



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ndewa & 12 others v Kenya Defence Forces & 3 others; County Government of Meru & another (Interested Parties) (Constitutional Petition E014 of 2021) [2022] KEELC 4802 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4802 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION E014 OF 2021

CK NZILI, J

SEPTEMBER 21, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
OR FUNDAMENTAL FREEDOM UNDER ARTICLES 35, 40,
47 (1) 67 AND 68 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE COMMUNITY LAND ACT, ACT NO. 27 OF 2016

AND

IN THE MATTER OF THE LAND ACT (ACT NO. 6 OF 2012)

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

LAWRENCE KANYI NDEWA 1ST PETITIONER
MWENDA THIRIBI 2ND PETITIONER
THIAKUNU MWIRABUA 3RD PETITIONER
JEREMIAH KORONYA MAILUTHA 4TH PETITIONER
CHARLES MWITI MUGAMBI 5TH PETITIONER
RICHARD KIAMBI 6TH PETITIONER
VINCENT MURANGIRI 7TH PETITIONER
MURIITHI MARTIN KAINDIO 8TH PETITIONER
MUTEMBEI IKIAO 9TH PETITIONER
PHILIP IGWETA 10TH PETITIONER



BERNARD M. NJOGI 11TH PETITIONER
SAMUEL GITILE 12TH PETITIONER
PETER KABERIA 13TH PETITIONER

AND

KENYA DEFENCE FORCES 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF DEFENCE 2ND RESPONDENT
**CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 3RD RESPONDENT**
ATTORNEY GENERAL 4TH RESPONDENT

AND

COUNTY GOVERNMENT OF MERU INTERESTED PARTY
NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. When this matter came up for hearing on 28.7.2022 counsels for the petitioners in the two petitions Miss Gitonga and Miss Kyalo told the court that parties had reached a consent to fully settle the two petitions and the same was filed in court on 15th July 2022. The terms of the consent were as follows:
 - i. That this petition be consolidated with (Meru ELC *Petition No. 13 of 2021, Joshua Kathawe and 150 others vs Cabinet Secretary, Ministry of Lands, Cabinet Secretary Ministry of Defence, Chief of the Kenya Defence Forces, Sub-county Land Adjudication and Settlement Officer Tigania East, Attorney General and National Land Commission*) and thereafter (Meru ELC *Petition No. 14 of 2021*) be designated as the lead file.
 - ii. That the Survey Plan Folio No.325, Register No.23 prepared by the 3rd respondent in favour of the 2nd respondent and subsequent leasehold title for L.R No. 27098 issued shall be revised accordingly and in accordance with the subsequent actual survey, to allow the 2nd respondent retain some portion and cede the remainder to Meru County. Coordinates of the portion to be excised from LR No. 27098 shall be as per ANNEX A.
 - iii. That the leasehold title for LR No.32634 prepared by the 3rd respondent in favour of the 2nd respondent shall be revised accordingly and in accordance with the subsequent actual survey to allow the 2nd respondent cede portions thereof. Coordinates of the portions to be ceded by the 2nd respondent shall be as per ANNEX B.
 - iv. That all the parties including but not limited to the 1st and 2nd respondents within the extent of land reference LR No.27098 exact acreage is to be established through actual survey, be subjected to the ongoing adjudication process within the Gambella/Ngaremara Adjudication Section.
 - v. That to give effect to clause 2, the 1st interested party shall immediately initiate the process of degazettment of the Gazette Notice No.86 of 2000 dated 6th June 2000 which established the Nyambene National Reserve within which the School of Artillery is situated (LR No.32634)



and within which part of the 78 Tank Battallion is situated (L.R No. 27098). The process of degazettment shall be commenced within 14 days of the adoption of this consent order and shall be completed within 60 days thereof.

- vi. That the residents affected by the process of implementation of clause 2 of this consent be resettled in the degazetted land referenced to in clause 5.

SUBPARA vii.

That L.R No.32634 and LR No.27098 within which the school of Artillery and 78 Tank Battalion are respectively situated and registered in the name of the 2nd respondent herein and the existing part development plans and survey plans be and are hereby set aside to give room of aligning them to the new proposed boundaries as per the attached sketch map and actual survey. Attached and marked ANNEX C is the said sketch map.

- viii. That to give effect to the provisions of clauses 4 & 7 of this consent, the tenure for residents in occupation of the area referenced to in clause 5 of this consent to be regularized.
- ix. That for the avoidance of doubt, actual acreage of the properties subject of this suit to be allocated and registered in favour of various parties herein, shall be determined through subsequent actual survey.
- x. That all the previous activities and excisions by the 3rd respondents and/or her agencies in respect to the entire land, referenced to in clause 5 of this consent shall be regularized save for the LAPSSET Corridor.
- xi. That the 2nd respondent shall be allocated the demarcated area as per the attached sketch map and actual survey thereto. Coordinates for the area to be allocated are defined in ANNEX D.
- xii. That the existing LAPSSET Corridor shall be respected and remain gazetted.
- xiii. That the 1st interested party being the planning authority shall undertake planning of the area to preserve the fragile ecosystems, setting up of green energy parks, extension of Isiolo Resort City and Entire LAPSSET Corridor, public utilities and develop a master plan to be incorporated and considered during the adjudication process contemplated in clause 8 of the consent.
- xiv. That a committee comprising of a representative from each party herein, shall be established to oversee the implementation of this consent.
- xv. That this consent also applies to (*Meru ELC Petition No. 13 of 2021, Joshua Kathawe and 150 others vs Cabinet Secretary, Ministry of Lands, Cabinet Secretary Ministry of Defence, Chief of the Kenya Defence Forces, District Land Adjudication and Settlement Officer Tigania East, Attorney General and National Land Commission*).
- xvi. That the sketch map attached to this consent has been agreed on by the parties to guide the implementation of the consent.
- xvii. That this consent marks (*Meru ELC Petition No.13 of 2021*) consolidated with (*ELC Petition No. 14 of 2021*) as settled.

The consent was dated at Nairobi on 30th June 2022 and signed by:

- (a) Ruthugua & Associates Advocates for Petitioners in Meru ELC Pet No. 014/2021
- (b) Ministry of Defence



- (c) County Government of Meru
 - (d) Attorney General for 3rd respondent, 4th respondent and 3rd interested party.
 - (e) Director Legal National Land Commission
 - (f) M.D Maranya & Co. Advocates for Petitioners in Meru ELC Pet No. 013/2021
2. Counsels urged the court to adopt the said consent as an order of the court. Miss Kimotho for Mugira for the 1st and 2nd respondents confirmed that to be the position as well as Mr. Ikioo for the interested party, (the County Government of Meru).
 3. Mr. Kieti litigation counsel holding brief for Mr. Wachira for the 3rd, 4th respondents and the 3rd interested party told the court his instructions were to adopt the consent.
 4. The court sought to establish from the respective advocates on record whether all the parties to the petitions had appended their signatures to the consent and considered the implication of the consent on third parties as well as its constitutional and statutory validity.
 5. Counsels for the petitioners told the court that all parties had considered all the issues before reaching that consent and hence urged the consent to be adopted as a decree of the court.
 6. Mr. Kieti for the 3rd and 4th respondents was of the view that though his instructions were to adopt the consent the issues raised by the court were significant and that there was need to address the court on the same.
 7. Mr. Ikioo advocate for the interested party submitted that all parties were involved in the process up to the signing of the consent, while Miss Gitonga advocate and Miss Kimotho advocate said they were unable to address court on the issues raised.
 8. The court directed parties within 14 days from the date thereof to file written submissions and address it on the juridical effects, implication and the constitutionality of the consent before the court could approve and or adopt it as a decree. None of the parties filed written submissions as ordered.
 9. The consent filed before court seeks to consolidate Petition No. 13 of 2021 with the instant petition. The basis of this is the Amended Petition dated 8.6.2021. The petitioners describe themselves as suing on their behalf and that of the people of the County Government of Meru residing in Tigania East Sub-County over land known as Ngaremara/Gambella Adjudication Section No. L.R No. 27098 and L.R No. 7019 said to be community land and previously reserved for Nyambene National Reserve and the defunct Meru Ranching Cooperative Society Ltd.
 10. It is averred that the land was gazetted in 1972 vide Gazette Notice No. 3210 and set apart from the use of the Kenya Defence Forces measuring 17,553 acres and is now occupied by the 1st respondent as 78 Tank Batallion Barracks.
 11. The petitioners pleaded that in 2009, the 3rd respondent declared it as an Adjudication Section for the Ameru community alleged to be in occupation.
 12. The petitioners claim is that the setting apart and the excision of L.R NO. 7019 to set up a school of Artillery by 1st & 2nd respondents was without public participation particularly considering that the 1st interested party who is in charge of the preservation of natural resources and wildlife was not involved.
 13. The petitioners aver in 2020, the 1st respondent acquired two title deeds for the entire land to the detriment of the community and in total disregard of an approximated population of 9500 people occupying Ngaremara location which has public facilities and amenities.



14. Further the petitioners aver the LAPPSET corridor passes through or occupies part of the suit land whose take over by the 1st respondent shall deny them its economic benefits.
15. The prayers sought by the petitioners are:
 - (a) Declaration that their rights to own and occupy the suit land have been infringed by the 1st and 2nd respondents.
 - (b) Declaration that the occupation and registration of the land by the 1st and 2nd respondents is unlawful and unconstitutional.
 - (c) Invalidation of the titles to the land held by the 1st and 2nd respondents
 - (d) Order that the 3rd respondent to transfer and register the parcels in L.R No. 27098 and 7019 in favour of Ameru community to be held by the 1st interested party in their trust, permanent injunction against the respondents from claiming the two parcels of land in the alternative the Ameru community be compensated for the land or offered an alternative land.
16. The petitioners set out the particulars as unconstitutionality of the respondents' acts in acquiring the land unprocedurally with no just compensation promptly paid to the residents or their custodian; the 1st interested party, occupying the land without a gazette notice or authority or consent to occupy it from the interested party; issuing eviction notices; failing to give the residents alternative land, obtaining titles through concealing material facts and ignoring the rights of the Ameru people.
17. As regards the 3rd respondent, the petitioners aver it issued titles to the 1st and 2nd respondents without following due process and when it was already gazetted as a national reserve; ignoring the prolonged use by Ameru people; disregarding an ongoing land adjudication process; failing to give them alternative land; disregarding the principles of community and trust land; failing to oversee and advance just and prompt compensation of the Ameru people and the 3rd interested party and lastly ignoring and violating the rights to property of the Ameru people.
18. The petitioners in Petition No. E013 of 2021 by a petition dated 28.4.2021 claiming to be residents and land owners of Ngaremara/Gambella adjudication section brought the petition on their own behalf and that of residents and land owners in Ngaremara/Gambella adjudication section measuring 17,531 acres, described as private and individual land, initially held in trust but leased to Meru Ranching Cooperative Society in 1972 for purposes of wildlife, cultural and tourism land use and promotion. They claimed the land had been now declared an adjudication section with effect from 2016 to which their parcels of land had been ascertained, recorded and issued with individual parcel numbers and were now awaiting the determination of objections if any before the issuance of title deeds.
19. The major complaints were that the 1st and 2nd respondents while claiming ownership of the entire land, dug a deep continuous trench cordoning off over 15.535 acres of land hence keeping away the petitioners from accessing their land and with an intention of evicting them.
20. The petitioners accuse the respondents of illegally acquiring the land without public participation and in breach of [*the Constitution*](#).
21. The prayers sought are:
 - (a) Declaration that the suit land comprising of 17,535 acres is private and individual land.



- (b) Declaration that the acts of 1st, 2nd and 3rd respondents of forceful eviction, entry and setting apart and setting up security equipment's or facilities amounts to infringement of the petitioner's constitutional right to occupation and ownership of land.
 - (c) Nullification of the 1st, 2nd and 3rd respondents' certificate of lease L.R No. 27098 and L.R No. 7019 the part development plans and developments thereof.
 - (d) Declaration that the occupation of the 1st, 2nd and 3rd respondents of the land is unconstitutional.
 - (e) Conservatory orders restraining the respondents from evicting, entering into remaining, acquiring, maintaining, possession, use, alienation and interference with their quiet possession.
 - (f) Prohibition against the intended forceful acquisition and
 - (g) Declaration that the process, procedures and channels employed by the 1st respondent to alienate the whole land in favour of the 2nd & 3rd respondents is contrary to law.
22. In response to the two petitions, the 1st, 2nd and 3rd respondents filed a replying affidavit sworn by Captain Julius Meso on 4.11.2021 respectively. The first ground is that the cause of action was time barred given the time of the entry into the land and the setting apart.
23. Secondly, they averred the petition did not meet the threshold of a constitutional petition since it was an ordinary civil dispute.
24. The third ground was that the land is not community land or private but public land acquired lawfully leading to the issuance of a certificate of lease on 1.11.2000 and a certificate of title issued on 14.10.2019 for the 78 Tank Battalion and in 2021 for the School of Artillery respectively.
25. The 1st, 2nd and 3rd respondents averred that the interests of the Ministry of Defence pre-existed the titling, surveying, beaconing and the fencing so as to safeguard public land against intruders and encroachers among them the petitioners who allegedly moved while aware it was not vacant land but public property belonging to the KDF as it executes its constitutional duty under Article 241 of safeguarding the territorial integrity of Kenya.
26. The 1st - 3rd respondents averred the land had been gazetted vide Gazette Notice 3210 with requisite ordinates and physical features hence their entry, use and occupation was in line with Article 62 (1) (a) & (b) of *the Constitution*.
27. Given the foregoing, the 1st - 3rd respondents averred that due to setting apart and the issuance of title deeds in their favour, any purported declaration of an adjudication section by the 4th respondent (DLASO) was not only illegal but unconstitutional which they have resisted and was suspended for there can be no individual right to land in a public land already set apart and registered for military use.
28. The 1st - 3rd respondents aver their occupation and titling preceded 2010 Constitution and were merely protecting public land in fencing it off from intruders and encroachers who allegedly moved in while aware it was not vacant land but public property belonging to the Kenya Defence Forces. The 1st, 2nd & 3rd respondents have attached a copy of the certificate of lease for title L.R 213242 for 8333 ha, Deed Plan No. 443242 dated 30.11.2020, certificate of lease for L.R No. 32634 both in favour of the Cabinet



- Secretary to the National Treasury (as trustee for the Ministry of Defence, under Cap 101 Laws of Kenya) for military purposes.
29. One of the special conditions in the lease is that the land shall not be used for any purpose considered dangerous offensive or be subdivided, changed or extended without the prior consent and approval of the National Government or the County Government.
 30. Further, the 1st-3rd respondents attached a Gazette Notice No. 3210 dated 31.10.1977 and a map for the suit land.
 31. On behalf of the 4th interested party, the Kenya National Highways Authority, Obop Michael swore a replying affidavit on 13.10.2021 opposing the petition, stating that the 2nd interested party through Gazette No's. 8686 and 1553 of 21.10.2016 and 15.2.2019 respectively gazetted the Lappset Corridor Development Authority which corridor consists of a 500 meter wide infrastructure corridor for road, railway pipelines, power transmission and other projects to be carried out which works were yet to reach the disputed area and that if need be, it may require acquisition of land through the 2nd interested party and compensation thereof.
 32. On account of the 1st interested party, the County Government of Meru, Jeremy Leenya M'Eringo swore an affidavit on 17.6.2021 supporting the petition alleging the suit land was community land to be adjudicated as per Article 63 of *the Constitution* and the *Community Land Act*. The 1st interested party averred the setting apart in 1977 for the 1st and 2nd respondents did not involve the county council then in existence and since the land was reserved for Nyambene National Reserve and gazetted vide Gazette Notice No. 86 of 2000 (i.e) L.R No. 2019 measuring approximately 7014 ha. He stated the land is occupied by close to 7500 families, it has public facilities and that the defunct County Council of Meru in 2008 had objected to the setting apart leading to various meetings between 2008 and 2011.
 33. The 1st interested party averred that on 24.2.2016, the 3rd respondent declared the suit land as an adjudication section by Notice No. DLASO/SE/Gen/Vol. 1/65 and a resolution of the County Assembly was passed declaring the suit land as community land.
 34. The 1st interested party averred that after an adjudication section was created, an adjudication area was done in which the 1st respondent was allocated Parcel No. 1 hived off from the subject land measuring 720 acres.
 35. The 1st interested party averred that the 1st respondent in 2020 illegally acquired title documents for the entire subject land and intended to occupy the subject land to the detriment of the Ameru people without public participation and or compensation for the affected people after annexing their land and who now risk dispossession and eviction.
 36. The 1st interested party further averred that a recommendation was made that the matter be referred to mediation to achieve an amicable solution.
 37. Mr. Nguyo Wachira, deputy chief state counsel filed a notice of preliminary objection on 10.2.2022 on behalf of the 3rd and 4th respondents raising nine key grounds that the petition is an intergovernmental land dispute between the respondent and the 1st interested party over the suit land which falls under Articles 6 (2), 189 (4) of *the Constitution* and pursuant to Section 3, 30, 35 of the *Intergovernmental Relations Act*. The court should not entertain the dispute until exhaustion of the internal dispute resolution mechanisms including negotiation, mediation and arbitration.
 38. Secondly, the 3rd and 4th respondents took the view that the prayers and the declarations sought concerned ownership and registration of land through adjudication whose procedure is provided under the *Land Adjudication Act*.



39. Thirdly, the 3rd and 4th respondents averred the court lacked the mandate to issue prayers no. (f), (g) and (h) by way of transfer and registration of land or issuing of a permanent injunction against the Government.

Determination

40. In these two petitions the parties are yet to set out the issues for determination and agree on the mode of hearing. Therefore, any consent to be recorded must be viewed against the issues falling for determination by the court since parties are bound by their pleadings and issues flow from pleadings. See *IEBC vs Mutinda Mule & 3 others* [2014] eKLR & *Raila Amolo Odinga & another v IEBC & 2 others* [2017] eKLR. Similarly, any consent to settle the petitions out of court must meet the constitutional and statutory test.
41. In this regard, whereas the parties have proposed in the consent to consolidate the two petitions, the ultimate power to allow for the consolidation is the court based on the known principles on the same, particularly if the parties are the same, issues are the same and in order to save cost and time of both the court and the parties in the hearing and determining the petitions. See *Maccu Motors & 7 others v David Kirimi Mwithimbu & 4 others* [2021] eKLR. The consent seems to be signed only in one file but binding the other parties in the 2nd file who have not yet appended all their signatures to it.
42. To this end and as there is no dispute the subject matter is the same, parties are more or less the same and the prayers sought are similar. The only point of departure between the petitioners is that the petitioners in No. E013 of 2021 unlike in E014 of 2021 describe themselves as residents and or recorded owners of a Ngaremara/Gambella location possessed with Parcel Numbers while awaiting the issuance of title deeds. In the other petition, the petitioners are general and representing Ameru people of Meru county.
43. Coming to clause no's 2, 3, 4, 5, 7, 8, 9, 10 & 11, it is quite obvious the contents have both profound constitutional and statutory ramifications going beyond the pleadings and prayers sought in the two petitions.
44. As a starting point, the main complaints by the petitioners are directed at the 3rd respondent and 2nd interested party in Petition No. E014 of 2021 and 1st respondent and interested party in Petition No. E013 of 2021.
45. The said parties have not responded to the petitions and particularly, the facts and the documents attached to the pleadings.
46. Clause 7 of the consent specifically states LR No. 32634 and LR No. 27098 housing the school of Artillery and 78 Tank Battalion registered in the name of Cabinet Secretary Ministry of Defence the 2nd respondent be set aside or revoked, resurveyed, re-planned, re-adjudicated and revised and apportioned to 1st interested party for resettlement of the petitioners.
47. Further, the court is asked to order for the degazettment of Gazette Notice No. 86 of 2000 dated 6th June, 2000 establishing the Nyambene National Reserve within which L.R No. 32634 the School of Artillery is situated and within which part of 78 Tank Battalion is situated in L.R No. 27098. The degazettment and the excision of the land is to commence 14 days after the consent is adopted and to be completed within 60 days.
48. The Kenya Wildlife Service is the department mandated under whose the Nyambene National reserve falls. It is not party to this petition.



49. Further, there is a whole process of conversion of public land/private land/community land to private and vice versa.
50. In the pleadings herein, the 1st and 2nd respondents have been categorical that the origin of their land was in line with the retired Constitution and the Trust Land Act leading to the issuance of title deeds in their favour.
51. This has not been controverted by the 3rd, 4th respondents and the 2nd interested party (the National Land Commission) who undertook the process and issued the title deeds in favour of the 1st respondent. Alongside this, the 3rd and 4th respondents have raised a preliminary objection which they have not withdrawn that the dispute herein must be subjected to Intergovernmental Relations Authority before it is handled by the court. There is no indication that the consent herein was out of a mediation committee duly established and gazetted with the mandate to settle the dispute in line with Sections 31-35 of Intergovernmental Relations Act.
52. Other than the lawyers on record, there is no indication that each of the parties in the two petitioners have executed the consent as required of a binding agreement.
53. The approval and adoption of a consent is a legal process based on sound principles.
54. Ransa Co. Ltd v Manca Francesco & 2 others [2015] eKLR the court was considering inter alia if a consent entered by counsels for the exparte applicant and a state counsel representing the respondents in a Judicial Review matter without the interested party could be a valid court order and whether a court has powers to grant judicial writs of mandamus and prohibition by consent whose effect was a revocation of a title to land.
55. The court held; it is a fundamental right to a party with a dispute before court to be heard before orders that affect him or her are made as held in Richard Leiyagu v IEBC & 20 others [2013] eKLR. The court held also that it would be unprocedural, irregular and unlawful to exclude a party named as an interested party in a consent, particularly if it seeks to take away the rights of such a party without his knowledge, concurrence or hearing.
56. In Kasmil Wesonga Ongoma & another v Wanga [1987] eKLR the court held; a consent judgment is a judgment in terms of which settled and agreed to by the parties to the action while in Flora Wasike v Desmond Wambeolla [1980] 1KAR, the court held a consent judgment has a contractual effect.
57. In these petitions, the issues raised revolve around the public law realm and raise serious constitutional and statutory implication on the conversion of public land to community and private land. They not only impact on the immediate parties but also other third parties not before this court.
58. In essence, if this consent is allowed, it will mean the titles to public land held by the 1st and 2nd respondents who are state organs stand revoked and shall mean that they cede part of their land to the 1st interested party which the 3rd and 4th respondents have in a preliminary objection to the petitions, stated that this court has no powers to grant such orders.
59. In Geoffrey M. Asango & 3 others v A.G [2020] eKLR the Supreme Court of Kenya was considering an appeal where the Court of Appeal was alleged to have disregarded the adoption and an approval of parties consent contrary to Article 159 (2) on the Constitutional principle of the promotion of alternative dispute resolution.
60. The court held that the adoption of a consent by a court is a process in which it discharges the duty of the evaluation and the clarity of a consent placed before it by parties and giving directions on the



manner of the adoption and in so doing this circumvents the risk of an unlawful order and validates the mode of adoption and compliance.

61. In *Hirani v Kassam* [1952] 19 EACA 131 the court held although an advocate has ostensible authority to compromise his client's case, such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which a client has given. See also *KCB Ltd v Benjob Amalgamated Ltd & another* [1998] eKLR.
62. In this consent, it is clear that the signatures appended by counsels acting for the 1st, 2nd respondents and 3rd interested party as well as 3rd and 4th respondents in the 1st and 2nd petitions respectively, fly against the affidavits and the preliminary pleadings filed under instructions of their respective clients.
63. Order 25 Civil Procedure Rules provides that where it has been proved to the satisfaction of the court and after the court hearing parties that a suit has been wholly or in part by a lawful agreement or compromise, the court shall on an application by any party order that such agreement, compromise or satisfaction be recorded and entered as judgment in accordance therewith.
64. Rule 29 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 provides that parties may with leave of the court, record an amicable settlement reached in partial or final determination of the case whereas Rule 30 thereof allows use of alternative dispute resolution mechanism.
65. The conditions are that the compromise must be proved to the satisfaction of the court and must be a lawful agreement. In *Leo Investment Ltd v Estuarine Estate Ltd* [2017] eKLR, the court held that a consent must meet the requirements of Section 3 (3) of the *Law of Contract Act*.
66. The issues raised in the consent before this court touch on the conversion of public land or land held in trust to private land which in *Narok County Government v Livingstone Kunini Ntutu & 2 others* [2018] eKLR was said must be beyond reproach.
67. In the certificate of lease and title deed produced by the 1st and 2nd respondents before this court the title holder is the Cabinet Secretary National Treasury in trust for the 2nd respondent.
68. The said Cabinet Secretary is neither a party to this suit nor has he or she signed the proposed consent. There is also no indication if the consent or authority of the said holder of the title to the land has been sought for and his appended signature to the consent in time with the special condition set out in the title documents.
69. The issue of the constitutionality and the legality of these two titles to the suit land is live before this court and which parties now appear to determine through a consent.
70. In Narok County Government case (supra), the court set aside such a consent and ordered the matter to go for trial to determine the issues on merits. Since public policy goes to the protection of public interest which is safeguarded by the national values and principles of governance in Article 10 of *the Constitution*.
71. The petitioners allege the property in issue was ancestral in nature before the setting apart in favour of the 1st and 2nd respondents. This raises serious constitutional, statutory and policy issues which cannot in my considered view, be determined through a consent of parties.
72. Faced with a similar scenario, the Supreme court in *Pati Ltd v Funzi Island Development Ltd and 4 others* [2019] eKLR held; it was in public interest that the court settles with finality the questions whether the land in issue belonged to the applicants or was illegally acquired so as to balance private and public interest since the conversion of public land to private land must be clean.



73. Article 62 (3) of *the Constitution* provides that certain public land shall vest and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the commission.
74. Article 62 (4) provides that public land shall not be disposed off or otherwise except in terms of an Act of parliament specifying the nature and terms of that disposal or use.
75. Article 62 (2) (b) of *the Constitution* in my considered view does not allow land held, used or occupied by a national state organ to be held by a county government in trust for the people resident in the county or be administered by the National Land Commission. Therefore, the land herein held by the 2nd respondent cannot be dealt with otherwise by way of a consent.
76. Section 5 (2) of the Act, *National Land Commission Act* provides that on behalf of and with the consent of the National and County Government it may alienate public land.
77. Alienation under the *Land Act* means the sale or other disposal of rights to land.
78. Section 8 (d) of the *Land Act* provides that in managing public land on behalf of the two governments, the commission may require the land to be used for special purposes and subject to such conditions, covenants, encumbrances or reservations while Section 9 of the *Land Act* provides for the conversion of land from public to private and vice versa with a specific provision that any major transaction involving conversion of public land to private land requires the approval of both the National Assembly and the County Assembly.
79. Further, the conversion can only be subject to public needs or in the interest of defence, public morality, public health or land use planning and may also be converted to community land.
80. Section 111(2) of the *Land Act* gives the National Land Commission powers to make rules for the assessment of just compensation in relation to land compulsorily acquired after making inquiries. The Supreme Court in *National Land Commission v A.G & 7 others* [2015] eKLR expounded on the mandate of the National Land Commission.
81. The consent herein is accompanied several annexures whose authenticity, makers and origin has not been clarified yet their impact in the implementation of the consent could impact on the Land Laws and *Survey Act*.
82. Looking at the above provisions, the court has no mandate to single handedly alienate public land or revoke titles without fair hearing of the affected parties. The consent herein seems to overlook all the above provisions of the law and arrogate to the parties the mandate to degazette, convert, revise, revert and alienate public land by seeking the imprimatur of this court through a constitutional petition which has neither been heard on its merits nor determined as to its constitutionality on merits.
83. In *Kenya Guard Allied Workers Union v Security Services & 38 others* [2003] eKLR the court held; public interest must be the engine of the millennium and must occupy center stage in courts to guard against and counter land grabbers. Even though the court has powers to encourage alternative dispute resolution mechanism and the power to adopt the resultant outcome, such a consent or resolution must be within the pleadings, rules of evidence, in conformity with statutes and above all, *the Constitution*.
84. This court must rise to the occasion and resist such overtures and stand against parties seeking to violate public or national interests and therefore violate *the Constitution* under the guise of



approving a consent which goes beyond the powers donated by *the Constitution* while sitting as a constitutional court and the reliefs it can grant under Article 23(3) of Constitution.

85. To allow such an alienation will defeat the public interest and go against both the letter and spirit of Chapter V of *the Constitution*, the national values and principles of governance. See *Republic vs Machakos County government & 2 others ex parte Johnstone Muthama* (2016) eKLR.
86. In view of the foregoing, my finding is that the consent dated 30.6.2022 and filed on 15.7.2022 herein fails both the statutory and the constitutional test. This court declines to approve and or adopt it as a decree or order of this court. The same is rejected and the parties ordered to proceed to take directions on both the consolidation and disposal of the petitions.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 21ST DAY OF SEPTEMBER, 2022

In presence of:

C/A: Kananu

Mr. Ikioo for 1st Interested party

Mugira for 1st & 2nd respondents

Wachira Guyo for 3rd, 4th respondents & 3rd Interested party

Miss Kyalo for petitioners in Petition 14 of 2021

Miss Gitonga for Maranya for petitioners in Petition E013 of 2021

HON. C.K. NZILI

ELC JUDGE

