



Kitelo & 2 others (Suing as representatives of the Ogiek/Ndorobo Community of Mt Elgon) v County Government of Bungoma & another (Environment and Land Case 10 of 2020) [2022] KEELC 4901 (KLR) (26 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE 10 OF 2020
BN OLAO, J
SEPTEMBER 26, 2022
FORMERLY KITALE ELC CASE NO 109 OF 2008**

BETWEEN

**PETER KITELO 1ST PLAINTIFF
FRED MATEI 2ND PLAINTIFF
ERIC KAPSIN 3RD PLAINTIFF
SUING AS REPRESENTATIVES OF THE OGIEK/NDOROBO COMMUNITY
OF MT ELGON**

AND

**THE COUNTY GOVERNMENT OF BUNGOMA 1ST DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 2ND DEFENDANT**

Conversion of trust land occupied by the Ogiek/Ndorobo Community of Mt Elgon into Chepkitale National Reserve was unlawful and of no legal effect

Reported by Kakai Toili

Land Law - conversion of land - conversion of trust land into a national reserve - what were the factors to consider when determining whether the law was followed in the conversion of trust land into a national reserve - Constitution of Kenya (Repealed) sections 114(2), 115(1) and (2), and 117(1), (3) and (4).

Constitutional Law - institution of a suit - locus standi - where a suit was instituted by plaintiffs that stated that they were representatives of the Ogiek/Ndorobo Community of Mt Elgon - what were the factors to consider when determining whether a party had locus standi to institute a suit on behalf of a community - Civil Procedure Rules, 2010, order 1 rule 8.

Jurisdiction - jurisdiction of the Environment and Land Court - jurisdiction to determine a dispute on the conversion of trust land into a national reserve - whether the Environment and Land Court had jurisdiction to



determine a dispute on the conversion of trust land into a national reserve where the conversion was prior to the promulgation of the Constitution of Kenya - National Land Commission Act cap 281, section 5; Environment and Land Court Act Cap 8D, section 13(2); Land Act Cap 280, section 150.

Civil Practice and Procedure – suits – institution of suits – filing a suit on behalf of others – where a plaintiff had not obtained written permission of the persons claimed to be represented – whether a plaintiff that had erred by filing a suit on behalf of persons who had not granted written authority to the plaintiff to represent them could be allowed to proceed with the suit - Civil Procedure Rules (Repealed) order 1 rule 13(2)

Environmental Law - environmental impact assessment reports - circumstances in which environmental impact assessment report was required - whether environmental impact assessment report was required for purposes of the conversion of trust land into a national reserve - Environmental Management and Co-ordination Act Cap 387, second schedule, paragraphs 2(d) and 13(a).

Words and Phrases - locus standi - definition of locus standi - the right to bring an action or to be heard in a given forum - Black's Law Dictionary.

Brief facts

The plaintiffs moved to the court and described themselves as suing as representatives of the Ogiek/Ndorobo Community of Mt Elgon (the Community). They impleaded the County Government of Bungoma and the Attorney General (the 1st and 2nd defendants respectively) seeking various remedies with regard to the conversion of trust land which they occupied and which they alleged was converted into Chepkital National Reserve without following the procedure set out in the law.

It was the plaintiffs' case that *vide* a Gazette Notice dated June 6, 2000, the 2nd defendant on the instructions of the 1st defendant through Legal Notice No 88 of 2000 converted their ancestral land to a national wildlife reserve *to wit* Chepkital National Reserve without having it set apart as provided in section 117 of the repealed Constitution as read with section 13(1) of the Trust Land Act.

Accordingly, the plaintiffs argued that the order issued on June 6, 2000 was of no legal effect. The plaintiffs also claimed that there was failure on the part of the defendants to comply with the Environmental Management and Co-ordination Act since no report was submitted to the National Environment Management Authority. The plaintiffs therefore sought among other orders a declaration that the conversion was unlawful and without legal effect.

Issues

- i. What were the factors to consider when determining whether the law was followed in the conversion of trust land into a national reserve?
- ii. Whether the Environment and Land Court had jurisdiction to determine a dispute on the conversion of trust land into a national reserve where the conversion was prior to the promulgation of the Constitution of Kenya, 2010.
- iii. What were the factors to consider when determining whether a party had *locus standi* to institute a suit on behalf of a community?
- iv. Under what circumstances was an environmental impact assessment report required in the conversion of trust land into a national reserve?

Relevant provisions of the Law

Civil Procedure Rules, 2010

Order 1 - Parties to Suits

Rule 8

One person may sue or defend on behalf of all in same interest [order 1, rule 8.]

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.



(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

Held

1. Jurisdiction was everything and without it, a court had no power to make one more step. A court downed its tools in respect of any matter before it the moment it held the opinion that it was without jurisdiction. Jurisdiction should be acquired before any judgment was given.
2. The term *locus standi* meant a right to appear in court and, conversely, to say that a person had no *locus standi* meant that he had no right to appear or be heard in any proceeding. Other than merely pleading that the plaintiffs were deficient of the *locus* to bring the same, the 1st defendant did not offer any evidence in support of that allegation. On the other hand, the court received witness testimonies from were members of the Community and were conversant with the facts of the case. The plaintiff's *locus standi* in the instant proceedings was not in doubt.
3. The suit was first filed at the High Court in Kitale on December 17, 2008, some 4 years before the commencement of the National Land Commission Act on May 2, 2012. The declaratory orders sought by the plaintiffs in the suit did not fall within the functions of the National Land Commission as set out in section 5 of the Act. The remedies sought by the plaintiffs fell within the jurisdiction of the court as set out in section 13(2) of the Environment and Land Court Act as well as section 150 of the Land Act. There was no provision in the National Land Commission Act 2012, and none had been pointed out by the defendants, that ousted the jurisdiction of the court to determine the issues raised.
4. The suit was originally filed at that court on December 17, 2008 before it was transferred to the instant court on February 20, 2020. No appeal was filed against the orders by the High Court at Eldoret granting the plaintiffs leave to file the suit out of time. The issue of limitation was not well taken.
5. Section 13A of the Government Proceedings Act was declared unconstitutional in *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* 2012 eKLR. The Court of Appeal agreed with that finding in *David Njenga Ngugi v A-G C. A Civil Appeal No 297 of 2004* [2016 eKLR]. That decision was binding on the instant court. In any event, among the documents produced by the plaintiffs *vide* the supplementary list of documents dated November 18, 2020 was a notice dated July 16, 2008 and served on the Attorney General's State Law Office Nairobi, in conformity with section 13A. The defendants did not cast doubt on the authenticity of that notice. The plaintiffs had fully complied with the law in 2008 before filing the suit.
6. The plaintiffs approached the court suing as representatives of the Ogiek/Ndorobo Community (the Community). The suit was filed on behalf of over 6000 members of the Community. The defendants having not called any evidence to rebut the oral testimony of the 1st plaintiff, the court was satisfied that indeed members of the Community were notified about the suit both by word of mouth and notices at public places. There was compliance with order 1 rule 8 of the Civil Procedure Rules in the circumstances of the case.
7. Whereas there was written authority by the other plaintiff's authorizing the 1st plaintiff to act on their behalf, there was no such written authority from the over 6000 members of the Community authorizing the 1st plaintiff to plead and appear on their behalf as was required by order 1 rule 13(2) of the Civil Procedure Rules. The trial has been conducted and determined without the members of the Community on whose behalf the suit was filed authorizing the plaintiffs to plead and act on their behalf. There was therefore no opportunity for the members of the Community to rectify that error.
8. If an application had been made before the hearing to have members of the Community sign and file their authority, then the court, pursuant to article 159(2)(d) of the Constitution of Kenya (Constitution), would have had no hesitation in allowing such application. Therefore, for purposes of the suit, the only plaintiffs were the 1st, 3rd and 4th plaintiffs.



9. The report by the State Department of Environment and Natural Resources titled “Report on Chepkitale National Reserve and the Ogiek Community” was not only from a Government agency but it was also prepared 5 years after the suit was filed. Taken together with the letter dated April 3, 2002 by the then Permanent Secretary, Secretary to the Cabinet and Head of the Public Service as well as the evidence adduced by the plaintiffs, and which was not rebutted, before its conversion into a national reserve, Chepkitale was trust land held by the Mt Elgon County Council in trust for the Community.
10. The conversion of the land in dispute from trust land to a national reserve was done through the Legal Notice No 88 dated June 6, 2000. That was during the regime of the repealed Constitution. The relevant law which was enacted under sections 114(2), 115(1) and (2), and 117(1), (3) and (4) of the repealed Constitution, was the repealed Trust Lands Act Cap 288 Laws of Kenya. The competent authority was the Mt Elgon County Council and since the land in dispute was previously trust land, it was mandatory that the relevant constitutional and other legal provisions cited were adhered to before any such authority could be given.
11. The Mt Elgon County Council did not comply with the Constitution and other relevant laws in converting the land in dispute from trust land to a national reserve. If it had done so, nothing would have been easier than availing those notices and other documentary evidence during the trial. The plaintiffs discharged the burden cast on them when they testified that, in fact there was no compliance with the law and the evidential burden shifted to the defendants to prove the contrary because it was never easy to prove the negative. However, the defendants elected not to call any witnesses to rebut the plaintiffs’ testimony.
12. In *Samuel M’amaroo M’kaura & 9 others v Meru County Government & 3 others* 2018 eKLR, the respondents called witnesses who testified that indeed the requisite notices were issued by the Nyambene County Council as required in law. The court in that case was able to see the impugned notices. In the instant case, no such notices were exhibited.
13. Pleadings and submissions, no matter how robust or persuasive, were not evidence upon which a court could base any decision. Disputes were only determined based on the parties’ evidence. Therefore, in the absence of any evidence by the defendants to rebut the plaintiffs’ testimony, it remained uncontroverted and the court had to accept it as the truth.
14. An Environmental Impact Assessment Report (EIA) would be required in the circumstances obtaining the instant case. There was nothing to suggest that the second schedule to the Environmental Management and Co-ordination Act was applicable since there was no urban development being proposed in the national reserve as per paragraph 2(d). However, insofar as what was being proposed was the establishment of protected areas, buffer zones, and wilderness areas as provided for under paragraph 13(a) of the second schedule, then an environmental impact assessment report (EIA) was necessary. There was no evidence that such a report was carried out. The purpose of an EIA report was to assess the likely significant impact of a proposed project on the environment, and in preparing such a report, account had to be taken of the status of the environment in which the proposed project was being undertaken.
15. The plaintiffs had no authority, as required by law, from members of the Community to file the suit on their behalf. There was a lapse in failing to get their authority, and it would therefore be remiss on the part of the court to make orders touching on strangers to the suit.

Suit partly allowed.

Orders

- i. *Declaration issued that the conversion of the suit land into a national reserve vide the Gazette Notice No 88 dated June 6, 2000 was unconstitutional, unlawful and of no legal effect. The land was to revert to the pre-June 6, 2000 status.*
- ii. *Defendants to meet the plaintiffs’ costs.*



Citations

Cases

Kenya

1. *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* Civil Application 12 of 1978; [1978] KECA 9 (KLR); [1978] KLR 103 - (Applied)
2. *County Government of Kiambu v Sebastian Muriuki Gakuru* Civil Appeal 148 of 2016; [2018] KEHC 4061 (KLR) - (Applied)
3. *Gitson Energy Ltd v Francis Chachu & 6 others* Civil Appeal 47 of 2014; [2017] KECA 769 (KLR) - (Applied)
4. *Kenya Bus Service Ltd & another v Minister For Transport & 2 others* Civil Suit 504 of 2008; [2012] KEHC 2402 (KLR) - (Explained)
5. *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusingjilu (Suing for and on behalf of 112 Plaintiffs)* Civil Appeal 212 of 2015; [2019] KECA 193 (KLR) - (Followed)
6. *M'kaura, Samuel M'amaroo & 9 others v Meru County Government & 3 others* Environment & Land Case 33 of 2014; [2018] KEELC 1702 (KLR) - (Distinguished)
7. *Moi, Daniel Toroitich v Mwangi Stephen Mureithi & another* Civil Appeal 240 of 2011; [2014] KECA 642 (KLR) - (Followed)
8. *Ngugi, David Njenga v Attorney General* Civil Appeal 297 of 2004; [2016] KECA 372 (KLR) - (Explained)
9. *Njau, Alfred & 5 others v City Council of Nairobi* Civil Appeal 74 of 1982; [1983] KECA 56 (KLR) - (Explained)
10. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 32 (KLR) - (Explained)
11. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)

Tanzania

East African Railways Corporation v Athony Sefu [1973] EA 237 - (Explained)

Texts

1. Daniel, G., (Ed) (2009), *Jowitt's Dictionary of English Law* London: Sweet & Maxwell
2. Garner, BA., (Ed), (2024) *Black's Law Dictionary* St Paul Minnesota: West Group Publishing

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 1; rules 8(1)(2); 12; 13(1)(2) - (Interpreted)
2. Community Land Act (cap 287) section 6 - (Interpreted)
3. Constitution of Kenya (Repealed) sections 114(2); 117; 118 - (Interpreted)
4. Constitution of Kenya article 159(2)(d) - (Interpreted)
5. Environment and Land Court Act (cap 8D) section 13(2) - (Interpreted)
6. Environmental Management and Coordination Act (cap 387) In general - (Cited)
7. Evidence Act (cap 80) section 112 - (Interpreted)
8. Government Proceedings Act (cap 40) sections 13A; 13(4) - (Interpreted)
9. Land Act (cap 280) section 115 - (Interpreted)
10. National Land Commission Act (cap 281) In general - (Cited)
11. Public Authorities Limitation Act (cap 39) In general - (Cited)
12. Trust Land Act (cap 288 Repealed) sections 7; 13(1)(2)(4) - (Interpreted)
13. Wildlife Conservation and Management Act (cap 376) In general - (Cited)

Advocates

None mentioned



JUDGMENT

- [1] Peter Kitelo, Fred Matei and Eric Kapsin (the 1st, 2nd and 3rd plaintiffs respectively) moved to this court *vide* their further amended plaint dated November 4, 2019 in which they described themselves as suing as representatives of the Ogiek/Ndorobo Community (hereinafter the Community) of Mt Elgon. They impleaded the County Government of Bungoma and the Hon Attorney General (the 1st and 2nd defendants respectively) seeking various remedies with regard to the conversion of trust land which they occupy and which they allege was converted into Chepkitale National Reserve without following the procedure set out in the law and the Constitution. That the said conversion of what was their ancestral land on which they depended for their livelihood not only denied them of their right of possession of their legal property but will also cause them irreparable damage now and for the forthcoming generations.
- [2] It is the plaintiffs' case that *vide* a Gazette Notice dated June 6, 2000, the 2nd defendant on the instructions of the 1st defendant through Legal Notice No 88 of 2000 converted their ancestral land to a National Wildlife Reserve to wit Cepkitale National Reserve without having it set apart as provided in section 117 of the *retired Constitution* as read with section 13(1) of the *Trust Land Act*.
- [3] Specifically, the plaintiffs pleaded in paragraph 11 of the amended plaint that the then Mt Elgon County Council failed to: -
1. Bring the proposal to set apart the land to the notice of the people concerned about the time and meeting of the Divisional Board at which the proposal would be considered.
 2. Have regard to a written record of representations made by the people of the area concerned to the proposal because no meeting took place.
 3. Approve the proposal to set apart the land by a resolution passed by a majority of all the members of the Council.
 4. Cause a notice of the setting apart to be published in the Gazette.
- Alternatively, before the order was made, the Trust Land should have been but was not set apart under section 118 of the *retired Constitution* and/or section 7 of the *Trust Land Act*. Accordingly, the order issued on June 6, 2000 is of no legal effect and was not made for the benefit of the residents on the land as no provision was made for compensating them for their loss of the land nor even an order for their resettlement on alternative land. There was therefore failure on the part of the defendants to comply with the *Environmental Management and Cordination Act 1999* since no report was submitted to the National Environment Management Authority.
- [4] The plaintiffs therefore sought Judgment against the defendants jointly and severally in the following terms: -
- (a) A declaration that the said conversion was unlawful, unconstitutional and without legal effect.
 - (b) Further or alternatively, declarations that the area of land identified in the schedule to the (Wildlife Conservation and Management) Chepkitale National Reserve Order 2000 has at all material times: -
 - 1 – Since June 6, 2000 been Trust Land vested in either Mt Elgon County Council or the 1st defendant; and



2 – Since August 27, 2010 has also been Community Land under article 63(2)(d)(iii) of the 2010 Constitution.

3 – Since 2 September 6, 2016 been held in trust by the 1st defendant on behalf of Ogiek/Ndorobo Community of Mt Elgon pursuant to section 6 of the Community Land Act.

(b1) A declaration that neither defendant is entitled to remove members of the Ogiek/Ndorobo Community of Mt Elgon from or otherwise interfere with their use or occupation of any land identified in the schedule to the Wildlife (Conservation and Management) Chepkitale National Reserve Order 2000 without their free, prior and informed consent.

(c) Costs

[5] Together with the further amended plaint, the plaintiffs filed statements of the following witnesses: -

1. Pius Ndiwa Muye (PW1)*

2. Peter Kitelo (PW2)

They also filed affidavits by Peter Kitelo (PW2) dated August 28, 2018, November 14, 2019 and November 17, 2019. The plaintiffs also filed a list of documents dated November 14, 2019 and a supplementary list of documents dated November 18, 2020.

[6] In his statement dated November 14, 2019, Peter Kitelo (PW2) confirms that he is a member of the Ogiek Community of Mt Elgon a hunter – gatherer indigenous, minority and marginalized Community with a population of about 6000. That the Chepkitale Trustland was declared a Game reserve *vide* Legal Notice No 88 of 2000 without the knowledge or involvement of the said community which submitted it's objection through Prof Johnson Changeiywo who wrote a letter on its behalf to the Permanent Secretary to the Cabinet and Head of the Public Service. In a response dated April 3, 2002, Mr Musyimi replied that the gazettment was effected in consultation with the Mt Elgon County Council and any de – gazettment could only be done after consultation with the concerned authority.

[7] The Community therefore undertook the first phase of consultations with the Mt Elgon County Council between 2002 and 2007 which however did not yield much results partly due to the emergence of the Sabaot Land Defence Force (SLDF) which brought a lot of suspicions between the communities in Mt Elgon as well as the prevailing insecurity. Meanwhile, the Provincial Administration issued numerous eviction notices which prompted the Community to seek legal redress even as it continued to resolve the matter amicably in line with the recommendations by Mr Musyimi. In a letter dated August 11, 2008, the County Council of Mt Elgon formed a committee to create linkages between the parties for a consultative process. This resulted in a meeting on August 15, 2008. Subsequently, the International Union for the Conservation of Nature (IUCN) agreed to use it's convening power to bring together the community and the Government Agencies under the "Whakatane Mechanism." Among the resolutions made at the "Whakatane Mechanism." was that Mt Elgon County Council must pass a resolution for the de – gazettment of Chepkitale Trust Land and ensure that it is converted to Community land managed by the Community as it had always been for generations. By a letter dated July 6, 2012, the Mt Elgon County Council intimated that it would support the de – gazettment of Chepkitale Trust Land and this was brought to the attention of the Court during the many mentions and in 2013, the Community wrote a petition to Dr Richard Lesiyampe the then Principal Secretary Environment and Natural Resources requesting the restoration of the Chepkitale Game Reserve to Community Land. Following that petition, Officers from the Directorate of Natural Resources Forest and Wildlife Conservation together with the Community visited Chepkitale area between September



27, 2013 and October 6, 2013 with the primary objective of providing a forum for interacting and familiarizing themselves with the issues affecting the Community in regard to the conservation problems in the Chepkitale National Reserve and the Mt Elgon Ecosystem as a whole key among them being that before the gazettement of Chepkitale as a National Reserve in 2002, the land in Chepkitale was Community land under the Ogiek. It was recommended that the Gazette Notice be rescinded by the Government so that the land reverts to the Community.

- [8] On January 28, 2011, the Community's advocate wrote to Mr Kassim Farah then District Commissioner Mt Elgon notifying him that this suit had been filed at the High Court in Kitale and instructing him against harassing and intimidating the Community with eviction. This file remained idle for a long time as the Community and the Government were still pursuing an amicable settlement. Meanwhile, the witness wrote a letter dated February 15, 2016 addressed to the Ministry of Environment and Natural Resources requesting to know if the Ministry was still interested in dealing with the issue amicably as the matter was due for mention on March 24, 2016. At the same time, the witness visited the Government Printer searching for notices regarding the gazettement of Chepkitale as a game reserve. He could not get them and was referred to the Kenya National Archives where he was given files for the years 1999 and 2000 but even there, he could not trace the notices and it became obvious to him that no notices were issued to members of the Community for any proposal to set aside part of Chepkitale trust land to enable the Community make representations to the Divisional Board about the proposal. Neither the witness nor any members of the Community were involved in the process and if they had been informed, they would have attended any meetings and made representation about the proposal to alter the legal status of the Chepkitale trust land. The Community was therefore not consulted and the gazettement was done clandestinely and unilaterally by the Mt Elgon County Council without informing the Community of the proposal. The Community is also not aware of any environmental project report done in connection with the proposal to convert the Chepkitale Trust Land into a National Reserve.
- [9] The witness filed two affidavits dated August 28, 2018, November 14, 2019 and November 17, 2020 contents of which I need not regurgitate since as they are well covered in the statement dated November 14, 2019.
- [10] On his part, Pius Ndiwa Muye (PW1) also recorded a statement dated November 14, 2019 and an affidavit dated August 28, 2018
1. The existing ultimatum issued by the Provincial Commissioner to the Ndorobo Community to vacate Chepkitale Reserve by October 18, 2008.
 2. The full meeting of the Mt Elgon County Council held on September 4, 2008 where a seven-member committee headed by Councillor Pius Muye was appointed to collect facts on eco – tourism priorities within Chepkitale area with a view of embracing the community's participation to venture in tourism.
 3. Structured dialogue between the Ndorobo Community and the Mt Elgon County Council.
In a memorandum dated October 17, 2008, the Councillors requested the Provincial Commissioner to rescind his ultimatum for some time to enable the Community come up with activities that could improve their livelihood. In a full council meeting on May 28, 2012, the Mt Elgon County Council passed a resolution to request the court to quash the gazettement of the Community land to a National Reserve.
- [11] Pius Ndiwa Muye (PW1) also filed an affidavit dated August 28, 2018 whose contents are similar to what is contained in his statement dated November 14, 2019.



[12] The plaintiffs also filed two (2) lists of documentary documents.

[13] The first list dated November 14, 2019 had the following documents: -

1. Legal Notice No 88 of 2000.
2. Letter by the Permanent Secretary and Secretary to the Cabinet and Head of the Public Service dated April 3, 2002 addressed to Johnstone Chengeiywo.
3. Letter by Peter Kitelo dated August 1, 2008 addressed to the County Clerk Mt Elgon County Council.
4. Letter from the Clerk Mt Elgon County Council dated August 11, 2008 addressed to Peter Kitelo.
5. Document headed Whakatane Assessment Kenya.
6. Petition from the Ogiek Community of Chepkitale addressed to Dr Richard Lesiyampe Principal Secretary Environment and Natural Resources.
7. Report on Chepkitale National Reserve and the Ogiek Community prepared by Prof Dr Enosh O Nyakweba dated November 4, 2013.
8. Letter by GN Thiongo Advocates dated 2 January 8, 2011 addressed to Mr Kassim Farah District Commissioner Mt Elgon.
9. County Government of Bungoma listing of villages.
10. Letter dated June 5, 2012 from Mt Elgon County Council addressed to Mr Peter Kitelo & 3 others.
11. Chepkitale Ogiek Community Consultative representatives.*
12. Letter dated August 11, 2008 from Mt Elgon County Council addressed to Mr Peter Kitelo (this is the same letter in No 4 above).
13. Agenda of joint meeting of the Ogiek and Mt Elgon County Council held on August 15, 2008.
14. Memorandum by the Councillors of Mt Elgon County Council dated October 7, 2008.
15. Minutes of full Council meeting of the Mt Elgon County Council held on May 28, 2008.

Although not listed above, the plaintiffs also filed a letter dated August 1, 2020 by Peter Kitelo and addressed to the Clerk Mt Elgon County Council.

[14] The plaintiffs also filed a supplementary list of documents dated November 25, 2020 containing the following documents: -

1. Notice under section 13A of the Government Proceeding Act dated July 16, 2008.
2. Letter from the Senior Deputy Solicitor General confirming receipt of the Notice.
3. Application for extension of time to file plaint.
4. Order issued on December 9, 2008 granting the plaintiffs leave to file suit out of time.
5. Letter from the County Council of Bungoma dated June 5, 2020 and Minutes of May 10, 2012 and May 28, 2012.



6. Report by KG Lindblomon the “Caves and People of Mt Elgon.”
 7. The Forest Ordinance Proclamation No 44.
 8. The Kenya Land commission report.
 9. The Crown Lands (Amendment) Ordinance.
 10. Map of Mt Elgon Trust Land.
- [15] The 1st defendant (then Mt Elgon County Council) filed a defence dated April 1, 2009 in which it questioned the *locus standi* of the plaintiffs to file this suit. It denied having instigated the 2nd defendant to issue the Legal Notice No 88 of 2000 adding that if it did, then it was in accordance with the clear provisions of the Constitution and the Trust Land Act chapter 288 laws of Kenya. It pleaded further that this suit is premature in so far as the statutory remedy has not been exhausted. Further, that the suit is time – barred and should be struck out.
- [16] The 1st defendant did not file any witness statements nor a list of documents. Indeed, no witness was called by the 1st defendant during the plenary hearing.
- [17] The 2nd defendant filed a further amended defence dated November 10, 2020 in which it denied the allegations that Chepkitale National Reserve is Trust land held on behalf of the Ndorobo/Ogiek Community of Mt Elgon and put the plaintiffs to strict proof thereof. It pleaded that Chepkitale National Reserve is public land having been gazetted vide Legal Notice No 88 of 2000 and forms part of the larger Mt Elgon ecosystem comprising Mt Elgon National Park, Namatel Central Forest in Uganda and Mt Elgon Forest Reserve. The Government of Kenya therefore has a duty to regulate it’s use for public good.
- [18] The 2nd defendant further denied that the gazettelement of Chepkitale National Reserve was done without any consultation or consent of the stakeholders adding that it was done with the consent of the 1st defendant which was the custodian of the land. The 2nd defendant also denied that prior to the gazettelement, the land was the plaintiffs’ ancestral land. It pleaded that the gazettelement of National Parks is part and parcel of the function of the National Government as a way of preserving the ecosystem and water catchment areas and Chepkitale National Reserve was never under the possession of the plaintiffs as alleged in the plaint. The 2nd defendant denied having breached the provisions of the Trust Land Act adding that the actions of the Minister were done lawfully and procedurally in consultation with all the stake holders.
- [19] The 2nd defendant described the suit as incompetent, fatally defective as it does not comply with the provisions of section 13A of the Government Proceedings Act and is also time barred. It pleaded further that this suit has been overtaken by events as the Chepkitale National Reserve has now been recognized by UNESCO as a biosphere and an important water tower.
- [20] This court’s jurisdiction to determine this suit was denied on the basis that Chepkitale National Reserve became public land in the year 2000 and now falls under the management of the National Land Commission and the conversion from public to Community land is not within the mandate of this court. The 2nd defendant therefore sought the dismissal of this suit for being scandalous, frivolous, vexatious and an abuse of the process of this court.
- [21] Just like the 1st defendant, the 2nd defendant did not file any witness statements or list of documents and neither called witnesses during the plenary hearing.



- [22] The trial commenced on September 20, 2021 when Pius Ndiwa Muye (PW1) and Peter Kitelo (PW2) testified on behalf of the plaintiffs. They adopted as their testimony the contents of their respective statements and affidavits already referred to earlier in this Judgment and which they further amplified in their evidence in chief. They were cross – examined at length both by Mr Mwangi and Mr Tarus counsel for the 1st and 2nd defendants respectively.
- [23] The defendants, as I have already stated above, closed their cases without calling any witnesses.
- [24] Submissions were filed by all the parties and were highlighted on February 9, 2022.
- [25] I have considered the plaintiffs’ evidence, the documents filed as well as the submissions by counsel.
- [26] Before I delve into the merits or otherwise of the plaintiffs’ case, there are important jurisdictional issues which have been raised by the defendants in their pleadings and which I must first resolve. This is because, as was held in the case of *Owners of The Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* 1989 KLR 1, jurisdiction is everything and without it, a court has no power to make one more step. A court downs its tools in respect of any matter before it the moment it holds the opinion that it is without jurisdiction. Jurisdiction must be acquired before any Judgment is given. The *locus* of the plaintiffs to file this suit has also been questioned. In paragraph 3 of its defence the then 1st defendant Mt Elgon County Council pleaded that this suit is incompetent because “the plaintiffs are deficient of the locus to bring the same.”
- [27] To begin with the issue of *locus standi*, it is defined in *Black’s Law Dictionary* as: -
- “The right to bring an action or to be heard in a given forum.”
- [28] The Court of Appeal in the case of *Alfred Njau & 5 others v City Council of Nairobi* 1983 eKLR put it in the following terms:-
- “The term *locus standi* means a right to appear in court and, conversely, as is stated in *Jowitt’s Dictionary of English Law*, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding.”

Other than merely pleading that “the plaintiffs are deficient of the locus to bring the same,” the 1st defendant did not offer any evidence in support of that allegation. On the other hand, it is clear from the testimonies of Pius Ndiwa Muye (PW1) and Peter Kitelo (PW2) that they are members of the Ogiek Community and are conversant with the facts of this case. Indeed, Pius Ndiwa Muye (PW 1) served as a Councillor in the Mt Elgon County Council between 1997 upto 2013 during which time he became aware about the gazettelement of Chepkitale National Reserve. On his part, Peter Kitelo (PW2) authored and received correspondences on behalf of the Community with regard to the gazettelement of the Chepkitale National Reserve and the efforts made towards the de – gazettelement of the same. And by their authority dated December 15, 2008 and filed originally at the High Court Kitale on December 17, 2008 where this suit originated, Ben Mugei Cheptuit, Fred Matei and Erick Kapsin (then the 2nd, 3rd and 4th plaintiffs) authorized Peter Kitelo the 1st plaintiff to swear affidavits and other documents on their behalf. Therefore, the suggestion that the plaintiffs lack the requisite *locus standi* to file this suit can only be described as preposterous and must be dismissed. The plaintiff’s *locus standi* in these proceedings is not in doubt.

- [29] With regard to this court’s jurisdiction to determine this suit, the 2nd defendant pleaded in paragraph 13C of its further amended defence dated November 10, 2020 that this court lacks jurisdiction because by virtue of the gazettelement of the Chepkitale National Reserve in 2000, it became public land under



the management of the National Land Commission and therefore it is not within the mandate of this court. This suit was first filed at the High Court in Kitale on December 17, 2008 some 4 years before the commencement of the National Land Commission Act on May 2, 2012. Secondly, the declaratory orders being sought by the plaintiffs in this suit do not fall within the functions of the said commission as set out in section 5 of the Act. Most importantly, it is clear that the remedies sought by the plaintiffs fall within the jurisdiction of this court as set out in section 13(2) of the Environment and Land Court Act as well as section 150 of the Land Act. In any event, I would follow the path taken in the case of *East African Railways Corporation v Athony Sefu* 1973 EA 237 where the court held that:-

“It is a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the superior courts in the absence of clear and unambiguous language to that effect.”

I have not seen any provision in the National Land Commission Act 2012, and none has been pointed out by the defendants, that ousts the jurisdiction of this court to determine the issues raised in this case.

[30] The other issue raised by the defendants in their pleadings is that this suit is time barred. In its defence, the 1st defendant has pleaded as follows in paragraph 9: -

“The 1st defendant avers that this suit is time barred and shall seek that the same be struck out.”

The 2nd defendant has pleaded in paragraph 11 of its further amended defence as follows: -

11: “The 2nd defendant avers that the plaintiff’s suit is fatally defective as it does not comply with the provisions of section 13A of the Government Proceeding Act and is time barred in line with the Public Authorities Limitation Act.”

The record shows that on November 25, 2008, Mohamed Ibrahim J (as he then was) granted the plaintiffs leave to file this suit out of time vide orders made in the High Court Eldoret in Miscellaneous Application No 388 of 2008. The judges specifically directed that the suit be filed at the High Court in Kitale within 30 days. Indeed, this suit was originally filed at that court on December 17, 2008 before Mwangi Njoroge J transferred it to this court on February 20, 2020. No appeal was filed against the orders by Mohamed Ibrahim J (as he then was) granting the plaintiffs leave to file this suit out of time. The issue of limitation is not well taken.

[31] On the issue that there was no compliance with the provisions of section 13A of the Government Proceedings Act, that provision was declared un – constitutional in the case of Kenya Bus Service Ltd & another v Minister For Transport & 2 others 2012 eKLR. The Court of Appeal agreed with that finding and stated as follows in David Njenga Ngugi v AG CA Civil Appeal No 297 of 2004 [2016 eKLR] at paragraph 14: -

“The right and power to sue does not spring from compliance with the Section and failure to fully comply with the section cannot hamper the right of a claimant to sue. As indicated above, the foundation of a tortious action against Government is in common law. It is clear that a suit that has been filed without full compliance with section 13A cannot be said to be incompetent nor can it be rightly struck out.

It’s competency or otherwise is dependent on considerations of section 13A (*supra*). It cannot be good law to hold that section 13A which is merely directory, can be regarded as imperative so as to render a competent suit incompetent for failure to fully comply with it.”



That decision is binding on this court. In any event, among the documents produced by the plaintiffs *vide* the supplementary list of documents dated November 18, 2020 is a Notice dated July 16, 2008 and served on the Attorney General's State law Office Nairobi in conformity with the provisions of section 13A of the *Government Proceedings Act*. The first paragraph of the said Notice reads: -

“Take Notice that I. Councillor Eliud Chelasha 2. Henry Kirui 3. Benjamin Belio 4. Philip Cheluget and 5. Phyllis Koroyenyof Post Office Box Number 17 Kapsokwony intend to institute civil proceedings against you on behalf of the District Commissioner Mt Elgon as well as the Ministry of Forestry and wildlife on the expiry of thirty (30) days from the date of this notice in conformity with section 13(4) of the *Government Proceedings Act*.”

I did not hear the defendants cast doubt on the authenticity of that notice. Therefore, and notwithstanding the fact that section 13A of the *Government Proceedings Act* was declared un – constitutional *vide* the Judgment delivered on September 21, 2012 in the case of *Kenya Bus Service Ltd & another (supra)*, the plaintiffs had in fact fully complied with the law in 2008 prior to filing this suit.

[32] Finally, the 2nd defendant pleaded in paragraphs 7B and 7C that the other plaintiffs have not authorized Peter Kitelo the 1st plaintiff to swear any documents on their behalf. That this suit therefore offends the mandatory provisions of order 1 of the Civil Procedure Rules and should be struck out. In his submissions, Mr Mwangi counsel for the 1st defendant has stated that the plaintiffs have moved to this court in a representative capacity on behalf of members of the Ogiek/Ndorobo Community but no notice was issued or served upon the potential plaintiffs and neither did they authorize the plaintiffs to file this suit. There was no compliance therefore with the provisions of order 1 rule 8(1) and (2) and 13 of the *Civil Procedure Rules*. In response, however, Ms Kinama counsel for the plaintiffs has submitted that there was compliance with the law and that in any event, strict compliance with the provisions of order 1 rule 8 and 13 of the *Civil Procedure Rules* is not mandatory and should not result in a suit being struck out. Further, that in the spirit of article 159(2) of the *Constitution*, the court should dispense justice without undue regard to procedural technicalities. Both counsel cited various decisions to guide this court in that regard.

[33] It is common ground that the plaintiffs approached this court suing as representatives of the Ogiek/Ndorobo Community of Mt Elgon. Order 1 rule 8(1) and (2) of the *Civil Procedure Rules* provides as follows: -

8(1) “Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.”

“(2) “The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.”

On the other hand, order 1 rule 13(1) and (2) provides that: -

13(1) “Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear plead or act for such other in any proceeding.”



- (2) “The authority shall be in writing signed by the party giving it and shall be filed in the case.” Emphasis mine

Peter Kitelo the 1st plaintiff confirmed when cross – examined by Mr Mwangi that this suit was filed on behalf of over 6000 members of the Ogiek Community. This is what he said: -

“I am a member of the Ogiek Community and I have moved to this court as a representative of the Ogiek Community. The Ogiek Community number about 6000 in members. They are aware about this suit. I have not filed any such notice to show that the Ogiek Community have been notified about this suit. But the Community is aware. There is no newspaper notice. The notice was by word of mouth and notices at public places. But I have not produced any such notice in this court. We called meetings and notified the Community about this case.”

The defendants having not called any evidence to rebut the oral testimony of the 1st plaintiff, this court is satisfied that indeed members of the Ogiek Community were notified about this suit both by word of mouth and notices at public places. The view I take of the matter is that given the circumstances of this case, notice by word of mouth or by public announcements satisfies the requirement of order 1 rule 8(2) of the *Civil Procedure Rules*. In any event, the 1st plaintiff having confirmed that indeed such notices were made, the onus shifted to the defendants to rebut that assertion as provided in section 112 of the *Evidence Act*. As was held by the Supreme Court in the case of *Raila Amolo Odinga & another v IEBC & 2 others* [2017] eKLR: -

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and it’s position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

The foregoing analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the claimant throughout the trial. It is only the evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the claimant. Emphasis mine.

I am satisfied that there was compliance with the provisions of order 1 rule 8 of the Civil Procedure Rules in the circumstances of this case.

- [34] With regard to compliance with the provisions of order 1 rule 13(1) and (2) of the *Civil Procedure Rules*, whereas there is written authority by the other plaintiffs authorizing the 1st plaintiff to act on their behalf, there is no such written authority from the over 6000 members of the community authorizing the 1st plaintiff to plead and appear on their behalf as is required by order 1 rule 13(2) of the *Civil Procedure Rules*. Counsel for the plaintiffs, citing the decision of Hedwig Ong’udi J in *County Government of Kiambu .v. Sebastian Muriuki Gakuru* 2018 eKLR submitted that there need not be strict compliance with the rule. However, that case was an appeal against a ruling of a magistrate allowing a party time to file the authority to act within 14 days. The Judge in dismissing the appeal took the view that substantive justice would be served if the party was given time to correct the error. In this case however, the trial has been conducted and determined without the members of the Ogiek/ Ndorobo Community on whose behalf the suit was filed authorizing the plaintiffs to plead and act on their behalf. There is therefore no opportunity for the members of the Community to rectify that error which was the position in *County Government of Kiambu v Sebastian Muriuki Gakuru* (*supra*).



In the circumstances, this court will be guided by the Court of Appeal's decision in the case of *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu* (suing for and on behalf of 112 plaintiffs) C.A Civil Appeal No 212 of 2015 [2019 eKLR] where the court while considering the then order 1 rule 12 of the old *Civil Procedure Rules* (now order 1 rule 13) said: -

“The simple requirement is that one or more of the plaintiffs be nominated to act in the proceedings for the other plaintiffs. The authority must be given in writing by each of the other plaintiff and the authority must be filed in court. The result is that the nominated plaintiff(s) become the named plaintiff and acts in a representative capacity. He becomes an active plaintiff and is dominus litis with regard to taking control of the suit, initiating any process and signing documents.” Emphasis mine.

As I have already stated above, the only plaintiffs who authorized in writing the 1st plaintiff Peter Kitelo to appear, plead and act on their behalf are 2nd plaintiff Ben Mugei Cheptuit (whose name was later struck out when the plaint was amended), Fred Matei and Eric Kipsin (the 3rd and 4th plaintiffs respectively). That authority was signed and duly filed in court on December 17, 2008. If an application had been made prior to the hearing to have members of the Community sign and file their authority, then this court, pursuant to the provisions of article 159(2)(d) of the *Constitution*, would have had no hesitation in allowing such application. Therefore, for purposes of this suit, the only plaintiffs are Peter Kitelo, Fred Matei and Eric Kapsin (the 1st, 3rd and 4th plaintiffs respectively).

[35] Having dispensed with those preliminary issues, I consider the following to be germane in the determination of this dispute: -

1. Whether the land in dispute was previously Trust Land before being converted into a National Reserve.
2. Whatever the setting apart of the suit land was done procedurally in conformity with the law and the Constitution.
3. What are the appropriate remedies?
4. Who bears the costs?

1:Whether the Land in Dispute was previously Trust Land before the Conversion

[36] It is the plaintiff's case that the land in dispute was previously classified as Trust land before it was converted into a National Reserve *vide* the Legal Notice No 88 of 2000. In their testimony during the plenary hearing, both Peter Kitel (PW 2) the 1st plaintiff and his witness Pius Ndiwa Muye (PW 1) stated that the land in dispute has always been Trust land held in Trust by the Mt Elgon County Council on behalf of the Ogiek/Ndorobo Community. Apart from their oral testimony as contained in their respective statements and affidavits, they also produced relevant documentary evidence in support of that assertion. The witnesses also spoke at length about the initiatives which they took in consultation with the Mt Elgon County Council and other relevant Government agencies to have the land in dispute revert to Trust land when they became aware about its gazettelement in the year 2000. The defendants did not adduce any evidence to rebut the very cogent testimony by the plaintiffs that the land in dispute was held by the Mt Elgon County Council in trust for the said Community. In the absence of any rebuttal evidence, this court must conclude, which I hereby do, that the plaintiff's evidence is the correct account with regard to the status of the land in dispute. If there was any doubt, that was duly clarified through a letter dated April 3, 2002 written by Mr FK Musyimi the then Permanent Secretary, Secretary to the Cabinet and Head of the Public Service and addressed



to Dr Johnstone Chengeiywo who had written on behalf of the Ogiek Community objecting to the gazettment of the said land. The letter is short and due to it's relevant, I shall reproduce it in extensor: -

April 3, 2002

Dr Johnstone Chengeiywo

Curriculum & Instruction Department

Egerton University

Po Box 536

Njoro

Dear Sir

Re: Chepkitale Trust Land

Please refer to your letter dated December 14, 2001 on the above subject.

Chepkitale Trust Land was declared a National Reserve in accordance with section 18 of the *Wildlife (Conversation (sic) and Management) Act* which states: "with agreement of a competent authority, the Minister may, by notice in the Kenya Gazette declare an area of land to be a National Reserve.

It is therefore important to note that the Gazette Notice you are objecting to was done after consultation with a local authority which holds the land in trust for the local communities. To this extend, the Minister acted in accordance with the law. Having declared the area as a National Reserve, the Minister has no authority to degazette the National Reserve without consulting the local authority.

You are therefore, kindly advised to consult the Mt Elgon County Council for more information on the process that it undertook before asking the Minister to declare the area a National Reserve.

Yours faithfully

Musyimi FK HSC

For: Permanent Secretary, Secretary to the Cabinet and Head of the Public Service." Emphasis mine.

That letter is an acknowledgement from the Office of the President, the highest office in the land, that the land in dispute was indeed held "in trust by the Mt Elgon County Council for the benefit of the Ogiek/NdoroboCommunity.

- [37] Then there is the report dated November 4, 2013 and prepared by Prof Dr Enosh O Nyakweba of the State Department of Environment and Natural Resources. It is titled "Report on Chepkitale National Reserve and the Ogiek Community." It followed a visit by officers from the Forest and Wildlife Directorate to the land in dispute in an effort to identify the problem and arrive at a recommendation. It is a long report and captures the views of members of the Ogiek Community who were present including the 1st plaintiff. I shall just briefly pick out the background, problem and recommendation.

The Background

"Officers from the Directorate of Natural Resources (Forest and Wildlife Conservation) accompanied by a member of the Ogiek Community of Mt Elgon visited Chepkitale area of Mt Elgon between the 27th September and October 6, 2013. The primary objective of the visit was to provide a forum for members of the Ogiek Community to interact with Staff from the Ministry of Environment, Water and Natural Resources, State Department of Environment and Natural Resources, Directorate of Natural Resources so as to familiarize with the issues affecting the Community in regard to conservation programs for Chepkitale National Reserve and Mt Elgon Ecosystem as a whole."



The Problem

“Chepkitale was gazetted as a National Reserve in 2002. Before this was done the land was a Community Trust Land under the Ogiek people. The Ogiek people were never consulted nor involved in the process of converting Chepkitale from a Community Trust Land into a National Reserve. This was done unilaterally by the then Mt Elgon County Council who were holding the land in trust for the Community. They had no express authority to ask for the gazette. Subsequent years the Community went to court to challenge this act. While the case was in progress, the Mt Elgon County Council asked the Community that they settle the dispute out of court. The Mt Elgon CC has since recommended to the government the Mt Elgon County Council was at fault and therefore would like that the gazette notice be revoked and Chepkitale reverts from a national reserve to a Community Trust Land.

This is what the Community is asking the government to do.”

The Recommendation

““On the basis of the above, and on the basis of our on – the – spot problem assessment and findings on the ground, it is hereby recommended that the gazette notice of 2002 be rescinded by the government and Chepkitale reverts back to its original status of a Community Trust Land as pilot of Community government partnership in natural resource protection, management and conservation.”

It is instructive to note that the above report is not only from a Government Agency but it was also prepared 5 years after this suit was filed. Taken together with the letter by Mr FK Musyimias well as the evidence adduced by the plaintiffs, and which was not rebutted, there can be no doubt in my mind that prior to its conversion into a National Reserve, Chepkitale was Trust Land held by the Mt Elgon County Council in trust for the Ogiek/Ndorobo Community. That issue must therefore be resolved in favour of the plaintiffs.

2: Whether the Setting apart of the Land in Dispute was done procedurally in conformity with the relevant laws and *The Constitution*.

[38] It is common ground that the conversion of the land in dispute from Trust Land to a National Reserve was done through the Legal Notice No 88 dated June 6, 2000. That was during the regime of the *retired Constitution* and section 114(2) thereof provided that: -

“114(2) “In this chapter, reference to a County Council shall, in relation to land within the areas of jurisdiction of the Taveta Area Council, the Pokot Area Council, the Mosop Area Council, the Tinderet Area Council, the Elgon Area Council, the Marakwet Area Council, the Baringo Area Council, the Olenguruone Local Council, the Mukogodo Area Council, the Elgon Local Council and the Kuria Local Council, be construed as references to those Council respectively.”
Emphasis mine.

Section 115(1) and (2) of the same *Constitution* provided that: -

“115(1) “All Trust Land shall vest in the County Council within whose area of jurisdiction it is situated.”

(2) “Each County shall hold the Trust Land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights,



interest or other benefits in respect of the land as may, under the African Customary Law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual provided that no right, interest or other benefit under African Customary Law shall have effect for the purposes of this sub – section so far as it is repugnant to any written law.”

Section 117(1)(3) and (4) of the retired Constitution provided that: -

“117(1) “Subject to this section, an Act of Parliament may empower a County Council to set apart any area of Trust land vested in that County Council for use and occupation –

- (a) by any public body or authority for public purposes; or
- (b) for the purpose of the prospecting for or the extraction of minerals or mineral oil; or
- (c) by any person or persons for a purpose which in the opinion of that County is likely to benefit the persons ordinarily resident in that area or any other area of Trust Land vested in that County Council, either by reason of the use 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 thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

(2) -

(3) Where a County Council has set apart any area of land in pursuance of this section, it may subject to any law, make grants or dispositions of any estate, interest or right over in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.

(4) No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart shall take place for the prompt payment of full compensation to any resident of the land set apart who –

- (a) Under the African Customary Law for the time being in force and applicable to the land, has a right to occupy any part of the land; or
- (b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.”

The relevant law which was enacted under the above provisions of the retired Constitution was the repealed Trust Lands Act cap 288 Laws of Kenya. Section 13(2) to (4) of the repealed Trust Land Act provided that: -

“13(2) “The following procedure shall be followed before land is set apart under sub section (1) of this section -

- (a) the Council shall notify the Chairman of the relative Divisional Board of the proposal to set apart the land, and the Chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall



meet to consider the proposals, and the Chairman shall forthwith inform the Council of the day and time of the meeting;

- (b) the Council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;
 - (c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the Council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting.
 - (d) The recommendations of the Divisional Board shall be considered by the Council, and the proposal to set apart the land shall not be taken to have been approved by the Council except by a resolution passed by a majority of all the members of the Council: Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three – quarters of all the members of the Council.
- (3) Where the Council approves a proposal to set apart land in accordance with subsection (2) (d) of this section, the Council shall cause a notice of the setting apart to be published in the Gazette.
- (4) Subject to this section, sections 7(3) and (4), 8(1), 9, 10 and 11 of this Act shall apply in respect of land set apart under this Section, mutatis mutandis, and subject to the modification that the compensation shall be paid by the Council (without prejudice to the Council obtaining reimbursement thereof from any other person).”

It is the plaintiffs’ case that the Mt Elgon County Council did not follow the procedure set out in section 117 of the *retired Constitution* or section 13 of the repealed *Trust Land Act* in setting apart the land in dispute as a National Reserve. This was pleaded in paragraph 11 of the amended plaint. The Mt Elgon County Council, however, pleaded in paragraph 8 of its defence that the conversion was done “in accordance with the clear provisions of the Constitution as well as the *Trust Land Act* cap 288 laws of Kenya .” On the other hand, the Attorney General pleaded in paragraph 7 of the amended defence “that if the suit land was converted to wildlife reserve, the said action was lawful, proper and justified and was done procedurally in consultation of all the stakeholders and in good faith while observing all the laws, rules and regulations as stipulated in the wildlife (Conservation and Management) Act and allied statutes .” Section 18 of the repealed *Wildlife (Conservation and Management) Act* provided that: -

“With the agreement of the competent authority, the Minister may, by notice in the Gazette, declare any area of land to be a National Reserve.”

The competent authority in this case is of course the Mt Elgon County Council and since, as is now clear, the land in dispute was previously Trust Land, it was mandatory that the relevant constitutional and other legal provisions cited above are adhered to before any such authority could be given. The



said Council clearly recognized that it had not adhered to the law because in its full Council meeting held on May 28, 2012, the following resolution was made under matters arising in paragraph (b): -

“It was further resolved that the Council together with the Community to request the court to quash the gazettelement of the Ndorobo/Ogiek Community land to the Game Reserve and revert it back to the Ndorobo/Ogiek Community land held under Trust by the Council.”

Further by a letter dated June 5, 2012 and addressed to the plaintiffs by Martin P Epusithe Clerk to the Mt Elgon County Council and copied to counsel for the parties, it is stated in the last paragraph that: -

“It was further agreed that the Council together with the Community to request the court to quash the gazettelement of the Community land to the Game Reserve and revert it back to the Ndorobo/Ogiek Community Land held under Trust by the Council.”

The import of that paragraph is that the Mt Elgon County Council was not only re – affirming that the land in dispute is held in trust on behalf of the Community but it was also conceding to the de – gazettelement of the National Reserves so that the land reverts to the Community. That could only have been done after the Mt Elgon County Council realized that it did follow the law before requesting the Minister to issue Legal Notice No 88 of June 6, 2000.

[39] The 1st plaintiff has explained at length both in his oral testimony and in his statement and affidavits on how he took the initiative on November 15, 2018 to visit the Office of the Government Printer to confirm if indeed the requisite notices had been issued by the Mt Elgon County Council before the Gazette Notice was issued. A perusal of the documents in that office did not yield any results and so he went to the Kenya National Archives but still failed to find any evidence to show that the Mt Elgon County Council issued notices to members of the Community on any proposal to set apart the land. He added that the Community was never involved in the process otherwise they would have made their representations as required in law. The inevitable conclusion is that the Mt Elgon County Council did not comply with *the Constitution* and other relevant laws in converting the land in dispute from Trust Land to a National Reserve. If it had done so, nothing would have been easier than availing those notices and other documentary evidence during the trial. The plaintiffs discharged the burden cast on them when they testified that in fact there was no compliance with the law and the evidential burden shifted to the defendants to prove the contrary because it is never easy to prove the negative. But as is now clear, the defendants elected not to call any witnesses to rebut the plaintiffs’ testimony.

[40] The defendants were content with prosecuting their cases through submissions. In his submissions, counsel for Mt Elgon County Council (the 1st defendant) cited the case of *Samuel M’amaroo M’kaura & 9 others v Meru County Government & 3 others* [2018] eKLR where the court said: -

“Save for the petitioners contending that there were no consultations between the then Minister for State and Nyambene County Council, no evidence was tendered to prove these allegations. The impugned notice is very clear that there were consultations between the then Minister and Nyambene County Council and in the absence of any evidence to the contrary I hold and find that indeed there were consultations between the Minister and Nyambene County Council.”



Counsel then proceeds to make the following submissions: -

“My Lord, we thus submit that the threshold under section 18 of the WMCA for consultative meetings and acquiring the consent of the competent Authority being from the Mt Elgon County Council was met and as such the gazettement of the suit land was procedural.”

On the other hand, counsel for the Attorney General (the 2nd defendant) made the following submission on the issue: -

“That the plaintiffs have not demonstrated the 2nd defendant breached the provisions of the Trust Land Act as with regards to gazettement of the Chepkitale National Reserve as it’s own role was to affect the recommendations of the then Mt Elgon County Council a fact which was confirmed by PW1 in his testimony and cross – examination.”

[41] To begin with, in the case of *Samuel M’amaroo M’kaura & 9 others v Meru County Government & 3 others* (*supra*) the respondents called witnesses who testified that indeed the requisite notices were issued by the Nyambene County Councils required in law. The court in that case was able to see the impugned notices. In his case, no such notices were exhibited and the 1st plaintiff even testified as to how he visited Government Press and the Kenya National Archives looking for any relevant documents to demonstrate that the law was complied with but in vain. It is of course true that Pius Ndiwa Muye (PW1) was a Councillor in the Mt Elgon County Council when the process of converting the suit land into a National Reserve was initiated as submitted by counsel for the then Mt Elgon County Council. He however conceded in the course of his oral testimony that the process was flawed and that was why the Mt Elgon County Council tried to have the conversion de – gazette. This is what he said when led in his evidence in chief by Ms Kinama: -

“The issue being raised was that we had not given a Notice to the Chairman of the Divisional Board or the Ogiek Community or carried out any Environmental Impact Assessment Report or assessed compensation that was payable. As a former Councillor of the Mt Elgon County Council, I ask the court to quash the Gazette Notice No 88 of 2000 because we did not follow due process.”

When the witness was cross – examined both by Mr Tarus Senior State Counsel for the 1st defendant and by Mr Mwangi counsel for the 2nd defendant, he conceded that the Minister was misled into issuing the Gazette Notice and that the conversion was not done procedurally. That infact explains why the Mt Elgon County Council was prepared to have the Minister de – gazette the conversion. And that further explains why the defendants did not call any witnesses to rebut the plaintiffs’ testimony which I find to be congruent and reliable.

[42] It must also be remembered that pleadings and submissions, no matter how robust or persuasive, are not evidence upon which a court can base any decision. Disputes are only determined on the basis of the parties’ evidence. In the case of *CMC Aviation Ltd v Kenya Airways Ltd (cruisair Ltd)* 1978 KLR 103, Madan J (as he then was) expressed himself as follows with regard to the role of pleadings: -

“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded up them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un –



proven. Averments in no way satisfy, for example, the definition of ‘evidence’ as Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident or renders evident to the mind that it is truth.” Emphasis mine

Where, as in this case, the defendants did not call any witnesses to support what is pleaded in their respective defences, those pleadings remain hollow. The court can therefore treat them as mere allegations which cannot support any case.

[43] And with regard to the role of submissions, the Court of Appeal stated as follows in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi & another [2014] eKLR: -

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ ‘marketing language,’ each side endeavouring to convince the court that it’s case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

[44] Therefore, in the absence of any evidence by the defendants to rebut the plaintiffs’ testimony, it remains un – controverted and the court must accept it as the truth. In the case of Gitson Energy Ltd v Hon Francis Chachu & others CA Civil Appeal No 47 of 2014 [2017] eKLR, the Court of Appeal upheld an order quashing a Gazette Notice that had set apart 150,000 acres of Community land to a private company in contravention of the relevant provisions of the retired Constitution and the Trust Land Act. This court must also declare that the Gazette Notice No 88 issued on June 6, 2000 was unconstitutional, unlawful and of no legal effect.

[45] I do not however, wholly share the plaintiffs’ view that an Environmental Impact Assessment Report (EIA) would be required in the circumstances obtaining in this case. There is nothing to suggest that the second schedule to the Environmental Management and Coordination Act was applicable since there was no urban development being proposed in the National Reserve as per paragraph 2(d). However, in so far as what was being proposed was the establishment of protected areas, buffer zones and wilderness areas as provided for under paragraph 13(a) of the second schedule, then counsel for the plaintiffs is right in submitting that an Environmental Impact Assessment Report (EIA) was necessary. There is no evidence that such a report was carried out. The purpose of an EIA report is to assess the likely significant impact of a proposed project on the environment. And in preparing such a report, account must be taken of the status of the environment in which the proposed project is being undertaken.

[46] Prayers b(i)(ii) and (iii) of the amended plaint were sought in addition or in the alternative to prayer (a). Have found in favour of the plaintiffs as sought in prayer (a). I find it superfluous to make any orders with regard to prayer b(i)(ii) and (iii).

[47] And with regard to prayer b1 of the amended plaint, this court has already made a finding that the plaintiffs herein had no authority, as required in law, from members of the Ogiek/Ndorobo Community of Mt Elgon to file this suit on their behalf. There was a lapse in failing to get their authority and it will therefore be a remiss on the part of this court to make orders touching on strangers to this suit. That prayer is declined. In any event, having granted prayer (a), the land in dispute reverts to the status in which it was prior to the Gazettement of June 6, 2000.

[48] On costs, they follow the event. There is no reason why the plaintiffs should be denied costs in this case where there is a clear violation of the law.



[49] In the circumstances, there shall be Judgment for the plaintiffs against the defendants jointly and severally and this court makes the following disposal orders: -

- a. A declaration that the conversion of the suit land into a National Reserve *vide* the Gazette Notice No 88 dated June 6, 2000 was un – constitutional, unlawful and of no legal effect. The land shall revert to the pre June 6, 2000 status.
- b. The defendants shall meet the plaintiffs’ costs.

BOAZ N. OLAO.

J U D G E

26TH SEPTEMBER 2022.

Judgment dated, signed and delivered at Bungoma this September 26, 2022 by way of electronic mail.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

26TH SEPTEMBER, 2022.

