



**Tsavo Heritage Foundation & 7 others v County Government of Taita Taveta & 2 others  
(Petition 12 of 2020) [2022] KEELC 13687 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13687 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
PETITION 12 OF 2020  
M SILA, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**TSAVO HERITAGE FOUNDATION ..... 1<sup>ST</sup> PETITIONER  
WASHUMBU (DA) COMPANY LIMITED ..... 2<sup>ND</sup> PETITIONER  
DAWIDA RANCH LIMITED ..... 3<sup>RD</sup> PETITIONER  
KAMBANGA RANCHING (DA) LIMITED ..... 4<sup>TH</sup> PETITIONER  
AMAKA DEVELOPMENT LIMITED ..... 5<sup>TH</sup> PETITIONER  
BURA (DA) RANCHING CO. LIMITED ..... 6<sup>TH</sup> PETITIONER  
OZA GROUP RANCH ..... 7<sup>TH</sup> PETITIONER  
MBALE RANCHING CO. LIMITED ..... 8<sup>TH</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF TAITA TAVETA ..... 1<sup>ST</sup> RESPONDENT  
SPEAKER, COUNTY ASSEMBLY OF TAITA TAVETA ..... 2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction and pleadings**

1. This suit was commenced through a petition filed on May 27, 2020 in the High Court of Mombasa. It was transferred to this court as it touches on subject matter that fell outside the jurisdiction of the High Court. The petition was subsequently amended, with the amended petition, dated July 23, 2020, being filed on July 30, 2020. There are eight petitioners. The 1<sup>st</sup> petitioner has described herself as an



organization based in Taita Taveta County, whose objective is to advocate and drive for rehabilitation and conservation of the Tsavo ecosystem and dispersal areas, for the ultimate benefit of the indigenous communities and wildlife living within the said ecosystem, through conservation programs and community empowerment. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> petitioners, respectively, Washumbu (DA) Company Limited, Dawida Ranch Limited, Kambanga Ranching Company Limited, Amaka Development Limited, The Bura (DA) Ranching Company Limited, and Mbale Ranching Company Limited, are limited liability companies. They respectively own the following parcels of land being LR No 14206, LR No 14208, LR No 29094, LR No 14207, LR No 14205, and LR No 14204. The 7<sup>th</sup> petitioner, Oza Group Ranch, is a group ranch registered under the [Community Land Act](#), and is the registered proprietor of the land parcel Mwanda/Oza/1. All these parcels of land are located within Taita Taveta County. The 1<sup>st</sup> respondent is the County Government of Taita Taveta, whereas the 2<sup>nd</sup> respondent is the Speaker of the County Assembly of Taita Taveta County. The 3<sup>rd</sup> respondent is the Cabinet Secretary, Ministry of Interior and Coordination of National Government.

2. In the petition, it is pleaded that between the 1960s and early 1970s, local leaders from Taita Taveta lobbied the Government to allocate land within the current Taita Taveta County to locals, who would apply for them, with the main objective being to have sustainable land use with the guidance of Ministry of Agriculture technical officers. It is averred that the land use as prescribed by the National Government is ranching, hence the creation of approximately 26 ranches that undertake this activity. It is said that a majority of the ranches are made up of Groups of Associations of persons, limited liability companies, and cooperatives, which have a minimum of 50 members each and are all residents of Taita Taveta County. These ranches are said to have titles to their land. It is further pleaded that the ranches primarily act as migratory corridors and are located between the Tsavo East and Tsavo West National Parks, and play a vital role in providing grazing land and access to waterholes for wild animals during the dry season. It is pleaded that the County Government of Taita Taveta, in compliance with summons and directions by the County Assembly of Taita Taveta, issued a statement and requested the County Assembly of Taita Taveta to debate and pass policies, laws and regulations regarding usage of the said parcels of land in total disregard of the law. It is added that the Taita Taveta County Assembly joint committee has now directed the County Executive Committee Member of Lands to move and immediately stop all activities for ranches. It is contended that this a reckless action by the County Government of Taita Taveta and its County Assembly, and the effect is that a few of the ranches have been invaded by third parties with the notion that all the ranches have been converted to community land and will be distributed. It is averred that the said invaders have driven away livestock belonging to the said ranches and grazing on land that is utilized by both the wild animals and livestock in the ranches. It is pleaded that the pressure on the available resources within the ranches has begun to rise with the water pans and grazing lands dwindling by the day due to the said invasion.
3. In this petition, the petitioners seek the following orders (paraphrased to avoid them seeming to be the orders of the court rather than the prayers) :-
  - a. A declaration be issued that pursuant to Article 67 (2) (a) and (h), Part 1, Fourth Schedule to the [Constitution of Kenya](#), the 1<sup>st</sup> and 2<sup>nd</sup> respondents have neither the powers nor mandate to determine land use, policy and ownership of privately owned land within Taita Taveta County or any part of Kenya.
  - b. A declaration be issued that pursuant to Article 60 (1) (b), the land rights of the petitioners' 26 ranchers are guaranteed and an order be issued directing the Speaker and any member of the Taita Taveta County Assembly to desist from entertaining, discussing or passing any motion to take over ownership and possession of the said ranches herein.



- c. A declaration be issued that any change of usage by the 1<sup>st</sup> and 2<sup>nd</sup> respondents for the ranches within Taita Taveta is in breach of Article 60(1) (e) of the [Constitution of Kenya, 2010](#).
  - d. An order directing the Cabinet Secretary, Ministry of Interior and Coordination of National Government, to provide adequate security to all the petitioners' ranches within Taita Taveta County and stop any invasion thereto.
  - e. A declaration be issued that the petitioners herein are the registered owners of the respective parcels of land and shall hold the same pursuant to the terms and conditions therein to the exclusion of the respondents and their agents or any third party.
  - f. Any other relief this honourable court may deem fit and just to grant.
  - g. Costs of this petition be awarded to the petitioners.
4. The supporting affidavit to the amended petition is sworn by Jacob Mwaluda Kipongoso, who is a director of the 1<sup>st</sup> petitioner. He has deposed that sometimes in the year 1973, leaders from the Taita Taveta community approached the Government and lobbied to have the wildlife hunting blocks to be allocated to the locals with the sole objective of preserving the resources. He has said that these individuals and groups created ranches that fall within the Tsavo ecosystem, which comprises of three national parks, being Tsavo East, Tsavo West, and Chyulu, and that these ranches are vital for the migratory species of wild animals, particularly elephants which migrate from Tsavo West to Mkomanzi Game Reserve in Tanzania. He has deposed that the Tsavo ecosystem hosts elephants, black rhinos, African wild dogs, Hunters Hartebeest and Grevy's Zebra, a majority of the latter two having been translocated to private conservancies to maximize protection and availability of water and grassland. He has added that the Tsavo ecosystem is a vital water catchment for most of the Coastal lowlands and large towns in Kenya, with the presence of Tsavo River and Athi/Galana River. He has deposed that the Ministry of Lands and Housing issued a National Spatial Plan, an integrated plan for balanced and sustainable development 2015 to 2045, wherein the National Government has provided policies upon which all County Governments ought to prepare their respective plans. He has annexed this National Spatial Plan to his affidavit. He has pointed to part of this plan which states that "all environmentally sensitive areas shall be protected and utilized in a sustainable manner." He has mentioned that there are currently 26 ranches within Taita Taveta County which are strategically located between Tsavo East and Tsavo West national parks and lie along the wild animals migratory corridor. He has stated that on 6 May 2020, the Member of County Assembly (MCA) for Kasigau Ward, one Hon. Abraham Juma, issued a statement requiring the six ranches in his ward to revert to the County Government and caused the County Executive Committee Member for Lands, Physical Planning, Housing and Mining (hereinafter, CEC Lands), one Mr. Mwandawiro Mganga, to be summoned to issue a written statement. He has stated that he has come to learn that on 11 May 2020, the said CEC Member issued a statement through a joint committee of Lands, Human-Wildlife conflict resolution, Administration, Devolution, Public Participation, Community Service and Drug Control, and Agriculture, Livestock and Fisheries, which implied that there is possibility of converting 6 ranches to be Community Land. To support this claim, he has annexed an article from Kwaela News Network, dated 11 May 2020. He has stated that the joint committee directed the CEC Member to "within 10 days stop all activities in the Ranches in the County" and "initiate a stop order of processing and issuance of any Title Deed to any Ranch within the County." He has averred that as a result of these utterances there is growing tension between members of the Ranching Community and their neighbours who have vowed to take over the ranches. He states that due to the perception created by the County Government of Taita Taveta and the County Assembly of Taita Taveta, that the ranches are up for grabs, some of the ranches have been invaded by unknown herders who have driven away livestock belonging to the



ranches. He is afraid that any further public utterances, declarations, discussions, and pronouncements by the County Government, or the County Assembly, shall heighten tension and cause chaos between the ranches and their neighbours, and any further invasion of the ranches shall cause great strain on the little resources available in the ranches which are shared between wild animals and livestock. He contends that the County Government has no legal basis or power to determine land use on the parcels of land held by the ranches as this is the mandate of the National Government through the National Land Commission and the County Government can only make policies on land use through County Spatial Plans, which is yet to be prepared and published by the County Government of Taita Taveta. He further contends that pursuant to Part 1 of Schedule 4 of the Constitution, the County Government of Taita Taveta has no legal basis to take over private land or even Community Land save that which they hold in trust for the people of Taita Taveta County.

5. I have not seen anything filed by the 1<sup>st</sup> respondent save for a notice of preliminary objection which contends that the petitioners lack the requisite locus standi to institute the petition under Section 47 of the [Community Land Act](#) read together with regulation 26 of the [Community Land Regulations, 2017](#); that this court does not have jurisdiction to hear and determine this petition; that the petition does not disclose a reasonable cause of action against the 1<sup>st</sup> respondent; that the petition as preferred violates mandatory provisions of the law and cannot sustain the prayers sought; and that the petition has been filed prematurely and should be dismissed with costs.
6. The 2<sup>nd</sup> respondent filed an “Answer to Petition.” In it, it is averred that allocation of land is by the National Government and there was nothing peculiar in the manner in which land in Taita Taveta was allocated contrary to the assertion of the petitioners that land was allocated for purposes of having sustainable land use. It is further stated that there exists more than 26 ranches in Taita Taveta County, excluding those operated by the petitioners, and that a majority are engaged in mining activities as opposed to ranching. It is also contended that some of those ranches have less than 50 members contrary to the assertion of the petitioners. It is not disputed that the ranches were allocated by the National Government and titles issued to them, but it is denied that most of the ranches are migratory corridors, and that to the contrary, most of the ranches have taken up mining, farming and the devastating activity of charcoal burning. It is denied that the County Government of Taita Taveta has issued a statement requesting the County Assembly of Taita Taveta to debate and pass policies, laws and regulations, regarding the usage of the subject parcels of land in total disregard of the law. It is also denied that the Taita Taveta County Assembly joint committee has directed the CEC Member of Lands to move and immediately stop all activities for the ranches. It is added that the CEC Member of Lands cannot legally restrain lawful activities within any ranch in the County. On the alleged invasion of the ranches, it is stated that these would be breaches of the law and such action is not with the connivance and neither can it be attributed to the 2<sup>nd</sup> respondent. It is averred that the petitioners have not substantiated any of the allegations nor have the petitioners demonstrated a violation of the constitution, statute, rules or regulations. The 2<sup>nd</sup> respondent asks for the petition to be dismissed.
7. The 3<sup>rd</sup> respondent filed what is titled as “Reply to Amended Petition.” It is averred that the petition raises no constitutional issues and is a civil suit disguised as a constitutional petition. It is pleaded that the petition fails to set out with precision the alleged acts of violation, the articles of the constitution violated, and the person guilty of the violation, and contravenes the principles set out in the case of [Anarita Karimi Njeru v Republic](#) (No1) (1979) KLR 154. It is also averred that the affidavits in support of the petition are not sworn by persons authorized in law to represent or depose documents on behalf of the petitioners. It is stated that the petitioners make allegations in the petition against persons who are not party to the petition contrary to the rules of natural justice. It is added that authority to institute and undertake criminal proceedings is vested in the Director of Public Prosecutions and that the DPP is independent of any direction or authority in exercise of his powers. It is stated that the



petitioners blame the Deputy County Commissioner Taita Sub-County and/or the OCS Wundanyi Police Station for failing to “help them file case against Renson Mnyamwezi” and that these officers have no powers to prosecute. It is claimed that the orders sought against the 3<sup>rd</sup> respondent are not executable or legally enforceable and court orders ought not to issue in vain.

8. The petition was argued through written submissions.

## **B. Submissions of counsel**

9. In his submissions, Mr. Midikira, learned counsel for the petitioners, submitted that the petitioners, save for the 7<sup>th</sup> petitioner, own their parcels of land on leasehold terms from the Government of Kenya. He submitted that the petitioners came to learn of the adverse action of the 2<sup>nd</sup> respondent when the Kasigau MCA demanded a conversion of their ranches to the community and that the 2<sup>nd</sup> respondent recommended that the 1<sup>st</sup> respondent should “within 10 days stop all activities in the ranches in the County.” As a result, the petitioners experienced invasion of their land by herders and neighbours who claimed that the land belongs to the 1<sup>st</sup> respondent and is available for use by any third party and available for human settlement. He submitted that some of the ranches were set on fire and that despite reports to the 3<sup>rd</sup> respondent, no action was taken. He submitted that the fact that the 2<sup>nd</sup> respondent can pass a resolution and instruct the 1<sup>st</sup> respondent to stop any activities on the petitioners’ parcels of land is in direct breach of Article 40 (2) (a) which provides that “Parliament shall not enact a law that permits the state or any person to arbitrarily deprive a person of property of any description or of any interest in or right, over property of any description.” He also submitted that the resolution is in breach of Article 42 of the Constitution i.e the right to a clean and healthy environment as the ranches are vital to the Tsavo ecosystem and that any attempt to turn the ranches into human settlement will greatly affect the delicate Tsavo ecosystem and tourism in general. He has also cited Article 10 of the Constitution (relating to national values) and Article 60 on principles of land policy. He has referred to the National Spatial Plan and pointed out that it identifies the Tsavo National Park as an important tourist site and also identifies Taita Taveta County as a wildlife conservation area. He submitted that the respondents need to adhere to Article 60 of the Constitution and added that the 1<sup>st</sup> respondent has not demonstrated in any way that the land of the petitioners is ideal for human settlement. He submitted that despite the invasion of their land the 3<sup>rd</sup> respondent took no action to arrest the perpetrators or provide any form of security to the petitioners contrary to Article 3 (1) of the Constitution. Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have no power to determine land use and policy unless the same is with the guidance of the National Government, and more particularly, the implementation of the National Spatial Plan. He relied on the case of Okiya Omtata & 3 Others v The Attorney General & 5 Others (2014) eKLR where it was held that Parliament is not beyond the reach of the court or the constitution. He submitted that the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents intend to turn the ranches into human settlement is in further breach of the constitution. He urged the court to allow the petition.
10. No submissions were filed on behalf of the 1<sup>st</sup> respondent.
11. For the 2<sup>nd</sup> respondent, Mr Nyange, learned counsel, submitted that the petition is premised on hypothetical scenarios. He submitted that the petitioners have not demonstrated that there is a bill that has been passed into law or that there was a motion in the County Assembly to debate the averments of the MCA of Kasigau Ward requiring the six ranches in his ward to revert to the County Government. He submitted that reliance on a news article does not amount to proof and relied on the case of Gitobu Imanyara & 2 Others v Attorney General and IEBC v National Super Alliance (NASA) Kenya & 6 Others (2017) Eklr on the probative value of media articles and newspaper cuttings. He also submitted that the mere introduction of a bill in the County Assembly, or statement by an MCA, does not constitute violation or threat of violation of the Constitution and referred to the case of Wanjiru



*Gikonyo & 2 Others v National Assembly of Kenya & 4 Others* (2016) Eklr. He submitted that the petitioners seem to challenge legislative proposals that the County Assembly might consider but are yet to enact into law hence the submission that there is no dispute for this court to resolve. He submitted that there has been no violation by the 2<sup>nd</sup> respondent of Article 40 of the *Constitution* as no draft bill has been presented by the petitioners. He submitted that no evidence has been presented that the 2<sup>nd</sup> respondent has the intention of acquiring the petitioners' property. He submitted that the petitioner seeks to gag the 2<sup>nd</sup> respondent from discussing or passing any motion on ownership of land and that this order goes against the principles of separation of powers and the functioning of the privileges and immunities of the legislative bodies. He relied on the Supreme Court decision in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* (2017) Eklr. Counsel submitted that there is no known legal barrier that bars the 2<sup>nd</sup> respondent from presiding over assembly debates and motions involving land laws, policies or regulation concerning the usage of land, and that there is nothing to show that there is in existence laws, policies or regulations that infringe on the rights of the petitioners. He added that the role of the 2<sup>nd</sup> respondent is limited to presiding over the business of the house and the proper party to answer to the allegations raised by the petitioner is the County Assembly which the petitioner did not join to the suit. He relied on the case of Commission for the implementation of the Constitution of Kenya v Parliament of Kenya & 5 Others, High Court Case No 454 of 2012. He submitted that County Governments have functions related to land and referred to the Fourth Schedule of the Constitution as read with Section 5 of the *County Government Act*; Article 63 of the *Constitution* read with Section 6 of the *Community Land Act* on holding of community land by County Governments in trust for the communities; The *Physical Planning and Land Use Act* which directs County Governments to prepare a County Physical and Land Use Development Plan. He nevertheless pointed out that the County Government has not debated or passed any law/policies inconsistent with the set policies of the national government. He submitted that the County Assembly is legally mandated to debate and pass county legislation on land contrary to the assertion of the petitioners.

12. The petitioners filed replying submissions. In response to the claim that there is no pending bill before the County Assembly, counsel submitted that under Article 22, a person has a right to institute proceedings where a right in the bill of rights is threatened. He relied on the case of *Ngunjiri Wambugu v Inspector General of Police & 2 Others* (2019)Eklr where the court held that a party need not wait for a violation to occur in order to seek reprieve from the court. He submitted that demonstration of a threat of violation is adequate to attract the attention of Court. On the submission that it was the County Assembly which ought to have been sued, counsel referred me to the case of *Simon Wachira Kagiri v County Assembly of Nyeri & 2 Others* where Aboudha J was of opinion that a suit against the County Assembly ought to be brought through its titular head, the Speaker. On the evidential value of a newspaper article, he referred to Section 86 (1) (b) of the *Evidence Act*, which states that the court shall presume the genuineness of every document purporting to be a newspaper or journal. He submitted that on the probative value, the articles need to be read together with the supporting affidavit. He reiterated that there are legal barriers which bar the 2<sup>nd</sup> respondent from presiding over assembly debates and motions which contravene the provisions of the Constitution and he again referred to the case of *Okiya Omtata v Attorney General* (supra). He submitted that whereas the 2<sup>nd</sup> respondent has a right to discuss land matters affecting the County of Taita Taveta, this has to be within the confines of Article 10 and 60 of the *Constitution*.
13. Mr Makuto, learned State Counsel, for the 3<sup>rd</sup> respondent, indicated that he will not be filing submissions but urged that prosecution is a matter that falls within the powers of the DPP and therefore orders cannot issue against the 3<sup>rd</sup> respondent.



### C. Disposition

14. I have taken into account all of the above.
15. I will start with the preliminary objection filed by the 1<sup>st</sup> respondent which urges that this court has no jurisdiction and secondly that the petitioners have no locus standi. Counsel for the 1<sup>st</sup> respondent did not make any submissions to support this preliminary objection and I am not sure what it is that the 1<sup>st</sup> respondent was basing its objection on. On the face of it, I find that this court has jurisdiction for the issues relate to rights over property and land use and title. This court has jurisdiction pursuant to Article 162 (2) (b) of the *Constitution* to hear “disputes relating to the environment, and the use and occupation of, and title to land.” Issues relating to environmental protection, deprivation to land, use and occupation of land, and title, have been raised and I am of opinion that this court has jurisdiction. On locus standi, I see no issue because the 1<sup>st</sup> petitioner has averred that she is party to this petition owing to its mandate to environmental protection and the other petitioners are owners of the ranches that stand to be affected allegedly by the actions attributed to the respondents. On whether the petition discloses a reasonable cause of action, that is a matter on the merits which I will look into shortly.
16. I will first start with the question whether the 2<sup>nd</sup> respondent is properly sued. The argument here is that if the petitioners had issue with the County Assembly, then they ought to have sued the County Assembly in its own name, and not sue the Speaker. In response, Mr. Midikira referred me to the case of *Simon Wachira Kagiri v County Assembly of Nyeri & 2 Others* (2013)eKLR . That was a suit filed by an individual seeking to quash his rejection for appointment by the County Assembly of Nyeri County, as County Executive Committee Member of the County of Nyeri. The suit was commenced inter alia against the County Assembly of Nyeri. One of the objections raised on behalf of the County Assembly was that the County Assembly is not sui juris and was not an entity capable of suing or being sued in its own name. It was argued that the appropriate way of bringing proceedings against the County Assembly is through the Speaker. The court (Abuodha J) held as follows on this point :-
- On the issue of whether the County Assembly may be sued in its own name the court takes the view that the County Assembly as a distinct institution in the County Government carrying out public duties as mandated by the Constitution and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision. However such suit ought to be brought through its titular head - the Speaker. The omission to cite the Speaker as such party is a technical omission that does not occasion the Assembly any prejudice. It is however a practice that must not be encouraged.
17. I have seen various decisions where the Speakers of County Assemblies or Speaker of the National Assembly or Senate have been sued on behalf of the County Assemblies, National Assembly and Senate. One of such is the case of *Judicial Service Commission v Speaker of the National Assembly & 8 Others* (2014) eKLR. I have also seen a situation where the Speakers themselves have sued, one being the case Nairobi High Court, Constitutional & Human Rights Division, Petition No 368 of 2014, Speaker, *Nakuru County Assembly & 46 Others (all Speakers of the other 46 counties) v Commission on Revenue Allocation* (2015) eKLR where the 47 speakers of the 47 county assemblies were the petitioners. Mr. Nyange referred me to the case of *Commission for the implementation of the Constitution of Kenya v Parliament of Kenya & 5 Others*, High Court Case No 454 of 2012, where Majanja J, stated as follows :-

41. I therefore reject the respondent’s contention that Parliament, as a State organ, cannot be sued by its own name at least for purposes of this suit. I think the common law notions of whether regarding capacity to be sued must yield to



the Constitution which recognizes Parliament as a State organ and imposes on its specific responsibilities. The doctrines of legal personality must be read against the beam of the rich provisions of our Constitution.

It will be seen from the above that Majanja J saw nothing wrong in suing Parliament.

18. The interpretation of the law is therefore rather ambivalent on whether or not the House (National or County Assembly) should be sued directly, or whether it is the Speaker who should be sued on behalf of the House. On my part, I think the choice of suing either the Speaker or the House itself, may depend on what is at stake and the nature of the cause of action. An action may be directed at the Speaker himself, and sometimes it may be directed at the National Assembly or Senate, or County Assembly, or to one of its Committees, or to an organ of the County Government. The law outlines distinct functions for all these institutions and offices. For example, the County Assembly under Section 14 has the power to make Standing Orders. If the Standing Orders are unconstitutional, and one seeks to have them so declared through a suit, then, because it is the County Assembly which passed the Standing Orders, then one, in my humble view, ought to sue the County Assembly directly. In the same vein, there are duties and functions directly assigned to the Speaker. If one has a problem with the manner in which the Speaker is performing his function, or seeks to bar the Speaker from doing a certain act or compel him to act, then, given that this is a cause of action against the office of the Speaker, then it is best to sue the Speaker directly. If the Speaker is being sued on behalf of the House, or action of the House, then it is best to clarify that the Speaker is being so sued on behalf of the House and not in his personal capacity. In the instance of such, the Speaker can then apply to be removed from the case if he has no mandate to act on behalf of the House.
19. Let us also not forget that within the County Governments set up, there are organs therein which can sue or be sued in their own names. One of such is the County Assembly Service Board, established under Section 12 of the *County Government Act*, and pursuant to Section 12 (b) of the *County Assembly Services Act*, Act No 24 of 2017, it has power to sue and to be sued. Thus if one has an issue to raise concerning this Board, then it is the Board itself to be sued. There is also the office of the Clerk of the County Assembly, which office has distinct functions. If one has an issue concerning this office, then it is best to sue the Clerk of the County Assembly. It will thus be seen that the manner of suing and the institution/office of the County Government to sue may vary depending on what office or institution of the County Government is targeted in the suit.
20. Given the various interpretations that have been given by different judges on how to approach the issue, I see no need of being overly technical. In the instance of this case, I can see that the Speaker is being sued because of directives allegedly given by the County Assembly of Taita Taveta. If the Speaker was of opinion that this is not a matter that he can take up, then he ought to have applied to be removed from the suit, and/or moved the County Assembly of Taita Taveta to be joined as such.
21. For the above reasons, I am unable to fault the petitioners for suing the 2<sup>nd</sup> respondent.
22. The 3<sup>rd</sup> respondent also raised issue that she has been improperly sued. The cause of action against the 3<sup>rd</sup> respondent is in prayer (d) of the petition. The petitioners want an order directing the 3<sup>rd</sup> respondent to provide security to their ranches. This is because they aver that their ranches are at risk of being invaded because of the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It appears to me as if counsel for the 3<sup>rd</sup> respondent misread the prayer, for it does not seek the 3<sup>rd</sup> respondent to charge the invaders, which would be the purview of the DPP, but only seeks that security be provided to them. I think it is an issue that may be the subject of interrogation and I will thus deal with it.



23. On the substance of the case, the petitioners have demonstrated ownership of the parcels of land in issue through their certificates of title. Their ownership of the land has indeed not been put to any challenge. The petitioners have stated they use their parcels of land as ranches which also accommodate wild animals that freely move in and out of their parcels of land. What I understand the petitioners to say is that they use their land as if they were extensions of the Tsavo East and Tsavo West National Parks, and these parcels of land are vital for the migration of animals between the parks, and also for the sustenance of the animals, for the parcels of land are a rich source of food and water for them. They aver that the use of these parcels of land in this fashion is critical for the sustenance of the Tsavo ecosystem. In other words the use of these parcels of land as ranches should not be disturbed, and neither should these lands be allowed to be taken away for purposes of human settlement, for this will destroy their critical function in environmental protection and maintenance of biodiversity.
24. What the petitioners are saying is very important. We must understand that land can have various uses. Not all land is suitable for human settlement, and even if it is, we also need to be alive to the fact that we need to maintain our heritage for this and the next generation. We must be alive to the principle of intergenerational equity and also intragenerational equity. We have a duty to safeguard biodiversity for this and the next generation and we cannot do this if we look at land only as a resource that should be used for farming or for human settlement as this is not the only economic use for land. Reserving land for use by wildlife is also an important way of using land. There is need to maintain wildlife populations as biodiversity is key in maintaining a balance in the ecosystem.
25. Though we have needs for development, development should be sustainable. Sustainable development is exemplified by the Sustainable Development Goals, one of which, Goal 15, is to “Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.” The targets within this Goal 15 include the taking of “urgent and significant action to reduce the degradation of natural habitats” and “halt the loss of biodiversity” and to “integrate ecosystem and biodiversity values into national and local planning.” (See targets within Goal 15 of the Sustainable Development Goals).
26. Kenya is also a signatory to the Convention on Biological Diversity. Article 6 of the Convention provides that :-
- Each Contracting Party shall, in accordance with its particular conditions and capabilities:
- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and
  - (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.
27. Thus, when we are developing sectoral plans, programmes and policies, we need to integrate conservation of biological diversity and be alive to the principle of sustainable development. This duty is upon both the national and county governments as it is among the national values and principles of governance outlined at Article 10 of the [Constitution](#). The said Article 10 provides as follows :-

10. National values and principles of governance



- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
  - (a) applies or interprets this Constitution;
  - (b) enacts, applies or interprets any law; or
  - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include—
  - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
  - (c) good governance, integrity, transparency and accountability; and
  - (d) sustainable development.
 (emphasis mine)

28. County Governments are bound by the above provision of the constitution. Thus, when County Governments make plans or policy decisions they must be alive to the principle of sustainable development and one of the elements of sustainable development is safeguarding of natural habitats that are key to the protection of biodiversity. If there are critical lands that are vital in safeguarding wildlife populations then we need to ensure that these are not adversely affected even as we make policies and plans for development or settlement of human populations.
29. What I am pointing out above ought not to be seen as hypothetical and beyond the realities on the ground. The reality is that we are losing big populations of flora and fauna. Animals and plants are going extinct. We should not forget that Kenya is one of the few countries that host some endangered and critically endangered species, such as rhinos, elephants, leopards, and lions, to sample a few. The habitats where such populations are held is under constant threat and pressure and there is every need to maintain and safeguard terrain that sustain such flora and fauna, for this and the next generation, and also for purposes of maintaining an ecological balance. We are now facing prolonged droughts as a result of climate change, and one of the factors leading to climate change is the decimation of forests, grassland, and other flora, that are important in keeping in check the rise in greenhouse gases. Prolonged drought results in depletion of food and water, which in turn leads to humans and wildlife competing for the scarce natural resources, thus escalating human/wildlife conflict that at times sadly ends in loss of life. We should therefore not merely look at vast land that is not overrun by human settlement as “wasted land” or “unutilized land”. That would be a very myopic way of looking at the land for it may be land that is key to the very sustenance of life for flora and fauna.
30. The Constitution of Kenya recognizes the need to safeguard the environment and I have already pointed at Article 10 of the Constitution on the national values and principles of governance which include sustainable development. Article 60 of the Constitution espouses the principles of land policies. These include the principles of “sustainable and productive management of land resources” and “sound conservation and protection of ecologically sensitive areas.” [See Article 60 (1) (c) and (e)]. Article 66 of the Constitution empowers the state to regulate the use of land *inter alia* for purposes of land use planning. Article 69 of the Constitution provides for various obligations vested on the state to protect the environment, including the elimination of processes and activities that are likely



to endanger the environment. Under Article 69 (2), every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

31. We should have all these important principles in mind when we are thinking about how best land may be utilized. This goes to politicians as well, and to those in control of County Governments, which, as devolved units, are more in touch with the people. There is great temptation for politicians to try and increase their popularity in order to get more votes by promising people land. Such promises however need to be kept in check so that parcels of land that are important for conservation are not affected. Unbridled utterances by politicians can also whip up emotions, and lead to invasion of land by people, without a care that such invasion not only infringes on the proprietary rights of the land owner but may also lead to environmental degradation. As such, it is extremely vital for politicians to internalize the need to safeguard land that is important for environmental sustainability, following the dictates of the Constitution, and the obligations of the State pursuant to various international instruments, but more so, under the moral duty to safeguard the heritage of this country for this and the next generation.
32. I would fault no one for coming to court for redress if they are of the view that a right under the bill or rights is violated or threatened. That is permitted at Article 22 of the *Constitution* which provides as follows :-
- 22 (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
33. The interpretation of the above Article is plain. One can come to court if he/she is of the view that a right in the Bill of rights is denied, violated or infringed, or is threatened. It is sufficient that the right is threatened. In order to prove that there is threat, a person is expected to demonstrate a set of facts or circumstances, which lead one to the conclusion that if allowed to proceed, whether as planned or collateral to what is planned, then the end, or natural, result will be an infringement of a right. One therefore does not have to wait for a bill of right to be violated. You would in fact prefer a scenario where one comes to court early, to nip in the bud any act whose result will be to lead to a violation of a person's rights, for you would not wish for anyone's rights to be violated. In health, we advocate for 'prevention being better than cure' and that antidote is also apt when it comes to the rights of the people, for violation of rights may come with painful consequences which may be difficult to remedy or reverse. For example, under Article 26 of the Constitution, there is the right to life. Would you want to wait until somebody's life is taken away before seeking redress in court? Wouldn't you rather come to court early and stop any action whose result may lead to the loss of life? This also applies strongly to protection of the right to a clean and healthy environment which is enshrined under Article 42 of the Constitution. If there is a threat to a clean and healthy environment, it is better for one to approach court before any action whose result will lead to a degradation of the environment takes place, for it may be impossible to reverse some acts that are deleterious to the environment. If for example, there is a planned dumping of toxic waste in an ecologically sensitive area, you would want that stopped before it takes place, for after the toxic waste is deposited, it may lead to a complete obliteration of the ecosystem of the area.
34. The petitioners have of course come to court claiming that their constitutional rights have been violated or are under threat of violation. In their amended petition (paragraph 31) they mention that the County Government of Taita Taveta has requested the County Assembly of Taita Taveta County to debate and pass policies, laws and regulations regarding usage of the petitioners' parcels of land. They state at paragraph 32, that the County Assembly has directed the CEC Lands, to move and immediately



stop all activities for the ranches. They aver that on 6 May 2020, the MCA of Kasigau Ward, issued a statement requiring the six ranches in his ward to revert to the County Government, and caused the CEC Lands, Mr. Mwandawiro Mghanga, to be summoned to issue a statement. They state that on 11 May 2020, the CEC Lands, issued a statement through a joint committee, which implied that there is possibility of converting the 6 ranches into community land. The joint committee is alleged to have directed the CEC member to “within 10 days stop all activities in the Ranches in the County” and “initiate a stop order of processing and issuance of any title deed to any Ranch within the County.” As a result of these, they claim that their parcels of land are now being invaded. The response of the 2<sup>nd</sup> respondent is to refute this and to state that there is no bill before it relating to any of the parcels of land of the petitioners and therefore this petition is premature.

35. The petitioners have annexed an extract from Kwaela News Network to support the facts in their petition. That news extract, dated 11 May 2020, states inter alia that “the Kasighau Ward Member of County Assembly Hon. Ibrahim Juma has successfully obtained a written submission from the Lands, Physical Planning, Housing and Mining, County Executive Committee Member (CECM) Mwandawiro Mghanga to facilitate reversion of Mbale, Wushumbu, Amaka, Dawida, Bura and Kambanga ranches to the community.” The same article states as follows :-

“The joint committee directed the CECM within 10 days to :-

1. Stop all activities in the ranches in the county.
2. Initiate a stop order of processing and issuance of any title deed to any ranch within the County.
3. Furnish the house with necessary information on how many ranches have title deeds and when their title deeds were issued.
4. Furnish the house with any lease agreements entered by the ranches and other entities, duration of the lease agreement and when they are to expire.
5. Furnish the house with the list of all directors, shareholders and minutes not only of the Six ranches but also all ranches in the County.
6. The lands department to write a letter to the National Land Register to stop all transactions between the government and the ranch owners to renew expired leases.”

36. There is no affidavit from the respondents to refute that this is what happened and no affidavit contesting that the news article is false. There is no affidavit which purports to state what the correct instruction was, if what was reported is not correct. The assumption that I will make is that what was reported was factually correct. I am aware that in his submissions, Mr. Nyange attacked the use of the newspaper article to form the facts of the petition. My response is that if the 2<sup>nd</sup> or any of the respondents were of the view that what was reported was not correct, then they ought to have produced the actual minutes of the meetings, or Hansard report, or whatever internal document they have of what was discussed, since these are documents within their possession. As I have mentioned, there is no affidavit sworn by any of the respondents to deny that what was reported is not correct and no attempt to put forth what they consider to be the correct facts. In light of that, I will have to assume that what was reported in the news article is true.



37. From it, it will be observed that a committee of the 1<sup>st</sup> respondent directed the CEC Lands to inter alia “stop all activities in the ranches in the county.” This is an affront to the rights of the petitioners under Article 40 of the Constitution which protects the right to property. Article 40 (3) provides that :-

- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

38. It will be seen from the above that the State is barred from depriving a person of his property unless there is an acquisition of the land for public interest accompanied by full compensation. In my view, a directive that a person should not use his land is akin to depriving the person of his property, for what is the use of property if you cannot be allowed to utilize and derive benefit from it ?

39. Moreover, Section 24 of the [Land Registration Act](#), vests upon the registered proprietor of land the rights and privileges that accompany that proprietorship. That section is drawn as follows :-

24. Interest conferred by registration.  
Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

40. The petitioners own the ranches in issue and they have every right to use these ranches following the provisions of Section 24 of the [Land Registration Act](#). It is them who are vested with the rights of use, ingress and egress. No person, institution, or entity, has a right to direct them to stop whatever activities they undertake on the ranch without there being any insinuation that any of the activities carried out are illegal. It was therefore wrong and improper for the 1<sup>st</sup> respondent, through its committees and employees, to purport to issue a directive to the CEC Lands, to have him stop all activities in the ranches. The CEC Lands may or may not have issued any notice, but it is apparent, that if he is to proceed as directed, then the rights of the petitioners will be violated. The petitioners are therefore correct to assert that their rights to property are already threatened, or are under threat, by the utterances, notices, directives, and actions of the institutions and offices of the 1<sup>st</sup> respondent. They



are also correct in asserting that the above may also lead to a violation of the right to a clean and healthy environment, for they have demonstrated that the activities that they undertake at the ranches are aimed at conservation of flora and fauna, and the protection of the Tsavo ecosystem. If the directive that they must stop all activities on the ranches is implemented, then there is a risk of the ranches being unattended which may lead to poaching, or other damaging acts to the environment. However, on the issue of a submission made by the CEC Lands, it is difficult to state that the submission is a violation of the petitioners rights. It is a mere submission that may be subjected to debate and rejected.

41. Let me now turn to the prayers sought in this petition. I have already outlined them at the beginning of this judgment. The first prayer (a) is for a declaration that pursuant to Article 67 (2) (a) and (h), Part 1, Fourth Schedule to the Constitution, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have no power or mandate to determine land use, policy and ownership of privately owned land within Taita Taveta County or any part of Kenya. I have no evidence that the 1<sup>st</sup> or 2<sup>nd</sup> respondents have made any determination on land use, or policy, or on the ownership of private land within Taita Taveta County. No bill has been prepared or presented with regard to this, or if there is one, I have no evidence of it. Neither have I seen any report relating to such. A court does not issue orders in a vacuum nor does it issue orders merely for purposes of determining hypothetical debates. If there will be a determination on land use, or a policy that has been passed by either the 1<sup>st</sup> or 2<sup>nd</sup> respondent, then this court can proceed to interrogate such policy, but it is not the business of court to make blanket orders without there being a context or subject matter. I am unable to proceed any further to interrogate this prayer as it is clearly premature. Prayer (b) seeks a declaration that pursuant to Article 60 (1) (b) the land rights of the petitioners are guaranteed and they want an order directing the Speaker and the County Assembly of Taita Taveta to desist from discussing or passing a motion to take over ownership and possession of the ranches. Again, it has not been shown that there is any pending motion seeking to take over the ownership and possession of the ranches of the petitioners. There is nothing for me to proceed to make a declaration under Article 60 (1) (b) (which provides for security over land rights) of the Constitution. I reiterate that a court does not make declarations or orders in a vacuum. I will say the same for prayer (c) of the amended petition and so too prayer (e). On prayer (d), the petitioners want an order for the 3<sup>rd</sup> respondent to provide security. Security is a right that every citizen is entitled to. I have not been shown that the petitioners have made any request for security which has been denied by the 3<sup>rd</sup> respondent. I have also not been given an instance where the petitioners have approached the 3<sup>rd</sup> respondent concerning the invasion of their land and the 3<sup>rd</sup> respondent has declined to take any action. Yet again, I cannot issue an order based on nothing. If the petitioners want security, then they are at liberty to ask for it from the 3<sup>rd</sup> respondent. They do not need an order of the court to ask for security unless such request for security has been made and denied. To leave it too open ended means that every person in Kenya is at liberty to file suit to ask for security which cannot be the purpose of litigation. There has to be a violation of a right to security or a threat to such right for one to approach court. There is nothing before me that suggests that the 3<sup>rd</sup> respondent is not going to avail security to the petitioners if they ask for it and certainly no instance has been demonstrated to me where security has been asked for and has been denied. I am for these reasons unable to grant prayer (e) of the amended petition. All these prayers, i.e prayers (a) through (e) are in my opinion speculative and premature. Prayer (f) seeks any other relief. I have interrogated the directive to the CEC Lands in the discourse above. I am of the opinion that the said directive, at least in so far as it directed the CEC Lands to stop any activity on the ranches, was an affront to the proprietary rights of the petitioners. I will issue an order of certiorari quashing that directive in so far as it purports to stop the ranches from dealing with their properties and/or in directing the CEC Lands to stop all activities on the ranches. That as I have explained, is an affront to the proprietary rights of the petitioners as contained in Article 40 of the Constitution and is also a



threat to a right to a clean and healthy environment as contained in Article 42 of the Constitution. That is the only order that I am inclined to issue within this petition.

42. The only issue left is costs. The petitioners have not persuaded me to grant any of the explicit orders that they set out. I also observe that this petition is brought in the public interest and qualifies to be public interest litigation especially on the part of the 1<sup>st</sup> petitioner. In those circumstances, each party to bear his/her own costs.

43. Judgment accordingly.

**DATED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

Page 6 of 6

