworn by Hussein Unshur Mohammed on August 15, 2020. Annexed to the affidavit are photographs "HM10" in proof of the improvements. The valuation report by Pinnacle Valuers Limited at page 325 of the petition further illustrates the improvements in the suit property after the 2nd respondent's occupation. The report also reveals that before the 2nd respondent's occupation, the land was scarcely populated and it is only after numerous improvements on the infrastructure that invasion by a small number of individuals has taken place.

Whether the cross petition is properly filed before this court.

93. In response to the petition, the 2nd respondent filed a cross petition on June 9, 2021 against the chief land registrar, the cabinet secretary Ministry of Lands and the National Bank of Kenya. These are 5th, 7th and 8th respondents respectively seeking various reliefs which have already been set out earlier in this petition. The cross petition is opposed by the 8th respondent from three fronts. Firstly, that rule 15(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 does not permit a response by way of a cross petition against another respondent. Secondly that the cross petition being founded on a sale agreement which is a private commercial contract cannot

be enforced in a constitutional petition. Thirdly that the claim is time barred the agreement having been entered into on December 24, 2012 which is 9 years ago.

94. In order to effectively determine whether the cross petition has been properly raised, it is imperative to first interrogate the definition of a cross petition. Rule 15[2][3] of the *Mutunga Rules* provides that 'The respondent may file a cross petition which shall disclose the matter set out in rule 10[2].

Rule 10[2] as referred above sets out the form of a petition. From the provisions in Rule 15, it is evident that a cross petition has not been defined and it has also not been specified on the parties against who a cross petition can be filed. It has only been indicated that the same may be filed in response to a petition. It then follows one has to resort to the Civil Procedure Rules as rendered in *Speaker of The National Assembly of The Republic of Kenya & another V Senate of The Republic of Kenya & 12 others* [Civil Appeal No E084 of 2021] eKLR where the court referred to the Civil Procedure Rules in order to understand whether what is provided therein in terms of pleadings is comparable to a cross petition. It was stated at paragraph 276 and 277 of the said decision that-

a. ''In order to answer the question whether the cross petition was competently filed, we must consider what a cross petition is. We have looked at the Civil Procedure Rules in order to understand whether what is provided therein in terms of pleadings is comparable to a cross petition. Under order VIII rule 2 it provides for reply by a defendant thus:

b. "A defendant in a suit may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof".

c. The rules make it clear that in response to a suit, a defendant may set off or set up by way of a counterclaim, and that it shall have the same effect as a cross-suit. The important point to note is that it is the main parties in a suit who can raise a cross suit or counterclaim. Secondly, once a counterclaim is filed, the trial court is required to decide of both the original claim by the plaintiff or claimant, and the cross-claim by the defendant. Furthermore, the counterclaim can raise issues outside the suit by the plaintiff, in which case the trial court has two options. One, it has the option, on the application of the plaintiff, if it is of the view, it cannot be conveniently disposed of in the main suit to direct that the counterclaim cannot conveniently be dealt with in the pending suit decline permission to the defendant to avail himself thereof. The second option is to entertain the counterclaim and determine both the claim and the counterclaim ''.

95. At Paragraph 278 the court delivered itself as follows; -

i. ''Using this analogue to a petition, it is clear then that once a respondent in answer to a petition files a cross-petition, the cross-petition is to be regarded as a petition filed by the

respondent inside the petitioner's case. It is a cross petition because it raises issues, including issues that may not have been raised in the original petition. And the court seized of such a matter has to make a determination of the petition and the cross-petition".

96. From the above it is clear that the main parties in the suit can raise a cross petition and there is nothing wrong with a defendant filing a cross suit against another defendant. In weighing the claim, I see this as the right forum to adjudicate on the 2nd respondents claim. I do not see any reason that would compel me to order that the cross petition is dealt with as separate suit. This is also the spirit in order 1 rule 24 of the *Civil Procedure Rules* 210 where a defendant can claim against a co-defendant. I do not think there is any need for this court to venture into the other objections raised on the cross petition since from my earlier finding I will not disturb the 2nd respondents title.

Whether the 8th respondent is a proper party in the petition

97. The 8th respondent alleges that it is not a proper party to this petition for failure to meet the requirements of a respondent as defined in rule 2 of The *Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013*. That the questions arising from the petition can be settled effectively without the bank as a party the claim being premised on alleged unconstitutional disposition of community land and whether the suit property is community land, how the same was acquired and whether the rights of the communities on it are affected. That its relationship with 1st and 2nd respondent ended after it exercised the statutory power of sale. That the only nexus between the Bank and the suit property is the history of the banks involvement and sell of the suit property to the 2nd petitioner and the ensuing litigation. They pray that this court strikes the 8th respondent from the petition. To state that the 8th respondent is not a necessary party to this suit would be rather misplaced. By virtue of the fact that they are the ones who sold the property to the 2nd respondent they were a necessary party and needed to be in this petition.

98. Dealing with this matter at this stage of final determination I will proceed to determine the allegations levelled against the 8th respondent and the evidence in support thereof and if there are any reliefs sought against them. At paragraph 46 it is implied that the loan funds advanced by the 8th respondent were not deployed to the user for which the funds were intended but were debentured for other unrelated business also see paragraph 34 of Peter Ponda affidavit sworn on 16th March 2020. At paragraph 62 it is stated that it came to the attention of the petitioner that that the bank sold the suit land to the 2nd respondent and its directors but of interest was that 'members of the petitioner herein who have continuously occupied the suit land, never even saw the notice of intention to sell the suit property by way of public auction as the law so provides'. also see paragraph 35 of Peter Ponda affidavit which in addition states that the bank sold the suit land without seeking orders of the court for the eviction of illegal occupiers. That the said sale was initiated and consummated in Nairobi at their exclusion. At paragraph 64 there is reference to the 3rd respondent working in cahoots with fraudsters from Nairobi and the link here is the previous allegation that the sale was done in Nairobi without the petitioner's involvement indeed the person who sold is the 8th respondent.

99. The above are the allegations levelled against the 8th respondent in the entire petition and affidavit of Peter Ponda. I will approach these allegations from the res judicata point of view. I have keenly read and considered Justice Tuiyot judgment Nairobi HCC No 566 of 2013 *Mwambeja Ranching Company Limited v Kenya National Capital Corporation Limited & another*. The decision was contested at the Court of Appeal and the court entirely agreed with the said decision and saw no reason to interfere with the sound decision of the court. The issue of the exercise of the statutory power of sale was litigated upon and identified by the judge as one of the issues for determination. At paragraph 34 of the said

judgement is discussed and analysed the legality or otherwise of the sale of the charged property which is the suit property. Key was the statutory notice which had also been a subject of the ruling of Ransley J dated July 26, 1999 and Okwengu J in related suits. It was found to be valid for all purposes including the sale of the property.

100. I have also considered the prayers in the petition and there is no relief or order that is being sought by the petitioners against the 8th respondent. I therefore make no finding against the 8th respondent and dismiss the suit against it.

Whether the petitioners rights have been violated and what orders should issue?

101. As observed earlier this petition has raised allegations of violation of the Petitioner's rights to ownership, use and occupation of the suit property. The Petitioner has made several prayers for reparation in rectifying the alleged violations. These include the prayers for orders of certiorari to quash the title deed issued to the 2nd respondent, orders of mandamus to convert and register the suit land to the 3rd respondent to hold in trust for the community, permanent injunction against the 2nd respondent. However, it is my humble view that no contravention of the rights stated has been proved to warrant these reliefs. The petitioners have failed to discharge the burden of proof to the required standard. In cases of this nature the standard of proof is balance of probabilities as was stated in *Miller v Minister of Pensions* 1947 2 ALL ER 372 where Lord Denning said the following about the standard of proof in civil cases:

> - 'The standard of proof is well settled. It must carry a reasonable degree of probability, if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

102. The petitioner has placed reliance on the 3rd respondents report prepared by Primatech Land Surveyors Consultants dated January 21, 2019. The same is annexed as "PP11" on the Petitioner's documents. The report alleges that the suit land was originally established as a private company ranch and registered in 1977. That it was however later registered as a family company and which registration left out the real founders. It is indicated that numerous disputes have arose between the family and community with complaints of land grabbing and encroachment within ranch. The report further states that original inhabitants of the ranch are being evicted by the private owner and unlawful expansion of boundaries with the intention to grab more land by the new owner.

103. The allegations raised in the report are however not supported by any tangible evidence. They seem to closely co relate with the petitioner's allegations of eviction and which are not substantiated. A look at the photographs annexed to the petition does not show any slight evidence of destruction of crops or houses. As such, the court fails to place any evidentiary value to the report.

104. The only area that emerges not to be in dispute where a claim can be grounded within the suit property as described in the grant is the portion which is said to be occupied by the squatters within the grant. This portion is also referred to in Nairobi HCC No 566 of 2013 *Mwambeja Ranching Company Limited v Kenya National Capital Corporation Limited & another*. The numbers of people however occupying this portion has not come out clearly from the material placed before this court either by the petitioners or the 2nd respondent. I have come across the number 30,000 which I did not encounter in the report prepared by the National Land Commission and not in respect of this specific suit property. No material was placed before this court to show how many people were being threatened with eviction or were actually harassed with a view to this eviction. What I have seen is a letter dated December 7, 2018 by the 2nd respondent exhibited by the petitioners as 'PP7' addressed to the County Executive Committee Member (CECM) Environment and Natural Resources Management Kwale

county. The said letter is marked to the attention of 'head, physical planning section' and expresses the 2nd respondent's intention to surrender free of cost portions B and C which are said to be 1,878.2 Ha (or 4,640 acres) and 3,479 Ha (8,594 acres) respectively to the county government of Kwale for an orderly settlement of the squatters currently occupying the portions. I have also seen a letter dated January 18, 2019 addressed to director land administration ministry of lands and physical planning Nairobi. The total acreage seems to correspond with the acreage mentioned in Nairobi HCC No 566 of 2013 Mwambeja Ranching Company Limited v Kenya National Capital Corporation Limited & another. In the said judgement the judge based its finding on a portion of the suit property (13,000 acres) which was included in the valuation yet it had not been factored causing an undervaluation. In fact from the instant pleadings the petitioners referred this court to clause J of the sale agreement dated November 1, 2012 between the 2nd and 8th respondent where they admit that 13,000 acres did not form part of the sale agreement, yet the 2nd respondent had allegedly moved into the entire suit land. This land is available and those deserving it as offered cannot benefit from it due to the fact that the 2nd respondent has to first contend with the petitioner's objections. Indeed, the 4th respondent in the letter dated January 10, 2019 (see PP8) addressed to the county physical planner Kwale County government confirms that they have no objection to the proposal for surrender for settlement. The excision of this portion must be progressed.

105. The upshot of the foregoing is that this court finds the petition not merited and the following orders shall issue; -

i. The petition is dismissed.

ii. It is hereby declared that the grant issued to the 1st respondent Mwambeja Ranching Company Limited was issued regularly and therefore the 2nd respondent's title arising from the LR 16659- formerly registered as LR No 14209 be and is hereby upheld.

iii. The portions described as B and C in the 2nd respondent's letter dated December 7, 2018 which are said to be 1,878.2 Ha (or 4,640 acres) and 3,479 Ha (8,594 acres) be excised from parcel LR 16659- formerly registered as LR No 14209 and surrendered to the 3rd respondent [county government of Kwale] and administered as recommended by the National Land Commission in the report dated 21st January 2019.

iv. That the 2nd respondent shall execute within 6 months of the date hereof documents of transfer in respect of iii above.

v. There shall be no orders on the cross petition in view of the finding in ii above.

vi. Given the nature of the suit each party to bear its own costs.

DELIVERED AND DATED AT KWALE THIS 15TH DAY OF JULY, 2022.

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr Oduor for the petitioner

Mr Sagana for the 2nd Respondent

Mr Mbuthia for the 4th Respondent

Mr Makuto for the 5th 6th and 7th Respondents

Mr Muthama for 8th respondent

Mr Denis Mwakina - Court Assistant.