



**Langat & 2 others (Suing as the officials of 343 members of Koita Welfare Self-Help Group) v Kericho County Government & 4 others; Koita Community Welfare Group (Interested Party) (Environment and Land Constitutional Petition 1 of 2017) [2022] KEELC 14459 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14459 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**  
**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 1 OF 2017**  
**MC OUNDO, J**  
**OCTOBER 27, 2022**  
**IN THE MATTER OF ARTICLES 10, 20, 21, 23, 28, 40, 61, 63 AND 68**  
**OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF SECTION 37 OF THE LAND ACT 2012 AND THE**  
**ENVIRONMENT COURT ACT 2011**  
**AND**  
**IN THE MATTER OF PARCEL NO. LR 5468/3/R**

**BETWEEN**

**JOSEPH LANGAT ..... 1<sup>ST</sup> PETITIONER**  
**PETROLINER CHERONO ..... 2<sup>ND</sup> PETITIONER**  
**BARNARD LANGAT ..... 3<sup>RD</sup> PETITIONER**  
**SUING AS THE OFFICIALS OF 343 MEMBERS OF KOITA WELFARE SELF-HELP GROUP**

**AND**

**KERICHO COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**  
**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**  
**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**  
**JAMES FINLAY KENYA LIMITED ..... 5<sup>TH</sup> RESPONDENT**



AND

**KOITA COMMUNITY WELFARE GROUP ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioners herein, via their Petition of 27<sup>th</sup> February 2017, which was amended on the 26<sup>th</sup> November 2020 to substitute the 3<sup>rd</sup> Petitioner, join the 5<sup>th</sup> Respondent and amend the number of the suit land, sought for the following orders;
  - i. An order of permanent injunction restraining the 1<sup>st</sup> Respondent by itself, its servants, agents, employees, officials and/or anyone working through it from trespassing, demarcating, subdividing, leasing, selling, interfering with and/or in any other way from adversely dealing with all that un-surveyed land known as LR No. 5468/3/R.
  - ii. A declaration that the Petitioners are the legitimate and *bona fide* owners of all that portion of land measuring approximately 1200 acres otherwise known as LR No. 5468/3/R.
  - iii. A determination that the forceful entry of the 1<sup>st</sup> Respondent of itself, its servants, agents, employees, officials and/or any other person working through it on to the un-surveyed parcel of land known as LR No. 5468/3/R was unconstitutional.
  - iv. An order of demolition of all the illegal structures on the parcel of land known as LR No. 5468/3/R constructed by the 1<sup>st</sup> Respondent.
  - v. An order directing the 2<sup>nd</sup> Respondent to initiate investigations on the LR No. 5468/3/R and recommend appropriate redress.
  - vi. An order directing the 2<sup>nd</sup> Respondent to monitor and have oversight over LR No. 5468/3/R.
  - vii. An order directing the 3<sup>rd</sup> Respondent to cause the survey, subdivide subdivision (sic) and issue (sic) issuance title deeds to the Petitioners and its members forthwith.
  - viii. Cost of this Petition borne (sic) by the Respondents.
2. The amended Petition was supported by an Affidavit sworn by the 2<sup>nd</sup> Petitioner-Petroliner Cheron, on behalf of the all the Petitioners, on the 30<sup>th</sup> November 2020.
3. The Original Petition was also supported by the Interested Party through a Replying Affidavit, dated the 25<sup>th</sup> August 2020 which was sworn by their Chairman, Stanley Kipngeno Chirchir on his behalf and on the behalf of his members.
4. Whereas the 2<sup>nd</sup> Respondent never entered appearance, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents sought not to amend and/or file further affidavits in response to the amended Petition.
5. The 1<sup>st</sup> Respondent, in their Replying Affidavit dated 12<sup>th</sup> February 2019 deponed that the Petitioners were not the owners of the suit land LR No. 5468/3/R which land was also not Community Land. They also deponed that they had not forcefully gained entry onto the said land and that the land which had been earmarked for the agricultural show ground was not LR No. 5468/3/R as alleged by the Petitioners, but No. LR 631 which was public land and which had been fully secured with clear fencing, for public good. They further denied having violated the Petitioners' Constitutional rights to ownership of land and/or property and that there had been no forceful or illegal entry onto the suit land being LR No. 5468/3/R.



6. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their Grounds of Opposition dated the 22<sup>nd</sup> January 2019 stating that the Petitioners did not have any cause of action against them as there was no evidence of ownership of the suit land provided to warrant a grant of the orders sought. That the Petitioners had also not demonstrated any violation of their rights as alleged and therefore the Petition was misconceived and an abuse of the court process.
7. Similarly in their Replying Affidavit of 8<sup>th</sup> July 2019, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents deponed that the land in question was not Community Land but private land as per the land search annexed therein. That the prayers as sought by the Petitioners for the 3<sup>rd</sup> Respondent to survey, subdivide and issue title deeds to the suit land thereafter was not within the legal purview of the 3<sup>rd</sup> Respondent and therefore the said relief was not capable of being obeyed as it was bad in law. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents hence sought that the Petition be dismissed with costs.
8. On the February 8, 2021, due to the prevailing condition at the time (Covid- 19 pandemic), and the fact that the matter had attracted a fully parked court, directions were taken that the Petition be disposed of by way of written submissions ,which submissions I shall summarize as herein under.

### **Petitioners' Submissions.**

9. The Petitioners' gave a brief history of the matter in question to the effect that whereas the 5<sup>th</sup> Respondent was the registered proprietor of land parcel known as LR No. 5468, they had at all material times been bona fide owners and residents of parcel of land known as LR No. 5468/3/R, which was part of LR No. 5468 and which measured approximately 1200 acres, for a period of more than five decades. That they had developed the said parcel of land, grazed their livestock therein and even buried their loved ones thereupon with the full knowledge and without interference from the 5<sup>th</sup> Respondent.
10. That this being the position, the 1<sup>st</sup> Respondent, without any color of right, forcefully and arbitrary gained entry into the said suit land whereby they proceeded to construct a show ground thereon using the County Commandant's administration officers to intimidate and threaten them so as to forcefully silence them against protesting against them.(1<sup>st</sup> Respondent)
11. That land, being a private land was registered to the name of the 5<sup>th</sup> Respondent as the lessee and held by them (Petitioners) and their ancestors as squatters since time immemorial.
12. The Petitioners thus framed their issues for determination as follows;
  - i. Whether the Petitioners are in physical occupation of LR No. 5468/3/R
  - ii. Whether the 1<sup>st</sup> Respondent has unlawfully trespassed and/or encroached on to LR No. 5468/3/R.
  - iii. Whether the Petitioners are entitled to the prayers as sought.
  - iv. Who should bear the costs of this Petition?
13. On the first issue for determination, it was the Petitioners' submissions that they had demonstrated through the affidavit sworn by the 2<sup>nd</sup> Petitioner and the annexures marked thereto as PC VI and PC VIII, that since time immemorial, they had been in occupation of a portion of land to title No. LR 5468 otherwise known to them as LR No. 5468/3/R, measuring approximately 1200 acres and registered to the 5<sup>th</sup> Respondent, a fact which had not been challenged by the 5<sup>th</sup> Respondent.
14. That the 5<sup>th</sup> Respondent having been fully aware of their occupation of the portion of the suit property and having not raised any objection thereto, its conduct was akin to waiver of its rights



- against the Petitioners' to the suit portion of land. That further the 5<sup>th</sup> Respondent's failure to enter appearance and/or file its reply to the Petitioners Petition left the Petition uncontroverted in as far as their occupation of the portion of the suit land was concerned.
15. On the second issue as to whether the 1<sup>st</sup> Respondent had unlawfully trespassed and/or encroached on to LR No. 5468/3/R, the Petitioners relied on the decided case in *Eliud Njoroge Gachiri v Stephen Kamau Nganga* [2018] eKLR to respond in the affirmative. They relied on pictures annexed in their supporting affidavit, which showed heavy machinery brought by the 1<sup>st</sup> Respondent to level the suit land. It was also their submission that the 1<sup>st</sup> Respondent only produced a cadastral map but failed to produce further evidence to support its claim that the impugned developments had been conducted on land parcel No. LR 631 and not on LR No. 5468/3/R, land which they had occupied. That the 1<sup>st</sup> Respondent's conduct was therefore sufficient evidence that they had unlawfully gained entry onto the private property LR No. 5468/3/R without the consent of the Petitioners and/or the 5<sup>th</sup> Respondent who was the registered proprietor.
  16. On the third issue for determination, the Petitioners submitted that since the provisions of section 107(1) of the *Evidence Act* lay the burden of proof upon a party who invoked aid of the law, that in so discharging the said burden of proof, they had established prima facie that they were entitled to orders of permanent injunction against the Respondents in that there was no dispute and indeed it had been admitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that land parcel LR No. 5468/3/R was private property and that the Petitioners had been in occupation and had developed approximately 1200 acres of the same since time immemorial.
  17. The Petitioners also submitted that they had established that the land, being private property, the 1<sup>st</sup> respondent, without color of right had trespassed onto the same wherein it had commenced adverse dealings thereon contrary to the provisions of article 47(1) of the *Constitution*. That had the 1<sup>st</sup> Respondent been desirous of compulsorily acquiring the said suit property, it was incumbent upon them to adhere to the provisions of section 107(1) of the *Land Act* wherein upon satisfaction by the National Land Commission that the land was required for a public purpose as per section 110(1) of the *Land Act*, the 2<sup>nd</sup> Respondent was then required, by dint of section 112 of the same Act, to inquire, hear issues on proprietary, and claims for compensation by persons interested in the suit land, a process which was not done.
  18. The Petitioners submitted that having established their claim over the suit land and the fact that they would suffer irreparable loss should they be evicted therefrom, that the balance of convenience therefore tilted in their favour and as such they were entitled to the prayers sought in their Petition, with costs.

#### **Interested Party's Submissions.**

19. The Interested Party associated themselves with the Petitioners' Petition and submissions in their quest for ownership of 1200 acres comprised of the registered suit land No. 5468/3/R by submitting that they had lived harmoniously on the said land for more than 50 years, wherein they had buried their loved ones, grazed their livestock, worshipped, tilled the land and developed the same without interference from either the 1<sup>st</sup> or 5<sup>th</sup> Respondents who had full knowledge of their presence and occupation thereon. They also acknowledged the fact that although the 5<sup>th</sup> Respondent was indeed the registered proprietor of the suit land, yet both they and the Petitioners shared equal ownership of 1200 acres of the same.
20. The Interested Party's further submission was that the 1<sup>st</sup> Respondent, having full knowledge of their occupation as squatters on the suit parcel of land, which was private land, had politically instigated,



forcefully trespassed thereon and hived large tracts of the said land wherein they had purported to construct a stadium thereon.

21. That the 1<sup>st</sup> Respondent, in effecting its evil scheme of grabbing the land had used its agents, the county 'askaris' and National police to harass, jail them without trial, intimidate and threaten both the Interested Parties and the Petitioners so as to deter them from associating with the suit land, which action had led to several demonstrations by the aggrieved parties.
22. That indeed the suit land, which was distinct from LR No. 631 was private land and not public land, a fact which was confirmed by the 3<sup>rd</sup> Respondent through their Replying Affidavit dated July 8, 2019 which had also annexed the certificate of title. The Interested Parties prayed that the court grants the reliefs sought by the Petitioners.

### **1st Respondent's submissions.**

23. The 1<sup>st</sup> Respondent's submission in opposition of the Petitioners' amended Petition was pegged on the following issues for determination;
  - i. Whether the suit parcel of land is a Community Land.
  - ii. Whether the Petitioners are entitled to the reliefs sought.
  - iii. Whether the 1<sup>st</sup> Respondent is entitled to develop public land.
24. On the first issue for determination as to whether the suit land was Community Land, the 1<sup>st</sup> Respondent, submitted that LR No. 5468 was registered in the name of the 5<sup>th</sup> Respondent James Finlay Kenya Limited previously known as African Highlands Produce Company Limited as a lessee. The suit land therefore did not fall into the category of a Community Land as defined under the provisions of article 63 of the Constitution.
25. That the parcel of land upon which the construction of the show ground was underway was LR No.631 which was public land as defined by article 62(1) of the Constitution and which the 1<sup>st</sup> Respondent was well within its purview to put up the said show ground.
26. The 1<sup>st</sup> Respondent further submitted that this was the second time the Petitioners had tried to have a second bite of the cherry having attempted to do so via a suit filed in the Kericho High Court being Civil case No. 98 of 2011, a suit they had withdrawn and filed a subsequent one in the Kericho Environment and Land Court being No. 12 of 2016 and which suit had subsequently been struck out by the Court.
27. That it was clear from the prayers sought by the petitioners in their petition, that they were indirectly seeking ownership of the suit land by way of adverse possession which was averse to the set down provisions under order 37 rule 7 of the Civil Procedure Rules. That where the statute provided for applicable rules and procedures to be followed in order to file a claim before court, parties ought to comply with the said procedure for orderliness in the manner in which proceedings were to be handled.
28. That as was held in the case of Kakuta Maimai Hamsi v Peris Pesi Tobiko & 2 others [2013] eKLR, article 159(2)(d) of the Constitution ought not be used as a panacea nor a general white-wash to cure and amend all ills, misdeeds and default of litigation.
29. Their submission was that the letters relied upon by the Petitioners' in support of their Petition only went further to support the fact and that they were landless and did not own any property. The said letters also dislodged their claim over the suit land in that they were scattered and did not permanently



reside in a single place or area or even the suit parcel. That those letters only requested that they (Petitioners) be settled but did not remotely infer that the suit land had been allocated to them.

30. That although the Petitioners' contention was that they had resided on the suit land for over 50 years whereby the late President Daniel Arap Moi had promised to allocate them the said parcel of land, yet a promise to allocate land in future did not create any interest in the land and the court should therefore not enforce such promise to declare the Petitioners the legitimate and bona fide owners of the suit parcel of land. The 1<sup>st</sup> Respondent relied on the case of *Nelson Kazungu Chai & 9 others v. Pwani University College (Malindi)* [2017] eKLR to submit that one could not acquire property rights of another's property other than in the manner prescribed by law.
31. Further submission was that the Petitioners having clearly established themselves as landless persons, section 134 of the *Land Act* was clear on the establishment of settlement schemes to facilitate access to land, shelter and livelihood to squatters and displaced persons.
32. The 1<sup>st</sup> Respondent, while relying on their Replying Affidavit and annexures thereto submitted that land parcel LR No 631, which was public land, had been earmarked to be used as a show ground as per the approved development plan No. 99/1980 and the Cadastral Map therein, and therefore they were well within their mandate to develop the show grounds for the benefit of the public.
33. That since the 1<sup>st</sup> Respondent was constitutionally mandated to be the custodian of public property and was bound to protect the same, granting the orders as sought by the Petitioners would have draconian effect on protection and preservation of public land. That the orders as sought by the Petitioners could therefore not be enforced whatsoever. That the Petition lacked merit and the same ought to be dismissed.

### **3rd and 4th Respondent' submissions.**

34. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents framed their issues for determination as follows;
  - i. Whether the Petition disclosed any cause of action against them.
  - ii. Whether the Petition disclosed any violation of Constitutional rights.
35. On the first issue for determination, the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that section 26 of the *Land Registration Act* was explicit to the effect that a certificate of title was conclusive evidence of ownership to land. That there was no evidence from the Petitioners that they were the registered proprietors of the suit land herein, the title deed adduced as evidence by the 3<sup>rd</sup> Respondent having proved ownership of LR No. 5468 by the 5<sup>th</sup> Respondent from the year 1926 to date.
36. That further, the registration of certificate of incorporation on the change of the names from African Highlands Produce Company Limited to James Finlay Kenya limited further went to confirm that the suit land herein was private property and not Community Land as deponed by the Petitioners. That the property being a private land, the 3<sup>rd</sup> Respondent did not have capacity to issue title to any other person unless duly instructed by the legitimate title holder. That in this case therefore, the 3<sup>rd</sup> Respondent could not act on the Petitioners' request.
37. On the second issue for determination, it was the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' submission that the courts had time and again held that where there was a statutory mechanism of approaching the court, a litigant ought first to exhaust the mechanism before embarking on Constitutional litigation as was held in the case of *Ann Wanjiru Gichuru & 7 others v Board of Management Mbegi Primary School & 2 others* [2020] eKLR.



38. That had the Petitioners sought to address the legitimacy of the 5<sup>th</sup> Respondent's title, they should have approached the court in the right manner and not through the filing of a Constitutional Petition.
39. That the Petitioners had not pleaded in particularity and specificity how their rights had been violated, infringed or threatened but had only cited articles 10,20,21, 23, 28, 40, 61, 63, and 68 of the Constitution as having been violated by the Respondents. That it was imperative of the Petitioners to direct the court and the Respondents on the specific infringements so as to enable the Respondents to craft their responses accordingly. That the Petition did not adhere to the principles as set down in the case of Anarita Karimi Njeru v The Republic [1979] 1KLR, was vague, imprecise and did not disclose any violation of the Petitioners' Constitutional rights and therefore the same ought to be dismissed with costs to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

### **Analyses and Determination.**

40. Before I make a finding to the Petition, it is important to note that having been granted leave to file their response to the amended Petition, file their submissions thereafter and/or file their application in opposition thereof, the 5<sup>th</sup> Respondent *vide* their Notice of Motion dated 8<sup>th</sup> June 2021 and an affidavit in support thereof of the same date sought to have themselves struck off from the proceedings for reasons that LR No. 5468/3/R, the subject matter herein was unknown to them, did not exist and was not part of LR No. 5468/3. That as per the cadastral plan annexed to their affidavit as JF1, LR No. 5468 had been subdivided into three subdivisions namely LR No. 5468/1, which was surrendered to the Government, LR No.5468/2 and LR No. 5468/3. That they were the registered proprietors to parcel of land LR No.5468/3 whose boundaries were defined and which was adjacent to an unknown piece of land occupied by the Petitioners. That it's joinder to the petition was improper as they had no relation and/or interest in the unmarked property occupied by members of the Koita Welfare Self-Help Group. That the Petition did not disclose any reasonable cause of action against them.
41. In a ruling dated the November 11, 2021 the court allowed their application and the 5<sup>th</sup> Respondent was struck of from these proceedings. See Josphat Langat & 2 others (Suing as the officials of 343 Members of Koita Welfare Self Help Group) v Kericho County Government & 4 others [2021] eKLR)
42. That said and done, where a legal wrong or injury is caused or threatened to a person or class of persons by reason of violation of any Constitutional or legal right, and such group of persons or person is, by reason of poverty, helplessness, disability or socio-economic disadvantage, is unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the Court under articles 22 and 258 of the Constitution.
43. In filing this Petition, the Petitioners and Interested Parties were acting not only on their behalf but on behalf of 343 members of Koita Welfare Self-Help Group and 370 members of Koita Community Welfare Group respectively and as squatters, beneficiaries and/or users of land LR No 5468/3/R which is herein referred to as the 'suit land'.
44. I have carefully considered the contents of the Petitioners' Petition, their Supporting Affidavit as well as the Interested Party's submissions in support of the Petition. I have also considered the Respondents' Replying Affidavits, Grounds of Opposition, submissions by Counsel as well as the relevant provisions of the law and authorities herein cited. I find the issues arising herein for determination being as follows:-
  - i. Whether the Petition discloses a legal interest capable of protection under the law.
  - ii. Whether the petitioners' rights under the Constitution had been infringed.



- iii. Whether the Petitioners are entitled to the orders sought in the Petition?
45. On the first issue for determination, it was incumbent of the petitioners not only to clearly identify the relevant and specific articles of the Constitution that had been violated, but also to avail evidence, through affidavit or otherwise of such violation particularity and specificity how their rights had been violated, infringed or threatened, as cited under articles 10,20,21, 23, 28, 40, 61, 63, and 68 of the Constitution, as per the principles laid down in respect of the Constitutional Petitions as set out in the case of Anarita Karimi Njeru (*supra*) to wit:-
- i. Specifically set out the provisions in the Constitution that have been allegedly violated;
  - ii. Provide the particulars of the alleged violations;
  - iii. Provide particulars in which the Respondents have purportedly infringed their rights.
46. From the above captioned Petition, the Petitioners as well as the Interested Parties have alleged that they had been in occupation of a portion of land No. LR 5468 otherwise known as LR No. 5468/3/R measuring approximately 1200 acres, which land was registered to the 5<sup>th</sup> Respondent, since time immemorial. That their Constitutional rights envisaged under articles 10, 20, 21, 23, 28, 40, 61, 63 and 68 of the Constitution had been violated by the Respondents herein wherein the 1<sup>st</sup> Respondent without any color of right, had forcefully and arbitrary gained entry into the said suit land thereby compulsorily acquiring the same where they had proceeded to construct a show ground thereon. That in the process, the 2<sup>nd</sup> Respondent had failed to inquire and hear the Petitioners' issues on the proprietorship and claims for compensation thereto since they (Petitioners) were persons interested in the suit land. That subsequently the Respondents' action had denied them their constitutional right to ownership of land and/or property. They therefore sought orders directing the 3<sup>rd</sup> Respondent to cause the re-survey and subdivision of the suit land and thereafter issue title deeds to them and their members forthwith.
47. The 1<sup>st</sup> Respondent opposed the Petitioners' Petition stating that they had not violated their (Petitioners') constitutional rights to ownership of land and/or property and neither had they forcefully nor illegally gained entry onto the suit land as alleged by the Petitioners. That indeed they had commenced construction of an Agricultural show ground, but on parcel LR No. 631 which was public land and which had been earmarked for the said purpose and which land had been fully secured with clear fencing for public good.
48. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' response and submissions was that the Petitioners did not have any cause of action against them as there was no evidence confirming the Petitioners' proprietorship over the suit subject matter, to warrant a grant of the orders sought. That further, the Petitioners had not demonstrated any violation of their Constitutional rights as alleged and therefore the Petition was misconceived and an abuse of the court process.
49. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' stand was that the land in question was not community Land but private land and therefore the prayers as sought by the Petitioners that they (3<sup>rd</sup> Respondent) surveys, subdivides and then issues title deeds to their membership, was not within their (3<sup>rd</sup> Respondent's) legal purview. That the relief as sought was not capable of being executed as it was bad in law. They also sought for the Petition be dismissed with costs.
50. A constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question to be decided herein so as to put this matter into the ambit of a Petition was whether the state was liable for acts committed by its agents while on duty. In this case, I find the answer in the negative as constitutional rights protect individuals from



governmental injury and regulate the discretion of the Government to inflict injury. No such evidence had been adduced by the Petitioners. Reference is made to the decision by Justice Mumbi Ngugi as (she then was) in *Joseph C. Kiptoo & another v Kericho Water and Sewerage Company* [2016] eKLR.

51. Looking at the prayers sought by the Petitioners and the Interested Parties as well as their arguments in support thereto, it is not in doubt that they seek to be registered as proprietors to a parcel of land they have referred to as LR No. 5468/3/R which they allege is community land upon which they have been in occupation since time immemorial.
52. Before we proceed further, it is imperative that we look at the definition and creation of a 'community land' to bring the Petitioners' argument into the purview of their assertion.
53. Section 2 of the *Community Land Act* gives meaning to 'Community Land as follows;
  - (a) Land declared as such under article 63(2) of the *Constitution*;
  - (b) Land converted into Community Land under any law;
54. Article 63 of the *Constitution* stipulates that 'Community Land' shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community interest.
55. Article 63(2) of the *Constitution* further sets out the various qualification of Community Land and the persons to whom it belongs to wit;
  - (a) land lawfully registered in the name of group representatives under the provisions of any law;
  - (b) land lawfully transferred to a specific community by any process of law;
  - (c) any other land declared to be Community Land by an Act of Parliament; and
  - (d) land that is—
    - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
    - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
    - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).
56. From the above captioned provisions of the law, it is clear that Community Land tenure rests on two pillars to wit the registration of a community and secondly, the registration of the community land which should be done in accordance with the provisions of section 7 of the *Community Land Act* and Section 8 of the *Land Registration Act* respectively. The whole process is however preceded by adjudication, which includes the recording of Community Land claims, demarcation of Community Land and delineation of boundaries. Upon such registration, a title deed in the prescribed form is issued in the name of the community.
57. I find that the Petitioners have failed to demonstrate that through an Act of parliament, that land they referred to as LR No. 5468/3/R had been declared Community Land in an Adjudication process wherein they had been registered as a community and the suit land subsequently registered to their name.



58. Indeed what is undisputed herein is that land LR No. 5468/3 is registered in the name of the James Finlay Kenya Limited previously known as African Highlands Produce Company Limited, as a lessee and therefore it did not fall into the category of Community Land but was private land.
59. This land is also distinct from land reference No. 5468/3/R which the Petitioners and Interested Parties lay claim to and to which they did not produce any registrable document of proof of the ownership of the same as community land.
60. It is therefore clear considering the Petition and submissions by both the Petitioners and Interested Parties that they seek ownership of the suit land No. 5468/3/R measuring approximately 1200 acres by virtue of their alleged occupation for a period of more than five decades, have developed it, grazed their livestock therein and even buried their loved ones. By so seeking ownership they have sought that the court orders the 3<sup>rd</sup> Respondent to cause a survey and subdivision of the said land and thereafter issue title deeds to them forthwith.
61. The law is clear on the issue of anyone seeking to obtain land by virtue of having lived on the same for over a period spurning 12 years and over. Such a situation is referred to as ‘adverse possession’ and which is found under section 7 of the law of *Limitation of Actions Act* which provides that;  
‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person’.
62. Indeed in the case of *Mwagandi v Mtana Lewa* v [2014] eKLR, the doctrine of adverse possession was defined as  
“.... the process by which a person can acquire a title to someone else’s land by continuously occupying it in a way that is inconsistency with the right of the owner”
63. The law under sections 37 and 38 of the *Limitation of Actions Act* is thus clear that for one to claim land by way of adverse Possession, they must apply to and obtain a registered court order vesting the land in them.
64. Section 38 of the *Limitation of Actions Act* provides the procedure to make such an application in that:  
‘Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land’.
65. In terms of Section 38 of the *Limitation of Actions Act*, where a person or persons, in the present instance, claims to have become entitled by Adverse Possession to land, they must apply to the Court for an order that they be registered as the new proprietors of the land in place of the registered owner.
66. Could the Petitioners herein then bring a Constitutional Petition to claim to have become entitled by Adverse Possession to land parcel No. 5468/3/R by stating that there had been violation of their constitutional rights under articles 10, 20, 21, 23, 28, 40, 61, 63, and 68 of the *Constitution*? The answer is negative. The court finds that the remedy for the Petitioners/Interested Parties would lie in the ordinary statute being the *Limitation of Actions Act* and not in a Constitutional Petition.
67. Indeed the Supreme Court of Kenya considered the question as to whether where a legislation has provided a remedy and prescribed a clear procedure for address of a particular grievance, a litigant can invoke the provisions of the *Constitution* for redress of such grievance, wherein it had termed this



situation as ‘the principle of Constitutional avoidance’ in the case of *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR as follows :-

“The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

68. In *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR the Court of Appeal held as follows;

‘Where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question’.

69. It is therefore an established principle that where a party has remedies in an ordinary civil law, or remedies provided for in statute, (s)he, or in this case they, need to pursue those remedies and follow the provisions of the laid down statute, rather than invoking the *Constitution*. Indeed, in many instances, a Constitutional Petition is not the best avenue to take where there is an established civil remedy and procedure, for it may happen that there are facts in contention which can only be tested when the suit is heard in the manner that civil suits are ordinarily conducted. See *Bandari Investment Company Limited v National Police Service & others* [2021] eKLR.

70. In the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR the Court of Appeal again held that

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

71. In the case of *Harrikissoon v Attorney General* [1980] AC 265, the Privy Council held that:-

“....The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by chapter 6 of the *Constitution* is fallacious. The right to apply to the High Court under section 6 of the *Constitution* for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action.....”

72. I am in total agreement with this position. Even where the Petitioners purport to act in the public interest, they must do so within the law that is in place as the court will not uphold an illegality for the reason that it could correct another wrongdoing.

73. The Petitioners have alleged that their Constitutional rights envisaged under articles 10, 20, 21, 23, 28, 40, 61, 63 and 68 of the *Constitution* had been violated by the Respondents herein wherein the 1<sup>st</sup> Respondent without any color of right, forcefully and arbitrary gained entry into the suit land thereby compulsorily acquiring the same and proceeding to construct a show ground thereon. That in the process, the 2<sup>nd</sup> Respondent had failed to inquire and hear issues on the proprietorship and claims for compensation thereto by themselves as persons interested in the suit land. That the Respondents



action had therefore denied them their constitutional rights to ownership of land and/or property. They therefore sought orders directing the 3<sup>rd</sup> Respondent to survey and subdivide the suit land and thereafter issue title deeds to them forthwith.

74. The Petitioners have further sought for an order of permanent injunction to issue restraining the 1<sup>st</sup> Respondent by itself, its servants, agents, employees, officials and/or anyone working through it from trespassing, demarcating, subdividing, leasing, selling, interfering with and/or in any other way from adversely dealing with all that un-surveyed land known as LR No. 5468/3/R.
75. They also sought for a declaration that they were the legitimate and bona fide owners of all that portion of land measuring approximately 1200 acres otherwise known as LR No. 5468/3/R and therefore the forceful entry of the 1<sup>st</sup> Respondent, its servants, agents, employees, officials and/or any other person working through it on to the un-surveyed parcel of land known as LR No. 5468/3/R was unconstitutional.
76. They have sought that in the light of the above, there be an order of demolition of all the illegal structures on the parcel of land known as LR No. 5468/3/R constructed by the 1<sup>st</sup> Respondent and thereafter the 2<sup>nd</sup> Respondent be directed to initiate investigations on the LR No. 5468/3/R and thereafter recommend appropriate redress.
77. I therefore find that in view of the prayers sought by the Petitioners/Interested Parties and the submissions therein submitted, respectfully, the remedies sought herein lay not in a Constitutional agitation but rather through an ordinary suit under the Land Law where they could enforce their rights. the Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.
78. The Petitioners cannot by-pass these Acts and seek to establish a cause of action under the Constitution unless the cause of action is based on challenging the constitutionality of provisions of articles 40, 61, 63 and 68 of the Constitution.
79. In the case of Godfrey Paul Okutoyi & others -v- Habil Olaka & another (2018) eKLR Chacha , J held that:-
- “It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional Petition. A party should only file a constitutional Petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”
80. In the case of Bernard Murage v Fine Serve Africa Ltd & others (2015) eKLR the Court held that:-
- “Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.
81. To conclude, courts must at all times guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as constitutional petitions, I find that the Petitioners are on



an unsustainable fishing expedition, the limitations in their Petition leaves me with no other option but to dismiss their Petition dated the February 27, 2017 and amended on the November 26, 2020 which I now do, with costs to the Respondents.

It is ordered.

**Dated and delivered at Kericho via Teams Microsoft this 27<sup>th</sup> day of October 2022.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

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