Buya & 200 others (Suing on Behalf of Ndera Community, Tana River County and Themselves) v National Land Commission & 5 others; County Government of Tana River (Interested Party) (Petition 10 of 2021) [2024] KEELC 13497 (KLR) (3 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13497 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION 10 OF 2021

EK MAKORI, J

DECEMBER 3, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10 (1) (A), (B), (C) & (2) (A), (B), 27, 40, 42, 60, 63 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006

AND

IN THE MATTER OF THE VIOLATION OF THE OBJECTS AND PURPOSES OF LANDS ACT, LAND REGISTRATION ACT, THE NATIONAL LAND COMMISSION ACT, THE COMMUNITY LAND ACT, MINING ACT NO. 12 OF 2016 AND THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999 (EMCA).

AND

IN THE MATTER OF THE PURPORTED EXTENTION OF LEASE OVER PLOT LR NO. 13597/1 LAMU CR 72070 IN FEVOUR OF IDA-SA GODANA RANCH COOPERATIVE SOCIETY LIMITED.

BETWEEN

ALI HERO BUYA ..... 1ST PETITIONER

ALI MOHAMED SAID ..... 2ND PETITIONER

JAMAEL ADE SHEKU ..... 3RD PETITIONER

ABDI ISMAIL ..... 4TH PETITIONER

OMAR WARIO ..... 5TH PETITIONER

MOHAMED MARODHADHO ..... 6TH PETITIONER

OMARI SINGO HARIBAE ..... 7TH PETITIONER

ALI BWANAID OMAR ..... 8TH PETITIONER

YASIN KOMORA MLUWA ..... 9TH PETITIONER

BAKARI KOMORA GARISE ..... 10TH PETITIONER

SAID BAKAR KOMORA ..... 11TH PETITIONER

BAKARI KOMORA GUBANI ..... 12TH PETITIONER

BWANAID MLUWA GARISE ..... 13TH PETITIONER

GAWAWA M BUYA ..... 14TH PETITIONER

MAULID ANNA BASHORA ..... 15TH PETITIONER

GARISE BWANAID KOMBO ..... 16TH PETITIONER

MLUWA BACHIKIO MACHAFU ..... 17TH PETITIONER

MOHAMED OKEY ABAE ..... 18TH PETITIONER

BAKARI HARIBAE SHEWO ..... 19TH PETITIONER

ATHUMAN GALANA MALIBE ..... 20TH PETITIONER

BAKARI ATHMAN ABDALLA ..... 21ST PETITIONER

YUSSUF AWADHI KOMORA ..... 22ND PETITIONER

HUSSEIN ABDALLA ..... 23RD PETITIONER

MOHAMED DEREVA GAWAWA ..... 24TH PETITIONER

BWANAMAKA DIRIVO BUYA ..... 25TH PETITIONER

MWATUMU GUYATO ANNA ..... 26TH PETITIONER

BWANAMKUU KOMORA HERO ..... 27TH PETITIONER

BAKARI KOMORA BUYA, OMAR ..... 28TH PETITIONER

BASIRA HIRIBAE ..... 29TH PETITIONER

ALI SAID SWALEHE ..... 30TH PETITIONER

MKYAMWINA HATEMBO HERO ..... 31ST PETITIONER

BAKARI BUYA DHIDHA ..... 32ND PETITIONER

DHADHO BUYA MLUWA ..... 33RD PETITIONER

SAID BUTE KOMORA ..... 34TH PETITIONER

ATHMAN BAKAR ..... 35TH PETITIONER

OMAR KOMORA GAO ..... 36TH PETITIONER

KOMBO OMAR MLUWA ..... 37TH PETITIONER

BASHORA OMAR BONAYA ..... 38TH PETITIONER

TAIREN ANNA ABAE ..... 39TH PETITIONER

MOHAMED BONA RHAYA ..... 40TH PETITIONER

BAKARI GARISE OMARA ..... 41ST PETITIONER

SAID GUBANI MASHUDI ..... 42ND PETITIONER

MACHAFU SWALEHE MOHAMED ..... 43RD PETITIONER

JUMAA ANNA ABAE ..... 44TH PETITIONER

SALIM BARISA KOMORA ..... 45TH PETITIONER

OMARI HAMISI BARISA ..... 46TH PETITIONER

OMAR DHADHO MARO ..... 47TH PETITIONER

MWAJUMA MOHAMED OMAR ..... 48TH PETITIONER

SAID B BABO ..... 49TH PETITIONER

ABAE BAKAR MOHAMED ..... 50TH PETITIONER

KOMORA BARISA BUYA ..... 51ST PETITIONER

ALI KIMPHAMPA DHADHO ..... 52ND PETITIONER

ABDALLA OMAR HAMESA ..... 53RD PETITIONER

ATHMAN BARISA GHOFWA ..... 54TH PETITIONER

MOHAMED HIRIBAE DHIDHA ..... 55TH PETITIONER

KALICHA SAID MAULID ..... 56TH PETITIONER

HONGE BAHOLA BABO ..... 57TH PETITIONER

SAID HIRIBE BAKARI ..... 58TH PETITIONER

ANNA MUKUYUNI OMARA ..... 59TH PETITIONER

SAID SALIM KOMORA ..... 60TH PETITIONER

MOHAMED GAVAVA HIRIBAE ..... 61ST PETITIONER

MOHAMED JILLO DHADHO ..... 62ND PETITIONER

NAPASHA KHADIJA HIRIBAE ..... 63RD PETITIONER

BAKARI MOROWA MALIKI ..... 64TH PETITIONER

MOHAMED ALI GAWAWA ..... 65TH PETITIONER

MOHAMED GAWAWA BUYA ..... 66TH PETITIONER

OMAR BALISA ABDALLA ..... 67TH PETITIONER

BAKARI BUTE KITOLE ..... 68TH PETITIONER

GAWAWA BUYA GAWAWA ..... 69TH PETITIONER

OMAR ANNUARY MOHAMED ..... 70TH PETITIONER

ALLY DHADHO MACHAFU ..... 71ST PETITIONER

HUSSEIN BARISA MOHAMED ..... 72ND PETITIONER

MWAJUMA HASERA SWALEHE ..... 73RD PETITIONER

SAID GAWAWA GODHANA ..... 74TH PETITIONER

GODHANA BWANAID ..... 75TH PETITIONER

HUSSEIN WATICHA MOHAMED ..... 76TH PETITIONER

WACHU WARE MOHAMED ..... 77TH PETITIONER

MOHAMED BWANAID BAKARI ..... 78TH PETITIONER

FATIME GUYATO MOHAMED ..... 79TH PETITIONER

JUARIA HAODO BABO ..... 80TH PETITIONER

SAID ABAE GAFO ..... 81ST PETITIONER

JILLO MOHAMED BUYA ..... 82ND PETITIONER

HIJABU MOHAMED HIRIBAE ..... 83RD PETITIONER

MOHAMED MARO SALIM ..... 84TH PETITIONER

FATUMA SAID SADIKI ..... 85TH PETITIONER

FATUMA HABOYA KOMORA ..... 86TH PETITIONER

MAJAWO BWANAMKUU BAKARI ..... 87TH PETITIONER

JILLO BAKARI MOHAMED ..... 88TH PETITIONER

BAKAR BASHORA ..... 89TH PETITIONER

HIRIBAE KOMORA BWANAID ..... 90TH PETITIONER

SHEVO ALI BUYA ..... 91ST PETITIONER

SHIRARE SADIQ HIRIBAE ..... 92ND PETITIONER

HUSSEIN BWANAMAKA HIRIBAE ..... 93RD PETITIONER

SAID BUYA JILLO ..... 94TH PETITIONER

SAID KAMEZA RHAYA ..... 95TH PETITIONER

OMAR ANNA BUIT ..... 96TH PETITIONER

BAKARI MOROA GALANA ..... 97TH PETITIONER

BALESA SALIM KOMORA ..... 98TH PETITIONER

BABWOYA MOHAMED KOMORA ..... 99TH PETITIONER

SAID GARISE KOMORA ..... 100TH PETITIONER

JAHI ATHMAN HAMZA ..... 101ST PETITIONER

RAMADHAN AWADHI GAWAWA ..... 102ND PETITIONER

SAADIA GUYATO ATHMAN ..... 103RD PETITIONER

OMAR HIRIBAE SAID ..... 104TH PETITIONER

BAHOLA BARISA BAJILA ..... 105TH PETITIONER

DHIDHA BARISA ALII ..... 106TH PETITIONER

OMAR BATUTU JILLO ..... 107TH PETITIONER

OMAR BAHOLA DHIDHA ..... 108TH PETITIONER

SAID HERO BADESA ..... 109TH PETITIONER

GALIDO JILLO BUYA ..... 110TH PETITIONER

ATHMAN SALIM BASHORA ..... 111TH PETITIONER

ATHMAN MOHAMED JILLO ..... 112TH PETITIONER

NKINDU JILLO KOKANI ..... 113TH PETITIONER

SAID KOMORA BUTE ..... 114TH PETITIONER

AWADH HIRIBAE SHEWO ..... 115TH PETITIONER

MALIBE HIRIBAE BWANAID ..... 116TH PETITIONER

BAKARA ATHMAN BABO ..... 117TH PETITIONER

ABAE HASSAN JILLO ..... 118TH PETITIONER

ABAE GAFO DHADHO ..... 119TH PETITIONER

ATHMAN MARO DHIDHA ..... 120TH PETITIONER

DHADHO IDD BARISA ..... 121ST PETITIONER

BUYA ATHMAN RHOVA ..... 122ND PETITIONER

RAMADHAN BASHORA JILLO ..... 123RD PETITIONER

KOMORA MOHAMED BAKAR ..... 124TH PETITIONER

OMAR ABUBAKAR JILLO ..... 125TH PETITIONER

SAID BARISA OMAR ..... 126TH PETITIONER

OMAR MARO BARISA ..... 127TH PETITIONER

FATIME SURU MOHAMED ..... 128TH PETITIONER

BAKAR GHOFWA BAHOLA ..... 129TH PETITIONER

OMAR ATHMAN KOMORA ..... 130TH PETITIONER

SALIM BAKAR GUMI ..... 131ST PETITIONER

WASANYE H MARO ..... 132ND PETITIONER

FATUMA MAKURU BARISA ..... 133RD PETITIONER

MOHAMED DABASA BUYA ..... 134TH PETITIONER

ESHA DARA MOHAMED ..... 135TH PETITIONER

SAID ABDALLA KOMORA ..... 136TH PETITIONER

AMINA HADIMA BARISA ..... 137TH PETITIONER

MOHAMED HUSSEIN MARO ..... 138TH PETITIONER

ALI DHIDHA BAMADAW ..... 139TH PETITIONER

MWANAMTITI HAJILO ABAE ..... 140TH PETITIONER

MOHAMED HUSSEIN GAWAWA ..... 141ST PETITIONER

BWANAID MOHAMED BUBU ..... 142ND PETITIONER

HADIJA TUTU BAKAR ..... 143RD PETITIONER

BAJILA SAID BARCOS ..... 144TH PETITIONER

NURU DIRAMO BARISA ..... 145TH PETITIONER

ALII BARISA MASABABU ..... 146TH PETITIONER

HAMDALA BARISA MATATA ..... 147TH PETITIONER

SAID ATHMAN BAHOLA ..... 148TH PETITIONER

MWASADA KORITI DHIDHA ..... 149TH PETITIONER

NCHINJULU BARISA ..... 150TH PETITIONER

MALIKA DOTA MARO ..... 151ST PETITIONER

ALI MARO BUYA ..... 152ND PETITIONER

NURU MALIKA ANNA ..... 153RD PETITIONER

HIRIBAE M LAKOLE ..... 154TH PETITIONER

SOMOE HABUTE BAHOLA ..... 155TH PETITIONER

MWANARUSI H BARISA ..... 156TH PETITIONER

NALUA NURU KOMORA ..... 157TH PETITIONER

DHIDHA BAESHA MARO ..... 158TH PETITIONER

ABDALLA GAWAWA MBOPYA ..... 159TH PETITIONER

ESHA HALAKO MARO ..... 160TH PETITIONER

MOHAMED BATUTU NKINDU ..... 161ST PETITIONER

MARIAM MALIKA SHEWO ..... 162ND PETITIONER

AMINA NABUYO BUYA ..... 163RD PETITIONER

RUKIA MUMBO RHOVA ..... 164TH PETITIONER

MOHAMED DHIDHA BAHOLA ..... 165TH PETITIONER

BWNAMAKA HALAKO BAKARI ..... 166TH PETITIONER

SHANI MWANAHARUSI HAODO ..... 167TH PETITIONER

MOHAMED LAKOLE GAWAWA ..... 168TH PETITIONER

ZAINABU HABONA BARISA ..... 169TH PETITIONER

BARISA MOHAMED SAID ..... 170TH PETITIONER

MARO BARISA MOHAMED ..... 171ST PETITIONER

SWALEHE BALOHA MARO ..... 172ND PETITIONER

HABINI NURU SAID ..... 173RD PETITIONER

NURU HALUKU MOROA ..... 174TH PETITIONER

MWANAMISI ALI BUYA ..... 175TH PETITIONER

FATUMA MAYAA DHIDHA ..... 176TH PETITIONER

MOHAMED OMAR ..... 177TH PETITIONER

ABDEREHEMAN BARISA ..... 178TH PETITIONER

ABDALLA BARISA ..... 179TH PETITIONER

SAID KINKO ..... 180TH PETITIONER

BAKARI ANNA GARISE ..... 181ST PETITIONER

OMAR MOHAMED HUSSEIN ..... 182ND PETITIONER

MOHAMED KILANGONI ..... 183RD PETITIONER

HIRIBAE DIRIWO ..... 184TH PETITIONER

HUSSEIN SHIRARE ..... 185TH PETITIONER

ALII DHADHO HUSSEIN ..... 186TH PETITIONER

ATHMAN KALIAN GARISE ..... 187TH PETITIONER

HAMISI BAGODHANA HAMESA ..... 188TH PETITIONER

OMAR MOHAMED BABWOYA ..... 189TH PETITIONER

ANNA KOMORA ..... 190TH PETITIONER

LUKE DHIDHA BARISA ..... 191ST PETITIONER

ATHMAN BUYA HIRIBAE ..... 192ND PETITIONER

JACOB MARO BUYA ..... 193RD PETITIONER

DR MOHAMED DHIDHA ..... 194TH PETITIONER

MLUWA ALI ..... 195TH PETITIONER

MOHAMED ABAE ANNA ..... 196TH PETITIONER

ABDULKADIR H GABO ..... 197TH PETITIONER

OMAR RHOVA MARO ..... 198TH PETITIONER

ATHMAN BUYA DIRIVO ..... 199TH PETITIONER

JAMAEL ADE SHEKU ..... 200TH PETITIONER

ABDI ISMAIL ..... 201ST PETITIONER

SUING ON BEHALF OF NDERA COMMUNITY, TANA RIVER COUNTY AND THEMSELVES

AND

THE NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

THE CHIEF LANDS REGISTRAR ..... 2ND RESPONDENT

IDA-SA GODANA RANCH COOPERATIVE SOCIETY LIMITED .... 3RD RESPONDENT

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED (KENTRACO) ..... 4TH RESPONDENT

KURWITU VENTURES LIMITED ..... 5TH RESPONDENT

THE ATTORNEY GENERAL ..... 6TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF TANA RIVER ..... INTERESTED PARTY

JUDGMENT

1. The Petitioners' amended Petition dated 8th December 2022 seeks to challenge the extension of a Lease over Land known as Plot LR No 13597/1 (the 'suit property') in favor of the 3rd Respondent herein. This extension was carried out without the consent and participation of the Ndera Community Members - the Petitioners herein, and with due regard to the law, thereby causing an injustice.

2. The background to the petition is that the Tana River County, formerly Tana River District, was organized into several villages (communities), each with a boundary curved out. The Bilisa community organized themselves into the Community Based Organization (CBO) named Ida-Sa Godana Ranch. The Petitioners allege that the then District Commissioner, while wielding his power and authority that goes with that office, assisted the 3rd Respondent in irregularly entering and occupying the Community land of the Ndera under the guise of "bringing" development.

3. The 3rd Respondents, with the blessings of the then-District Commissioner, registered the Suit Property in favor of the 3rd Respondent without the consent and participation of the Ndera Community. The tenure of the said 45-year lease lapsed in 2015. However, in 2018, the 1st and 2nd Respondents extended the expired lease of the suit property for 99 years. The Petitioners believe that the 1st and 2nd Respondents effected the said extension of the lease over the suit property without the consultation or participation of the Ndera Community members. No form of compensation was extended to the Community, and nor was any proposal to advance the same to the Ndera Community members in contravention of Articles 40 and 63 of the *Constitution* as read in Sections 15(5), 35, and 36 of the *Community Land Act* No 27 of 2016.

4. After renewing the lease, the 3rd Respondent entered into third-party agreements with the 4th and 5th Respondents, allegedly undertaking mining activities without any environmental impact mitigation measures or Environmental Impact Assessment License taken. The 3rd Respondent acquired the renewed lease without due process, particularly on public participation.

5. The Petitioners allege the 45-year Lease over the suit property was granted illegally in 1970 in favor of the 3rd Respondent. The Lease was to run until 2015, after which the use or disposition of the suit property became subject to Articles 40, 60, 63, and 69 of the *Constitution* of Kenya—together with all other enabling Statutes forming the new land law regime, passed in 2012.

6. The Respondents herein have been engaging the Tana River Community Land Management Board, constituted per the mandates of Section 15 of the *Community Land Act* No 27 of 2016, to renew the lease.

7. The petition will challenge the mining activities on the ground; further, the petition will seek to ensure that any monies arising from the mining or wayleave activities accrue to the community. The Petitioners will also seek costs of the petition or any other reliefs the Court may deem fit to grant. The prayers in the amended petition are crafted as follows:

    a. A declaration that the issuance of a lease in 1970 to the 3rd Respondent over the suit property was null and void ab initio and ineffectual to confer any right, interest, or title upon the 3rd Respondent;

    b. A declaration that the issuance of a new lease of 99 years and or extension of the 1970 lease to the benefit of the 3rd Respondent was null and void ab initio and ineffectual to confer title upon the 3rd Respondent;

    c. A declaration that the wayleave and sub-lease conferred upon the 4th and 5th Respondents or anyone else over the suit property is null and void and of no effect;

    d. A declaration that the mining activities undertaken by the 4th and 5th Respondents over the suit property are in utter disregard of legal procedures laid down in the applicable law and are thus illegal, null and void;

    e. An order for rectification of the Land Register by the cancellation of the lease over the suit property and the Certificate of Lease in favour of the 3rd Respondent to restore the suit property to the Petitioners;

    f. A permanent injunction against the 3rd, 4th, and 5th Respondents and anyone acting under them restraining them from in any manner howsoever dealing with the suit property;

    g. Compensation to the Petitioners by the 3rd Respondent for loss of use since 1970;

    h. An order for compensation to the Petitioners by the 4th Respondent to the tune of Kshs 25,890,620/- plus accrued interest for limited loss of land use and the wayleave acquired from the 3rd Respondent; and,

    i. An order for compensation to the Kenyan people on behalf of the Ndera Community for the illegal mining activities and, in lieu, an environmental restoration order;

8. The Petition is supported by the affidavits sworn by Jacob Maro Buyo, deposed on the 21st of May 2021 and on the 22nd of December 2023, on behalf of the other Petitioners. In response to the petition, Zacharia Ndege has deposed a replying affidavit dated 11th January 2024 on behalf of the 1st

Respondent. One Abdallah Bakero Boku, on behalf of the 3rd Respondent, has also deposed a replying affidavit on 19th October 2023.2nd, 4th, 5th, 6th Respondents and the Interested Party filed no responses to the petition. However, there are affidavits on record in response to the Motions earlier canvassed at the interlocutory stage of the petition that may be relevant to the disposal of the Petition, and the Court will refer to the same if need be.

9. At the directions of the Court, the petition was further canvassed through written submissions. The Petitioners, the 1st Respondent, and the 3rd Respondent complied. The other Respondents and the Interested Party did not.

10. Based on the materials and submissions placed before me, the questions for this Court to determine are:

    a. Whether a declaration should be made stating that the lease granted in 1970 to the 3rd Respondent concerning the suit property was null and void from the outset and ineffective in conferring any rights, interests, or title to the 3rd Respondent;

    b. Whether a declaration should be issued asserting that the issuance of a new lease for 99 years or the extension of the 1970 lease was null and void from the outset and ineffective in conferring title upon the 3rd Respondent;

    c. Whether a declaration should be issued indicating that the wayleave and sub-lease granted to the 4th and 5th Respondents or any other parties concerning the suit property are null and void and without effect;

    d. Whether a declaration should be made that the mining activities conducted by the 4th and 5th Respondents on the suit property are in complete violation of the legal procedures established in the applicable law and are, therefore, illegal, null, and void;

    e. Whether an order should be issued for the rectification of the Land Register by cancelling the lease concerning the suit property and the Certificate of Lease in favor of the 3rd Respondent to restore the suit property to the Petitioners;

    f. Whether a permanent injunction should be granted against the 3rd, 4th, and 5th Respondents and anyone acting on their behalf, prohibiting them from dealing with the suit property in any manner;

    g. Whether compensation should be awarded to the Petitioners by the 3rd Respondent for loss of use since 1970;

    h. Should an order for compensation be directed at the 4th Respondent to pay a sum of Kshs 25,890,620/—plus accrued interest for limited loss of land use and the wayleave taken from the 3rd Respondent;

    i. Should an order for compensation be made on behalf of the Kenyan people to the Ndera Community for the illegal mining activities, along with an order for environmental restoration, and;

    j. Who should be responsible for covering the costs of the suit?

11. Before I delve into the framed issues, there was a Preliminary issue that was raised on whether the ELC has jurisdiction to deal with the question of historical injustice on land matters in Kenya; this is what the Court said in its ruling on the Preliminary Objection significantly raised by the 3rd Respondent:

> " The lease is said to have expired in 2015. A renewal applied for. An extension was extended in 2018. The new lease triggered a new cause of action, reviving the 1970 lease. This Court and the other Superior Courts have severally held that historical injustice issues touching on Constitutional violations cannot be hinged on the Statute of Limitations; however, where there is an inordinate delay, the Court will have to consider each case on its unique circumstances rather than limiting the right complained of. See for instances in the case of *Safepak Limited v Henry Wambega & 11 others* [2019] eKLR where the Court of Appeal held as follows:
>
> > "Whether a constitutional petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done. In the present case, the Judge determined, correctly in our view, that Section 7 of the *Limitation of Actions Act* does not apply to this matter. The Judge was also satisfied that the claim was not defeated under the doctrine of laches. We do not have a basis for interfering with that decision."
>
> On the doctrine of exhaustion, this Court and other Superior Courts have discoursed this doctrine for quite a while. There are lots of authorities in this realm, including the one quoted by the 3rd respondent on the role of NLC in historical injustice cases that is the Supreme Court holding *In the Matter of the National Land Commission* [2015] eKLR, where the apex Court held as follows on the role of NLC in historical injustice cases Article 67 (2) (e):
>
> "[313] In the course of rendering this Advisory Opinion, we have considered the mandates of the NLC as set out in the *Constitution* [Article 67(2) (d), (e) and (f)]. These are conducting research on land issues and on natural resources—with appropriate recommendations to certain agencies; initiating inquiries into historical land grievances—and recommending courses of redress; promoting traditional methods of resolving land conflict.
>
> (314) From those provisions, it is clear to us that the NLC bears a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented. As regards such functions, the NLC, on the basis of clearly-formulated statutes, should be able to design a clearly-structured agenda for regular operations and, inter alia, should seek to devise a well-focused safeguard-mandate in relation to land issues."
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> On the same, subject in the case of *Ledidi Ole Tauta & others v Attorney General & 2 others* [2015] eKLR where the petitioner's claim bordered on historical injustices. In upholding the NLCS's mandate as provided for under Article 67 (2)(e) and Section 15 of the *National Land Commission Act*, 2012, the Court stated as follows:
>
> > "In our view, it is the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The Court is not the appropriate organ to carry out the investigation

and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The Court should not usurp the roles of other state institutions. We, therefore, are of the view it was premature on the part of the petitioners to come to Court without either exhausting the process of obtaining a degazettment of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67(2) (e) of the *Constitution*."

Further in *Safepak Limited v Henry Wambega & 11 others* [2019] eKLR on a similar topic the Court held as follows:

> "There is however the additional complaint in the present case that the petitioners' first port of call before approaching the ELC, should have been the National Land Commission on which the specific function of carrying out investigations into historical land injustices is vested. The advisory opinion of the Supreme Court in In the Matter of the National Land Commission (above), the High Court decision in *Leidi Ole Tuta & others v Attorney General & 2 others* (above), and the decision of this Court in *Speaker of the National Assembly v James Njenga* (above) were cited in support. Those authorities stand for the proposition, with which we agree, that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be followed provided that the remedy thereunder is effectual."

The doctrine of exhaustion or abstention has also been discussed in the following other cases (not cited by the parties) by this Court and the Superior Courts. In *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR, Petition 3 of 2020, Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ. held as follows:

> "...It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.

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

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the U.S. Supreme Court in *Railroad Commission of Texas v Pullman Co.*, 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal Courts to decline to hear cases concerning federal issues where the case can also be

resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *EnGLAnd v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal Court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal Court. If such a reservation is made, the parties can return to the Federal Court, even if the State Court makes a ruling on the issue.

(53) Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the *Constitution* was protected. [54] The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance..."

The position taken by the Supreme Court in the Kibos Case is also replicated by the Apex Court in *United Millers Limited v Kenya Bureau of Standards and 5 others* [2021] eKLR, as follows:

"[25] Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of the *Constitution*. From the foregoing, we find no difficulty in concluding that the issues before the High Court, as well as the Court of Appeal, did not either involve the interpretation and application of the *Constitution* or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.

(26) We also take judicial notice that the superior Courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior Courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

(27) In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine Petition No 4 of 2021 or the instant application for conservatory or stay orders."

In this petition, what the Court needs to determine is whether, given the provisions of the law, NLC is vested with the power to hear and determine historical injustice cases in the form of a complaint. As alluded by the authorities cited – whenever there is a first port of call – the Court ought to await the outcome of the primary organ before proceeding further.

In this action, the petitioners contended that they have tried that avenue through various Memorandums and meetings with NLC which have yielded no fruits hence recourse to this Court. Besides, NLC already approved the extension of the lease in this petition and is opposed to the current petition. It has already taken sides that the lease was properly extended after due process. The conclusion will be that even if the matter is referred to it, there is already a decision.

Munyao J. had an opportunity to distill the issue of jurisdiction between the NLC and this Court on historical injustice grievance in the case of *Henry Wambega & 733 others v Attorney General & 9 others* [2020] eKLR as follows:

"Let me first start with the question of jurisdiction.

28. The petitioners have brought this petition partly on the claim of historical injustices. There is of course contention from the respondents on whether this Court has jurisdiction to hear claims of historical injustice related to land or whether the claims should be addressed by the National Land Commission (NLC). The petitioners have argued that this Court has jurisdiction. They have referred me to my own decision in the case of *Kipsiwo Community Self Help Group v Attorney General & 6 others* (2013) eKLR and the Court of Appeal decision in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* (2018) eKLR.

29. In the Kipsiwo case, a Self-Help Group filed suit claiming that their forefathers had historically been in occupation of some specified land and that they were forcefully evicted and they now wished to have title to the land. A preliminary objection was raised, firstly, that the case was improperly filed by an entity with no capacity to sue, and secondly, that the Court had no jurisdiction as the

right forum to address historical injustices would be the NLC. On the first objection, I held that the case was actually not properly filed because the Group had no capacity to sue or to be sued and I struck out the suit on that ground. On the question of whether the Court had jurisdiction, I held that though one could approach the NLC for redress, there was nothing to bar the jurisdiction of the Court. My dictum was as follows: -

> "... I have not seen anywhere in the *Constitution*, or in the *NLC Act*, which provides that a person cannot initiate a constitutional petition based on a perceived historical injustice and that the NLC has a monopoly on such mandate. I think, so long as one can cite a violation of a Constitutional provision or Constitutional right, then such a person may initiate a Constitutional petition and seek redress. I don't think that the basis of such a complaint is important. Such complaints could be based on any foundation. It could be, as in our case, a historical injustice, or even a continuing land injustice.
>
> Thus, in as much as I agree that the NLC has a mandate to look into historical injustices; I do not agree that an individual cannot commence a Constitutional petition, on the foundation of historical land injustice. In so far as the jurisdiction of ELC, is concerned, the ELC will have jurisdiction, if the basis of the case is land and environment, including a matter founded on claims of historical land injustices."

30. In the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others*, the petitioners filed suit claiming that they had been deprived of ownership of certain land without compensation. They averred that they were registered as owners of the land but the Government acquired it without paying compensation. The Court after hearing the dispute made an order for compensation which the State appealed. Within the appeal, counsel for the NLC submitted inter alia that it is the NLC which is mandated to deal with historical land injustices under Article 67(2) (e) of the *Constitution*. In addressing this point, the learned Judges of the Court of Appeal stated as follows: -

> "75. On the question whether a Court should await investigations and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a Court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter. Our conviction stems from a reading of Article 67(2) (e) of the *Constitution*. The Article provides that the NLC can investigate "present or historical" land injustices. We lay emphasis on the word "present." If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not Courts of law. This would prima facie render the Environment and Land Court redundant. We do not think this was intended to be so. Our view is fortified by Section 15(3)(b) of the *National Land Commission*

Act which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary Court system.

76. Further, there is nothing in the 2010 Constitution or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a Court in relation to a claim founded on historical injustice..."

31. Counsel for the respondents, on the other hand, referred me to the cases of *Ledidi Ole Tauta v Attorney General & others* (2015) eKLR and *Kenya National Chamber of Commerce & Industry – KNCCI (Muranga Chapter) & 2 others v Del Monte Kenya Limited & 3 others*. In the case of Ledidi Ole Tauta, the petitioners, of Maasai descent, claimed that their forefathers owned some certain land falling within Ngong Hills before the colonial period and that they should thus be declared to be entitled to the same. A preliminary objection was raised, and in addressing the same, the Court made the following dictum: -

> "We also note that the petitioners (sic) claim to the land is predicated on what the petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the Court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices.
>
> The *Constitution* acknowledged there could have been historical injustices in the manner land issued were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67 (1) of the *Constitution* is to investigate historical injustices and to make recommendations for redress... In our view, it's the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The Court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The Court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to Court without either exhausting the process of obtaining a degazzetement of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67 (2) (e) of the *Constitution*."

32. In the *Kenya Chamber of Commerce v Del Monte* case, the plaintiffs filed suit claiming that their forefathers lived on land owned by the 1st defendant and were deprived of the land during colonialism. They asked the Court to redeem their historical rights by making an order for 1,500 acres to be excised from the land of the 1st respondent and be allotted to them. A preliminary objection

was filed that the Court has no jurisdiction to determine the claim which was based on historical injustices. In determining the question, Kemei J referred to the decision in the case of Nathan Tirop Koech case and found that the jurisdiction of the ELC is wide and can encompass historical land injustices.

33. I think the issue of jurisdiction is settled. This Court has jurisdiction to hear claims even those based on historical injustices. What we need to have in mind here is that just because a Court is vested with jurisdiction, does not mean that in all cases the Court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words, depending on the facts and circumstances surrounding the case, the Court can defer jurisdiction to another body, or decline to take up the matter altogether, and this would not be because it has no jurisdiction, but because given the surrounding circumstances, it would be best for the Court not to exercise its jurisdiction."

What we have in this matter is a Constitutional Petition stating that a lease was wrongfully extended without following the law and proper procedures adopted, hence perpetuating a historical injustice that started way back in 1970 and needs to be corrected. NLC supports the extension and hence cannot have a second bite on it. The predominant feature in this petition – albeit multifaceted is the extension of the lease and its effect on the ownership rights of the petitioners. This Court will proceed to hear the petition. At the end, the preliminary objection is hereby dismissed with costs."

12. After determining that this Court has the jurisdiction to address the issues raised in the petition, I will acknowledge that the Petitioners assert that their rights to own the suit property in question began to be violated in 1970 when the lease for that property was granted to the 3rd Respondents and subsequently renewed in 2018, indicating a continuous historical injustice. The matter of the 1970 lease will be examined alongside the renewal of the lease in 2018.

13. The Petitioners aver that the Ndera Community was deceptively dispossessed of the Suit Property on the first account in 1970 by a 45-year' Lease granted to the 3rd Respondent with no public participation accorded to the Petitioners. The resulting consequence of the irregular and illegal disposition of the suit property to the 3rd Respondent included:

a. The 3rd Respondent proceeded to clear, alter boundaries, survey, and cause the registration of the suit property in their name while excluding the Petitioners from the said land and restricting the Petitioners from enjoying their traditional and customary rights/privileges over the said land;

b. With the blessings of the illegal disposition of the said land to the 3rd Respondent herein, the 3rd Respondent began to encroach upon the village farms and existing farming system developed by the Petitioners;

c. The 3rd Respondent took to demolishing houses and buildings belonging to the Petitioners;

d. The 3rd Respondent took to encroaching upon graveyards, farms, schools, compounds, and amenities of the Petitioners;

e. The 3rd Respondent took to destroying permanent trees and forest on the said land; and

f. The 3rd Respondent initiated mining activities, particularly gypsum extraction, without any mitigation of the environmental repercussions on the suit property;

14. Soon after the lapse of the 45-year lease in 2015, the 1st and 2nd Respondents purported to renew it in favour of the 3rd Respondent the said lease Instrument for a further 99 years without the community's consent and participation in the process. That there is no document or record to show that in renewing the Lease, the Respondents observed Article 63(4) of the *Constitution* and whether Ndera Community Members consented to have the lease extended for a further 99 years in favour of the 3rd Respondent by a two-thirds majority vote per the edicts of Section 15(5) of the *Community Land Act* No 27 of 2016.

15. In keeping with Articles 63 of the *Constitution* of Kenya, 2010, Section 15(5) of the *Community Land Act* No 27 of 2016 provides that:

> " Any decision of a registered community to dispose of or otherwise alienate community land shall be binding if it is supported by at least two-thirds of the registered adult members of the community, while all other decisions of the registered community shall be by a simple majority of the members present in a meeting."

16. The Tana River County Land Management Board convened a two-day meeting on 8th and 9th April 2015, to discuss the extension of the lease to a 99-year tenure. However, the meeting minutes recorded on 8th April 2015 demonstrate that there was no public participation and that members were not afforded the requisite opportunity to be heard. Instead, the concerns of the community were baptized by the Chairman of the Tana River County Land Management Board as "political interference."

17. The Petitioners aver that a meeting of the community presided over by the Chairman of the Land Management Board was clouded with deception, malice, and misrepresentation and cannot be said to have met the threshold of public participation within the meaning of Article 10(2) of the *Constitution* of Kenya, 2010 and by extension, Section 15(5) of the *Community Land Act* No 27 of 2016 – see *Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR, where the Court held that "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The import of this is that the people must be involved, and their concerns must be considered in what is summed up as the inclusivity of views and the community concerned.

18. Further, in the case of *Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party)* (Constitutional Petition 4 of 2019) [2022] KEHC 158 (KLR) the Court affirmed that to attain the principle of public participation in a decision-making process, the following parameters should be met:

    a. there had to be evidence of inclusivity that was to say that all stakeholders or those affected by an administrative policy, or law had to be given an opportunity to express or ventilate their views well aware of what was at stake.

    b. The affected people had to be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information had to be disseminated through public barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reached the targeted audience.

    c. The government agency or a public officer in charge of the programme of public participation had to of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement had to be meaningful and done in good faith rather than a mere formality.

d. Public participation called for innovation and some level of malleability depending on the nature of subject matter for example culture, geographical issues, logistical constraints. The test to be applied was effectiveness and efficiency. The question to be asked was, was the mechanism effective in achieving sufficient public participation.

e. Public participation did not mean that everyone had to give their views on the issue at hand as to attain such a standard at times could be impractical. A public participation exercise had to however show intentional inclusivity and diversity. A programme of public participation could not disregard bona fide major stakeholders otherwise the program would be ineffective and illegal. Those mostly affected by the policy were expected to have a bigger say in that policy, legislation or action and their views had to be sought, taken into account. The view of the major stakeholders had to be captured through minutes or any other proof that showed that their views were captured and had a bearing in the final decision.

f. Public participation was not a public relations exercise. It had to be meaningful and done in good faith.

19. The Petitioners submit that each of the parameters espoused in the Mugo & 14 others v Matiang'i case cited above, what the Respondents have elected to call public participation, suffers a grave deficit of compliance with Article 10(2) of the *Constitution* of Kenya, 2010 as read with Section 15(5) of the *Community Land Act* No 27 of 2016.

20. Petitioners aver that whereas the evidence shows that indeed there was a two-day meeting presided over by the Tana River County Land Management Board, the Ndera Community Members were not allowed to express or ventilate their views on the question of the extension of the Lease in favour of the 3rd Respondent. Instead, the Chairman of the Tana River County Land Management Board resorted to threats and intimidation of the members. This can be found in the minutes of 8th April 2015, recorded by the Chairman, who reminded members that he could give directions as he was duty-bound. He mentioned some members inciting the locals. The Chairman reminded members that in 2009, the lease extension for Idasa - Godana Ranch was approved and recommended for 45 years extension by the defunct Commissioner of Lands through the County Council along with the inactive Kitangale Ranch because of political interference Ida-sa Godana Ranch was denied their legal right while Kitangale was granted.

21. The Petitioners assert that the two-day meeting was not called and held in good faith. It was for formality purposes as the concerns raised by members were disregarded and branded political interference.

22. The Petitioners contend that the process of reapplying for a lease over Community Land, the direct participation of that community, is eminently missing in this case. It remains paramount and cannot be underestimated or swept under the rags. Reliance is placed in the case of *Charles Mwangi Kagonia v Dhraj D. Popat & another* [2006] eKLR.

23. The Petitioners assert that the record shows that on 9th April 2015, the Chairman of Tana River County Land Management Board made a unilateral decision to extend the Lease to a 99-year tenure without regard to the Ndera Community member's concerns. Furthermore, the Respondents have attempted to explain that the lease expired in 2015 but was extended in 2018 due to certain unexplained hurdles they experienced. According to the Petitioners, the record will show that this is far from the truth as the record shows spirited efforts by the Respondents to extend the lease and have it registered in favour of the 3rd Respondent at all costs.

24. The Petitioners aver that, for instance, the Lease was presented at the land's registry for registration on 20th July 2018 (some three years after the 1970 Lease had expired). While doing so, the Respondents backdated the said Lease to 1st July 2015. However, the same Lease instrument was signed at the back on 24th September 2018. Even more so, the Certificate of Title was presented for registration on 26th September 2018.

25. The Petitioners believe that registering the lease itself discloses illegalities. It demonstrates that every intention was made to grant the 3rd Respondent an extension of the Lease at all costs. Be that as it may, it is the Petitioner's humble submission that the lessee's interests cease once the lease term expires. Thus, the subject parcel of land becomes available for allocation by the Commissioner of Land for further allocation upon application by a party. Reliance is placed in the case of *Charles Mwangi Kagonia v Dhraj D. Popat & another* [2006] eKLR. The Court held without equivocation that: - The prominent rights that the defendant has as a leasehold owner had ceased. The issue of extension of an expired lease is barred by statute, which provides that the term of a registered lease may be extended by an instrument executed by the lessor and the lessee for the time being and registered before the expiry of the then-current term of the lease.

26. The Petitioners are of the view that Consistent with the case *Charles Mwangi Kagonia v Dhraj D. Popat & another* [2006] eKLR, the 1st and 2nd Respondent is in breach of their duties by effecting the extension of the Lease in favour of the 3rd Respondent herein. It is even more disturbing that the said lease was irregularly extended long after the original lease had expired to a term longer than the original lease term. The extension of the said lease to a term of 99 years was illegal. It violated the Petitioner's rights to property under Article 40(6) of the *Constitution* of Kenya, 2010, and as read with Section 26 of the *Land Act*, 2012.

27. The Petitioners further contend that Article 40(6) of the *Constitution* provides that

> "...the right to property ownership do not extend to any property found to have been unlawfully acquired.

Furthermore, Article 63(4) of the *Constitution* provides that:

> "...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,

28. The Petitioners state that Article 63(4) of the *Constitution*, 2010, cited above, Section 15(5) of the *Community Land Act* No 27 of 2016 provides that any decision of a registered community to dispose of or otherwise alienate community land shall be binding if it is supported by at least two-thirds of the registered adult members of the community, while all other decisions of the registered community shall be by a simple majority of the members present in a meeting.

29. The Petitioners avow that the Respondents produced no document to demonstrate that the threshold stipulated under Section 15(5) of the *Community Land Act*, essentially giving force to Article 63(4) of the *Constitution* of Kenya, was met.

30. The petitioners submit that their proprietary rights, as espoused under Articles 40, 63, and 69 of the *Constitution*, 2010, have been violated or threatened with violation. The Petitioners' rights under Section 15(5) of the *Community Land Act* No 27 of 2016 have also been swept under the rags.

31. The 1st Respondent, through a Replying Affidavit dated 11th January 2024, sworn by Zacharia Ndege, its Principal Land Administrator, on the issue of the 1970 lease and its extension in 2015, contends that the suit property was State/Government Land before its alienation and allocation to the 3rd Respondent in 1970. Under Paragraph 3 of the said Replying Affidavit, the 1st Respondent refers to the Tana River District Ranching Development map (annexure ZN-1), which shows that the suit property was State/Government Land.

32. 1st Respondent contends that the map obtained from the Senior Plans Records Office of the Ministry of Lands (SPRO) shows a demarcation between Trust and State Land. The 3rd Respondent's Land falls on State land under the Tana River District Ranching Development Map.

33. 1st Respondent states that the Petitioners, according to the records from the Ministry, since 1970, did not file a matter with the Commissioner of Lands, except on the 5th of March 1985, through the Tana River County Council, in a letter voiced their concern on a strip of land measuring two and a half miles wide and Four miles long, which the Ndera Community felt should be delineated to them, to be used as Pastoral Land, showing awareness of the activities of the 3rd Respondent.

34. 1st Respondent states that where Land is claimed to be community land, the first step is to seek land registration under the *Community Land Act* 2016. The Procedure falls under Section 7 to Section 14 of the *Land Act*. The recognition, protection, and registration procedure of unregistered community land comprises a series of activities, such as confirming if land is available for registration. This involves checking existing records and maps and matching them against the land for which the community seeks registration. This activity aims to establish the registration status of the earmarked land and ensure that it is available for registration to the community.

35. 1st Respondent vouches that The Petitioners have never attempted to secure their rights under the *Community Land Act* nor sought to register their land and have it adjudicated. The claim of community land cannot be by casting aspersions towards the 1st Respondent but by tendering evidence. On this point, the 1st Respondent submits that in the case of *Mako Abdi Dolal v Ali Duane & 2 others* [2019], eKLR, the Court noted that before the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the *Government Lands Act* (Repealed). Section 4 of the Act provided as follows:

> " All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act."

36. The 1st Respondent proceeded to state that the disposition of government land shadowed the following procedure - the Municipal Council, where the land was situated, had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible Council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was, first of all, government land and, second, that it was indeed available for disposition. See Harrison Mwangi Nyota v Naivasha Municipal Council & 20 others [2019] eKLR:

37. For an allotment letter to become operative, the allotee must comply with the conditions, including paying stand premium and ground rent within the prescribed period. See the decision in *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* [2014] eKLR.

38. According to Mr. Ndege's replying affidavit for the 1st Respondent, the Tana River County Council approved the land allocation to the 3rd Respondent on 27th July 1970. Furthermore, the letter of allotment dated 1st July 1970 was unopposed by the Tana River County Council.

39. The 1st respondent proceeds to state that the other step is - where the allotee has complied with the conditions set out in the allotment letter, which is the cadastral survey, its authentication and approval by the Director of Surveys, and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and, finally, the issuance of a certificate of lease - see *Nelson Kazungu Chai & 9 others v Pwani University College* [2014] eKLR, where the Court held as follows:

> 'It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3."

40. According to the 1st Respondent, the process was also restated in the case of *African Line Transport Co. Ltd v The Hon. AG*, Mombasa HCCC No 276 of 2013, where Njagi J. held as follows:

> " Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot."

41. The 1st Respondent contends that the Survey Plan referred to in the 1st Respondent's replying affidavit was approved by the Director of Surveys; this is further proven by the suit land being issued with a Land Reference Number 13597. The Tana River District Ranching Development Map shows that from its inception, the land was never community land but rather state land, further proved by the lack of adduced plans or maps supporting the Petitioner's claim.

42. 1st Respondent asserts that it cannot be accused of renewing a lease that was community land if it was never community land.

43. 1st Respondent distinguishes the authority referred to by the Petitioner submissions - *Meza Galana & 3 others v Attorney General & 2 others* [2007] eKLR, as it relates to community representatives from Tana River District who filed a suit against the defendants seeking, inter alia, a declaration that the Legal Notice declaring Tana Primate Reserve to be a National Reserve to be quashed as it was not a valid notice. The Court held that the legal notice was invalid as the community had not been made aware of the decision to gazette the area as a National Reserve, and their views had not been sought before the decision was made. However, the Land referred to does not refer to this particular suit or Tana River Ranches. The argument of public participation hinged on the above case and primarily the Petitioner case falls, as the Tana River County Council approved the allocation of the land to the 3rd Respondent on the 27th of July 1970 and the letters on the 5th of March 1985 and 9th April 1985 adduced as evidence in the replying affidavit of the 1st Respondent, shows the Petitioners were well aware that the land belonged to the 3rd Respondent, they did not claim any rights except a small strip of land to be ceded to be used as pastoral land. The assertion of the rights purportedly infringed also arouses mischief, as the claims were brought about when both the 4th and 5th Respondents established development.

44. Article 67(2)(a) of the *Constitution* mandates the 1st Respondent to manage public land on behalf of the National and County Governments, and as such, the evidence adduced by the 1st Respondent conclusively addresses the issue as to the nature of the suit property. The 1st Respondent, therefore, prays that this Petition be dismissed with costs.

45. The 3rd Respondent, taking a cue from the 1st Respondent, states that on its part, the 3rd Respondent filed a Response dated 19th October 2023, supported by an Affidavit of the same date sworn by Abdalla Bakero Boku, the 3rd Respondent's Chairman. The 3rd Respondent avers that the suit property is not Community Land and was never material to these proceedings at any point in time, as alleged by the Petitioners. The 3rd Respondent contends that the suit property was unalienated Government land before it was allocated to the 3rd Respondent through a 45-year Grant on 1st July 1970 as supported by the 1st Respondent. Initially, the 3rd Respondent was issued a Letter of Allotment Ref. 42778/75 dated 19th June 1970 over the suit property. Later, in 1981, the Commissioner of Lands revised the terms of the allotment by issuing the 3rd Respondent with a revised Letter of Allotment dated 11th February 1981 to enable the preparation of the Grant in favor of the 3rd Respondent. Subsequently, upon the 3rd Respondent fulfilling the revised conditions for allotment, Grant Number CR 20944 was issued in favor of the 3rd Respondent for a lease term of 45 years from 1st July 1970 when the 3rd Respondent had accepted the initial allotment offer contained in the Letter of Allotment Ref. 42778/75 dated 19th June 1970. At the time, the suit property was unalienated Government land and not Community Land as alleged.

46. The 3rd Respondent further contends that before the allocation of the suit property, the Petitioners' representatives were consulted. The meeting held on 17th April 1973 between Ida-Sa (the 3rd Respondent herein) and the D.A.C Committee on 17th April 1973 reflects how the Petitioners were indeed consulted before the Grant was issued in 1970.

47. On 2nd March 2015, before the expiry of the Lease (the lease was to expire on 1st July 2015), the 3rd Respondent submitted its application for extension of the Lease to the 1st Respondent through the Office of the County Executive for Lands, Agriculture, Livestock Development and Fisheries, Tana River County Government. Additionally, and in the absence of immediate response, the 3rd Respondent followed up on the said application via a letter dated 23rd March 2015.

48. Contrary to the Petitioners' allegations that the Interested Party (the County Government of Tana River) opposed the extension of the Lease, on 17th April 2015, the Office of the County Executive for Lands, Agriculture, Livestock Development and Fisheries, Tana River County Government, recommended the extension of the 3rd Respondent's lease and stated that it expected the renewal to be done by the 1st Respondent soonest possible since the 3rd Respondent was the only Ranch that contributed a significant source of revenue to the Tana River County Government.

49. The 3rd Respondent submits that the delay in registration and issuance of the new Lease and Certificate of Title over the suit property by the 1st Respondent was a result of the procedural hurdles the 3rd Respondent's application for extension of the lease was put through from March 2015. The application was finally approved, allowing for the registration and issuance of the Lease and the Certificate of Title on 15th July 2018 and 28th September 2018, respectively.

50. The 3rd Respondent proceeds to state that Several objections were lodged with the Tana River County Land Management Board by the Petitioners and the Wardei Community members to oppose the application for extension. On 8th and 9th April 2015, the Board held meetings between all the concerned parties, including the Petitioners, and deliberated over the complaints raised, allowing

the complainants to register their issues. The Board reached a majority decision in support of the extension application, and consequently, the Board recommended the extension of the lease to the 1st Respondent.

51. The 3rd Respondent contends that It is also noteworthy that Petitioners previously instituted a suit in Malindi Petition No 8 of 2015 - Ndera Integrated Agricultural Development Project (CBO) v the Ida-Sa Godana Ranching Co-operative Society & 5 others against the 3rd Respondent at the High Court in Malindi challenging the 3rd Respondent's application for extension of the lease over the suit property. The said suit was, however, dismissed for want of prosecution as the Petitioners abandoned their obligations to prosecute their suit. In the circumstances, it is clear that the present Petition is an outright abuse of court process.

52. Being the lawful registered proprietor of the suit property and in the exercise of its proprietary rights under Article 40 of the *Constitution*, the 3rd Respondent avers it has equitably, efficiently, productively, and sustainably for over fifty-two (52) years now, managed the suit property herein and recently leased a portion of it to Kurwitu Ventures Limited, the 5th Respondent herein. As per the Lease dated 15th November 2018, it is clear that the lease was strictly for agricultural purposes and in line with the conditions of the 3rd Respondent's lease as renewed by the 1st Respondent. It is, therefore, not true that mining activities have been on the suit property.

53. The 4th Respondent is a State Corporation mandated to construct, operate, and maintain the National Electricity Transmission Grid. Section 144 of the *Land Act*, 2012 states that State Corporations may apply for Wayleaves to the 1st Respondent. It complies with this provision and the applicable regulations that the 1st Respondent published Gazette Notice No 5546 of 7th August 2020, notifying the affected land owners and County Government of the plan to construct an electricity transmission line by the 4th Respondent on the Garsen-Hola-Bura-Garissa transmission line. Due to the Court's Conservatory Orders issued on 28th May 2021, the process is yet to be completed. This is affirmed by the affidavit deposed by Johnston Muthoka on 1st July 2021 in opposition to the issuance of conservatory orders.

54. The 3rd Respondent reiterates that the suit property is not and has never been community/ancestral/ trust land as alleged by the Petitioners or at all it was unalienated Government land before its allocation to the 3rd Respondent in 1970. The 1st Respondent affirms this position under Paragraph 3 of its replying affidavit through reference to the Tana River District Ranching Development map, which shows that the suit property was State/Government Land.

55. The 3rd Respondent submits that there is a clear distinction between what was previously, under the repealed 1963 Constitution, known as Government land (now Public land) and Trust land (now Community Land). Suppose, indeed, the suit property was trust land (now known as community land) before 1970, as the Petitioners alleged. In that case, the Petitioners have failed to discharge their legal burden of proving that assertion. The repealed *Government Lands Act*, Cap 280 (the *GLA*), was the law governing Government land in 1970 as enacted in Section 2 of the *GLA* and Section 204 of the Repealed Constitution. This meant that all such land in the Regions was deemed Government land unless shown to be Trust land as provided for under Section 208 of the Repealed Constitution. Under Section 3(a) of the *GLA*, the President had special powers to make grants or dispositions over Government Land.

56. According to the 3rd Respondent, Article 63 of the *Constitution* 2010 exhaustively describes Community Land, which does not include Public Land. 3rd Respondents assert that Petitioners allege that the suit property was community land (formerly Trust Land) held by the County Government

in trust for the community - nothing whatsoever has been adduced before the Court to support this allegation. In the case of *Bahola Mkalindi v Michael Seth Kaseme & 2 others* [2013] eKLR, Angote, J. outlined the distinction between Government Land and Trust Land under the Repealed Constitution as provided for under Section 208 of the Repealed Constitution (which section deals with Trust Land). The Judge further distinguished Trust Land from Government Land.3rd Respondent avers that in the said decision, the Judge made a finding that unalienated Government Land was not Trust Land in that it was not vested in local communities. It was not held in trust for them by a County Council. Further, unlike Trust Land, the County Councils had no role in allocating unalienated Government land. They could not even purport to administer such land on behalf of the Government.

57. 3rd Respondent submits that the Interested Party herein has not been holding the suit property in trust for the Petitioners or any other community. It is clear from the Revised Letter of Allotment dated 11th February 1981 that the offer for allotment was from the Commissioner of Lands, on behalf of the Government, and not from the County Council of Tana River. In any event, the said letter was copied to the Clerk of the County Council of Tana River and the District Commissioner of Tana River District.

58. 3rd Respondent contends that In the *Mkalindi v Michael* case (*supra*), the Judge observed that Section 117(1) of the repealed Constitution allowed County Councils, through an Act of Parliament, to set apart any area of Trust land vested in a County Council for use and occupation by a public body; or for the prospecting for or for the extraction of minerals or by any person for a purpose which in the opinion of the County Council is likely to benefit the person ordinarily resident in that area or any other area of Trust land vested in that County Council either because of the use to which the area so set apart is to be put or because of the revenue to be derived from rent in respect thereof. However, under section 117 (4) of the repealed Constitution, the setting apart of Trust land was to be of no effect unless the prompt payment of full compensation of any resident of the land set apart who, under the African Customary Law, has a right to occupy any part or is in some other way prejudicially affected by the setting apart. The suit property could not have been trust/community/ancestral land before 1970 because, as demonstrated through the letter of allotment itself, the offer for allotment came from the Government of the Republic of Kenya through the Commissioner of Lands; if the suit property was Trust land at the time, the County Council of Tana River, which was copied in the Letter of Allotment and which had participated in the allotment process all along would have objected to the same on grounds that firstly, it was trust land, exclusively to be administered by the County Council in trust for the Community, and secondly, that no compensation had been paid to the affected communities.

59. The 3rd Respondent states that the Supreme Court similarly had occasion to distinguish Government Land from Trust Land under the Repealed Constitution. In the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2021] eKLR, the County Government of Mombasa claimed that the suit property was public land and trust land held by it on behalf of the communities. The Superior Court found the allegation to have been unsubstantiated.

60. The 3rd Respondent urges the Court to find that the suit property was indeed unalienated Government Land before 1970, as demonstrated. Additionally, the Petitioners have not even attempted to lay the basis for their claim that the suit property was community land.

61. Regarding the validity of the 1970 lease, the 3rd Respondent believes that even if the suit property was unalienated Government land before 1970, Article 40(6) of the *Constitution* states that property rights may not be protected where the property is found to have been unlawfully acquired. As to what constitutes a valid, regular, and legal allocation of unalienated Government land, the Supreme Court, in the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) (*supra*) cited with approval the procedure for the allocation of unalienated land as laid out

by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR.

62. The 3rd Respondent believes that the revised Letter of Allotment dated 11th February 1981 reveals that the suit property had undergone planning and a Part Development Plan No 42778/68B prepared accordingly. The Revised Letter of Allotment also refers to the initial Letter of Allotment Ref. 42778/75 of 19th June 1970 attached to Grant No CR 20944 is a copy of the Survey Plan dated 15th November 1990. It can further be seen from the copy of the Grant that it was registered on 3rd December 1990. Therefore, the 3rd Respondent contends that its acquisition of the suit property by way of allotment followed the prescribed steps of planning (on or around 19th June 1970 vide PDP No 42778/68B); allocation (Initial Letter of Allotment dated 19th June 1970 and a further revised Letter of Allotment dated 11th February 1981); surveying (Survey Plan dated 15th November 1990 annexed to the Grant) and issuance of the Certificate of Lease (Grant) (registered on 3rd December 1990).

63. The 3rd Respondent believes it has demonstrated that the allocation was valid, regular, and legal, further supported by the 1st Respondent's case. Its proprietary rights must be protected under Article 40 of the *Constitution*. Indeed, other than unsubstantiated bare allegations that the 3rd Respondent "unlawfully moved to occupy" the suit property, no challenge has been made against the allocation process, nor any illegality or irregularity thereof demonstrated before this Court. It remains trite that he who alleges the existence of any fact must prove the same.

64. The 3rd Respondent contends that The Petitioners allege that the 3rd Respondent's Lease was illegally extended vide the Lease dated 25th July 2018 and a Certificate of Title duly registered as CR No 72070/1 on 28th September 2018, long after the initial lease had expired on 1st July 2015. It has, therefore, been alleged that the extension was null and void *ab initio*; there has been nothing to extend past the expiration of the initial lease on 1st July 2015. The Petitioners are mistaken in their allegations for the following reasons:

    a. The 3rd Respondent applied for an extension of the Lease on 2nd March 2015 through the Office of the County Executive for Lands, Agriculture, Livestock Development and Fisheries, Tana River County Government before the expiry of the Lease on 1st July 2015;

    b. In the absence of an immediate response, the 3rd Respondent followed up on the said application via a letter dated 23rd March 2015.

    c. The objections lodged against the extension and their subsequent resolution by the County Land Management Board delayed the approval process, leading to the expiry of the Lease;

    d. Since the initial lease expired in the pendency of the procedural hurdles, the 3rd Respondent's application for extension was put through from March 2015; upon approval of the application for extension, the 1st Respondent could only then renew (and not extend) an expired lease;

    e. Finally, on approval, a new Letter of Allotment dated 8 February 2018 was issued, followed by a Lease executed on 15th July 2018, and finally, a Certificate of Title registered on 28th September 2018.

65. Where any lease held by the National or County Government is about to expire, Section 13(1) of the *Land Act*, 2012 establishes the lessee's pre-emptive allocation rights on application.

66. The 3rd Respondent avers that Section 13(1) of the Act is an amendment to the Act introduced through Section 48 of the Land Laws (Amendment) Act, No 28 of 2016. The 3rd Respondent's lease had already expired (on 1st July 2015), and the 3rd Respondent had already submitted its application for

an extension (on 2nd and 23rd March 2015). Before the amendment, Section 13(1), then applicable to the 3rd Respondent's expired Lease, accorded the 3rd Respondent pre-emptive rights to the allocation against the whole world upon application as the immediate lessee.

67. This means that even if the 3rd Respondent's 1970 Lease expired before the 3rd Respondent applied and obtained an extension of the same as argued by the Petitioners, which is denied, the 3rd Respondent still had pre-emptive rights to the allocation of the suit property in priority to every other person having been the immediate past holder of the leasehold interest. Following the procedure and being satisfied that the 3rd Respondent had fulfilled the required conditions, the 1st Respondent properly and regularly re-allocated the suit property to the 3rd Respondent through the Letter of Allotment dated 8th February 2018. Subsequently, the 1st Respondent executed the Lease dated 15th July 2018; a Certificate of Title was duly registered on 28th September 2018.

73. Further, Section 13(2) mandates the 1st Respondent, the National Land Commission (NLC), to make rules for better carrying out its functions, including handling applications for extension of leases before their expiry.

74. The 3rd Respondent observes that as a result of the requirement placed on the NLC by Section 13(2), the *Land (Extension and Renewal of Leases) Rules, 2017* were enacted through Legal Notice No 281 of 2017 purposely to offer guidance on the procedure for application for extension and renewal of leases. The 3rd Respondent opines that It is not in contention that these Rules came into existence after the expiry of the 3rd Respondent's 1970 Lease and long after the 3rd Respondent had already made its application for an extension of the Lease.

75. The 3rd Respondent submits that from the provisions cited in the preceding paragraph, all a lessee has to do if they desire their lease to be extended is to apply for such extension at any time before the expiry of the Lease. Noting that the approval for extension may take up to ninety (90) days from the date of the application, it is not unforeseeable that the Lease sought to be extended may expire in the pendency of the formalities that must be undertaken before the execution of the lease and registration of the extension in the Register.

76. The 3rd Respondent, therefore, submits that even though the Rules governing the extension and renewal of leases were not in force when the initial Lease expired on 1st July 2015, the 3rd Respondent applied for an extension on 2nd March 2015, four (4) months before expiry and cannot be faulted for the administrative hurdles that had to be successfully dealt with before renewal and issuance of the Lease dated 25th July 2018. Additionally, the renewal of the Lease in favor of the 3rd Respondent is in line with the 3rd Respondent's pre-emptive rights under Section 13(1) of the *Land Act*. The decision in the *Serah Mweru Muhu v Commissioner of Lands & 2 others* [2014] eKLR is cited where the Petitioner's application for lease extension remained in pendency until the lease expired before the extension could be granted. Subsequently, the Commissioner of Lands refused to extend the lease, claiming that it had expired and, therefore, the Petitioner had no proprietary rights to be protected. In disagreeing, Majanja J. found that the Petitioner could not be faulted for the intervening circumstances that interrupted the Lease extension process.

77. Similarly, Munyao J. in *Remtone Holdings Company Limited v Mashukur Enterprises Limited & another* [2017] eKLR reaffirmed a lessee's pre-emptive right to re-allocation or extension where the lease expires or is almost expiring.

78. The 3rd Respondent affirms that the 1st Respondent followed due procedure and met all the requirements before re-allocating the suit property and subsequent renewal of the Lease. Additionally,

nothing has been adduced before the Court challenging the extension/renewal process, and as such, it is submitted that the process was legal and valid.

79. In a rejoinder to the submissions by the 1st and 3rd Respondents, the Petitioners allege that if the Suit Property is taken to be Unalienated Government Land in 1970, the same was irregularly allotted to the 3rd Respondent and did not meet the test set by the Supreme Court in the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] eKLR,(*supra*) which laid down step by step the legal procedure for allotment of government land. The Supreme Court affirmed this position while borrowing a leaf from the Court of Appeal decision in *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR.

80. The Petitioners contend that consistent with the Supreme Court holding in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] eKLR, (*supra*), the Respondents ought to satisfy this Court that the 3rd Respondent observed the step-by-step legal procedure opined by the Supreme Court were met before the purported allocation to the 3rd Respondent on 1st July 1970 and 11th February 1981. It is to be noted that far from the guidelines set out in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] eKLR (*supra*) and in a bid to satisfy this Court that the Suit Property was properly allotted - the 1st Respondent has merely produced before this Court the following documents - A copy of Tana River District Ranching Development Map, a copy of the Survey map obtained from the Ministry of Lands and Physical Planning, a copy of the Letter of Allotment issued by the Commissioner of Lands for a term of 20 years from 1st July 1970, a copy of the Letter of Allotment issued by the Commissioner of Lands for a term of 45 years and copy of Letter of Allotment issued by the NLC for 45 years from 8th February 2018.

81. It is the Petitioner's submission that a quick examination of the documents produced by the Respondents herein does not meet the threshold set by the Supreme Court in the *Dina Management Case* (*supra*). Notably, the 3rd Respondent did not produce any evidence of the letter to the Commissioner of Lands seeking allocation of the suit property and demonstrated adherence with the step-by-step prescription described by the Supreme Court. Further, the 3rd Respondent did not produce a Part Development Plan before this Court that should have accompanied the Letter of Allotment. The Petitioners conclude that the process of the purported allocation of the suit property if at all, was flawed per the Supreme Court standards in the *Dina Management Case* (*supra*). Indeed, the Supreme affirmed that a title or a lease is an end product of a process. Where the process is flawed, the end product must be void. The Petitioner, on the same issue, cites the Court of Appeal in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR.

82. The Petitioners reiterate that Sergon J., in the case of *Meza Galana & 3 others v Attorney General & 2 others* [2007] eKLR, found that the Suit Property was Trust Land. It was incumbent upon the Respondents to satisfy the Court that there was full compliance with the *Trust Land Act* (Cap 288 Laws of Kenya) (repealed) for the 1970 Lease and the *Community Land Act* for the renewal in 2018.

83. It is the Petitioner's submission that the Suit Property was and remains a Community Land, for which the Lease of 1970 to the 3rd Respondent was created under the auspices of Section 115 or 117 of the Repealed Constitution, which is why under paragraph 9 of the 3rd Respondent's affidavit, it admits consultation of community and the Board of County Council of Tana River, who have no role under the *Government Lands Act* (Repealed), were involved.

84. Petitioners aver that the question of whether the Suit Property was unalienated Government land or otherwise was long settled by Sergon J. in the case of *Meza Galana & 3 others v Attorney General & 2 others* [2007] eKLR, the Court found that the land comprising of Ndera and Gwano Locations

was Trust Land bestowed upon Tana River County Council under Section 115 of the *Constitution* as trustee for the inhabitants of the aforesaid land before the same was purportedly Gazetted as a National Reserve.

85. Further, Respondents herein have not made a single attempt to contradistinguish the circumstances and findings of Sergon J. in *Meza Galana & 3 others v Attorney General & 2 others* [2007] eKLR and, as such, the Respondent's claim that the suit property herein which comprises of the Ndera community land was an unalienated Government land is unfounded.

86. The Petitioners believe the circumstances here and the findings of Sergon J. in *Meza Galana & 3 others v Attorney General & 2 others* [2007] eKLR are similar in that the land comprising of Ndera and Gwano Locations were Trust Land bestowed upon Tana River County Council under Section 115 of the *Constitution*. The judgment was never appealed against nor reviewed.

87. The parties' averments and submissions on the issues raised concerning the Suit Property are germane. The Petitioners, on the one hand, claim the Suit property is Community land and should be treated as such. On the other hand, the 1st and 3rd Respondents believe that the land in question has been Government land since 1970 and remains so to date, and it is regularly and legally allotted to the third Respondents.

88. The Petitioners then pleaded the aspect of historical injustice, that as the Suit land had been changing hands since 1970, as persons who were on the ground, their petitions and grievances to the relevant Government Agencies had gone unheeded; hence, the petition before this Court.

89. The land in question has been quite elusive for the Kenyan people. To legalize the acquisition and occupation of foreigners, the British Parliament promulgated two laws: the British Settlements Act of 1887 and the Foreign Jurisdiction Act of 1890. This extended the power of "Her Majesty" to provide for the government of acquired settlements. The laws were made to secure land for settlers; African customary property laws were ignored, and separate laws were enacted to govern areas occupied by Africans.

90. Therefore, all land declared to be "Crown Land" was to be governed by the Crown Lands Ordinance of 1902. Prime land in Kenya was seized from Africans and allocated to white settlers without compensation—these encompassed areas such as the White Highlands and various Rangelands. Displacement occurred as many individuals were compelled to vacate their homes when colonialism took hold. As stated, land ownership in the colonial framework registered individual titleholders rather than preserving the customary land tenure systems that Africans had utilized for centuries. The two sets of regimes under the Crown land (for the colonizers) and trust land (for the colonized) were passed over for independence. It is what perpetuated historical land injustices that are persistent to date.

91. Then, set in a land-grabbing phenomenon involving government officials unlawfully seizing land. Both public and private entities have unlawfully appropriated land, leading to the illegal division of public and trust lands. In 2010, Kenyans passed a new Constitution, which saw reforms and overhaul of the land laws system achieved. Among the hopes of the new Constitution was the introduction of Article 67 of the *Constitution*, which set up the National Land Commission and defined its functions. In 2011, the Parliament passed the *National Land Commission Act* to give effect to Article 67 of the *Constitution*. One of the functions of the NLC, as set out in the legal instruments, was to investigate and make recommendations concerning present and past historical land injustices. It was hoped that these law provisions would give the NLC enough power and instruments to address the Country's past historical land injustices. Since its establishment in 2011, the NLC has not done much in this field to discharge its mandate.

92. Under Article 67(2)(e) of the *Constitution* and Section 5(1)(e) of the *National Land Commission Act*. the *Constitution* of Kenya 2010 recognized historical land injustice as one of the thorny issues that the NLC ought to have resolved upon its creation, and a time frame was provided. The mandate of NLC is spelled out in Article 67(2) of the *Constitution*. The mandate is replicated in Section 5 of the *NLC Act* as follows:

a. To manage public land on behalf of the national and county governments;

b. To recommend a national land policy to the national government;

c. To advise the national government on a comprehensive programme for the registration of title to land throughout Kenya;

d. To conduct research related to land and the use of natural resources and make recommendations to appropriate authorities;

e. To initiate investigations, on its own or on a complaint, into present or historical injustices and recommend appropriate redress;

f. To encourage the application of traditional dispute resolution mechanisms in land conflicts;

g. Assess tax on land and premiums on immovable property in any area designated by law;

h. To monitor and have oversight responsibilities over land use planning throughout the country.

73. Additionally, other functions of the Commission are prescribed in Article 67 (3) of the *Constitution*, Chapter 15 of the *Constitution*, and relevant statutes, including the National *Land Act* (2012), *Land Registration Act* (2012), and *Community Land Act* (2016), among others.

74. The National Land Commission's (NLC) authority to address claims related to historical land injustices concluded on May 1st, 2022. According to the *NLC Act* of 2012, the commission was required to propose legislation for investigating and resolving claims within two years of its establishment. The five-year timeframe for the commission to handle issues related to public land concluded on May 1st, 2017. The National Land Commission (Amendment) Bill, 2022, also known as the Owen Baya "Bill," aims to modify Sections 14 and 15 of the *National Land Commission Act*. Section 14 of the Act provided the Commission the responsibility to examine grants or transfers of public land to determine their validity or legality within five years from the Act's commencement. It also permitted the Commission to request Parliament to extend these five years. Section 15(3) of the Act outlined the conditions for the Commission to accept a claim of historical injustice, one of which requires that the claim be submitted within five years from the Act's commencement date. The Commission's ability to address historical land injustices was restricted to a decade from the Act's effective date.

75. The Bill aims to eliminate these time restrictions. It is crucial to highlight that although the Act became effective in 2012, the *National Land Commission (Review of Grants and Dispositions of Public Land) Regulations* were published in May 2017. Furthermore, the National Land Commission (Investigation of Historical Land Injustices) Regulations were implemented in October 2017 after the deadline for claim submissions expired. The Commission was tasked with an investigative and resolution role concerning the legitimacy and legality of titles, which was anticipated to facilitate the resolution of matters addressed in the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the "Ndungu Report").

76. Sources from the NLC indicate that by the end of 2020, the Commission had received 15,513 complaints, investigated 5,773, and officially determined and published 4,088. The Commission collected 693 claims regarding historical land injustices and resolved 126. Given that the Commission no longer has the authority to handle these claims, there will be no means of redress for the unresolved claims that remain to be investigated and processed – I will revert to this issue in my conclusion.

77. The history of the land in question in the eye of the Petitioners is that this was their ancestral land where they resided since time immemorial. In 1970, under the aegis of the then-District Commissioners, it was passed over and a lease issued to the 3rd Respondent without their consent. The lease expired in 2015 and was renewed in 2018; as a community, they were never consulted on all those occasions. They knew this was community land, which remains community land to date. The allocation to the 3rd Respondent has not benefited them, nor have they been compensated.

78. Petitioners claim they have contacted the NLC and other government bodies to resolve their concerns regarding the suit property associated with historical injustices. Their grievances have consistently gone unheard.

79. From the evidence and documents produced by the parties and a significant affidavit by Zacharia Ndege of the NLC, the suit land was state land according to the original copy of the Tana River District Ranching Development Map. The survey map obtained from the Ministry of Lands and Physical Planning shows the land was surveyed, and the acreage provided mirrors what the map contained. The land cannot be communal since no adjudication or settlement happened. The Commissioner of Land issued 3rd Respondent allotment for 20 years to run from 1970. The County Government of Tana River approved it. The survey was done; in 1980, a renewal was done for 45 years as the initial years were minimal to realize a profit. A letter of allotment was issued in 1981 for 45 years, commencing - 1970.

80. In March 1985, the Tana River County Council voiced concern that a strip measuring two and a half miles wide and four miles long, which the Ndera Community felt should be delineated to them to be used as pastoral land. In April 1985, the District Commissioner dispelled this animosity between the Petitioners and the 3rd Respondent. He recommended that the 3rd Respondents cede a part of the Western boundaries to ensure future co-existence with the Ndera Community. In a meeting in April 2015, the 1st Respondent approved the extension of the lease of the 3rd Respondent subject to conditions such as surrendering adequate land for Kibaoni Village and Mnazini Settlement Scheme. A meeting of the Tana River County Land Management Board approved the renewal, and the 1st Respondent approved it on 23rd July 2015, with an allotment letter issued on 8th February 2018 with the knowledge that there was public participation.

81. The genesis of the 1970 lease is as stated in the affidavits by Mr. Jacob Marao for the Petitioners and by Abdalla Bakero Boku for the 3rd Respondents. The initial meeting between the Ida-sa DAC Committee, The District Commissioner, and the Ndera Community is per the Minutes of the DC Hola dated 17th April 1973, where the DC urged residents to look up for development.

82. The Petitioners' grievances concerning the suit property are captured in the record of correspondences and meetings as shown by the materials placed before the Court. In a letter dated 5th March 1985, the then Tana River County Council wrote to the District Commissioner, Tana River, concerning the suit property; the letter partly said:

> " The Ida-sa Godana ranch has taken up all the western part of the hinterland, crossing the main road to the old Chief's camp to the Dead River—approximately 1km from the main

road (Garsen -Hola). The piece of land from the Dead River extends to and borders the Mnazini scheme and extends southwards up to the Ndera-Salama boundary.

This area is approximately 2 ½ miles wide and 4 miles long is flood-fed area and the only piece of land remaining in the location for agricultural production.

The Ndera landless have voiced up their need for utilizing this area...."

83. In a letter dated 9th April 1985, the District Commissioner wrote to the Commissioner of Land, airing Ndera's grievances on the survey being carried out and the recommendations by the District Development Committee.

84. In a joint meeting between the Ndera Community and Ida-sa on 29th November 1994, the Ndera Community raised their concerns on how the lease was procured in 1970:

" said B.Bahola (Chief Ndera) made the following observations regarding the Ida-Sa-Gordana and Ndera conflict;

The ranch acquired land from Ndera Location without consent of the Nderas. The Society carried general survey and extended its boundaries to the east to the chief's office Mnarani in 1985.

The Chief further accused the ranch of inciting the Wardeis to occupy Ndera Land in the pretext of being society's land thereby helping aggravate the tribal clash. He narrated subsequent wars fought in 1995(Ndera versus Mwima) over land disputes. In 1976 and 1996 (Ndera versus Wardeis) from North Eastern province....

The councilor Ndera Mr. Said Sadiq claimed that his position even after the meeting of 1973 was that the boundary started from the old main road westwards. He confirmed there used to be a village at Kokani, Matamana. And Mnazini along the main road. He stressed that the ranch officials should consult the wananchi (Nderas) something that never happened.

The chairman demanded from the Manager (Ida-sa Godana) the plan that allocated the letter of allotment to the ranch. He asked the manager to avail this document in the next meeting scheduled for 11th January 1995 at the same venue. The aggrieved party (Ndera) also helps to look for the same."

85. During the transition period, the Ndera Community wrote to The Transition Authority (TA), airing their grievances, stating that the 1970 lease was due for extension. In the Letter dated 17th June 2015, the TA wrote to NLC and stated:

" Section 35 of the TDGA places a moratorium on the transfer of public assets and liabilities, including immovable assets such as land, by any state organ, public office, or public entity without the approval of TA.

TA is in receipt of a complaint from the elders of Ndera Location, Tana River County on the extention of Lease of Idasa Godana Ranch which they are opposed to.

The authority, therefore, advises that your office to engage the elders (Gasa) of Ndera Location before any action or approval is granted to extend the lease."

86. Before the lease was approved and renewed, the Tana River County Land Management Board called two meetings on April 8th and 9th, 2015. One of the agenda items was the renewal of the lease subject of the current petition.

87. On 8th April 2015, much of the deliberations were on the site visit and the grievances by the Ndera Community and other communities bordering the Ranch, significantly the Wardei. A report was given to the Board, and the meeting from the Minutes was acrimonious. In a 4:3 split, the Board decided:

    i. That Kibaoni village be given enough space curved out of the Ranch

    ii. The river should be the boundary, unlike the earlier beacon placed.

    iii. The Ranch owners have free access to the river bank for the watering corridor.

88. In that meeting, the Secretary observed that the Chair should be held responsible because the Board verdict might cause uproars as he gave deaf ears to the member's plea. The Chairman replied that he was ready to carry any blame and acted within the framework of the guiding principles and the *Constitution*.

89. Dissatisfied with the decision to extend the lease, the Ndera Community wrote to the NLC on the 21st of May 2021 to question the lease renewal on account of public participation and, finally, this petition.

90. From the sequence of events, as captured above, it cannot be said that the Petitioners have never raised concerns regarding how the lease was granted to the 3rd Respondent in 1970, extended in 1985, and renewed in 2018.

91. In the submissions by parties, a question arose whether the suit land should be classified as Public or Community land. The Petitioners believe that the land in question should be declared community land, and the lease renewal should have followed the framework laid in the *Trustland Act* (repealed) and now the *Community Land Act* 2016. The 1st and 3rd Respondents believe that we are dealing with public land under the *Government Lands Act* (repealed) as the appropriate framework for dealing with the suit property.

92. From the documents placed before me by the parties, the allotment letters dated 19th June 1970, which mirrored the allotment letter issued on 4th December 1980, that the allocation was being done by the Government as follows under *GLA*. Grant No CR. 20944 issued to the 3rd Defendant on 27th day of November 1990 – was to be issued under the *GLA*.

93. The 1918 renewal shows that the same was being made at the behest of the County Government of Tana River. The letter of allotment dated 8th February 2018 states:

> " RENEWAL OF LEASE – LR. No 13597/1 -TANA RIVER COUNTY
>
> I have the honour to inform you that the National Land Commission, on behalf of the County Government of Tana River, hereby offers you a grant of the above plot shown on the red on the attached plan.... Subject to your formal written acceptance of the following conditions and payment of the charges as prescribed hereunder."

94. But the lease issued on 26th July 2018 indicates that the National Government issued the lease as follows:

> " This lease is issued pursuant to the transition provisions in Section 160 and 161 of the *Land Act* and Section 108 of the *Land Registration Act* ....

The National Government in consideration of the sum of Kenya Shillings 89,800/- by way of stand premium paid on or before the execution hereof....."

95. The lease issued on 26th September 2018 shows:

"Ida-sa Godana Ranching Cooperative Society ... pursuant to Section 108 of the *Land Registration Act* is/are the registered proprietor(s) as lessee(s) from the Government of Kenya for a term of 99 years."

96. Under the *Government Lands Act* and The Trusland Act, the Commissioner of Land was the allocating authority of both Government Land and Trust land, delegated by the President Under Section 2 of the *GLA*:

"Government land" means land for the time being vested in the Government by virtue of sections 204 and 205 of the *Constitution* (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963) and sections 21, 22, 25, and 26 of the *Constitution* of Kenya (Amendment) Act, 1964;

"unalienated Government land" means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment."

97. Section 204 of the Repealed Constitution provided that: -

"204. Subject to the provisions of section 205 and 208 of the *Constitution*, all estates, interests and rights in or over land situate in a Region that, on 31st May 1963 were vested in Her Majesty...shall be deemed to be vested in the Region on 1st June 1963."

98. Under Section 3(a) of the *GLA*, the President had special powers to make grants or dispositions over Government Land as highlighted below:

"3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;"

99. Section 53 of the *Trust Land Act* provide:

"The Commissioner of Lands shall administer the Trust land of each council as agent for the council, and for that purpose may—

(a) exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13 (2) (d) of this Act; and

(b) execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient: Provided that—

(i) the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him; and

(ii) the Minister may, by notice in the Gazette, terminate the Commissioner of Land's power to act under this section in relation to the Trust land of any particular council, where the Minister is satisfied that the council has made satisfactory arrangements to administer its Trust land itself."

100. Trust land could be dealt with in the manner as laid by Angote J. in *Bahola Mkalindi v Michael Seth Kaseme & 2 others* [2013] eKLR:

> " Under the repealed Constitution and the Trust Lands Act, trust lands are neither owned by the Government nor by the County Councils within whose area the land falls under. The County Council simply held such land on behalf of the local inhabitants of the area.
>
> 27. For as long as Trust land remained unadjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land is transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.
>
> 28. Indeed, Section 115(2) of the repealed Constitution provided that Trust land could only be dealt with in accordance with the African Customary Law vested in any tribe, group, family or individual.
>
> 29. the *Constitution* also provided that the only way Trust land could be legally removed from the purview of communal ownership of the people was through adjudication and registration or setting apart.
>
> 30. Adjudication and registration of Trust land removed the particular land from the purview of community ownership and placed it under individual ownership while setting apart removed the Trust land from the dominion of community ownership and placed it under the dominion of public ownership.
>
> 31. Trust land could only be allocated legally pursuant to the provisions of the *Constitution*, the *Trust Land Act* and the *Land Adjudication Act*.
>
> 32. The repealed Constitution, at section 115(4) mandated Parliament to make provisions under an Act of Parliament with respect to the administration of Trust land by a County Council.
>
> 33. Consequently, Parliament enacted the *Trust Land Act*, the Local Government Act (repealed) and the Town Planning Act which was repealed and replaced with the Physical Planning Act in 1996. These statutes, amongst others, allowed County Councils to deal and administer Trust land on behalf of the residents of their respective areas.
>
> 34. Section 117(1) of the repealed Constitution allowed, through an Act of Parliament, County Councils to set apart any area of Trust land vested in a County Council for use and occupation by a public body; or for purpose of the prospecting for or for the extraction of minerals or by any person for a

purpose which in the opinion of the County Council is likely to benefit the person 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.

35. Where an area of Trust land has been set apart by the County Council for the purposes that I have enumerated above, section 117(2) of the repealed Constitution provided that 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.

36. However, under section 117 (4) of the repealed Constitution, the setting apart of Trust land shall be of no effect unless the prompt payment of full compensation of any resident of the land set apart who under the African customary law has a right to occupy any part or is in some other way prejudicially affected by the setting apart.

37. Trust land could also be set apart for Government purpose. Under Section 118(1) of the repealed Constitution, if the president was satisfied that the use and occupation of an area of Trust land was required for the purpose of the Government of Kenya or for a body corporate or for the purpose of the prospecting for or the extraction of minerals, such land would be set apart accordingly and was vested in the Government of Kenya or such other person or authority.

38. If Trust land is set apart for the purpose of the Government, the Government was required to make prompt payment of full compensation if the setting apart extinguished any estate, interest or right in or over the land that would have been vested in any person or authority.

Other than Trust land which has been set apart for government purpose, the Government also had land which was not Trust land. This was land which was not within the 39."Special areas" as specified in the *Trust Land Act* and which was on 31st May 1963 vested in the Trust Land Boards.

40. Government land is the land that was vested in the Government of Kenya by dint of sections 204 and 205 of the *Constitution* that was contained in Schedule 2 of the Kenya Independence Order in council, 1963 and Sections 21, 22, 25 and 26 of the *Constitution* of Kenya (Amendment) Act 1964.

41. The enactment of the *Government Lands Act*, Cap 280 replaced the 1915 Crown Lands Ordinance.

42. The *Government Lands Act* was enacted to make further and better provisions for regulating the leasing and other depositions of Government Land. Under this Act, it is only the President who could sign documents granting title although he would delegate these powers to the Commissioner of Lands.

43. Unalienated Government land was not Trust land in that it was not vested in local communities and it was not held in trust for them by a County Council.

44. Under section 3 of the *Government Lands Act*, it is only the President who was allowed to make grants or disposition over unalienated Government land.

45. It is the Commissioner of Lands, on behalf of the President, who used to allocate unalienated Government land to the person whose application for the allocation of such would have been approved by the President.

46. Once the approved candidate for the land had been selected, and an approved part development plan (PDP) by the Director of Physical Planning is issued, an offer was made to the person by the Government. The offer is what came to be known as a letter of allotment which used to be signed by the Commissioner of Lands.

47. Unlike Trust land, the County Councils had no role to play at all in the allocation of unalienated Government land. They could not even purport to administer such land on behalf of the Government. I therefore do not understand why the Defendants would say that the purported land that was allocated to the 1st and 2nd Defendants by the 3rd Defendant was Government land and not Trust land."

101. The Supreme Court also reckoned the difference in *Dina Management Limited v County Government of Mombasa & 5 others* [2021] eKLR, as follows:

> " 36. Section 208 of the Independence Constitution specifically provided for trust lands, which were described in four ways. First, land in special areas vested in the Trust Land Board. Second, areas of the land that were known before 1st June 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement areas the boundaries of which were described in schedules. Third, land situate in a Region the freehold title to which is registered in the name of a county council and lastly, the land the freehold title to which is vested in a county council by virtue of escheat under the provisions of section 211 of that Constitution. It remained incumbent upon the 1st respondent to also indicate the basis upon which it was claiming the suit property to be described as trust land and how such property vested on the 1st respondent which, burden it had not discharged."

102. The initial processes that resulted in the suit land being allocated to the 3rd Respondent are based on a Ranching map from the Municipal Council of Tana River with subsequent allotments and a certificate of Grant signed by the Commissioner of Land. The Municipal Council, in the ensuing correspondences, acknowledged the allocation. The various deliberations before the County Commissioners indicate there was always a dispute on how this land was allocated and how it was changed from Trust land to Government land. The 1st Respondent also could not provide a clear picture of the initial allocation, dependent on information from the Ministry of Lands. The affidavit by Silas Mburugu, Principal Land Administration for the Chief Land Registrar – 2nd Respondent, and that of Isaiah Ndisi Munje, County Attorney for the Interested Party – in answer to interlocutory applications filed herein- do not provide the necessary initial documents on the decisions taken to allocate the suit land. The former said that it was initially allocated as public land, and the latter said that the initial lease to the 3rd Respondent was irregularly and un-procedurally issued, and the renewal was also improperly done. The 2nd Respondent and the Interested party did not respond to the petition nor file submissions. The Court will go by what the parties participating in these proceedings provided.

103. The two levels of Government - as we have now never existed before the new Constitution 2010. As indicated, the Commissioner of Land acted as the land custodian for the National Government and the Local Authorities (Municipal Councils).

104. Section 53 of the *Trust Land Act* is the one that empowered the Commissioner of Land to deal with Trust lands on behalf of the County Councils. An allocation could be made at the detriment of a Local Authority and, by extension, its inhabitants.

105. Correspondences on record from 1970 to 1981 through the 1990s, when the grant was issued, show the participation of the District Commissioners and the County Government of Tana River. The presence of the National Government is minimal. The Commissioner of Lands seems to come into the picture with the instructions of the Local Authority and the District Commissioners. The County Government, from the correspondences on record, seems to have been getting revenue from the 3rd Respondent as the only viable Ranch. This took center stage when the Board was considering the extension/renewal, which is why the County was not opposed to the renewal/extension. Applications for renewal/extension were made through the County Executive Officer responsible for land – Tana River County. The allotment was finally issued in 2018 by the County Government of Tana River.

106. Trust land was meant to benefit the Local Authority and its inhabitants. Setting Apart had to consider compensation for the residents ordinarily residing on the land. The issue of compensation by the Government when dealing with Trust land was again elaborately set by Angote J. in *County Government of Tana River v Tana and Athi River Development Authority & another* [2016] eKLR:

> "Where an area of Trust land has been set apart by the County Council for the purposes that I have enumerated above, section 117(2) of the repealed Constitution provided that 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.
>
> 64. However, under section 117 (4) of the repealed Constitution, the setting apart of Trust land was of no effect unless prompt payment of full compensation of any resident of the land set apart who under the African customary law had a right to occupy any part or was in some other way prejudicially affected by the setting apart.
>
> 65. Trust land could also be set apart for Government purposes. Under Section 118(1) of the repealed Constitution, if the president was satisfied that the use and occupation of an area of Trust land was required for the purpose of the Government of Kenya or for a body corporate or for the purpose of the prospecting for or the extraction of minerals, such land would be set apart accordingly and was vested in the Government of Kenya or such other person or authority.
>
> 66. If Trust land is set apart for the purpose of the Government, the Government was required to make prompt payment of full compensation if the setting apart extinguished any estate, interest or right in or over the land that would have been vested in any person or authority.
>
> 67. The Respondents have not annexed any minutes to show that indeed the then Tana River County Council approved the setting apart of the suit property and how the residents of the area were compensated by the 1st Respondent, if at all".

107. On appeal to the Court of Appeal, the Superior Court in *Tana and Athi Development Authority v National Land Commission & another* [2023] KECA 1207 (KLR), the ELC was faulted on this ground:

> "In his judgement, the learned Judge found that the Appellant and the 2nd Respondent did not annex any minutes to show that indeed the then Tana River County Council approved the setting apart of the suit property and how the residents of the area were compensated by the 1st Respondent, if at all. Clearly the issue of compensation was never raised in the petition. Even had it been raised, there was no evidence by any of the members of the community that they were never compensated. Accordingly, based on the pleadings as well as the evidence, the learned Judge erred in finding that the residents of the area were never compensated."

108. Members of the Ndera community, residents of Tana River County, and subjects of the Interested party brought this action, alleging irregular allocation and lack of compensation for this particular land; as I have said, correspondences on record show that this land was initially Trust Land. The Petitioners have consistently been questioning how the allocation happened, and there have been no answers. No minutes from the then County Council were available to show how the Setting Apart happened.

109. Back to the allocation, after the lease was renewed, the allotment letter issued to the 3rd Respondent by the 1st Respondent was done on behalf of the County Government of Tana River County.

110. This is further given credence by Sergon J's decision in *Meza Galana & 3 others v Attorney General & 2 others* [2007] eKLR to demonstrate that this was Trust land when discussing concerning land situate within the Ndera and Gwano locations where the suit property falls. Significantly, this is what the Judge said:

> "It is clear from the evidence that the County Council started the process of setting aside the trust land for purposes of creating a game reserve to be managed on its behalf by the Kenya Wildlife Service (2nd Defendant). It is clear from the provisions of S.117(2) of the *Constitution* that where a county council has set apart, like in this case any area of land, any rights interest, or other benefits in respect of that land that were previously vested in any tribe, group family, or individual under African Customary Law shall stand extinguished.
>
> However, before a County council sets trust land aside, it must follow the procedures laid down under the *Trust Land Act* (Cap 288 Laws of Kenya), which Act came into being pursuant to Section 117 (1) of the *Constitution*. Section 13 of the aforesaid Act provides as follows:
>
> "13.
>
> (1) In pursuance of S.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) Or .....
>
> (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 and not more than 3 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 meetings.

(b) The council shall bring the proposal to set apart the card 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 recommendations concerning the proposal to set apart the land together with a record of the representations made at the meeting.

(d) The recommendations 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.

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."

The law is so detailed and elaborate when it comes to the appropriation of trust land by county councils. In this case the land held in trust for the residents of Gwano and Ndera has been gazetted to be a game reserve. The question which must be answered is whether or not the Tana River County Council complied with the provisions laid out under Section 13(2) of the *Trust Land Act* (Cap.288 Laws of Kenya)? Unfortunately, the aforesaid council (3rd defendant) did not present any evidence. The only evidence available to assist this court is the affidavit of Enos Kidai its then clerk sworn on 1st July 1993.

Assuming for a moment that, that was the only evidence the council could in its defence, then in my estimation the council did not meet the requirements of the law as set out in Section 117 of the *Constitution* and under Section 13 of the *Trust Land Act*. There was no cogent evidence that the council ever consulted the residents of Gwano and Ndera Locations under Section 13(2)(b) of the *Trust Land Act*. There is also no evidence that the council passed the resolution with the required quorum under Section 13(2)(d) of the *Trust Land Act*. It is clear from the minutes attached to the aforesaid of Enos Kidai that the resolution passed was that of a committee and not that of a full council. In the end and for the above reasons I find the gazette notice No 4 of 1976 issued by the Minister of Tourism and Wildlife invalid. This means that the plaintiffs rights have not been extinguished. Judgment is entered

for the plaintiffs and against the defendants as prayed in the plaint save that prayer (a) cannot issue against the Government (1st defendant). The prayer for damages for trespass was not strictly proved nor the kind of damages submitted. On this head, I will not make any award. Costs is awarded to the plaintiffs."

111. The anticipated lease, issued in 2018 when the *Community Land Act* took effect, should have been under the Act as the allocation dealt with Trust land.

112. From the materials before me, I hold that the suit land was always Trust land, which should have transited to Community land.

113. If we take that the land was allocated as unalienated public land, the steps as set in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] eKLR, (*supra*), which laid down the legal procedure for allotment of government land and thus held that an allotment to stand the test of validity, the following processes must be observed and adhered to:

> " The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows:
>
> > "...It is trite law that under the repealed *Government Lands Act*, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
> >
> > 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:
> >
> > > "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."
> >
> > 105. This process is restated in *African Line Transport Co Ltd v 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 in respect of the plot.

106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2nd to 6th respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, "the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land."

114. In summary, the allottee must write a letter to the Commissioner of Lands seeking allocation of the suit property. Suppose the Commissioner of Lands is satisfied with the request. A Part Development Plan (PDP) must be drawn and approved by the Commissioner of Lands or the Minister for Lands before any unalienated Government land can be allocated. A letter of allotment is then issued, accompanied by a PDP with a definite number. These are then taken to the survey department, which undertakes the surveying. Once complete, the survey is referred to the Director of Surveys for authentication and approval. After that process, a land reference number is issued for the plot. The Supreme Court affirmed this position while borrowing a leaf from the Court of Appeal decision in *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

114. 3rd Respondents ought to have satisfied this Court that it observed the step-by-step legal procedure opined by the Supreme Court was met before the purported allocation to the 3rd Respondent on 1st July 1970 and 11th February 1981. The 1st Respondent produced before this Court the following documents: A copy of Tana River District Ranching Development Map, a copy of the Survey map obtained from the Ministry of Lands and Physical Planning, a copy of the Letter of Allotment issued by the Commissioner of Lands for a term of 20 years from 1st July 1970, a copy of the Letter of Allotment issued by the Commissioner of Lands for a term of 45 years and copy of Letter of Allotment issued by the NLC for 45 years from 8th February 2018. The grant was issued in 1990, and the lease for 99 years issued in 2018.

115. The 3rd Respondent did not produce any evidence of the letter to the Commissioner of Lands seeking allocation of the suit property and demonstrated adherence with the step-by-step prescription described by the Supreme Court. Further, the 3rd Respondent did not produce a Part Development Plan before this Court that should have accompanied the Letter of Allotment. It will be noted that the Ranching Map for Tana River was not a PDP. It will be further stated that after the initial allotment happened in 1970, how the survey was conducted subsequently and in 1981 was opaque, with complaints raised by the neighbors that it was not transparent. The 3rd Respondent did not demonstrate that after allocation in 1970 and 1981, it strictly complied with the allocation requirements. The process of the purported allocation was flawed per the Supreme Court standards in the Dina Management Case. Indeed, the Supreme Court affirmed that a title or a lease is an end product of a process. Where the process is flawed, the end product must be void.

116. The root of the title then acquired by the Respondent is shaky on all fronts.

117. In Kenya, the primary distinction between lease renewal and lease extension is that renewal constitutes a new lease agreement, while extension signifies the continuation of the existing lease. A new lease agreement is established on the same property following the expiration of the original lease. This usually entails a new lease with revised terms and potentially increased rent or rates. The lease is prolonged for a predetermined duration without any break, achieved through a lease amendment. The *Land (Extension and Renewal of Leases) Rules, 2017* oversee lease extensions and renewals in Kenya. To seek a lease extension, the lessee must apply to the NLC. This application must include a copy of the registered owner's identification card or passport or the company's certificate of incorporation. If no action is taken after a lease expires, the lease is terminated, and the land reverts to the government (see FORM PLUPA under the *Physical and Land Use Planning Act*,2019.

118. The lease in this matter expired in 2015. The Land then reverted to the County Government of Tana River to be held in Trust for its inhabitants in accordance with the provisions of Articles 60 and 63 of the *Constitution*. Article 60. (1) of the *Constitution* provides the principles of land policy in Kenya as follows:

> " That Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—
>
> (a) equitable access to land;
>
> (b) security of land rights;
>
> (c) sustainable and productive management of land resources;
>
> (d) transparent and cost effective administration of land;
>
> (e) sound conservation and protection of ecologically sensitive areas;
>
> (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
>
> (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.
>
> (2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.

119. Article 63(2) of the *Constitution* defines Community land to include:

> " (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.

120. At the centre of this petition, we have two competing interests. That of the Petitioners who plead that they have been marginalized by a lease procured in 1970 which did not consider their rights as a community to own land, thus perpetuating a continuing historical land injustice. The other competing interest is that of the 3rd Respondent, who has been holding a lease since 1970, extended in 1981 and renewed in 2018 with an expectation that it had a legitimate expectation that the same had to be renewed and that the pre-emptive rights under Section 13(1) of *Land Act* applied.

121. Before I make my final disposition on the issue, it will be reckoned that the lease renewal was done in 2018 - the new Rules for Renewal and Extension, 2017, had not taken effect. The 3rd Respondent applied for the extension before the expiry, but the lease lapsed and was renewed in 2018; the considerations for the renewal did not attain the spirit of Article 60 – on the principles of land policy and allocation of community land under Article 63(4) of the *Constitution*. This will be elaborated further in the succeeding discourse.

122. In the meetings conducted by the Tana River County Land Management Board, what emerges is that the Board did not consider the grievances raised by the Petitioners. As laid elsewhere in this judgment, the purpose of the meetings was to rubber stamp the lease renewal without giving the parties aggrieved a fair hearing – this was in contravention of Article 10 of the *Constitution* on public participation as a value of governance.

123. The Tana River County Land Management Board convened a two-day meeting on the 8th and 9th of April 2015 to discuss the lease extension. However, as alluded to above, the meeting minutes recorded by the Board on the 8th and 9th of April 2015 demonstrate that there was no public participation and that members opposed to the lease extension, including the Petitioners, were not afforded the requisite opportunity to be heard. Instead, the concerns of the community were baptized by the Chairman of the Tana River County Land Management Board as "political interference."

124. The meeting cannot be said to have met the threshold of public participation within the meaning of Article 10(2) of the *Constitution* of Kenya, 2010 - see *Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR, where the Court held that "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making

process. The import of this is that the people must be involved, and their concerns must be considered in what is summed up as the inclusivity of views and the community concerned. Further, in the case of *Mugo & 14 others v Matiang'i & another, Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party)* (Constitutional Petition 4 of 2019) [2022] KEHC 158 (KLR), the Court affirmed that to attain the principle of public participation in a decision-making process, the following parameters should be met:

> "It is apparent, going by the above decision and other decisions cited by the parties in this matter and in particular the decision in *Khelef Khalifa & 2 others versus Independent Electoral and Boundaries Commission and another* [2017] eKLR, that to attain the principle of public participation in a decision-making process, the following parameters are required;
>
> a) There must be evidence of inclusivity that is to say that all stakeholders or those affected by an administrative policy, or law must be given an opportunity to express or ventilate their view well aware of what is at stake.
>
> b) The affected people must be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information must be disseminated through public barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reaches the targeted audience.
>
> c) The government agency or a public officer in charge of the programme of public participation must of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement must be meaningful and done in good faith rather than a mere formality.
>
> d) Public participation calls for innovation and some level of malleability depending on the nature of subject matter for example culture, geographical issues, logistical constraints etc. The test to be applied is effectiveness and efficiency. The question to be asked is, is the mechanism effective in achieving sufficient public participation.
>
> e) Public participation does not mean that everyone must give their views on the issue at hand as to attain such a standard at times can be impractical.
>
> A public participation exercise must however show intentional inclusivity and diversity. A programme of public participation cannot disregard bona fide major stakeholders otherwise the program would be ineffective and illegal. Those mostly affected by the policy must have a bigger say in that policy, legislation or action and their views must be sought, taken into account. In other words, the view of the major stakeholders must be captured through minutes or any other proof that shows that their view were captured and had a bearing in the final decision.
>
> f) Public participation is not a public relations exercise. It must be meaningful and done in good faith."

125. The minutes of the Board show that the parameters espoused in the *Mugo & 14 others v Matiang'i Case* (*supra*) on public participation are lacking, contrary to the command of the *Constitution* under Article 10(2).

126. Here, the evidence from the minutes shows that, indeed, there was a two-day meeting presided over by the Tana River County Land Management Board, and the Ndera Community Members were not allowed to express or ventilate their views on the question of the extension of the Lease in favour of the 3rd Respondent. Instead, the Chairman of the Tana River County Land Management Board stifled grievances raised by the members of the Board and the public. This can be found in the minutes of 8th April 2015, recorded by the Chairman, who reminded members that he could give directions as he was duty-bound. He mentioned some members inciting the locals. The Chairman reminded members that in 2009, the lease extension for Idasa - Godana Ranch was approved and recommended for 45 years extension by the defunct Commissioner of Lands through the County Council along with the inactive Kitangale Ranch because of political interference Ida-sa Godana Ranch was denied their legal right while Kitangale was granted. The two-day meeting was for formality as members' concerns were disregarded and branded political interference. In the process of reapplying for a lease renewal, whether community land or public land, public participation is required; the direct participation of that community is missing in this case. Nothing from the minutes is available to show the broadcast of this meeting, nor are there minutes to show that a baraza was conducted.

127. The Petitioners have challenged the lease renewal/extension (sic), which is the subject of this petition, claiming an absence of public participation. Public participation is essential before making any decision that is likely to significantly impact the citizens in allocating Community or Public land.

128. Article 1(1) of the *Constitution* gives power to the people of Kenya - it contemplates that the power shall be exercised under the *Constitution*.

129. Article 10 (2) of the *Constitution* provides:

> " National values and principles of governance –
>
> 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.

130. All state organs and public officials must adhere to governance principles and national values in performing their duties. Article 2 of the *Constitution* holds all individuals and all state organs across both levels of government accountable, meaning that no one can wield their authority outside the framework of the *Constitution*. Article 2 (4) of the *Constitution* also renders any action or failure to act that goes against the *Constitution* void. the *Constitution* does not envisage where these governance principles and national values may be ignored or compromised.

131. Under Article 61(1):

> " All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals."

132. Article 62(2):

> " Public land shall vest in and be held by a county 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.
>
> (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
>
> (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."

133. Since the lease had expired and the suit property was due for allocation, it then fell under the purview of Section 12. (1) of the *Land Act*, which provides:

> " The Commission may, on behalf of the National or county governments, allocate public land by way of—
>
> (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;
>
> (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;
>
> (c) public notice of tenders as it may prescribe;
>
> (d) public drawing of lots as may be prescribed;
>
> (e) public request for proposals as may be prescribed or
>
> (f) public exchanges of equal value as may be prescribed."

134. To take care of the interests of the 3rd Respondent, who had a legitimate expectation of the extension of the lease, Section 13(1) of the Act provides:

> " Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.
>
> (2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the foregoing, the rules may provide for the following.
>
> (a) prescribing the procedures for applying for extension of leases before their expiry.

(b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee.

(c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or reallocation of the land.

(d) other covenants and conditions to be observed by the lessee."

135. Since this was a reallocation, the 1st Respondent, through its Board, then fell in error by failing to give the residents of Tana River County – including the Petitioners - a chance to be heard about the extension of the lease or the reallocation of the same. This was the chance missed to address the concerns of the continuing historical injustice of the allocation of this land since 1970. The 1st Respondent then was mandated to do so under Article 67(2)(e) of the *Constitution* as read with Section 5 (1)(e) of the *NLC Act*, which commenced in 2011 and ended on the 1st of May 2022.

136. Based on the above findings, it is my holding, therefore, that the renewal/extension (sic) of the lease concerning the suit property by the 1st Respondent to the 3rd Respondent is null and void and of no effect ab initio for failure to accord the Petitioners herein and the residents of Tana River County a chance to be heard.

137. The 3rd Respondents, after the lease renewal, entered into various contracts with third parties. the 4th Respondent created a Right of way (Electricity) Wayleave) being Garsen-Hola-Bura -Garissa 220 KV 235 KM Transmission Line over the suit Property vide Gazette Notice No 5546 of 7th August 2020. The owners of the suit property were to be compensated a sum of Kshs 12,028,275/- over the use of 264.19 Acres of the suit property. This money was to devolve to the 3rd Respondent now that they are the leaseholders of the suit property. The Petitioners oppose the payment of the said money to the 3rd Respondent because of the grievances raised in the petition. The 3rd Respondent contends that the said Gazette Notice lists the acreage affected by the transmission line and the respective owners of the affected lands, including the 3rd Respondent herein. As provided for under Section 148 of the *Land Act*, compensation for acquiring a communal right of way is only due to persons who are in lawful actual occupation of the land, and where the land is private, as in this case, compensation is to be based on the value of the land as determined by a qualified valuer.

138. 3rd Respondent aver that as held in the case of *Lawangiro Camel Farms Limited v Kenya Electricity Transmission* [2017] eKLR, the Government can only enter into an agreement for compensation with the registered proprietor of the land which granted it the right of way on the suit land, but not with third parties. The Court should be inclined to agree with the 3rd Respondent that, indeed, the suit property is now private land (under a leasehold tenure), the process initiated by the 1st Respondent on the 5th Respondent's intention to acquire a wayleave over the suit property was legal, valid and therefore, follows that the Petitioners have no basis upon which to claim compensation from the 5th Respondent since they have no proprietary rights over the suit property.

139. On the lease with the 5th Respondent, the 3rd Respondent submits that being the lawfully registered proprietor of the suit property. In exercising its proprietary rights under Article 40 of the *Constitution*, the 3rd Respondent has managed the suit property herein equitably, efficiently, productively, and sustainably for over fifty-two (52) years. As per the terms of the Lease dated 15th November 2018, nothing prohibits the 3rd Respondent from entering into third-party contracts so long as the consent of the County or National Government is obtained.

140. In line with its proprietary rights, the 3rd Respondent leased a portion of the suit property to Kurwitu Ventures Limited, the 5th Respondent. The Lease dated 15th November 2018, duly registered at the Land Registry, is limited to the 5th Respondent's farming and agricultural activities. As such, it is unclear why the Petitioners would allege mining activities on the property and further seek an environmental restoration order. As with the other Petitioners' allegations, nothing has been adduced to support this allegation. Therefore, there is no basis upon which the said Lease between the 3rd and 5th Respondents would be deemed illegal.

141. The Petitioners aver that the proposed activities to be undertaken on the suit property by the 4th and 5th Respondents pose a grave environmental threat to the suit property and its surrounding environs. The 3rd, 4th, and 5th Respondents have proposed various activities on the suit property, ranging from creating a grid to mining and agricultural activities with absent environmental impact mitigation measures—section 63 of the *Environmental Management and Co-Ordination* (No 8 of 1999). The Petitioners question whether the National Environmental Management Authority issued this license. If it was issued, did the 3rd, 4th, and 5th Respondents comply with the edicts of Sections 58, 59, and 60 of the *Environmental Management and Co-Ordination* (No 8 of 1999)?

142. The Petitioners conclude that there is no material evidence to prove that the Respondents acquired the Environmental Impact Assessment License. However, if they did, the same was done without the public participation of the Petitioners, which is a violation of Sections 58, 59, and 60 of the *Environmental Management and Co-Ordination* (No 8 of 1999) that there was no public participation in the process of acquiring the Environmental Impact Assessment License if at all any was acquired from the authority. The Petitioners have cited the decision in *Independent Electoral and Boundaries Commission & 4 others v Ndii & 312 others; Ojwang & 4 others (Amicus Curiae)* (Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021 (Consolidated)) [2021] KECA 363 (KLR) the Court of Appeal pronounced itself on the question of proof of public participation and held that - once the Petitioners complained about that lack of public participation, it would be unrealistic to demand proof of that absence of public participation, as that would require them to prove a negative, which was a logical, notional, and cognitive absurdity. It was upon the Respondents to the petition to lay before the Court evidence that, contrary to the complaint, they did conduct real and meaningful public participation as required by the *Constitution*.

143. The Petitioners conclude that the proposed activities on the suit property by the 4th and 5th Respondents after the grant of the sublease by the 3rd Respondent herein do not adhere to the principles of sustainability, intra-generational equity, prevention, and the precautionary principle as espoused in the case of *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR.

144. The Court has found that the lease held by the 3rd Respondent is null and void. Therefore, the contracts entered by third parties will also be null and void, as the 3rd Respondent's title has been impeached and obtained unprocedurally and illegally, as discussed above; see the *Dina Management Case*(*supra*). Nothing on record shows that consent was obtained in writing before from either the County National Government for the sublease the 3rd Respondent entered with the 5th Respondent. On that front, too, the sub-lease is null and void.

145. However, it will be noted that there is a stoppage of the project that the 4th Respondent was undertaking by this Court. The public interest will demand that it will be against the public good to continue with the injunctive orders as it will tend to negative the development of Tana River County and its inhabitants and, by extension, the government policy on the last mile connectivity program (LMCP)) that aims to have all Kenyan households access to electricity. Those injunctive orders will

be lifted, and the Court will make appropriate orders on the monies meant for compensation in the final orders.

146. The petitioners did not prove environmental degradation or the lack of EIA licenses for the programs. The same goes for the mining of gypsum. It was not substantiated. No orders will be available under this, and the call for an award of damages.

147. What relief(s) are available in this matter? I reckon the issues raised in this petition are convoluted and, I dare say, an overkill, and the Court must issue appropriate and efficacious orders at the end.

148. I will agree with the Petitioners' submissions as held in *Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others* [2019] eKLR where the Court cited the South African Constitutional Court in *Minister of Health & others v Treatment Action Campaign & others* (2002) 5 LRC 216 at page 249 as follows:

> "...appropriate relief will in essence be relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

149. Further, the Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 to include a remedy that will:

> "(1) meaningfully vindicate the rights and freedoms of the claimants;
>
> 2) employ means that are legitimate within the framework of our constitutional democracy;
>
> (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
>
> (4) be fair to the party against whom the order is made."

150. The arsenals also available to this Court include what is provided in Article 23(3) of the *Constitution*, which prescribes the orders the Court can issue when fundamental rights have been alleged to have been violated:

> " 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."

151. Section 13(7) of the *ELC Act* provides the orders that the ELC can issue to include:

> " 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.

152. Article 159(2)(c) provides:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

153. Section 20 of the *ELC Act* has also provided this Court with other options it can consider to reach just, appropriate, and efficacious orders:

> " Alternative dispute resolution
>
> (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution, including conciliation, mediation, and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the *Constitution*.

154. The guiding principles under Section 18 of the *ELC Act* are also handy:

> " Guiding principles
>
> In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—
>
> (a) the principles of sustainable development, including—

(i) the principle of public participation in the development of policies, plans, and processes for the management of the environment and land;

(ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law; .....

(b) the principles of land policy under Article 60(1) of the *Constitution*;

(c) the principles of judicial authority under Article 159 of the *Constitution*;

(d) the national values and principles of governance under Article 10(2) of the *Constitution*; and

(e) the values and principles of public service under Article 232(1) of the *Constitution*."

154. In this judgment, the Court decided on the issue of jurisdiction, which I need to revisit before I conclude. The Preliminary Objection herein raised the issue of the doctrine of abstention or the exhaustion doctrine – that the 1st Respondent, the NLC, better handled the issues raised herein. I found that the NLC had already opposed this petition. However, in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), the Supreme Court has recently pronounced itself that parties should not be limited in access to justice whenever they seek to ventilate their matters - the only catch is - that the forum in which they seek redress is efficacious and adequate and that the doctrine of abstention/exhaustion is applied by the Courts where there exists such primary forum:

> "It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC, and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under *EMCA*, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations, as is the case in the present dispute. The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.
>
> 119. Similarly, in respect of the *Energy Act*, section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal's attention.
>
> 120. In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC, which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts, therefore, clearly fell into an error by finding that the appellant had not

demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals."

155. *In the Matter of the National Land Commission* [2015] eKLR, the apex Court held as follows on the role of NLC in historical injustice cases Article 67 (2) (e):

> "(313) In the course of rendering this Advisory Opinion, we have considered the mandates of the NLC as set out in the *Constitution* [Article 67(2) (d), (e) and (f)]. These are conducting research on land issues and on natural resources—with appropriate recommendations to certain agencies; initiating inquiries into historical land grievances—and recommending courses of redress; promoting traditional methods of resolving land conflict.
>
> (314) From those provisions, it is clear to us that the NLC bears a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented. As regards such functions, the NLC, on the basis of clearly-formulated statutes, should be able to design a clearly-structured agenda for regular operations and, inter alia, should seek to devise a well-focused safeguard-mandate in relation to land issues."

156. The prayers sought by the Petitioners include – injunction, declaratory, award of damages, and prerogative orders. Some of the acts complained of in this petition will require investigations. This Court notes that the evidence tendered through affidavits was insufficient, for instance, to determine the initial allocation processes from 1970. The 1st Respondent will need to probe, investigate, and make recommendations in a less adversarial environment, addressing the issue of good neighborliness and societal cohesion to avoid a winner-take-all scenario. I will also note that the issues raised in this petition will need consultations between the two levels of government, the national government and the county government of Tana River.

157. Besides, the land-allocating authority is the executive and not the judiciary; some of the orders sought, like the cancellation of the lease and the registration of the Petitioners as proprietors of the suit property, cannot be bypassed by this Court under the provisions of the *Constitution*, the *Land Act*, and the *Community Land Act*, which have enacted an elaborate process of determining and allocating land and registering Community land as well.

158. The judiciary advocates for Alternative Justice Resolution Mechanisms (AJS)under Article 159(2) (c) of the *Constitution*; this is also provided under Section 20 of the *ELC Act*, which I have stated above. In the same measure, Article 67(2)(f) provides that in exercising its mandate, NLC shall deploy traditionally known dispute resolution mechanisms, among other mechanisms, in resolving disputes. In this case, the elaborate Traditional Dispute Resolution Mechanism deployed by the people of Tana River County will be beneficial. Consequently, in my final measures in the disposal of this petition, other than declarations and prerogative orders, the Court can direct the balance of the grievances to be addressed by the most efficacious and adequate forum to redress the issues raised - the 1st Respondent - the NLC. I know that the NLC mandate to redress historical land injustice claims lapsed, but that

did not remove the provisions of Article 67(2)(e) of the *Constitution*. As held by the Supreme Court *in the Matter of the National Land Commission* [2015] eKLR:

> " the NLC bears a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented."

159. Parliament needs to move quickly in passing the Owen Baya Bill since there are still many historical land injustice cases, and the people of this region need redress. Otherwise, the Court will be inundated with these claims, as has already happened. The NLC Chairman, Mr.Gershon Otachi, addressing the Residents of Tana River County as reported in the Daily Nation of 2nd October 2023:Coast counties make up 2,624 of the casesKilifi County has 2,024 claims followed by Mombasa County with 228 claims, Kwale with 187 claims, Tana River with 127, Taita Taveta with 41, and Lamu County with 17 casesIn Tana River County, leaders have appealed to the commission to cede more land from the irrigation schemes for the expansion of the townsMore than 65 per cent of land injustice cases in the country are from the Coast region, with Kilifi county accounting for over 2,000 cases reported to the National Lands Commission.A report from the NLC shows that out of 3,743 claims currently under review, Coast counties make up 2,624 of the cases.In an interview with journalists in Garsen during the Lands Injustices Dialogue, NLC Chairperson Gershon Otachi said the cases in the region have more weight compared to cases in other counties."

160. The Court will apologize wholeheartedly to the parties for having taken longer than is necessary to deliver this judgment because of the convoluted nature of the issues raised and the pressure of work.

161. The Court commends the industry displayed in this matter by Mr. Muga, learned counsel for the Petitioners, Mr. Kiilu, learned counsel for the 1st Respondent and Ms. Odhiambo, learned counsel for the 3rd Respondents

162. Having said so, the petition will partially succeed, and the Court will issue the following final orders:

a. A declaration be and is hereby issued that the new lease of 99 years, an extension of the 1970, 1981 lease as renewed in 2018 to benefit the 3rd Respondent, is hereby declared null and void ab initio as ineffective in conferring title to the 3rd Respondent proprietary rights.

b. The 1st Respondent's issuance and/or renewal of the lease in 2018 to the 3rd Respondent was in contravention of Article 1 (1),10(2),61(1) 62(4), Section 12 of the *Land Act* as representing continuing historical land injustice against the Petitioners herein.

c. Pursuant to, and in the spirit of Article 23(3) of the *Constitution*, an order be and is hereby issued in the form of a structural interdict/ continuing mandamus compelling/directing the 1st Respondent, within 6 months hereof to initiate investigations, on the complaint raised in this petition by the Petitioners, into historical land injustices occasioned by allocation and extension of the lease issued to the 3rd Respondent in 1970 extended in 1981 and renewed in 2018, over Land known as Plot LR No 13597/1.

d. This will be conducted in consultation with the National Government and the County Government of Tana River. The investigations should specifically address the following:

   i. The continuing historical injustice claim raised by the petitioners and the manner of redress.

   ii. Whether allocation and lease of Plot LR No 13597/1 deprived the Petitioners of ancestral/Community land.

iii. Recommend redress, considering under Article 10(2)(b) of the *Constitution* on the doctrine of equity on the 3rd Respondent's legit expectation of the lease extension/ renewal.

e. The measures proposed above are in recognition of Article 159(2)(c), 67(2)(f), and Section 20 of the *ELC Act* on Alternative Dispute Resolution Mechanisms.

f. A permanent injunction be and is hereby issued against the 3rd and 5th Respondents, anyone acting under them, restraining them from dealing with the suit property in any manner that will change the substratum of the suit property - Plot LR No 13597/1 until the investigations and recommendations proposed are completed.

g. Based on public interest, the injunctive order in place against the 4th Respondent be and is hereby lifted on the disputed property as the same pertains to development and is contrary to the public good.

h. However, the sum of Kshs 25,890,620/, along with accrued interest for limited loss of land use and the wayleave affecting the disputed property, will remain unpaid and be banked in an escrow account to be held by the Interested party in trust for the people of Tana River County until the investigations and recommendations by the 1st Respondent are finalized and the beneficiaries established.

i. The prayer for compensation to the Kenyan people on behalf of the Ndera Community for the unauthorized mining activities and an order for environmental restoration is denied as it was not substantiated.

j. As the law abhors a vacuum after six months, hereof, a report should be filed before this Court for implementation and/or further orders from this Court

k. Judgement and Orders herein be served on the NLC for compliance.

l. Judgement and orders herein be served on the Clerk of the National Assembly to fast-track the Owen Baya Bill.

m. As the petition is partially successful and takes a reconciliatory tone, each party shall bear its costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 3RD DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Muga, for the Petitioners

Mr. Kiilu, for the 1st Respondent

Mr. Ojwang for the 2nd and 6th Respondents

Ms. Mwangi, for the 3rd Respondent

Abdi: Court Assistant