Mapelu & 13 others v Cabinet Secretary, Ministry of Lands & Physical Planning & 164 others; Nyayo Tea Zones Development Corporation & 2 others (Interested Parties) (Environment & Land Petition 12 & 13 of 2018 (Consolidated)) [2022] KEELC 13468 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13468 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND PETITION 12 & 13 OF 2018 (CONSOLIDATED)

JM MUTUNGI, MN KULLOW & GMA ONGONDO, JJ

OCTOBER 13, 2022

BETWEEN

JOSEPH KIMETO OLE MAPELU & 12 OTHERS ..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING & 156 OTHERS ..... RESPONDENT

AND

NYAYO TEA ZONES DEVELOPMENT CORPORATION INTERESTED PARTY

AS CONSOLIDATED WITH

ENVIRONMENT & LAND PETITION 13 OF 2018

BETWEEN

PAUL KIPRONO CHEPKWONY ..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF LANDS & 7 OTHERS ... RESPONDENT

AND

FRIENDS OF MAASAI MAU COMPLEX AND MARA CONSERVATORY ..... INTERESTED PARTY

TRUSTED SOCIETY OF HUMAN RIGHTS ..... INTERESTED PARTY

The Land Registrar does not have the authority to alter an adjudication register submitted under section 27(c) of the Land Adjudication Act by the Director of Land Adjudication.

The case concerned a dispute over the ownership of land bordering the Maasai Mau Forest in Kenya. The petitioners claimed that they had been illegally evicted from their land by the government. The government argued that the petitioners had encroached on forest land and that their evictions were lawful. The court was tasked to determine the authority of the Chief Land Registrar to alter an adjudication register under the Land Adjudication Act; the process for de-gazetting and allocating forest land, and whether land titles obtained through unlawful processes could be legally protected. The High Court held that the Chief Land Registrar had no authority to alter an adjudication register. De-gazetting and allocating forest land required a specific legal procedure. That Land titles obtained unlawfully were not protected by law; consequently, evictions from unlawfully acquired land can be lawful if carried out properly. Evictees from unlawfully acquired land were not entitled to compensation.

Reported by Trevor Kamau, Andrew Derrick, and John Ribia

Constitutional Law *- fundamental rights and freedoms - right to property - forceful eviction – unlawful evictions – where an evictee had no legal claim to the land they were evicted from – whether the eviction of a person that had no legal claim to the land they were evicted from could amount to a violation of the evictee's right to property - whether land titles obtained through unlawful processes could be legally protected - whether evictees who had no lawful claim to the land they were evicted from had the capacity to file for unlawful eviction – whether one could seek compensation for eviction from land that they had occupied or acquired unlawfully – Constitution of Kenya, article 40; Land Act (Cap 280) section 152G; Land Regulations, 2017 (L.N.280/2017) regulations 63 to 70; Land Adjudication Act (Cap 284) section sections 3(2), 5, 23(5), 26, 27, and 29(3).*

Land Law *- classification of land – public land - forest land – degazetting of forest land – allocation of forest land – forest land vis-à-vis trust land – what was the procedure to be followed in degazzetting and allocating forest land - what was the difference between forest land and trust land – - Forest Conservation And Management Act (Cap 385) section 34; Land Adjudication Act (cap 284) section 5, 23(5); 26; 27; 29(3); Trusts of Land (CAP. 290) section 13.*

Land Law *- land adjudication - land adjudication process – role of the Chief Land Registrar in the process of land adjudication – powers of the Chief Land Registrar - what was the process of land adjudication and registration of group ranches - when did an adjudication of land under the Land Adjudication Act become final - whether the Chief Land Registrar had the authority to alter an adjudication register issued to it by the Director of Land Adjudication – Land (Group Representatives) Act (repealed) - Land Adjudication Act (Cap 284) sections 3(2), 5, 23(5), 26, 27, and 29(3).*

Brief facts

The petitioners challenged the forceful eviction and alienation of the petitioners and other private owners of individual property of all the land comprising the Reiyo, Enakishomi, Sisiyan, Enoosokon and Nkaroni group ranches. The petitioners contended that the aforesaid former Group Ranches did not form part of the Maasai Mau section of the Mau Forest. It was the petitioners' case that they had legally been issued with titles to the five Group Ranches, having been authorized to sub-divide the same into individual parcels of land. The respondents contended that the petitioners had encroached on forest land and that their evictions were lawful.

Issues

i. What was the difference between forest land and trust land?
ii. What was the process of land adjudication and registration of group ranches?
iii. When did an adjudication of land under the Land Adjudication Act become final?
iv. Whether the Chief Land Registrar had the authority to alter an adjudication register submitted under section 27(c) of the Land Adjudication Act by the Director of Land Adjudication.
v. What was the procedure to be followed in de-gazzetting and allocating forest land?

vi. What were the considerations to determine whether evictions were effected lawfully?
vii. Whether land titles obtained through unlawful processes could be legally protected.
viii. Whether evictees who had no lawful claim to the land they were evicted from had the capacity to file for unlawful eviction.
ix. Whether one could seek compensation for eviction from land that they had occupied or acquired unlawfully.

Held

1. Where a forest had been gazetted, there could be no lawful alienation of such forest unless the forest had been legally and regularly de-gazetted as a forest in accordance with the law. Likewise, where land was vested under a County as Trust Land, such land could only be legally set apart for alienation through a valid process under section 13 of the Trust Land Act, or the Land Adjudication Act. The process of setting apart trust land and or forest land was elaborate and unless such a process was adhered to, such land could not be validly and/or legally alienated.
2. Land that was registered in the names of the group ranches was through the process of land adjudication commenced under the provisions of the Land Adjudication Act. Where a group, during the process of adjudication was determined to be the owner of land, such group was under section 23(5) of the Land Adjudication Act required to be incorporated under the provisions of the Land (Group Representatives) Act (repealed) and such land to be administered in accordance with the Act.
3. The objective of the Land (Group Representatives) Act (repealed) was to provide for the incorporation of representatives of groups who had been recorded as owners of land under the Land Adjudication Act, and for purposes connected therewith and purposes incidental thereto. The five group ranches whose land was subdivided after the dissolution of the groups, had all acquired their land through the process of land adjudication.
4. It was not explained how the adjudicated land area exponentially increased from 3,070.54 Ha to well over 18,000 Ha. There was no evidence that after the adjudication process was completed, there were any pending objections and/or any application to alter or amend the adjudication records, as related to the group ranches. Under section 27 of the Land Adjudication Act, the adjudication record became final once all objections to the adjudication within an adjudication section were finalised and the record submitted to the Director of Land Adjudication for onward release to the Chief Land Registrar for registration and processing of titles.
5. The adjudication register transmitted by the Director of Land Adjudication to the Chief Land Registrar was final save for any appeals that may have been noted as outstanding. Any alteration to the adjudication register could only be made by the adjudication officer under section 27(1) of the Land Adjudication Act, and/or by the Director of Land Adjudication following the determination of an appeal by the Cabinet Secretary Ministry of Land under section 29(3) of the Act. The Chief Land Registrar would have no mandate and/or authority to alter any adjudication register.
6. The mutation referred to as proving the basis for the amendment was not exhibited by any of the parties. It was not possible to verify who prepared the mutation and/or at whose request or instance. The purported amendment of the adjudication registrar to vary the adjudicated land parcels' sizes, was unlawful and irregular. The Land Registrar lacked the mandate and/or authority to effect any alterations to the adjudication register and any amendments and/or alterations effected on the register were unlawful, illegal and null and void.
7. The adjudication process as at the time the Director of Land Adjudication issued the certificate of finality, was complete. Once the adjudication register was submitted to the Chief Land Registrar under section 27(c) of the Land Adjudication Act, the only role the Chief Land Registrar had, was to effect registration in accordance with section 28. The Chief Land Registrar did not have any mandate or jurisdiction to alter or amend an adjudication register submitted under section 27(c) of the Act by the Director of Land Adjudication. The power of the Land Registrar to rectify as donated by section 142

of the Registered Land Act (repealed) and now under section 79 of the Land Registration Act could not be extended to rectifying or altering an adjudication register.

8. The alterations effected in the respective land registers which in effect altered the adjudication register, was without any due process being followed and was unlawful and null and void. The five group ranches bordered forest land and though the Maasai Mau forest was not a gazetted forest but an unalienated forest land which fell under the mandate of the Narok County Council at the time the activities occurred. It was part of trust land under the jurisdiction of the Narok County Council and hence constituted a community forest and could not be alienated unless a formal process of setting apart and excision of the forest land for some declared purpose was followed as provided under section 117 of the repealed Constitution and section 13 of the Trust Land Act.

9. There was no evidence that neither the National Government or the County Council of Narok made any declaration/resolution to set apart and/or excise any part of the forest for human settlement. The allocation of additional land to the five group ranches outside the adjudicated land, constituted unlawful encroachment onto forest land. Any land titles issued over any such land were unlawful, illegal and null and void.

10. Section 27 of the Forest Act 2005 (repealed) and section 34 of the Forest Conservation and Management Act illustrated the procedure that needed to be followed to allocate forest land. The de-gazettement of a public forest and/or the alteration of the boundaries of an existing public forest, had to follow a clearly set out legal procedure and that consideration of any impacts to the environment was vital. If the natural habitat for any threatened or endangered species or a water catchment area and ecology and biodiversity conservation would be affected and/or prejudiced, the de-gazettement and/or variation of forest boundaries may be denied. That epitomised the importance and significance given to the protection and conservation of forests owing to the vital and critical role they played in environmental conservation.

11. Section 152 G of the Land Act, 2012 provided for the mandatory procedures to be followed during eviction. The Cabinet Secretary was required to prescribe regulations to give effect to the provisions of section 152G(1). Although no formal regulations were made under section 152G (2) were brought to the courts attention, Land Regulations, 2017 (L.N.280/2017) (the Regulations), were made under the Land Act and under part VIII, regulations 63 to 70 made provisions for conduct of evictions that effectively gave effect to the provisions of section 152G(1). The Regulations touched on the identity of the persons effecting the evictions, by whom such persons were authorised, time for carrying out of the evictions, protection of property and possessions, and service of notices on the affected persons. The Regulations were tailored to ensure orderly evictions and respect for human dignity.

12. Eviction notices were issued. The main consideration in unlawful evictions must be whether the respondents acted civilly, reasonably and in a humane manner in effecting the evictions. If they acted callously, caused injury and wanton destruction and damage to property, and without regard to the human dignity of the affected persons, then and notwithstanding the persons were unlawfully encroaching onto forest land, the evictions would be unlawful and in violation of the affected persons' rights.

13. The activities that led to the unlawful encroachment onto the Maasai Mau Forest from the evidence, occurred in the late 1990's and between 2000 and 2005. The purported amendment /alteration of the land register occurred around the years 2000 and 2003. That was the period that land grabbing had reached its heights in Kenya when public land and any unoccupied land whether private and/or public, was targeted for alienation. Public officials working in the Ministry of lands particularly within the Commissioner of Lands offices and the Land Registries, were compromised to make unlawful and illegal allocations and/or to falsify ownership records resulting in the widespread unlawful and illegal allocations and fraudulent land registry records. =article 40 of the Constitution read along section 26(1)(a)(b) the Land Registration Act in responding to the menace provided that land obtained

unprocedurally and/or illegally, and land title that iwas shown to have been fraudulently and/corruptly acquired would not be protected under the law. The same would be liable to be cancelled.

14. The government was entitled to take action to reclaim forest land that had been unlawfully and illegally alienated. The petitioners were given notice to vacate from the forest and the government had justification to enforce the notices to vacate. The evidence that the majority of the illegal and unlawful occupants of the forest voluntarily and without any use of force vacated from the forest, was not controverted and was accepted by the court to be factual. The petitioners never had any evidence that force was applied to get them to vacate from the forest land. The government did in fact set up the operation "*Okoa Msitu Wa Mau "* which apart from sensitizing the occupants of the need to vacate from the forest, was also assisting with transportation and in demolition of structures where required. The court did not find any evidence to support the petitioners' assertion that the evictions were unlawful and/or were forcibly carried out by the respondents.

15. Article 40 (6) of the Constitution provided that property that was unlawfully acquired was not protected. Not all titles deserved the protection of the law. One could not merely waive a title and claim protection just because they hold a title. The process and procedure of acquiring the title was equally vital and important and that if the title was acquired unlawfully or illegally, such a title could not deserve the protection of the law. Section 26(1) of the Land Registration Act buttressed the provisions of the Constitution and provided the instances under which a proprietor's title may be challenged. A title acquired fraudulently and/or through misrepresentation or unprocedurally or through corruption may be challenged.

16. The petitioners did not prove that the additional land was acquired lawfully by the group ranches. The titles acquired out of the unlawfully and illegally acquired land by the group ranches were not valid. The group ranches could not give good titles, if they themselves never had good title to the land. The titles were unlawfully issued and could not be sustained. They were null and void and were for cancellation.

17. The eviction of the petitioners was justified as the intention of the respondents was clearly to recover forest land that had been unlawfully and illegally alienated. The purpose was to restore, rehabilitate and conserve the Mau Forest which had its pride of place as the largest water tower in Kenya and was of great ecological value.

18. The evictees from the Maasai Mau Forest did not deserve to be compensated since they did not prove that they were the lawful owners and as such, the evictions were lawful. The titles they held were invalid having been acquired out of land that had been irregularly acquired, their occupation was illegal and the evictions were justified.

19. Article 40(4) of the Constitution related to property acquired by the state for any of the specified purposes under article 40(3) of the Constitution. The Maasai Mau Forest was always a public forest and had never been alienated save for the land that had been lawfully adjudicated under the provisions of the Land Adjudication Act. The state was found not to be invoking the provisions of article 40(3) of the Constitution as the land already belonged to the government. The government could not compensate persons who, in essence, were illegal occupiers of its land. Article 40(4) was not applicable in the circumstances of the instant case since the land was found to have been illegally acquired and as such, any resultant titles from the subdivision of such land could not acquire validity even if such title was acquired by a third party who may not necessarily have had any knowledge and/or notice of how the mother title may have been acquired.

20. Some of the interested parties, who were respondents in the cross petition may have innocently acquired titles from the group ranches or group ranch members following the subdivision of the group ranches' parcels of land. However, since the land had been unlawfully acquired, the titles created from such land were irregular and unlawful and therefore null and void. Those titles deserve to be cancelled. The interested parties were not entitled to be compensated for the land and/or to be given alternative

land by the government. The interested party's recourse would be against the persons who allocated them land and/or sold the land to them.

21. The Land Registrar, no doubt, was privy to all the adjudication records, and was presumed to know the provisions of the Land Adjudication Act, and his role as pertains to the adjudication process. That he could purport to amend/alter the adjudication register to increase the land adjudicated several fold, when by law, he could not do so bothered the court. Also, there must have been surveyors involved though no evidence was tabled as to how the survey that increased the adjudicated land was authorised. There must have been a scheme to grab forest land and that several government officers were roped in the scheme to facilitate the evil design. So, a huge chunk of forest land was alienated resulting in the encroachment by settlers which led to the wanton and rampant destruction of part of the forest and the degradation of the ecosystem.

22. Public officers that abused their offices to the detriment of the public interest and indeed, to the detriment of innocent third parties, ought to be held to account and should take responsibility of their acts. Perhaps the law should be amended to make such officers culpable in such situations. It was the acts of such officers that quite often gave rise to myriad litigation and/or make the determination of such litigation difficult as the courts were denied the benefit of critical evidence that otherwise would have assisted in the adjudication of the disputes. The court expressed its disapproval as regards the misguided acts of such officers that expose the state and the public to unnecessary disputes that arise as a result of their nefarious acts.

23. Article 69 of the Constitution obligates the state and every person to co-operate in the conservation and preservation of the environment. Article 69 (1)(a), (b), (f), (g), (h), and (2) read together spoke to those obligations. It was clear what was expected of everybody as regards matters of environment. Neither the government nor the court could abdicate their responsibilities when it came to safeguarding and conserving the environment. The government had a clear duty and obligation to ensure the Maasai Mau forest was not depleted through illegal allocations. The Maasai Mau Forest and indeed, the entire Mau Forest complex needed to be conserved and protected.

24. It could not be gainsaid why the Mau Forest complex required to be protected and conserved as a critical water tower. The environment served the present generation and the future generation and hence there is necessity that the environment was not degraded to the prejudice of the future generations in the spirit of the preamble to the Constitution and section 18(a)(iv) of the Environment and Land Act. Whatever developments that were undertaken by the government and/or the citizens must have had regard to the protection and conservation of the environment in tandem with article 69(2) of the Constitution. There was need to conserve and protect the Mau Forest Complex for the wider interest of the public so that the present and future generations could enjoy its benefits.

Petition dismissed.

Orders

i. *Declaration issued that the subdivision of Reiyo, Enakishomi, Sisiyian, Enoosokon and Nkaroni Group Ranches beyond the initial acreage at the time of adjudication and first registration were irregular, unlawful, null and void and of no consequence and did not confer to the respondents to the cross petition any proprietary rights over the land.*

ii. *Declaration issued that the subdivided land that was over and above the initial registered acreage of the Group Ranches Land parcels comprised part of Maasai Mau Forest reserve and the same would be restored to the forest.*

iii. *Order issued that the land titles created following the subdivisions of Reiyo, Enakishomi, Sisiyian, Enoosokon and Nkaroni Group Ranches were obtained illegally, unlawfully and unprocedurally and hence a nullity ab initio, as it constituted unlawful encroachment into the Maasai Mau Forest Reserve, and the said titles were ordered nullified, cancelled and revoked.*

iv. *The respondents in the cross petition who may have still been in the forest land (suit properties) were ordered to vacate with immediate effect and in any event within 90 days from the date of the judgment failing which an order of eviction would be issued against them.*

v. *The respondents/cross petitioners in conjunction with the County Government of Narok were ordered and directed to carry out ground survey with a view of delineating and establishing the Maasai Mau Forest boundary by fixing beacons and/or permanent features designating the extent of the forest having specific regard to the initial acrearages of the registered adjudicated land to Reiyo, Enakishomi, Sisiyian, Enoosokoni and Nkaroni Group Ranches within a period of twelve months from the date of the judgment to ensure the forest is protected and conserved for posterity.*

vi. *Once the Maasai Mau Forest boundary was established as under order (v) above, the respondents/cross petitioners in order to protect and conserve the forest would erect a perimeter fence on the portion of the forest abutting the land adjudicated to Reiyo, Enakishomi, Sisiyani, Enoosokoni and Nkaroni Group Ranches within 24 months from the date of the judgment and such fence once erected, would be maintained by the Kenya Forest Service.*

vii. *Each party would bear its own costs.*

Citations

Cases

Kenya

1. *Arthi Highway Developers Limited v West End Butchery Limited & others* Civil Appeal 246 of 2013; [2015] KECA 816 (KLR)
2. *Chemei Investment v Attorney General & others* Petition 94 of 2005 - (Explained)
3. *Githinji, Elizabeth Wambui v Kenya Urban Roads Authority & 4 others* Civil Appeals 156 & 160 of 2013 (Consolidated); [2019] eKLR - (Mentioned)
4. *Henry Muthee Kathurima v Commissioner of Lands & Director National Youth Service* Civil Appeal 8 of 2014; [2015] KECA 892 (KLR) - (Explained)
5. *Ingosi, Timothy & 87 others v Kenya Forestry Services & others* Environment & Land Case 479 of 2012; [2016] KEELC 1181 (KLR) - (Mentioned)
6. *Kalyasoi Farmer Co-Operative Society & 6 others v County Council of Narok* Civil Case 664 of 2005; [2005] KEHC 564 (KLR) - (Mentioned)
7. *Kenya Medical Supplies Agency (KEMSA) v Mavji Kanji Hirani & 8 others* Civil Appeal 115 of 2017; [2018] KECA 485 (KLR)
8. *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* Civil Appeal 327 of 2014; [2017] KECA 465 (KLR) - (Mentioned)
9. *Kipchirchir, Clement & 38 others v Principal Secretary Ministry of Lands & Urban Development & 3 others* Petition 42 of 2013; [2015] eKLR - (Mentioned)
10. *Letuya, Joseph & 21 others v Attorney General & 5 others* ELC Civil Suit 821 of 2012; [2014] eKLR - (Mentioned)
11. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
12. *Mring'a, Stephen & 2 others v County Council of Taita Taveta & 2 others; Interested Parties Banton Fundi Sareli & 7 others* Constitutional Petition 925 of 2006; [2016] KEHC 2554 (KLR) - (Explained)
13. *Munyu Maina v Hiram Gathiha Maina* Civil Appeal 239 of 2009; [2013] KECA 94 (KLR) - (Mentioned)
14. *Mureithi & 2 others v Attorney General & 4 others* Civil Appeal 158 of 2005; [2006] KEHC 14 (KLR) - (Mentioned)
15. *NK Arap Ng'ok, Joseph v Moijo Ole Keiwua & 4 others* Civil Application 60 of 1997; [1997] KECA 1 (KLR) - (Mentioned)

16. *Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others; Garbage Collector & 15 others* Civil Appeal 617 of 2003; [2004] KEHC 10 (KLR) - (Mentioned)
17. *Shah, Milan Kumar & 2 others v County Council of Nairobi & another* Civil Suit No1024 of 2005; [2005] eKLR - (Explained)

United Kingdom

Maritime Electronic Co Ltd v General Dairies Ltd [1937] All ER 748 - (Mentioned)

Regional Court

Tarmal Industries Ltd v Commissioner of Lands & Excise [1968] EA 4H - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 10, 27(4)(8); 28, 35(1); 40(3); 47; 63(4)(5); 63(4)(5); 67(2) - (Interpreted)
2. Evidence Act (cap 80) sections 106A, 106B, 107, 108 - (Interpreted)
3. Forest Conservation and Management Act, 2016 (Act No 34 of 2016) section 34 - (Interpreted)
4. Land (Group Representatives) Act (cap 287) In general - (Cited)
5. Land Act, 2012 (Act No 6 of 2012) section 152G; part VIII - (Interpreted)
6. Land Adjudication Act (cap 284) sections 5, 23(5); 26; 27; 29(3) - (Interpreted)
7. Land Consolidation Act (cap 283) sections 3(2); 26; 29(1) - (Interpreted)
8. Land Registration Act, 2013 (Act No 3 of 2012) sections 26, 80 - (Interpreted)
9. National Land Commission Act, 2012 (Act No 5 of 2012) sections 14(6)(7); 40(6) - (Interpreted)
10. Survey Act (cap 299) section 32 - (Interpreted)
11. Wildlife Conservation and Management Act (cap 376) section 6 - (Interpreted)

Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966
2. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
3. Universal Declaration of Human Rights (UDHR), 1948

Advocates

Mr Manyonge and Mr JK Bosek for appellants

Mr Oscar Eredi, Deputy Chief State Counsel and Ms Fatma Ali, State Counsel for the 1st, 2nd, 3rd, 4th, 5th and 11th respondents

Ms Joy Brenda Machinda for the 6th respondents

Mr Mariaria for the 7th and 8th respondents

RK Langat for the 9th and 10th respondents

Mr Kamwaro for the 2nd interested party

Mr Meing'ati for the 3rd interested party

Ms Mary Muigai for the 185, 191,232, 251, 283,290 and 465 respondents

JUDGMENT

Intoduction and Background

1. This judgment is in respect of two consolidated constitutional petitions namely Narok ELC Petition No 12 of 2018 and Narok ELC Petition No 13 of 2018 (the twin petitions).

    (a) Narok ELC petition No 12 of 2018 dated July 18, 2018, amended on March 15, 2019 and duly lodged in court on March 20, 2018 by Joseph Ole Mapelu and 156 others against eleven (11) respondents (Hereinafter referred to as the first petition herein). The 157 petitioners sought a total of twelve orders including declarations that their rights under the *Constitution of Kenya, 2010* have been violated, orders of prohibition, permanent injunction and compensation against the respondents from any interference with the subject matter namely the former five group ranches of Reiyo, Enakishomi, Sisiyan, Enoosokon and Nkaroni. Together with the petition, the petitioners filed an application for conservatory orders, *inter alia*, to stop the respondents from evicting them from their parcels of land, and

    b. Narok ELC petition No 13 of 2018 dated July 25, 2018 filed on even date, amended on March 15, 2019 and filed in court on March 20, 2019 by Prof Paul Kiprono Chepkwony, the Governor of Kericho County against the eight (8) respondents (the second petition herein). The petitioner filed the petition in his private capacity as a citizen and on behalf of various private land owners who are members of the former group ranches of Reiyo, Enakishomi, Sisiyan, Enoosokon and Nkaroni Group Ranches. He sought more or less the same orders sought in the first petition. Similarly, alongside his petition, he filed an application under rule 24(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, again seeking similar orders to that which the applicants sought in the first petition.

2. Originally, the twin petitions and the applications were placed before Kullow J, sitting at the Narok Environment and Land Court for directions. Given the fact that the petitions and the applications raised similar issues, directions were taken that the applications in the twin applications be consolidated and heard together. Thus, on 10th August 2018, the twin applications were consolidated and it was ordered that the first petition be the lead file herein.

3. Accordingly, the applications in the twin petition were heard and a ruling delivered on September 17, 2018. The court (Kullow, J) found the applications devoid of merit and dismissed them.

4. Immediately, the twin petition was referred to the Honourable Chief Justice, for purposes of constituting a three-judge bench as the matter raised significant legal issues and was of great public importance. The Honourable Chief Justice considered the request and constituted a bench of three judges (Munyao J-presiding, Kullow J and Ong'ondo J) to hear and determine the twin petitions. It was further directed that the matter be heard at the Nakuru Environment and Land Court.

5. During further hearing on February 19, 2020, the petitioners made an application to have the presiding judge of the bench Justice Munyao J recuse himself from the proceedings for likely conflict of interest. The Hon Judge did recuse himself on February 19, 2020 accordingly. The Hon Chief Justice then re-empanelled the bench by replacing Justice Munyao J with Mutungi J.

6. On September 29, 2020, the petitioners/cross respondents requested to have further proceedings in the matter conducted at the Narok Environment and Land Court. There was no objection thereto. The

Honourable court allowed the request since there is a new court structure that could accommodate the three judge bench at Narok Law Courts and the subject matter falls within Narok County.

A. Legal Representation

7. The petitioners in the twin petition are represented by two learned counsel, Mr Manyonge and Mr JK Bosek.

8. Mr Oscar Eredi, Deputy Chief State Counsel and Ms Fatma Ali, state counsel of the Attorney General's Office appear for the 1st, 2nd, 3rd, 4th, 5th and 11th respondents.

9. The 6th respondent is represented by learned counsel, Ms Joy Brenda Machinda.

10. The 7th and 8th respondents are represented by learned counsel, Mr Mariaria.

11. Learned counsel, RK Langat Advocate appears for the 9th and 10th respondents.

12. The 1st interested party, Nyayo Tea Zones Development Corporation was not represented herein and never participated in the hearing of the petition.

13. The 2nd interested party, Friends of Maasai Mau Complex is represented by learned counsel, Mr Kamwaro

14. The 3rd interested party, Trusted Society of Human Rights Alliance is represented by learned counsel, Mr Meing'ati.

15. Ms Mary Muigai instructed by the firm of Muigai Kimei and Company Advocates appears for respondents namely numbers 185, 191,232, 251, 283,290 and 465 in the cross-petition as listed below:

    (a) Rukuti Ole Koriata 185, 232, 283

    (b) Sanja Ole Sankei 191, 251, 290

    (c) Looyieyio Ole Ntutu 465

B. The Petitioners' Case

16. In support of the first petition is an affidavit sworn on March 19, 2019 by Joseph Kimeto Ole Mapelu, the 1st petitioner. He deposed, inter alia, that on or about July 7, 2018, the respondents without any right or legal authority and in utter disrespect of property rights and human dignity of the petitioners illegally commenced forceful eviction and alienation of the petitioners and other private owners of individual property of all the land comprising the following five former Group Ranches:

    a. Reiyo Group Ranch

    b. Enakishomi Group Ranch

    c. Sisiyan Group Ranch

    d. Enoosokon Group Ranch, and

    e. Nkaroni Group Ranch

17. The petitioners contend that the aforesaid former Group Ranches do not form part of the Maasai Mau section of the Mau Forest. That the petitioners are victims of Government of the Republic of Kenya high handedness, abuses of office, discrimination and marginalization.

18. It is the petitioners' case that they have legally been issued with titles to the five Group Ranches, having been authorized to sub-divide the same into individual parcels of land. That several titles have since changed hands from the original owners to the current owners.

19. The petitioners aver that the respondents' actions are politically motivated and past attempted evictions of the petitioners by the defunct Narok County Council were stopped *vide* High Court Civil Case No 664 of 2005, Nairobi. That their rights are threatened and/or have been violated including the right to property, lack of a fair administrative action before the evictions were commenced and violation of their right to inherent dignity following the manner in which the eviction was conducted and their property destroyed.

20. A fortiori, the petitioners seek the following orders:

    i. A declaration that within the intendment of article 10 of the *Constitution* the respondents are bound by the key national values and principles, to have regard to human dignity, equity, social justice, inclusiveness, equality and human rights.

    ii. A declaration that within the intendment of article 28 of the *Constitution* the respondents are bound to respect and protect the inherent dignity of the petitioners and individual owners of property in Reiyo, Enakishomi, Sisiyan, Enoosokon and Nkaroni Group Ranches.

    iii. A declaration that within the intendment of article 35(1) of the *Constitution* the respondents are bound to release all documents pertaining to the legal justification for the forceful eviction, alienation and destruction of private property in the ranches.

    iv. A declaration that within the intendment of article 40(3) of the *Constitution* the respondents cannot deprive the petitioners of their right to own property.

    v. A declaration that within the intendment of article 47(1) of the *Constitution*, the respondents are bound to provide administrative action that is lawful, reasonable and procedurally fair.

    vi. A declaration that within the intendment of article 47(2) of the *Constitution*, the respondents are bound to provide reasons for failure to provide written reasons for the forceful evictions.

    vii. A declaration that within the intendment of articles 63(4) & (5) of the *Constitution*, the respondents cannot alienate and illegally acquire property in the group ranches without proper regard to the law.

    viii. A declaration that the forceful evictions and alienation of the group ranches to all the land comprising the group ranches, is inconsistent with the provisions of articles 10, 27(4), 28, 35(1), 47, 63(4) & (5) and 67(2)(f) of the *Constitution*, and is illegal, null and void.

    ix. An order of permanent injunction be issued to restrain the respondents, their agents and persons acting under the authority of the respondents from interfering with the property rights of the petitioners and other residents who have acquired title deeds from the Government of Kenya in respect of the following former group ranches:

        a. Reiyo Group Ranch

        b. Enakishomi Group Ranch

        c. Sisiyan Group Ranch

        d. Enoosokon Group Ranch, and

e. Nkaroni Group Ranch

x. An order of prohibition against the respondents, their agents or persons acting under their authority and command, from evicting or in any manner whatsoever interfering with the petitioners' and other residents' ownership and quiet possession of their property comprised in the following former group ranches:

a. Reiyo Group Ranch

b. Enakishomi Group Ranch

c. Sisiyan Group Ranch

d. Enoosokon Group Ranch, and

e. Nkaroni Group Ranch

xi. An order for compensation for:

a. General damages for infringement of rights of the petitioners under articles 10, 28, 35, 40, 47 and 63 of the *Constitution*.

b. Special damages for the destruction of property

c. Interests on (a) and (b) above at court rates.

xii. There be an order as to costs.

21. The 1st petitioner in the first petition swore a further affidavit on August 9, 2018 in support of the petition. Basically, the same was in support of the twin applications which were determined by way of a ruling delivered on September 17, 2018 as noted in paragraph 3 hereinabove.

22. On 9th April 2019, the petitioners filed a supplementary affidavit sworn on April 2, 2019 by the 1st petitioner in the 1st petition in support of the amended Petition for and on behalf of the other petitioners. It is deposed therein in part that on July 25, 1975, Ilmotiok/Narok area where the former Sisiyan Group Ranch is located, was declared an adjudication section. That the former Sisiyan Group Ranch was surveyed and survey maps issued according to the law, adding that the group members paid various amounts of money between the years of 1999 and 2000 for the sub-division of Sisiyan Group RanCh.

23. The petitioners also Contend that in a letter dated August 15, 2000 the then Ministry of Lands and Settlement affirmed the position that the former Sisiyan Group Ranch did not encroach into the forest in question. Thus, a directive was issued to the Provincial Surveyor of the defunct Rift Valley Province, to amend the Registry Index Map.

24. Furthermore, the petitioners maintained that the individual land owners in the former Nkaroni Group Ranch have been issued with valid titles to their land after the Group Ranches were dissolved. That the said former Group Ranch was surveyed and survey maps issued according to the law.

25. In the second petition, the orders sought are as stated in paragraph 1(b) hereinabove.

26. It is noteworthy that the petitioners in the twin petition called a total of six (6) witnesses in support of the petitions.

27. PW1, Johnson Kipketer Talam testified on February 17, 2020 and adopted his witness statement on record herein. He deposed, inter alia, that he lives at Enkaroni Group Ranch LR No 9262 and that he

obtained title deed to the land. He stated that there is the 1st interested party's tea plantation between the ranch and the land allocated to them. That there is a trust land which is Mau Forest and no person has invaded the same. He further stated that land adjudication was carried out in the area.

28. The documents marked as "JKT 1 to 15" and annexed to the affidavit of PW 1 were admitted as plaintiff PExhibits 1 to 15 respectively. According to him the petitioners should be allowed to return to the Group Ranches and be compensated for loss incurred. He asserted the petitioners obtained lawful titles to the suit land at Enkaroni Group Ranch. He stated that he was forcibly evicted from the area by the Government of the Republic of Kenya.

29. On cross-examination, PW1 stated that he bought his parcel of land LR No 9262 from a Mr Tunai who had no title deed to the same. That he had no written agreement or document to show that he purchased the land. That he also bought LR No 9505 from Hannah Naikumi. He admitted that he did not conduct a search of the land at the Narok Land Registry prior to it's purchase. He also admitted to owning land LR No 2880 at Sogoo.

30. PW2, Joseph Tesol Rotich relied on his witness statement dated October 18, 2019. He stated that his land was within Reiyo Group Ranch. That however, he was uprooted from the said land when the government threatened to revoke titles thereof. He asserted that the petitioners had lawful titles to the land. That they have never been approached by the National Land Commission or any other commission about the extent and area of the land in dispute. He stated that the government through its police officers forcibly evicted the petitioners from the said land.

31. On cross-examination, PW2 emphasized that he possesses a title deed which was issued to him by the Government of Kenya. He stated that he bought sixty (60) acres from Reiyo Group Ranch but did not have a written agreement to prove the same.

32. On February 18, 2020, Joseph Kimetto Mapelu (PW3) testified in part that he was an original member of Nkaroni Group Ranch which was dissolved in 1973 after land adjudication was carried out in the area. That he owns Land Parcel numbers CIS Mara/Ololunga/8769 and CIS Mara/Ololunga/5766 whose titles he was issued with on June 3, 1999 and CIS Mara/Ololunga/8769 whose title he obtained on August 15, 2003. He stated that he was never issued with any notice informing him that the said titles were fraudulently obtained. He stated the said titles were issued by the Land Registrar and the Survey Office in Narok. He further stated that they did not allocate any land in the forest. He also told the court that there were houses that were burnt during the eviction.

33. PW3 relied on his witness statement filed in this matter and sought to produce the titles as part of his evidence. He further stated that he was from the Ogiek Community, the indigenous people of the area and that the land from where they were evicted is their ancestral land.

34. During cross-examination, PW3 admitted that although he was the secretary of Nkaroni Group Ranch until its dissolution, he did not know the exact acreage of the land that the group owned as he had not seen the title of the land. He was also unable to explain how the acreage of the Group Ranch increased to five thousand (5000) hectares.

35. PW4, Christopher Kiplangat Bore adopted his witness statement dated October 18, 2019 and the annexures thereto as part of his testimony. He stated that he bought land from Sisiyan Group Ranch in 1988 when the members were dissolving the Group Ranch. That he later obtained title to the land which measures approximately 7 hectares. He admitted that neither the National Land Commission nor National Environmental Management Authority (NEMA) was involved in the process.

36. During cross-examination, PW4 lamented that the petitioners were not given any notice prior to the evictions. He however, admitted that he did not have a sale agreement or share certificate as proof of purchase of the land.

37. Moreover, PW4 testified that he was not a member of Sisiyan Group Ranch but bought his parcel from one Rukuti, an official of the Group Ranch. He could not recall how much he paid for the land. In re-examination, PW4 stated that he has no dispute respecting boundaries of his land with his neighbours.

38. PW5, Simon Lepapa Namuyak relied on his witness statement dated October 18, 2019 with an amendment that the adjudication was carried out in 1973. He stated that he was evicted from his parcel of land title no. Narok/Ololunga/6869 in Enakishomi Group Ranch, although his title was not among those to be nullified. It was his testimony that no notice was given and no meetings were convened to inform them of the evictions. That he obtained his title document from Narok Land registry. That there has never been any dispute between the petitioners and the County government

39. During cross-examination, PW5 stated that he was the treasurer of Enakishomi Group Ranch and the original title holder of Narok/Ololunga/6869, having obtained the same in 1998. He stated that he was evicted from the land and no longer lives thereon. He admitted that there was a dispute between Mr Koriata and the group ranch. That later, the original boundary of the group ranch was altered to make provision for other members.

40. PW6, Godfrey Kipchirchir Sang, a historian by profession and a publisher, relied on his witness statement herein together with the annexures thereto as part of his evidence. He testified that the principal occupants of the adjudication sections were members of the Maasai, Kipsigis and Ogiek communities. Also, that the acceptees purchased land from the Maasai in exchange for money or animals hence, they were not in the initial list of group ranch members but were later listed as acceptees.

41. On cross-examination PW6 admitted that he was not a member of any of the group ranches. That he was not an expert on land issues.

B. The Respondents' Case

42. The respondents filed their respective replying affidavits on diverse dates.

43. By a replying affidavit dated June 4, 2019 and filed on June 6, 2019, the 6th respondent, stated that the encroachment into the Maasai Mau trust land forest started during the sub-division of the five group ranches namely Reiyo, Enakishomi, Sisiyan, Enoosokon and Nkaroni which bordered the forest at the time. That the said group ranches illegally and irregularly extended their known boundaries into the forest.

44. The 6th respondent asserted that the report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex which was published in March 2009 made various recommendations for the restoration of the Mau Forest and the humane handling of resettlement of bona fide dwellers of the forest. Furthermore, that conserving the Maasai Mau forest is of the greater public good and outweighed the petitioners' efforts to enforce their private individual rights.

45. The 9th respondent filed a replying affidavit sworn on October 23, 2019 on October 25, 2019. The crux of their case is that there had been massive encroachment into the Maasai Mau forest by persons alleging to have legal titles. That there was need by the government to recover forest land illegally excised. That therefore, the evictions and the conservation of the Maasai Mau forest was in public interest and the honourable court should uphold the same.

46. On August 6, 2018, the Hon Attorney General filed a replying affidavit sworn on August 3, 2018 by Paul Kiiru Mwangi, the acting Director, Land Adjudication and Settlement. The Hon Attorney General contended that in mid 1970s, the government declared five Adjudication Sections to the north of Olposimoru and Maasai Mau Forest. These are Olposimoru "A" and "B", Kamrar, Kilaba and Olokurto. That around the same period, five other Adjudication Sections were declared to the south of these forests which include Ilmotiok, Osupuko/Ololunga, Nkoben, Nkareta and Naisoya Adjudication Sections.

47. The Hon Attorney General asserted that Reiyo Group Ranch, Enakishomi Group Ranch, Sisiyan Group Ranch, Enoosokon Group Ranch and Nkaroni Group Ranch emanated from three Adjudication Sections established under the *Land Adjudication Act* Chapter 284 Laws of Kenya.That Reiyo Group Ranch falls within Ngoben Adjudication Section while Nkaroni, Enakishomi and Enoosokon Group Ranches fall within Ololunga Adjudication Section. Sisiyan Group Ranch falls within Olomutiok Adjudication Section.

48. It was the contention of the Hon Attorney General that on completion of the adjudication process in accordance with the *Land Adjudication Act* (*supra*), the acreages of the five Group Ranches referred to in the amended petition and hereinabove were as follows:

    i. The register for Sisiyan Group Ranch was opened on September 11, 1980 under registration section Narok Cis-Mara/Ilmotiok/375 measuring approximately 447.5 hectares.

    ii. The register for Nkaroni Group Ranch was opened on July 10, 1980 under registration section Narok/Cis-Mara/Ololunga/118 measuring approximately 1597.5 hectares.

    iii. The register for Enaikishomi Group Ranch was opened on July 10, 1980 under registration section Narok/Cis-Mara/Ololunga/115 measuring approximately 1748.54 hectares.

    iv. The register for Reyio Group Ranch was opened on November 13, 1980 under registration section Narok/Cis-Mara/Nkoben/34 measuring approximately 26.0 hectares.

    v. The register for Enosokoni Group Ranch was not availed but the adjudicated land- Narok/Cis- Mara/Ololunga/100 measured approximately 155 hectares.

49. The Hon. Attorney General further contended that group ranches during sub-division illegally and unlawfully increased the acreage and extended beyond their known boundaries into the Maasai Mau Forest. That on realization of the unprecedented invasion of the Maasai Mau Forest, a survey of the forest's perimeter boundary was undertaken and those who were found to be within the Forest Reserve were evicted in the year 2005.

50. It was further asserted that as a result, in 2008 the then Prime Minister appointed a Taskforce on the Conservation of the Mau Forest complex. That the Taskforce made several recommendations on the effective management structure to stop further degradation of the forest.

B. The Cross-Petitioners' Case

51. On June 4, 2019, the Cabinet Secretary, Ministry of Lands and Physical Planning, Cabinet Secretary, Ministry of Interior and Co-ordination of National Government and the Attorney General lodged an amended cross-petition dated June 3, 2019. The amended cross-petition is anchored on the supporting affidavit of Dr Nicholas Muraguri, the Principal Secretary in the Ministry of Lands and Physical Planning and sworn on even date.

52. The cross-petitioners's case is that the encroachment into the Maasai Mau Trust land forest was caused by the petitioners' irregularly increasing the sizes of the five group ranches which bordered the forest, far in excess of their registered areas. That the additional areas were excised from the forest reserve. That such illegal and fraudulent excision of forest land and the purported proprietary rights/interests derived from the same is a nullity and of no legal consequence.

53. Wherefore, the cross-petitioners urged the Honourable court to issue the orders infra;

    a. That a declaration be issued that the subdivision of Reiyo, Enakishomi, Sisiyian, Enoosokon and Nkaroni Group Ranches beyond the initial acreage at the time of adjudication and first registration was irregular, unlawful, null and void and is of no consequence as it did not confer to the respondents any proprietary rights over the suit land

    b. This honourable court be pleased to issue an order that land title numbers set out under prayer (b) of the cross- petition which are subdivisions of Reiyo, Enakishomi, Sisiyian, Enoosokon and Nkaroni Group Ranches were obtained illegally, unlawfully and unprocedurally and in blatant violation of the law and hence a nullity ab initio, the same constitute an unlawful encroachment into the Maasai Mau Forest Reserve, hence the said titles be and are hereby nullified, cancelled and revoked.

    (c) A declaration that the land constituted in the titles as set out under prayer (b) of the cross petition are part of the Maasai Mau Forest reserve and the same should be restored to the forest.

    (d) A declaration to the effect that any acquisition, sale. transfer, occupation and any dealing whatsoever with the above mentioned titles or any part of the Maasai Mau Forest or any trespass, occupation and settlement thereupon by the respondents herein or their agents, assignees, successors in title (ejusdem generis) is unlawful, null and void.

    (e) That the respondents in the cross-petition be compelled to vacate the suit properties with immediate effect failure to which an order of eviction be issued against them.

    f. That the respondents be condemned to bear the costs of this cross-petition and the costs of the petition.

    g. Any other appropriate relief this honourable court may deem fit to grant.

B. Summary of the response to the Amended Cross-Petition

54. In response to the amended cross-petition, the respondents filed a replying affidavit sworn by Joseph Kimeto Ole Mapelu, the 1st respondent therein, dated September 17, 2019 and filed on September 18, 2019.

55. The respondents denied encroaching into the Maasai Mau Trust Land forest beyond the registered boundaries, stating that the subdivision of the five former group ranches in question was approved by agencies of the Government of the Kenya and valid title deeds issued. In addition, the respondents alleged that the cross-petitioners' actions to evict the respondents are politically motivated and that they had earlier on filed a case, *Kalyasoi Farmers' Co-operative Society & 6 others v County Council of Narok* [2005] eKLR which confirmed the respondents' rights to ownership of the Group Ranches.

56. The respondents asserted that there would be a threat to security, peace and stability in the area if the forceful evictions, malicious destruction of property and alienation of the respondents' property rights proceeded. They urged the honorable court to dismiss the amended cross-petition with costs.

57. Notably, Rukuti Ole Koriata, Sanja Ole Sankei and Looyieyio Ole Ntutu (DW8) were joined to the cross petition as respondents by the Cabinet Secretary of Lands and Physical Planning, acting through the Attorney General. Rukuti Ole Koriata and Sanja Ole Sankei were both officials of Sisiyan Group Ranch respectively. The two officials were issued parcels of land known as Cis-mara/Ilmotiok 4223, 4228, 4229, 4234, 4235, 4236, 4239, 4245, 4246, 4261, 4265 and 4848 as joint holders in trust for a sizeable number of Sisiyan Group Ranch members.

58. Ms Muigai, learned counsel for DW8 and the said two officials of Sisiyan Group Ranch submitted that they would not contest cancellation of those titles if the court found that the same should be surrendered in public interest. That parcels of land known as Cis-mara/Ilmotiok/3729, 3790 and 3869 were allocated to Rukuti Ole Koriata as a member of Sisiyan Group Ranch. Counsel further submitted that Mr Koriata (deceased) would be seeking compensation from the government if such parcels of land are to be taken over in public interest.

59. Sanja Ole Sankei opted not to participate in the cross-petition proceedings. His counsel submitted that Mr Sankei therefore, would have no claim against the Government of Kenya if the land parcels, Cis-mara/Ilmotiok/3736 and 3818, allocated to him were compulsorily acquired by the government in the public interest.

60. Looyieyio Ole Ntutu (DW8) testified in court that he did not obtain the land parcel number LR Cis Mara/Ololunga/9109 from any group ranch. He stated that he was a 3rd party purchaser for value, having purchased the said land from a Mr Kipruto Arap Ng'eno who was then the registered proprietor of the land. He prayed that he should be compensated for the land now already taken over by the government and referred to the Report commissioned by the office of the Prime Minister in 2009 where it was recommended that 3rd party purchasers for value be compensated.

61. Thomas Mumo (DW1), an Environmental Scientist working at Kenya Water Tower Agency relied on his witness statement on record and testified that the government assessed various water towers and gave recommendations to restore the towers. He stated that recommendations were made to revise the forest cutline from that made by the 1st interested party, Nyayo Tea Zones Development Corporation and relied upon by the petitioners. He further stated that notices were issued to residents to move from the forest; phase 1 evictions were effected in 2018 and phase 2 evictions were executed in 2019/2020. He stated that the forest boundary was know and that there were no schools inside the forest when the evictions were carried out.

62. Upon cross-examination, DW1 stated that the recommendations to revise the cut-lines were made before the evictions were carried out. Also, that the stakeholders were involved as they held public barazas (meetings). He admitted that the petitioners were issued with titles by government officials but when verification was done, it was found that some titles were issued irregularly and illegally.

63. DW2, Tom Chepkwesi, Principal Land Registrar based at Narok Lands Office adopted his witness statement on record. He made reference to various documents on record and testified that group ranches are usually private entities and use private surveyors. That the survey is supposed to conform to the original survey and, if the survey/subdivision is faulty, the process could be repeated and the earlier survey revoked. Further, he stated that a land board consent is a prerequisite before subdivision of the land and the five (5) group ranches obtained requisite consents. DW2 stated that the amendments to the acreage of the five group ranches were unlawful as the land registrar did not have powers to make such amendments to an adjudication register. He stated that the Ministerial Task Force of September 2005 concluded that the five group ranches irregularly and illegally increased their land parcels and called for revocation of the irregular titles issued on forest land.

64. DW2 was cross-examined and he clarified on the initial acreage of the group ranches. He stated that there were anomalies in the land board application form, emphasizing that land titles issued outside the group ranch areas would be invalid as there was no such land available for allocation. He urged the court to cancel such titles. He insisted that his office established proper boundaries and the records thereof are with the surveyor. Further, he stated that amendments effected after completion of the adjudication process were not valid.

65. DW2 admitted that in the instant matter, officers of the government may have committed malpractices.

66. DW3, Evans Kegode of Kenya Forest Service relied on his witness statement on record as part of his testimony. He stated that Maasai Mau Forest was not declared an adjudication area and that the five group ranches merely encroached into the forest area.

67. During cross-examination, DW3 clarified that there were no evictions where there was regular settlements. He stated that Phase 1 of evictions involved Ngoben and Kaleta while Phase 2 involved Olposurko and Ololunga areas. He stated that some parts of Olposimoru Forest were degazzeted and titles have been issued. Upon re-examination, DW3 stated that compulsory acquisition of the suit property could not be done because it was public forest land.

68. On June 23, 2021, the affidavit sworn by Mr Paul Kiiru Mwangi was admitted in evidence without calling him to testify as he had retired from the public service. He was substituted by Michael Irungu Kagwi (DW4), an Adjudication Officer and expert witness who gave the details of the process of adjudication.

69. Upon cross examination, DW4 explained that a declaration for adjudication anchors the process in law. That such a declaration is accompanied by a detailed description of the area the subject of adjudication. He stated that once the land is demarcated, the particulars of the land cannot change without due process.

70. DW4 admitted that the registered owners who held titles to the group ranches were not involved in the Taskforce activities that culminated in their titles being recommended for revocation. On re-examination, DW4 affirmed that if there was connivance in the land transactions, then that cannot result in valid transactions.

71. DW5, Jackson Kamoye, the Chairman of the 2nd interested party established as a Community Based Organization (CBO) and as a Non-Governmental Organization (NGO) in 2008 to conserve and protect the Mau Forest testified and relied on his witness statements dated January 23, 2020 and January 27, 2020. He confirmed that the five group ranches encroached into the forest.

    1. DW5 further testified in examination in chief that;

> " ...My name is included as No 55 in the petition (amended petition). I do not wish to be one of the petitioners. My title CIS/MARA ILIMOTIOK/3810 is within Mau Forest. I have no objection to the title being cancelled. I was one of the persons who complained there was encroachment into the forest..."

72. In cross-examination, DW5 accused the Chairman of Sisiyan Group Ranch of dishing out land which resulted in the encroachment into Maasai Mau Forest. He stated that there were no forceful evictions from the forest as people voluntarily vacated from the forest. He emphasized that he never sold land to anybody and further denied he came to court because he wanted the other communities to be removed from the forest. Upon re-examination, DW5 reiterated that there were no forceful evictions but people voluntarily vacated the forest.

73. DW6, Michael Koikai, a retired public officer and farmer, relied on his witness statement dated January 23, 2020 in his evidence. He testified that both the Ole Ntutu Commission Report of 2005 and the Report of the Prime Minister's Taskforce of 2009 recommended the removal of people from the forest.

74. During cross-examination DW6 testified that there have been at least three evictions; in years 1986, 2005 and 2018/2019. In re-examination, DW6 stated that when adjudication is declared, the National Land Commission would have no mandate over such land.

75. DW7, Joseph Tipanko Ole Karia, a member of the Mau Task Force appointed in 2008 testified on June 27, 2021 and relied on his statement dated January 24, 2020. He stated that he was given a parcel of land CIS Mara/Ololunga/9222 by the 1st petitioner in the 1st petition. He stated that he later surrendered the land for cancellation since he knew it to be forest land. He stated that Group officials were giving land to undeserving people. He stated the Task Force recommended that all illegal parcels be cancelled and all government officers surrender their titles. He further stated that the Mau Task Force Report was made public. That the same was not challenged.

76. During cross-examination, DW7 stated that the Taskforce recommended that third party purchasers be compensated. That the Taskforce also made a recommendation to cancel all illegal titles. He added that some county officials gave letter of no objection to the excisions but they had no authority to do so. He alleged that some of those officials were given land.

77. DW8, Looyiyo Ole Ntutu, who was named in the cross-petition as respondent number 465 in the cross petition testified that he purchased land parcel CIS Mara/ Ololunga/9109 from Kipruto Arap Ng'eno in 2002/2003. He stated that he was open to being compensated.

78. On cross-examination, DW8 stated that he is a third-party purchaser for value. However, he admitted that he did not have a copy of sale agreement or acknowledgement of payment thereof. He also admitted that he did not exhibit a copy of the letter of consent or evidence of payment of stamp duty. There was no re-examination of the witness.

B. The Interested Parties' Case in Brief

79. The 1st interested party Nyayo Tea Zones Development Corporation never participated in the twin petition proceedings.

82. The 2nd interested party, Friends of Maasai Mau, opposed the twin petitions through the affidavit sworn on January 23, 2020 duly filed in court as well as a further affidavit sworn on January 27, 2020 and filed in court on January 28, 2020. By the replying affidavit dated January 23, 2020, the 2nd interested party associated itself with the entire cross petitioners' case.

80. The 3rd interested party Trusted Society of Human Rights, like the 2nd interested party opposed the petitions and supported the cross petition.

Submissions of the Parties:

The petitioners submissions

81. In their submissions the petitioners relied on the amended petition dated March 15, 2019 and the supporting affidavit thereto together with the *viva voce* evidence adduced by the witnesses.

82. It is the petitioners case that on or about the July 7, 2018, the respondents without any right or legal Authority; and disrespectful of the petitioners property rights and human dignity illegally commenced forceful evictions and alienation of the petitioners' individual properties which was comprised within

five group ranches which the petitioners asserted did not form part of the Maasai Mau Forest as alleged by the respondents.

83. The petitioners contended that they were issued with title deeds after they purchased their respective parcels of land from members of the various group ranches. They contended that the evictions were politically motivated and that previous attempts to evict them were stopped vide High Court Civil Case No 664 of 2005, wherein the court affirmed the petitioners right of ownership of the parcels of land.

84. The petitioners further contended that their evictions was contrary to the provisions of article 10 of *Constitution of Kenya 2010* ; which places a requirement for the observance of human dignity, equity, social justice, inclusivity, equality and nondiscrimination. The petitioners contended that the evictions were conducted forcefully and maliciously by the respondents in violation of the petitioners constitutional rights respecting ownership of property.

85. In their submissions, the petitioners contended that their land resulted from subdivision of the parcels of land belonging to the group ranches which subdivisions were authorized by the defunct County Council of Narok. They stated that pursuant to the aforesaid subdivisions some of the group ranch members sold their respective parcels to among others the petitioners.

86. The petitioners contended that the Maasai Mau Trust Land Forest was never gazetted as a Forest under the *Forest Conservation and Management Act 2016* (formerly the Forest Act, 2005), that there was no map delineating its boundaries and because of the lack of a map the petitioners stated that the forest started from the boundaries of the adjudication section boundaries of the 5 group ranches.

87. The petitioners further argued that since the land comprising of Maasai Mau forest was trust land, under the *Constitution of Kenya 2010* the same became Community land and thus the Maasai Mau Forest is unregistered community land that is held in trust by the County Government of Narok on behalf of the Community. The petitioners argued that if any eviction was to be carried out, the Executive Committee member responsible for land matters in Narok County would be responsible and such evictions would be required to comply with the provisions of section 152D of the *Land Act 2012* and in the instant case there was no Notice issued to the petitioners which rendered the evictions illegal and unlawful. The petitioners have in this regard relied on the case of *Mitu Bell Welfare Society v Kenya Airport Authority & 2 others, Initiation for Strategic Litigation in Africa (amicus curiae* (2021) eKLR).

88. The petitioners submitted article 10 of the *Constitution of Kenya 2010* binds state officers and public Officers to implement any public policy in conformity with National values on participation of the people, human Dignity, equity, social Justice, inclusivity and non- discrimination and protection of the marginalized. It was the petitioners view that the respondents carried out the evictions without regard to the provisions of article 10 of the *Constitution of Kenya 2010*.

89. Further, the petitioners relied on the United Nations Basic principles and guidelines on development based eviction and contended that contrary to the provisions the UN guidelines and the *Land Act* the evictions were characterized with violence, destruction of property and no form of resettlement given to those who were affected and hence the manner in which the eviction were conducted violated the petitioners right to housing under article 43 of the *Constitution*.

90. The petitioners further relied and outlined various articles of the *Constitution of Kenya 2010* and more particularly that the respondent were to ensure the administrative action was fair and reasonable.

91. The petitioners submitted that that tiles they held were issued by the government and thus contended the titles were indefeasible. It was the petitioners contention that the respondent had not proved that

there was fraud in acquiring the titles listed in the amended cross petition dated June 13, 2019 and that no evidence was tendered in court to show the specific titles that had been issued in the Mau forest land.

92. The petitioners contended that since they had acquired their titles lawfully and were evicted from their parcels of land which did not encroach on the Forest, they were entitled to compensation for the destruction of their homes. The petitioners urged the court to take Judicial Notice of the fact that they were third party purchasers of the land for value and/or inherited the properties from their parents. They further urged the court to order the relocation of all persons residing beyond the boundaries of the group ranches land.

93. On whether the respondents cross petition should be allowed, the petitioners rely on the provisions of section 14(6) & (7) of the *National Land Commission Act* which provides:-

    (6) "Where the Commissioner finds that the title was irregularly acquired, the commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

    (7) No revocation of title shall be effected against abonefide purchaser for value without notice of defect in the title.

94. The petitioners contended that the 6th respondent, the National Land Commission, had not started any process to analyse the legality of the tittles listed in the cross petition yet the burden to prove fraud in the acquisition of the title deeds lay with the cross- petitioners as was held in the case of *Arthi Highway Developers Limited v West End Butchery Limited and others* (2015) eKLR where the court reiterated the law as stated in the case of *DR Joseph Arap Ngok v Justice Moijo Ole Keiwa and 5 others Civil Appeal* No 60 of 1997 where the court considered the standard of proof of fraud that would vitiate title.

95. The petitioners contended that given the cross petitioners had not demonstrated how the titles were acquired fraudulently, the cross petition lacked merit and the same ought to be dismissed.

The 1st to 5th respondent's submissions

96. The 1st to 5th respondents in response to the petition filed a replying affidavit and an amended cross petition.

97. The cross petition sought to have the titles issued on the suit land revoked. It was the respondents position that the petitioners had encroached into the Maasai Mau forest and that the said titles were acquired fraudulently and irregularly. The Respondents submitted that the Mau forest was a critical water tower in the Country providing water to millions of people, livestock and wildlife and that the Mau Forest Complex comprises of Trans Mara, Olposimoru, Maasai Mau Mt. Londiani, Eastern Mau, Mau Narok, South West Mau and Western Mau.

98. The respondents contended that the encroachment into the forest began in the year 2000 when the neighbouring Group Ranches applied for consent to sub-divide their land to individual members. Whereas at the completion of the Adjudication process, the boundaries of the five Group Ranches were known and clearly defined, on sub-division of the land the initial acreage of the group Ranches was increased resulting in encroachment into the Maasai Mau Forest.

99. On whether there was forceful eviction of those who encroached into the forest, the respondents submitted that all forests in Kenya should be protected and that all titles issued on land in the forest without following the procedure set out in section 28 of the Forest Act 2005 (now repealed) and section 34 of the *Forest Conservation and Management Act* No 34 of 2016 were unlawful. The respondents

contended that there was no evidence placed before the court to demonstrate that the provisions of section 34 of the said *Act* was complied with and hence those holding titles could not claim any right.

100. The respondents contended that there were irregularities witnessed during the subdivision as the acreage of each of the five Group Ranches exceeded the adjudicated acreage and boundaries which led to encroachment into the Maasai Mau Forest and therefore no valid titles could be conferred upon the petitioners.

101. The petitioners to fortify their submissions relied on the case of *Joseph Letuya & 21 others v Ag and 5 others* [2014] eKLR where Nyamweya J held as follows:-

> The process of conferring legal and equitable property rights in Kenya Law is settled, and is dependent upon formal processes of allocation or transfer and consequently registration of title or of certain transactions that confer title in land in the absence of a legal title of ownership. The process of allocation of Forest land is further governed by the Forest Act that require a process of excision of forest land before such land can be allocated. The Applicant did not bring evidence of such processes of allocation of title to land located in the Mau forest and solely relied on their long occupation of the same.

102. The 1st to 5th respondentS further argued that it was the National Land Commission (NLC) that had the Constitutional mandate to manage, alienate and allocate public land and all alienated land classified as public land ought to be held in trust by the County Government in trust for the people resident in a county, and shall be administered on their behalf by the National Land Commission as provided for under article 62 of the *Constitution*. It was the 1st to 5th respondents' further contention that the proper procedure for degazettment of Forest land as provided under the Forest Act was not followed. A notice of variation of boundaries or revocation of state or local forest ought to have been published and approved by resolutions of parliament as provided for under section 28 of the Forest Act.

103. In support the above position the 1st to the 5th respondents relied on the case of *Timothy Ingosi & 87 others v Kenya Forest Services &2 others* (2016) eKLR where the court held :-

> " The said situation is that due process was not followed. In my view, without altering the boundaries of the Forest by degazettment and following due process, the Land in Dispute was not available for allocation and therefore the tittle deeds issued over the suit land were and remain questionable until due process is followed.

104. The 1st to 5th respondent also relied upon the provisions of article 69(1)(a)(b)(c)(d)(e)(g)(h) and (2) of the *Constitution of kenya* and contended that the encroachment of the Mau forest went against the principle of sustainability as well as the principle of intergenerational equity and thus the government had the responsibility to protect; and preserve the Forest in the interest of the public for posterity. They stated that the evictions were carried out humanely and that prior to the evictions Notices were issued and after the encroachers vacated, no further eviction took place as the presence of security forces secured the forest and prevented renewed encroachment.

105. On whether the petitioners are entitled to compensation, the 1st to 5th respondents contended that any person who had acquired their land without following due process was not entitled to the protection of the law against deprivation of property. The 1st to the 5th respondents relied on the case of *Kenya*

Medical Supplies Agency (KEMSA) v Mauji Kanji Hirani & 8 others [2018] eKLR where the court of Appeal held that:

> " Article 40 is categorical that the rights (of protection of right to property) in articles 40 "do not extend to any property that has been found to have been unlawfully acquired" ---

106. The 1st to 5th respondents in the premises contented that as the process of acquiring the property was marred with irregularities and illegalities, the petitioners could not legally claim any protection and the question of compensation could not arise.

107. On the photographs that the petitioners had relied upon, it was the contention of the 1st to the 5th respondents that the same were so plain and had no probative value that could be attached to the same for purposes of discharging the burden of proof placed on the petitioners. The respondents further stated that the said photographs do not comply with the provisions of section 106A, 106B, 107 and 108 of the *evidence Act* chapter 80 of the Laws of Kenya.

108. The 1st to the 5th respondents further submitted that though the cross petition was served on all the respondents by way of advertisement in the Newspapers, save for 3 respondents who appeared to oppose the cross petition on the basis that they were innocent and bonafide purchasers, all the other named respondents in the cross petition did not appear. The respondents contended that the titles were unlawfully and unprodedurally acquired, deserved to be quashed and cancelled. The 1st to 5th respondents placed reliance in supPort of their submission on the case of *Clement KiPchirchir & 38 others v Principal Secretary Ministry of Lands & Urban Development & 3 others* [2015] (eKLR) where Munyao, J held as follows:-

> " It will be seen from article 40, the title to land which is found to be unlawfully acquired cannot seek shelter under article 40 of the *Constitution*. The respondent have further relied on the provisions of *Land Registration Act* No 3 of 2012 wherein Section 26 does protect title to Land but removes such protection for titles that were improperly acquired. It is the contention of the respondent that the aforesaid titles were improperly and fraudulently acquired and thus they do not enjoy the full protection of the law and on the above basis the respondents have urged the court to declare the titles quashed and cancelled pursuant to the provisions of section 143 of the Registered *Land Act* cap 300 (repealed) and section 80 of the *Land Registration Act* No 3 of 2012.

109. In conclusion the 1st to 5th respondents submitted that since there was no sufficient evidence to show that the suit parcels of land were acquired legally and statutory provisions of the law followed, then the court ought to find that the titles issued in the Maasai Mau Forest were acquired illegally and the same be cancelled and no compensation awarded to the petitioners.

The 7th and 8th Respondent's Submissions

110. The 7th and 8th respondent's submissions touched on whether the Director General of Kenya Wildlife Services can be sued in his personal capacity. It was their contention that he cannot be sued as such the same was contrary to the law. To buttress this position, they have relied on the provisions of section 6 of the *Wildlife Conservation and Management Act 2013* which provides as hereunder: -

> 6 (1) There is established a service to be known as the Kenya Wildlife Service.
>
> (2). The service shall be a body Corporate with perpetual succession and a common seal and capable in its Corporate name, of

(a) Suing and being sued.;

(b) ----------

(c) ----------

(d) ----------

111. The 7th and 8th respondents contended that the pleadings and the evidence adduced touched on the person of the Director General of Kenya Wildlife Service in his individual capacity and in the circumstances the petition was incompetent and ought to be dismissed..

112. The 7th & 8th respondents further contended that the petition was vague and did not show the culpability of any of the parties present. They relied on the affidavit of Robert Muasya in opposing the petition in which he outlined the functions of Kenya Wildlife Services and that his evidence was uncontroverted. As regards the ecological sensitiveness of the Mau Forest, they stated that the petitioners had not responded to the facts surrounding the degradation of the Forest which affected not only human beings but also Wildlife that the Kenya Wildlife was mandated to safeguard.

113. On whether the petitioners were entitled to compensation the 7th and 8th respondents argued that no evidence was tendered to show violence was meted out on the petitioners or damage to their property and hence the issue of compensation did not arise. Further, they stated that the petitioners did not specifically plead nor did they prove the claim for damages.

The 9th and 10th Respondent's Submissions

114. The 9th and 10th respondents submitted that despite the petitioners contention that they had valid titles, the petitioners di not show any proof by way of an official search that they held valid titles, and/or how they were allocated the said land. The 9th and 10th respondents further submitted that the land the petitioners purport to hold titles to, was within the Maasai Mau Forest and that the procedure for excision of the said land was not properly followed as provided for under the *Forest Act*(cap 385) (now repealed by the Forest Act, Act, No 7 of 2005).

115. The 9th and 10th respondents argued that if titles were issued prior to the degazettment of the Maasai Mau Forest, then such titles could not be said to be good titles for they were obtained in clear contravention of the law and thus the same cannot be protected under the provisions of article 40 of the *Constitution of Kenya* and section 26 of the *Land Registration Act*.

116. The 9th and 10th respondents further relied on the Prime Minister's Task Force Report on the Conservation of the Mau Forest Complex which they argued had created boundary between the Forest and the Adjudication section and further showed encroachment into the forest land.

117. On whether the petitioners were entitled to compensation, the 9th and 10th respondents contended that since the petitioners were privy to an illegality and they participated in the encroachment of the forest and possessed questionable titles, they could not be entitled to compensation.

118. On whether there was forceful eviction of the petitioners, the 9th and 10th respondents submitted that the eviction was not arbitrary as alleged but was reasonable and proportional. They stated that the petitioners were issued with notices prior to their eviction and indeed the majority of the encroachers voluntarily vacated from the forest land.

Submissions by 3 Respondents in the Cross- Petition

120. Ms Muigai advocate represented three respondents in the cross petition namely, Rukuti Ole Koriata, Sauja Ole Sankei and Looyieyio Ole Ntutu who appeared after the cross petition was advertised in the Newspapers. The three respondents were named as respondent numbers 185,232,283,191,251,290 and 465 respectively depending on the land titles each of them held. The said respondents submitted that they held valid titles that they had acquired lawfully. The said respondents asserted that they were bonafide owners of the land titles that they held and sought that their titles be protected under the law.

121. The respondents stated that even though the cross petitioners argued that the Maasai Mau Forest was Trust land, they had failed to enjoin the County Government of Narok as a party to the cross petition so as to shed light on the no objection letters that were issued by the County Government of Narok during the subdivision and consequent transfer of the parcels of land that were owned by the five group ranches.

2nd Interested Party Submissions

122. The 2nd interested party Friends of Maasai Mau Complex and Mau Conservation opposed the two petitions by way of affidavit filed on January 28, 2020. It was their contention that when the Land adjudication process under the *Land Adjudication Act* was concluded between 1973 and 1980 the five subject group Ranches were allocated various parcels of land as stated hereinabove. That Registry Index Maps were prepared which clearly defined the boundaries and the number of hectares each of the group Ranches was allocated. However the said boundaries were later adjusted which adjustment could only have been made by amendment pursuant to the provisions of section 19(1) of the Registered *Land Act*, cap 300 Laws of Kenya (now repealed which provides as follows :-

> 19(1) where the Registrar is maintaining the Registry Map he may, or in any case he may require the Director of Survey to correct the line or position of any boundary shown on the registry Map with agreement of every person shown by the Registrar to be effected by the correction, but not such corrections shall be effected except on the instructions of the Registrar in writing in the prescribed form to be known as mutation form and the mutation form shall be filed.
>
> 2. Whenever the boundary of a parcel is altered on the registry Map, the parcel number shall be cancelled and the parcel shall be given a new number.

123. It was the contention of the 2nd interested party relying on the evidence of Mr Chepkwesi, the Narok Land Registrar that there were incidents of meddling with the records which led to the increase in the acreage owned by the five Group Ranches. This meddling and falsification of the records in their opinion was undertaken when the consent to subdivide the individual group Ranch Land was granted by the Land Control Board.

124. The 2nd interested party further averred that the mutation forms that purport to alter the boundaries and increase the acreage that was owned by each of the group Ranches was illegal and unprocedural and consequently any person who was allocated land in excess of the original acreage and issued with title, such titles were illegal and unlawful. They further contended that the Registration and issuance of any title in excess of the original hectares available for subdivision required that Registry Index Maps are duly ascertained and approved by the Survey of Kenya as prescribed under the Provisions of Section 19 of the Registered *Land Act* (supra) The petitioners' did not provide any extracts of Registry Index Maps duly approved by the Director of Surveys as envisaged under section 32 of the *Survey Act*, cap 299 of the Laws of Kenya. It was the contention of the 2nd Interested Party that the Registry Index

Maps relied on by the petitioners lacked coordinates and reference marks and thus could not be relied upon to establish the exact location of the parcels of land referred therein.

125. The 2nd interested party further argued that by reasons of the foregoing, the title deeds issued on the encroached portions of the Forest were unlawfully acquired as the encroached portions were not available for alienation. They argued the petitioners had failed to produce consent of the Land Control Board for the subdivision and transfers of the parcels from the group ranches to the petitioners. For the foregoing reasons the 2nd interested party urged the court to declare the said titles unlawful, illegal and null and void and orders the same to be cancelled.

126. The 2nd interested party in their submissions relied on the case of *Elizabeth Wambui Githinji v Kenya Urban Roads Authority & 4 others* (2019) eKLR which relied on the dicta by Maraga J (as he then was) in case of *Republic v Minister of Transport and Communication & 5 others exparte Waa Ship Garage Collectors & 15 others* Mombasa HCMCA No 617 of 2003 [2006] 1 KLR (E&L) 563 where he stated:

> " Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of indefeasibility of title deed. It is quite evident that should a constitutional challenge succeed titles under the Trust land provisions of the *Constitution* as under section 1 and 1A of the *Constitution* or under the doctrine of public trust, a title would have to be nullified because the *Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the latter and spirit of section 1 and 1A of the *Constitution*."

127. The 2nd interested party further cited the finding in the case of *Chemei Investment v AG and others* Nairobi Petition No 94 of 2005 at paragraph 6 where it was held.

> " The *Constitution* protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal binders based on indefeasibility. I therefore adopt the ruling of the court in the case of *Milan Kumar Shah and 2 others v County Council of Nairobi & AG* (Nairobi HCC Suit No 1024 of 2005 where the court stated :-
>
> > "We hold the registration of title to land as absolute and indefeasible to extend, Firstly, that the creation of such title was in accordance with the applicable Law and secondly, when it is demonstrated to a degree higher than the balance of probability
> >
> > that such registration was procured through persons or body which claims and relies on the principle has not himself or itself been part of the cartel which schemed to disregard the applicable law and public interest."

128. Relying on the above cases it was the 2nd interested party's contention that no material was placed before the court to show that the land registrar had adhered to the laid down procedure and the law in making all the entries that closed the titles of the five group ranches on subdivision of their respective parcels of land. The subdivided land parcels were far in excess of the adjudicated land.

134. The 2nd interested party further submitted that though article 40 of the *Constitution* protects the rights of every person either personally or with others to acquire property anywhere in Kenya and such property to be protected, the 2nd interested party, however, contended such protection did not extend to property that is acquired illegally and unlawfully under article 40(6) of the *Constitution*.

129. The 2nd interested party further contended that the petitioners had not identified or set out with a reasonable degree of precision the right that they alleged been infringed and the nature of such infringement. They contended that the orders sought by the petitioners lack clarity as they sought for declaration in respect of all that parcel of land in the five group Ranches without reference to any specific titles. The 2nd interested party asserted that given the subject titles in the petitions were acquired illegally and unlawfully the titles should be cancelled and the petitions dismissed.

Analysis, evaluation of the evidence and submissions and determinations.

130. After reviewing the respective pleadings by the parties, the evidence and having considered the written submissions filed on behalf of the parties we have identified the following issues for determination;

i. Whether Maasai Mau complex constituted Trust Land and /or forest land?

ii. Whether the identified Group Ranches namely, Reiyo, Enakishomi, Sisiyan, Enoosokoni, and Nkaroni acquired land that was in excess of their entitlements as per the adjudication carried out, and if so, whether such acquisition was lawful and/or amounted to unlawful encroachment onto a forest reserve?

iii. Whether the Respondents effected unlawful evictions against the petitioners, and if there were such evictions, whether the same were carried out in violation of the petitioners' constitutional rights?

iv. Whether the titles created and issued over the disputed alleged forest land were regularly and/or unlawfully processed and issued, and if unlawfully issued whether the same ought to be cancelled, nullified and/or revoked?

v. Whether the petitioners are entitled to compensation for unlawful eviction and damages to their properties?

vi. Whether persons who held titles in the alleged disputed forest land should be compensated for the loss of their land and/or given alternative land?

vii. Whether the Maasai Mau Forest complex should be delineated, conserved and protected as a water tower?

viii. What reliefs should the court grant?

The status of Maasai Mau Forest Complex

131. The petitioners by their pleadings, and in their evidence and submissions, asserted that the Maasai Mau Forest Complex had never been delineated and there was not in existence any survey Map delineating the boundaries of the Maasai Mau Forest Reserve. It was their contention that the Maasai Mau Forest had never been gazetted as a forest and therefore, remained as trust land under the Narok County Council. The petitioners claimed that the government through adjudication set apart some of Maasai Mau Forest land and allocated the same to the group ranches and individuals. The Attorney General representing the 1st to the 5th respondents submitted that the Mau Forest complex is a critical water tower within the East African region and provided a life line to millions of people, livestock and wildlife and hence its conservation was of critical importance. The respondents submitted that the Mau complex includes; Transmara, Olposimoru, Maasai Mau, Mt Londiani, Eastern Mau, Mau Narok, South West Mau and Western Mau forests. Mr Evans Kegode of Kenya Forest Services testified as defence witness 3 and he affirmed that the Mau Forest Complex comprised of 22 forest blocks including the Maasai Mau Forest. He confirmed Maasai Mau forest was not a gazetted forest but was

Trust land under the defunct Narok County Council. He explained that Kenya Forest Services assisted in the management of Maasai Mau Forest. He stated that Maasai Mau Forest was a water catchment area not only for Kenya but for the East African Region. He explained that Maasai Mau forest borders Olpusimorou Forest which is a gazetted forest and that the two forests are separated by the Nyayo Tea Zone though there was no formal boundary between the two forests. The witness asserted that though the Maasai Mau Forest was under the Narok County Council, it was a public forest.

132. On the evidence, it is clear to us that the Mau Forest Complex is expansive and straddles several counties namely, Narok, Kericho and Nakuru. The Maasai Mau Forest which is the subject matter in this petition forms part of this complex. It is our view that where a forest is gazetted, there can be no lawful alienation of such forest unless the forest has been legally and regularly degazetted as a forest in accordance with the law. Likewise, where land was vested under a County as Trust Land, such land could only be legally set apart for alienation through a valid process under section 13 of the Trust *Land Act*, cap 288 Laws of Kenya or the *Land Adjudication Act*, cap 284 Laws of Kenya. Section 13 of the Trust *Land Act* provides as follows:-

> 13. Setting apart by council
>
> (1) In pursuance of section 117(1) of the *Constitution*, a council may set apart an area of Trust land vested in it for use and occupation —
>
> (a) by any public body or authority for public purposes; or
>
> (b) for the purpose of the extraction of minerals or mineral oils; or
>
> (c) by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.
>
> (2) The following procedure shall be followed before land is set apart under subsection (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 recommendation 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).

133. The process of setting apart Trust Land and or forest land was elaborate and unless such process was adhered to, such land could not be validly and/or legally alienated. In the present matter, whether or not the process of alienation and the titles created following the alienation and adjudication process were valid, will be considered later in this judgment.

The Group Ranches

134. The petitioners and the respondents in the cross petition acquired land within the disputed Maasai Mau Forest land either by virtue of having been members of the group ranches or by virtue of having purchased land from members of the group ranches.

135. The group ranches that owned Land and in respect to whom land was adjudicated and alienated were Reiyo Group Ranch, Enakishoni Group Ranch, Sisiyan Group Ranch, Enoosokomi Group Ranch and Nkaroni Group Ranch. Each of the group ranches had a specified parcel of land of specific acreage adjudicated and allocated to them. The group ranches were incorporated pursuant to the provisions of the *Land (Group Representatives) Act*, cap 287 Laws of Kenya and were registered as owners of the adjudicated land.

136. On the basis of the oral and the documentary evidence adduced, the said group ranches initially had their respective land parcels adjudicated as follows: -

a. Reiyo Narok/Cis-Mara/Nkoben/34 measuring 26.0 Hectares.

b. Sisiyani Narok/Cis-Mara/Llmotiok/375 measuring 447.54 Hectares

c. Enakishomi Narok/Cis-Mara/Ololunga/115 measuring 844.5 Hectares.

d. Enosokon Mara/Ololunga/110 measuring 155.0 Hectares.

e. Nkaroni Narok/Cis-Mara/Ololunga/118 measuring 1597.5 Hectares.

137. At the time of subdivision/excision, the same Group Ranches' land parcel acreages increased exponentially. Reiyo group ranch increased from 26.0 hectares to 878.59 hectares; Sisiyan group ranch increased from 447.54 hectares to 1215.64 hectares; Enakishomi group ranch increased from 844.5 hectares to 9,748.54 hectares; Enosokon group ranch increased from 155.0 hactares to 658.0 hectares; and Nkaroni group ranch increased from 1,597.5 hectares to 5,582.51 hectares. Overall, there was an aggregate increase of a total of 14,103.7 hectares. The unexplained increase in acreage of the land parcels is the source of the problem. The respondents contended that the increases were what caused the encroachment onto the forest land. The respondents' submission is that the titles that were created over what was essentially forest land, were unlawfully and irregularly acquired and ought to be cancelled and the forest rehabilitated and conserved.

138. The parties did not dispute that before the Group Ranches were allocated the land through the process of land adjudication, the land constituted Trust Land under the Narok County Council. What is in issue are the sizes of the parcels of land that were adjudicated in favour of the group ranches. The objective of the *Land Adjudication Act*, cap 284 Laws of Kenya is summed up in the preamble to the Act thus:-

> " An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust Land, and or purposes connected therewith and purposes incidental thereto

144. Section 3(1) of the Act sets out the land to which the Act applies as follows: -

3.

(1) The Minister may by order apply this Act to any Area of Trust Land if -:

a. The county council in whom the land is vested so requests;

b. The Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered and

c. The *Land Consolidation Act* does not apply to the area:

139. The process of land adjudication under the Act commences by the Minister declaring an area an adjudication section under section 3(2) of the *Act* which provides:-

3. (2) An order under this section shall define the area to which it relates either by description or reference to a plan or both.

140. The Act further sets out in an elaborate manner how the process of adjudication is carried out and in addition establishes a comprehensive dispute resolution mechanism. Any objections to the adjudication process, firstly, lie to the adjudication committee appointed by the Adjudication officer, then to the Adjudication officer and finally to the Minister by way of appeal, whose decision is final. Section 26 of the *Act* reads;

26. Objection to adjudication register

(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection. (Emphasis laid)

Section 29(1) of the *Act* stipulates:

29. Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final. (Emphasis added)

141. We have made extensive reference to the *Land Adjudication Act* because the land that was registered in the names of the Group Ranches from whom the petitioners and the respondents in the cross petition obtained their individual titles, was through the process of land adjudication commenced under the provisions of the Act. That process during the hearing of the petitions was put to question. Where a group, during the process of adjudication is determined to be the owner of land, such group is under section 23(5) of the *Land Adjudication Act* required to be incorporated under the provisions of the *Land (Group Representatives) Act* and such land to be administered in accordance with the said Act. Section 23(5) of the *Land Adjudication Act* provides as follows:-

23.(5) Where a group is recorded as the owner of land or as entitled to an interest not amounting to ownership of land, the adjudication officer shall—

(a) cause the group to be advised to apply for group representatives to be incorporated under the *Land (Group Representatives) Act* (cap 287);

(b) cause the recording officer to record that the group has been so advised; and

(c) notify the Registrar of Group Representatives that the group has been so advised.

142. The objective of the Land (Group Representatives) Act is aptly summed up in the preamble to the Act as follows: -

> " An Act of parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the *Land Adjudication Act*, and for purposes connected therewith and purposes incidental thereto"

143. The five group ranches whose land was subdivided after the dissolution of the groups, had all acquired their land through the process of land adjudication. The final adjudication records furnished to the Land Registrar showed that the 5 affected group ranches had, in aggregate, been adjudicated land

totalling 3,070.54 Hectares as per the evidence by DW2 and DW4 who were respectively the Principal Land Registrar, Narok and Deputy Director, Land Adjudication Ministry of Lands. It was not explained how the adjudicated land area exponentially increased from 3,070.54 Hectares to well over 18,000 Hectares. There was no evidence that after the adjudication process was completed, there were any pending objections and/or any application to alter or amend the adjudication records, as related to the Group Ranches. Under section 27 of the *Land Adjudication Act*, the adjudication record becomes final once all objections to the adjudication within an adjudication section are finalised and the record submitted to the Director of Land Adjudication for onward release to the Chief Land Registrar for registration and processing of titles. Section 27 of the *Act* provides as follows: -

> 27. Finalization of adjudication register, subject to appeals
>
> (1) The adjudication officer shall from time to time alter the adjudication register to conform with any determinations of objections under section 26 of this *Act*.
>
> (2) If the adjudication officer considers that to alter the adjudication register would incur unreasonable expense, delay or inconvenience, he may, instead, recommend to the Minister that compensation be paid and the Minister may make such payment of compensation out of moneys provided by Parliament as he thinks fit.
>
> (3) When all objections have been determined and the time for appeal under section 29 of this *Act* has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall—
>
> (a) alter the duplicate adjudication register accordingly; and then
>
> (b) certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
>
> (c) forward the adjudication register to the Chief Land Registrar together with a list of the appeals.

144. It is evident from the foregoing provision that the adjudication register transmitted by the Director of Land Adjudication to the Chief Land Registrar is final save for any appeals that may have been noted as outstanding. In our view, any alteration to the adjudication register could only be made by the Adjudication officer under section 27(1) of the *Land Adjudication Act* and/or by the Director of Land Adjudication following the determination of an appeal by the Minister under section 29(3) of the Act. The chief Land Registrar would in our view, have no mandate and/or authority to alter any adjudication register.

145. As per the evidence, Ololunga of Osupuko Division Narok was declared an Adjudication Section on November 6, 1973; Ngoben; and Olomutiok of the same Division were declared as Adjudication Sections on July 25, 1975. Reiyo Group Ranch was within the Ngoben Adjudication Section, while Nkaroni, Enakishomi and Enooosokoni Group Ranches were within the Ololunga Adjudication section. Sisiyan Group Ranch was within Ilimutiok Adjudication section. Notices of completion of Adjudication Registers for Ngoben, Ololunga and Ilmotiok Adjudication sections were issued on February 16, 1979, March 10, 1977; and May 22, 1978 respectively. The certificate of finality for Ngoben Adjudication section was issued on 30th June 1980; and that of Ololunga and Llmotiok Adjudication sections were issued on June 24, 1980 and May 9, 1980 respectively.

146. After the certificate of finality was issued, the parcels of land adjudicated and demarcated in favour of the Group Ranches were registered in their respective names before the Group Ranches were dissolved

and members issued with individual titles after subdivision. As per the extract of titles exhibited, the Group Ranches parcels were registered as follows:-

i. Enakishomi Group Ranch- 10/7/1980- Narok/CIS-Mara/Ololunga/115 measuring Approx.844.5 Ha.

ii. Nkaroni Group Ranch-10/7/1980- Narok/CIS- Mara/Ololunga/118 measuring Approx 1597.5 Ha.

iii. Sisiyian Group Ranch-11/9/1980- Narok/CIS-Mara Ilmotiok/375 measuring Approx 447.5 Ha.

iv. Reiyo Group Ranch- 13/11/1980- Narok/CIS-Mara/Nkoben measuring Approx 26.0 Ha.

v. Enosokoni Group Ranch-date of registration not available-Narok.Cis-Mara/Ololunga/110 measuring Approximately 155 Ha.

147. In the register for land parcel Narok/CIS-Mara/Nkoben/34 in the name of Reiyo Group Ranch, there is an endorsement on the face of it, presumably by the Land Registrar amending the area from 26.0 Ha to 878.58 Ha with a notation "Area Amended under sect 142(1)(c) – See mutation No.165645-4/8/03". We presume the reference to section 142 (1) (c) relates to the Registered *Land Act*, cap 300 Laws of Kenya (now repealed) which provided for rectification by the Registrar as follows:-

142.

(1) The Registrar may rectify the register or any instrument presented for registration in the following cases –

(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all persons interested;

(c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.

148. We note that the mutation referred to as proving the basis for the amendment was not exhibited by any of the parties. It was therefore, not possible to verify who prepared the mutation and/or at whose request or instance. We however, note that the purported amendments to the various sizes/ areas of the referenced Group Ranches' parcels of land, were effected after the adjudication process was completed and finalised. The adjudication registers that were submitted by the Director of Land Adjudication to the Chief Land Registrar in regard to the Group Ranches and which were used to register their respective parcels of land, were pursuant to sections 27 and 29 of the *Land Adjudication Act* final and not liable to be amended. It is our view therefore, that the purported amendment of the adjudication register to vary the adjudicated land parcels' sizes, was unlawful and irregular. The Land Registrar lacked the mandate and/or authority to effect any alterations to the adjudication register and any amendments and/or alterations effected on the register were unlawful, illegal and null and void.

149. The declarations made under section 5 of the *Land Adjudication Act*, chapter 284 Laws of Kenya declaring Ngoben, Ololunga and Ilimutiok, all in Narok, adjudication sections, gave a concise description of the area in regard to which the adjudication was applied. The declarations complied with

the provisions of section 5(2) of the *Land Adjudication Act* which stipulated what such a declaration must contain. Section 5(2) of the Act provides thus: -

> 5. Establishment of adjudication sections
>
> 5.(2) A separate notice shall be published in respect of each adjudication section, and in each such notice the adjudication officer—
>
> (a) shall define as clearly as possible the area of the adjudication section;
>
> (b) shall declare that interests in land within the adjudication section will be ascertained and recorded in accordance with this Act;
>
> (c) shall fix a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer, either in writing or in person or by his agent duly authorized according to law (including recognized customary law). (Emphasis added)

150. In the case of Ngoben and Ilimutiok Adjudication sections, all persons who were claiming any interest in land within the adjudication sections, were required to make their claims to the recording officer not later than November 30, 1975. In the case of Ololunga Adjudication Section, all persons with claims/ interest were required to make their claims to the recording officer not later than February 6, 1974. After all the claims were collated, the respective Adjudication officers issued Notices of completion of adjudication registers for the respective adjudication sections referred to earlier in the judgment. After the objections lodged following the notification of the completion of the adjudication register were handled, the Director of Land Adjudication issued the certificates of finality in regard to the Adjudication sections referred to earlier in the judgment, rendering the Adjudication Register final in all respects.

151. In our considered view, the adjudication process as at the time the Director of Land Adjudication issued the certificate of finality, was complete. Once the adjudication register was submitted to the Chief Land Registrar under section 27(c) of the *Adjudication Act*, the only role the Chief Land Registrar had, was to effect registration in accordance with section 28 of the Act. The Chief Land Registrar does not have any mandate or jurisdiction to alter or amend an adjudication register submitted under section 27(c) of the Act by the Director of Land Adjudication. The power of the Land Registrar to rectify as donated by section 142 of the Registered *Land Act* (repealed) and now under section 79 of the *Land Registration Act, 2016*, (2012) cannot extend to rectifying or altering an adjudication register.

Validity or otherwise of the titles created over the group ranches increased land above the adjudicated acreage.

152. The respondents have argued and submitted that the extra and/or additional land that the Group Ranches acquired over and above what was adjudicated in their favour under the adjudication process, was acquired unlawfully and illegally. They have submitted that as a consequence of the unlawful and illegal acquisition, the five group ranches whose parcels bordered the Maasai Mau Forest have encroached onto what in reality, was forest land by exponentially increasing their land parcels through unlawful, irregular and illegal means. The respondents have submitted that the individual titles that were created from land that was unlawfully and irregularly acquired cannot be valid and have urged the court to annul and/or cancel the same.

153. In countering the respondents submissions, the petitioners and the interested parties who supported the petition have argued and submitted that they hold titles that were duly issued by the Government of Kenya and the same should be held to be valid and given legal protection. The interested parties who

purchased their land from the original allottees claim, they are innocent purchasers for value without any notice of any defect in the titles they acquired. They contended on that account, their titles were indefeasible.

154. In the petitions before us, we do not understand the respondents to be challenging the initial adjudication process that resulted in the five group ranches being registered as the owners of the various parcels of land in 1980 with the acreages as shown at the time the adjudication register was registered. What is in contestation is the land that was apparently increased and/or added to the land parcels that were adjudicated to the five group ranches. The respondents contend that the added land resulted in encroachment on the forest land. They argue that there was no due process followed and that rendered the encroachment unlawful and illegal. The petitioners did not adduce any evidence to show and/or illustrate how and by what means the initially adjudicated land parcels belonging to the five group ranches increased their land sizes from about the year 2000 after a period of more than 20 years from the date the adjudication process was completed.

155. We have evaluated the adjudication process as relates to the five group ranches, Reiyo, Enakishomi, Sisiyan, Enoosokon and Nkaroni and are satisfied their parcels of land were duly adjudicated and the process completed in 1980 when their adjudication registers were registered by the Chief Land Registrar and land registers opened in their individual names in respect of their distinctive land parcels. We find that the alterations effected in the respective land registers which in effect altered the adjudication register, was without any due process being followed and was unlawful and null and void. The five group ranches bordered forest land and though the Maasai Mau forest was not a gazetted forest, it was an unalienated forest land which fell under the mandate of the Narok County Council at the time the activities occurred. It was part of Trust Land under the jurisdiction of the Narok County Council and hence constituted a community forest and could not be alienated unless a formal process of setting apart and excision of the forest land for some declared purpose was followed as provided under section 117 of the repealed Constitution and Section 13 of the Trust *Land Act*. The petitioners did not present any evidence that either the National Government or the County Council of Narok made any declaration/resolution to set apart and/or excise any part of the forest for human settlement.

156. Clearly, section 4 of the Forests Act cap 385 Laws of Kenya (repealed by the Forest Act, 2005) stipulated as follows:-

> 4 (i) The Minister, may from time to time, by notice in the Gazettee:-
>
> a. Declare any unalientated Government land to be forest area;
>
> b. Declare the boundaries of forest and from time to time alter those boundaries;
>
> c. Declare that a forest area shall cease to be a forest area.
>
> (2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1) twenty-eight days notice of intention to make the declaration shall be published by the Minister in the Gazette.

157. Other than the adjudication process that culminated with the five Group Ranches being registered as owners of defined and specified parcels of land in 1980, there was no evidence of any other process through which any additional land forming part of the community forest or Maasai Mau forest land was alienated and/or allocated. We, in the premises, are constrained to agree with the respondents that the allocation of additional land to the five group ranches outside the adjudicated land, constituted unlawful encroachment onto forest land. Any land titles issued over any such land were unlawful, illegal and null and void.

Whether there was unlawful evictions?

158. The petitioners have submitted that the evictions carried out by the government against persons who purportedly were living in the Maasai Mau Forest, were carried out in an inhumane manner characterised with violence, destruction of properties including schools, and without any resettlement and/or protection of the rights of the petitioners. The petitioners also submitted the evictions violated their constitutional rights and failed to adhere to the United Nations Basic Principles and Guidelines on Development based Evictions and Displacement of 2007 (The said UN Guidelines were vide the Land Laws (Amendment) Act No 28 of 2016 enacted under section 152G of the *Land Act, 2016*. The petitioners argued that their right to housing under Article 43 and their children's rights under article 53 of the *Constitution of Kenya,2010* were violated and further that the respondents acted in violation of international conventions and protocols to which the government was signatory to, and which form part of our laws by virtue of article 2(5) and (6) of the *Constitution*.

159. The respondents submitted that owing to the unlawful encroachment onto the forest, there was degradation and unprecedented destruction of the forest and a need to protect, conserve and rehabilitate the forest. The respondents stated that on May 30, 2018, the Government issued a public notice requiring all illegal settlers to move out of the forest. The government thereafter set out to sensitise the public and the affected persons of the need to conserve and rehabilitate the forest by having all the illegal occupants vacate the forest land peacefully through an operation christened "*Okoa Msitu Wa Mau*".

160. Through the operation, the affected persons were assisted to move out and to remove their structures while also the vacated areas were secured and prepared for rehabilitation through reforestation by replanting trees. The respondents stated that the majority of the affected people moved out voluntarily and peacefully before the expiry of the notices and denied there was any forceful eviction as alleged by the petitioners. The respondents further submitted that the petitioners admitted that notices to vacate from the forest were issued prior to the evictions as was attested in the written statements of Christopher Kiplangat Bore, Simon Lapapa Tankae. Namunyaki and Joseph Tesoi arap Rotich who were listed as witnesses for the petitioners.

161. The respondents contended that Maasai Mau Forest was a public facility that was of vital significance and importance as a water catchment area and was for the benefit of many people within Kenya and within the East African region, That livelihoods were dependent on water whose catchment was the Mau Forest Complex of which the Maasai Mau Forest was a part. The respondents therefore, submitted that as the Maasai Mau Forest had never been set apart as a settlement, it needed to be protected and conserved for posterity. The respondents referred the court to section 27 of the Forest Act 2005 (now repealed) and section 34 of the *Forest Conservation and Management Act*, 2016 to illustrate the procedure that needed to be followed to allocate forest land. Section 27 of the Forests Act, 2005 provided as follows:-

> 27 (1) A notice under this Part which is proposed: - (a) to vary the boundaries of a state or a local authority forest; or
>
> (b) to declare that a forest shall cease to be a state or local authority forest shall only be published where the proposal is recommended by the Service in accordance with subsection (2) and is subsequently approved by resolution of Parliament.
>
> (2) The Service shall not recommend any such proposal unless;-

(a) it has been approved by the forest conservation committee for the area in which the forest is situated; b) it is satisfied that such variation of boundary or cessation of forest proposed by the notice:-

(i) shall not endanger any rare, threatened or endangered species;

(ii) does not adversely affect its value as a water catchment area; and

(iii) does not prejudice biodiversity conservation, cultural site protection of the forest or its use for educational, recreational, health or research purposes.

(c) the proposal has been subjected to an independent Environmental Impact Assessment; and

(d) public consultation in accordance with the Third Schedule has been undertaken and completed in relation to the proposal.

162. The above provision in the repealed Forests Act, 2005 was reintroduced under section 34 of the *Forest Conservation and Management Act*, of 2016 that replaced the Forests Act, 2005 in more stringent terms. In the latter Act, it was parliament through a petition, that was given the mandate to degazette and/or vary the boundaries of a public forest after due consideration of the various factors spelt out under the Act. Section 34 (1) and (2) of the *Forest Conservation and Management Act 2016* stipulates that: -

34. Variation of boundaries or revocation of public forests

(1) Any person may petition the National Assembly for the variation of boundaries of a public forest or the revocation of the registration of a public forest or a portion of a public forest.

(2) A petition under subsection (1) shall demonstrate that the variation of boundaries or revocation of the registration of a public forest or a portion of a public forest does not —

(a) endanger any rare, threatened or endangered species; or

(b) adversely affect its value as a water catchment area; and prejudice biodiversity conservation, cultural site protection of the forest or its use for educational, recreational, health or research purposes.

163. It was clear from the referenced provisions of the Forests Act, 2005 and the *Forest Conservation and Management Act, 2016* that the degazettement of a public forest and/or the alteration of the boundaries of an existing public forest, has to follow a clearly set out legal procedure and that consideration of any impacts to the environment is vital. If the natural habitat for any threatened or endangered species or a water catchment area and ecology and biodiversity conservation would be affected and/or prejudiced, the degazettement and/or variation of forest boundaries may be denied. That epitomises the importance and significance given to the protection and conservation of forests owing to the vital and critical role they play in environmental conservation.

164. Earlier in this judgment, we have held that the land owned by the group ranches was acquired through the process of land adjudication up to the point at which the adjudication register was submitted by the Director of Land Adjudication to the Chief Land Registrar for registration under section 27(2) of the *Land Adjudication Act*. We have equally held that as there was no due process followed to increase the land parcels of the group ranches which they eventually subdivided and issued individual titles, the increased land was unlawfully and illegally acquired. The titles emanating from the subdivision of the land that was unlawfully and illegally increased over and above the adjudicated land of the group ranches, cannot in our view be valid titles. The argument by the petitioners that trust land could be alienated to benefit the members of the community, is to miss the point. Even if the land is taken to have been trust land, there was a forest thereon and due process required to be followed to alienate the land. There is clear evidence that when the government needed to alienate some of the Trust Land it declared the three adjudication sections that we have dealt with earlier in the judgment and that the adjudication process was completed. The question that the petitioners never provided any answers to is what process was used after the adjudication process had been finalized to have the parcels of the group ranches increased in area several fold. We have determined that there was no valid process that was followed and consequently the excess land over and above the land properly adjudicated, was unlawfully and illegally acquired. We agree with the holding by Nyamweya J (as she then was) in the case of *Joseph Letuya & 210 others v Attorney & 5 others* [2014] eKLR concerning how title to land may be acquired including where land may be forest land. In the case, the Judge stated:-

> " The process of conferring legal and equitable property rights in land under Kenya law is settled, and dependent upon formal processes of allocation or transfer, and consequently registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated. The applicant did not bring evidence of such processes of allocation of title to land located in Mau Forest and solely relied on their long occupation of the same".

165. In the case of *Timothy Ingosi & 87 others v Kenya Forest Services & 2 others* [2016] eKLR Ombwayo, J faced with a situation where the plaintiffs had been allocated what was forest land without due process being followed to degazette and to excise the land from the forest, stated thus:-

> " The sad situation in this case is that due process was not followed. In my view without altering the boundaries of the forest by de-gazettment and following due process, the land in dispute was not available for allocation and therefore the title deeds issued over the suit land were and remained questionable until due process is followed."

166. The judge proceeded to hold that the forest land was not available for allocation and that the land was irregularly allocated to the plaintiffs and that the titles held by the plaintiffs were irregularly acquired. However owing to the long period of occupation by the plaintiffs, the Judge gave the government a window of two years to consider whether to regularise the process of alienating the affected forest land but otherwise dismissed the plaintiffs suit seeking to be declared as the lawful owners of the suit land.

170. In the petitions before us, the petitioners, as we have observed, adduced no evidence to show the process that led the land parcels of the group ranches to increase from the adjudicated sizes to sizes in some of the instances that were more than twenty times of the adjudicated area. We have held that the increments were unlawful and that the additional land encroached onto the forest land. The encroachment was unlawful and the petitioners were not entitled to the land. The government was entitled to give notice to all those persons who had encroached onto the forest to vacate. We

have observed earlier that the Mau Forest complex was a water catchment area and many livelihoods depended on it both locally and regionally and there was need for the Mau Forest Complex ecosystem to be protected and conserved.

171. The submissions by the petitioners that they were forcefully evicted without any regard to their human dignity is not supported by any evidence. What however, cannot be disputed is that there were evictions that were prompted by the notices to vacate from the forest served by the government.

172. There was admission by the petitioners that indeed, notices to vacate were issued by the government. The issue is whether the evictions were effected forcefully and /or in an inhumane manner and if there was justification for the evictions. The petitioners have submitted that the government effected the evictions without any regard to the petitioners' rights as enshrined in the *Constitution* and in breach of United Nations Guidelines on steps that ought to be taken in effecting evictions where large groups of people stood to be affected. These guidelines were through the Land Laws (Amendment) Act, 2016, introduced and inserted as an amendment to the *Land Act, 2012* under section 152 G which provides thus:-

152 G. Mandatory procedure during eviction

i. Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedure-

a. Be preceded by the proper identification of those taking part in the eviction or demolitions;

b. Be preceded by the presentation of the normal authorizations for the action;

c. Where a group of people are involved, government officials or their representatives to be present during an eviction;

d. Be carried out in a manner that respects the dignity, right to life and security of those affected.

e. Include special measures to ensure effective protection of the group and people who are vulnerable such as women, children, the elderly, and persons with disabilities;

f. Include special measures to ensure that there is no arbitrary deprivation of property or possession as a result of the eviction;

g. Include mechanisms to protect property and possessions left behind involuntarily from destruction;

h. Respect the principles of necessity and proportionality during the use of force; and

i. Give the affected persons the first priority to demolish and salvage their property.

(2) The cabinet sectary shall prescribe regulations to give effects to this section.

173. Under subsection (2) of the above cited provisions, the Cabinet secretary was required to prescribe regulations to give effect to the provisions of section 152 G (1). Although no formal regulations made under section 152G(2) were brought to our attention, we note that Land Regulations, 2017 (LN 280/2017), were made under the *Land Act* and under part VIII, regulations 63 to 70 made provisions

for conduct of evictions that effectively give effect to the provisions of section 152G (1) (*supra*). The regulations touch on the identity of the persons effecting the evictions, by whom such persons are authorised, time for carrying out of the evictions, protection of property and possessions, and service of notices on the affected persons. The regulations are tailored to ensure orderly evictions and respect for human dignity. In the present matter, we have observed that notices were issued. The consideration in our view, must be whether the respondents acted civilly, reasonably and in a humane manner in effecting the evictions. If they acted callously, caused injury and wanton destruction and damage to property, and without regard to the human dignity of the affected persons, then and notwithstanding the persons were unlawfully encroaching onto forest land, the evictions would be unlawful and in violation of the affected persons' rights.

174. The respondents through the various Task Forces that had been set up to address the issue of the illegal encroachment into the Maasai Mau Forest, that had resulted in serious degradation of the environment through illegal human activities, affirmed that indeed there was illegal encroachment onto the forest. The findings by the Task Force formed by the office of the Former Prime Minister in 2009, confirmed that the five group ranches during subdivision of their respective parcels of land, had far exceeded the portions of land they were entitled to and had encroached onto the forest and curved out land titles in forest land. This led to the invasion of the forest and settlement of people therein and the resultant degradation of the forest through logging, charcoal burning, cultivation, grazing and wanton cutting down of trees. The respondents' position was that they were duty bound and obligated to conserve as well as protect the environment as the *Constitution* demands, in that regard, they gave notice to the unlawful and illegal encroachers in the forest to vacate from the forest land.

175. The petitioners have set up as proof of ownership the land titles they held, acquired in the swathe of land encroached upon in the forest land. The forest land constituted public land and could not be alienated otherwise than in accordance with the law. The appropriate procedure to alienate forest land and /or trust land having not been adhered to, the titles held by the petitioners over the illegally alienated land, were invalid and were liable to be cancelled. The titles were issued over what was essentially public land and the title holders could not lawfully set up the titles to defeat the public interest. The Court of Appeal in the case of *Kenya Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR cited with approval the case of *Republic v Minister for Transport & Communication & others, Ex parte Waa Shio Garbage Collector & 15 others* Mombasa HCMCA No 617 of 2003 [2006] I KLR (E&L) 563 where Maraga, J (as he then was) stated thus:-

> " Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of indefeasibility of title deed---It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the *Constitution* or under section 1 and 1A of the *Constitution* or under the doctrine of public trust a title would be nullified because the *Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public trust and resources in trust for the needs of society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the *Constitution*"

Nyamu, J (as he then was) expressed similar views in the case of *Mureithi & 2 others (for Mbari ya Murathimi Clan) v Attorney General & 5 others* Nairobi JCMCA No 158 of 2005 [2006] 1 KLR 443 where he stated thus:-

> "should the land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forest?

How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the courts to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the *Constitution*? I venture to suggest that such titles ought to be nullified on this ground and thrown into the dustbin!".

176. The activities that led to the unlawful encroachment onto the Maasai Mau Forest from the evidence, occurred in the late 1990's and between 2000 and 2005. The purported amendment /alteration of the land register occurred around the years 2000 and 2003. This was about the period that land grabbing had reached its heights in Kenya when public land and any unoccupied land whether private and/or public, was targeted for alienation. Public officials working in the Ministry of lands particularly within the Commissioner of Lands offices and the Land Registries, were compromised to make unlawful and illegal allocations and/or to falsify ownership records resulting in the widespread unlawful and illegal allocations and fraudulent land registry records. The 2010 Constitution under article 40(6) and the *Land Registration Act 2012* under section 26(1)(a) & (b) in responding to this menance categorically provided that land obtained unprocedurally and/or illegally, and land title that is shown to have been fraudulently and/corruptly acquired would not be protected under the law. The same would be liable to be cancelled.

177. The government was entitled to take action to reclaim forest land that had been unlawfully and illegally alienated. The petitioners were given notice to vacate from the forest and the government had justification to enforce the notices to vacate. The evidence that the majority of the illegal and unlawful occupants of the forest voluntarily and without any use of force vacated from the forest, was not controverted and we accept that as factual. The petitioners never led any evidence that force was applied to get them to vacate from the forest land. The government did infact set up the operation "Okoa Msitu Wa Mau" which apart from sensitizing the occupants of the need to vacate from the forest, was also assisting with transportation and in demolishing of structures where required. We find no evidence to support the petitioners' assertion that the evictions were unlawful and/or were forcibly carried out by the respondents.

Whether the titles created and issued over the disputed forest land were valid?

178. The petitioners have premised the petition on the fact that they held what they asserted were valid titles that had been issued by the government. They denied that they had encroached onto forest land. The petitioners were notably supported in regard to their claim of sanctity of title by some of the interested parties who were joined to the petitions by the respondent by way of cross petition as respondents. In the cross petition, Ms Muigai acted for Rukuti Ole Koriata, Sanja Ole Sankei and Looyieyio Ole Ntutu who were named as respondents 185, 232, 283, 191, 251, 290; and 465 respectively. It was their position that they had validly acquired their titles and therefore, the same ought to be protected under the law as they were bonafide owners of the land.

179. We have determined and held that the land added to the initial adjudicated land in regard to the five group ranches, was unlawfully and illegally acquired as due process was not followed in the allocation. The additional land comprised forest land that had not been lawfully set aside/or degazetted to enable the same to be used for settlement. Article 40 of the *Constitution of Kenya, 2010* provides for protection of land rights and specifically provides under sub article (3) that a person should not be deprived of his property unless the property is required for a public purpose in which event prompt compensation for the property should be made. However, article 40(6) of the *Constitution* provides that property that

is unlawfully acquired is not protected. We set out hereunder article 40 of the *Constitution* for ease of reference:-

> 40. Protection of right to property
>
> (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—
>
> (a) of any description; and
>
> (b) in any part of Kenya.
>
> (2) Parliament shall not enact a law that permits the State or any person—
>
> (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
>
> (b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4).
>
> (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
>
> (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
>
> (i) requires prompt payment in full, of just compensation to the person; and
>
> (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
>
> (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
>
> (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
>
> 6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. (emphasis added).

180. It is clear having regard to article 40(6) of the *Constitution* that not all titles deserve protection of the law. One cannot merely waive a title and claim protection just because he/she holds a title. The process and procedure of acquiring the title is equally vital and important. If the title was acquired unlawfully or illegally, such a title cannot deserve the protection of the law. The *Land Registration Act, 2012* section 26(1) buttresses the provisions of the *Constitution* and provides the instances under which a proprietor's title may be challenged. A title acquired fraudulently and/or through misrepresentation or unprocedurally or through corruption may be challenged. Section 26(1) of the *Land Registration Act, 2016* reads as follows:

> 26. Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall

be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

181. The courts have in instances where it is proved that a title was acquired fraudulently and/or unprocedurally, declared such titles void and cancelled the same. The Court of Appeal in the case of *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR while holding the doctrine of indefeasibility of title has limitations where it is shown a title was procured fraudulently or unprocedurally, the court stated thus: -

> "...We have considered the provisions of section 26 of the *Land Registration Act* in light of the provisions of article 40(6) of the *Constitution* and it is our considered view that the concept of indefeasibility of title is subject to article 40(6) of the *Constitution*. Guided by the provisions of article 40(6) of the *Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired..."

Further. in the same case. the court held as follows:-

> "Article 40(6) of the *Constitution* clearly stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired. The appellant relied on the doctrine of estoppel arguing that the commissioner of Lands is estopped from denying that he has a good title. It is our view that estoppel cannot be used as shield to protect unlawfully acquired property; estoppel cannot be used to circumvent constitutional provisions and estoppel cannot override express statutory procedure; there can be no estoppel against a statute.(see *Tarmal Industries Ltd v Commissioner of Lands & Excise*, (1968) EA4H; see also *Maritime Electronic Co Ltd v General Dairies Ltd* [1937] All ER 748)."

182. In a separate case, the Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR held that where a proprietor's title was under challenge, it was not sufficient for such a proprietor to wave the certificate of ownership to prove ownership. The process and procedure through which the title was acquired was a relevant factor to be considered. The court in the case stated:-

> "We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony"

183. In the petitions before us, the petitioners were aware that the respondents were questioning and challenging the titles that emanated from the land that was increased and/or added to the initial adjudicated land. The petitioners made no effort to explain the process that resulted in the increase of the land parcels from the adjudicated land sizes to the sizes that were subjected to subdivision. For instance, no official of the Group Ranches testified to offer any explanation. It is our considered view that the petitioners did not prove that the additional land was acquired lawfully by the group ranches. As we have held, the land was acquired irregularly and unprocedurally, the petitioners could not have acquired valid titles when the process through which the head title was acquired was flawed. It is our determination that the titles acquired out of the unlawfully and illegally acquired land by the group ranches were not valid. The group ranches could not give good titles, if they themselves never had good title to the land. The titles were unlawfully issued and in our view, cannot be sustained. They are null and void and are for cancellation.

Whether the petitioners are entitled to compensation for unlawful eviction and damages to their properties?

184. We have held that there were no unlawful evictions. The petitioners did not adduce any evidence to prove that the evictions were forceful and/or inhumanely carried out. To the contrary, the respondents established that the persons who were given notice to vacate from the forest were those who had encroached onto the forest land. Many of them obliged and vacated on their own volition and some even surrendered the titles they held to the land unlawfully allocated to them. Although no certified and authenticated survey Map delineating the forest Land was availed, there was uncontroverted evidence that the land that was adjudicated to the group ranches, was many times less than the land that the group ranches ultimately availed for subdivision for settlement of their members and other persons. The petitioners would only have been entitled to compensation if there was proof the land they were evicted from lawfully belonged to them and/or if it was proved that the evictions were carried out in a manner that violated the rights of the petitioners. We have held that the evictions did not offend any constitutional or statutory provisions and/or any international conventions and/or instruments such as the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR), the *International Convention on Economic, Social and Cultural Rights* (ICESCR) and the optional Protocols to the ICCPR.

185. In the case of *Clement Kipchirchir & 38 others v Principal Secretary Ministry of Lands Housing and Urban Development & 3 others* [2015] eKLR Munyao, J dealing with a similar matter where there had been evictions out of forest land and the evictees petitioned the court seeking a declaration that the evictions violated their right to property, freedom and dignity and in the alternative, compensation of the property at current market values inter alia, stated thus: -

> "60. The general position in international law is that where it is necessary for persons to be evicted, such persons need to be evicted in a humane way, and alternatives offered to them. It is not the position that a state is barred by *ICCPR* or the *ICSCER* from evicting persons. Evictions are indeed permissible so long as the eviction is justified; that there are adequate safeguards to protect the dignity and security of the persons, and alternatives are provided. We cannot say that the evictions of the petitioners was in any way arbitrary or that there was no justification for it. The petitioners were in illegal occupation of the Mau Forest complex, an important ecological pillar and lifeline to a myriad of species, not to mention that it is probably the most important water catchment in the country. The importance of the Mau Forest is well captured

in the Report of the Prime Minister's Task Force on the conservation of the Mau forest complex attached to the replying affidavit of the 3rd Respondent--"

186. In our view, the eviction of the petitioners was without doubt justified as the intention of the respondents, clearly, was to recover forest land that had been unlawfully and illegally alienated. The purpose was to restore, rehabilitate and conserve the Mau Forest which has its pride of place as the largest water tower in Kenya and is of great ecological value. Indeed, many Kenyan lives and many animal species depend on the Mau Forest and any destruction of the Mau Forest Complex ecosystem, would be prejudicial to their interests.

187. On the issue whether or not the evictees from the Maasai Mau Forest deserved to be compensated, we think not. The petitioners did not prove they were lawful owners of the property and the evictions in our view were lawfully carried out. The titles the petitioners held were invalid having been acquired out of land that had been irregularly acquired. We see no basis for any compensation to be awarded to the petitioners. Their titles were unlawful, their occupation illegal and the evictions were justified.

In the case of *Clement Kipchirchir & 38 others v Principal Ministry of Lands Housing and Urban Development & 3 others* (*supra*) Munyao J observed as follows on the question of compensation in regard to unlawfully acquired titles;

> " 50. Having held above, that the titles of the petitioners were not lawfully acquired can the petitioners then be entitled to compensation for the value of the land for which they held titles? My short answer is no. One cannot seek compensation for something that has been acquired unlawfully unless there is an express provision in the law. To hold otherwise would be an absurdity".

188. We have considered whether the provisions of article 40(4) of the *Constitution* would come to the aid of the petitioners, on the basis that they were occupants in good faith, but our view is that article 40(4) of the *Constitution* relates to property acquired by the state for any of the specified purposes under article 40(3) of the *Constitution*. In the instant case, the Maasai Mau Forest was always a public forest and had never been alienated save for the land that had been lawfully adjudicated under the provisions of the Adjudication Act. The state in the present case, was not invoking the provisions of Land under article 40(3) as the land already belonged to the government. The government could not compensate persons who, in essence, were illegal occupiers of its land. We therefore, hold that article 40(4) of the *Constitution* was not applicable in the circumstances of the instant case. It is our view that where land is found to have been illegally acquired, any resultant titles from the subdivision of such land cannot acquire validity even if such title is acquired by a third party who may not necessarily have had any knowledge and/or notice of how the mother title may have been acquired. We believe this is necessary to forestall fraudsters from having a field day in the knowledge that they can unlawfully and illegally acquire land and pass it on immediately to innocent and unsuspecting third parties without any repercussions to them. Let fraudsters take note that innocent and bonafide purchasers who end up acquiring void titles have recourse to them in the event the titles are declared void and are cancelled. We subscribe to the observation by the Court of Appeal in the case of *Funzi Island Development Ltd & 2 others v County Council of Kwale & 2 others* [2014] eKLR that :-

> " A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title"

189. We appreciate that some of the interested parties, who are respondents in the cross petition may have innocently acquired titles from the group ranches or group ranch members following the subdivision of the group ranches' parcels of land. However, as we have argued above, since the land had been

unlawfully acquired, the titles created from such land were irregular and unlawful and therefore null and void. These titles deserve to be cancelled. For the reasons we have advanced, the interested parties are not entitled to be compensated for the land and/or to be given altenative land by the government. The interested parties recourse would be against the persons who allocated them land and/or sold the land to them.

190. We have agonised concerning the role and responsibility of the government officers, notably the Land Registrar who plainly played some role in the unlawful allocation and alienation of forest land without due process having been followed. The Land Registrar, no doubt, was privy to all the adjudication records, and was presumed to know the provisions of the *Land Adjudication Act*, and his role as pertains to the adjudication process. That he could purport to amend/alter the adjudication register to increase the land adjudicated several fold, when by law, he could not do so bothers us. Also, there must have been surveyors involved though we were not given any evidence as to how the survey that increased the adjudicated land was authorised. It does appear to us that there must have been a scheme to grab forest land and that several government officers were roped in the scheme to facilitate the evil design. So, a huge chunk of forest land was alienated resulting in the encroachment by settlers which led to the wanton and rampant destruction of part of the forest and the degradation of the ecosystem. We are of the view that public officers that abuse their offices to the detriment of the public interest and /or indeed, to the detriment of innocent third parties, ought to be held to account and should take responsibility of their acts. Perhaps the law should be amended to make such officers culpable in such situations. It is the acts of such officers that quite often give rise to myriad litigation and/or make the determination of such litigation difficult as the courts are denied the benefit of critical evidence that otherwise would have assisted in the adjudication of the disputes. We will say no more, save to express our disapproval as regards the misguided acts of such officers that expose the state and the public to unnecessary disputes that arise as a result of their nefarious acts.

Whether the Maasai Mau Forest should be delineated and conserved?

191. During the hearing of the petition, it was evident that there was no clear delineation of the forest land and the settlement land. The parties did not tender in evidence any authenticated survey Map showing the delineation and extent of the forest land and the bordering settlements. Reference was however, made to an unauthenticated Map of the entire Mau Forest complex and it was pointed out to the court where the five group ranches' parcels of land were situated and it was clear they all bordered the forest. The petitioners' position was there was a cutline and that the forest land and the settlement land was separated by the Nyayo Tea Zone that was introduced to act as a buffer to prevent encroachment into the forest but was not the boundary. What however, was not in dispute was there was a forest that bordered the land adjudicated to the group ranches but the extent and boundary of the forest on the settlement side remained unclear and undefined.

192. The respondents have maintained that their objective in giving the illegal occupants in the forest notice to vacate was so that they could reclaim encroached forest land and to restore and rehabilitate the Maasai Mau Forest which was part of Mau Forest Complex which was a critical water tower upon which many lives and species depended. We accept that Maasai Mau Forest is part of the Mau Forest Complex and is a water tower of critical importance and a biodiversity hot spot. The Mau forest ecosystem requires to be maintained and sustained if the full benefits of the Mau Forest complex is to be realised. Article 42 of the *Constitution* declares that every person has a right to a clean and healthy environment and right to have the environment protected for the benefit of both the present and future generations. It provides as follows:-

    42. Environment

Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69; and

(b) to have obligations relating to the environment fulfilled under article 70.

Article 69 of the *Constitution* obligates the state and every person to co-operate in the conservation and preservation of the environment. Article 69(1)(a), (b), (f), (g), (h), and (2) read together speak to those obligations. Article 69(1) of the *Constitution* provides as follows :-

69. Obligations in respect of the environment

(1) The State shall—

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

(d) encourage public participation in the management, protection and conservation of the environment;

(e) protect genetic resources and biological diversity;

(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources

193. Having regard to the above constitutional dictates, it is clear what is expected of everybody as regards matters of environment. Neither the government nor the court can abdicate their responsibilities when it comes to safeguarding and conserving the environment. The government had a clear duty and obligation to ensure the Maasai Mau forest was not depleted through illegal allocations and we applaud the government for stepping in to ensure the degradation of the Maasai Mau Forest was not escalated by what was, no doubt, unlawful encroachments. The Maasai Mau Forest and indeed, the entire Mau Forest complex needs to be conserved and protected. It cannot be gainsaid why the Mau Forest complex requires to be protected and conserved as a critical water tower. The environment serves the present generation and the future generation and hence there is necessity that the environment is not degraded to the prejudice of the future generations in the spirit of the preamble to the *Constitution* of Kenya, 2010 and section 18(a)(iv) of the Environment and *Land Act, 2015* (2011). Whatever developments

that are undertaken by the government and/or the citizenly must have regard to the protection and conservation of the environment in tandem with article 69(2) of the *Constitution*.

194. We therefore, have no hesitation in holding that there is need to conserve and protect the Mau Forest Complex for the wider interest of the public so that the present and future generations can enjoy its benefits.

What reliefs should the court grant?

195. We believe we have addressed all the identified issues and now turn to consider the reliefs and/or orders that we should finally make in disposition of the twin petitions and the cross petition. On the evidence, we are satisfied the petitioners have not proved the petition to the required standard. The petitioners did not prove that any of their constitutional rights were violated as alleged in the petitions. We dismiss both Petitions 12 and 13 in their entirety for lack of merit.

We are satisfied that the cross petition by the Cabinet Secretary, Ministry of Land and Physical Planning, Cabinet Secretary, Ministry of Interior & Co-ordination of National Government, County Commissioner, Narok County Commandant, Administration Police and the Attorney General ("the cross petitioners") has been proved on a balance of probabilities. Thus, we allow the same and we make the following consequential orders: -

1. A declaration is hereby issued that the subdivision of Reiyo, Enakishomi, Sisiyian, Enoosokon and Nkaroni Group Ranches beyond the initial acreage at the time of adjudication and first registration was irregular, unlawful, null and void and of no consequence and did not confer to the respondents to the cross petition any proprietary rights over the land.

2. A declaration be and is hereby issued that the subdivided land that was over and above the initial registered acreage of the Group Ranches Land parcels comprised part of Maasai Mau Forest reserve and the same should be restored to the forest.

3. An order is hereby issued that the land titles created following the subdivisions of Reiyo, Enakishomi, Sisiyian, Enoosokon and Nkaroni Group Ranches as set out under prayer (b) in the cross petition were obtained illegally, unlawfully and unprocedurally and hence a nullity ab initio, and constitute unlawful encroachment into the Maasai Mau Forest Reserve, and the said titles are hereby ordered nullified, cancelled and revoked.

4. The respondents in the cross petition who may still be in the forest land (suit properties) are ordered to vacate with immediate effect and in any event within 90 days from the date of the judgment failing which an order of eviction shall issue against them.

5. The respondents/cross petitioners in conjunction with the County Government of Narok are ordered and directed to carry out ground survey with a view of delineating and establishing the Maasai Mau Forest boundary by fixing beacons and/or permanent features designating the extent of the forest having specific regard to the initial acrearages of the registered adjudicated land to Reiyo, Enakishomi, Sisiyian, Enoosokoni and Nkaroni Group Ranches within a period of twelve months from the date of this judgment to ensure the forest is protected and conserved for posterity.

6. That once the Maasai Mau Forest boundary is established as under order (5) above, the respondents/ cross petitioners in order to protect and conserve the forest shall erect a perimeter fence on the portion of the forest abutting the land adjucated to Reiyo, Enakishomi, Sisiyani, Enoosokoni and Nkaroni Group Ranches within 24 months from the date of the judgment

and such fence once erected, shall be maintained by the Kenya Forest Service, the 9th respondent herein.

196. On the issue of costs we are aware that that costs are awarded at the discretion of the court. In public interest ligation cases, the courts are generally slow to award costs against a party as that could stifle and deter public interest litigation to the prejudice of the public whose interest and rights may be at risk.

197. In the present petitions, we are satisfied the matter was of public interest as what was in contest was whether the land allocated to the petitioners was within the Maasai Mau Forest which is a critical national resource. We are of the view that it would be punitive to order the petitioners to bear the costs of the petition. We order that each party shall bear their own costs of the twin petitions and the cross petition.

198. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAROK THIS 13TH DAY OF OCTOBER 2022.

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J. M. MUTUNGI

JUDGE

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M. N. KULLOW

JUDGE

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G.M.A ONG'ONDO

JUDGE