



Osman & 164 others (Suing on Their Behalf and Behalf of Residents of Merti Sub-County, Chari, and Cherab Wards in Isiolo County) v Northern Rangelands Trust & 8 others (Petition E006 of 2021) [2025] KEELC 99 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELC 99 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
PETITION E006 OF 2021
OA ANGOTE, CK YANO & CK NZILI, JJ
JANUARY 24, 2025

BETWEEN

ABDIRAHMAN OSMAN & 164 OTHERS PETITIONER
SUING ON THEIR BEHALF AND BEHALF OF RESIDENTS OF MERTI SUB-COUNTY, CHARI, AND CHERAB WARDS IN ISIOLO COUNTY

AND

NORTHERN RANGELANDS TRUST 1ST RESPONDENT
THE COUNTY GOVERNMENT OF ISIOLO 2ND RESPONDENT
ABDI JARSO 3RD RESPONDENT
GOLICHA JARSO 4TH RESPONDENT
HALKANO GOLLO 5TH RESPONDENT
GOLLO FUGICHA 6TH RESPONDENT
KENYA WILDLIFE SERVICE 7TH RESPONDENT
MINISTRY OF LANDS AND PHYSICAL PLANNING 8TH RESPONDENT
COUNTY COMMISSIONER OF ISIOLO 9TH RESPONDENT

JUDGMENT

Introduction

1. Vide the Petition dated 27th September, 2021, the Petitioners seek the following reliefs as against the Respondents, jointly and severally:



- i. A declaration be and is hereby issued that the Petitioners' constitutional rights have been violated by the actions and omissions of the Respondents herein in relation to establishing conservancies within Chari ward and Cherab ward, Merti sub county, and the entire Isiolo County without public participation of the Petitioners infringed (sic) on the Petitioners rights.
- ii. A declaration be and is hereby issued that Cherab community conservancy operated and chaired by the 3rd Respondent and Bulesa Biliqo community conservancy operated by the 4th, 5th and 6th Respondents are operating illegally in so far as establishing and purporting to establish conservancies in Chari and Cherab wards, Merti sub county and the rest of Isiolo County is concerned.
- iii. The Honourable Court be and is hereby pleased to issue permanent injunction stopping, prohibiting and forbidding the Respondents jointly and severally, whether acting by themselves, their agents, servants, representatives, assignees and/or umbrella bodies of the 1st Respondent and an injunction against any Community Based Organizations acting under the 1st, 3rd, 4th, 5th and 6th Respondents instructions from entering, mapping, surveying and delineating, carrying out conservancy operations, evicting community members, carrying out any activities or in any way disposing the unregistered community land in Chari Ward and Cherab Ward, Merti sub-county and the entire Isiolo county.
- iv. The Honourable Court be and is hereby pleased to issue permanent injunction order stopping, prohibiting and forbidding the 1st, 3rd, 4th, 5th and 6th Respondents jointly and severally, whether acting by themselves, their agents, servants, representatives or assignees or whosoever acting under their instructions from operating or deploying Rangers to operate in any part of Chari and Cherab Ward, Merti sub county and the rest of Isiolo County.
- v. The Honourable Court be pleased to order that the 2nd Respondent to co-ordinate with the 8th Respondent and the Petitioners and offer necessary facilitation on the registration of the community land in Chari and Cherab Ward, Merti sub county under the [Community Land Act, 2016](#).
- vi. That a permanent injunction do issue against the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents jointly and severally, whether acting by themselves, their agents, servants, representatives, assignees from entering into any agreement on behalf of the Petitioners and the community of Cherab ward and Chari ward, Merti sub-county without undertaking documented public participation as mandated by law and without involving the Petitioners.
- vii. The Honourable Court be pleased to issue an order compelling the 7th Respondent to take up all the activities that have been undertaken by the 1st, 3rd, 4th, 5th and 6th Respondents relating to establishment and management of community conservancies within Cherab and Chari wards, Merti sub-county and the rest of Isiolo County to wit all the licenses and authority granted to the 1st, 3rd, 4th, 5th and 6th Respondents or any of its affiliates and umbrella bodies be revoked immediately.
- viii. That this Honourable Court be pleased to grant an injunction stopping, prohibiting and forbidding the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents, whether by themselves, their agents, servants, assignees, licensees, umbrella bodies or any other person working under their authority, instructions or contract, from entering, mapping, surveying, delineating or in any other way disposing the unregistered community land, carrying out conservancy operations, evicting and intimidating community members within Cherab Ward and Chari Ward of Merti sub-county and within the rest of Isiolo County.



- ix. That this Honourable Court be pleased to grant orders compelling the 2nd Respondent to execute its trust mandate relating to the management of the unregistered community land in Cherab and Chari wards as well as the rest of Isiolo County to wit all licenses or authority granted to the 1st, 2nd, 3rd, 4th and 6th Respondents or any of its affiliates and umbrella bodies be revoked immediately.
- x. That this Honourable Court be pleased to grant a permanent injunction against the advertisement, hiring, recruitment, employment or any other form of contractual agreement for or of services of rangers, drivers or other conservancy personnel by the conservancy community based organizations being run by the 1st, 3rd, 4th, 5th and 6th Respondents or any other conservancy or community based organization under the management or patronage of the 1st, 3rd, 4th, 5th and 6th Respondents either by themselves or through anyone acting under their authority or contract.
- xi. That this Honourable Court be pleased to grant an interim injunction against the 1st Respondent either by themselves or through anyone acting under their authority or contract stopping, prohibiting them from erecting any structures on unregistered community land.
- xii. That this Honourable Court be pleased to compel the 7th Respondent to oversee all conservancy operations as mandated by law within Chari and Cherab Ward in Merti sub county as well as the entire Isiolo county.
- xiii. That an order be and is hereby issued barring the 9th Respondent as well as all Officers under his/her instruction including the Deputy County Commissioner-Merti Sub county, Chiefs, Assistant Chiefs and all other National Government Administration officers from interfering in the community land in Chari and Cherab wards of Merti-sub county, Isiolo County.
- xiv. That this Honourable Court be pleased to issue orders compelling, the 9th Respondent and the Isiolo County Police Commandant do oversee the implementation of the orders sought herein and to ensure that peace and order is maintained.
- xv. Any such further/and or other relief that this Honourable Court may deem fit and just to grant in the interests of justice and that may become apparent and necessary in the course of these proceedings.
- xvi. The Petitioners be awarded general damages for losses occurred on alienation of land and loss of land use.
- xvii. The costs of the Petition be borne by the Respondents.

The Petitioners' case

2. The 1st – 168 Petitioners filed the Petition on their own behalf and on behalf of residents of Merti – sub-county, Chari, and Cherab wards in Isiolo County. They filed the Petition pursuant to Articles 3(1) 22(1) and 258 of the *Constitution* seeking to enforce indigenous, pastoralist, and community rights as people living and conducting their daily activities on community land that is jointly and severally owned by them.
3. The complaints by the Petitioners are that the 1st Respondent, working as an umbrella group together with the 3rd -6th Respondents, established and is running community wildlife conservancies in unregistered community land within Isiolo County without express consent, approval, authority, or mandate from them and the community at large.



4. They averred that their efforts to register the community and its community land have been met with untold frustrations by the relevant authorities. They contend that as long as community land registration is pending, any attempts to establish a wildlife conservancy is premature and ought to be stopped.
5. According to the Petitioners, the 2nd Respondent is the constitutionally mandated trustee of all unregistered community land within the County, to hold it in trust and help manage the land until its registration; that in disregard of its mandate and contrary to section 6(8) of the [Community Land Act](#), it has allowed the 1st Respondent and its umbrella bodies to establish and run wildlife conservancies without the participation or the involvement of the community members.
6. It is the Petitioners' case that the 3rd Respondent is the chair of Cherab Community Conservancy whereas the 4th, 5th, and 6th Respondents are the co-founders of Bulesa Biliqo Conservancy and that the 3rd, 4th, 5th and 6th Respondents, under the patronage of the 1st Respondent, have gone ahead to advertise for vacancies to be filed in a purported wildlife conservancy that they intend to establish.
7. The Petitioners averred that the 3rd and 4th Respondents chair and run community-based organizations which purport to represent the community, a blatant misrepresentation as the Petitioners have not publicly participated nor had any dealings in and over the community land.
8. They stated that in their operation of the conservancies, the 1st Respondent has taken extreme measures including arming rangers whose presence in the county elicits tension; that there have been several instances of violence, loss of life, and forceful disappearances as was the case in the establishment of Biliqo Bulesa Conservancy; that the 1st Respondent uses the armed rangers as a private army for quelling any opposition by the community and that as a consequence, there has been a rise in the proliferation of small arms in the region as the members of the community try to defend themselves.
9. As regards the 7th Respondent, it is averred by the Petitioners that it is a uniformed and disciplined service established under [Wildlife Conservation and Management Act](#) 2013 (hereinafter [WCMA](#)) with the mandate to provide security and offer advisory services relating to the conservation of wildlife and the establishment of conservancies and sanctuaries.
10. According to the Petitioners, in abdication of its statutory mandate and without any structure or proper regulation, it has let the 1st Respondent take up the said mandate, who, despite protests and objections from the community, continues to make plans for the establishment of conservancies devoid of any public participation.
11. The Petitioners urged that the establishment of the community conservancies which are at an advanced stage, will disenfranchise the community rendering them homeless, with no grazing land, and will extinguish their important cultural sites such as Kura Disan Owwo graveyard in Ires Roba Sentho, Ires Kira, Ires Saku, Ires Wadha, Ires Ture and Ires Buuna.
12. They asserted that the 1st Respondent's actions, the 2nd and 7th Respondents' complacency and the 3rd-6th Respondents' involvement in purporting to represent the community is creating a risk of human-wildlife conflict consequently threatening their rights to life, property, ownership, human dignity, economic, social, and cultural rights, right to a clean and healthy environment, and that whilst there are clear plans on the establishment of the wildlife conservancy, there is no clarity on the relocation of the community.
13. The Petitioners contended that the 1st Respondent, with the muscle of the rangers and the local administration, continues to intimidate, coerce, and threaten their community leaders when they



- attempt to oppose any of their plans, hence threatening the community's rights to security and human dignity.
14. Further, it was averred, there has been no disclosure of any approvals from the relevant bodies for the 1st Respondent to establish a conservancy, including an Environmental Impact Assessment, Environmental Social-Economic Impact Assessment, Economic Social Impact Assessment, or any feasibility study done on the establishment of the said conservancy despite the fact that the same is bound to interfere with the community's ability to continue with their social and economic life as pastoralists.
 15. It is the Petitioners' contention that the foregoing violates their social, economic, and cultural rights, both as derived from the Constitution and in various International Conventions.
 16. According to the Petitioners, there has been direct and calculated discrimination against, and disenfranchisement of the youths, women, and persons with disabilities in all the activities by the 1st Respondent's move and that as the community does not allow joint forums for men and women during public participation exercise, there was need to set up separate forums to enable each of the identified groups air their concerns.
 17. Additionally, they stated, there has been a lack of involvement of the community elders and elected leaders in all the decisions that have been taken by the Respondents, from whom the locals get guidance on various issues affecting the community and that the failure to involve them is an affront to their cultural ways and cultural rights.
 18. The Petitioners maintained that the 3rd - 6th Respondents' Chair and those who run the CBOs are not the representatives of the community herein and have no authority to act for it and that they have engaged various authorities seeking information on the legality of the 1st Respondent's operation in the Chari and Cherab wards of Merti Sub County and the entire Isiolo County, which information has not been sufficient to address the community concerns.
 19. According to the Petitioners, they registered their complaints with various authorities including the ombudsman which referred them to the County Co-ordinator, National Land Commission (NLC); that the NLC wrote to the ombudsman explaining that the process of setting up the purported conservancy was suspended and that this response did not resolve the impasse as the Respondents are still actively proceeding with plans to establish the conservancies.
 20. It is averred by the Petitioners that they equally made a complaint to the County Commissioner and the Deputy County Commissioner(DCC) of Merti Sub County, who wrote to the 1st Respondent and invited the parties for negotiations; and that the aforesaid negotiations bore no fruits and were a sham as they did not in any way address the dispute.
 21. It is the Petitioners' case that the DCC cannot be taken as a genuine neutral arbiter as evinced by their letter referring the complaint to the 1st Respondent, in which they lauded the 1st Respondent for its support in security and promised to continue partnering with them on the activities and that the office has directed all the Assistant County Commissioners(ACC) and chiefs to fully support officers from the 1st Respondent's offices in their operation.
 22. It is urged that all the relevant government authorities have failed to offer any solutions to the dispute; that despite the frustrations, the community is making concerted efforts to register the suit lands and the attempts to establish a conservancy is tantamount to putting the cart before the horse, more so when the land is supposed to be held in trust by the 2nd Respondent on their behalf.



23. The Petitioners averred that the Kenya National Commission on Human Rights(KNCHR) presented an advisory opinion over the Isiolo County Community Conservancies Bill, 2021 to the County Assembly of Isiolo on the 21st April 2021 and that the opinion highlighted the aforesaid Bill noting that it would fundamentally violate the Constitution as it sought to legalize the illegally existing conservancies while also creating a pathway for the 1st Respondent to create more conservancies on community land without following due processes of the law.
24. The Petitioners contended that the 2nd Respondent's actions in allowing third parties such as the 1st Respondent and its conservancies to operate in community land contravenes both the Constitution and the Community Land Act.
25. According to the Petitioners, through their Petition dated 14th May 2021 addressed to the National Land Commission, they had requested for intervention in the stalemate but unfortunately got no response to-date and that the 1st Respondent is actively working and marshaling support from the relevant authorities and has hired land cruiser vehicles that are currently used within the Merti area to intimidate and harass those opposed to the project while at the same time appeasing the National Government and its security apparatus to accept its activities fully.
26. They urged the court to intervene and address the aforementioned violations, which have gone unaddressed or unremedied; that otherwise, the Respondents will set an unconstitutional precedent and will be acting against both the Constitution and the law; that if the Respondents are not stopped, it will lead to repossession of indigenous community ancestral land, destruction of the community land, and interference with the ecosystem within the area contrary to Articles 42 and 69 of the Constitution.

The 1st Respondent's preliminary objection and reply

27. In response to the Petition, the 1st Respondent, filed a Notice of Preliminary Objection dated the 15th November, 2021 based on the grounds that:
 - i. The Honourable Court lacks jurisdiction to entertain the Petition and the Notice of Motion dated the 21st September, 2021 in view of Section 117 of the Wildlife Conservation and Management Act, 2013.
 - ii. There are no requirements known to law for declaration or gazzetment of a community or any other wildlife conservancy. As such, the Petition and Motion are misconceived, fatally incompetent and an exercise in futility.
 - iii. The Honourable Court lacks first instance jurisdiction to entertain the Petition and the Motion in view of Section 42 of the Community Land Act, 2016. In any event, the Petitioners have not demonstrated any exceptional circumstances.
 - iv. The Petition does not meet the basic threshold requirements for a constitutional petition.
28. The 1st Respondent equally filed a Replying Affidavit through its Chief Executive Officer, Mr. Lalampaa, on 30th June, 2022. Vide the response, he conceded that the suit land is unregistered community land jointly and severally owned by the Petitioners and other members of the community and that, consequently, the rights of the Petitioners to the land rank equally with those of the 3rd to 6th Respondents and indeed other community members who wish to adopt conservancies as a legitimate land use for the collective benefit of the community.
29. Accordingly, it was deponed, the Petitioners do not have veto power over decisions made by other members of the community, and neither can they dictate how the suit land can or should be managed



- or utilized; that the 1st Respondent unreservedly supports the registration of community land and has facilitated and championed inclusive initiatives geared towards strengthening and perfecting community land rights, as articulated in its Guide to Establishing Community Conservancies-the NRT Model.
30. Mr. Lalampaa deponed that it was not a condition precedent under the *Community Land Act* that the land must be registered first before any conservancies could be established and that indeed, many conservancies across Kenya are transitioning from the group ranches regimes without any freeze or disruption of their programs or operations.
 31. The 1st Respondent opined that the Petitioners' allegation that the community should be prevented from using and benefiting from their land until it is registered as a community land is factually incorrect, disingenuous and self-serving and will gravely prejudice the community at large.
 32. The 1st Respondent maintained that it has no role whatsoever in the scheme of registration of community land and had no inclination or capacity whatsoever to frustrate or obstruct the process, and that no evidence had been tendered to that effect.
 33. According to Mr. Lalampaa, he was acutely aware that conservancies cannot be established or run without effective community engagement and broad public participation, hence, it would be foolhardy, let alone illegal, to purport or attempt to avoid mandatory public participation and community involvement.
 34. The 1st Respondent averred that the conservancies complained about by the Petitioners are registered as CBOs whose membership is open to any member of the community, and no members of the community, including the Petitioners, have been excluded from participation in the transparently undertaken community development initiatives.
 35. It was his position, that the Petitioners have deliberately avoided opportunities available at the grassroots to participate in community decision-making; that in any event, the Petition is not specific or cogent on how the Petitioners' right to public participation has been threatened, infringed or violated; that there has been and will continue to be robust and continuous public participation at the grassroots in respect of any and all land use and community benefit initiatives and that this is in line with the community's way of life, community conservancies model and its policy commitments.
 36. It is urged that the 1st Respondent is committed to working with the community and other stakeholders to address the inevitable teething problems and resource gaps to make community participation as robust as humanly possible; that the establishment of a community conservancy was a voluntary community decision and therefore a conservancy is an exclusively community entity and that consequently, the assertions that the 1st Respondent was allowed to establish and run the conservancies by the 2nd Respondent is untrue.
 37. On the contrary, he contended, a conservancy is instrumental in harnessing the community to pursue a shared vision and mobilize resources, which is instrumental in advancing national and international policy and objectives relating to the conservation of biodiversity.
 38. The 1st Respondent's Chief Executive Officer denied that the community rangers are its private army, whose presence elicits tension and fuels violence, loss of life, forced disappearance, or causes all ills asserting that there is no evidence to back the Petitioners' allegations in this respect.
 39. It was deposed by the 1st Respondent's Chief Executive Officer that the Petitioners are ignoring the historical and political context of Isiolo County and Northern Kenya generally as to the well-known loss of life and property associated with cattle rustling, ethnic conflicts and impacts related to lack of



- adequacy of essential government services and that it is the Petitioners who have launched attacks as an electoral tactic or campaign as a means to draw unnecessary attention.
40. According to the 1st Respondent, it is an undisputed fact that community wildlife scouts assist in the smooth running of conservancies to ensure that wildlife, other natural resources in the conservancies, and visitors who visit the same are protected from poachers and other security threats and that community wildlife scouts have national police reserve status and play a critical, but limited role to assisting the police and local administration with law enforcement at all times, while continuing and operating under the command and control of the area police command.
 41. It is deponed that the 1st Respondent has institutionalized professionalism of the community wildlife scouts, through among others mandatory pre-recruitment vetting, regular training, continuous learning and development after passing out, constant human rights training, enforcement of a code of discipline, and standing orders.
 42. As regards their deployment, it was deponed that the same is done based on the existing guideline notes for patrols, joint operations, lawful functions and authority to bear arms, and the enforcement of discipline in line with Sections 110,113 and 114 of the *National Police Service Act*.
 43. The 1st Respondent denied that the community conservancy scouts had engaged in illegal or wrongful acts; that regarding the allegations that approvals are required to establish a conservancy, nothing could be further from the truth; that wildlife conservation is a land use, like any other land use, that the community members can freely engage in, whether as individuals or collectively.
 44. It is urged that the community wildlife conservancies recognize, support, and are wholly compatible with the Petitioners' and the community's traditional way of life as pastoralists and will not in any way disrupt, upend, or alienate the community's existing traditional practices and that the community has embraced the creation of grazing plans in their respective conservancies, with community grazing committees established to administer and oversee the smooth implementation of the plans for suitable grazing.
 45. The 1st Respondent denied that the establishment of conservancies will interfere with the community's socio economic well-being or threaten, violate, or infringe upon their social, economic, and cultural rights and that on the contrary, it has benefitted and will continue to benefit the community in funding water projects, offering bursaries to school-going children, the construction and renovation of schools, funding for women microfinance enterprises and the issuance of soft loans for women, community scouts, and the youth.
 46. As an entity, it is averred, the 1st Respondent does not derive any benefits from discriminating against the youth, women, and persons with disabilities and that it is committed to supporting the community through its elders, elected leaders, and all other available community avenues to ensure that there is open, continuous, and effective public participation in the use of the available natural resources.
 47. Contrary to the Petitioners assertions, it is contended, the 7th Respondent has not abdicated its statutory mandate, and the assertions in that regard constitute a grave misconception considering that approximately 70% of Kenya's wildlife resources are on private and community land outside the state controlled, protected area systems and it would be impossible and an exercise in futility for the Government of Kenya through the 7th Respondent to attempt to single-handedly conserve and manage wildlife without involving communities and other partners.
 48. Further, it was averred, Kenya's current policy, statutory and constitutional arrangements relating to wildlife conservation emphasizes the concepts of decentralization, collaboration, and community-based natural resource management; that Kenya's obligations under international law, including the



Convention on Biodiversity, requires it to increase the number of wildlife conservancies on private and community land, hence, the prayers sought by the Petitioners are not in the public interest and will turn the applicable wildlife management law and policy on its very head and that it would be retrogressive if the court were to accede to the Petition.

49. It is averred that the 1st Respondent is aware that the 3rd to 6th Respondents are duly elected community leaders who were elected in an open, transparent, and credible election carried out in accordance with the conservancy constitution and were accountable to the community, and that equally, the 3rd – 6th Respondents are also right holders in the suit land and hence are legitimate representatives of the broader community with crucial roles to play in all community affairs.
50. Regarding dispute and grievance resolution, the 1st Respondent averred that the Petitioners have demonstrated that they have side-stepped elevated local dispute resolution mechanisms and have instead opted for a more escalated and divisive mechanism; that their alleged complaints to the ombudsman and the County Commissioner were not genuine, and that they only rushed to court after they were unable to get the outcome they wished for, namely, to have the community development activities pursued through the conservancy injunctioned or halted.
51. The 1st Respondent averred that it was aware of the existing community structures available and ready for resolution of the Petitioners' grievances, but unfortunately, the Petitioners were not willing to resort to them.
52. Regarding the advisory from KNCHR, the 1st Respondent conceded that the same makes very grave adverse findings against it. However, it is asserted, it was not given a chance to have its say and state its side of the story before publication; that consequently, the report was prepared in violation of its right to natural justice, due process and fair administrative action, and the court's reliance on such a report would amount to travesty of justice and that the report is replete with glaring factual and conceptual errors and misrepresentation hence cannot be safely relied on.
53. Mr. Lalampaa stated that the correct factual position in Northern Kenya was captured in a recently published independent report by Dr. Kanyika Jena, PhD, entitled "Due diligence report concerning the report stealth game published by the Oakland Institute" and that the Court should especially take note of its findings that there is no evidence to support any of the allegations that the 1st Respondent is complicit in the alleged killings or fueling conflict.
54. He averred that the report also noted the 1st Respondent's strong performance record in facilitating the establishment of community conservancies and its impacts, the pivotal role it plays in the region's human rights and development objectives, and how the local community in the region has been impacted by its initiatives and have acknowledged the interlinkages between human rights impacts surrounding programs and activities, and are diligently exploring and pursuing mitigation options.

The 2nd Respondent's reply

55. The 2nd Respondent opposed the Petition through a Replying Affidavit sworn by Hashian Mohamed Abdi, its County Attorney, on 27th April 2024. He deponed that the Petition has not been pleaded with precision and specificity and subsequently falls short of meeting the threshold of constitutional drafting; that the Petitioners failed to state with clarity what constitutional rights had been denied, violated, or threatened and the nature of the same for the Petition to meet the constitutional threshold and that it discloses no known cause of action against it.



56. According to the 2nd Respondent, as the Petitioners have demonstrated that the county has no presence or role in the said land, any orders sought against it would amount to nothing or would be an exercise in futility.
57. Mr. Abdi opined that the primary rule as regards permanent injunctions is that the same can only be issued in the clearest of cases with unique circumstances which is not the position herein and that the Isiolo Conservancy Bill was subjected to adequate public participation in line with Articles 10, 174, 209, and 201 of the Constitution and Section 87 of the County Governments Act.
58. In any event, the 2nd Respondent contended, the issue raised against the Bill by the Petitioners is not justiciable and does not fall under the jurisdiction of this Court and that the Court should be hesitant to assume jurisdiction or entertain the present Petition, which can adequately be handled in another forum.

The 3rd to 6th Respondents' reply

59. The 3rd to 6th Respondents did not file any Replying Affidavit but instead opposed the Petition vide Grounds of Opposition premised on the grounds that:
 - a. The Petitioners impermissibly seek to deploy participation rights to exercise veto powers and dictate outcomes, powers which they do not have because their rights in the suit land rank *pari passu* with the Respondents' rights.
 - b. The Petitioners have failed to demonstrate that they have suffered any actual or threatened harm so as to amount to a threat, violation, or infringement of any of their rights.
 - c. The establishment of the impugned conservancies did not undermine but instead promoted attainment and advancement of the marginalized and vulnerable community's human rights, including those of women and children.
 - d. Considerations of proportionality and the broader public interest militate against granting the Petitioners any of the reliefs sought in the Petition.

The 7th Respondent's response

60. The 7th Respondent opposed the Petition by way of a Replying Affidavit by Dr. Margaret Nyabwari Mosa, its Chief Licensing Officer, sworn on 19th March 2024. She averred that although Section 39 of the Wildlife Conservation and Management Act, 2013 allows any person or community who owns land on which wildlife inhabits to individually or collectively establish a wildlife conservancy, it has yet to receive any application for the establishment of a wildlife conservancy in Cherab and Chari wards Merti sub-county in Isiolo County.
61. The 7th Respondent maintained that as per the register of wildlife conservancies and wildlife sanctuaries under its custody, there is no registered wildlife conservancy or sanctuary in Isiolo County and that there being no license, approval, authority, or permit issued for the establishment of a wildlife conservancy or sanctuary, it cannot, therefore, be compelled to revoke what has not been issued.
62. Dr. Mosa deponed that in accordance with Sections 70-73 and 44 of the Wildlife Conservation and Management Act 2013, the establishment of a wildlife conservancy does not disenfranchise the community, but rather gives them the right to use and benefit from wildlife on their land according to their objectives for wildlife management, tourism, settlement, religious, culture and traditional sources of livelihood as per the approved management plan for the wildlife conservancy.



63. She averred that the 7th Respondent's management and conservation of wildlife is restricted to protected areas, which excludes wildlife conservancies; that consequently, it cannot be compelled in law to take over the management of a wildlife conservancies as prayed by the Petitioners and that there is no provision in law for it to manage community land, whether registered or not as such responsibility is placed on the 2nd Respondent.
64. She maintained that the assertions that the 7th Respondent has abdicated its responsibilities or duties is misleading, baseless, and speculative.
65. The 8th and 9th Respondents did not file any response to the Petition save for oral submissions by Mr. Kimathi Advocate at the hearing of the Petition.

The Petitioners' Further Affidavit

66. Vide a Further Supporting Affidavit dated 29th March, 2024, Abdirahman Osman, on behalf of the Petitioners, reiterated that the suit land remains unregistered land and that there has been no demonstration that the establishment of the wildlife conservancies was done pursuant to the law and after involving them or other community members through public participation.
67. They maintained that the 1st to 6th Respondents had no mandate to make decisions touching on the community land without consulting or involving them and the community at large and that no evidence has been availed by the Respondents in respect to any public participation or public forums undertaken prior to establishing the community conservancies.
68. It was deposed that the 1st Respondent has not adduced evidence of any public participation forum inviting the Petitioners to participate in community decision-making, be it records on when the invitations were made, which views were given, who gave the views and where the views were given regarding their rights to property ownership in community land.
69. They urged that due process was not followed at all and that a policy document such as the one relied on by the 1st Respondent does not affirm that any public participation was conducted before it was produced and whether public participation occurred before the establishment of the conservancies.
70. According to the Petitioners, it is not true that the 2nd Respondent has a minimal role to play in the establishment of community conservancies on unregistered land and that even if the conservancies are community based, the community members ought to be involved and have to be established according to the law.
71. Regarding Sections 4, 39, 40, and 44 of the *Wildlife Conservation and Management Act*, as read together with Section 115 of the *County Governments Act* and Article 59 (1) (d) of the *Constitution*, the Petitioners averred that public participation, access to information and sharing of that information with the community is critical in the establishment, registration, and management of conservancies and the plans thereto.
72. It was urged that the 2nd Respondent holds unregistered community land in trust for the community pursuant to Articles 63(3) of the *Constitution*, and Section 6(1) of the *Community Land Act*, and therefore, it cannot be true that the 2nd Respondent can be absolved of its constitutional and statutory responsibilities of holding the community land in trust pending its registration, and more so to ensure the conservancies whether community or national based are registered in line with Section 4, 39 40 and 44 of the *Wildlife Conservation Management Act* as read together with Articles 69 (1)(d) and (f), of the *Constitution* and Section 115 of the *County Governments Act*.



73. It is the Petitioners' position that the 1st Respondent cannot justify the use of armed rangers, also referred to as community wildlife scouts, terming them as equivalent to having national police reserve status, when it has failed to produce information about their registration and that in a region with a proliferation of firearms, it is crucial to have them regulated.
74. Further, the Petitioners urged, the Court should note that some of the areas where conservancies have been established are conflict-prone zones and ethnic pastoral communities operating in these conservancies fully participate in the potential ethnic conflicts over pasture and water, leading to loss of thousands of livestock if not loss of lives.
75. Under Section 87 1(b) (c) of the *Wildlife Conservation and Management Act*, it is contended, the 7th Respondent must keep a record of registered conservancies and a register of wildlife scouts and that denial of such records for Isiolo County means that the community wildlife scouts as described under paragraph 23-25 of the 1st Respondent's Replying Affidavit are operating illegally for neither the 1st Respondent nor the 7th Respondent have presented an authority allowing them to operate and bear firearms in the first instance.
76. The Petitioners refuted the allegations by the 1st Respondent that the Petitioners and the community have benefited from the establishment of the impugned conservancies and that on the contrary, the said conservancies have alienated huge chunks of community land, leading to displacement and infringement on free land use, hence directly interfering with the community's right to own property.
77. The Petitioners denied the claim that the 3rd -6th Respondents' speak for and on behalf of the community, stating that they do not recall any forum where the 3rd -6th Respondents were elected to represent the community.
78. On the contrary, according to the 4th Respondent, he is actually a director and shareholder of the 1st Respondent's company and hence cannot adequately represent the interests of the community, being conflicted.
79. The Petitioners asserted that the Petition has demonstrated a violation of their rights to ownership of property, which right is tied to land use and thereby affecting their livelihood and their social and economic rights and that they have pleaded the violation of rights and property due to the establishment of conservancies contrary to the *Community Land Act*.
80. The creation of the conservancies, it was pleaded, has led to vast chunks of land being hived off the unregistered community land and being converted into the impugned conservancies over lands that were traditionally their grazing, burial and cultural sites without the 2nd and 7th Respondents exercising their constitutional and statutory responsibilities under Article 63 (3) of the *Constitution* and Section 6(1) of the *Community Land Act*, to protect those rights.

The 1st Respondent's Further Affidavit

81. In response to the Further Affidavit, the 1st Respondent swore a Further Affidavit on the 25th September, 2023. It was averred that the 1st Respondent is a non-profit members organization that supported the establishment and operation of community conservancies in Kenya for the protection and enhancement of wildlife resources.
82. The 1st Respondent reiterated that the communities undertake wildlife conservation in community conservancies hand in hand with compatible land uses, and as such, the conservancy is essentially a devolved unit for harnessing and promoting development at ward level.



83. The 1st Respondent averred that Cherab Community Conservancy is a registered CBO and one of the 43 conservancies and that in order for the said conservancy to be fully operational and to enable it to carry out community conservancy activities effectively, the conservancy commenced construction of a ranger's outpost and headquarters offices, which will serve and benefit members of the marginalized and disadvantaged community.
84. It was deponed that prior to the construction of the conservancy, the 1st Respondent conducted extensive public participation on the project with the members of the community followed by an environment impact assessment report and NEMA license and that prior to undertaking the project, there was extensive public participation which the Petitioners failed to participate in despite being given an opportunity to do so.
85. It is the 1st Respondent's case that the Petitioners seek to deliberately mislead the Court that there was no community and or public sanction before the commencement of the project and have come to Court with unclean hands.
86. According to the 1st Respondent, the factual position is that the conservancy, in general, and the project, in particular, will benefit the community and advance development and human rights as per the several tangible identified benefits throughout the project cycle and that the community members including the Petitioners will benefit from the construction of the community conservancy headquarters in the nature of employment as casual labourers, consultants, material suppliers, transporters, security service providers as well as generation of revenue for the national and county government.
87. Further, it was deposed by the 1st Respondent's Chief Executive Officer, upon completion, there will be a conservancy headquarters, which will have administration offices, staff quarters, a kitchen, water storage facilities, and ablution facilities promoting security operations within the conservancy, and contributing to the conservation of wildlife in the conservancy through security improvement and coordination of conservancy activities, among other benefits.
88. The 1st Respondent averred that any negative impacts that may arise from the project will be addressed in accordance with the guidelines provided for under the EIA assessment plan and the license from NEMA; that the project was a community development initiative championed by members of the community themselves, whose land in which it was constructed remains fully communally owned, managed, and controlled and that the 1st Respondent has not taken over any part of the community land as alleged by the petitioners.
89. The 1st Respondent contends that stalling the said project will significantly prejudice its image, integrity, and credibility, noting that it has already obtained funds from donors for the said project and that granting the orders sought by the Petitioners will further expose it to legal suits for breach of contract, having invited and awarded the successful bidder tender for furnishing the necessary labor material, and equipment for purposes of tendering.
90. According to the 1st Respondent, the aforesaid activities were undertaken in preparation for the construction works in Cherab Conservancy, Isiolo County, as per the attached tender invitation notice marked TL – 4; that the 1st Respondent has no control or influence over the national police service and was therefore not aware of and has not in any way been involved in the alleged harassment and intimidation of the Petitioners by the security forces and that it has been at the forefront in actively facilitating peace and reconciliation in accordance with its mandate.



91. The 1st Respondent's CEO averred that prohibiting and forbidding all conservancy activities will impede the community members' right to freedom of association as guaranteed under Article 36 of the Constitution and will improperly limit and restrict the community's right to access, use and benefit from their property contrary to Articles 40, 60, and 69 of Constitution of Kenya and shall violate Kenya's commitment under the Convention on Biological Diversity (BDD) 1992.
92. The 1st Respondent opined that the community efforts in the establishment of the conservancies to protect the environment for its members' benefit and future generations will be severely compromised contrary to the sustainable development aspiration under Article 10 and the right to a clean and healthy environment under Article 42 Constitution of Kenya.
93. Further, it was deposed, the Petition, if allowed, will frustrate the marginalized community members' efforts to advance their social and economic rights, including to access reasonable standards of sanitation and clean and safe water contrary to Articles 43 and 46 Constitution of Kenya.

Submissions

The Petitioners' submissions

94. The Petitioners, through Counsel, filed submissions on 21st September 2021. It was submitted that the Petitioners are members of an indigenous pastoralist community residing in the Chari and Cherab wards, representing the larger Borana community being pastoralists who share cultural beliefs and common ancestry, identifiable on the basis of ethnicity, culture, and similar community interest.
95. It was submitted by counsel that the community land in question is central to their survival and livelihood because it is their cultural ancestral and grazing land held under an intergenerational trust for future generations and that where the 1st, 3rd, 4th, 5th and 6th Respondents have established conservancies, the community land is used as dry season and wet season grazing areas and hold critical cultural sites.
96. Counsel submitted that the community land in question, located in the Isiolo North constituency is yet to be adjudicated and or registered despite their efforts to do so; that the non-registration and/or adjudication has been occasioned by challenges, some caused by the local authorities, who have delayed and frustrated the process and that in the interim, the land is held in trust for them by the 2nd Respondent.
97. According to Counsel, various private entities, including the 1st, 3rd, 4th, 5th, and 6th Respondents, have established conservancies without involving the community; hence, the same was done without public participation contrary to Articles 40, 63, 63(3) 69(1) and (2) of the Constitution, Section 4, 6, 7, 8, 10 and 11 of the Community Land Act, Sections 4, 39, 40 and 44 of the Wildlife Conservation and Management Act, Section 37 of the Land Act, Section 8 of the Land Registration Act, Article 26(1) of the UN Declaration on the Rights of Indigenous People (UNDPIP) and Article 14 of the African Charter on Human and Peoples Rights.
98. Counsel submitted that under Article 63 of the Constitution, community land vests in and is held by communities identified on the basis of ethnicity, culture, or similar community interests; that in this case, the Petitioners fit the description as they lead a nomadic lifestyle and are pastoralists under which the concept of traditional land ownership does not exist, for they own land communally, which they use as grazing land by the community at large and that for those reasons, the establishment of Cherab and Chari community conservancies by the 1st, 3rd, 4th, 5th and 6th Respondents shall interfere with the need for pastoralists to have flexible, cross-boundary movement of their animals.



99. It was submitted that the land also has the Petitioners worship sites and shrines for cultural practices as well as burial sites for their kin and ancestors; that the cultural sites such as Kuro Bisan Owwo graveyards in Ires Oroba Sentho, Ires Kira, Ire Saku, Ire Wadha, Ires Ture, and Ires Buuna being graves named after deceased prominent community members and that the Petition is not just about a fight to get back the land, but rather to reclaim their social and economic way of life and protect their cultural practice.
100. According to Counsel, Articles 63 (3) & 4 of the Constitution as read with Section 6(1) of the Community Land Act, provides that unregistered community land shall be held in trust by the county government and shall not be disposed of or otherwise except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
101. Counsel for the Petitioners submitted that the 2nd Respondent has conceded to abdicating its duty in this regard by alleging that they have no presence in the community land.
102. It was contended that the 1st, 3rd, 4th, and 5th Respondents' acts of establishing conservancies on unregistered community land were done without public participation contrary to Article 69 (1) (d), of the Constitution and without an environmental impact assessment and environmental audit as required.
103. It was submitted by counsel that the 7th Respondent's response leaves more doubts than answers as regards the 2nd Respondent's mandate to manage community land as it cannot confirm the issuance of permits to operate.
104. Counsel urged that it is only fair that the community land is first registered before the land use can be determined; that the 2nd and 7th Respondents appear to be partial and biased against them and in favor of the 1st Respondent going by the failure to act on their complaints and that it is not possible to have their issues herein addressed by the 1st, 7th, 8th and 9th Respondents, who are complicit in the matter and are in favor of allowing the 1st, 3rd, 4th and 5th Respondents to continue their dealings with the land without a proper legal framework.
105. It was asserted by counsel for the Petitioners, that none of the Respondents have adduced evidence proving public participation was actually and adequately conducted as required by law and that further, no EIA was conducted before establishment of the conservancies.
106. Reliance in this regard was placed on the cases of British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment) and Mui Coal Basic Local Community & others v P.S Ministry of Energy and others [2015] eKLR.
107. Counsel submitted that the 2nd Respondent's action of allowing the 1st, 3rd, 4th, 5th, and 6th Respondents interfere, acquire, and utilize community land without proper procedure, and the 8th and 9th Respondents' failure to ensure the proper management of community land and allowing the establishment of conservancies without due procedure, violates their constitutional rights as per Articles 40 and 63 of the Constitution.
108. It was urged that the establishment of conservancies in Cherab and Chari wards of Isiolo County was not in line with the elaborate procedures set out under Sections 39, 40 and 44 of the Wildlife Conservation and Management Act and Section 115 of the County Governments Act on public participation and that the 2nd and 8th Respondents are mandatorily required by the cited law to



- initiate public participation in matters that concern county planning, such as the establishment of conservancies, for it goes to the role of the county planning.
109. According to the Petitioners' Counsel, the establishment of Biliqo Bulesa and Cherab community conservation by the 1st Respondent, who has gone ahead to recruit, train, and arm scouts to guard the conservancies, who have become a security threat to the locals, was done without regard to the cited statutory and constitutional tenets and amounts to breach of the law and their human rights.
 110. Counsel for the Petitioners urged that the allegations by the 7th Respondent that there are no conservancies in Isiolo County has no factual and legal basis in view of the clear admission by the 1st Respondent that they do exist and are being guarded by duly recruited, trained, armed personnel known as wildlife scouts leaving unanswered questions as to the nature and type of enterprise being run by the 1st, 3rd, 4th, 5th and 6th Respondents on unregistered community land.
 111. Nonetheless, it was submitted, the 1st Respondent has not presented any evidence of duly approved official authority letters and personnel to establish conservancies, raising questions about the legality of their actions and the legitimacy of the conservancies.
 112. Counsel submitted that whereas the 1st, 3rd, and 6th Respondents may assert a right to establish conservancies based on purported land ownership rights, the failure to demonstrate proper public participation, obtain necessary permits and approvals, and involve the Petitioners in the decision-making process, casts serious doubts on the validity of their actions.
 113. It was contended by the Petitioners' counsel that the 2nd Respondent's admission of non-involvement leaves no doubt that the exercise was not undertaken in accordance with Section 6(1), 7, 8, 10 11 and 13(3) (c) of the [Community Land Act](#), Section 115 of the [County Governments Act](#) and Article 63(3) of the [Constitution](#).
 114. According to the Petitioners' counsel, the establishment of conservancies without proper consultation and adherence to the cited legal framework undermines the principles and values of the [Constitution](#) and infringes upon their rights as collective land owners and members of the community, which principles also ought to be aligned with Section 4 of the [Wildlife Conservation and Management Act](#), since the 2nd Respondent is duty bound to ensure that the community land vested in it to hold in trust for the community is managed and utilized in accordance with the law.
 115. It was submitted that the failure to consider the community interests by involving them and the broader community in any decision concerning the community land amounts to an overreach violating Articles 40 and 63(3) of the [Constitution](#) of Kenya.
 116. According to the Petitioners' counsel, while acknowledging the establishment of the conservancies, the 3rd -6th Respondents' Grounds of Opposition have fallen short of addressing the critical questions as to whether there was public participation and compliance with the law and if the said Respondents were bestowed with any mandate in the public participation forums to exclusively allow the establishment of conservancies.
 117. Going by the provisions of the [Community Land Act](#), it was contended, the 3rd-6th Respondents have no power to determine what benefits the community within the context of the [Community Land Act](#), which role belongs to the Community Land Management Committee (CLMC) elected from the community under the Third Schedule Rules 8, 9 and 13.2 of the [Community Land Regulations, 2017](#), and that the CLMC's other mandate is to conduct the affairs of the community with a view of achieving the most significant, practical, social and economic benefit for its members.



118. It was asserted by the Petitioners' counsel that given that the 7th Respondent has distanced itself from any alleged existing conservancies or registered conservancies in the whole of Isiolo County, it leaves no doubt that what the 1st Respondent has termed as existing conservancies were undertaken or established without effective public participation and the involvement of all stakeholders and all conservancies established all over Isiolo county were not done in accordance with the law.
119. As to security issues, it was submitted that the same is the exclusive preserve of the 7th Respondent under Section 112 of the *Wildlife Conservation and Management Act* and that in this case, the 7th Respondent has denied the existence of rangers in the impugned conservancies.
120. The Petitioners' counsel submitted that under Section 87(1)(b) &(c) of the *Wildlife Conservation and Management Act*, the 7th Respondent is mandated to keep a record of register of wildlife scouts and its denial of the existence of such records for Isiolo County is an explicit confirmation that their existence is illegal, and they were established without any consultation or approval by both the regulatory authorities and the involvement of the Petitioners as pastoralists and the community in general.
121. Given the foregoing infractions of the law and the *Constitution*, Counsel urged that the Court should find that the Petitioners are entitled to the declaratory reliefs sought, including an award of general damages for the breach of their constitutional rights guided by the case of *Jaoko Noo Oroo & others v AG* [2013] eKLR.

The 1st, 3rd, 4th, 5th and 6th Respondents' submissions

122. The 1st, 3rd, 4th, 5th and 6th Respondents' counsel relied on written submissions dated 25th June 2024. It was submitted that the Petition, as crafted, has not met the precision test as set out in *Anarita Karimi Njeru v Rep* (1979) eKLR and *Mumo Matemo v Trusted Society of Human Rights Alliance* [2013] eKLR; that secondly, the Petitioners have failed to establish the essential evidentiary link between the provisions of the *Constitution* alleged to have been contravened and the manifestation of contravention or infringement on them; and that the allegations relating to alleged "dealings" with the community land are speculative, unsubstantiated and do not disclose any harm for this court to redress.
123. Counsel for the Respondents submitted that the Petitioners have failed to demonstrate that there was no public participation and that further, the Petitioners have failed to prove that the 1st Respondent's role extends beyond facilitating the establishment of community conservancies and as such, the obligation to undertake public participation lies with it and it denied the Petitioners an opportunity to participate.
124. According to the Respondents' counsel, the Petitioners have failed to controvert the fact that the conservancies were open for membership to any community member and that none of the members of the community, including the Petitioners, were shut out from participating in the decision-making relating to their land, in conjunction with the Respondents and other right-holders.
125. It was argued that the Petitioners have at all times had reasonable opportunities to participate. Reliance in this respect was placed on the cases of *Minister for Health and another v New Clicks South Africa (Pty) Ltd and others* [2005] ZACC 14 and *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR.
126. Counsel urged the Court to find that the 1st Respondent's community conservancy model in general, and the impugned conservancies, in particular, are an innovative, compelling, and a legitimate form for effective, continuous, ongoing public participation, especially in the absence of the community land management committees.



127. It was submitted that the Petitioners have failed to surmount the evidential burden placed on them as regards their allegations on the use of the community land.
128. Counsel for the Respondents submitted that the *Constitution* does not define alienation, dealing with land, or disposal apart from what is defined in Section 3 of the *Land Act*, 2012 and that the Petitioners have failed to demonstrate how the establishment of the conservancy by the 3rd – 6th Respondents has interfered with ownership of the land, use, and access save for relying on mere inferences and innuendos likening the establishment of conservancies to a wildlife protection area, and inviting the court to infer threats or a violation, yet the tenure of the suit land remains intact.
129. It is submitted that the Petitioners rushed to court on the basis of mere apprehension, which may never materialize and that no harm has arisen from the establishment of the impugned conservancies warranting the Courts' intervention for redress.
130. On whether the Petitioners are entitled to the reliefs sought against them, Counsel submitted that in determining the same, the court should adopt a purposive and holistic approach guided by decision in *Kenya National Human Rights Commission* [2014] eKLR, *Center for Human Rights Education and Awareness v John Harun Mwau & others* [2012] eKLR.
131. Counsel noted that while public participation is crucial, it should not be read, interpreted, or applied in a manner that makes it take precedence over other national values and principles, especially those that relate to the management and governance of natural resources, which must also be applied with equal force especially when public participation was susceptible to being weaponized as held in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015]eKLR.
132. Counsel urged that it is undisputed that the suit land is unregistered community land held in the trust for the community by the 2nd Respondent and that, as a matter of law and fact, the 1st Respondent cannot and has not established conservancies on the suit land, which only the community could do and that there being no evidence that it has acquired ownership of the suit land, enabling it to establish conservancies, the Petitioner's apprehension remains hypothetical.
133. According to Counsel, the 3rd – 6th Respondents have a clear and defined interest in the suit land, which ranks equally with the Petitioners' rights with entitlement to associate, use the land for lawful purposes, and seek the assistance of development partners such as the 1st Respondent, and that if a permanent injunction is issued, it would offend Articles 40, 60, 63 and 69 of the *Constitution* and will not be in the public interest.
134. As to prayers 6 and 8, it was submitted that the court should decline to issue the reliefs there being no evidence in support thereof; that they have equal rights to use and enjoy the land, and therefore, such an order would elevate the Petitioners' right to public participation to a veto power over their rights, which rank *pari passu*.
135. Regarding prayer No 4, it was submitted that the 1st Respondent has demonstrated that the community rangers have the status of the national police reserve properly and lawfully operating under the Inspector General of Police in line with the *National Police Service Act* and that as the IG of Police is not a party to the Petition, no adverse orders can be issued without him being given an opportunity to be heard.
136. On prayer 7, it was submitted that that *mandamus* in the manner requested would have far-reaching consequences given that under Article 63 (1) and Section 7(a) of the *Wildlife Conservation and*



- Management Act, the 7th Respondent's role is limited to conserving and managing national parks, wildlife conservation and animal sanctuaries.
137. Counsel urged that the grant of orders of *mandamus* would be ultra vires, unenforceable, unworkable and impractical, more so when the Petitioners have not produced any license for the court to quash.
138. Counsel contended that the court cannot quash what is nonexistent and that issuance of such an order would not only be retrogressive, but also offend Kenya's international commitments under the CBD, its national values of sustainable development, the devolution of conservation of wildlife to the communities in Isiolo county, and by extension other parts of Kenya, and would therefore deny Kenyans the power to control and manage their land under Articles 10, 50 and 260, of the Constitution relating to natural resources, and to public participation in wildlife conservation and management, which is a public interest.
139. On prayers 11 and 16, it was submitted that granting the same would be unjust as all the developments in the suit parcel of land were subject to management planning required under Section 44 of the Wildlife Conservation and Management Act and have EIA approval under Section 58 of EMCA, which are the constitutional pillars or safeguards with respect of the community land in general and sustainable use of wildlife resources in particular.
140. As for general damages and costs, it was submitted that the same are unwarranted in light of the Petitioners' failure to establish their case and that as it is a public interest matter, each party should bear its own costs.

The 2nd Respondent's Submissions

141. The 2nd Respondent relied on written submissions dated 15th April 2024. Counsel submitted that no evidence has been adduced to support the contention that it has failed to discharge its mandate under Article 63(3) of the Constitution as read together with Section 6(1) of the Community Land Act, or to show that the conservancies were constituted with its knowledge as an authority by either being notified of the same or for failing to enforce its mandate under the law.
142. It was submitted that the Petitioners have failed to tender evidence that the documents sent to the National Land Commission, the Ombudsman, and the DCC were copied to it and that further, the Petitioners have not demonstrated that the conservancies were established subject to its authority or permission and contrary to Article 63 (4) Constitution and Section 6(8) of the Community Land Act.
143. Counsel for the 2nd Respondent submitted that there has equally been no demonstration that it had abdicated its duties, thereof, or colluded with the 1st, 3rd –6th Respondents to defeat the Petitioners' right to land.
144. Counsel contended that the Petition is devoid of particularity and precision as held in Anarita Karimi Njeru v Rep (1979) eKLR and Mumo Matemo v Trusted Society of Human Rights Alliance [2013]eKLR and that the proposed Isiolo County Community Conservancy Bill, 2021, seeks to legalize the illegally existing conservancies in the county while at the same time creating a pathway for the 1st, 3rd -6th Respondents to lawfully create more conservancies on the community land following due process of law.
145. Counsel urged that the 2nd Respondent, being a trustee of the community land and allowing the 1st Respondent and other conservancies to operate in the community land cannot be against the Constitution and the Community Land Act and that despite having the legal burden to do so, the



- Petitioners have been unable to substantiate the Petition. Reliance in this regard was placed on the case of *Evans Otieno Nyakwama v Cleapas Brian Ongeni* (2015) eKLR.
146. It was submitted that the Bill hadn't been passed and could not, therefore, be the basis of the establishment of the conservancies and that the only way to operationalize the *Wildlife Conservation and Management Act* in Isiolo County would be by producing a framework for sustainable community land used by community wildlife conservancies to generate income for it.
 147. Counsel urged that the court should not entertain the Petitioners on account of the doctrine of exhaustion, mootness, and ripeness and that the Petitioners should have invoked Article 60 (1) (g) of the *Constitution* of Kenya by addressing any complaints to Isiolo County Assembly as was held in *Albert Chankholo Mumba & others v Maurice Manga & 1048 others* [2019] eKLR and *Pevan EA Ltd and another v Chairman, Betting Control & Licensing Board & 7 others & others* [2023] eKLR.
 148. According to Counsel, the Petition is moot and is an academic exercise disclosing no cause of action for the court's determination as held in *Speaker of National Assembly v James Njengo Karume* (1992) eKLR, since the Petitioners had the opportunity to challenge the Bill by submitting a memorandum to the county assembly as other groups did, such as the advisory by the Kenya National Human Rights Commission (KNCHR) dated 21st April 2021.
 149. It was urged that the Petitioners slept on their rights to public participation; that the Petition is tantamount to jumping the gun because the legislative process is still on and none of their rights have crystallized and that guided by the case of *Jasbir Singh Rai & others v Tarlochan Singh Rai & others* [2014] eKLR, and *Ukoti & others v AL & others* [2023] eKLR each party should bear its own costs being a public interest cause.

Oral submissions

150. Vide oral submissions by Mr. Makaka for the Petitioners, Mr. Ogolla for the 1st, 3rd -6th Respondents, Mr. Salim Mohamed for the 2nd Respondent and Mr. Mutai, for the 7th Respondent, they emphasized the contents of their written submissions alluded to above.
151. Learned counsel for the 8th and 9th Respondents submitted that as per Section 5 of the *Land Act*, members of the community can own land individually and collectively, meaning that no one member of the community can veto the others or limit the community acting in unison, especially given that under Article 36 of *Constitution*, there is freedom of association. Learned counsel submitted that Section 4 (3) of the *Community Land Act* recognizes the application of other laws as held in the Fatuma Dulo case.
152. In a rejoinder, the Petitioners' counsel submitted that the 1st Respondent is a limited liability company in which the 4th Respondent is a director and a shareholder and hence could not speak for the Petitioners. Equally, he averred, the 3rd - 6th Respondents cannot purport to speak for and on behalf of the community, for a Community-based Organization does not draw all its membership from the community.
153. Counsel for the Petitioners asserted that no management plan had been displayed by the Respondents in line with Section 21 (3) of the *Community Land Act* and that the registration of a community conservancy is a land use issue and that the Petitioners were not consulted before the establishment of the conservancies, and neither was the 7th Respondent involved.



Analysis and determination

154. The court has carefully gone through the pleadings, evidence tendered by the parties, written submissions, and the law. The issues calling for our determination are:-
1. Whether the Petitioners have the requisite locus to institute the Petition?
 2. Whether the Petition meets the constitutional threshold?
 3. Whether the Petitioners have exhausted the available alternative dispute resolution mechanisms before moving to court?
 4. Whether the Petition raises constitutional questions?
 5. Whether the Petitioners have proved a breach of their constitutional rights and freedoms by the Respondents?
 6. Whether the Petitioners are entitled to any constitutional reliefs?
 7. What appropriate reliefs are the Petitioners entitled to?
 8. What is the order as to costs?

Whether the Petitioners have the requisite locus to institute the Petition?

155. A party seeking constitutional relief claiming breach of his constitutional rights and freedom has to comply with Articles 22 and 258 of the *Constitution* as read together with Rule 10 of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice, and Procedure Rules 2013*, (the Mutunga Rules). Article 22 (1) thereof provides that every person has the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.
156. Article 22 (3) thereof provides that the person may on his own behalf or on behalf of another person as a member of, or in the interest of a group or class of persons' public interest or an association acting in the interest of one or more of its members, institute a suit claiming threatened or breach of their constitutional rights and freedoms.
157. In *Joshua Waiganjo v AG & others* [2013] eKLR, the court observed that even where one purports to enforce the rights of another, a nexus must be established especially where a case has a direct effect on the person whose rights are effected.
158. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, the court warned that a person who moves to court seeking judicial redress in cases of this kind must not act for personal gain or private profit, political motivation, or other unspecified considerations. See also *Council of County Governors v Lake Basin Development Authority & others* [2017] eKLR.
159. Article 260 of the *Constitution* defines a person to include a company, association or other body of persons, whether or not incorporated. Article 259 provides that the *Constitution* must be interpreted in a manner that promotes inter alia its purposes, values, and principles, including the rule of law and good governance.
160. The 1st – 168th Petitioners filed the Petition on their own behalf and on behalf of residents of Merti – sub-county, Chari, and Cherab wards in Isiolo County. The Petitioners are members of the ingenious pastoralist community residing in Chari Ward and Cherab ward, Merti sub-county of Isiolo County living and conducting their daily activities on the community land which is severally and jointly owned



by them. This description has not been controverted by the Respondents. Indeed, the 1st Respondent has admitted that the disputed wildlife conservancies are fully operational and/or ongoing with a view of serving and benefiting the community.

161. In this Petition, the Petitioners have defined their interests, rights, nexus and the connection between the suit parcels of land that they live on, occupy, use, and define or derive their livelihood from which the Respondents are alleged to have alienated by allowing, authorizing, planning and approving the establishment and running of community conservancies.
162. The Petitioners have, therefore, disclosed their community, group, clan, and collective interests and rights and hence have locus standing to sue before this court.

Whether the Petition meets the constitutional threshold?

163. The next issue is whether the Petitioners meet the constitutional threshold to file the Petition. Rule 10 of the *Mutunga Rules*, provide that a Petition must disclose the facts relied upon, constitutional provisions violated, the nature of injury likely to be caused to the Petitioners, details of any past litigation, reliefs, and the signatures. The Petition must be supported by an affidavit, or documents, as per Rule 11 thereof.
164. A constitutional Petition must be pleaded with reasonable precision. See *Anarita Karimi Njeru v Rep* (1979)eKLR, *Mumo Matemo v Trusted Society*[2013]eKLR. A Petitioner cannot file a Petition without stating the facts and information he intends to use to prove his case.
165. A constitutional Petition should not be made in a factual vacuum. The presentation of evidence to support a Petition is essential to a proper consideration of the constitutional issues raised, as a decision on violation of constitutional rights cannot be based on an unsupported hypothesis, as held in *Leonard Otieno v Airtel (K) Ltd* [2018] eKLR.
166. In the Petition, the Petitioners have alleged breach of Articles 24, 27, 28, 29, 40, 42, 47, 48,69,70, 73, 129, 185, and 258 of the *Constitution*. Part C of the Petition sets out the factual background and constitutional issues. Part G of the Petition sets out the particulars of the unconstitutionality of the Respondents acts. Similarly, the Petitioners have invoked the international and regional framework pertaining to the constitutional and statutory issues raised. Lastly, the Petitioners have supported the Petition with Affidavit evidence backed by several annexures showing the interventions that they sought before resorting to Court.
167. The Petition before the court was pleaded with precision. The Respondents were able to appreciate the issues therein and responded to it without seeking better particulars on the manner, time, and nature of the alleged violations of the Petitioners' constitutional rights and freedoms. See *Timothy Njoya v Attorney General & another* [2014] eKLR.
168. The Petitioners have surmounted all these hurdles and given details of their complaints, backed by documents to sustain the alleged breach of the right to land, fair administrative action and public participation. (See *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment)



Whether the Petitioners have exhausted the alternative dispute resolution mechanisms before moving to court?

169. Vide their Preliminary Objection, the 1st Respondent contends that this Court lacks jurisdiction, in the first instance to entertain the Petition in view of Section 117 of the *Wildlife Conservation and Management Act*, 2013 and Section 42 of the *Community Land Act*, 2016.

170. According to the 1st Respondent, the *WCMA* and the *Community Land Act* provide ADR mechanisms which are accessible and have adequate remedies in the first instance in the resolution of the dispute before Court.

171. As a principle, the doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to Courts. Speaking to the ambit and rationale for this doctrine, the Court of Appeal in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”

172. In the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslims for Human Rights & 2 others (Interested parties)* [2020] eKLR, a five-judge bench held as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...”

173. The Court went on to outline the exceptions to the rule as follows:

“As observed above, the first principle is that the High Court(read ELC) may, in exceptional circumstances consider and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County*



Government & 2 others [2018] eKLR. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion...”

174. The 1st Respondent makes reference to Section 42 of the *Community Land Act*, and Section 117 of the *Wildlife Conservation and Management Act*. Section 42 of the *Community Land Act* provides thus:

“(1) Where all efforts of resolving a dispute under this Act fail, a party to the dispute may refer the matter to court.”

175. On the other hand, Section 117 of the *Wildlife Conservation and Management Act* provides:

“117.

(1) Any dispute that may arise in respect of wildlife management, protection or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the Devolution of Government Act including traditional resolution mechanisms.”

176. In the present case, the Petitioners are aggrieved by the establishment of conservancies by the 1st Respondent, working as an umbrella group with the 3rd-6th Respondents on their unregistered community land without their consent or approval.

177. They opine that in allowing the establishment of the conservancies, the 2nd Respondent, the constitutionally mandated trustee of all unregistered land in the community has abdicated its role in this regard.

178. It is their contention that their efforts to register the community and its community land have been met with untold frustrations by the relevant authorities and the conservancies. They contend that as long as community land registration is pending, any attempts to establish a wildlife conservancy is premature and ought to be stopped.

179. They assert that the 1st Respondent’s actions, the 2nd and 7th Respondents’ complacency and the 3rd-6th Respondents’ involvement in purporting to represent the community is creating a risk of human-wildlife conflict consequently threatening their rights to life, property, ownership, human dignity, economic, social, and cultural rights, right to a clean and healthy environment.

180. Considering the foregoing, it is apparent that the Petitioners claims are not merely in respect of wildlife management, protection or conservation as anticipated in Section 117 nor do they exclusively fall under the ambit of the *Community Land Act*. Indeed, it is noted that there were attempts to seek resolution of the dispute as anticipated by Section 42 of the *Community Land Act* as evinced by the letters to the ombudsman, NLC, DCC and ACC and the objection under this head may well be moot.

181. The Petition raises a multitude of issues cutting across both statutes and the *Constitution* and is in the nature of a multi-faceted claim.



182. The Apex Court has had the opportunity to weigh in on the doctrine of exhaustion in light of multifaceted claims as herein. In *Benson Ambuti Atega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR the Court stated:

“50. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court “in the interests of justice.” It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised its discretion to hear and determine the Petition.

52. Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

54. Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the *Constitution* was protected.”

183. In a more recent decision, the Supreme Court in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (PetitionE007 of 2023)[2023] KESC 113 (KLR) stated:

“...the resolution of environmental issues before NEMA has been the subject of prior decisions by our superior courts and two schools of thought have emerged in that regard. On one hand, there is a series of decisions that have taken the position that, even though the ELC has original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under *EMCA*, by first referring a matter to NET before an appeal can lie to the ELC. There is however another school of thought that has posited that, if the complaints and prayers by a petitioner relate to infringement of the constitutional right to a clean and healthy environment or any other constitutional



violation, then NET lacks the jurisdiction to determine the constitutional issue hence the provisions of Section 129 of *EMCA* are inapplicable to such claims.

- [100] In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either *EMCA* or the *Energy Act*. This is because the provisions of *EMCA* or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. ..As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.
- [102] In the above context, what was in issue in the appellant's petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2nd and 3rd respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2nd and 3rd respondents, by failing to adhere to the stop order, violated the appellant's rights under Articles 40 and 42 of the *Constitution*.
- [103] The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.
- [104] Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of the *Constitution* as read with Section 4(1) of the *Environment and Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the *Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR...
- [105] We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand,



then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

[107] Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 others* (Pet.No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

[108] It was therefore sufficient that the appellant alleged that a right in the *Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of the *Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why Section 3 of *EMCA* provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment.”

184. Whereas the Supreme Courts in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR and *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR) both addressed the question of a multifaceted claims. In Benson Ambuti, the Court decided that the ELC is to defer to the established statutory authorities, while in Nicholas Abidha, it was held that a Petitioner could choose an appropriate forum as between the Court and the alternative process.

185. From the foregoing binding decisions of the Apex Court, the principles that can be deciphered in dealing with an objection on jurisdiction on the basis of failure to exhaust alternative avenues are that first, the disputes must be determined on a case by case basis. The Court is also called upon to consider the efficacy of the alternative remedies and must be satisfied that constitutional claims are not a smoke screen meant only to escape strictures of alternative process.

186. In the circumstances, the allegations discussed above are all intricately tied to the alleged constitutional violations falling within the ambit of this Court such that no other body would be able to adequately and holistically resolve the issues. Indeed, none has been pinpointed by the Respondents [See *Mark Ndumia Ndugu v Nairobi Bottlers Ltd & another* (2018) eKLR.



187. In the end, the Court finds that this objection is unmerited.

Whether the Petition raises constitutional questions?

188. The next issue is whether the Petition raises constitutional questions. A constitutional Petition must raise constitutional issues or questions. Otherwise, not every ill in the society or breach of statutory rights should find its way before a constitutional court.
189. Constitutional issues or questions refer to matters that require the interpretation of the Constitution, its values, rights, organs, duties, and functions and whose answers are obtained from the Constitution and not from a statute. See Coast Waters Services Boats v Atome Achayo & others [2018] eKLR; Hakizimana Abdool Abdulkarim v Arrow Motors EA Ltd & another (2017) eKLR and Fredrick & others v Mec for education and Training Eastern Cape & others.
190. As already stated above, the Petitioners are questioning the establishment, licensing, constitution, running, and alienation of community land by the Respondents to establish, found, manage, run, and operate community conservancies in their unregistered community land to which they hold communal, individual, and collective land rights.
191. The Petitioners urged the court to determine the constitutional implications of alienating such land before the said communal rights are ascertained through the operationalization of the Community Land Act in line with Articles 60, 61, and 62 of the Constitution.
192. A constitutional question must derive its answers from the Constitution and not a statute. It must be one whose remedy can only be made by a Constitutional Court. In Uburu Muigai Kenyatta v Nairobi Star Publishers Ltd (2013) eKLR, the court observed that not every ill in the society should attract a constitutional sanction.
193. In John Harun Mwau & 3 others v AG & others [2012] eKLR and Gatirau Peter Munya v Dickson Mwenda & 2 others (2014) eKLR, it was held that the court will not consider a constitutional question where another remedy has been provided for in law, while in James Kanyitta Nderitu v AG & another (2019) eKLR, the court observed that a constitutional Petition should not be used to circumvent primary legislation for enforcement of a given right or violation.
194. In this Petition, the Petitioners have narrated the claim which they blame the eight Respondents for. They have set the historical context of the dispute and the manner in which they are connected to the suit land, the nature of their individual and collective rights to the suit land described, and the development of their communal land, allocation of powers, and structures of government.
195. The Petition is also founded on alleged or threatened violation of their constitutional rights specifically public participation, social, economic and cultural rights and arbitrary deprivation by the 1st Respondent working with the umbrella groups purporting to run conservancies in the community land, without involving them.
196. The Petitioners also allege frustrations by authorities in their attempts to register community land.
197. In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 the court observed that the Petitioner must show the rights said to be infringed as well as the basis of his or her grievance. A constitutional issue or question was defined in Turkana county Government & others v A.G & others [2016] eKLR and in Fredrick & others v Mec for Education & Training East Cape & others (2002) 23 KLR 81 (CC).



198. In *Wanjiru Gikonyo & others v National Assembly of Kenya and others* (2016) eKLR, the court observed that the justiciability dogma prohibits the court from establishing hypothetical or academic interest cases or obstract arguments
199. In *Kiriro Wa Ngugi & others v Ag & others* [2020] eKLR the court held that the doctrine of non-justiciability comprises of the political question doctrine, constitutional avoidance, and ripeness.
200. In *William Odhambo Ramogi & others v AG & others* [2018] elk, the court defined the political question doctrine as where courts should not adjudicate certain controversies because their resolution is more proper within the political branches.
201. In *KPA v Mitu Bell Welfare Society & others* [2016] eKLR, it was held that the role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and the executive. Otherwise, generally, courts have no role to play in formulation of government policy which is a function best suited for the executive and legislature.
202. The court in the above case cited *Marbury v Madison* 5. US 137 which held that the province of the judiciary is solely to decide on the rights of the individual and not to enquire on how the executive performs its duties (see also *Ndora Stephen v Minister for Education & others* NRB HC Petition No 464 of 2012).
203. A constitutional cause of action is governed by Articles 22 and 23 (3) of the *Constitution*. In *Kemrash Harrikisson v AG of Trinidad and Tobago* (1979) 3 WLR 62, the court observed that the right to move to the court for constitutional redress is an essential safeguard of rights and freedoms, and its value would be diminished if allowed to be misused as a general substitute for ordinary proceedings.
204. Applying the foregoing case law, the Respondents have termed the Petition as moot since the issues raised have not crystallized. The 2nd Respondent averred that the impugned Bill pending before the County Assembly of Isiolo has yet to become law, whereas the 1st, 3rd – 6th Respondents take the view that the community conservancies are yet to be constructed and operationalized.
205. In this Petition, what the Petitioners are questioning is the rush to establish community conservancies by the 1st Respondent in total disregard of their rights to community land yet to be registered, without following the *Constitution* and the *Community Land Act*, and in total disregard of the 2nd Respondent who is constitutionally and statutorily mandated to hold the unregistered land in trust of the inhabitants of the area, and without the involvement of the 7th Respondent, which is constitutionally and statutory supposed to regulate, manage and oversee establishment of wildlife community conservancies and sanctuaries.
206. The 1st Respondent has pleaded that there are existing community conservancies that have been established after rigorous public participation among the local communities and other stakeholders.
207. It is trite that a party cannot be allowed by the court to approbate and reprobate at the same time. Parties are bound by their pleadings (See *Raila Odinga & others v IEBC*[2013] and [2017] eKLR. A party may not blow hot and cold at the same time.
208. The 1st Respondent cannot plead that it has established a community conservancy in line with the law and at the same time allege that the issue of the constitutionality and the statutory basis of the community conservancies has not crystalized, or that the issue is an academic question, yet to ripen for the court to determine its constitutionality or legality.
209. *Black Laws dictionary* 10th Ed defines a moot case as where a controversy no longer exists or where the question is abstract and does not arise from existing facts.



210. In *Daniel Kaminja & others v County Government of Nairobi* [2019]eKLR, the court held that a matter is moot where a determination by the court will have no practical impact or where a court is acting in vain even if the judgment is given in favor of the Plaintiff, and where the suit is not related to the practical situation of human nature and humanity.
211. In this Petition, we find that the parties have pleaded justiciable issues, problems and controversies posing significant questions of both fact and law, whose answers are to be derived from the *Constitution* and not statutes.
212. In our view, therefore, the issues raised by the Petitioners are not idle, moot, or academic as alleged by the Respondents.

Whether the Petitioners have proved a breach of their constitutional rights and freedoms by the Respondents?

213. The next issue is whether the Petitioners have proved that the establishment and running of community conservancies by the 1st, 3rd and 6th Respondent's falls short of the *Constitution* and statute law governing the establishment of community conservancies in unregistered community land.
214. The word conservancy comes from the Latin word 'conservator', which means to save or keep from danger, preserve or keep unchanged. Wildlife conservation in Kenya is as old as humanity. Kenyans in early times used traditional customs, rules, taboos, beliefs, and practices of the various ethnic groups relating to wildlife. See Overseas Development Administration ODA 1996 Africa Wildlife Consultation Final Report of the Consultation (London, ODA, 77) cited in Benson Kinyua Ngure, The wildlife conservation and management in Kenya: Implementing the legal framework (accessed from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353319)
215. Benson Ngure takes the view that formal wildlife conservancies in Kenya began with the arrival of the British colonialists around 1895, who came up with the management plans and perceived the indigenous resources and methods as incompatible. Through these plans, traditional subsistence hunting was banned. Rural communities were also prohibited from entering what was established as national parks and game reserves to access pasture and fuel wood.
216. Therefore, progress and policies were introduced in Kenya to protect wildlife from the perceived destructive forces and humans. The National Parks Ordinance was enacted in 1945, which formerly introduced the National Park System of Wildlife Management in Kenya. This law was followed by the Wild Animals Protection Ordinance of 1951.
217. The post-independence government came up with the first Wildlife Policy, namely Sessional Paper No 3 of 1975, establishing the Wildlife Conservation and Management Department. The *Wildlife (Conservation and Management) Act* was subsequently enacted in 1989, which, inter alia, established the Kenya Wildlife Service.
218. The law was based on a theory of conservation through protection, where the conservation and management of wildlife was administered through a system of national parks and reserves that excluded local communities from active participation in the management of national parks and reserves. See Benson Ngure (supra).
219. The law was based on the Western guidelines and philosophies of nature conservation, with KWS being charged with the duty of overseeing the conservation and management of wildlife in Kenya as per Section 3 of the *Wildlife (Conservation and Management) Act*.



220. The Minister was granted powers to define or alter the boundaries of national parks and reserves. Following the enactment of the Constitution, conservation of wildlife resources was clearly redefined in Article 69 of the Constitution. Game reserves, national parks, government animal sanctuaries and specially protected areas became public land under Article 62 (1) (g) of the Constitution.
221. Under Article 62(2) of the Constitution, the then trust land, was redefined as public land, which vested and was to be held by the county government in trust for the people resident in the county and to be administered on their behalf by the National Land Commission.
222. On the other hand, public land, which is composed of game reserves and national parks under Article 62 (3) thereof, is to vest and be held by the national government in trust for the people of Kenya and is to be administered on their behalf by the National Land Commission.
223. Coming to community land, Article 63 defines it as land lawfully held, managed, or used by specific communities as community forests, grazing areas or shrines, ancestral land, land traditionally occupied by hunters and gatherers, communities or land lawfully held as trust land by the county government including that held in trust under Article 69 (2) as public land.
224. Article 63(3) & 4 of the Constitution states that any unregistered community land shall be held in trust by county governments on behalf of the communities of which it is held and shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the right of members of each community individually and collectively.
225. The Community Land Act, 2016 is the law that was enacted to give effect to Articles 63 (3), (4) and (5) of the Constitution. The preamble of the Act is clear that it aims to give effect to Article 63 (5) of the Constitution to provide for the recognition, protection, and registration of community land rights and management and administration of community land to provide for the role of county governments in relation to unregistered community land and for connected purposes.
226. The Act defines “Community” as a conscious distinct and organized group of users of community land who are citizens of Kenya and who share attributes such as common ancestry, similar culture or unique mode of livelihood, socio-economic or similar interest, geographical space, ecological space or ethnicity.
227. Community land tenure rights and interests are defined as unwritten ownership practices in specific communities where land is owned or controlled by a family, clan or designated community leader, possession or enjoyment of common rights, privileges, or interests in land and or rights conferred by or derived from African customary law, customary or practices that are not inconsistent with any written law or the Constitution.
228. Communal use of land is defined as holding or using land in undivided shares by a community. Section 3 of the Community Land Act provides that community land shall vest in the community and may be held as customary, freehold, leasehold or such other tenure as per law.
229. Section 5, provides that every person shall have the right, either individually or in association with others, to acquire and own property as per Article 40 of the Constitution. Section 5 (5) thereof provides that every person who immediately before the Act came into effect had a subsisting customary right shall continue to hold such right.
230. From the foregoing, it is quite clear that customary land rights and interest of the Petitioners as part of the ethnic group or community who use and occupy Cherab and Chari wards are constitutionally guaranteed whether or not the land is registered as community land.



231. Section 6 thereof provides that the county government should hold in trust all unregistered community land on behalf of the communities generally resident in such communities until the land is registered.
232. The county governments under Sections 6 (6), (7) and (8) thereof are prohibited from dealing with unregistered land otherwise than as per the Act or any other applicable law. Dealing with the land includes disposal, transfer, conversion, or any other way as per Section 6 (6).
233. Section 14 (2) of the [Community Land Act](#) provides that a customary right of occupancy on any community land subsisting before commencement of the Act is a recognized right of occupancy in the respective community land subject to Article 40 (6) of the [Constitution](#).
234. Section 15 of the [Community Land Act](#) provides for the powers and functions of a community land management committee to manage and administer registered community land. It includes the power to dispose of, or otherwise alienate community land so long as it is supported by at least two-thirds of the registered adult members of the community.
235. Regarding land use and development planning of community land, Section 19 thereof provides that a plan must be submitted to the county government for approval. As to the conservation and management of resources in community land, Section 20 of the [Community Land Act](#) mandates the registered community to abide by the relevant applicable laws, policies, and standards on natural resources, including involvement of communities and other stakeholders in the management and utilization of land based on natural resources.
236. On the issue of grazing rights, Section 28 of the [Community Land Act](#) grants members of the community the right to access grazing land. In addition, Section 29 allows a registered community to designate and reserve some land as community conservation areas, cultural or religious sites. Furthermore, Section 30 grants every community member equal rights to benefit from community land, including the right to access and use community land, regardless of gender or age.
237. Section 31 of the [Community Land Act](#) provides that contracts and transfers over community land shall be carried out in a manner similar to transactions over private land as provided for under the [Land Act](#) and registered as provided in the [Land Registration Act](#).
238. Concerning existing rights to use and occupy community land, Section 34 of the [Community Land Act](#) provides that any person who immediately before the commencement of the Act held a right to use and occupy any part of the community land whether by virtue of any written authority under the law or lease may continue to use and occupy such land under such right, subject to the same terms and conditions until the lease expires.
239. Section 34 (2) thereof provides that any conversion commenced after the 2010 Constitution shall be null and void. Regarding natural resources on community land, the same are to be used and managed sustainably and productively for the benefit of the whole community, including future generations with transparency and accountability and on the basis of equitable sharing of accruing benefits.
240. Section 36 of the [Community Land Act](#), provides that any investment in community land shall be made after a free, open, consultative process and shall contain provisions on environment, social, cultural, and economic impact assessment; stakeholder consultations and involvement of the communities; continuous monitoring and evaluation of the impact of the investment to the community; payment of compensation and royalties.
241. Further requirements include, requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity



- building of the community and transfers technology to the community; and, any other matters necessary for determining how local communities will benefit from investments in their land.
242. Under Section 36(2) of the [Community Land Act](#), an agreement relating to investment in community land can be made between the investor and the community. Section 36(3) provides that no agreement between an investor and the community shall be valid unless it is approved by two-thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of the adult members of that community is represented.
243. As to regulation of community land use planning, the state, under Article 66 of the [Constitution](#), has powers to regulate the same on account of defense, public safety, order, morality, health, or land use planning under Section 38 thereof.
244. Pursuant to Section 22 of the fourth schedule of the [Constitution](#), Section 38 (10) of the [Community Land Act](#) is subject to the national and county government laws and policies relating to fishing, hunting, gathering, water protection, protection of animal and wildlife, and environmental laws.
245. Regarding dispute resolution, Section 39 (4) of the [Community Land Act](#) provides that a court shall apply the customary law prevailing in the area of jurisdiction in settling the community land disputes so far as it is not repugnant to justice and morality or inconsistent with the [Constitution](#).
246. In respect to adjudication and registration of community land, Section 46 (6) of the [Community Land Act](#), mandates the cabinet secretary to develop the adjudication program and to ensure that the new and existing adjudication programs shall be subject to the Act, be governed by the law, and shall be concluded within three years of the enactment of the Act.
247. On public participation, Section 48 of the [Community Land Act](#) mandates the Cabinet Secretary in charge of the 8th Respondent to formulate rules on the procedure regarding regulation and registration of all parcels of land, settlement of disputes, requirements for investor partnerships, conversion of land, fees payable, conditions on prospecting and mining, operations on community land, public education, payment of royalties, protection of the pastoral resources and the limitation and control of the grazing stock, and election of Community Land Management Committee.
248. In line with the Act, the Cabinet Secretary gazetted the [Community Land Regulations, 2017](#) Legal Notice No 279 (Amended on 25th April, 2024) Rule 22 thereof sets out requirements for investor partnership. It provides as follows:
- “(1) The community assembly may enter into partnerships for purposes of investment and development of community land.
 - (2) In determining whether to allocate land to individuals or partners for investment purposes, the community land management committee shall ensure that—
 - (a) the land is geo-referenced and planned in line with national and county spatial plans;
 - (b) public consultations are made by placing a notice in, at least two daily newspapers of nation-wide circulation, one local newspaper and local radio station, where applicable, and affix notices at the County, Sub County and ward offices inviting comments on or objections to the intended reservation of community land containing the following—



- (i) a description of the property in issue;
 - (ii) details of the envisaged investment;
 - (iii) specify the date, venue and time of the public consultations; and
 - (iv) a specified period of at least thirty days period for making the representations.
- (c) the investor demonstrates and provides evidence of the accruing benefits of the investment to the community.
- (3) Upon receipt of the representations from the public on the intended allocation, the community land management committee shall—
- (a) consult other relevant authorities and technical experts;
 - (b) analyze the representations and ascertain the view of the community;
 - (c) take into consideration all other matters required under the Act or any other law; and
 - (d) determine whether based on the considerations referred to under paragraph (a) and (b), the land ought to be allocated.
- (4) The community land management committee shall negotiate the terms of the agreement taking into consideration the best interests of the community.
- (5) The allocation shall be approved by two thirds of the adult members of the community assembly in accordance with section 36(3) of the Act.
- (6) The community land management committee shall cause valuation to be carried out for purposes of assessment of market value of the land and land rent to be paid prior to allocation of land to investors.”

249. the [Constitution](#) of Kenya 2010 changed the manner in which the state and the community were going to manage natural resources, including wildlife. The fourth schedule of the [Constitution](#) under part 1, paragraph 22 (a) & (b) placed fishing, hunting and gathering, protection of animals and wildlife as part of the protection of the environment and natural resources, with a view of establishing a durable and sustainable system of development.

250. The role of the county governments under part 2 paragraph (10) of the fourth schedule remained the implementation of specific national policies on natural resources and environmental conservation and ensuring and coordinating the participation of the community and locals in governance at the local level and assisting communities and locals to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

251. As to the registration of community land, land survey and mapping are part of the county planning and development. The role of the national government as regards land registration of community land falls under the general principles of land planning and coordination of planning by the counties. Under Rule 10 of the [Community Land Regulations, 2017](#) the Cabinet Secretary is required to declare community land registration units in accordance with the [Land Registration Act](#).



252. Rule 12 of the *Community Land Regulations* provides:
- “(1) Within eighteen months, from the commencement of the Regulations, every county government shall, in consultation with communities, prepare and submit to the Cabinet Secretary an inventory of all unregistered community land within the county in Form CLA 6 set out in the Fifth Schedule.
- (2) Upon receipt of the inventory, the Cabinet Secretary is required to develop and publish in the Gazette a comprehensive adjudication programme under section 8(1) of the Act.”
253. Under Rule 12(4), of the Regulations, if a county government does not submit the inventory within 18 months, the Cabinet Secretary, in consultation with the communities, is required to prepare an adjudication programme based on the existing data on adjudication programmes.
254. Rule 14 provides that there shall be maintained a community land register in accordance with the provisions of Section 8 of the *Land Registration Act*. Upon receipt of the cadastral map, the Registrar is required to open a community land register in the name of the community and issue a certificate of title and lease.
255. The guiding principles of *Wildlife Conservation and Management Act* are set out in Section 4. They include conservation and management of wildlife, entailing effective public participation, use of an ecosystem approach, encouragement of wildlife conservation and management as a form of land use on the public, community, and private land benefits of wildlife conservation being derived by the land user in order to offset costs and to ensure the value and management of wildlife does not decline.
256. The same is to be exercised in accordance with the principles of sustainable utilization to cater for the benefits of present and future generations and lastly, the benefits accruing from wildlife conservation and management being enjoyed and equitably shared by the people of Kenya.
257. Section 5 of *Wildlife Conservation and Management Act*, mandates the Cabinet Secretary to come up with wildlife conservation and management strategies catering to norms, standards, priority areas, innovative schemes, incentives, targets, research, monitoring, sustainable sharing of benefits, guidelines for granting and monitoring user rights and mitigation measures on human-wildlife conflict.
258. It also grants KWS the power to inter alia assist and advise in the preparation of management plans for community and private wildlife conservancies and sanctuaries, advise the National Land Commission and the Cabinet Secretary and Council on the establishment of national parks, wildlife conservancies, and sanctuaries.
259. Section 18 of *Wildlife Conservation and Management Act* establishes the community wildlife conservation committees, the chairperson being the county commissioner. Their functions under Section 19 are to inter alia bring together relevant stakeholders to harness participation in conservation and management programs of wildlife and develop and implement in collaboration with the service and community wildlife association mechanisms for mitigation of human-wildlife conflict.
260. Sections 26 and 27 of the *Wildlife Conservation and Management Act*, provide that wildlife conservation, protection and management shall conform with the *EMCA* and that no user right, license, or permit shall be granted under the Act without compliance with a strategic environmental, cultural, economic, and social impact assessment and the issuance of a license under *EMCA*.



261. Sections 39 and 40 of *Wildlife Conservation and Management Act*, provide for the establishment of conservancies or sanctuaries by individuals, communities, landowners, and groups of land owners upon registration under the appropriate law and in case of an individual, with the recognized wildlife manager by the County Wildlife Conservation and Compensation Committee.
262. Under Section 40(3) thereof, the registration of conservancies or sanctuaries must be in a prescribed form containing a list of the wildlife conservancies, its activities, governance structure, management plan, measures and types of activities, type of wildlife user rights, land use practices in the area, method of monitoring wildlife and wildlife user activities, and community wildlife scouting scheme.
263. Sections 40 (4) of the Act mandates the 7th Respondent to keep an up-to-date record of all approved association wildlife managers and wildlife user activities. Sections 41, 43 and 44 mandates the wildlife manager, approved by the Cabinet Secretary on the recommendation of the county wildlife conservation committee to ensure wildlife conservancies and sanctuaries comply with approved management plans and adhere to the standard of management as per the approved management plans which complies with the fourth schedule and which upon approval by the Cabinet Secretary for wildlife conservancies and sanctuaries have to be gazetted.
264. Sections 70, 71 and 73 of *Wildlife Conservation and Management Act*, provide that every person has the right to practice wildlife conservation and management as a form of gainful land use, including investing resources for the practice of accessing wildlife resources, enjoyment of benefits accruing therefrom, subject to the rights of other stakeholders and to sustainably utilize and exploit wildlife resources, whether as a land owner or in a conservation area in accordance with the relevant laws, including land use management and planning.
265. Section 75 of the *Wildlife Conservation and Management Act*, provides that for mutual co-existence in the framework of human-wildlife conflict, every decision and determination on the matter of conservation and management of wildlife resources shall not be exercised in a manner prejudicial to the rights and privileges of communities living adjacent to conservation and protected area, provided that parties shall have due regard on enabling laws including laws on devolution and land management.
266. Section 112(2) of *Wildlife Conservation and Management Act*, grants the 7th Respondent powers to control and coordinate all wildlife security issues in all parks, reserves, wildlife conservancies, and sanctuaries in collaboration with other law enforcement agencies, counties, and community wildlife scouts.
267. Section 112(8) provides that it is only the 8th Respondent that can make rules and regulations with respect to wildlife security operations in parks, protected areas and wildlife conservancies and sanctuaries. Rules 1(1) and (2) of the fourth schedule of *Wildlife Conservation and Management Act* provides that:
- “(1) Where this Act imposes a requirement for public consultation, the responsible authority shall publish a notice in relation to the proposal—(a)in the Gazette; (b)in at least three national newspapers;(c)in at least one newspaper circulating in the locality to which the proposal relates; and(d)in at least one Kenyan radio station broadcasting in the locality.
- (2) The notice shall in each case—(a)set out a summary of the proposal;(b)state the premises at which the details of the proposal may be inspected;(c)invite written and or oral presentations and comments on the proposal;(d)specify the person or body to which any such presentations and comments are to be



submitted; and(e)specify a date and place by which any such comments are required to be received, not being a date earlier than sixty days after publication of the notice.”

268. On its part, the fifth schedule under part 1 provides for management plans being the instrument in which all the ingredients for active management are described, in particular which organizations will undertake what responsibilities and what actions are intended to achieve what ends.
269. Part 2 sets out the planning framework providing for information which should be included as a minimum which includes, a legal description of the area covered (whether national, provincial, local or some other designation); a brief statement of the wildlife management goals and objectives; the time period for which the plan is valid; the species covered by the plan; a description of habitat types, amounts, and plant composition (where possible); a description of the activities being undertaken; a report detailing the participation of neighbouring communities in the preparation of the plan; a description of the anticipated benefits and beneficiaries.
270. From the framework cited above, it is not in dispute that the 2nd, 7th, 8th and 9th Respondents have cross-cutting critical constitutional and statutory roles to play in matters of national policy, statutory and constitutional duties, powers, and functions relating to the environment, natural resources, planning, land survey, and mapping, security in wildlife conservancies, licensing, issuance of permits, licenses and lastly on public participation by the locals in the management of the environment and natural resources.
271. The 1st Respondent has urged the court to find and hold that its community conservancy model, in general, and the impugned conservancies, in particular, are an innovative, effective, and legitimate forum for effective continuance, ongoing public participation, especially in the absence of the community land management committees.
272. Further, the 1st, 3rd, and 6th Respondents have urged us to find that there were no clear and intentional attempts by the Respondents to lock out the Petitioners from participating in the governance of the suit land, such that their public participation rights in particular and the constitutional rights pleaded in general were threatened, violated or infringed upon in any way, and that all that the Petitioners are seeking as an exercise of a veto power which they do not have in law.
273. The 1st, 3rd- 6th Respondents have also urged the court to find that the *Constitution* does not define what land alienation or dealing is, and that the only recourse is the definition under Section 3 of the *Land Act* and, therefore, the establishment, management and the running of the community conservancies does not amount to alienation or dealing with land as per the law.
274. The 1st, 3rd – 6th Respondents, while agreeing that the unregistered land is held in trust by the 2nd Respondent as per Article 62 of the *Constitution* and Section 4 of the *Community Land Act*, submit that as a matter of law and fact, they could not and did not establish any conservancies in the suit land and it is only communities that did so.
275. In this case, it is submitted that there is no evidence that the 1st, 3rd – and 6th Respondents have acquired any land to establish community conservancies as defined in the *WCMA*.
276. Furthermore, the 1st Respondent urges the court to find that the 3rd – 6th Respondents have pari passu rights or interests under the *Community Land Act*, just like the Petitioners, and are therefore entitled to seek the assistance of development partners such as the 1st Respondent to use the land for useful purposes; hence the conduct of the 1st, 3rd – 6th Respondents did not offend Articles 40, 60, 63 and 69 of the *Constitution*, since they acted in the public interest.



277. It is trite law that parties are bound by their pleadings, and issues for court determination flow from the pleadings. In a constitutional petition, parties are allowed to put in responses, affidavits and annexures to sustain their pleadings. In this Petition, the 3rd – 6th Respondents chose to oppose the Petition by way of Grounds of Opposition.
278. The 8th and 9th Respondents chose not to file either responses, affidavits or Grounds of Opposition. The 1st Respondent filed Replying Affidavits. In the said affidavits, nowhere did the deponent of the 1st Respondent plead that he had the authority to swear the affidavits for and on behalf of the 3rd – 9th Respondents.
279. The failure by the 3rd – 6th & 9th Respondents to file a Replying affidavit has profound implications. In *Peter v Nyakundi & others v Principal Secretary State Department and Planning Ministry of Devolution & planning and another* (2016) eKLR, the court observed that Grounds of Opposition are deemed to address points of law and cannot amount to a proper or valid denial of allegations made on oath. The court cited *Mereka & Co. others v Unesco* (2015) eKLR and *Prof. Olaka Onyango & others v Hon. AG* Petition 8 of 2014 (Constitutional Court of Uganda) that failure to file a Replying Affidavit can only mean that those facts are admitted.
280. Rule 20 of the *Mutunga Rules* provides that a petition may be heard and determined by way of affidavits, written submissions, or oral evidence. In *Daniel Kibet Mutai & others v AG* [2019] eKLR, the court said that the Respondent had made a conscious and deliberate decision not to respond or challenge the Appellant's affidavit evidence, and therefore the court could not become the Respondents' advocates by questioning evidence that had not been challenged. [See also *Philip Tirop Kitur v AG* (2019) eKLR.]
281. Written submissions cannot amount to evidence or pleadings as held in *D. T Moi v Murithi* [2022] KESC 9. The 1st Respondent cannot arrogate to itself the constitutional and statutory mandate, functions or duties it does not possess. It is not for the 1st Respondent to speak for and on behalf of the 3rd – 8th Respondents on matters of policy, law and security.
282. It is the Petitioners' case that the 2nd Respondent's actions in allowing the establishment of conservancies on its unregistered community land not only contravenes the *Constitution*, but is in breach of its statutory mandate as set out in Section 6(8) of the *Community Land Act*.
283. As regards the 8th Respondent, it is contended that its' failure to ensure the proper management of community land and allowing the establishment of conservancies without due procedure, violates their constitutional rights as per Articles 40 and 63 of the *Constitution*.
284. Further, the Petitioners opine, the 2nd and 8th Respondents are mandatorily required by the law to initiate public participation in matters that concern county planning, such as the establishment of conservancies, for it goes to the role of the county planning.
285. In response, the 2nd Respondent contends that it has no presence on the land, has had no role to play in the establishment of the conservancies and no orders can lie against it. The 8th Respondent did not file a substantive response.
286. The *Community Land Act* did not repeal the *Land Consolidation Act* and the *Land Adjudication Act*. It, however, repealed the *Land Group Representatives Act* Cap 287 and the *Trust Land Act* Cap 288. The *Community Land Act*, the *Land Adjudication Act* and the *Land Consolidation Act* have therefore been operating seamlessly in transition as held in the *County Government of Meru & another v DLASO Tigania East sub-county & others* [2018] eKLR.



287. Section 8 (1) and (2) of the [Community Land Act](#) provides that subject to this Act and any law relating to the adjudication of titles to land, the Cabinet Secretary shall, in consultation with the county governments, ensure that the process of documenting, mapping and developing of the inventory of community land shall be transparent, cost-effective and participatory.
288. Section 3 of the [Land Adjudication Act](#) grants the Cabinet Secretary powers to apply the [Land Adjudication Act](#) and the [Land Consolidation Act](#) to any community land if the county where the land is vested requests and the Cabinet Secretary considers it expedient that the right and interest of a person in the land should be ascertained and registered.
289. A formal request must, therefore, be made to the Cabinet Secretary in charge of the 8th Respondent by the 2nd Respondent. In the interpretation of a statute the court in [Gatimu Kinguru v Muya Gathangi](#) (1976), KLR 253 held that it would be wrong for the court, in the absence of an express provision to that effect, to water down any accrued rights and privileges of citizens.
290. In this Petition, it is not disputed that the [Community Land Act](#) has not been operationalized in Cherab and Chari wards. The 2nd and 8th Respondents have said nothing as regards whether there are measures in place to operationalize the [Community Land Act](#) in Cherab and Chari wards so that the Petitioners can realize and fully utilize the social, economic, development, and cultural benefits.
291. This is despite the fact that under Section 46(6) of the [Community Land Act](#), the 8th Respondent is mandated to operationalize the Act within three years from the date of the enactment of the Act and within 18 months from the date the Community Land Regulations, 2017 came into effect. This means therefore that the Petitioners rights to enjoy the accrued benefits to community land are anchored on both the [Constitution](#) and the statute and can therefore not be wished away by the 2nd and 8th Respondents.
292. The 8th and 9th Respondents urged us to rely on the [Fatuma Adan Dullo and others v Cabinet Secretary Ministry of Land and Physical Planning and others](#) [2020] eKLR. We note however, that the main Petition herein was dismissed by the Court on 11th December, 2023 in [Fatuma Adan Dullo and others v Cabinet Secretary Ministry of Land and Physical Planning and others](#) (2023) KEELC 22100(KLR).
293. The 2nd Respondent has not told this court if the county government of Isiolo has developed and published in the gazette a comprehensive adjudication program for purposes of registration of community land and consulted the 8th Respondent under Sections 6, 7 & 8 of the [Community Land Act](#) who upon request is mandated to issue a public notice of intention to survey, demarcate, and register community land under Section 8 (4) & (6) of the Act.
294. It is the 2nd and 8th Respondents who must answer to the Petition as to why the community land rights of the Petitioners have not been registered and, in the absence of registration, how they must be safeguarded in light of the community conservancies being established by the 1st, 3rd – 6th Respondents without the intervention of the 7th Respondent who is statutorily mandated to manage and regulate wildlife conservancies.
295. The statutory obligation is upon the CS in charge of the 8th Respondent who ought to tell this court if it has issued a notice for the registration of communities' recognition and adjudication of the suit land under the [Community Land Act](#).
296. In the [County Government of Tana River v Dakane Shake Bocha & others](#) [2021], eKLR at issue was the implication of Article 63 (3) of the [Constitution](#) and Section (6) of the [Community Land Act](#) and the role of county governments on unregistered /unsurveyed land in alienation, disposal or selling of



such land. The court found that the sale was irregular and illegal without the authority of the county government under the law to alienate the land.

297. In *Obo & others v NLC & others* Civil Appeal E054 of (2021) (2024) KECA 232 (KLR) (8th March 2024) (Judgment), the court observed that under Sections 6 (1) of the *Community Land Act*, all unregistered land is to be held by county governments on behalf of the communities for which it is held. The court observed that what gives a community the standing to claim land in that capacity is registration under the *Community Land Act*.
298. The court observed, guided by De Smith Would & Jowell's "Judicial review of administrative action 6th Edition sweet & Maxwell 609, that a legitimate expectation arises where a person responsible for making a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage and is at the root of the constitutional principle of the rule of law which requires predictability and certainty in government's dealings with the public.
299. In view of the foregoing, and in particular the provisions of the *Community Land Act* and its Regulations, it is our finding that the 2nd and 8th Respondents have not complied with the law in relation to registration of the suit land. We are therefore in agreement with the Petitioners submissions that the 2nd and 8th Respondents are statutorily mandated to facilitate the registration of the community land in Chari and Cherap wards, Merti sub-county, Isiolo County.
300. Pursuant to Section 4 of the *Wildlife Conservation and Management Act*, public participation is a foundational principle of wildlife conservation. Similarly, the *Community Land Act* contains provisions emphasizing the importance of public participation in matters involving investor relationships with community land. It also mandates that dealings with unregistered community land must adhere to these participatory principles.
301. Article 2, sub-section 4 of the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention), 1998 defines the public as:
- “ means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.”
302. Under Article 10 of the *Constitution*, public participation is a fundamental principle of governance. Article 69 specifically references the public participation in environmental management by requiring the state to encourage public participation in the management, protection and conservation of the environment. Article 47 makes reference to Fair Administrative Action.
303. These constitutional dictates are reinforced by the provisions of the Environment Management and Coordination Act, *EMCA* and the *Environment and Land Court Act*, both of which require the Environment and Land Court to be guided by the requirements for public participation in development of policies, plans and processes for the management of the environment.
304. Other than the *Constitution* and the *EMCA*, Principle 10 of the *Rio Declaration on Environment and Development*, which is applicable by dint of Article 2(5) and 2(6) of the *Constitution*, provides that:
- “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage



public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

305. The principle of public participation has been discussed in many judicial decisions. It has been said to be a form of checks and balances on the various arms of government in the execution of their mandates.
306. In *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment), the court said public participation applies to all aspects of governance and the public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation and the lack of a prescribed legal framework for public participation is no excuse for not conducting public participation, the onus is on the public entity to give effect to the constitutional principle using reasonable means.
307. Further, public participation must be actual but not illusory. It is not a cosmetic public relation nor a mere formality to be undertaken as a matter of course just to fulfil constitutional requirements. There is need for both quantitative and qualitative components in public participation; public participation is not an abstract notion but must be purposive and meaningful; public participation must be accompanied by reasonable notice and reasonable opportunity; public participation is not necessarily a process consisting of oral hearings, written submissions can be made.
308. The fact that someone was not heard is not enough to annul the process. Allegations of lack of public participation do not automatically vitiate the process. The allegations must be considered with the peculiar circumstances of each case.
309. The mode, degree, scope, and extent of public participation are to be determined on a case-by-case basis. Components of meaningful public participation include clarity of the subject matter to ensure the public can understand it; clear and straightforward structures and processes of participation; an opportunity for backward influence to allow meaningful contributions; commitment to the process through inclusive and effective representation; integrity and transparency of the process to build trust; and the capacity of the public to engage, which requires prior sensitization on the subject.
310. Further, the court observed, whether public participation was sufficient to meet the test is a question of fact. We agree that the *Constitution* must be interpreted holistically as held in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment).
311. Under Section 36(2) of the *Community Land Act*, an agreement relating to investment in community land shall be made between the investor and the community. Section 36(3) provides that no agreement between an investor and the community shall be valid unless it is approved by two-thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two – thirds is met. This requirement is replicated in Rule 22 of the *Community Land Act* Regulations, 2017.
312. The 1st Respondent has stated that Cherab Conservancy is one of its 43 member conservancies which is fully operational and has commenced construction of rangers outposts and headquarters offices, which will serve and benefit members of the marginalized communities. Further, the 1st Respondent has averred that there was adequate and extensive public participation on the project with the members of the community before the commencement of the project including the preparation of EIA Assessment Report/Study followed by a NEMA license as per annexures marked TL1, 2, 4.



313. On their part the 2nd and 7th Respondents through their deponents did not address the question of public participation, let alone its effectiveness, modalities, timelines, particulars, participants and or reports before, during and after the 1st, 3rd – 6th Respondents mooted, started and operationalized the setting up and commissioned establishment of community conservancies in Isiolo county in general and in particular in Cherab and Chari wards in the year 2020 and up to the filing of this petition. The only issue that the 2nd Respondent commended was public participation during the presentation of the county assembly bill.
314. The Petition was filed on the 4th October, 2021. Vide its Replying Affidavit in response to the Petitioners Further Supporting Affidavit, the 1st Respondent adduced TL1, the Certificate of Registration for Cherab conservancy which indicates its date of registration as 28th May, 2021; TL2, the community awareness documentation setting out details of alleged meetings which is dated the 5th January, 2023; TL 3, an EIA Report for the proposed cherab conservancy. The report that was supplied to the Court was not signed and dated. TL4, is the NEMA license No NEMA/EIA/PSL/22788 issued on the 18th November, 2022 for the construction of Cherab Community Conservancy Headquarters.
315. Under Section 31(1)(e) of the *Wildlife Management and Conservation Act*, the Cabinet Secretary in consultation with the competent authority is required to gazette areas zoned to have wildlife conservation and management as their land use priority. The section further provides that such an area cannot be gazzeted until the relevant provisions of the Environment Management and Co-ordination Act have been complied with and public participation has occurred.
316. Section 58 (1) and (2) of *Environment Management and Co-ordination Act* requires that any person being a proponent of a project shall, before financing, commencing, proceeding with carrying out execution or conducting any undertaking specified in the 2nd schedule to the Act to submit a project report to the authority and also undertake a full environment impact assessment, study report.
317. The evidence by the 1st Respondent through aforementioned annexures were all prepared after the Petition was filed but more importantly, the documents do not address the issue of creation of conservancies in the suit lands as required under the *Wildlife Management and Conservation Act* and *Environment Management and Co-Ordination Act*.
318. Equally, there is no evidence tendered that the 2nd and 8th Respondents facilitated public participation relating to the nature, extent, benefits, and impacts of the establishment and running of wildlife community conservancies in unregistered community lands in Cherab and Chari wards. There are no records that were undertaken by the state agencies showing meetings, press conferences, gazzement, briefing of members of public village baraza, and structured questionnaires concerning wildlife community conservancies in community land before October, 2021 when the Petition was filed.
319. Additionally, there has been no disclosure of any approvals from relevant bodies authorizing the 1st Respondent to establish a conservancy. There is no evidence of an Environmental Impact Assessment, Environmental Social-Economic Impact Assessment, Economic Social Impact Assessment, or any feasibility study conducted prior to the establishment of the conservancy despite the fact that the same is bound to interfere with the community's ability to continue with their social and economic life as pastoralists.
320. It is therefore the finding of the Court that the 1st, 2nd, 7th and 8th Respondents breached the principles of public participation, which is a constitutional imperative under Articles 10 and 69(1),(d), (e) and (f) of the *Constitution*.



321. The Petitioners have further complained that the 1st Respondent, working as an umbrella group together with the 3rd -6th Respondents, established and is running community wildlife conservancies in unregistered community land within Isiolo County without express consent, approval, authority, or mandate from them and the community at large.
322. In response, it was asserted that 1st Respondent is a non-profit members organization; that the rights of the Petitioners to the land rank equally with those of the 3rd to 6th Respondents and indeed other community members who wish to adopt conservancies as a legitimate land use for the collective benefit of the community.
323. Accordingly, it was deponed, the Petitioners do not have veto power over decisions made by other members of the community, and neither can they dictate how the suit land can or should be managed or utilized.
324. Our reading of the *Wildlife Conservation and Management Act* is that it has not adopted a fixed model of what a wildlife or community conservancy is so long as it adheres to the underlying legislative principles, concepts, and governance standards. The *Wildlife Conservation and Management Act*, in our view, leaves no room for the 1st, 3rd-6th Respondents not to comply with the law on membership, running, registration, constitution, regulation, governance structures, authorized activities, and compliance with the *Constitution* as regards sustainable development, public participation, and the right to fair administrative action.
325. Section 39 allows any person to establish a wildlife conservancy. Section 87(b) provides that KWS shall maintain registers of national parks, national reserves, wildlife conservancies and sanctuaries managed and established under the Act.
326. The 1st, 3rd – and 6th Respondents base their response on annexures TLLT titled A Guide to Establish Community Conservancies NRT Model dated January 2015, the version whose authors are Juliet King, Tom Lalampaa, Ian Craig, and Mike Harrison. The same is not a government policy. It has no legal force beyond the operations of the 1st Respondent.
327. It cannot override the *Constitution* and statutes. A member of a team may not unilaterally set the regulations of the game and impose them on all the players. The manner in which the 1st Respondent’s model was produced has not been explained. Whether it was subjected to public participation and approved by the relevant ministry has not been indicated.
328. The 1st, 3rd – 6th Respondents cannot be both a team player and a regulator of the manner of establishing and running conservancies on their terms in total breach, ignorance, and overlooking of the *Constitution* and sectoral laws governing the establishment and running of community wildlife conservancies.
329. From the statutory framework, it is evident that the community conservancy must seek registration from the community wildlife conservation committee after filing the required application form and depositing key documents, among them the land size and land agreement and management plan. [8th Schedule of the *Wildlife Conservation and Management Act*]
330. The 3rd – 6th Respondents have not sworn an affidavit attaching the aforesaid licenses, permits, legal registration status, and approvals that they have been authorized to establish and run community conservancies under the umbrella of the 1st Respondent in Cherab and Chari wards.



331. We are in agreement with the Petitioners that the 1st, 3rd – and 6th respondents are acting or undertaking their activities relating to community conservancies outside the constitutional and legal framework set out above and hence have infringed, threatened, or violated their rights to property.
332. The 1st Respondent averred that it applied its model in the establishment of the impugned conservancies and that donor funds have been sourced for the project and tenders opened for the same; otherwise, to stall the exercise through court orders will prejudice it and the community in general and will impede their freedom of association under Article 36 *Constitution* of Kenya and will also improperly limit and restrict communities right to access, use and benefit from their property contrary to Articles 10, 40, 42, 43, 56, and 69 of the *Constitution* and will violate Kenyas’ commitments under the *CBD*, 1992.
333. However, the *Constitution*, the *Wildlife Management and Conservation Act* and the *Community Land Act* provide for the involvement and participation of all the members of the community in the conservation and management of natural resources including conservancies. Therefore, to the extent that the Respondents have not complied with the said laws, it is our view that the Petitioners’ rights in respect to the unregistered community land have been infringed.
334. The Petitioners contend, that in their operation of the conservancies, the 1st Respondent has taken extreme measures including arming rangers whose presence in the county elicits tension; that there have been several instances of violence, loss of life, and forceful disappearances as was the case in the establishment of Biliqo Bulesa Conservancy; that the 1st Respondent uses the armed rangers as a private army for quelling any opposition by the community and that as a consequence, there has been a rise in the proliferation of small arms in the region as the members of the community try to defend themselves.
335. In response, the 1st Respondent contends that its armed rangers operate as wildlife scouts and hold the status of police reservists. They deny any allegations of violence instigated by their rangers.
336. Article 239 of the *Constitution* defines Kenya’s national security organs as the Kenya Defence Forces, the National Intelligence Service, and the National Police Service. The primary objective of these organs is to promote and guarantee national security in accordance with the principles outlined in Article 238(2) thereof. These principles emphasize the compliance and respect for the rule of law, democracy, human rights and fundamental freedoms. Article 238(2)(c) provides that in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya.
337. Article 243 further establishes the National Police Service, comprising of the Kenya Police Service and the Administration Police Service. The functions and objectives of the National Police Service are elaborated in Article 244, which include maintaining public safety, upholding the rule of law, and respecting human rights.
338. Further, the *National Police Service Act* sets out the establishment of National Police Reservists. This section establishes the National Police Reserve, which is composed of individuals who; are residents of Kenya aged between 18 and 55 years; volunteer for service; and are enrolled as reserve police officers.
339. Section 110(3A) of the Act further stipulates that police reserve officers must be provided with proper uniforms, service identity cards, and weapons; be deployed in specific areas with defined commands and supervision structures; and undergo vetting and training before deployment.
340. Section 110(4) thereof provides that reserve police officers are subject to the same requirements as regular police officers and must be supervised by the National Police Service. Additionally, under



- Section 110(5), the Commission is obligated to maintain an updated database of all reserve police officers.
341. Finally, under Section 111, evidence of appointment of a Reserve officer shall be the certificate of appointment, which shall be issued to every Reserve Police officer upon appointment.
342. Section 87 of the *Wildlife Conservation and Management Act* imposes additional regulatory obligations regarding the management of firearms and personnel involved in wildlife conservation mandating the 7th Respondent to maintain a register thereof.
343. Despite the 1st Respondent's assertions, it has not provided any evidence to demonstrate compliance with the above statutory requirements. No certificates of appointment have been provided evincing appointment of the rangers. Neither have they been shown to be properly registered, vetted, trained, or supervised in accordance with the *National Police Service Act*.
344. This is aggravated by the 2nd and 7th Respondents admission of the non-existence of any registers for the armed rangers.
345. In a region characterized by the proliferation of firearms, the regulation and oversight of armed personnel are critical to ensuring public safety and adherence to the rule of law. The lack of transparency and accountability regarding the armed rangers undermines these objectives and raises serious concerns about the legality of their operations.
346. In light of the constitutional and statutory frameworks governing national security and law enforcement, it is evident that the existence and operation of the 1st Respondent's armed rangers are unconstitutional and contrary to statute.
347. The 1st Respondent's failure to provide evidence of compliance with the *National Police Service Act* and the *Wildlife Conservation and Management Act* further reinforces this conclusion. These rangers cannot lawfully exercise functions that are reserved for duly constituted national security organs without adhering to the prescribed legal framework.

Whether the Petitioners are entitled to any constitutional reliefs?

348. The Petitioners have sought several reliefs including declarations of violations of their constitutional rights, permanent injunctive orders, as well as general damages.
349. The Court has found that that the Petitioners have ably demonstrated breach of statutory duties, and violations of a number of their constitutional rights by the Respondents and will issue declarations in that respect.
350. The Petitioners also seek general damages for breaches of their constitutional rights.
351. The Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment) succinctly discussed the principles guiding the award of damages in constitutional petitions thus:

“The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.

17. Special damages on the other hand are awarded for losses that are not presumed but have been specifically proved and that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury



and the hearing of the action. The attendant common law rules of proof are also applicable, in the absence of specific rules that regulate awards of compensation in constitutional petitions. It is trite under common law in this regard that special damages must be specifically pleaded and proven.

As regards the other types of damages that can be awarded in constitutional petitions, nominal damages typically consist of an insignificant allocation awarded upon proof that the defendant has violated the plaintiff's legal and constitutional rights. They are awarded for the purposes of declaring and vindicating legal and constitutional rights, and do not require proof of harm. Punitive damages are awarded in addition to compensatory or nominal damages, and proof of a highly culpable state of mind is necessary to support an award of punitive damages. Punitive damages primarily serve penal and deterrent functions in cases of gross constitutional violations, as well as vindicatory function.”

352. We note that this Petition was filed by a handful of Petitioners suing on their behalf and on behalf of other residents of Chari and Cherab wards, Merti sub-county, Isiolo County. However the citizens affected number in the thousands and the land affected is over 300,000 hectares and a handful of citizens ought not be awarded damages exclusive to themselves

What are the appropriate remedies?

353. It is trite that an appropriate relief should be an effective remedy for purposes of enforcing the Constitution, human rights and the rule of law. In Fose v Minister of Safety and Security [1997] (3) SA 786(CC)1997(7) BCLR 851 Ackermann, J, writing for the court, stated that:

“(19)Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

354. And in Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17; Ngcobo, J put the position thus:

“(45)The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source".(emphasis)

355. The evidence tendered before us clearly shows that the Petitioners attempted to engage the Respondents before moving to Court. Out of those efforts, the National Land Commission gave an advisory dated 14th June, 2021, noting that the 1st Respondent had been suspended until the community was sensitized and approved the 1st -6th Respondents initiatives.



356. Equally, the 9th Respondent by a letter dated 31st May, 2021 acknowledged receipt of the complaints by a section of Merti residents of non-inclusion in the community engagement of the proposed conservancy. In a letter dated 19th May, 2021, the 9th Respondent directed the 1st Respondent to halt the establishment of the conservancy until there was inclusive, participatory and wide consultations with the local community. All these attempts were ignored by the 1st Respondent.
357. Equally, the 2nd, 7th, 8th and 9th Respondents before this Court did not say whether they enforced the resolutions alluded to in annexures A03, 4, 5 and AO6.
358. In view of the foregoing, this court must, therefore, issue orders that not only remedy the violations but also reinforce constitutional accountability and discourage any future disregard for participatory and lawful processes.
359. We now summarize our findings and conclusions on the issues framed for determination as follows:
- i. We find that the Petitioners have the requisite *locus standi* to institute this Petition on their own behalf and on behalf of members of Merti-sub-County, Chari and Cherab wards in Isiolo County.
 - ii. We find that the Petition before the court was pleaded with sufficient precision, setting out the nature of Petitioners alleged violations and meets the constitutional threshold set out in the Anarita Karimi Case.
 - iii. We find that the Petitioners did not, in instituting this Petition breach the doctrine of exhaustion of remedies.
 - iv. We find that the Petition raised justiciable issues, controversies, and significant questions of fact and law, whose resolution lies within the ambit of the Constitution rather than statutes.
 - v. We find that the 2nd and 8th Respondents have breached their constitutional and statutory mandates by failing to facilitate the registration of the unregistered community land in Chari and Cherab wards, Merti-sub county in Isiolo County.
 - vi. It is our finding that the establishment of the conservancies in the unregistered community land in Chari and Cherab wards has been undertaken in breach of the constitutional principles of public participation as enshrined in Articles 10 and 69(1)(d), (e), and (f) of the Constitution.
 - vii. We find that the 1st, 3rd, 4th, 5th and 6th Respondents are conducting activities relating to community conservancies outside the constitutional and legal frameworks and have as a result, infringed, and violated the Petitioners' constitutional rights, including but not limited to property rights.
 - viii. We find that the existence and operation of armed rangers in the conservancies in Chari and Cherab wards, under the management of the 1st Respondent are illegal and unconstitutional.
360. Ultimately, the Court finds that the Petition is merited and proceeds to issue the following reliefs:
1. A declaration does hereby issue that the establishment of conservancies in Chari ward and Cherab, Merti sub county, was undertaken without due public participation and is consequently unconstitutional.
 2. A declaration does hereby issue that Cherab community conservancy operated and chaired by the 3rd Respondent and Bulesa Biliqo community conservancy operated by the 4th, 5th and



6th Respondents are operating illegally in so far as establishing and purporting to establish conservancies in Chari and Cherab wards, Merti sub county.

3. A permanent injunction does hereby issue prohibiting and forbidding the Respondents jointly and severally, whether acting by themselves, their agents, servants, representatives, assignees and/or umbrella bodies of the 1st Respondent from entering, mapping, surveying and delineating, carrying out conservancy operations including the recruitment, employment or entering into any other forms of contracts, evicting community members, carrying out any activities or in any way disposing the unregistered community land in Chari and Cherab wards, Merti sub-county.
4. A permanent injunction does hereby issue prohibiting the 1st, 3rd, 4th, 5th and 6th Respondents jointly and severally, whether acting by themselves, or anyone under them from operating or deploying Rangers or guards to operate in any part of Chari and Cherab Ward, Merti sub county.
5. An order is hereby issued directing the 2nd Respondent to co-ordinate with the 8th Respondent and the Petitioners and offer necessary facilitation on the registration of the community land in Chari and Cherab Ward, Merti Sub County under the [Community Land Act](#), 2016.
6. An order does hereby issue directing the 7th Respondent to revoke any and all licenses and authorities that may have been granted to the 1st, 3rd, 4th, 5th and 6th Respondents related to the establishment and management of community conservancies within Cherab and Chari wards, Merti sub-county.
7. An order does hereby issue compelling the 9th Respondent and the Isiolo County Police Commandant to oversee the implementation of the orders sought herein and to ensure that peace and order is maintained.
8. The Court declines to grant any damages.
9. Costs are awarded to the Petitioners to be borne by the Respondents jointly and severally.

DATED, SIGNED, AND DELIVERED IN ISIOLO THIS 24TH DAY OF JANUARY, 2025.

O. A. ANGOTE

PRINCIPAL JUDGE

C. K. YANO

JUDGE

C. K. NZILI

JUDGE

In presence of;

Mr Makaka for the Petitioner

No appearance for the Attorney General

Mr Ogolla for the 1st, 3rd, 4th, 5th and 6th Respondent

No appearance for 7th Respondent

No appearance for the 2nd Respondent



