



Mwakireti & 4 others v Kenya Wildlife Service & 6 others; Washumbu (DA) Company Limited & 3 others (Interested Parties) (Petition E009 of 2024) [2025] KEELC 3746 (KLR) (Environment and Land) (8 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
PETITION E009 OF 2024
EK WABWOTO, J
MAY 8, 2025**

BETWEEN

**THOMAS MWAMBETA MWAKIRETI 1ST PETITIONER
GIDION MWADIME PHILIP 2ND PETITIONER
DANSON MWASIKIRA KIZONGONA 3RD PETITIONER
COSMAS KITIRO MTERENGO 4TH PETITIONER
WILSON NYAMBU MWANGOMA 5TH PETITIONER**

AND

**KENYA WILDLIFE SERVICE 1ST RESPONDENT
THE COUNTY GOVERNMENT OF TAITA TAVETA 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT
MINISTRY OF LANDS, PUBLIC WORKS AND URBAN
DEVELOPMENT 4TH RESPONDENT
THE CHIEF LAND REGISTRAR 5TH RESPONDENT
THE NATIONAL LAND COMMISSION 6TH RESPONDENT
KENYA NATIONAL HUMAN RIGHTS COMMISSION 7TH RESPONDENT**

AND

**THE WASHUMBU (DA) COMPANY LIMITED INTERESTED PARTY
DAWIDA RANCH LIMITED INTERESTED PARTY
MBALE RANCHING (DA) CO LIMITED INTERESTED PARTY**



JUDGMENT

1. The Petitioners filed the Petition dated 1st October 2024 seeking for the following reliefs:-
 - a. A declaration that fencing off Kasighau Hill without conducting any and/or sufficient public participation is illegal and therefore null and void.
 - b. A declaration that the Respondents have violated the fundamental freedoms and rights of Kasighau community which is a minority and marginalised community.
 - c. An order directing the 2nd, 4th, 5th and 6th Respondents to allocate and adjudicate Kasighau Community with land comprising of Mbale Ranch described as L.R No. Mbale/14204; Bura Ranch described as L.R No. Bura/14205; Wushumbu Ranch described as L.R No. Wushumbu/14206; and Dawida Ranch described as L.R No. Dawida/14208 to be held by Kasighau Council of Elders on behalf of Kasighau Community.
 - d. Costs of the Petition.
 - e. Any other order(s) that this Honourable Court may deem just and appropriate in the circumstances.
2. The Petition was opposed by the 1st, 2nd, 3rd, 4th, 5th and 7th Respondents and the Interested Parties. The 6th Respondent supported the Petitioners' case.

The Petitioners' case

3. It was the Petitioners case that their forefathers and the entire Kasighau Community are the original owners and inhabitants of the parcels of land surrounding the Kasighau Hill that is presently known as Kasighau Location which consists of Washumbe Ranch, Kambanga Ranch, Amaka Group Ranch, Bura Group Ranch, Dawida Group Ranch and Mbale Group Ranch.
4. Kasighau Hill remains the only source of livelihood for the Kasighau Community having lived in what is presently Kasighau Location for generations and engaged in ranching, livestock keeping, agriculture and other traditional livelihoods passed from one generation to the next.
5. It was averred that the violations meted against the Petitioners stems back to incidences of World war I. Sometimes in the year 1914 the British in their exploration, conquest and colonization of Africa came to Kenya. In its bid to reign over its territory, the British installed military communication equipment at the top of Kasighau Hill in the midst of African villages which provided for patrol units around the adjacent Anglo German Frontiers. The Germans in the then Tanganyika discovered the military command and pushed their forces to secure it as a second permanent base inside the British territory.
6. Sometimes in the year 1915 there erupted a deadly fight between the Germans and the British which culminated into the expulsion and displacement of the Petitioners from their ancestral land in 1915 causing the Petitioners and Ksighau Community to bear the scars of colonial injustices inflicted during the British Colonial period. During this period, the British forcefully to over the Petitioners land and razed down their huts. Thereafter the British forced the Petitioners to walk on foot from Kasighau to Maungu then to Mombasa where hundreds of elderly people died of hunger and thirst due to the long walk.



7. The Petitioners stated that there were forced evictions of the Kasighau Community from their properties. The evictions were forceful, violent and with no basic regard to human rights and that their property and crops including cash crops, mango and coconut trees and houses were utterly destroyed with some community members being imprisoned while others were executed in public so as to instil fear.
8. It was stated that sometimes in 1929 after some agitation by the community, the Kasighau community were allowed to move to Mwatate area where they sojourned for eight years but denied the right to move back to their ancestral land. Upon returning to Kasighau, the Petitioners found that their ancestral land had been subdivided into ranches owned by parties who originally are not from Kasighau Community. Soon thereafter, the Petitioners began their agitations to reclaim their ancestral land back.
9. It was further stated that the Petitioners lodged a complaint with the 6th Respondent relating to historical injustices meted upon Kasighau community and sought to be allocated land comprising of uncommitted ranches of Wushumbu, Mbale, Bura and Dawida Ranches. On 5th May 2015 the 6th Respondent wrote to the Land Adjudication and Settlement Officer seeking details on the ownership and occupation of group ranches within Kasighau Community.
10. On 2nd June 2016 the Kasighau Community held a meeting attended by over 70 members. The Kasighau Community after lengthy discussions resolved among other resolutions that Kasighau Council of Elders be issued with the title deed of Kasighau group ranches. Vide letter dated 17th November 2016, the 6th Respondent wrote to the Governor Taita Taveta County asking for his decision.
11. It was stated that the 6th Respondent upon analysis and consideration of the records established that there exist 12 ranches in Kasighau hill out of which the following Ranches are uncommitted and free for allocation:
 - a. Mbale Ranch described as L.R No. Mbale/14204;
 - b. Bura Ranch described as L.R No. Bura/14205;
 - c. Wushumbu Ranch described as L.R No. Wushumbu/14206; and
 - d. Dawida Ranch described as L.R No. Dawida/14208.
12. According to the Petitioners, in order to claim and initiate the allocation of the above mentioned ranches to the Kasighau Community, they were advised to form a company which resulted to the formation and the incorporation of Zome Kasighau Limited incorporated on 10th January 2017.
13. The 6th Respondent then instructed the Petitioners to correspond with the then Governor for Taita Taveta County and obtain consent. The Governor issued further instructions that the Petitioners and the entire Kasighau Community should build several social amenities in Kasighau for him to grant them the said consent which was never done despites efforts by the communities to build social amenities.
14. That since then, the Petitioners have tried all possible means to have the 6th Respondent perform its duties envisioned in Section 15 and 16 of the [National Land Commission Act](#) but no action has been taken yet the historical land injustice in this case was occasioned in the early 1900's well within the stipulations of sub-section (2) and was occasioned initially by colonial occupation then by cronies in the first post-independence government.



15. The Petitioners also stated that despite the 2010 Constitution being in force for now more than 13 years the Kasighau Community have not fully benefited from the fruits of the 2010 Constitution. Kasighau Community have remained marginalized with less developments undertaken by both the national and the county governments. As such, the Kasighau Community continues to bear the scars of the colonialists and the Kenyan governments even after the country attained its independence on 12th December 1963.
16. Schools, health centres, water projects and most public utilities have been started by the Kasighau Community while the community is entitled to fulfilment of these social economic rights. It was stated that that both the National and County Governments have done little to improve the livelihoods of the people of Kasighau.
17. According to the Petitioners, these marginalization continues to cause severe breaches and violations of the rights of Kasighau Community.
18. It was contended that the Kasighau Community have since occupied and put into use Kasighau Hill since time immemorial. The Kasighau Community have had free access to Kasighau hill for their daily sustenance for centuries.
19. Sometimes in the year 2020, the 1st Respondent attempted to erect an electric fence 4 kilometres radius from the Kasighau Hill. When the elders of the Kasighau Community raised concerns as to why their ancestral land was being fenced off, the 1st Respondent ceased erecting the fence and disappeared without any formal communication.
20. It was averred that later the 1st Respondent without conducting any public participation, consultation, or due process contrary to *the constitution* and the relevant laws scheduled an erection of electric fence 4 kilometers radius from the Kasighau Hill which the Petitioners and entire Kasighau Community rely upon for grazing, access to water, shrine and other cultural practices.
21. The Petitioners contended that the 1st Respondent has scheduled fencing activities which are to be commenced soon is to the detriment of the Petitioners and the wider community, whose access to the Kasighau hill and water sources will be severely restricted. The Petitioners risked being but off and restricted from accessing Kasighau Hill which is their sole source of their livelihood.
22. It was further contended that the 1st Respondent has not conducted effective and qualitative public participation or consultations with the Petitioners or other members of the community, in violation of Article 10 of *the Constitution*, which mandates public participation in decision-making.
23. It was further contended that the 1st Respondent failed to invite members of the public and particularly the Kasighau Community before coming up, developing and fencing off the Kasighau Hill. The Petitioners are entitled to protection of their constitutional rights, including the right to property, cultural rights and the special rights of marginalized communities.
24. It was further contended that the Respondents have failed to act despite the Petitioners petitioning relevant bodies to be allocated land comprising of Mbale Ranch described as L.R No. Mbale/14204; Bura Ranch described as L.R No. Bura/14205; Wushumbu Ranch described as L.R No, Wushumbu/14206; and Dawida Ranch described as L.R No. Dawida/14208.
25. It was further averred that the Respondents actions are in violation of the Petitioners rights as was pleaded in the Petition.



The 1st Respondent's case

26. The 1st Respondent filed a Replying Affidavit sworn by Josephat Erupe dated 28th October 2024. It was averred that in discharge of its mandate it recognizes the importance of community engagement and involvement in conservation.
27. In a bid to win more space for wildlife and to promote human and wildlife co-existence it promotes creation of wildlife conservancies by owners of private and community land.
28. It was contended that wildlife conservancies are imperative in promotion of human and wildlife coexistence as they establish a buffer zone between wildlife protected areas and human settlements and on this background that when approached by members of the Kasigau community, it registered the Kasigau Conservancy.
29. It was further contended that in the recent past there has been an increase in incidences of human wildlife conflict in the general Kasigau area, causing the community grave loss of property, severe injuries and in some instances deaths. In a bid to contain the escalating incidences of human wildlife conflict the local community, its leadership and KWS proposed the establishment a 38 kilometre Bura-Izera-Kasigau-Rukanga fence in Mwatate and Voi Subcounties to secure the community and their property from damage by wildlife.
30. In recognition of the role of the local community in conservation, KWS notified the local communities of the intention to fence the area and invited their views on the proposed fencing.
31. It was contended that the Petitioners were notified of this invitation through the area chief as admitted at paragraph 14 of the affidavit in support of their Notice of Motion.
32. It was further contended that on 3rd August 2024 a community engagement forum was held at Marungu area where 92 members of the local community attended. In attendance were also the area chiefs, the Managers of Mgeno Conservancy and Chalongo Conservancy, the proposed contractor as well as representatives of KWS. In the said community engagement forum, members of the community were informed of the details of the proposed fencing and the importance of the same and its benefits to the community. Among the concerns raised by the community members was that a fence would deny them access into the conservancy for which the community was assured access into the conservancy through access gates.
33. The 1st Respondent further contended that on 3rd August 2024, a community engagement forum was held at Bungule area where 183 members of the local community attended. In attendance were also the area chiefs, the manager of Mgeno Conservancy, a representative from Kasigau Conservancy, the area Member of County assembly, the proposed contractor as well as representatives of KWS. In that community engagement forum, members of the community were informed of the details of the proposed fencing and the importance of the same and its benefits to the community. Similarly among the concerns raised by the community members that a fence would deny them access into the conservancy for which the community was assured access into the conservancy through access gates.
34. It was also further contended that on 6th September 2024 a community engagement forum was held at Kisimenyi area where 98 members of the local community attended. In attendance were also the area chiefs, village elders as well as representatives of KWS. In the said community engagement forum, members of the community were informed of the details of the proposed fencing and the importance of the same and its benefits to the community and the community wholly supported the fencing.



35. According to the 1st Respondent, it is apparent that comprehensive public participation was conducted and the views of the local community taken into consideration prior to undertaking the fencing project. The fence to be erected is not in any way a permanent boundary or barricade between community land and the conservancy and that the intended fencing is in Kasighau Conservancy, demarcation of which is very clear.
36. It was the 1st Respondent's contention that the intended fencing is not on the Petitioners or their community's land as alleged but rather on land registered as Kasighau Conservancy land and the Petitioners have not presented any evidence to show that the intended fencing is on their community land.
37. The 1st Respondent further contended that the intended fencing will not in any way fence off Kasighau hill which is far away from the area intended to be fenced and will in no way deny the Petitioners access to water, grazing land, shrines and other areas of cultural importance as alleged.
38. The 1st Respondent reiterated that the community will continue to access the area through access gates to be established by the management of the conservancies, for which the local community are members.
39. The 1st Respondent also reiterated that the local community has been involved and continues to be involved at arriving at the intended fencing and their views considered. In addition, upon explanation of the benefits of the fencing to the community in terms of reduced human wildlife conflict, employment opportunities in construction of the fence and operation of conservancies the local community was supportive and gave a nod to the implementation of the fencing project.
40. It was averred that noting the community engagement and involvement prior to implementation and commencement of the project, the benefits of the project, it is apparent that there is no violation of the Petitioners rights as alleged.
41. According to the 1st Respondent, it is clear that comprehensive and extensive public participation was undertaken prior to the intended fencing project, that the Petitioners apprehension that Kasighau Hill is going to be fenced off is unfounded the Petitioners' allegations remain spurious and it is in the interest of the public that the fencing proceeds since the 1st Respondent stands to suffer more prejudice should the fencing exercise be halted.

The 2nd Respondent's case

42. The 2nd Respondent filed a Replying Affidavit sworn by Jimmy Mtawa the County Chief Officer from Department of Land, Physical Planning and Urban Development.
43. It was the 2nd Respondent's case that the 2nd Respondent holds in trust all unregistered community land on behalf of the communities of Taita Taveta. There are multiple public, community as well as private ranches and conservancies. They include:- Amaka Ranch, Bachuma Ranch, Bura Ranch, Chalongo Conservancy, Choke, Dawida Ranch, Izera Ranch, Kambanga Ranch, Kamungi Conservancy, Kasigau Ranch, Kutima Ranch, Lake Jipe Conservancy, Lualenyi, Lumo Wildlife Conservation Trust, Maungu Ranch, Marungu Hill Conservancy Association, Mbale Ranch, Mbulia Conservancy, Mgeno Ranch, Mkuki Ranch, Mramba Ranch, Mwashui Ranch, Ndara Ranch, Ndara B Ranch, Oza Community, Rukinga Wildlife Conservancy, Sagala Ranch, Shirango Wildlife Conservancy, Taita Ranch, Taita Wildlife Conservancy, Teri B Community Land, Wangala Ranch, Wushumbu Ranch, among others.



44. The land in Taita Taveta County can only be properly and profitably managed through ranching, conservancies, irrigation schemes and other similar large land holding economic models.
45. As a result of Taita Taveta's proximity to Tsavo East and Tsavo West National Parks, incidences of human wildlife conflicts are common. There are numerous incidences of lives being tragically lost, predation, human injury, human threat, crop damage and property worth millions destroyed.
46. The initiative by Kenya Wildlife Service to fence the parks, sanctuaries and ranches is a great mitigating measure that will ensure that the human-wildlife conflict is minimized and even eradicated. The cost and the destructive nature of the human wildlife conflict has been a subject of keen attention by the county government, the national government, Kenya Wildlife Service, Conservationists, Churches, Communities living in conflict prone area, and even International Non-Governmental organizations.
47. It was stated that the question of fencing off the parks and curbing human wildlife conflict and the county development model as set out above are part of the county integrated development plan every year since the advent of the devolution in 2013. The County Integrated development plans have always been a product of public participation. While other citizens have always given their views and supported the current efforts to curb human wildlife conflict and supplemented the government proposal and contributed new ideas on the best economic development model, the petitioners herein do not provide evidence that they participated in public participation and gave views that land subdivision and speculation is a better economic model.
48. According to the 2nd Respondent's, the petitioners herein have not followed the procedure provided for by law before approaching this court.
49. Beyond subdividing the land the Petitioners do not proffer another different and better economic model other than conservation, ranching and tourism. This is unsustainable.
50. Before the project was conceived, the locals were duly consulted through various public participation fora. The concerns of the community in terms of access have been duly addressed through the provision of pass gates.
51. It was averred that there are no community members who has been stopped from accessing water sources that they previously utilized. Indeed, this is not the first time that sanctuaries and watering points and springs are being fenced off. Mzima Springs is fenced off within Tsavo East National Park. But the government has made adequate provisions for the citizens to access water.
52. It was contended that there is no evidence that there is any traditional worshippers who have desired to access any shrine. Indeed, the shrine or religious sanctuary has no where been mentioned or photographic evidence produce. There yet still no positive deposition that any community member was denied access to a vital shared resource.
53. It was averred that no prejudice will be suffered by the Petitioners if the orders are denied and that the Petitioners will benefit from the project since the wild animals will be restrained from roaming around thus facilitating a peaceful existence of both flora and fauna.
54. It was further averred that it was agreed during the public participation that the locals will be given priority employment to undertake the fencing of the 20km stretch. This will create over 30,000 jobs stimulate the local economy and provide income to the residents of Taita Taveta and that the fencing will not lock out access by the locals.



55. It was averred that the ranches are owned by companies even in Kasighau area and that the court and indeed the government do not have any justifiable reason to deal with private land in the manner this court has been invited to deal with the private land.
56. It was also averred that Kenya Wildlife Service has already contracted contractors to carry out the works. The taxpayer's money will not be prudently used if the project is halted or abandoned and the court was urged to dismiss the Petition.

The 3rd to 5th Respondent's case

57. The 3rd to 5th Respondents filed grounds of opposition dated 5th March 2025. The grounds of opposition was premised on the grounds that the Petition are misconceived, frivolous, vexatious and an abuse of the process of the court, the prayers sought are being premature and that there is no cause of action against them. It was further stated that orders sought were untenable and the court was urged to dismiss the Petition.

The 6th Respondent's case

58. The 6th Respondent filed a Replying Affidavit sworn by Elijah Letangule, its Deputy Director of Land Administration.
59. It was averred that here is a clear map delineating the boundary within Kasighau Location and there is also a letter dated 7th June 1972 to the Commissioner of Lands on the Kasighau Ranch boundaries with a view to redraw the boundaries to include Trust Land which had been formerly included. It was also averred that there was clear evidence of land set aside for community use, recognized in planning documents without subsequent alterations. It was also averred that any encroachment on community land by the 1st Respondent without due process violates both the statutory obligations under Section 18 and 19(c) (d) of the *Wildlife Conservation and Management Act* 2013.

The 7th Respondent's case

60. The 7th Respondent filed a Replying Affidavit dated 14th November 2024 stating inter alia that the Petition does not disclose any cause of action against the Commission since the same is anchored on historical land injustices which is within the mandate of the 6th Respondent.

The case of the Interested Parties

61. The Interested Parties opposed the Petition by filing a Replying Affidavit sworn by David Lusoka Mshila the Chairman of Mbale Ranching Company on 20th January 2025.
62. It was averred that the allocation of these ranches among others were done sometimes in 1973 by the District Agricultural Committee in areas that were former hunting blocks that were considered range land.
63. It was stated that the said allocation were done as a compensation for the land taken away from the community during the establishment of Tsavo East and Tsavo West National Park. The main purpose of the allocation was to accommodate the communities existing within Taita Taveta region and the ranching companies established thereafter was for purposes to acquiring title and establishing formal administrative structures for the said ranches vide public limited companies.
64. It was contended that the Kasighau Community was equally allocated a hunting block which later was referred to as Kasighau Ranch.



65. The interested parties denied the allegation that there was discrimination in the allocation of ranches as the Kasighau Community was equally accommodated the allocation of the hunting blocks in addition to the land left to the community where they reside.
66. The interested parties deny the allegation that its ranches/parcel of land is uncommitted and averred that the area has been surveyed and each ranch issued with a parcel number and size.
67. It was averred that their ranches are Directed Agricultural Companies which at all material times the Ministry of Agriculture supervised its activities in the allocated areas.
68. According to the Interested Parties, the National Lands Commission and the County Government of Taita Taveta have since acknowledged the above mentioned allocation and the only challenge some of the Ranches faced is the issuance of title.
69. It was stated that arising from the said allocation by the District Agricultural Committee, Wushumbu Ranch have since been registered as owners of Land reference Number 14206.
70. According to the Interested parties, the Petition is an abuse of court process and they urged the court to dismiss the same.

The Petitioners submissions

71. The Petitioners filed written submissions dated 20th February 2025. Counsel submitted on the following issues:-
 - a. Whether the instant Petition has met the threshold of a Constitutional Petition.
 - b. Whether this Petition is in contravention with the doctrine of constitutional avoidance.
 - c. Whether the Petitioners constitutional rights have been threatened, infringed or violated.
 - d. Whether the Petitioners are entitled to the reliefs sought.
72. Citing Rule 4(1) and 10 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules), and the case of Anarita Karimi Njeru =Versus= Republic (1979) KLR 154, it was argued that the Petition does meet the threshold for grant of the reliefs sought.
73. On whether this Petition is in contravention of the doctrine of constitutional avoidance, it was submitted that the Petitioners have clearly demonstrated violation of their fundamental rights and the court cannot be barred by the doctrine of constitutional avoidance in considering the same. The cases of Royal Media Services Ltd =Versus= A.G & 6 Others (2015) eKLR among others were cited in support.
74. On whether the Petitioners rights had been violated, it was submitted that the actions of the Respondent had contravened Articles 10, 27, 40, 44, 56, 63 and 69 of *the Constitution*.
75. It was argued that there was no public participation and no evidence had been produced to demonstrate the same.
76. It was further submitted that for a long time the Kasighau community have constructed homes, public utilities, cultivated the land, enjoyed unchallenged rights to pasture, grazing, ranching, livestock keeping, agriculture and relied on the land to sustain their livelihoods. In doing so, the Kasighau community have exercised an indigenous form of tenure, holding the land through a collective form of ownership.



77. The 1st Respondent's actions in fencing the community's land will constitute a violation of Article 40 of *the Constitution* of Kenya, by unlawfully restricting their access to land that they use for grazing and cultural activities among others. Further, the scheduled fencing has not followed the appropriate provisions of law as public participation was not conducted.
78. It was contended that the 6th Respondent had also failed in resolving the said dispute.
79. It was further contended that the fencing of the land by the 1st Respondent denies the Petitioners access to sites of cultural and historical significance and thus violating their rights under Article 44 of *the Constitution*.
80. It was argued that Article 69(1)(a) of *the Constitution* provides that the State shall ensure that the environment is managed in a way that promotes sustainable development. The community has the right to demand that the government's environmental actions, including the construction of fences, respect their rights to land, culture, and livelihoods.
81. It was also submitted that the Respondents have discriminated the Petitioners and the entire Kasighau Community for being a minority and marginalized community contrary to Article 27 of *the Constitution*. The Kasighau Community have already suffered from historical injustices and unequal access to land and resources.
82. It was the Petitioners submissions that the failure to consult and involve the community in decision making about their land use while doing so for other groups could amount to discrimination based on ethnicity or social origin, violating their rights under Article 27(4), which prohibits discrimination on these grounds.
83. It was also submitted that the 1st Respondent clearly admitted in their Replying Affidavit dated 28th October 2024 that they have conducted community engagement forum in Marungu, Bungule and Kisimeyi areas only. The fact that they have failed to conduct public participation in the Kasighau location specifically Bughuta, Makwasinyi and Rukunga sub-locations was not denied and that the same goes to show that the Kasighau community have suffered discrimination despite previously faced historical injustices in respect to their land.
84. The court was urged to grant the reliefs sought by the Petitioners.

The 1st Respondent's submissions

85. The 1st Respondent filed written submissions dated 5th March 2025. Counsel submitted on one single issue being whether the fencing off Kasighau Hill by the 1st Respondent without conducting any/or sufficient public participation is illegal.
86. It was submitted that on 3rd August 2014 and 6th September 2024 a community engagement forum was held at Bungule and Kasimenyi respectively and members of the local community attended wherein the whole community supported the fencing and as such the parameters of public participation had been met.
87. The court was urged to dismiss the Petition with costs.

The 2nd Respondent's submissions

88. The 2nd Respondent filed written submissions dated 12th March 2025. Counsel submitted on the following issues:-
 - a. Whether the Petitioners have locus standi to institute the proceedings.



- b. Whether the court has jurisdiction to determine the Petition.
 - c. Whether the rights of the Petitioners were violated.
 - d. Costs.
89. It was submitted that there was no evidence presented before this court to show that the Petitioners were representing the community and as such the Petitioners are busy bodies.
90. On the aspect of jurisdiction, it was submitted that there is a clear set mechanism for adjudication of land and the court cannot be the first port of call and reliance was placed on Section 8 of the [Community Land Act](#).
91. It was further submitted that Section 117 of the Wildlife Management and Conservation Act establishes an elaborate dispute resolution mechanism. The case of Ibrahim Mohamed Ibrahim & Another =Versus= KWS & 4 Others (2020) eKLR was cited in support.

The 6th Respondent's submissions

92. The 6th Respondent filed written submissions dated 28th February 2025 wherein Counsel submitted on the following issues:-
- i. Whether there is community land set aside for the Kasighau Community.
 - ii. Whether there was due process by the 1st Respondent in the construction of a fence on the Petitioner's land.
93. It was argued that there indeed exists community land belonging to the Petitioner which is distinct from the 1st Respondent's land and that the 1st Respondent did not conduct public participation in fencing the land and thus violated Articles 10 and 69 of [the Constitution](#).
94. The 6th Respondent urged the court to grant the reliefs sought in the Petition.

7th Respondents submissions

95. The 7th Respondent filed written submissions dated 27th February 2025 and Counsel submitted on the following issues:-
- i. Whether or not the Petitioners constitutional rights have been violated, threatened and or infringed by the 7th Respondent and
 - ii. Whether or not the Petitioners are entitled to the reliefs sought.
96. It was submitted that the 7th Respondent did not violate the Petitioners' fundamental rights and freedoms as alleged since the 7th Respondent had vide a letter dated 25th June 2021 advocated for the Petitioners rights. The court was urged to dismiss the Petition.

Interested Parties submissions

97. The Interested Party filed written submissions dated 5th March 2025. Counsel submitted on the following issues; jurisdiction and whether the threshold of fraud has been established by the Petitioner so as to impeach the Interested Parties ownership over the suit land.
98. It was submitted that the Petitioners ought to have filed their grievance at the National Environment Tribunal before coming to this court.



99. It was submitted that the Petitioners had also not adduced any proof of evidence seeking the allocation of the Interested Parties land. The court was urged to dismiss the Petition with costs.

Analysis and Determination

100. Having considered the respective parties pleadings and written submissions, the following issues arise for determination:-

- i. Jurisdiction.
- ii. Whether there was adequate public participation conducted prior to the fencing exercise.
- iii. Whether there is any violation of the Petitioner's rights.
- iv. Remedies if any.

101. The court shall now proceed to determine the said issues sequentially.

102. The 1st and 2nd Respondents objected to the Petitioners claim on the basis that this court does not have jurisdiction to hear and determine the same. It was averred inter alia that the doctrine of constitutional avoidance bars this court from hearing and entertaining the Petition filed herein. It was submitted that the Petitioners had not demonstrated that they had exhausted the existing and established other dispute resolution mechanisms before moving to this court.

103. In responding to this issue, the Petitioners submitted that the court has jurisdiction to hear and determine the matter it was submitted that the Petitioners have clearly demonstrated violation of their fundamental rights and the court cannot be barred by the doctrine of constitutional avoidance in considering the same.

104. It is worth noting that while the court's jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute, the same may only be considered where the alternative forum is accessible, affordable, timely and effective. See also the decision of the Supreme Court in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment). In the instant Petition, the Petition has sought several reliefs in the main petition which cannot be granted by the proposed alternative forum as submitted by the Respondents.

105. The Petitioners seek inter alia various reliefs in the Petition including a declaration on violation of their fundamental rights and freedoms which such remedies cannot be granted by other forums and further considering the supreme court case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Supra) case it is the finding of this court that it has jurisdiction to hear and determine the Petition.

106. On the second issue as to whether there was adequate public participation prior to the fencing exercise, it was the Petitioners case that there was no adequate public participation in respect to the 1st Respondent's fencing exercise.

107. While the Petitioners complained about lack of meaningful public participation as one of the grounds the Petition. All the Respondents and the Interested parties save for the 6th Respondent disagreed with the Petitioners and were in unanimity that indeed there was adequate public participation which met the Constitutional threshold.



108. Article 10 (2) a of *the Constitution* outlines participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Article 69(1) (d) of *the Constitution* provides that the State shall encourage public participation in the management, protection and conservation of the environment.
109. In the case of Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy and 17 Others [2015] eKLR, the Court set out the minimum basis for adequate public participation as follows: -

“From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”

- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.



- d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional Box.
- f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

110. This court accepts the principles set out in the Mui Coal Basin case (supra) as the applicable principles in examining the threshold of public participation that should be met in undertaking similar exercise like the one being undertaken by the 1st Respondent.

111. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR referred to *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR stated as follows: -

“the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances.

112. From the evidence that was tendered, the 1st Respondent adduced minutes of the meetings and community engagement forums in respect to the 1st Respondent's fencing exercise held on 3rd August 2024 and 6th September 2024 wherein the members present wholly supported the project, these minutes were not disputed by the Petitioners. There was no also no evidence tendered that the Petitioners were denied an opportunity to participate in the said engagements and forums.



113. In view of the foregoing, this Court is therefore satisfied that there was sufficient evidence that indeed public participation that was undertaken herein was adequate since members of the public including the Petitioners were afforded an opportunity to air their views in respect to the proposed fencing exercise.
114. On whether there is a violation of any of the Petitioners rights. The Petitioners contend that the 1st Respondent's actions of undertaking the fencing exercise is illegal, unconstitutional, unlawful and discriminative against them. The Petitioners argued that the Respondents contravened Articles 10, 27, 40, 44, 56, 63 and 69 of *the Constitution*.
115. The Petitioners claims entitlement to the disputed land by virtue of Article 63 of *The Constitution*. This Article prescribes what amounts to community land. Although the Petitioners do not specify the exact nature of their ownership, it seems to be based on Article 63(2)(d)(i).
116. Section 7 of the Wildlife Conservation and Management) Act gives the 1st Respondent the mandate to undertake the said exercise in compliance with the law.
117. Then Article 62(1)(g) of *The Constitution* 2010 declares National Parks (such as Tsavo National Park) to be Public Land. Public land vests in and is held by the National Government in trust for the people of Kenya (Article 62(3)).
118. The court in considering the said issue noted that regrettably, the Petitioners failed to place before court evidential material to demonstrate that the 1st Respondent's actions is illegal, unlawful and unconstitutional. In view of the foregoing, the Petitioners cannot be said to have established a basis of violation of any of their rights as enumerated in the Petition. It is therefore the finding of this court that the Petitioners have not established any violations of their rights by any of the Respondent.
119. In the instant case the Petitioners have been unable to demonstrate any violation of their rights by the Respondents.
120. The last issue is whether the Petitioners are entitled to any of the relief set out in the petition against any of the respondents. As I have pronounced myself earlier, having found that the Petitioners have been unable to demonstrate any violation and or their infringement of their rights, it follows that they have failed to prove their petition on a balance of probabilities. The net result is that he they are not entitled to any of the reliefs sought in the petition.

Conclusion

121. It is the finding of this court that the Petition has not been proved to the required standard. The Petitioners have not proven their case to sustain this petition and it is my holding that no fundamental rights and or other constitution rights of the Petitioners have been violated and or infringed as alleged.
122. Consequently, the Petition dated 1st October 2024 is hereby dismissed. Each party to bear own costs of the Petition.

DATED, SIGNED AND DELIVERED IN VIRTUAL/OPEN COURT AT VOI THIS 8TH DAY OF MAY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Macharia for Kipkirui for Petitioners



Mr. Kiilu for 6th Respondent

Ms. Omutimba for 7th Respondent

Mr. Mwangi for 3rd Respondent

No appearance for other parties

Court Assistant: Mary Ngoira and Norah Chao.

