Peter & 9 others (Petitioning on Their Own Behalf and on Behalf of 50 Co-Petitioners) v County Government of Isiolo & 3 others (Petition E001 of 2025) [2025] KEELC 5184 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5184 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

PETITION E001 OF 2025

JO MBOYA, J

JULY 3, 2025

BETWEEN

NAOMI NAMBURA PETER ..... 1ST PETITIONER

MARY NGINA MUTIA ..... 2ND PETITIONER

ANDREW MBURUNGA MWAMBIA ..... 3RD PETITIONER

SUSAN KIBURI KAIRUTHI ..... 4TH PETITIONER

GERALD MATHIU ..... 5TH PETITIONER

JAMES MURIUNGI MARETE ..... 6TH PETITIONER

MARY JOAN KERIO ..... 7TH PETITIONER

JAMAROSE NANYEIT LOCHI ..... 8TH PETITIONER

PAULA GIBOLOI JOHN ..... 9TH PETITIONER

TERESIA NTHAMA DAVID ..... 10TH PETITIONER

PETITIONING ON THEIR OWN BEHALF AND ON BEHALF OF 50 CO-PETITIONERS

AND

THE COUNTY GOVERNMENT OF ISIOLO ..... 1ST RESPONDENT

THE KENYA AIRPORTS AUTHORITY ..... 2ND RESPONDENT

THE CABINET SECRETARY FOR LANDS AND SETTLEMENT 3RD ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

JUDGMENT

1. Before me is the Petition dated 21st October 2016; filed by and on behalf of the named Petitioners on their own behalf and on behalf of 50 co-petitioners, whose names have been highlighted in a schedule/inventory dated 21st October 2016. The reliefs sought at the foot of the instant Petition are as hereunder;

    i. A declaration do issue that the Petitioners have legitimate, lawful, and legal property rights and/or interests over the respective plots that were duly allocated to them the Petitioners having fulfilled the requisite conditions including paying the levies for the allocations and land rents to the 1st Respondent and/or its predecessor.

    ii. A declaration that the compulsory acquisition of the respective plots of the Petitioners by the 2nd Respondent in the year 2005 without any reasonable and structured notice of acquisition or at all, without reasonable opportunity of being heard and without full compensation and/or provision of identifiable alternative land was a violation of the Petitioners' fundamental rights to equal protection and benefit of the law and to protection against deprivation of property rights and/or interests under sections 70(a) and 75 of the former constitution and Articles 27 and 40 of the current constitution and failure of the rules of natural justice.

    iii. A declaration that the demolition of homes and structures of the Petitioners and eviction from their respective plots by the 1st Respondent without notice, without orders of the court and without compensation and/or provision of alternative land and basic necessities of life is a violation of the fundamental rights of the Petitioners to human dignity, life, protection of the law, security and integrity of the human person, protection of property and prohibition against forced evictions guaranteed by sections 70(a), 71(1) and 75 of the former constitution and Articles 26, 27(1), (2), 28, and 40 of *the Constitution* of Kenya 2010 and Articles 10 of the International Covenant of Economic Social and Cultural Rights (ICESCRs).

    iv. A declaration that the delay and/or failure by the 1st and 3rd Respondent to take the requisite steps to declare the areas of Mwangaza, Kiwanjani, and Chechelezi as adjudication areas in the meaning of section 3 of the *Land Adjudication Act* (Cap 284), to commence and finalize the process of alienation, demarcation, registration and issuance of title deeds to the petitioners for their respective plots situate in the said areas is a violation of the petitioners' fundamental right to equal protection and benefit of the law and the right to protection of the property and/or interest in property guaranteed by sections 70(a) and 75 of the former constitution and Articles 27 and 40 of the current constitution.

    v. A mandatory order compelling the 1st Respondent to put the Petitioners into possession and occupation of their respective plots in Mwangaza, Kiwanjani, and Chechelezi as allocated to them through the ballot exercise of 18.05.2005 and to guarantee the petitioners security of tenure, possession and occupation of their respective plots or in the alternative to allocate the petitioners with alternative plots and to put the petitioners in possession and to guarantee security of tenure, possession, and occupation of such plots.

    vi. A mandatory order compelling the 3rd Respondent to declare the areas of Mwangaza, Chechelezi and Kiwanjani situate in Isiolo County as adjudication areas in the meaning of section 3 of the *Land Adjudication Act* (Cap 284).

vii. An order for such general and/or exemplary/vindicatory damages to each of the petitioners as may be assessed by the Honourable Court consequent to declaration of violations of fundamental rights in (ii) to (iv) above.

viii. Costs of this petition

ix. Interest on monetary awards.

2. The 1st Respondent duly entered appearance and thereafter filed a Notice of Preliminary bjection dated 5th December 2016; grounds of opposition dated 5th December 2016 and a notice of intention to cross-examine the 1st Petitioner on the basis of the Supporting Affidavit. For coherence, the notice to cross-examine is also dated the 5th December 2016.

3. The 2nd Respondent duly entered appearance on 23rd November 2016 and thereafter filed a reply to the petition sworn on 17th May 2017. Instructively, the 2nd Respondent has contended that the Petition beforehand is premature, misconceived and legally untenable in so far as the reliefs being claimed thereunder do not lie within the mandate of the 2nd Respondent. Moreover, the 2nd Respondent has posited that the question of [sic] compulsory acquisition can only be canvassed against the National Land Commission, which by law is the body mandated to undertake compulsory acquisition when and where deemed appropriate.

4. The 3rd and 4th Respondents duly entered appearance through the Honourable Attorney General on 4th February 2017. However, the Honourable Attorney General does not appear to have filed any substantive response to the Petition.

5. The subject petition was subsequently transferred to Isiolo vide the orders of Hon. Justice B. M Eboso, Judge; and thereafter the Petition was re-numbered and assigned the current number, namely; Isiolo ELC Petition E001 of 2025.

6. Suffice it to state that upon the transfer of the Petition, same [Petition] came up for directions on 4th March 2025 whereupon learned counsel for the Petitioners intimated to the court that same required timelines to file and serve written submissions. Furthermore, learned counsel for the Petitioners also covenanted to have the petition canvassed by way of affidavit evidence.

7. Premised on the foregoing, the court proceeded to and issued directions pertaining to the hearing and disposal of the petition. In particular, the court directed that the petition shall be disposed of on the basis of affidavit evidence. Moreover, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

8. The Petitioners subsequently filed written submissions as pertains to the petition and wherein same reiterated the contents of the supporting affidavit and contended that the Petitioners are entitled to the reliefs sought at the foot of the petition.

9. I have cross-checked the Case Tracking System [CTS] of the court and I have been unable to trace and/or track any submissions on behalf of the Respondents. Nevertheless, it is imperative to underscore that with or without the written submissions on behalf of the Respondents, the court is still enjoined to craft and deliver the requisite judgment. To this end, I shall therefore proceed to craft the judgment, albeit considering the pleadings on record and the Written submission[s] filed by the Petitioners.

10. Having reviewed the petition, the responses thereto and upon taking into account the written submissions filed by learned counsel for the petitioners, I come to the conclusion that the determination of the instant petition turns on four [4] key issues, namely; whether the petitioners herein have accrued and/or acquired any lawful rights and/or interests in respect of the Properties that

underpins the subject petition; whether the petitioners claim on the basis of compulsory acquisition is legally tenable or otherwise; whether the prayer for declaration pertaining to declaration of the designated areas as an adjudication sections is legally tenable; and whether the order for mandatory injunction against the 3rd Respondent to declare the designated areas as an adjudication sections can issue on the face of Article 67(2) of *the Constitution* or otherwise.

11. Regarding the first issue, namely; whether the petitioners herein have accrued and/or acquired any lawful right[s] and/or interest[s] in respect of the Properties that underpins the subject petition, it is imperative to recall and reiterate that the petitioners herein contend that same had been issued with various letters of allotment between the 1970s and 1990s in respect of various plots situated at Mwangaza area within the County of Isiolo. Furthermore, the Petitioners contended that upon being issued with the letters of allotment, same duly entered upon, took possession and commenced to develop their respective plots. [See paragraph 7 of the Petition].

12. It was further the position of the petitioners that on or about the 1st March 2005, the 1st Respondent [County Government of Isiolo] wrote/issued notices directed to the Petitioners and intimating to the Petitioners that their plots fell within the area required for the expansion of Isiolo Airstrip. In this regard, it was averred that the 1st Respondent offered to relocate the petitioners and to give same alternative plots at Kiwanjani area.

13. Additionally, the petitioners averred that same were duly relocated to Kiwanjani area wherein same were issued with various plots. For good measure, it was posited that the Plots in question were issued to compensate the Petitioners in lieu of their plots which had been surrendered for purposes of the expansion of Isiolo Airstrip.

14. Be that as it may, the petitioners have contended that despite having been relocated to and having been issued with letters of allotment in respect of the Plots at Kiwanjani and chechelezi, the 1st Respondent subsequently proceeded to and caused demolitions of the petitioners' plots which had been allocated unto them in lieu of the surrendered plots for expansion of Isiolo Airstrip.

15. Premised on the foregoing, the petitioners herein have now approached the court and same are seeking inter alia an order of declaration to declare that the Petitioners have legitimate, lawful, and legal property rights of interest over [sic] their respective plots that were duly allocated unto them.

16. The question that does arise is whether the petitioners herein are entitled to the declarations sought or otherwise. To start with, there is no gainsaying that the petitioners beforehand have neither availed to the court the requisite minutes of the county council of Isiolo, duly certified to confirm that same [petitioners] were duly allocated any plots. Instructively, the allocation of plots (if at all) by the county council of Isiolo [now defunct] would only been discernible at the foot of duly certified minutes of the said council. [See the provisions of sections 80 of the *Evidence Act* Chapter 80 Laws of Kenya].

17. Furthermore, it is imperative to underscore that even though the petitioners are contending to have been allocated plots by the county council of Isiolo,[now defunct] the petitioners have neither tendered or produced before the court letters of allotment [if at all same were ever issued]. Notably, the County Council of Isiolo [now defunct] could only make recommendations or approvals for allocation and thereafter escalate such recommendations and a Letter of No Objection to the Commissioner of Lands [now defunct] for purposes of issuance of the letter of allotment. [See Section 53 of the Trust *Land Act* Chapter 288 Laws of Kenya, now repealed].

18. To my mind, if the petitioners' contention that same were duly allocated plots, [in the manner contended] is true, then it behoved the petitioners to tender and produce before the court letters of

allotment [if any] in accordance with the law. Sadly, I have reviewed the entirety of the petition but I have not come across any letter of allotment.

19. On the other hand, it is imperative to recall that no allotment could issue over and in respective of what was previously trust land unless the intended plot was duly captured at the foot of a part development plan in accordance with the provisions of Section 3 of the Physical Planning Act, Chapter 286, Laws of Kenya [Now Repealed].

20. Suffice it to state that it was incumbent upon the Petitioners to also tender and produce before the court evidence of duly approved part development plan. For good measure, there is no gainsaying that the duly approved part development plan is the instrument that attests to the availability of [sic] the intended plot for purposes of allotment.

21. I beg to observe that the petitioners herein have annexed various part development plans to the supporting affidavit but curiously the various part development plans that have been annexed are incomplete. In particular, various part development plans are neither dated nor signed [sic] by the persons who are said to have prepared the same. Moreover, the various part development plans have not been approved. In addition, the purported part development plans do not also have the approved development plan number.

22. Quite clearly, the purported part development plans which underpin the petitioners' claim before the court are devoid of probative value. Same cannot therefore be deployed to issue declaratory orders, either in the manner sought or at all. [See the case of Dina Management Limited versus The County Government of Mombasa and 5 others [2023]KESC at paragraphs 104-109 thereof]

23. It is important to highlight that the petitioners were obliged to tender and produce before the court credible documents to underpin their claim of ownership and/or entitlement to [sic] the plots under reference. In any event, there is no gainsaying that the public documents which were being relied upon, ought to have been duly certified for purposes of authenticity.

24. In the case of Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment), the Supreme Court of Kenya stated as hereunder;

> " 80. The *Evidence Act*, cap 80 Laws of Kenya, applies to all proceedings, including constitutional petitions, save for the exceptions set out therein. Section 2 thereof provides that: Application.
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> 1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator. 2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.
>
> 81. The *Evidence Act* provides for the admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states: Certified copies of public documents.
>
> 1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be,

and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section."

25. Other than the fact that the Petitioners have neither tendered nor produced copies of their letters of allotment and have also tendered incomplete part development plans; it is important to highlight that the petitioners herein have also not identified the plots [if any] that were ever allocated to them. Instructively, no details of plots and no plot numbers have been referenced in the body of the petition. Can a court of law proceed to make a declaration in vacuum?

26. To my mind, the petitioners herein needed to have appreciated the necessity to plead the petition with a requisite particularity. The provision of particulars of the claims being adverted to, including the particular[s] of the Plot[s], goes a long way in enabling the court to fashion appropriate reliefs and issue appropriate directions. In any event, it is not lost on me that a court of law cannot just make declarations for the mere asking.

27. The need for parties and in this case the petitioners, to avail particulars of their claims, including details of the plot numbers [If any] was elucidated in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR) where a Five-Judge bench of the Court of Appeal stated thus;

"

"(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly

unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

28. There is yet another perspective that merits due consideration. The perspective relates to whether a letter of allotment, [if at all] same had been issued to the petitioners, which is not the case, can underpin a declaration that the petitioners have acquired lawful and legal property rights over [sic] the unnamed plots.

29. To start with, it is common ground that title to land or acquisition of property rights over designated land would only arise upon the issuance of the letter of allotment by the designated body, due compliance with its conditions thereunder; and ultimately upon issuance of the certificate of title or certificate of lease [whichever is applicable].

30. The foregoing position was underscored by the Court of Appeal in the case of Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR, where the court stated as hereunder;

" Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to the provisions held."

31. Moreover, the legal position that a letter of allotment [if any] does not by and of itself confer property rights was elaborated upon and aptly considered by the Supreme Court of Kenya in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment). The court noted as follows;

" 58. So, can an allotment letter pass a good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others *CA 60/1997* [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows: "It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all " [Emphasis added].

61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself is incapable of conferring a transferable title to an allottee. Put differently, the

holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not, therefore, that the allotment letter has not lapsed."

32. Flowing from the foregoing analysis, what becomes apparent is to the effect that the Petitioners herein have not established any rights and/or interests to the unnamed plots which underpin the subject petition. In the absence of any rights and/ or interest over and in respect of [sic] the unnamed plots, the petitioners herein cannot accrue any declaratory orders or at all.

33. Before concluding on this issue, it is instructive to underscore that a court of law can only declare rights and/ or interests which have been acquired by the Claimants. However, there is no gainsaying that courts of law do not give rights to parties. On the contrary, courts of law exist to vindicate and protect rights that have already been acquired by the claimants. [See the provisions of Article 20[3][a] of *the Constitution*, 2010]

34. In the case of Nelson Kazungu Chai & 9 others v Pwani University College [2017] KECA 135 (KLR) the Court of Appeal while addressing a similar situation stated thus;

> " A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inhere to every human being upon birth. They are acquired in different ways after one comes into this world. One cannot acquire property rights over another's property other than in a manner prescribed in law. In this case, the appellants' claim to the suit property was, in our view, merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed, other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument that the appellants can leverage on to elevate the appellants' right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40 of *the Constitution*. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding. Our conclusion is that the learned Judge arrived at the right decision based on the evidence placed before him, and he cannot be faulted."

35. Turning to the second issue, namely; whether the petitioners' claim on the basis of compulsory acquisition is legally tenable or otherwise, it is imperative to underscore that claims pertaining to compulsory acquisition [if any] could only be raised and canvassed against the Commissioner for Lands [now defunct]. To this end, it is important to recall that the provisions of the Land Acquisition Act, Chapter 295, Laws of Kenya [now repealed] bestowed the powers for compulsory acquisition on the commissioner of lands and not otherwise.

36. For ease of appreciation, it suffices to take cognizance of the provisions of section 6 of the Land Acquisition Act [Supra]. The said section stipulates thus;

> " 6.
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> (1) Where the Minister is satisfied that any land is required for the purposes of a public body, and that—
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> (a) the acquisition of the land is necessary in the interests of defence, public safety, public order,

public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part.".

37. The Petitioners herein have sought a declaration that [sic] the compulsory acquisition of their respective plots by the 2nd Respondent [Kenya Airports Authority] in the year 2005 without payment of full compensation constituted breach, violation, and or infringement of their rights . It is instructive to observe that the 2nd Respondent herein was not vested with any power to undertake compulsory acquisition. In this regard, there is no gainsaying that the claim pertaining to [sic] compulsory acquisition is mislaid, misplaced, and misconceived.

38. Additionally, it is worthy to highlight that by the time the subject petition was being filed in 2016, the legal position as pertains to compulsory acquisition had changed. Notably, the power to undertake compulsory acquisition vested in the National Lands Commission [See section 109-113 of the *Land Act*, 2012[2016].

39. In my humble view, if the petitioners were convicted that their rights to the unnamed plots had been violated on the basis of [sic] compulsory acquisition, then their claim lay against National Land Commission and not the Second Respondent. [See Article 67(2) of *the Constitution* 2010]. [See also the decision in Patrick Musimba vs National Land Commission (2015)e KLR].

40. In a nutshell, it is my finding and holding that the Petitioners herein are non-suited as against the 2nd Respondent in so far as the Purported compulsory acquisition is concerned.

41. Next is the issue of whether the prayer for declaration pertaining to the declaration of the designated areas as an adjudication section is legally tenable. The Petitioners herein have also sought for a declaration that the failure of the 1st and 3rd Respondents to take steps to declare the designated areas as adjudication sections has violated the rights of the petitioners. Suffice it to underscore that the designated areas which underpin the claims by the petitioners now constitute public land [see Article 62 of *the Constitution* 2010].

42. To the extent that the designated areas constitute public land, there is no gainsaying that neither the 1st Respondent [County Government of Isiolo] nor the 3rd Respondent [The Cabinet Secretary for Lands and Settlement], have any capacity to deal with, dispose of, alienate and/or in any manner purport to administer same. For coherence, it is common ground that the administration and management of public land now vests in National Lands Commission.

43. Arising from the foregoing, it is crystal clear that neither the County Government nor the Cabinet Secretary for Lands and Settlement can purport to declare any public land as an adjudication section. Such an action [if at all] would not only be ultra vires but unconstitutional.

44. In the case of Cordison International (K) Limited v Chairman National Land Commission & 44 others [2019] KECA 830 (KLR) the Court of Appeal discussed the legal meaning of administration and management of public land.

45. For coherence, the court stated thus

> " 30. Article 67 of *the Constitution* that establishes the National Land Commission gives it power to, inter alia, manage public land on behalf of the national and county governments. The suit land is public land as defined under Article 62(1) (a) of *the Constitution* and therefore vests in and is held by the County Government of Lamu in trust for the people resident in the County. Article 62 (2) of *the Constitution* provides that the land shall be administered on behalf of the County residents by the National Land Commission. Section 5 (1)(a) of the *National Land Commission Act* is also explicit that one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments. Under section 5(2) of the Act the Commission may, "on behalf of, and with the consent of the national and county governments, alienate public land."
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> 31. Section 12 of the *Land Act* grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the Act specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land."

46. Likewise, the Supreme Court of Kenya has also clarified the mandate of NLC and particularly as concerns administration and management of pubic land on behalf of the county and national governments respectively.

47. In The National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) (2 December 2015) (Advisory Opinion) the Supreme Court stated thus;

> " 222. The *Land Act* defines "alienation" as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent for such disposal.
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> 223. It may be inferred that the power of alienation of public land is one of the ways through which the NLC administers such land. The requirement of consent to such a transaction, from the National or County Government, is certainly a check-and-balance relationship between the two State organs. The NLC's function of monitoring the registration of all rights and interests in land, is another mechanism of checking the powers of the body responsible for registration.
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> 224. Section 5(2)(e) of the NLC Act mandates the Commission to manage and administer all unregistered trust land and unregistered community land on behalf of County Government. Counsel for the Commission for the Implementation of *the Constitution* submitted that this provision was contrary

to the terms of *the Constitution*. In the case, In Re IIEC, this Court had held that while exercising its Advisory Opinion jurisdiction, it may undertake the interpretation of *the Constitution*.

225. As already noted, land in Kenya is classified as public, community or private. With regard to "community land", Article 63 provides:

> (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
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> (2) Community land consists of-
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> (a) land lawfully registered in the name of group representatives under the provisions of any law;
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> (b) land lawfully transferred to a specific community by any process of law;
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> (c) any other land declared to be community land by an Act of Parliament; and
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> (d) land that is-
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> (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
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> (ii) ancestral lands and lands traditionally occupied by hunter gatherer communities; or
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> (iii) land that is lawfully held as trust land by the County Government, but not including any public land held in trust by the County Government under Article 62(2).
>
> (3) Any unregistered community land is held in trust by County Governments on behalf of the communities for which it is held" (emphases supplied).

226. Article 62(2) species the categories of public land that vest in county governments. And the NLC Act confers power upon the NLC to administer and manage public land that is vested in County Government. However, "community land", as defined in Article 63(1), has its own place and system of governance; and the land referred to in Section 5 (2)(e) of the NLC Act, is "community land", and not "public land". These distinct definitions of "community land" and "public land", as well as their applicable governance systems as provided in *the Constitution*, do not require any special professional input, as a basis for interpreting the provisions of Articles 62(2) and (3) and 67 (2) (a). The Commission has no special claim to the remit of administering or managing community land. From the historical background already set

out, a recognition of the special character of community land is essential, with attendant cautions in its management. In our opinion it is necessary for Parliament to make amendments to Section 5(2)(e) of the NLC Act, to bring it into line with the constitutional provisions we have cited."

48. Flowing from the foregoing discussion, I am afraid that the declaration that is being sought as against the 1st and 3rd Respondent as pertains to the areas, namely; Mwangaza, Kiwanjani, and Chechelezi within Isiolo County, cannot issue. For good measure, the designated areas [which were previously trust land] now constitute public land and thus the only body that can undertake any action in respect thereof is the National Land Commission.

49. Regarding the fourth and final issue, namely, a mandatory order compelling the 3rd Respondent [Cabinet Minister for Lands and Settlement] to declare the areas of Mwangaza, Chechelezi and Kiwanjani situate in Isiolo County as adjudication areas, it is important to reiterate the discussion underpinning issue three above.

50. Nevertheless, I wish to add that what was referenced as trust land in terms of Section 3 of the Land Adjucation Act, Chapter 284, Laws of Kenya, ceased to exist. For good measure, the Trust *Land Act*, Chapter 288, Laws of Kenya was repealed by the *Land Registration Act* 2012. In this regard, the provisions of Section 3 of the *Land Adjudication Act* [Supra] stand superseded to the extent that same reference the Trust *Land Act*.

51. Secondly, it is also not lost on me that the areas which underpin the current petition fall within public land in the contemplation of Article 62 of *the Constitution* 2010. To this end, it is common knowledge that the 3rd Respondent cannot therefore, be compelled to undertake any action that impacts on public land.

52. Thirdly, even assuming that the 3rd Respondent had any powers over what now comprises of public land [which is not the case] it is evident that Section 3 of the *Land Adjudication Act*, Chapter 284, Laws of Kenya, which the Petitioners are referencing gave the minister [now the Cabinet Secretary] discretion. Instructively, the provisions of Section 3 deploy the word "may" and not "shall".

53. My understanding of the provision of Section 3 of the *Land Adjudication Act* [Supra] which has been referenced by the petitioners, drives me to the conclusion that the minister [now the Cabinet Secretary] has discretion. Suffice it to state that where a body is vested with discretion, a court of law cannot usurp the exercise of such discretion and command the discretion to be undertaken in a particular manner. Such an endeavour would be illegal.

54. Before concluding on this issue, it is imperative to reproduce the provisions of Section 3 of the *Land Adjudication Act* [supra]. The said section stipulates thus;

> " 3. Application
>
> (1) The Minister may by order apply this Act to any area of Trust land if—
>
> (a) the county council in whom the land is vested so requests; and
>
> (b) the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered; and

(c) the *Land Consolidation Act* (Cap. 283) does not apply to the area: Provided that this Act may be applied to an area to which the *Land Consolidation Act* (Cap. 283) applies where a record of existing rights has not been completed and certified under section 16 of that Act, and in such case, where anything has been done in the course of or for the purpose of adjudication under that Act, the Minister, if he is satisfied that those things have been done substantially in accordance with the principles of this Act, may, by order, order that those things shall be deemed to have been done under the corresponding provisions of this Act.

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

55. To my mind, the relief touching on mandatory order to compel the 3rd Respondent to declare the designated areas as adjudication sections falls by the wayside. It is legally untenable.

56. Furthermore, the prayer under reference was premised on a misapprehension of the current legal regime including the provisions of Articles 62 and 67(2) of *the Constitution* 2010.

Final Disposition:

57. For the reasons which have been highlighted in the body of the Judgement, it must have become crystal clear that the petition beforehand is premature and misconceived. Furthermore, the reliefs sought at the foot of the petition are contrary to the provisions of *the constitution* and same are thus legally untenable.

58. Consequently, and in the premises, the final orders that commend themselves to me are as hereunder;

i. The Petition be and is hereby dismissed.

ii. Each party shall bear own costs.

59. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 3RD DAY OF JULY 2025

OGUTTU MBOYA, FCIArb;CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma/Mukami – Court Assistant

No Appearance for the Petitioners

No Appearance for the 1st Respondent

No Appearance for the 2nd Respondent

No Appearance for the 3rd and 4th Respondents