Kuwam & 6 others v Cabinet Secretary Ministry of Defence & 5 others; Law Society Of Kenya & another (Interested Parties) (Environment & Land Petition 004 of 2021) [2024] KEELC 6708 (KLR) (14 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6708 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT & LAND PETITION 004 OF 2021

PM NJOROGE, J

OCTOBER 14, 2024

BETWEEN

JOSEPH LORUNYEI KUWAM ..... 1ST PETITIONER

JOHN OYAN LUSURU ..... 2ND PETITIONER

JOYCE NAIRESIA LESEGI ..... 3RD PETITIONER

ALI HASSAN MOHAMMED ..... 4TH PETITIONER

KURESHA BILLE MOHAMMED ..... 5TH PETITIONER

MARY KEPEN MBATIA ..... 6TH PETITIONER

JOSEPH MTWANJA ..... 7TH PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF DEFENCE ..... 1ST RESPONDENT

THE CABINET SERETARY MINISTRY OF INTERIOR CONDITION OF THE NATIONAL GOVERNMENT ..... 2ND RESPONDENT

THE CABINET SEC MIN. OF LANDS ..... 3RD RESPONDENT

THE COUNTY COMMISSIONER, ISIOLO COUNTY ..... 4TH RESPONDENT

THE COUNTY GOVERNMENT OF ISIOLO ..... 5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ..... 6TH RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

JUDGMENT

1. This Petition is dated 4th October, 2019. Upon the filing of the petition, the Hon Lady Justice Lucy Mbugua, sitting at Meru issued an interim conservatory order in the following terms:

> "A conservatory order be and is hereby issued restraining the respondents by themselves, their agents and/or servants from evicting the applicants and the more than 20,000 members of the Turkana, Samburu, Borana, Somali and Ndorobo communities within Burat Ward Isiolo County that they represent from their ancestral land measuring approximately 350 square miles that comprise Burat Ward Isiolo County pending the hearing and determination of the application herein."

2. By consent of all the parties, this conservatory order was confirmed. On 19th May, 2021, the Honourable Lady Justice Lucy Mbugua, sitting at Meru ordered that there be an order for status quo pending the hearing and determination of the petition.

3. This order of status quo became the subject of an application filed by the petitioners dated 10/6/2022 and 16/11/2022. The 1st application sought a conservatory order restraining the respondents from undertaking new constructions on the suit land. It also sought the citation of the 1st Respondent/The Commandant School of Infantry, Isiolo/ Army General/ Brigadier in charge of The School of Infantry, officers and or agents for contempt of court for breaching the status quo issued by the Court.

4. The 1st and 2nd Respondents, in reaction to the petitioners' application, filed an application dated 16/11/2022. In their application the 1st and 2nd Respondents sought declaratory orders that the petitioners lacked focus strandi to institute this suit. They also sought a declaratory order that lacked Jurisdiction to entertain the petition

5. On the 27th day of November, 2023, this court delivered a ruling that addressed the issues raised by the 2 applications. That ruling is reproduced here below as it contains some issues raised in the main petition.

   To put all the issues raised and responded to on this petition I will reproduce in full the submissions by the Petitioners, by the 1st and 2nd Respondents, and by 3rd to the Respondents. It is sadly noted that the 1st Interested Party, the Law Society of Kenya and 2nd Interested Party, the National Land Commission and the 5th Respondent, the County Government of Isiolo did not file submissions.

6. On 27th day of November, 2023 this court delivered a ruling that addressed the issues raised by the 2 Applicants. That Ruling is reproduced here below as it contains some issues raised in the Main Petition.

   Ruling

   1. This ruling concerns 2 applications. The first application which was filed by the Petitioners is dated 10/6/2022. The second one filed by the 1st Respondent is dated 16/11/2022.

   2. The Petitioners application dated 10/6/2022 seeks the following orders;

      1. That the Honourable Court be pleased to hear prayer 2 here below ex parte in the first instance due to urgency.

2. That the Honourable Court be pleased to issue an interim conservatory order restraining the respondents by themselves, their agents and/or servants from continuing with any construction of new buildings/projects on the suit land pending the hearing and determination of the application.

3. That the Honourable Court be pleased to issue an interim conservatory order restraining the respondents by themselves, their agents and/or servants from continuing with any construction of new building/projects on the suit land pending the hearing and determination of the petition herein.

4. That the Honourable Court be pleased to cite the 1st Respondent/The Commandant School of Infantry, Isiolo/ Army General/Brigadier in charge of the School of Infantry/ Officers and or agents for contempt of court for breaching the status quo order issued by the Honourable Court on 19/5/2021

5. That the Honourable Court be pleased to give such further or better reliefs as it may deem fit and just to.

6. That the costs of this application be provided for.

3. The application is supported by the affidavit of Joseph Lorunyei Kuwamand has the following grounds;

(a) That on the filing of this petition dated 4th October, 2019 interim orders were issued to the effect that:

> "A conservatory order be and is hereby issued restraining the respondents by themselves, their agents and/or servants from evicting the applicants, and the more than 20,000 members of the Turkana, Samburu, Borana, Somali and Ndorobo communities within Burat Ward Isiolo County that they represent; from their ancestral land measuring approximately 350 square miles that comprise Burat Ward Isiolo County pending the hearing and determination of the application herein"

(b) That by consent the orders herein were confirmed by all parties, and they remain in force pending the hearing and determination of the Petition

(c) On 19th May, 2021 the Honourable Court ordered that there be an order for status quo pending the hearing and determination of the petition.

(d) That in a move to change the status quo, the 1st Respondent through its officers (Kenya Defence Forces) and or agents have commenced construction of buildings on the suit land.

(e) That the officers at School of Infantry, Isiolo Camp should be cited for contempt for the breach of the status quo orders.

(f) That the orders were issued in the presence of the 1st Respondent's counsel and all parties were aware.

(g) That the clear defiance of these orders is only meant to embarrass this court before the eyes of the public.

(h) That if the orders herein are not granted the matter will be convoluted and the petition will be rendered nugatory.

(i) That the 1st Respondent's officers, without any colour of right, have encroached on to the petitioners' ancestral land and commenced construction of new buildings outside their current occupation.

(j) That the acts of the 1st Respondents officers continue to cause a lot of anxiety and tension on the ground.

(k) That the communities affected in this petition own the land they occupy because it is their ancestral land/community land. They have no alternative land, and should they be evicted they shall be rendered destitute.

(l) Unless the Honourable Court urgently intervenes, the more than 20,000 members of the affected communities would be rendered destitute and there is likelihood of bloodshed and loss of life.

(m) Unless the court urgently intervenes the constitutional rights of the more than 20,000 members of the affected communities, including their right to property as protected under Article 40 of the Constitution of Kenya are in real and imminent danger of being infringed.

(n) It is in the interest of justice to allow this application.

4. The 1st and 2nd Respondents application dated 16/11/2022 seeks the following orders;

1. That the Honourable Court be pleased to hear this application on priority basis.

2. That the Petitioners Lack Locus Standi to file this petition generally.

3. That the Petitioners lack Locus Standi to file the Petition against the 1st Respondent.

4. That the Petition be dismissed/discontinued against the 1st Respondent.

5. That the nature of issues herein are non-justiciable.

6. That alternative remedies have not been exhausted.

7. That the court lacks jurisdiction to hear this Petition.

8. That the Petition herein be dismissed with costs.

5. The application is supported by the affidavit of Boniface Maina Ombiri.

6. The two applications were canvassed by way of written submissions.

7. For both applicants, the parties have canvassed the applications as if they are addressing the issues raised in the Petition itself. At this interlocutory stage I will not be driven to address issues which ought to be considered during the hearing and determination of the petition. I will ignore the parties' arguments which seem to be addressing the Main Petition. Having said that, I wish to state that I have considered all the pleadings, the authorities and the submissions proffered by the parties to buttress their diametrically incongruent assertions. I do opine that all the authorities the parties have cited are good authorities in their facts and circumstances. BUT not all cases are congruent to a degree of mathematical exactitude in their facts and circumstances. For the reason that the issues that have been cited by the parties, by and large, address issues which ought to be considered during the hearing and determination of the Petition itself, I have elected not to regurgitate their facts and the principles of law they espouse.

   By and large the submissions filed by the parties reflect what they have contained in the grounds they have proffered to buttress their applications.

8. A conspectus of the Petitioners case is that they seek a conservatory order for status quo to remain as was ordered by this court at Meru on 4/10/2019 to the effect; "A conservatory order be and is hereby issued restraining the respondents by themselves, their agents and/or servants from evicting the applicants, and the more than 20,000 members of the Turkana, Samburu, Borana, Somali and Ndorobo communities within Burat Ward Isiolo County that they represent from their ancestral land measuring approximately 350 square miles that comprise Burat Ward Isiolo County pending the hearing and determination of the application herein". They say that this order was by consent confirmed by all the parties and was to remain extant pending hearing and determination of this Petition.

9. They claim that the 1st Respondent has been in contempt of the apposite court order by constructing new buildings outside their current occupation. For this claimed disobedience of the court orders they pray that the 1st Respondent/ Commandant School of Infantry, Isiolo/Army General/Brigadier in charge of the School of Infantry/Officers and or agents be punished for contempt of court for infracting upon the status quo order issued by the court on 19/5/2021. They also ask the court to be pleased to give such further or better orders as it may deem fit for ends of justice.

10. A conspectus of the 1st and 2nd Respondents' case is that;

    1. By law, the Petitioners lack the mandate to file the instant Petition owing to provisions of the Community Land Act.

2. By law, the Petitioners lack the mandate to file the instant Petition against the 1st Respondent as the land owned by the 1st Respondent is not community land.

3. The Petitioners have not demonstrated their authority to file the instant Petition on behalf of the alleged communities or community members.

4. The issues raised in the Petition are at face value and law non-justiciable.

5. The Petition herein raises policy issues which are not within the purview of this Honourable Court.

6. The Petition herein is not ripe for adjudication by this Honourable Court given the provisions of sections 33 and 35 of the Intergovernmental Relations Act, and sections 39-42 of the

   Community Land Act.

7. Given the nature of the issues raised in the Petition herein, interests of justice are better served if the issues are resolved in other forums other than through the Constitutional Petition.

8. The Petition at hand concerns 350 square miles of land and likely involves interests beyond the listed Petitioners, the listed Respondents and most likely affects other individuals, other private entities and Government Agencies.

9. The Isiolo County Government has in its pleadings admittedly taken steps towards survey and adjudication of the land in dispute which is in direct conflict with national security interest and policies particularly the section of the disputed land already in use and occupation by the Kenya Defence Forces.

10. Article 66 (1) of the Constitution is to the effect that the State may regulate the use of any land or interest or right over any land in the interest of defence which is a policy issue.

11. The Petition concerns alleged historical land injustices which is at a first instance a function of the National Land Commission under Article 67 (2) (e) of the Constitution.

12. The Petitions main prayers are for damages and not repossession of the land.

13. Article 159 (2) of the Constitution is to the effect that alternative forms of dispute resolution are to be promoted. Article 189 (3) and (4) of the Constitution provide that every reasonable effort must be put to resolve intergovernmental disputes through alternative dispute resolution mechanisms. Article 67 (2) (f) provides that the National Land Commission is to encourage the application of alternative dispute resolution mechanisms in land conflicts.

14. Sections 33 and 35 of the Intergovernmental Relations Act, No. 2 of 2012 and Section 42 of the Community Land Act provide for judicial recourse only after failure of alternative dispute resolution mechanisms.

15. I have considered the totality of the pleadings, the authorities the parties have proffered and do find as shown here below.

16. Regarding the Petitioners application, the parties agree that a Status Quo order was issued by this court on 19/5/2021 at Meru. They only differ on its interpretation. I do note that the parties had by consent approved that order.

    I am guided by the principle enunciated in the case of Kenya Airlines Pilots Association (KALPA) Versus Another [2020] eKLR, where the court held that; "a status quo is meant to preserve the subject matter as it is existed as of the day of making the order". I do note that although the 1st and 2nd Respondents state that they are not in contempt of court, they do not dispute the claim that they have embarked on constructing buildings and structures beyond the area they were occupying when the status quo order was issued.

    For this reason, I will grant prayers 2 and 3 in the Petitioners' application dated 10th June, 2022. I will give my determination regarding prayer 4, for the citing some parties for contempt, later on in this ruling.

17. Regarding prayers by the 1st and 2nd respondents in prayers 2 and 3 of their application that the Petitioners lack locus to file this Petition, I dismiss these prayers and unequivocally find that every Kenyan and every resident or a group of Kenyan and residents have got the Constitutional right to access Courts to canvass their claims that their fundamental and constitutional rights have been infracted upon. For this same reason, I dismiss prayer 5 in the 1st and 2nd Respondents' application and find that the issues raised by the Petitioners are justiciable. For the same said reason, I dismiss prayer 4 which asks this court to dismiss the Petitioners' Petition against the 1st and 2nd respondents.

18. Concerning the prayer that the Petitioners suit be dismissed for non exhaustion of available remedies, I do note that at one time in 2018, at the behest of the National Land Commission, a technical team was established to thrash out the issues being raised in this Petition. However, over 4 years later, the National Land Commission has not made its determination. I also find that the failure to establish the institution mandated to handle land issues by the Community Land Act cannot be blamed on the Petitioners. I also find that that the Petitioners cannot be denied access to courts to prosecute their claims of being denied their fundamental and Constitutional rights and those rights

cannot be suspended by the indolence and cavalier attitudes by state institutions. I, therefore dismiss prayer 6 in the 1st and 2nd Applicants application.

19. I find prayer 7 in the 1st and 2nd Respondent's application veritably nebulous and rather skullduggerous. Of course, the Environment and Land Court has the jurisdiction to hear and determine all environment and land issues. This Petition indubitably raises land issues. Unequivocally, this court has jurisdiction to hear and determine this Petition.

20. There are also two main prayers, in the alternative. The 1st is that this court vacates the status quo orders issued on 19th May, 2021.

I opine that the 1st and 2nd respondents have not satisfied this court, in any way, that the said orders should be vacated. The 1st and 2nd respondents do not deny that the impugned orders are extant. Nor do they dispute the circumstances surrounding their issuance including that the orders were, by consent, accepted by the parties. In the circumstances, prayer 9 in the 1st and 2nd Respondents' application is hereby dismissed.

21. The 2nd alternative prayer is that this court refers this dispute to mediation or arbitration by the Intergovernmental Relations Technical committee. I find that this is not a proper case to be referred to the Intergovernmental Relations Technical Committee. In this Petition, the Petitioners are six individuals. The 1st, 2nd, 3rd, 4th, 6th and 7th respondents are either government functionaries or a government agency. The government agency is the National Land Commission.

22. The Intergovernmental Relations Technical Committee handles disputes between County Governments and the Central Government. This dispute is between 6 individuals and named parties. It is not between a County Government and the named government functionaries and one government agency. I, therefore dismiss prayer 9 in the 1st and 2nd Respondent's application.

23. I now revert to prayer 4 in the Petitioners application to the effect;

> "That the Honourable Court be pleased to cite the 1st Respondent/The Commandant School of Infantry, Isiolo/Army General/Brigadier in charge of the School of Infantry/Officers and or agents for contempt of court for breaching the status quo order issued by the Honourable Court on 19/5/2021"

24. I find that the 1st and 2nd, 3rd and 6th respondents are aware of the status quo order issued by this court on 19/5/2021. Everyone including the 1st, 2nd, 3rd and 6th respondents must obey court

orders. Court orders cannot be issued in vain. They are hereby directed to forthwith obey the status quo orders FAILING WHICH individuals found culpable will personally be liable to punishment for contempt of court.

25. I do find that the crafting of prayer 4 in the Petitioners application evinces veritable incoacy. In contempt of court matters, those cited must be properly and individually named. Of course, courts cannot jail institutions for contempt of court. It is named individuals who are punished. For this lack of specificity, including names, for those intended to be cited for contempt, I dismiss prayer 4 in the Petitioner's application.

26. In the circumstances, this court issues the following orders;

    (a) Prayer 3 in the Petitioners application dated 10th June, 2022 is hereby granted.

    (b) Prayer 4 in the Petitioners application dated 10th June, 2022 is hereby dismissed.

    (c) Prayers 2, 3, 4, 5, 6, 7, 8, 9 in the 1st and 2nd respondents' application dated 16th November, 2022 are hereby dismissed.

    (d) Costs for both applications shall be in the cause.

Delivered in openCourt At Isiolo this 27th Day of November, 2023 in the presence of:

Court assistant: Balozi/Rahma

Caleb Mwiti holding brief for Abubakar for the Petitioners.

Benjamin Kimathi holding brief for Mugira for the 1st and 2nd Respondents.

Benjamin Kimathi for the 3rd and 4th Respondents.

Hon. Justice P.m Njoroge

Judge

7. The petition was wholly canvassed by way of written submissions.

8. To put all the issues raised and responded to in this petition into their proper perspective, I will reproduce in full the submissions by the Petitioners, by the 1st Respondent and by the 2nd, 3rd, 4th and 6th Respondents. It is sadly noted that the 1st interested party, the Law Society of Kenya and 2nd interested party, the National Land Commission and the 5th Respondent, the County Government of Isiolo did not file submissions.

9. The petitioners submissions take the following format:

    Petitioner's Final Submissions

    Your Lordship,

1. The Petitioners' have on record an amended Petition dated 10th February 2020, annexed to it is the supporting Affidavit sworn on 10th February 2020 and reliance is also placed on the supporting affidavit sworn on 5th October 2019. The Petitioners also place reliance on the Further Affidavit dated 23rd November 2019. These affidavits bear the evidence to be relied upon by the Petitioners whilst advancing their case. See Para 87A of the Amended Petition.

2. The Petitioners seek the following prayers;

   (a) A declaration that the Respondents have violated the Constitutional rights of the members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities contrary to the provisions of Articles 10, 27, 28, 29, 35, 39, 40, and 47 of the Constitution of Kenya.

   (b) A declaration that the land in Burat Ward, Isiolo County, measuring 350 Square Miles is the ancestral land of the members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities residing thereon and it is legally their community land.

   (c) A declaration that all previous attempted alienation, setting apart and/or allocation of the community land of the members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities situated at Burat Ward, Isiolo County have been unlawful, unconstitutional null and void.

   (d) General Damages for violation of the rights of the more than 20,000 members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities in Burat Ward, Isiolo County. di) A cancellation of the Title Deed IR 6183 as the same was issued without following due process. e. Costs of the Petition.

3. Some of the Respondents participated in this petition whilst others chose to ignore or abandon the claim by the Petitioners.

Facts of the Petition

4. The Petition herein was instigated when the 4th Respondent and his officers, on or about 12th September 2019, called for a public Baraza within Burat Ward. The 4th Respondent informed the public that he had an eviction notice written by the Cabinet Secretary, Ministry Of Defence, through the Ministry Of Interior And Co-ordination Of National Government. He proceeded to read the letter which purported to give the Petitioners' communities, whose members number over Twenty Thousand, 30 days' notice to vacate their ancestral and community land lest they be forcibly evicted.

5. The 4th Respondent refused to avail a copy of the said notice and has subsequently refused to avail the same to the community leaders despite persistent demands. In view of the aforesaid, the Petitioners, through MAGEE LAW LLP, made demands vide a letter addressed to the 1st, 2nd and 4th respondents dated 18th September, 2019. (See JLK 48).

6. On 18th September, 2019 the Commission on Administrative Justice wrote to the 4th Respondent, raising the complaint regarding eviction. (See JLK 49). On 28th September, 2019 the Saturday Nation Newspaper quoted the 4th Respondent as having said that the suit land belongs to the Kenya Defense Forces School of Infantry having allegedly acquired it in the 1970s through compulsory acquisition. (See JLK 50).

7. The Petitioners, 7 individuals, representing different ethnic communities' resident at Burat Ward (the disputed land), the communities are Turkana, Samburu, Borana, Somali, Ndorobo and Meru, were obligated to file this petition to defend their property rights.

8. The residents, who are more than 20,000 (Twenty Thousand) in number are settled on the unregistered community land measuring approximately 350 square miles comprising of a big part of a ward known as Burat Ward.

9. The petition has been instituted by the Petitioners on their own behalf and on behalf of their respective communities' resident at the disputed land. The Petitioners aver that the communities have settled in the disputed land since time immemorial, that to evict them reeks of malice and the same is unlawful and unconstitutional.

10. The Petitioners aver that though the colonial government and successive governments have attempted to resettle them, the same has been futile. The Petitioners state that aforesaid land is community land held in trust for them by the colonial government, the local county council and the County Government of Isiolo at various times.

11. The petitioners and the communities they represent settled on the suit land before independence and have the following as evidence of their settlement thereon;

    (a) There are more than 20,000 people who reside on the suit land.

    (b) There are more than 12,000 voters registered by the independent electoral and boundaries commission (I.E.B.C) within Burat Ward.

    (c) There are 7 gazetted electoral polling stations situated on the suit land namely, Elsa Primary School, Kakili Primary School, Kambi Ya Juu Primary School, Kilimani Primary School, Leparua Primary School, Ntaraban Primary School And Ngare Silgon Primary School.

    (d) There are 12 primary schools, 2 secondary schools and 15 early childhood centers, 5 dispensaries and one health centre. The said institutions belong to the National Government through the Ministry of Education and the County Government of Isiolo; and they were established with the communities support so as to serve the educational and health needs of the petitioners and the communities they represent.

(e) The aforesaid institutions occupy land as follows;

(i) Leparua Mixed Day Secondary - 75.5 Acres

(ii) Leparua Primary School - 125 Acres

iii. Ntaraban Primary School - 50 Acres

iv. Leparua Clinic - 20 Acres

v. Kipsing Primary School - 20 Acres

vi. Kipsing Secondary School - 20 Acres

vii. Lengwenyi Primary School - 20 Acres

viii. Kalawash Primary School - 20 Acres

v. iNooloroi Primary School - 20 Acres

x. Ndonyo Lengala - 20 Acres

xi. Kipsing Health Centre - 20 Acres

xii. Lengurma Primary School - 20 Acres

xiii. Lengurma Dispensary - 20 Acres

xiv. Longopito Primary School - 20 Acres

xv. Tuale Primary School

xvi. Kampi Juu - 29 Acres

xvii. Kakili - 15 Acres

xviii. Ecde Centres - not allocated

xix. Elsa Primary School - 11 Acres

xx. Elsa Secondary School - 10 Acres

(f) The enrolment in primary schools in the said institutions is more than 2534 whereas in the early childhood education centres is more than 950.

(g) There are 2 dams, namely, Kilimani Game Galana Dame funded by African Development Bank to a tune of 381 million and Kakili Irrigation Scheme Dam, funded by Action aid – Kenya to a tune of 10 Million.

(h) There are numerous irrigation projects. Namely; Ntirim – Elsa water project, funded by NDMA to a tune of 35 Million, Elsa – Youth Water project, funded by Catholic Diocese development office, to a tune of 15 million, Kakili Water Project, CARITAS, Nguzoro/Kamario water Project, funded by Catholic Diocese to a tune 20 Million, Akadeli Water Project, funded by Catholic Diocese and CDF isiolo North to a tune 30 Million, Kambi ya

Sheikh Water project, funded by Action aid Kenya to tune of 50Milion.

(i) There are houses, shops and other buildings constructed and established by members of the communities.

(j) There are numerous grade cattle reared by members of the communities.

(k) There are numerous cattle, goats, sheep and donkeys grazed by members of the communities.

(l) There are 40 registered Village Savings loans associations (VSLAs) manned by members of the community.

(m) There is registered dairy cooperative SACCO manned by the members of the community.

(n) There is an abattoir, by the county government funded by the national government.

(o) There Silos docks contracted by the county government co funded by the national government for fattening of cattle

(p) There are peoples' farms and several water projects.

(q) There are graves and burial sites in many homes on the suit land.

(r) There are permanent houses and homes to over 20,000 people.

(s) There are government administrators, including chiefs and assistant chiefs serving the communities.

(t) There is an elected leader representing the communities being the Member of County Assembly of Isiolo for Burat Ward.

12. It therefore makes no sense for the 1st Respondent to claim that the land is now theirs despite all these developments, and without a proposal for compensation for the compulsory acquisition.

13. The Petitioners have been able to get documentation from the Kenya National Archives to demonstrate that the suit land belongs to the them and their communities and the historical injustices occasioned to them by previous and current government agencies.

14. The official gazette of the colony and protectorate of Kenya (special issue) Volume XL-No. 34 of 5th July, 1938 published a bill to amend the Crown Lands Ordinance (notice number 527) and a bill to make provision for Native Lands in the colony.

(a) Under Section 58(b), the native leasehold areas were defined as follows;

> "The areas of land, the boundaries of which are set out in the sixth schedule to this ordinance, shall be

reserved for the use and occupation of natives, and shall be known as the native leasehold areas".

(b) Schedule 6 set out the boundaries of Isiolo native leasehold area as follows;

> "The native Leasehold areas, which are described below, are delineated and crossed hatched brown on boundary plan no. 157, deposited at the Land Survey Records Office, Nairobi Freehold areas which are within the boundaries described are not part of the native Leasehold Areas and are excluded therefrom whether specifically mentioned or not When a river or stream is described as forming a boundary the centre line of its course shall be the boundary unless otherwise stated Commencing at the Trigonometrical Beacon Lendili, thence easterly by a straight line to the Trigonometrical Beacon Mukogodo, thence south-easterly by the straight line between that Trigonometrical Beacon and the western corner of L.R No. 2791 for a distance of about 65,000 feet, thence due east by that river to its intersection with the Nyeri Archer's Post road in the vicinity of the KAR Wagon Camp thence north-easterly by the straight line from that point of intersection to the southern of the two principal summits of Shaba hill, for a distance of about 80,000 feet, thence due North by a straight line to its intersection with the Ewaso Nyiro thence up-stream by that river to appoint due north of the Trigonometrical Beacon Lendili (the point of commencement)" (See annexure "JLK 27")

15. It is evident therefore that the colonial government in 1938 recognized that this Isiolo area was native land, that belonged to the people. The area described above consists of the disputed land and other lands.

16. The Honourable Court should also take judicial notice that the lands were not unoccupied, and they have never been. The lands were available for farming, grazing, hunting and gathering. The colonial government through its machinations was designating land and grabbing what seemed greener and lucrative. This injustice cannot be countenanced, not in this suit!

17. Vide Government Notice No. 657 of 1941 the Isiolo native leasehold area was extended by 125 square miles. (See annexure "JLK 30".)

18. In the periods of 16th February 1949, the Provincial Commissioner, Northern Province wrote to the District Commissioner, Isiolo quarantine area.

a) In paragraph one, the letter stated,

"A meeting was held in the office of the Chief Native Commissioner on the 9th of February at which the Provincial Commissioner, Central Province, Mr. Faulkner of the Veterinary Department and myself were present. It was agreed:

(i) That the Veterinary Department would give up that part of the quarantine lying north of a line running west of a point on the Isiolo river two miles upstream of the Kipsing road bridge.

(ii) That we would get the Somalis out of the area lying to the South of this line.

iii. That in exchange we would hand the crocodiles jaws area back to the Central Province for inclusion in the Mukogodo reserve.

iv. That a township should be established around Isiolo, its boundary being the circumference of a circle three miles in radius with its centre at the police guard roam"

b) In paragraph 4, the letter stated,

"During my recent discussion with general Edwards I again brought up the question of the four farms which adjoin the Southern boundary of the quarantine. The meat marketing board would like to acquire grazing leases but have not so far taken any steps in this direction. When you next see the owners of these farms would you be good enough to sound them on the matter and let me know how they react"

(See annexure JLK "31")

19. It is evident from the above that the colonial government was eyeing the grazing lands owned by the Petitioners' ancestors. The colonial government utilized the idea of gazetting an area as a quarantine area to avoid continued occupation by the communities. It is a known fact that the Somali community, are nomads and pastoralists in nature. But the colonial government continued using this to their advantage.

20. In a letter dated 28th April, 1949, the Provincial Commissioner, Northern Province wrote to the director of veterinary services in regard to Isiolo Quarantine and Holding Ground and stated that at the time they had no legal powers to evict Somalis from the quarantine area. At paragraphs 3 and 4, the letter stated;

" 3 with regard to the prevention of further Somali incursions into the quarantine it is most important to bear in mind that we have at present no legal powers to prevent this; as the law now stands they are merely moving from one part of the quarantine into another part of the quarantine. I cannot prevent future movements of this

sort unless some legal distinction is made between the areas in which the Somalis may reside and the areas in which they may not; in the opinion of the attorney general the problem can best be solved.

a) By re-gazetting the quarantine in accordance with the agreement reached at the meeting of the 9th of February, b) By adding the northern part of the quarantine to leasehold area, and

c) By declaring the leasehold area to be a "native Area" within the meaning of Rules 21 and 28 of the disease of animals ordinance.

4 We now have an excellent opportunity of removing the Somalis from the southern part of the quarantine and of preventing any further incursions into this area. The initiated will make it immensely more difficult for us to achieve our end when we finally decide to settle the matter; by that time, we may find that it has become impossible to remove the Somalis from any part of the quarantine."

(See JLK 32).

21. In a letter dated 28th December, 1949 the Provincial Commissioner, Northern Province wrote to the Provincial Commissioner, Central

Province and stated:-

(a) That Isiolo Somalis had been in occupation of the Southern half of the quarantine for some twenty years and would therefore feel considerable resentment to the attempts to remove them therefrom.

(b) That there was need to explain the matter of excision of approximately 8,000 acres from Isiolo leasehold to the local inhabitants.

(See "JLK 33").

22. The District Commissioner, Isiolo wrote to the Provincial Commissioner, Northern Province a letter dated 7th November, 1952 whereby he stated;

a) That vide Gazette Notice of 10th October, 1952, the Northern boundary of the Isiolo veterinary quarantine had been withdrawn south of the Isiolo –Ngare Ndare Ford road.

b) That consequently the Turkana resident in Isiolo leasehold area may use the grazing to the south of the road between the Isiolo and Ndare rivers.

See annexure "JLK 34".

23. The District Commissioner, Isiolo wrote to the Provincial Commissioner Northern Province Letter File No. Vet 25/4/5 titled: YOur (125) Isiolo

Veterinary Quarantine And Leasehold Areas as related to the alienSomali Population Of Isiolo.In the said letter he indicated:

(a) The earliest gazettement of the ISIOLO quarantine area that he was able to get was in the 1926 consolidate edition of the Laws of Kenya; Cap 157, Section 26(5).

(b) That in 1938 the Isiolo leasehold area came into being and had the effect of reducing the quarantine area to an area lying South of a line approximately due West of the Isiolo boma.

(c) That in 1941 by Government Notices 656 and 657 an exchange of land increased the size of the quarantine again but added to the leasehold what was alleged to be suitable compensation; that is to say the crocodile jaws area and the area lying to the East of Shaba as far as line running due South of the Chanler's falls (Gotu).

(d) That in 1943 the quarantine was regazetted which put into effect the 1938 exchanges of land vis-à-vis the leasehold.

(e) That in 1943 a new veterinary quarantine area was gazetted by Government Notice Number 79 of 1943. This area was considerably smaller than previously, being in the region of 60,000 acres. The whole of the crocodile jaws area was excluded.

(f) That for the privilege of having legal portion of the quarantine the Somalis gave up a strip of land of 15 square miles in the Ol Donyo Nyiro area and 4 square miles in the township (Government Notice No. 1117 of 1952).

(g) That the area remained until November, 1952 when by Government Notice 1127 of 1952, a new area was established consisting of 45,000 acres.

(h) That during the years 1926, 1927 and 1928, alien Somalis were removed from certain areas and township commonages in Kenya and were deposited onto the Quarantine area; not that they wished to enter it.

(i) That in 1929 a start was made to move these people from the Quarantine across to the east bank of the Isiolo river. It was during this move that it was discovered that the Somalis were being settled by the government, not in the Northern Frontier District (N.F.D) as had been supposed, but in Meru District. This move continued through one settlement of Habrawal remained just over the river to the west.

(j) That during the stay of even the eldest settlers with the exception of a short period in 1930 when sheep breeding experiment took place in the quarantine, these Somalis have had the run of the Quarantine and have used it extensively.

(j) That in 1945 the Somalis were given order to quit the area as it was alleged that it was wanted for veterinary purposes. The

Somalis did not move because they would not and the veterinary department either could not or would not use it.

(k) That on gazettement in 1952 the Somalis were told to move from the new area. They declined and it seemed the Somalis had not given up the struggle and were using the area for grazing.

(l) That the Isiolo leasehold area was declared a leasehold area in 1938 as a result of the acceptance by the government of the recommendations of the carter commission.

(m) That the new leasehold area had been gazetted and declared a "native area" under the diseases of animal ordinance.

(n) That there were some facts supporting the Somalis claim to the quarantine lands.

(o) That at the time there was an estimated 2,000 Turkana in the leasehold area and Township and about 800 cattle, and 20,000 sheep and goats.

(p) That in 1951 it was decided to move the Turkana's to Turkana. However, the exercise was called off due to an outbreak of foot and mouth disease.

(q) That the Turkana's came to Isiolo destitute and in search of work and they became rich in stock during the war years when they became herds men employed by livestock control.

(j) That if the Somalis wished to claim the quarantine they should brief a lawyer to represent their interests before the government.

(See annexure "JLK 38.")

24. The District Commissioner, Isiolo prepared a report referenced LND. 16/20/137 dated 11th January, 1954 whereby he inter alia stated:

(a) That the estimated stock of the Somalis was 10,000 cattle, 6,000 sheep and 12,000 goats.

(b) That the estimated stock of the Turkana's was 2,400 cattle, 20,000 sheep and 4,000 goats.

(c) That Somalis must be incorporated in any development scheme if only because there was nowhere else to put them in Kenya should they not be included.

(d) That it was nearly 30 years since the Government arranged for certain "alien" Somalis to occupy the Isiolo veterinary quarantine.

(e) That in 1945 Mr. TurnBull prepared a memorandum in which he suggested means of settling the Somalis in the Isiolo leasehold.

(f) That the assumption that the Somalis and their families would not be repatriated to their Country of origin there was no

doubt that they must be provided with a properly constituted settlement area and the Isiolo leasehold area, as stated in the carter land commission report, is the obvious one.

25. In Gazette Notice No. 1827 of 17th March,1989 the Commissioner of Lands yet again purported to set apart the same parcel of land measuring approximately 107,200 hectares as holding ground. This is the part of land now being claimed by the 1st Respondent. (See annexure "JLK-40").

26. After the said gazettement of the holding area, members of the Ndorobo community moved to court to challenge this gazettement and on 4th May 1990, Hon. Justice S. O. Oguk issued orders quashing the said gazettement. (See annexure "JLK-19").

27. It can therefore be seen that all previous attempted alienation, setting apart and/or allocation of the community land of the members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities situated at Burat Ward, Isiolo County have been unlawful, unconstitutional null and void.

28. Members of the Petitioners' communities were allocated plots and parcels of land near Isiolo Town which were surveyed and which the said members have been utilizing and transacting with.

29. The members of the Petitioners' communities registered the Isiolo Holding Grounds Users Association with the Ministry of Culture and Social Services in 1992. The said Association has a Memorandum of Understanding with the Ministry of Livestock and Fisheries and had a Strategic Plan for 2007-2011. (See "JLK-42").

30. The Waso Trust Land presented a memorandum that was prepared by Professor Gufu Oba to the Boundary Commission on 4th March, 2010 regarding, inter alia, the suit land. (See "JLK-43").

31. The members of the Turkana Community presented their claim to the suit land to the National Land Commission on 3rd June, 2018. In the presentation they annexed a letter by the District Commissioner, Isiolo addressed to the Commissioner of lands dated 28th September, 1965 in which he stated:

    (a) That he recommended Turkana settlement on the extreme west end of the leasehold bounded by the river valley LACOMAN, about 350 square miles.

    (b) That the people would be present with their livestock.

    (c) That the land should be set apart with minimum delay.

    (See "JLK-44").

32. The Executive Chairman of Kilimani Burat Dam and Kilimani Irrigation Scheme presented a report to the Chairman, Truth, Justice and Reconciliation Commission of Kenya during a public hearing between 9th May, 2011 and 12th May, 2011 at Isiolo. (See "JLK-45").

33. The programme coordinator, Isiolo indigenous community initiative, Elite/elders wrote a letter dated 15th June, 2011 to the Permanent Secretary, Office of the Deputy Prime Minister. In the said letter he gave a brief of the indigenous communities and the need to protect their community land which comprises the suit land herein. He stated;

(a) "Borana.

Isiolo indigenous community's initiative elite/elder consists of all co-ethnicity groups in Isiolo County for last 5 years since it was registered as CBI. Isiolo County ethnic groups of that has denied us recognition and referred to us as Northern Frontier District Community. Assassination of the First African District Commissioner Borana tribesman, Daud Dabasso Wabera and paramount Chief Galma Dido took place in June 1963.

The DC was in-charge of 6 NFD districts known as Northern Province and fate of province was not yet decided because Borana and Somalis boycotted the referendum of 1963. The fate of NFD was not yet decided even after independence and before Rome Conference of August 1962 AND two OAU declaration on 1966 and 1968. Borana community was marginalized by both precolonial and post independent government of Jomo Kenyatta and also by our neighboring great Meru Community taken our so called trust land because we are IDPs and Ex-IDPs.

(b) Somali.

Issak And Harti (a Somali Sub-tribe)

Borana community political leadership came and marginalized (Somali) known as Issack and Harti tribesman living in Isiolo Central District. Harti and Issack who were minority group in Isiolo County and also marginalized by pre-colonial regime, post-independence of Jomo Kenyatta, Moi regime to be recognized under this new constitution as far as minority group is concerned.

(c) Meru.

Meru community, who are the bonafide resident of Isiolo county since independence and living and in the area of Kulamawe, Mwangaza and part of Kiwanjani, who are also marginalized group by pre-colonial regime and Moi regime of dividing and rule system of governance between the great Meru in line of tribal e.g Tigania and Igembe etc during Moi era and also by bad Isiolo political leadership since independence. This led to Merus of Isiolo were not defending the common border from outsider from great Meru, three-kilometer Meru to Nairobi and Nyambene side just as nearer Gambela.

(d) Turkana.

Turkana community who are known in Isiolo County as charcoal burners and who came as unskilled labourers of LMD (Livestock marketing division) of the GOK arm. Some few came during independence as Somali labourers and European road labourers through Baragoi to Isiolo. They are pastoralists who are also living in West Location and Ngaremara location in East Division. They are also marginalized by both Kenyatta and Moi regimes from Isiolo politicians.

(e) Garre.

The Garre community (a Somali sub clan) who came from Mandera to Isiolo as businessmen and few families who came to Isiolo as a result of LMD herders and employees and others came as police officers like Haji Aliow Kalla and Harun Garbicha in 1940s and 1950s before independent settles around LMD area. After the collapse of LMD in 1984, they joined livestock trade and others and reared livestock in West location and Burat area in Isiolo County. In fact the Euphorbia tree (Aano or Muthuuri) in Isiolo and part of Meru was introduced from Kismayu by Abdullahi Aliow.

(f) Ajuran.

Ajuran community who came to Isiolo as LMD cattle herders from Wajir and later lived in Isiolo West location (LMD) have been supplying cattle from North Eastern in 1950s-1960s.

(g) Samburu.

Samburu community from Samburu County in Rift Valley crossed Waso Nyiro River and lived around Oldonyiro Division in Isiolo Central Division since independence.

(h) Ndorobo.

Ndorobo of Laikipia Maasai live along the border of Isiolo County and Laikipia in Kipsing and Laparua area of Burat since independence.

We recommended all these co-ethnicity tribes be included in County forum. This allows equalization among the communities in Isiolo as there is huge economic disparity and other community land recommendation as above.

(i) Article on community land under bill of right.

Isiolo former LMD (GOK) holding ground in Isiolo Central West Location to be protected under community (Isiolo holding ground users Association since 1989 to date). ii. Kilimani Game Galena Irrigation Scheme measuring about 880 ha with about 420 families now active between Isiolo and Lower Lewa springs (Lugh Oman) to the North where the two rivers meet since 1968,

be protected also under community land article for Isiolo county food security and sustainability."

(See annexure "JLK-46".)

34. The above communities, despite their differences and commonalities, have continued to co-exist in Isiolo county since time immemorial.

35. That the National Land Commission held stakeholder consultative meetings regarding the suit land in 2018. Upon hearing of the stake holders, the National Land Commission made the following recommendations for the way forward;

a) A technical team was constituted from government agencies (both from county and national) to undertake a mapping/ surveying exercise that can depict what institution and communities as well as facilities are where for informed decision making. The team to consist of the following;

(i) Deputy County Commissioner – 1 pax

(ii) County Government – 2 pax (livestock and veterinary)

iii. National Government – 4 pax 2 from veterinary and 2 from Livestock Department iv. Ministry of Education – 2 pax

v. Health (County) – 1 pax

vi. Lands (Survey) – 2 pax i.e. 1 pax National and 1 from County

vii. NLC – 2 pax – i.e. Opaa and County Cordinator/ Mwatia

viii. KDF – 2 pax

(b) National Land Commission to draft letters to institutions to nominate representatives/experts to technical team to undertake the mapping/surveying exercise.

(c) 1st meeting of experts for the mapping to be held on 4th September, 2018; meant to draft TOR among other things.

(d) By 31st September, NLC should have received names of nominees from the government institutions.

(e) County government to facilitate local (County Surveyor) to pick up the points and details e.g. of rivers, hills, schools, settlements, with names for inclusion into the map during the survey exercise that is to be conducted by the multiagency team of experts as per time No. 1" (See "JLK-47").

36. The National Land Commission is yet to make its final determination.

37. The names commonly used in Isiolo County clearly demonstrate that the Petitioners' communities were the ancestral owners of the suit land;

(a) Isiolo -a Ndorobo word meaning "moving wind" OSI-WO-LO.

(b) Oldonyiro– A Samburu word meaning black hill.

(c) Ngarandare– A Samburu word meaning water for goats.

(d) Angureapeot– named after one of the Turkana Elders who was among the people repatriated by Colonial Government and the names exists up to date and his son's and grandson lives at Morulem.

Lotiki, Aliwo and other villages inside the disputed leasehold grounds.

(e) Motunyi Hills/Nataruk– A Maasai word meaning the hill of vultures and nataruk from Turkana meaning the same.

(f) Burat–Somali word meaning white hills –the significance in grazing is it turns the colour of goats to be whiter and fatter.

38. The land in question is a bread basket for Isiolo County and the entire Northern Kenya and supports over 100,000 human population in terms of food security and therefore if the eviction is carried out the mentioned population will be rendered helpless and poor.

39. The 1st Respondent filed a title to prove ownership but has failed to show how it acquired the land through the known legal process as laid below in the Legal foundations of the petition.

40. The 1st Respondent has failed to take the court through the process of setting apart as relayed in the previous Constitution of Kenya (Repealed) as was the Applicable law, under Section 118. (See below).

41. Unregistered land, having being held in trust by the County Council, the 1st Respondent has failed to show that the County Council of Isiolo issued the requisite consent for the setting apart, and the community authorized this compulsory acquisition and the community was also paid for this compulsory acquisition.

42. Section 7 of the Trust Land Act (Repealed) is equally of importance. (See below).

43. The 5th Respondent, the County Government of Isiolo, supports this petition and states that, at paragraph 12 of its Replying Affidavit, it does not understand how the 1st Respondent acquired title. It remains a mystery.

44. The County Government of Isiolo is a crucial party when it comes to the process of setting apart, having been ignored, it can only mean one thing, that the process was illegal and unconstitutional!

Legal Foundations of the Petition

45. Article 2(1) of the Constitution provides,

> "(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

46. Article 10 of the Constitution provides,

> "(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions.
>
> (2) The national values and principles of governance include—
>
> (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
>
> (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
>
> c) good governance, integrity, transparency and accountability; and
>
> d) sustainable development."

47. Article 19 of the Constitution provides,

> "(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.
>
> (4) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
>
> (3) The rights and fundamental freedoms in the Bill of Rights—
>
> (a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

48. Article 20(1) and (2) of the Constitution provides,

> "(1) The Bill of Rights applies to all laws and binds all State organs and all persons. (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom."

49. Article 21(1) of the Constitution provides,

> "(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."

50. Article 21(3) of the Constitution provides,

> "(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities."

51. Article 22 of the Constitution provides,

> "(1) 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 or infringed, or is threatened.
>
> (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> (a) a person acting on behalf of another person who cannot act in their own name;
>
> (b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court."

52. Article 23 of the Constitution provides,

"(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

53. Article 27 of the Constitution provides,

"(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender."

54. Article 28 of the Constitution provides,

> " Every person has inherent dignity and the right to have that dignity respected and protected."

55. Article 29 of the Constitution provides,

> " Every person has the right to freedom and security of the person, which includes the right not to be—
>
> (a) deprived of freedom arbitrarily or without just cause;
>
> (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
>
> (c) subjected to any form of violence from either public or private sources;
>
> (d) subjected to torture in any manner, whether physical or psychological;
>
> (e) subjected to corporal punishment; or
>
> (f) treated or punished in a cruel, inhuman or degrading manner."

56. Article 35 of the Constitution provides,

> " (1) Every citizen has the right of access to—
>
> (a) information held by the State; and
>
> (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
>
> (5) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
>
> (3) The State shall publish and publicise any important information affecting the nation."

57. Article 39 of the Constitution provides,

> " (1) Every person has the right to freedom of movement.
>
> (2) Every person has the right to leave Kenya.
>
> (3) Every citizen has the right to enter, remain in and reside anywhere in Kenya."

58. Article 40 of the Constitution provides,

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

59. Article 47 of the Constitution provides,

> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (2) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
> (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> (b) Promote efficient administration."

60. Article 61 of the Constitution provides,

> "(1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.
>
> (2) Land in Kenya is classified as public, community or private."

61 Article 63 of the Constitution provides,

> "(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
>
> (2) Community land consists of—
>
> (a) Land lawfully registered in the name of group representatives under the provisions of any law;
>
> (b) Land lawfully transferred to a specific community by any process of law;
>
> (c) Any other land declared to be community land by an Act of Parliament; and
>
> (d) land that is—
>
> (i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) Ancestral lands and lands traditionally occupied by hunter gatherer communities; or

iii. Lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this Article."

62 Article 258 of the Constitution provides,

"(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) A person acting on behalf of another person who cannot act in their own name;

(b) A person acting as a member of, or in the interest of, a group or class of persons;

(c) A person acting in the public interest; or

(d) An association acting in the interest of one or more of its members."

63 Section 152B of the Land Act No. 6 of 2012 provides,

"An unlawful occupant of private, community or public land shall be evicted in accordance with this Act."

64 Section 152C of the Land Act No. 6 of 2012 provides,

> "The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction."

65 Section 152D of the Land Act No. 6 of 2012 provides,

> "(1) The County Executive Committee Member responsible for land matters shall cause a decision relating to an eviction from unregistered community land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.
>
> (2) In the case of registered community land, the procedure prescribed in section 152E shall apply."

66 Section 152E of the Land Act No. 6 of 2012 provides,

> "(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
>
> (2) The notice under subsection (1) shall—
>
> (a) Be in writing and in a national and official language;
>
> b In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land; (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
>
> (d) Be served on the deputy county commissioner in charge of the area as

well as the officer commanding the police division of the area."

67 Section 152G of the Land Act No. 6 of 2012 provides,

"(1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures —

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

(b) Be preceded by the presentation of the formal authorizations for the action;

(c) Where groups of people are involved, government officials or their representatives to be present during an eviction;

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

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

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

(g) include mechanisms to protect property and possessions left behind involuntarily from destruction;

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

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

(2) The Cabinet Secretary shall prescribe regulations to give effect to this section."

68 Section 13 of the Environment and Land Court Act No. 19 of 2011 provides,

> "(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) Relating to land administration and management;
>
> (d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) Any other dispute relating to environment and land.
>
> (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
>
> (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
>
> (5) Deleted by Act No. 12 of 2012, Sch.
>
> (6) Deleted by Act No. 12 of 2012, Sch.
>
> (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs."

69 Regulation 63 of the Land Regulations, 2017 provides,

"(1) Upon establishing that a particular parcel of public land is unlawfully occupied, the Commission shall issue a notice to the unlawful occupiers of public land to vacate the land in Form LA 57 set out in the Third Schedule.

(2) The notice under paragraph (1) shall be published the Gazette, in one newspaper with nationwide circulation, by radio announcement in a local language where appropriate and by affixing it on the affected land."

70 Regulation 64 of the Land Regulations, 2017 provides,

"(1) Upon establishing that a particular parcel of unregistered community land is unlawfully occupied, the County Executive Committee Member responsible for land matters in the county shall issue notice in Form LA 57 set out in the Third Schedule to the unlawful occupiers to vacate the land.

(2) The County Executive Committee Member shall publish a notice issued under paragraph (1) in the Gazette, in one newspaper with nationwide circulation, by radio announcement in a local language where appropriate and by affixing it on the affected land."

71 Regulation 66 of the Land Regulations, 2017 provides,

"Any person participating in an eviction shall identify themselves by production of—

(a) the original national identification cards;

(b) official or staff identification cards;

(c) a letter of authorization from the owner; or

(d) a letter from the Commission in case of public land."

72 Regulation 67 of the Land Regulations, 2017 provides,

"(1) Evictions shall be formally authorized in writing and by—

(a) The Commission, in the case of public land;

(b) The County Executive Committee Member responsible for land matters, in the case of unregistered community land; or

(c) The owner of the land, in the case of private or community land.

(2) The authorization granted under paragraph (1) shall be copied to the national government administrators in the county and to the Officer Commanding the Police Division of the area in which the land is situate."

73 Section 70 of the Constitution that was repealed in 2010 provided,

"Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

(a) Life, liberty, security of the person and the protection of the law; (b) Freedom of conscience, of expression and of assembly and association; and

(c) Protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

74 Section 75 of the Constitution that was repealed in 2010 provides,

> "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –
>
> (a) The taking of possession or acquisition 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 property so as to promote the public benefit; and
>
> (b) The necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
>
> (c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
>
> (2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for –
>
> (a) The determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and
>
> (b) the purpose of obtaining prompt payment of that compensation: Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) –

(a) To the extent that the law in question makes provision for the taking of possession or acquisition of property –

(i) In satisfaction of any tax, duty, rate, cess or other impost;

(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;

(iii) As an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract; (iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

(v) In circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants; (vi) in consequence of any law with respect to the limitation of actions; or

(vii) For so long only as may be necessary for

the purposes of an examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or (b) to the extent that the law in question makes provision for the taking of possession or acquisition of –

(i) Enemy property;

(ii) Property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

iii. Property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or (iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the

instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(6) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament."

75. Section 114 of the Constitution that was repealed in 2010 provided, "(1) Subject to this Chapter, the following descriptions of land are Trust land –

(a) Land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust Land Act as in force on 31st May, 1963), and which was on 31st May, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of the Trust Land Board;

(b) The areas of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement Areas and the boundaries of which were described respectively in the Fourth, Fifth, Sixth and Seventh Schedules to the Crown Lands Ordinance as in force on 31st May, 1963, the areas of land that were on 31st May, 1963 communal reserves by virtue of a declaration under section 58 of that Ordinance, the areas of land referred to in section 59 of that Ordinance as in force on 31st May, 1963 and the areas of land in respect of which a permit to occupy was in force on 31st May, 1963 under section 62 of that Ordinance; and

(c) Land situated outside the Nairobi Area (as it was on 12th December, 1964) the freehold title to which is registered in the name of a county council or the freehold title to which is vested in a county council by virtue of an escheat: Provided that Trust land does not include any estates, interests or rights in or over land situated in the Nairobi Area (as it was on 12th December, 1964) that on 31st May, 1963 were registered in the name of the Trust Land Board under the former Land Registration (Special Areas) Ordinance.

(2) In this Chapter, references to a county council shall, in relation to land within the areas of jurisdiction of the Taveta Area Council, the Pokot Area Council, the Mosop Area Council, the Tinderet Area Council, the Elgeyo Area Council, the Marakwet

Area Council, the Baringo Area Council, the Olenguruone Local Council, the Mukogodo Area Council, the Elgon Local Council, and the Kuria Local Council, be construed as references to those councils respectively."

76. Section 115 of the Constitution that was repealed in 2010 provided, "(1) All Trust land shall vest in the county council within whose area of jurisdiction it is situated: Provided that there shall not vest in any county council by virtue of this subsection - (i) any body of water that immediately before 12th December, 1964 was vested in any person or authority in right of the Government of Kenya; or (ii) any mineral oils.

(2) Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual: Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law.

(3) Notwithstanding subsection (2), provision may be made by or under an Act of Parliament enabling a person to be granted a right or interest to prospect for minerals or mineral oils on any area of Trust land, or to extract minerals or mineral oils from any such area, and the county council in which the land is vested shall give effect to that right or interest accordingly: Provided that the total period during which minerals or mineral oils may be prospected for on, or extracted from, any particular area of land by virtue of any grant or grants while the land is not set apart shall not exceed two years.

(4) Subject to this Chapter, provision may be made by or under an Act of Parliament with respect to the administration of Trust land by a county council."

77. Section 116 of the Constitution that was repealed in 2010 provided, "(1) A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land. (2) The laws to which subsection (1) applies are – (a) the Land Consolidation Act and the Land Adjudication Act; and (b) any other law permitting the registration of individual titles to estates, interests or rights

in or over land that, immediately before registration, is Trust land (except so far as the law permits the registration of estates, interests or rights vested in persons or authorities for whose use and occupation the land has been set apart under this Chapter)."

78. Section 117 of the Constitution that was repealed in 2010 provided, "(1) Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation - (a) by a public body or authority for public purposes; or

(b) For the purpose of the prospecting for or the extraction of minerals or mineral oils; or

(c) By any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.

(2) Where a County Council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.

(3) Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.

(4) No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who –

(a) Under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or

(b) Is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart. (5) No right, interest or other benefit under African customary law shall have effect for the

purposes of subsection (4) so far as it is repugnant to any written law."

79. Section 118 of the Constitution that was repealed in 2010 provided, "(1) Where the President is satisfied that the use and occupation of an area of Trust land is required for any of the purposes specified in subsection (2), he may, after consultation with the county council in which the land is vested, give written notice to that county council that the land is required to be set apart for use and occupation for those purposes; and the land shall then be set apart accordingly and there shall be vested in the Government of Kenya or in such other person or authority referred to in subsection (2) as may be specified in the written notice, such estates, interests or rights in or over that land or any part of it as may be specified in the written notice. (2) The purposes for which Trust land may be set apart under this section are –

(a) The purposes of the Government of Kenya;

(b) The purposes of a body corporate established for public purposes by an Act of Parliament;

(c) The purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the Government of Kenya;

(d) The purpose of the prospecting for or the extraction of minerals or mineral oils.

(3) This section shall apply to land that has already been set apart in pursuance of section 117 as it applies to other land, and in that case a setting apart under this section shall extinguish any estate, interest or right in or over the land or any part thereof that may be vested in any person or authority in consequence of the setting apart under that section, but section 75 shall apply in relation to the setting apart under this section as if it were a compulsory acquisition by the Government of Kenya under an Act of Parliament of the estate, interest or right so extinguished.

(4) Where land is set apart under this section –

(a) Any rights, interests or other benefits in respect of that land that were previously vested in any tribe, group, family or individual under African customary law shall be extinguished; and

(b) The Government of Kenya shall make prompt payment of full compensation for the setting apart to such persons as under section 117 (4) are entitled to compensation when land is set apart in pursuance of that section.

(5) Subject to this section, Parliament may prescribe the manner in which and the conditions subject to which a setting apart under this section shall be effected."

80. Section 119 of the Constitution that was repealed in 2010 provided, "Where the President is satisfied that any land that has been set apart under section 118 is no longer required for any of the purposes specified in that section, the President shall in writing so notify the county council in whose area of jurisdiction the land is situated, and thereupon the setting apart shall cease to have effect and any estate, interest or right vested in any person or authority in consequence of the setting apart shall be extinguished and (without prejudice to the subsequent making of a further setting apart under any provision of this Chapter) the land shall again be held by the county council in accordance with section 115:

> Provided that, where an estate, interest or right that is vested in a person or authority other than the Government of Kenya is extinguished in pursuance of this section, section 75 (except paragraphs (a) and (b) of subsection (1) thereof) shall apply to that extinguishment as if it were a compulsory acquisition by the Government of Kenya under an Act of Parliament of the estate, interest or right so extinguished."

81. Section 120 of the Constitution that was repealed in 2010 provided, "(1) Where a person in whom there is vested an estate, interest or right in or over land to which this section applies dies intestate and without heirs, that estate, interest or right shall escheat to the county council in whose area of jurisdiction the land is situated.

(2) Where a company in which there is vested any estate, interest or right in or over land and to which this section applies is dissolved, then, except so far as provision is made by the law relating to companies for the vesting of that estate, interest or right in some other person or authority, it shall escheat as if it were vested in a person who dies intestate and without heirs.

(3) The land to which this section applies is the land, other than land that is situated in the Nairobi Area (as it was on 12th December, 1964), that is specified in paragraphs (a), (b) and (c) of Section 114(1)"

82. Section 7 of the Trust Land Act, Cap 288 (now repealed) provided as follows,

"(1) Where written notice is given to a council, under subsection (1) of section 118 of the Constitution, that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection

(2) Of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette. (2) Before publishing a notice under subsection (1) of this section, the council may require the Government, within a specified reasonable time — (a) to demarcate the boundaries of the land, and for this purpose to erect or plant, or to remove, such boundary marks as the council may direct; and

(b) To clear any boundary or other line which it may be necessary to clear for the purpose of demarcating the land, and, if the land is not demarcated within the time fixed by the council, or if the person or body on whose application the land is to be set apart so requests, the council may carry out all work necessary for the demarcation of the land and require the applicant to pay the cost of the demarcation.

(2) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District Commissioner.

(3) Where the whole of the compensation awarded under section 9 of this Act to persons who have applied before the date specified in the notice given under subsection (1) of this section has been deposited in accordance with section 11 of this Act the council shall make and publish in the Gazette a notice setting the land apart."

83. Section 8 of the Trust Land Act, Cap 288 (now repealed) provided as follows,

"(1) Where land is set apart under section 7 of this Act, full compensation shall be promptly paid by the Government to any resident of the area of land set apart who—

(a) under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof; or (b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart. (2) A notice of setting apart published under section 7 of this Act shall also be published by displaying a copy at the District

Commissioner's office and at some other public or conspicuous place in the area concerned."

84. Section 12 of the Trust Land Act, Cap 288 (now repealed) provided as follows,

> "Notwithstanding anything in this Act, any person claiming a right or interest in land set apart under this Act shall have access to the High Court for—
>
> (a) The determination of the legality of the setting apart; and
>
> (b) The purpose of obtaining prompt payment of any compensation awarded."

85. Section 13 of the Trust Land Act, Cap 288 (now repealed) provided as follows,

> "(1) In pursuance of section 117(1) of the Constitution, a council may set apart an area of Trust land vested in it for use and occupation—
>
> (a) By any public body or authority for public purposes; or
>
> (b) For the purpose of the extraction of minerals or mineral oils; or (c) by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.
>
> (2) The following procedure shall be followed before land is set apart under subsection (1) of this section—
>
> (a) The council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;
>
> (b) The council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the

meeting of the Divisional Board at which the proposal is to be considered;

(c) The Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

(d) The recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council: Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.

(3) Where the council approves a proposal to set apart land in accordance with subsection (2)(d) of this section, the council shall cause a notice of the setting apart to be published in the Gazette.

(4) Subject to this section, sections 7(3) and (4), 8(1), 9, 10 and 11 of this Act shall apply in respect of land set apart under this section, mutatis mutandis, and subject to the modification that the compensation shall be paid by the council (without prejudice to the council obtaining reimbursement thereof from any other person)."

86. Section 69 of the Trust Land Act, Cap 288 (now repealed) provided as follows,

> " In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof, in so far as such rights are not repugnant to any of the provisions of this Act, or to any rules made thereunder, or to the provisions of any other law for the time being in force."

87. Section 2 of the Community Land Act No. 27 of 2016 defines community as follows,

> " Community" means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes—
>
> (a) common ancestry;

(b) similar culture or unique mode of livelihood;

(c) socio-economic or other similar common interest;

(d) geographical space;

(e) ecological space; or

(f) ethnicity.

88. Section 4 of the Community Land Act No. 27 of 2016 states as follows,

> "(1) Community land in Kenya shall vest in the Community.
>
> (2) Subject to the provisions of this Act or any other written law, the State may regulate the use of community land in accordance with Article 66 of the Constitution.
>
> (3) Community land shall vest in the community and maybe held under any of the following tenure system —
>
> (a) customary;
>
> (b) freehold;
>
> (c) leasehold; and
>
> (d) such other tenure system recognized under this Act or other written law"

89. Section 5 of the Community Land Act No. 27 of 2016 states as follows,

> "(1) Every person shall have the right, either individually or in association with others, to acquire and own properly, in accordance with Article 40 of the Constitution— (a) of any description; and (b) in any part of Kenya.
>
> (2) Customary land rights shall be recognized, adjudicated for and documented for purposes of registration in accordance with this Act and any other written Iaw.
>
> (3) Customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer.
>
> (4) Subject to Article 40 (3) of the Constitution and the Land Act, no interest in, or right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose, and

upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement.

(5) Subject to the provisions of section 46 of this Act, any person who immediately before the commencement of this Act had a subsisting customary right to hold or occupy land shall upon commencement of this Act continue to hold such right."

90. Section 6 of the Community Land Act No. 27 of 2016 states as follows,

"(1) County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.

(2) The respective county government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered community land.

(3) Upon registration of community land, the respective county government shall promptly release to the community all such monies payable for compulsory acquisition.

(4) Any such monies shall be deposited in a special interest earning account by the county government.

(5) The respective county government shall transfer the amount and the interests earned to the communities as may be prescribed.

(6) Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable law.

(7) Upon the registration of any unregistered community land in accordance with this Act, the respective registered community shall, assume the management and administrative functions provided in this Act and the trustee role of the respective county government in relation to the land shall cease.

(8) A county government shall not sell, dispose, transfer, convert for private purposes or in any other way dispose of any unregistered community land that it is holding in trust on behalf of the communities for which it is held."

91. Section 8 of the Community Land Act No. 27 of 2016 states as follows,

> "(1) Subject to this Act and any law relating to adjudication of titles to land, the Cabinet Secretary shall, in consultation with the respective county governments, develop and publish in the Gazette a comprehensive adjudication programme for purposes of registration of community land.
>
> (2) 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.
>
> (3) The inventory of community land referred to in subsection (2) may be accessed by the county governments for ease of access by members of the community.
>
> (4) The Cabinet Secretary shall issue a public notice of intention to survey, demarcate and register community land.
>
> (5) The notice shall—
>
> (a) contain the name of the community;
>
> (b) state which land is to be adjudicated;
>
> (c) invite all interested persons interests or any other claim on their claims;
>
> (d) specify an area or areas of land to be a community land registration unit; and
>
> (e) be for a period of sixty days.
>
> (6) The Cabinet Secretary shall cause the land to be adequately surveyed but such survey shall exclude—
>
> (a) all parcels already in use for public purposes; and (b) adjudicated private land.
>
> (7) A cadastral map of the land shall then be produced and presented to the Registrar for registration."

92. Section 11 of the Community Land Act No. 27 of 2016 states as follows,

> "(1) Community land shall be registered in accordance with the provisions of this Act and the Land Registration Act, 2012 (No. 3 of 2012). (2) The Cabinet Secretary shall by a notice in the

gazette, appoint an adjudication officer in respect of every community registration unit who shall— (a) facilitate in consultation with the respective county governments the adjudication of the community land including the recording of community land claims, demarcation of community land and delineation of boundaries; and

(b) perform any other function conferred by this Act. (3) Upon adjudication, the title relating to community land shall be issued by the Registrar in the prescribed form."

93. Section 12 of the Community Land Act No. 27 of 2016 states as follows,

" Community land maybe held—

(a) As communal land;

(b) As family or clan land;

(c) As reserve land; or

(d) In any other category of land recognized under this Act or other written law."

94. Section 14 of the Community Land Act No. 27 of 2016 states as follows,

" (1) A customary right of occupancy in community land shall in every respect be equal in status and effect to a right of occupancy granted in any other category of land and shall, subject to this Act, be—

(a) Capable of being allocated by the community to an individual person, family, group of persons, clan, an association, partnership or body corporate wholly owned by citizens of Kenya;

(b) Capable of being of indefinite duration; and

(c) Governed by customary law in respect of any dealings.

(2) A customary right of occupancy on any community land subsisting before the commencement of this Act shall upon the commencement of this Act be a recognizable right of occupancy in the respective community land subject to Article 40(6) of the Constitution.

(3) A person, a family unit, a group of persons recognized as such under any customary law or who have formed or organized themselves as an association, a cooperative society or any other body recognized by any written law, who are members of a community may apply to the registered community for customary right of occupancy.

(4) The registered community shall, when considering the application have regard to—

(a) Proposals made by the adjudication team or any subcommittee of the registered community set up for that purpose; and

(b) Equality of all persons including—(i) Equal treatment of applications for women and men; and (ii) non-discrimination of any person on the basis of gender, disability, minority, culture or marital status.

(2) Upon approval by the registered community, the registered community shall issue a certificate of customary right of use and occupancy in the prescribed form."

95. Section 42 of the Community Land Act No. 27 of 2016 states as follows,

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

(2) The Court may—

(a) Confirm, set aside, amend or review the decision which is the subject of the appeal; or

(b) Make any order in connection therewith as it may deem fit."

96. Article 42 of the African Charter on Human and Peoples Rights states as follows,

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

97. Article 5, 13(1) & 17 of the Universal Declaration of Human Rights states as follows,

> "(5) No one shall be subjected to torture or to cruel, inhuman or degrading treatment 05 or punishment.
>
> 13
>
> (1) Everyone has the right to freedom of movement and residence within the borders of each State.
>
> (2) .....
>
> 17.
>
> (1) Everyone has the right to own property alone as well as in association with others.
>
> (2) No one shall be arbitrarily deprived of his property."

98. It is therefore our position that the Respondents failed to follow the legal process set out in the Constitution of Kenya 2010, Community Land Act, 2016 and Regulations thereto, the Land Act 2012, the African Charter on Human and Peoples Rights, and Universal Declaration of Human Rights.

Violations of the Constitution.

Violations of Article 10 of The Constitution

99.

(a) The national values and principles of governance include rule of law, the participation of the people, human rights, protection of the marginalized, good governance, transparency, accountability and sustainable development.

(b) The Respondents have violated the aforesaid values by not availing relevant documents, like the eviction notice, to the affected communities. They have therefore not been transparent and accountable to the people.

(c) By failing to involve the communities who own the ancestral land in the decisions relating to the same since colonial times, they violated the value of participation of the people.

(d) By making decisions relating to the suit land while not following the law in place at all material times, the Respondents violated the values of good governance and the rule of law.

(e) By threatening to unlawfully evict the affected communities which are marginalized communities, the Respondents have failed to protect them and have infringed on their human rights.

(f) By threatening to evict the communities from their ancestral land which they have extensively developed the Respondents will disrupt sustainable development of an expansive and productive area.

Violations of Article 27 of The Constitution.

100.

(a) The said Article guarantees equality and freedom from discrimination. Every person is equal before the law and has the right to equal protection and equal benefit of the law. The state should not discriminate directly or indirectly against any person on any ground including ethnic or social origin.

(c) From the facts set out in this petition it is evident that the Respondents have not afforded the affected communities protection under the law as is given to other communities whose members have private land ownership tenure.

(d) For a very long-time marginalized communities have failed to acquire title to their lands as successive governments take advantage of their lands. Why is it that other counties or Kenyans, have titles to their lands, but in Isiolo county this process remains frustrated?

2. It is also clear that the Respondents have taken advantage of the fact that the affected communities are marginalized and may not have the financial or political might to protect their ancestral land from unlawful alienation.

Violations of Article 28 of The Constitution.

101.

(a) Every person has inherent dignity and to have that dignity respected and protected.

(b) The Respondents have treated the members of the affected communities with utter contempt and disregard of their dignity. They have failed to even give a dignified response to their request for information which is merely met with threats of violent evictions.

(c) The dignity of the said members to have the honour to raise and educate their children in a safe environment; and to carry on their day-to-day life with honour has been violated by the threats made by the Respondents.

(d) To purport to evict a community that has lived on its land since time immemorial, without offering compensation, reeks of disrespect and indignity. Human dignity demands that the Respondents take a special value and care of the people, their

aspirations and protect their personal honor. No person should be evicted from their homes without due process!

Violations of Article 29 of The Constitution.

102.

(a) The freedom and security of the members of the affected communities has been violated.

(b) The said members have been exposed to psychological torture by the Respondents by being threatened to be evicted from their ancestral land within 30 days; yet they have no alternative land. The said members have been subjected to emotional and psychological turmoil.

(c) The members of the affected communities have been treated in a cruel, inhuman and degrading manner.

Violations of Article 35 of The Constitution.

103.

(a) After the petitioners were orally informed that their communities would be evicted from the ancestral land, they demanded to be given a copy of the notice in writing. The said notice has to date never been supplied.

(a) The information sought which is contained in the notice which has not been availed was crucial to enable the members of the affected communities protect their rights in relation to their ancestral land.

Violations of Article 39 of The Constitution.

104. The right of the members of the affected communities to live and reside on their ancestral land in Burat Ward, Isiolo County has been threatened by the threat of eviction therefrom.

Violations of Article 40 of The Constitution.

105.

(a) The right of the members of the affected communities to own and utilize their ancestral and community land in Burat ward, Isiolo County has been threatened.

(b) The Respondents have threatened to arbitrarily deprive the affected communities of their community land without their involvement or consent.

(c) The Respondents have not even disclosed if their intention is to compulsorily acquire the community land, and if so, have not offered adequate compensation to them.

Violations of Article 47 of The Constitution.

106.

(a) The administrative acts carried out by the Respondents in regard to the suit land have not been expeditious, efficient, lawful, reasonable and procedurally fair.

(a) The Respondents have actively concealed information from members of the affected communities yet the Constitution demands that for every adverse administrative act, written reasons for the action must be given.

(b) The Respondents have not followed the law as set out in statutes and in the Constitution in dealing with the suit land and therefore their actions have not been lawful.

(c) The act of giving communities who have settled on the suit land for a century oral notice to vacate within 30 days is neither reasonable nor procedurally fair.

(d) The act of attempting to evict the members of the affected communities when their children are preparing to sit for national exams is not lawful, reasonable or procedurally fair.

(e) The act of uprooting communities from their ancestral land with no alternative settlements is not lawful, reasonable or procedurally fair.

Case law

107. In the locus classicus case of Ayuma & 11 others (Suing on their own Behalf and on Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari (Interested Party) [2013] KEHC 6003 (KLR) the three-judge bench found an eviction by a public body to have infringed on the rights of the residents therein and with approval the UN treaties sated as follows;

"UN Basic Principles and Guidelines on Development based Eviction and Displacement articulated the steps that states should undertake prior to taking any decision initiating an eviction;

1) that the relevant authority should demonstrate that the eviction was unavoidable and was consistent with international human rights commitments;

(2) that any decision relating to evictions should be announced in writing in the local language to all individuals concerned sufficiently in advance stating the justification for the decision;

(3) that alternatives and where no alternatives exist, all measures taken and foreseen to minimize the adverse effect of evictions;

(4) that due eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that may be damaged during evictions;

(5) that evictions should not result in individuals being rendered homeless or vulnerable to other human rights violations; and

(6) that there must be resettlement measures in place before evictions can be undertaken.

(2) The Guidelines on Evictions further articulated the conditions to be undertaken during evictions as follows;

(1) That there would be mandatory presence of Governmental officials or their representatives on site during eviction;

(2) That neutral observers would be allowed access to ensure compliance with international human rights principles;

(3) That evictions would not be carried out in a manner that violated the dignity and human rights to life and security of those affected;

(4) That evictions would not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams; and

(5) That at all times, the State was to take measures to ensure that no one was subjected to indiscriminate attacks."

108. In the case of Mohammed Hussein Yakub & Others and County Government of Mandera & 5 Others (2020) eKLR, where the court found that a land parcel is community land if it has an ancestry of being used by the community as a shrine or for grazing purposes. In this matter the Petitioners have presented evidence to prove that the land is community land.

109. In the case of County Government of Tana River v Mohamed Gorre Bulale & 3 others [2021] eKLR the Honourable Court while dealing with a similar matter found;

> " 7 The suit land herein is vested with the County Government of Tana River, the plaintiff herein. The defendants have not informed the court the progress they took to either convert the land from un-surveyed community land to private property. They have not shown that they engaged the plaintiff herein and indeed the community to grant them the authority to effect such sale."

The same questions arise in this case, how did the 1st Respondent obtain a title to an unsurveyed land? How did they obtain title without engaging the community? How did their 100 acres increase to 107,200 hectares? As a government, and custodians of all documentation, the answers should be easy like 1,2,3.

110. In the Court of Appeal case of Commissioner of Land Vs. Coastal Aquaculture (1997) eKLR, the court held that the government as the custodian of all land documents, must provide the gazette notice showing that the government took possession of the land and that the property had vested in it and nothing would have been easier than to furnish them to the court.

The Court of Appeal in dismissing the Appeal also quoted the High Court judgment of Hon Ringera J (Rtd) where he stated;

> " As regards the adequacy and validity of the notice published under section 6(2) of the Land Acquisition Act, I have come to the judgment that notice should reflect the Minister's certificate to the Commissioner under section 6(1), and must accordingly include the identity of the public body for whom the land is acquired and the public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies hardship to the owner. Those details must be contained in the notice itself for the prima facie validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence."

In the instant case, we are yet to see the notice that gave the 1st Respondent the land. It remains a mystery.

111. In Eunice Grace Njambi, Kamau & Another Vs. Attorney General & 5 Others (2013) eKLR, the court said that under the repealed Land Acquisition Act,

the government had an obligation to execute the process of land acquisition to finality to effectuate title acquisition with proper documentation.

112. In Virenda Ramji Gudka & Others Vs. Attorney General (2014) eKLR, the court stated that a specific provision of the Law conferred the rights of compulsory Acquisition. The applicable Law is Article 40 of the Constitution and Sections 107 and 133 of the Land Act, which replaced the Land Acquisition Act and which must be complied with for the rights of acquisition to crystallize.

113. Flowing from the Constitution, even if the land was public, the National Land Commission has to be involved in the Acquisition. The 1st - 4th Respondents' actions must be looked at from the spectrum of Article 40(3) of the Constitution. The 1st - 4th Respondents have not responded to the petition with documentary evidence showing strict adherence to Article 40(3) of the Constitution and the provisions of the National Land Commission Act, Land Act, and the Land Registration Act. Under the cited laws, the 1st Respondent has no constitutional and statutory right to unilaterally or otherwise alienate the suit land through a letter, fiat, or decree.

114. In Joseph Ihugo Mwaura & Others Vs. the Attorney General & Others (2012) eKLR, the court observed that Section 75 of the retired Constitution did not create proprietary interest but protected proprietary interest through the existing legal framework.

Conclusion

115. Your Lordship we therefore humbly submit that the Petition herein is merited and the same ought to be allowed as prayed.

We are most obliged.

Dated At Nairobithis 18th day of September 2024.

Ramadhan Mukira & Co.

Advocates For The Petitioners

Adm No:P.105/9188/12

LSK/2024/04924

10. The submissions filed by the 1st Respondent take the following format:

1ST Respondent's Final Submissions

The Petition:

1. If it may please your Lordship, the Petitioners filed the instant Petition seeking the following prayers:

   (a) A declaration that the Respondents have violated Articles 10, 27, 28, 29, 35, 39, 40 and 47 of the Constitution of Kenya.

   (b) A declaration that the land in Burat Ward Isiolo County measuring 350 square miles is the ancestral land of the Turkana, Samburu, Borana, Somali and Ndorobo Communities.

(c) A declaration that all previous attempted alienation, setting apart and/or allocation of that land situated in Burat Ward, Isiolo County have been unlawful, unconstitutional, null and void.

(d) General damages for violation of the rights of more than 20,000 members of the Turkana, Samburu, Borana, Somali and Ndorobo Communities living in Burat War, Isiolo County.

(e) Cancelation of the Title Deed IR 6183 as the same was issued without following due process.

(f) Costs of the Petition.

2. The Claim by the Petitioners is for 350 square miles of land in Burat Ward, Isiolo County which they claim is their ancestral land that has been unlawfully set apart and alienated by the colonial government as well as post-colonial governments to their detriments as members of the Turkana, Samburu, Borana, Somali and Ndorobo Communities living in Burat War, Isiolo County.

3. The 1st Respondent herein is the Cabinet Secretary to the Ministry of Defence which houses the Kenya Defence Forces being one of the national security organs under Article 239 of the Constitution.

Key Issues

4. The 1st Respondent considers the following key issues for determination by this Honourable Court:

(a) Whether the suit has been brought before this Honourable Court after a duration of unreasonable delay hence time barred

(b) Whether due process for setting apart/alienation of the suit land was adequately followed to the point of issuance of the Title Deed in favour of the 1st Respondent

(c) Whether there have been any Constitutional violations attributable to the 1st Respondent

(d) Whether the Petitioners are entitled to any form of damages as a result of any such violations

Submissions

5. At the onset, the 1st Respondent humbly submits that the Petition is at the very least not only ambiguous but also comprising of generalizations as it makes no reference to a described piece of land on which the claim is based.

6. This is on the basis that the 350 square miles of land (224,000 acres/90,649.6Ha) claimed by the Petitioners is vague, ambiguous and a generalization that turns on nothing.

7. The Petitioners have not provided any maps or disclosed the location of the land or otherwise demonstrate any nexus of the land with the 1st Respondent.

8. The Petitioners have further conveniently clothed this suit as a Constitutional petition to blur the real issue which is a land ownership dispute. The penultimate prayer in their amended Petition clearly portrays that they contest the 1st Respondents title.

9. The second objective that the Petitioners seek to achieve by clothing a land ownership suit as a constitutional Petition is to circumvent the provisions of the Limitations of Actions Act.

10. Even if the court was to assume that the dispute is properly filed as a Constitutional Petition, the same still fails as the Petitioners have not explained their delay or demonstrated why an action should be sustained several decades after their alleged cause of action accrued.

11. The issues in this Petition are in regard to the transactional processes through which the suit land was alienated thus being manifestly time barred.

12. The Petitioners have further deliberately failed to explain the reasons for their delay in filing the instant Petition for a cause of action that allegedly accrued decades ago thus greatly prejudicing the 1st Respondent.

13. The Kenya Defence Forces is established under Article 241(1) of the Constitution and has the primary mandate of protecting the sovereignty and territorial integrity of the Republic. The territory of the Republic includes the territory and territorial waters as provided in Article 5 of the Constitution. The Kenya Defence Forces therefore has a prominent role to play in protecting the Statehood.

14. The land owned by the Kenya Defence Forces in Burat Ward was deliberately and strategically placed at its current geographic location in the 1970's over national security considerations. Further, Isiolo region has been developed as a military hub very deliberately and out of national security interests.

15. Colossal public resources have been spent over the years to establish the school and the region as a military hub and that the school requires vast land due to the nature of training, simulations carried out and equipment used

16. The 1st Respondents title to the School of Infantry land flows from the quarantine land which land was properly set apart. Questions of compulsory acquisition and the attendant processes are therefore misplaced in this Petition.

17. I wish to make reference to the history of the land as outlined in the Petitioners Supporting Affidavit dated 5th October 2019:

    (a) That by the official gazette of the colony of the protectorate of Kenya volume XL –No 34 of 5th July 1938 there was a Bill to amend the Crown Lands Ordinance. By this amendment, Native Leasehold Areas were reserved for the use and occupation of the natives. On the other hand, freehold areas within the boundaries described in the 6th schedule were excluded whether specifically mentioned or not. (see annexure JLK 27)

(b) The quarantine area was from the onset not part of the Native Leasehold Areas. The locals were permitted to use the land but were well aware that they had no legal right to the land. (see annexure JLK 29).

(c) The boundaries of the native leasehold were changed in 1941. In that year, the Governor by a Gazette Notice resumed possession of a portion of the Isiolo Native Leasehold area and by way of exchange gave out two areas of the Crown Lands back to the native leasehold areas. (see annexure JLK 30).

(d) There were various adjustments and discussions regarding the quarantine area vis-à-vis the crown lands as pointed out in correspondences by various provincial and district administrators. (See annexures JLK 31-JLK 37).

(e) Adjustments to the quarantine land culminated in Gazette Notice number 1127 of 21st October 1952 which stands as the most recent Gazette Notice by the colonial government. (See annexure JLK 35)

18. The gazettement of the quarantine land effectively meant that the land had at the time changed status to crown land.

19. All rights over land which were created under the colonial government prior to independence were transitioned and confirmed to have been validly granted under the former Constitution of Kenya.

20. As reiterated by Hon Justice A. G. A. Etyang in the High Court at Meru Civil Suit No. 11 of 1995 between Kipsoi Kinyanga & 93 Others v. Isiolo County Council & 3 Others with respect to this same suit property when he stated:

> "Due to its importance, I will reproduce Mr. Marangu's affidavit which reads:
>
> (1) That I am an Administrative Officer with the Isiolo County Council hence authorized to swear this affidavit...
>
> ...
>
> (7) That the 1st Defendant (Isiolo County Council) rightfully and legally gave the said land to the Ministry of Agriculture, Livestock Development and Marketing after all due procedures were followed.
>
> (8) That this land ceased to be trust land when the setting apart procedure was completed and the land given to the said ministry.
>
> (9) That the original occupants of the land, that is the Somali, Turkana and Borana were duly compensated and they moved out of the said land...

...

11. That the land is already vested in the Government Ministry and all tribal and/or community rights are extinguished.

12. That the Isiolo County Council rightfully passed minutes to set apart the land after all the procedures were followed"

21. Based on the foregoing it is apparent that the Petitioner's claim is defeated. I urge this Honourable Court to have a wholesome look at the historical background.

22. The Kenya Defence Forces Scholl of Infantry cantonment area (barracks and training area) was excised from the greater quarantine land and the school has operated from the site where it has had continued and effective occupation and use since the 1970s.

23. The issuance of an allotment letter and title was meant to formalize the 1st Respondents title otherwise its interest in the land precedes this said allotment.

24 The 1st Respondent asserts that it has a valid title to 10,665 Hectares of land in Burat ward which it has been occupying and making use of for the benefit of the entire nation.

25. As held by the Court of Appeal in Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR, "where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register."

26. The acquisition of the land as well as the attendant processes were duly complied with in accordance to the existent provisions of the law and the 1st Respondent has so established by going to the root of its title.

27. Vide Gazette Notice Number 3210 of 1977, the said land was reserved for use by the then Kenya Armed Forces now the Kenya Defence Forces. See annexure "BMO 2" of the 1st Respondent's Replying Affidavit dated 25th February 2022.

28. As clearly indicated in the Gazette Notice Number 3210 of 1977 "all applications for compensation by persons who claim to be entitled to compensation under Section 8 of the Trust Land Act Cap 288 were required to be submitted to the respective District Commissioners at Isiolo, Maralal and Lodwar"

29. The titling to the land was formalized vide IR No. 6183 issued in 2006 for an area measuring 10,665 Hectares. This had been preceded by the requisite allotment in the year 2000 and the survey officially conducted in the year 2004. See annexure "BMO 3" and "BMO 4" being copies of the said allotment letter and Title Deed respectively

30. The acreage outlined in the letter of allotment at the time was an approximation subject to confirmation by actual survey. The survey was conducted in the year 2004 which confirmed the actual acreage to be 10,665 Ha being the basis upon which the title to the land was issued in favour of the 1st Respondent.

31. As reiterated by the Supreme Court in Petition No. 8 (E010) of 2021 Dina Management Ltd v. County Government of Mombasa & 5 Others when referencing the case of African Line Transport Co. Ltd v. The Hon. Attorney General, Mombasa, HCCC No.276 of 2003 [2007] eKLR where it was held that "planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued."

32. The process of reservation as quarantine land, reservation for military use by the Kenya Armed Forces, actual possession and continued utilization including but not limited to development, subsequent allotment, survey and titling was not only above board but also fully compliant with the law and not marred with any form of illegalities or irregularities.

33. The Petitioners therefore deliberately and irredeemably delayed or otherwise acquiesced to the aforestated process leading to the issuance of the title deed in favour of the 1st Respondent such that the exercise of judicial discretion doesn't tilt in their favour.

34. As stipulated under Article 62(1)(b) of the Constitution of Kenya, land lawfully held, used or occupied by a state organ is public land. Additionally, Article 66(1) of the Constitution of Kenya on regulation of land use and property further provides that "the State may regulate the use of any land or any interest in or right over any land in the interest of defence, public safety, public order, public morality, public health or land use planning.

35. The Kenya Defence Forces continues to occupy and utilize the land for training purposes in order to fulfil its Constitutionally mandated duty under Article 241(3) of the Constitution of Kenya.

36. The public purpose for which the land was reserved and the purpose of its utilization seemingly outweighs the private interests of the Petitioners herein.

37. The encroachment of the military land by the Petitioners alongside other locals therefore endangers their own security and safety as the land is utilized for live training of even long-range arms and ammunition.

38. The encroachment on military land is a blatant disregard to the respect of public property and sanctity of title and this Honourable Court ought not to condone such actions.

39. A need to satisfy the hunger for land among communities deemed to be landless ought not to be used as a measure to disenfranchise the 1st Respondent's right to hold public land.

40. As stated by Maraga J (as he then was) in the case of Republic v Minister for Transport and Communication & 5 Others; exparte Waa Ship Garbage Collector and 15 Others (2006) 1 KLR (E&L) 563 "... a democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats public interest goes against the letter and spirit of the Constitution."

41. Any declarations against the sanctity of the title held by and on behalf of the 1st Respondent herein would have far reaching ramifications sustained for the benefit of national security if it deprives the institution under the 1st Respondent of its legitimate training grounds requisitely acquired in accordance to the law and there is therefore need to concertedly safeguard against any such actions in the public interest.

42. This Honourable Court, ought to issue the necessary orders for the Petitioners to vacate the land and completely stop any further encroachment into the military land not only in the interests of the applicable law but also in the interests of safety and security of the Petitioners.

43. Whereas members of the public who have encroached ought to be taken out of public land on account of their safety concerns, Article 43(1)(b) of the Constitution gives certain economic and social rights to members of the public. This may therefore necessitate administrative action including resettlement plans of any genuine squatters as may be addressed by the 2nd Interested Party (National Land Commission) in conjunction with the 5th Respondent (County Government of Isiolo) without necessarily disenfranchising the 1st Respondent.

44. The realm of mapping genuine squatters, sourcing for funding and resettlement does not take away the 1st Respondent's rights to the suit land espoused by their actual possession for decades on end, continued utilization and registration of title in their favour.

45. It is our submission therefore that to the extent that the claim herein flows from historical communal interests on land, if at all there were any communal rights over the land held by the Petitioners or the alleged communities prior to or during the colonial era, the same were extinguished by the colonial law, the independent Constitution, the 1969 Constitution and the Constitution of Kenya 2010 in the attendant procedures.

46. We therefore also invite the Court to take judicial notice of the historical fact that communal land interests in Kenya are generally ethnic based and as such, it is deductively untenable to confine arguments of historical communal land interests especially for large tribes such as the Turkana, Samburu, Borana, Somali and Ndorobo to an Administrative Ward further reiterating the aforementioned decision by Hon Justice A. G. A. Etyang in the High Court at Meru Civil Suit No. 11 of 1995when he stated "any intended division of this Country into tribal or community in order to promote particular tribal or community welfare, wellbeing or tribal interest be it of a commercial or political nature would be unconstitutional and political units for ease

of administration and possible political convenience and ease of political representation".

47. The 1st Respondent having lawfully and procedurally acquired title to the suit land, the Petitioners encroachment into the same, manifested no legitimate expectation to be expected to enjoy peaceful and quiet possession of the same knowing very well that the land had already been set apart as far back as 21st October 1952vide the Gazette Notice Number 1127 and subsequently reserved for use by the then Kenya Armed Forces now the Kenya Defence Forces vide another Gazette Notice Number 3210 of 1977.

48. The land was already reserved for public use hence there being no legitimate expectation by the respective Petitioner communities that they would be settled on the said land.

49. No evidence has been adduced to demonstrate that any evictions have been carried out and if so that they have been carried out unlawfully or in an inhumane manner thus further negating the Petitioners claim for any damages in that regard.

Conclusion

50. It is our submission that given evidence that the 1st Respondents have had effective occupation and use of the land it owns within Burat Ward since the 1970s, the parcel of land owned by the 1st Respondents is public land by virtue of Article 62(1) (b) of the Constitution of Kenya 2010. Further, the 1st respondent has a title issued in its favour and the same has not been challenged for fraud, irregularity or illegality.

51. The Petitioners whether on their own behalf or on behalf of the Turkana, Samburu, Borana, Somali and Ndorobo communities therefore lack proprietary rights over the land hence no proof of any violation has been demonstrated.

52. To the contrary, the Petitioners have no legal basis to claim any interest in the land other than communal native rights which in our submission have since been extinguished. In the circumstances, the balance of convenience does not tilt in their favour.

53. In consideration of the entirety of this case and our submissions thereof, we humbly urge this Honourable Court to find no merit in the Petition, proceed to dismiss the same with costs and order for the humane eviction of all persons found to have encroached onto the 1st Respondents registered land.

All of which is respectfully submitted.

Dated At Nairobithis ..... . day of ..... 2024.

J G Kiiru

Special State Counsel

For: The Hon. Attorney General

11. The submissions filed by the 2nd, 3rd, 4th and 6th Respondents take the following format:

2nd 3rd 4th and 6th Respondents Submissions

Your Lordship, The 2nd, 3rd, 4th And 6th Responents In The Suit Are On Record Stating that they rely on the position and responses filled by 1st respondent as the government position in this suit, from which premise these submissions proceed.

1. The Petitioners seek the following prayers;

   (a) A declaration that the Respondents have violated the Constitutional rights of the members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities contrary to the provisions of Articles 10, 27, 28, 29, 35, 39, 40, and 47 of the Constitution of Kenya.

   (b) A declaration that the land in Burat Ward, Isiolo County, measuring 350 Square Miles is the ancestral land of the members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities residing thereon and it is legally their community land.

   (c) A declaration that all previous attempted alienation, setting apart and/or allocation of the community land of the members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities situated at Burat Ward, Isiolo County have been unlawful, unconstitutional null and void.

   (d) General Damages for violation of the rights of the more than 20,000 members of the Turkana, Samburu, Borana, Somali, Meru and Ndorobo Communities in Burat Ward, Isiolo County.

   d) A cancellation of the Title Deed IR 6183 as the same was issued without following due process.

   e) Costs of the petition.

2. The Constitution of Kenya 2010 was promulgated to govern various aspects of the Republic as from its effective date. One of the emotive issues that were contested in the lead up to the promulgation of the current Constitution was land. To this end the Constitution of Kenya made far widereaching pronouncements on land majorly under Article 40 of the constitution, it addressed issue on ownership of lands in Kenya by non-citizens under Article 65 of the Constitution, and also went ahead to classify land in Kenya into three categories, being, public Land under Article 62, Community land under Article 63 and Private Land under Article 64 of the Constitution.

3. The petition before this Honorable Court however contemplates ownership by private individuals or communities over land that is currently public land, their main contention herein or the goal that is intended to be achieved is the conversion of public land into private land not through a legal process set out in law but by a declaration by this court, to first declare the lands as community land then proceed to quash all processes that defined or classified the land as

public land and finally have the petitioners paid damages for lands that were held by the state as public land pursuant to the laws that vested the lands on the state.

4. Article 62(1) (b) of the Constitution of Kenya, 2010 defines public land as:

> " Land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;"

5. Article 62(2) of the Constitution vests public land to be held by a county government in trust for the people resident in that county, which land is to be administered by the National Land Commission for lands classified under Article 62(2) (a) of the Constitution.

6. However, under clause 62(2) (b) exempts the holding and administration away from the county government and national land commission. It provides:

> Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
>
> (a) Clause (1) (a), (c), (d) or (e); and
>
> (b) Clause (1) (b), other than land held, used or occupied by a national State organ.

7. It is not in dispute that the gazette notices and processes that the petitioners seek to quash date back to 1920, these being Government notice no 402 of 1920, government notice no 259 of 27th July 1922, government notice no of 29th July 1927, government notice no 79 of 1943, gazette notice no 1827 of 17th March 1989. These are the processes that culminated with the land being set apart and handed over to the ministry of livestock as Isiolo Special Leasehold area.

8. From the petition before this court it is not in dispute that the Respondents occupation and use of the land in question are pursuant to the law, which occupation and use of the land predates the promulgation of the current constitution of Kenya.

9. It therefore follows that the land in question squarely falls in the ambit of public land per Article 62(1) (b) of the Constitution, it also follows that the same land is not one which the County Government of Isiolo or the National LandCommission can administer under Article 62(2) (b) of the Constitution.

10. The Petitioners therefore have no claim that can be maintained against the Respondents as the issue of classification of the land was addressed on the effective date of the Constitution, which is to say on the effective date when the Constitution of Kenya came into force the Respondents was already in occupation of the land and had been in continuous use of the same since the year 1922.

11. The constitution clearly states that all the state needs to prove is occupation of the land at the effective date and if by law at that time they were in occupation whether supported by law as set out under the trust land act or were in occupation pending the process of setting apart taking place, then that land as per the constitution is public land.

12. The absurd question then that this court has to address is whether that ownership and occupation as per the constitution can be declared unconstitutional since the same is a constitutional provision.

13. The Petitioners on the other hand would be relying on article 63 of the constitution and I will reproduce the same entirely here in

63.

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

63 (2) Community land consists of—

(a) Land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) Land that is—

(i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) Ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 63 (2).

14. In this case the lands the subject of dispute in this case does not fit within the definitions of Article 63(2) (a), (b) and (c) of the constitution.

15. The land would fall within the ambit of article 63(2)(d)(ii) which is ancestral lands and lands traditionally occupied by hunter-gatherer communities, however the promulgators of the constitution were careful not to create a conflict in the constitution between public land and community land and in the constitution where there is a dispute as to how to classify the parcel of

land the constitution fall back on the provision of Article 63(2)(d)(iii) of the constitution where public Land is expressly exempted from being considered as community land.

16. In effect to give effect to the constitution where the court is faced with a situation where there are two contentions on the classification of land, then the constitution expressly provides that public land definition and holding takes precedence over community land.

17 In this case whether the petitioners have occupied the public land in question since time immemorial, the constitution is clear that the same remains public land and cannot be declared or arbitrarily converted to community land. It is the constitution not a statute.

18. Now the petitioners pray that they be compensated by the state for holding public land as per the constitution, this is not tenable and would be an abuse of court process that land that belongs to the public is transmitted to private individuals and the public is as well required to pay these persons who are beneficiaries of public land.

19. Compensation for land is in the constitution governed by article 40 of the constitution, under the article the state pays compensation for acquisition of private or community land for purposes of converting it to public land for use for a public purpose, it does not compensate people who occupy public land and the provision is not meant for regularization of illegal occupation of public land, it's absurd that the petitioners occupy public land and now want to be compensated for illegal occupation by damages and on top of that be given the land as community land as well, in any event the law is quite clear that where compensation is to be paid it is either monetary or alternative land but not both.

20. Be that as it may the Petitioners hence their bet under Article 40(3) of the Constitution of Kenya, 2010 which provides that the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation;

    (i) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

    (ii) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

        a) Requires prompt payment in full, of just compensation to the person; and

        b) allows any person who has an interest in or right over, that property a right of access to a court of law

21. While Article 40(4) of the Constitution of Kenya, 2010 provides that provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

22. The question that then follows is what is compensation and what criteria has been set out in law to be followed in the award of compensation and by whom.

23. The question is whom is to acquire land is addressed under section 107 of the Land Act

107.

(1) Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.

108.

(2) The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.

24. In the case of Isaiah Otiato & 6 others vs County Government of Vihiga [2018] eKLR, the Learned Judge held that on completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed, it could be a monetary award, it could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission.

25. The petitioners have not provided any evidence of their request to the National Land commission for compensation, they have instead chosen to move court, whereas this is their constitutional right, they have chosen to sidestep and ignore the role of the National Land Commission, in the pursuit of their claim.

26. In the case of Anthony Miano & others vs Attorney General & others [2021] eKLR the Learned Judge found that the doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.

27. The court stated that,

> " 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution.

28. In the case of Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others [2015] eKLR, the Coat of Appeal stated that:

> " 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 fora of last resort and not the first port of call the moment a storm brews...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 the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

29. Indeed since the land in question was acquired before the coming into force of the current constitution and the current constitution having squarely placed and categorized the land as public land, it does not in any way mean persons who lost land before the effective date are not entitled to compensation, the same under the constitution would be classified as an historical injustice which is to be addressed under Article 67(2)(e) of the Constitution, which provides for the functions of the National Land Commission which provides its role as

> " To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress"

30. Section 107A of the Land Act provides for the Criteria for assessing value for compulsorily acquired freehold land.

31. There is no valuation report in line with the law attached or provided to guide this court to reach a just conclusion on the value of damages suffered by any person.

32. Further there is no attached list that identifies any of the petitioners as persons affected by the expansion who are entitled to be compensated for the same, the same is left to this court to blindly agree to any person appearing before it claiming to be affected to be so affected.

33. Further the court is not told whether the compensation sought is for the 7 petitioners or it is for the alleged over 20,000 thousand residents, no indication is given of who will receive and distribute the compensation on behalf of the alleged over 20,000 residents. Indeed, no information is attached of any exercise of public participation that was undertaken where the resolution to sue on behalf of the communities was reached, with the sole decision that the petitioners shall collect compensation on behalf of unnamed persons and

distribute as per their will agreement or fiat, i would say such an exercise would be bad use of public resources.

34. The question that still remains unanswered is what is compensation that the petitioners demand herein as per the Laws of Kenya, the answer to the same can be traced from both case law and statute, in Isaiah Otiato & 6 others vs County Government of Vihiga [2018] eKLR (supra) and Section 111 of the Land Act, where under Section 111(1b) (c) it includes Compensation for compulsorily acquired land may take any one or more of the following forms—

    (a) Allocation of alternative parcel of land of equivalent value and comparable geographical location and land use to the land compulsorily acquired;

35. I would hesitate to state that the community land act is quite clear that where compensation for unregistered community land is paid, the same is not to the petitioners or private persons the same is governed by section 6 of the community land act, which provides

    6.

        (1) County governments shall hold in trust all county unregistered community land on behalf of the communities for which it is held.

        (2) The respective county government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered community land.

        (3) Upon registration of community land, the respective county government shall promptly release to the community all such monies payable for compulsory acquisition. (4) Any such monies shall be deposited in a special interest earning account by the county government.

36. On whether the land in question is public land or private land the same was so eloquently captured in the 1996 decision of the High court decision of KIPSOI Kinyanga & 90 Others Versus The Attorney General, Meru High Court Civil Suit No11 OF 1995, where Etiyang, J held "This court will not issue illegal and unconstitutional declarations whose only result would be to create a state of anarchy in the country."

37. In that case which also relates to the same parcel in dispute herein, the prayers sought then are an exact replica of the ones herein only that at the time it was only members of the Maasai Community who were claiming ownership of the same land and quashing their setting apart as public land, the prayers as per the judgment were as followsDeclaration that the members of Maasai tribe in Leparua area are the rightful occupants of all that area known as Isiolo special Lease hold area measuring 124163 HA within Leparua Area, which land is held in trust for them by isiolo county council.Declaration that the occupation of 16964HA within Leparua area by the director of settlement is illegal.That

Isiolo county council is in breach of trust for wrongful allowing or leasing of 16964 HA of Leparua Area to director of Livestock.A declaration that the director of livestock be declared a trespasser on the 16,964 HA of Leparua area.That the commissioner of lands do declare the Leparua area an exclusive trust land for Maasai community.

38. The same Leparua area is in contention and this time the petitioners have been clever enough to avoid suing the owner of the land the Ministry of Livestock, I dare say the same was aimed at concealing that the suit is res judicata, the decision in relied upon herein that affirmed the fact that the land is public land has never been appealed or set aside the same being a decision by a court of similar and concurrent jurisdiction as this. From that judgement it is clear that members of the public had been moved out of the Isiolo Special leasehold area and compensation was paid out, the return of the occupiers was due to drought that elicited sympathy by the government that they be allowed to graze their animals in the public lands.

39. Further how would the ministry of livestock be condemned unheard, they have not been sued or invited to respond to allegations that the public land that they hold and which was affirmed by the court as properly set apart is held by them illegally and their ceding of a portion of their land to the Ministry of defence for a public purpose is unlawful.

40. Should this court find that the ceding of part of the land to the ministry of defence is unlawful would the land revert back to how it was before the Ministry of defence took posesion which is public land or is it an opportunity to now divest the entire both the portion ceded to ministry of defence and the rest of the portion from Ministry of livestock without inviting them to protect their ownership. This would be expressly against the right to fair trial, Article 50 of the constitution provides

    50.

        (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

41. As has been seen above the law is quite clear on public land versus community land, my parting short is one does the court have the jurisdiction in law to convert public land to community land or those are functions exclusively left to other bodies, can the court take over the role of identification, administration, registration and conversion of public land to community land where the same is provided for in law, the answer is clearly no, the court can only fall back to section 24 of the community land act which provides

    7

        (1) Public land may be converted to community land by allocation by the Commission in accordance with the Land Act, 2012

(2) Conversion of public land to community land under subsection (1) may be affected on a case by case basis.

(3) The Commission ma), by an order published in the gazette identify other specific parcels to which subsection (2) shall not apply.

42. The court is quite clearly not the commision and as earlier stated no evidence has been presented that the dispute was referred to the National land commission to resolve and act in accordance with section 24, the actions of the commission are obviously same land today is the subject of the dispute before this court, the decision of the high court mentioned above has never been appealed or set aside and the position still stands that as per that decision the land remains public land.

43. The title held by the 1st defendant emanates from the said land and interestingly there is no challenge to the donor and owner of the Land the Ministry of livestock in this petition. It therefore follows that should this court deem it fit to cancel their title the same reverts to the position preceding this case which is that it is public land owned by the Ministry of Livestock.

44. It is for these reasons that the petition before this court ought to be dismissed with no orders as to cost it is so prayed.

45. Accordingly, we submit that the petitioners are not entitled to any of the orders so claimed and the petition ought to be dismissed with cost.

Dated at Meru This...7th ...day of .....October..... 2024

B. Kimathi K

Senior Litigation Counsel

For: Hon. Attorney General

Recap And Analysis

12. It is not controverted by any of the parties in this suit that the petitioners and the communities they represent have been occupying part of the suit land for many years. None of the respondents and the interested parties have controverted the assertion by the petitioners that the communities concerned number more than 20,000 people. Various colonial gazette notices issued by the colonial government constructively attest to the reality that the mentioned communities have been occupying parts of the suit land.

13. It is clear that the Military, that is the Department of Defence (DOD) has also been occupying part of the suit land for decades. It seems that there was a live and let live relationship between the DOD and the concerned communities. However, on or about 12th September, 2019, the County Commissioner, Isiolo County convened a public Baraza within Burat Ward and informed the residents that an eviction notice for them to vacate the suit land had been written by the Cabinet Secretary, Ministry of Defence through the Ministry of Interior and coordination of National Government. The communities concerned were given 30 days to vacate what they describe as their ancestral land. This state of affairs was the overarching aetiology for this dispute. It is after the County Commissioner's Baraza, that the petitioners moved to court to instigate this petition.

14. An attempt by the 1st Respondent to have this petition dismissed through an application dated 16th November, 2022, was dismissed by this Court on 27th November, 2023. Among other things, they wanted the petition dismissed for non-exhaustion of available remedies and for the petitioners lacking locus standi. As the said Court's ruling has been reproduced in full earlier on in this judgement, I do not see the need to discuss it further.

15. A conspectus of the petitioners' submissions is that they have lived on the suit land for decades, have schools and other facilities used by the community, including health facilities and water facilities. They also say that they have their houses, farmland, and buildings on the suit land. They also say that they have buried their ancestors on the suit land.

16. The Petitioners say that the suit land due to their long usage of the same is legally their community land. They attack Title Deed IR 6183 issued to the 1st Respondent and say that it was issued contrary to the law. They pray that it be cancelled.

17. In their submissions the 1st Respondent say that the land used by the Kenya Defence Forces in Burat Ward was strategically placed at its current location in the 1970's over security considerations. They say that the Kenya Defence Forces is established under Article 241(1) of the Constitution with the primary mandate of protecting the sovereignty and territorial integrity of the Republic of Kenya.

18. The 1st Respondents says vide Official Gazette of the Colony and Protectorate of Kenya Volume XL-No 34 of 1938, Native Leasehold areas were reserved for the use and occupation of the natives. On the other hand, freehold areas within the boundaries described in the 6th Schedule thereof were excluded whether specifically mentioned or not. According to them the land being used by KDF is not land that was prescribed for use by natives. They say that the quarantine land established under the 1938 Official Gazette was culminating in Gazette Notice number 1127 of 21st October, 1952, which is the most recent Gazette Notice by the Colonial government pertaining to the apposite land. The upshot of this submission is that the suit land was never ancestral land.

19. The 1st Respondent submits that by their having occupied the suit land from the 1970's and having obtained the title to the land in the year 2006 well before the promulgation of the Constitution of Kenya, 2010, the land they use is public land from the effective date of the Constitution of Kenya, 2010.

20. The 1st Respondent submits that the petitioners have no legal basis to claim any interest in the land, it being public land, other than communal native rights which they say were extinguished when the land became public land. It is mainly for this reason that they pray that the petition be dismissed and an order be issued for eviction of all persons found to have encroached on to the 1st Respondent's registered land.

21. A conspectus of the submissions by the 2nd, 3rd, 4th and 6th Respondents is that the suit land, which is the subject of this petition, is public land which under Article 62(2) of the Constitution should be administered by the National Land Commission. They say that the title issued to the Department of Defence was issued before the promulgation of the Constitution of Kenya 2010 and before the enactment of the Community Land Act. As such the provisions of the Community Land Act cannot be applied to the land.

22. They say that the process used to set aside the suit land for use by the military was in accordance with the law. They say that the aetiology of the present title held by the military is traceable to Government Notice no 402 of 1920, Government Notice no 259 of 29th July, 1922, Government Notice no 79 of 1943, and Gazette Notice no 1827 of 17th March, 1989. They therefore submit that the suit land has been public land and not ancestral land from the 1920s. They also say that should there be necessity

for acquiring some particular land, section 107 (1) of the Land Act spells out the method of doing so and the criteria for so doing can only be prescribed by the National Land Commission and not by a Court of Law.

23. The Attorney General who represents the 2nd, 3rd, 4th and 6th Respondents submits that this court ought to decline to issue the orders sought by the petitioners because the petitioners have not exhausted available remedies which should have been by petitioning the National Land Commission which is constitutionally mandated to handle historical injustices apposite to land. The Attorney General says that since the land was bequeathed to the Ministry of Defence by the Ministry of Livestock, should the court find ownership of the land by the military unlawful, it would mean that the land would revert back to the Ministry of Livestock. They argue that should this become the position, the Ministry of Livestock would have been condemned unheard as the petitioners had not enjoined them in this petition. Regarding compensation, the Attorney General in his submissions was laconic that compensation by the Government to the petitioners for public land was indubitably untenable.

24. The Attorney General is unequivocal that this dispute was never referred to the National Land Commission as envisaged by the law. The Attorney General also says that for public land to be converted to community land, the Law mandates that role to the National Land Commission and not to the Court. For all the proffered reasons the Attorney General, for the 2nd, 3rd, 4th and 6th Respondents, prays that the petition be dismissed.

Final Disposition

25. I have considered the submissions and the authorities proffered by the parties to buttress their sometimes veritably incongruent assertions. This petition distinguishes itself from the authorities cited by the parties in at least one very material respect. Constructively or openly all the parties accept that this petition brings out a glaring veneer of historical injustices. The Court notes that the suit land is situated within Isiolo County, which at one time housed the headquarters of the defunct Northern Frontier District. Isiolo County was a closed region. The colonial provincial system of government was a system sui generis and veritably prone to abuse. District Commissioners and District Officers were lay magistrates. Even Chiefs lorded over Native traditional Courts. Of course, the Chiefs operated under the ambit Of District Commissioners and District Officers. Denizens of closed regions had no opportunity to prosecute and promote their rights. Hence, all colonial government notices were issued without reference to the denizens of the closed areas. From the way that those notices were issued, the livelihoods of inhabitants and the status of their land were invidiously and injuriously affected. Indeed, as for most other original Kenyans, they were tenants and serfs of the crown and indubitably prone to be kicked around the way footballers kick balls. In other words, the Colonialists treated them as children of lesser gods amenable to being treated discriminatively.

26. To address the reality of historical land injustices Article 67 was introduced in the Constitution of Kenya, 2010. In 2011, Parliament passed the National Land Commission Act to give effect to this article. The Constitution established the National Land Commission. One of its key functions is to investigate and make recommendations in respect of present and past historical land injustices

27. Perhaps in recognition that this petition had a palpable veneer of historical land injustices, on 22/1/2024, the Attorney General's representative told the Court that the parties were in the process of negotiations. On the same date, Counsel for the 1st Respondent (DOD and the Cabinet Secretary) informed the Court that the Cabinet Secretary had convened a meeting of the stakeholders. He asked the Court to grant negotiations an opportunity. This Court gave the parties 60 days for them to explore an out of Court settlement. On 8/4/2024, this request was repeated by both the representative of the 1st and 2nd respondents and the representative of the 3rd, 4th and 6th Respondents. Indeed, the court

was told that the ongoing negotiations had been handicapped by the recent untimely loss of the Army Commander, General Ogolla. More time was sought. On 22/5/2023, the Counsel representing the 1st Respondent told the Court that the 1st Respondent was amenable to negotiations, by extension meaning an out of Court settlement. It was acknowledged that the issues raised in the petition arose out of historical injustices going back to the beginning of the 20th century.

28. At paragraph 35 of the Petitioners' submissions, it is proffered that following stakeholders consultative meeting in 2018, it was recommended by the National Land Commission that a technical team be constituted to look into the alleged historical land injustices. Here below are the details:

a) A technical team was constituted from government agencies (both from county and national) to undertake a mapping/surveying exercise that can depict what institution and communities as well as facilities are where for informed decision making. The team to consist of the following;

(i) Deputy County Commissioner – 1 pax

(ii) County Government – 2 pax (livestock and veterinary)

iii. National Government – 4 pax 2 from veterinary and 2 from Livestock Department iv. Ministry of Education – 2 pax

v. Health (County) – 1 pax

vi. Lands (Survey) – 2 pax i.e. 1 pax National and 1 from County

vii. NLC – 2 pax – i.e. Opaa and County Cordinator/Mwatia

viii. KDF – 2 pax

(b) National Land Commission to draft letters to institutions to nominate representatives/experts to technical team to undertake the mapping/surveying exercise.

(c) 1st meeting of experts for the mapping to be held on 4th September, 2018; meant to draft TOR among other things.

(d) By 31st September, NLC should have received names of nominees from the government institutions.

(e) County government to facilitate local (County Surveyor) to pick up the points and details e.g. of rivers, hills, schools, settlements, with names for inclusion into the map during the survey exercise that is to be conducted by the multiagency team of experts as per item No. 1" (See "JLK-47").

29. By the time this petition was filed, with its aetiology being the 30 days eviction notice issued by the County Commissioner, Isiolo, the technical committee had not completed its work. Perhaps, had the committee completed its work, this petition would not have been filed.

30. I find that the submission by the Attorney General that the petitioners had not approached the National Land Commission for a possible redress, is not entirely correct. This assertion is outrightly debunked by the fact that the National Land Commission and the stakeholders had established a technical team in 2018. I opine that this inchoate process should, without delay, be completed in accordance with the law.

31. It is my considered opinion that this petition primarily raises historical land injustices concerns. The role of the military is crucial regarding the safeguarding of the national sovereignty of the Republic of

Kenya and the general protection of the people of Kenya. Cancellation of its title to the suit land cannot be ordered without consideration of the grave consequences of such action. By so stating, I do not say that the title in question cannot be impeached in proper circumstances BUT in the circumstances of this case, I find it necessary to direct the National Land Commission to get seized of all the issues involved and to come up with a definitive recommendation/determination within a stipulated period of time.

32. In the circumstances, I issue the following orders:

(a) All the issues apposite to this petition are referred to the National Land Commission for consideration, which commission in obeisance to any legal process it may deem necessary to undertake, MAY complete the work of the technical committee it had established in 2018 AND the National Land Commission must complete the apposite investigation within 24 months of today.

(b) The Court declines to grant prayers a, b, c, d and e in the petition.

(c) Pending completion of the investigation this Court has ordered the National Land Commission to conduct, this Court confirms the status quo granted by the Court on 19th May, 2021 and for avoidance of doubt with the effect that: " An order is hereby issued restraining the respondents by themselves, their agents and/or servants from evicting the applicants and the more than 20,000 members of the Turkana, Samburu, Borana, Somali and Ndorobo Communities within Burat Ward, Isiolo County, that they represent from the land they presently occupy measuring approximately 350 square miles that comprise Burat Ward, Isiolo County and this order to protect any other Kenyans who may have been living within the confines of the suit land when this Petition was filed.

(d) In view of the inchoate attempts by the Ministry of Defence through the formation of a committee and by the National Land Commission and Stakeholders to form a technical committee both seeking a resolution of the dispute which is the subject of this petition, AN ADVISORY ORDER Is hereby issued advising the parties to explore a resolution of the dispute through the Alternative Justice System (AJS) structures already established at the Isiolo Law Courts OR generally through adoption of the Alternative Justice System. It is clarified that this advisory order does not in any way encumber the National Land Commission from autonomously executing its constitutional mandate.

(e) As this petition has evinced an overwhelming veneer of public interest litigation, the Court orders that the parties bear their own costs.

DELIVERED IN OPEN COURT AT ISIOLO THIS 14TH DAY OF OCTOBER, 2024 IN THE PRESENCE OF:

CA: Balozi/ Rahma

Abubakar present for the Petitioners.

Major Kiiru for the 1st Respondent.

Benjamin Kimathi for the 2nd, 3rd, 4th and 6th Respondents.

Mwirigi holding brief for the 5th Respondent.

HON. P.M. NJOROGE

JUDGE