



**Taireni Association of Mijikenda v North Witu Ranching Limited & 9 others;  
Kipini Wildlife and Botanical Conservatory Trust & 3 others (Interested Parties)  
(Petition E13 of 2020) [2023] KEELC 18778 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18778 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
PETITION E13 OF 2020**

**MAO ODENY, J**

**JULY 10, 2023**

**IN THE MATTER OF: ARTICLES 1, 2, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 40, 43, 47, 52,  
56, 60, 61, 62, 63, 64, 67, 68, 69 AND 258 OF THE CONSTITUTION ON KENYA, 2010**

**AND**

**IN THE MATTER OF: COMMUNITY LAND ACT NO. 27 OF 2016, LAND  
REGISTRATION ACT OF 2012 AND THE NATIONAL LAND COMMISSION ACT**

**BETWEEN**

**TAIRENI ASSOCIATION OF MIJIKENDA ..... PETITIONER**

**AND**

**NORTH WITU RANCHING LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WITU NYANGORO RANCH T/A COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**WITU LIVESTOCK COOPERATIVE SOCIETY LIMITED .... 3<sup>RD</sup> RESPONDENT**

**NAIROBI RANCHING COMPANY ..... 4<sup>TH</sup> RESPONDENT**

**AYADH SALEH SAID, SAID SALEH, OMAR SALEH SAID .... 5<sup>TH</sup> RESPONDENT**

**LAMU COUNTY GOVERNMENT ..... 6<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 8<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LAND AND PHYSICL  
PLANNING ..... 9<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 10<sup>TH</sup> RESPONDENT**

**AND**



**KIPINI WILDLIFE AND BOTANICAL CONSERVATORY TRUST ..... INTERESTED PARTY**  
**WITU FOREST AND KIPINI CONSERVANCY FOREST . INTERESTED PARTY**  
**ALPERTON HOLDINGS LIMITED ..... INTERESTED PARTY**  
**BETTER GLOBE FORESTRY LIMITED ..... INTERESTED PARTY**

**An association registered under the Societies Act has no capacity to sue or be sued.**

*The petitioner, a body registered under the Societies Act contended that the Giriama community were the inhabitants of Witu, before an invasion by the Shifta in 1964. Their main contention was that the suit property formed part of the Giriama community ancestral land and was therefore not available for setting apart or allocation by the Government. They also alleged that the government’s actions amounted to historical land injustice. On the other hand, the respondents contended that an association such as the petitioner was not a juristic person with the capability to sue or be sued in its name but only through the trustees and officials. The court held that an association registered under the Societies Act could only sue through its officials. The petition was dismissed with costs.*

Reported by John Ribia

**Civil Practice and Procedure** – capacity to sue – locus standi – juristic persons - bodies registered under the Societies Act - whether an association registered under the Societies Act was a juristic person with the capacity (locus standi) to sue or be sued – Constitution of Kenya, article 22.

**Land Law** – classification of land – ancestral land – burden of proving land was ancestral - in a suit contending land was ancestral, which party bore the burden of proof to prove that the land was ancestral - Constitution of Kenya, article 63.

**Brief facts**

The petitioner was an association registered pursuant to the Societies Act. The petitioner’s contended that the Giriama community were the inhabitants of Witu, before they were invaded by the Shifta in 1964. Their main contention was that the suit property formed part of the Giriama community ancestral land, therefore not available for setting apart or allocation by the Government. They also alleged that the government’s actions amounted to historical land injustice. On the other hand, the respondents contended that an association such as the petitioner was not a juristic person with the capability to sue or be sued on its name but only through the trustees and officials.

**Issues**

- i. Whether an association registered under the Societies Act was a juristic person with the capacity (*locus standi*) to sue or be sued.
- ii. In a suit where it was alleged that land was ancestral, which party bore the burden of proof to prove that the land was ancestral?

**Held**

1. If a party did not have a right to appear or be heard then such a party in other words did not have *locus standi*. The court could not bend the law to accommodate the petitioner’s claim where the law provided that an association registered under the Societies Act could only sue through its officials. That was the law and procedure unless the petitioner was envisaged in the interpretation of a person as provided for under article 260 of the Constitution and article 22 which dealt with the infringement of the bill of rights which unfortunately the petitioner did not fall under.
2. A claim for ancestral land found its basis under article 63 of the Constitution. The applicable definition in the instant case was article 63(2)(d). The burden of proving that the suit property herein was



- ancestral land and that the respondents were unlawfully registered as proprietors lay squarely on the petitioner.
3. The evidence presented did not state with precision that the members of the petitioner occupied the suit property. The document's authenticity could not be verified. When one was presenting a constitutional petition, then they must back it up with cogent evidence. The petitioner failed to do so.
  4. The right to own land in a private capacity was protected and could not be taken away without good reason or just compensation. Allegations of fraud must be pleaded and strictly proved in a case where fraud was alleged. It was not enough to infer fraud from the facts. To constitute a breach, a petitioner must demonstrate with a degree of precision the provisions breached, the breach and the manner in which the provisions were breached
  5. There was no evidence that the petitioner's members' rights were breached or that constitutional provisions were infringed.

*Petition dismissed with costs.*

## **Citations**

### **Cases**

1. African Orthodox Church of Kenya v Charles Omuroka & Lagos Ministry for Orthodox Renewal (Civil Case 299 of 2013; [2014] KEHC 2172 (KLR)) — Explained
2. Aliaza v Saul (Civil Appeal 134 of 2017; [2022] KECA 583 (KLR)) — Mentioned
3. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Mentioned
4. Beekey Supplies Limited & Devki Steel Mills Limited v Attorney General & Kenya Bureau of Standards (Constitutional Petition 10 of 2016; [2017] KEHC 399 (KLR)) — Mentioned
5. Elijah Makori Nyang'wara v Stephen Mungai Njuguna & another (Environment & Land Case 609 (B) of 2012; [2013] KEHC 5046 (KLR)) — Mentioned
6. Evans Otiendeh Omolo v School Committee Union Primary School & School Committee Kibuye Primary School (Environment & Land Case 225 of 2014; [2015] KEHC 1545 (KLR)) — Explained
7. John Wekesa Khaoya v Ag. State Law Office (Miscellaneous Application 122 of 2014; [2014] KEHC 2170 (KLR)) — Mentioned
8. Jonathan Mbaya Mketta & 2 others v Witu Nyangoro Ranch (DA) Co. Ltd & (Environment & Land Case 73 of 2016; [2022] KEELC 769 (KLR)) — Mentioned
9. Kenya Bankers Association v Minister for Finance and Another ([2002] 1 KLR) — Mentioned
10. Kiebia v M'lintari & another (Civil Case 10 of 2015; [2018] KESC 22 (KLR)) — Mentioned
11. Kinyanjui Kamau v George Kamau (Civil Appeal 132 of 2005; [2015] eKLR) — Mentioned
12. Kirinyaga United Bar Owners Organization v County Secretary Kirinyaga County Government – Kirinyaga County & 6 others (Petition 16 of 2014; [2014] KEHC 1831 (KLR)) — Mentioned
13. Law Society of Kenya v Commissioner of Lands & 2 others (Civil Case 464 of 2000; [2001] KEHC 831 (KLR)) — Explained
14. Maathai v Kenya Times Media Trust Ltd (Civil Appeal 5403 of 1989; [1989] KEHC 2 (KLR)) — Explained
15. Manase Guyo & 260 others v Kenya Forest Services (Constitutional Petition 22 of 2014; [2016] KEHC 3726 (KLR)) — Explained
16. Manase Guyo & 260 others v Kenya Forest Services (Constitutional Petition 22 of 2014; [2016] KEHC 3726 (KLR)) — Mentioned
17. Martha Chelal & Micah Kipyegon (Legal representatives of the Estate of Kipyegomen Chelal Alias (Kipiakoment Chelal) v Elijah Kipkemoi Boiywo, Jonah Kurgat & District Land Registrar Uasin-Gishu (Environment & Land Case 62 of 2014; [2019] KEELC 2002 (KLR)) — Mentioned
18. Matemvu v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014; [2014] KESC 6 (KLR)) — Explained



19. Mavoko Land Development Company Limited v Mlolongo Catholic Church, Francis of Asisi Health Centre & Francis of Asisi Secondary School (Environment & Land Case 70 of 2016; [2022] KEELC 1999 (KLR)) — Explained
20. Mohammed Abduba Dida v Debate Media Limited & Media Council of Kenya (Civil Appeal 238 of 2017; [2018] KECA 642 (KLR)) — Mentioned
21. Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Mentioned
22. National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) (Advisory Opinion Reference 2 of 2014; [2015] KESC 3 (KLR)) — Mentioned
23. Senti Kumi Community Self Help v Kenya Maritime Authority & Chairman National Land Commission (Environment & Land Case 2 of 2019; [2019] KEELC 4469 (KLR)) — Mentioned
24. Witu Nyangoro Ranch (D.A) Company Limited v Nagea Damon Dofoe & 32 others (Environment & Land Case 100 of 2016; [2021] KEELC 2475 (KLR)) — Mentioned

### Statutes

1. Constitution (repealed) — section 206 — Interpreted
2. Constitution (Repealed) — article 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 40, 43, 47, 52, 56, 60, 61, 63, 64, 67, 68, 69, 258 — Interpreted
3. Evidence Act (cap 80) — section 107 — Interpreted
4. Land Control Act (CAP. 302) — section 8 — Interpreted
5. Land Registration Act (cap 300) — section 26 — Interpreted
6. National Land Commission Act (cap 281) — section 15 — Interpreted
7. Societies Act (cap 108) — In general — Cited
8. Trust Land Act (repealed) — section 7 (1); 208 — Interpreted

### Advocates

None mentioned

## JUDGMENT

1. By a petition dated November 12, 2020, the petitioner Taireni Association of Mijikenda, an association registered under the [Societies Act](#), Laws of Kenya filed this petition seeking the following orders;-
  - a. A declaration order does issue that the original and first settlers in the whole that area known as Witu, were Giryama and later were joined by others.
  - b. A declaration order does issue that all that piece of land known as Witu was not a public land before or around December 12, 1963 and it remained inhibited by the Giryama and other communities.
  - c. A declaration order does issue that on or around 1964, the Witu area was invaded by the Shifta and the reason why the communities moved out of the area known as Witu and the communities actually made a return on or around 1969, long before the 1<sup>st</sup> to 5<sup>th</sup> respondents gained the possession of the suit lands.
  - d. A declaration order does issue that the developments, infrastructure, such as schools, markets, churches, health centres, hotels, dips and many others are features which define human settlement and a mark of the presence or occupation by people or community on all that area known as Witu.



- e. A declaration does issue that all that piece of lands were allotted and allocated to some persons and other portions were disposed and grants were issued to other persons unconstitutionally and unlawfully.
  - f. A declaration order does issue that no one or person who as of majority age and was already in occupation of the whole or any part of the suit lands long before the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents became proprietors of the suit lands, be deemed or described as squatters.
  - g. A declaration order does issue that the state acted unconstitutionally, when it displaced the communities from the suit lands, proceeded to label them as squatters and impeded or denied them the rights to enjoy the fullness of the economic and social rights.
  - h. An order of *certiorari* does issue quashing the all those lease agreements issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> respondents and freehold titles issued to the 4<sup>th</sup> and 5<sup>th</sup> respondents, for land titles, Plan 298760, 342406, 348088, Chara/Kipini Block 1/10, Witu/Witu Block 1/5 and Chara/Kipini Block 1/1 respectively.
  - i. An order of *certiorari* does issue quashing the all those lease agreements/sales/mortgages/or any other form of arrangement entered between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents with other third parties and to quash any transfer of all or any portion or part and or mutation of any of the titles of the suit lands, for land titles, Plan 298760, 342406, 348088, Chara/Kipini Block 1/10, Witu/Witu Block 1/5 and Chara/Kipini Block 1/1 respectively.
  - j. Any other reliefs that the court may deem fit to grant; and
  - k. Costs of the petition be borne by the respondents.
2. The petition was premised on the ground that the Giriama community were the original settlers of Witu area which comprised of Land Reference No 29274, plan No 342406 now registered to the 2<sup>nd</sup> respondent; Land Reference No 19917, plan no 298760 registered to the 1<sup>st</sup> respondent; Land Reference No 29114, Plan No 348088 registered to the 3<sup>rd</sup> respondent; Chara/Kipini Block 1/10 and Witu/Witu Block 1/5 both registered in the name of the 4<sup>th</sup> respondent; and Chara/Kipini Block 1/1 registered to the 5<sup>th</sup> respondents.
  3. The petitioner relied on historical reports of the suit property as given by one Raymond Thoya said to be associated with the establishment of facilities within that area pre and post-independence periods; and the history of the Mijikenda as documented by Professor Gideon Were in the History of East Africa.
  4. The petitioner averred that the first settlers within the suit property and its environs were the Mijikenda community particularly the Giriama, Chonyi and Kauma between the year 1900 and 1964 when a certain group identified as Shiftas invaded the suit property forcing the Mijikenda to be displaced. That sometime around the year 1969, the Mijikenda began to return to the suit property and the petitioner stated that was long before the government issued the grants to the 1<sup>st</sup> to 5<sup>th</sup> respondents thus disinherit the said communities of their ancestral land.
  5. It was the petitioner's case that the acquisition of the suit property after December 12, 1963 by the government was unlawful and contrary to the [Constitution of Kenya 1963](#) and 2010 as the same was not public land. That the acquisition was done in contravention of the then Constitution and sections 7,8,9, 10, 11 and 12 of the then [Trust Land Act](#).



6. The petitioner further contended that the government's actions limited their economic rights and social standing contrary to articles 19 and 43 of the *Constitution of Kenya, 2010*. That the respondents have been making arbitrary arrests of the members of their community and drugging them on mud contrary to articles 27, 28 and 29 of the *Constitution*.
7. Further, that as members of marginalized groups, the government's actions removed the community's protection guaranteed under articles 52 and 56 of the *Constitution*. The petitioner added that the 7<sup>th</sup> respondent failed in discharging its duties under article 67(2) (a) and (e) of the *Constitution*, instead acted with a biased perception to declare the original settlers as squatters.
8. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondent did not enter appearance. the remaining respondents and the 3<sup>rd</sup> and 4<sup>th</sup> interested parties opposed the petition.

#### 2<sup>Nd</sup> Respondent's Case

9. The 2<sup>nd</sup> respondent filed a response dated June 2, 2022 wherein they averred that the petition should be dismissed for want of authority to institute proceedings on behalf of the community contrary to order 1 rule 8 of the *Civil Procedure Rules*. It was their case that when the 2<sup>nd</sup> respondent took possession of Land Reference No 29274 in the year 1973 there was no person in occupation thereof and that the said land was not ancestral land. That the 2<sup>nd</sup> respondent was in peaceful possession until when they leased out part of it to the 4<sup>th</sup> interested party as per a memorandum of understanding dated February 23, 2008 and a lease agreement dated May 30, 2012.
10. That certain squatters invaded the said land when the 4<sup>th</sup> interested party had cleared the bushes within, necessitating criminal proceedings on trespass and the suit ELC No 100 of 2016 *Nyangoro Ranch Company Limited v Nagea Damon Dafoe & 32 others* where judgment was entered in favour of the 2<sup>nd</sup> respondent on July 16, 2021.
11. The 2<sup>nd</sup> respondent averred that they made an application for allotment to the government which was allowed and a letter of allotment was first issued on December 6, 1979, and later on renewed with the letter of allotment referenced No 95500/5. Upon making the requisite payments, the 2<sup>nd</sup> respondent was then issued with deed plan no 342406 and eventually a title issued in their name. It was the 2<sup>nd</sup> respondent's contention that the claim for ancestral land was not proved as required in the *Constitution*.
12. The 2<sup>nd</sup> respondent stated that the issues raised in the present petition were similar to those in ELC 73 of 2016 Jonathan Baya Mketta and Raymond Karisa Shaban, suing as officials of Nyangoro Farmers CBO v Witu Nyangoro Ranch Company Limited & 2 others, and that the plaintiff therein and petitioner herein filed the respective suits on behalf of communities said to be living on the 2<sup>nd</sup> respondent's land, thus offending the sub-judice rule.
13. It was the 2<sup>nd</sup> respondent's case that the petitioner had also filed another suit Mombasa Constitutional Petition No 22 of 2014 against the 1<sup>st</sup> and 2<sup>nd</sup> interested parties over the land owned by the 4<sup>th</sup> respondent, raising similar issues as in the present petition. That suit was ultimately determined therefore this petition is an abuse of the court process and further that the reliefs sought could not be granted for failure to demonstrate any violation or infringement of the petitioner's rights by the respondents.



### 8<sup>th</sup> -10<sup>th</sup> Respondents' Case

14. The 8<sup>th</sup> -10<sup>th</sup> respondents filed grounds of opposition dated August 31, 2021 stating that the petitioner had no *locus standi* to maintain the present proceedings on behalf of the communities for want of evidence of an express authority by its members; and that by virtue of article 63(3) of the Constitution, the proper petitioner would have been the 6<sup>th</sup> respondent herein.
15. The respondents stated that the registration of the suit property, the 8<sup>th</sup> respondent acted in good faith and within its mandate under section 14 of the Land Registration Act. That there was no evidence to support the alleged unconstitutionality or illegality occasioned by the 8<sup>th</sup> respondent. The respondents added that the petition was *sub-judice* Mombasa Petition No 22 of 2014 Manase Guyo and 26 others v Kenya Forestry Services; Garsen Criminal Case No 29 of 2014 Republic v Simon Charo Kajana & 10 others; Malindi ELC No 73 of 2016 Jonathan Baya Mketa and 2 others v Witu Nyangoro Ranch Co Limited and 3 others; and Malindi ELC No 100 of 2016 Witu Nyangoro Ranch Co Limited v Nagea Damon Dofoe & 32 others.
16. The 8<sup>th</sup> -10<sup>th</sup> respondents also filed a replying affidavit sworn by Samuel Mwangi on June 23, 2022 who deponed that he was a Senior Registrar of Titles at the Mombasa Lands Registry and that they received a grant for LR No 29274 for registration accompanied by a Deed Plan No 342406 belonging to the 2<sup>nd</sup> respondent. That the grant was booked for registration on September 25, 2012 and assigned a new grant no CR 57750. He exhibited a copy of the grant and survey plan as SKM-1 (a) and (b). That sometime later on May 14, 2015, they received a letter (SKM-2) from the 7<sup>th</sup> respondent informing them that the 2<sup>nd</sup> respondent ranch had been recommended for regularization following investigations into large scale ranch parcels in Lamu County.
17. On February 14, 2013 they received another grant for LR No 29114 for registration belonging to the 3<sup>rd</sup> respondent which was booked for registration on February 15, 2013 and assigned new grant no CR 59024 as exhibited on annexures SKM-3 (a) and (b) respectively. Unlike the 2<sup>nd</sup> respondent's land, this was not subject of the investigations as per a letter from the 7<sup>th</sup> respondent marked SKM-4. This land was later transferred to the 3<sup>rd</sup> interested party as per a copy of the transfer annexed as SKM-5.
18. The deponent Mr Mwangi stated that they received another grant for LR No 19917 accompanied by a Deed Plan no. 298760 registered to the 1<sup>st</sup> respondent which was booked for registration on July 7, 2009 and assigned Grant No CR 45974 as seen on annexure SKM-6 (a) and (b). Subsequently, the 1<sup>st</sup> respondent transferred the land to Luca Investment Limited as per annexure SKM-7.
19. Mr Mwangi, stated that the petition did not disclose any breach of fundamental human rights on the part of the 8<sup>th</sup> and 9<sup>th</sup> respondents and that the same should be dismissed.

### 3<sup>rd</sup> Interested Party's Case

20. Similarly, the 3<sup>rd</sup> interested party filed grounds of opposition dated January 27, 2021 stating that the petition on the claim for historical land injustices did not satisfy the criteria in section 15 of the National Land Commission Act, 2015. That the allegation raised in the petition were hearsay and fabricated thus failing to meet the criteria of a constitutional petition.

### 4<sup>th</sup> Interested Party's Case

21. The 4<sup>th</sup> interested party filed a replying affidavit sworn on June 15, 2022 by Jean Paul Deprins, a director of the 4<sup>th</sup> interested party Company. Mr Deprins deposed that he leased 15,000 Ha for a period of 45



years from the 2<sup>nd</sup> respondent upon being introduced by the District Forestry Officer, Lamu sometime in the year 2006 as per a letter in the annexure. That as at that time the land was unoccupied and bushy necessitating them to hire armed guards against wild animals.

### Petitioner's Submissions

22. On the issue of *locus standi*, counsel for the petitioner submitted that the suit was filed as a public interest litigation suit and that it had no beneficial interest. According to counsel the petitioner relied on articles 22(2)(b)(c) and (d), 258(2)(b), (c) and (d), and 260 of the [Constitution of Kenya](#) to file the petition, therefore it was not necessary to file any authority.
23. Counsel relied on the cases of [Mumo Matemu v Trusted Society of Human Rights Alliance & 6 others](#), Supreme Court Civil App No 29 of 2014 where the case of [Maathai v Kenya Times Media Trust Limited](#) [1989] KLR 267 was cited; and [John Wekesa Khaoya v AG](#) [2013] eKLR where the court relied on the case of [Kenya Bankers Association v Minister for Finance & another](#) [2002] 1 KLR.
24. Counsel argued that the threshold for constitutional petitions as set out in the case of [Anarita Karimi Njeru v R](#) [1979] eKLR was subjective and that the only standard was set out under article 22(3) of the [Constitution](#) and the [Constitution of Kenya \(Protection of Bill of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#). To counsel, the petitioner had complied with the said rules.
25. On whether the grants issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were unlawful and unconstitutional, counsel submitted that as per section 204 of the former Constitution of 1963, the suit property remained out of the scope of the then national government and the same was held in trust on behalf of the community by a regional government. That the only way the suit property could be placed under the national government, was by invocation of section 208 of the former [Constitution](#) and the [Trust Land Act](#). That no setting apart would legally take place before compensation. Counsel argued that setting apart of the suit property by the then national government was not particularly in accordance with section 208(7)(a), (b) and (c). This was because, the 1<sup>st</sup>-3<sup>rd</sup> respondents were neither a public body nor mineral extractors.
26. Counsel submitted that at that time, and by virtue of section 206 of the [Constitution](#), 1963 only the regional assembly where the suit property was located could issue grants or dispositions over land within a particular region and not the president, provided that section 208 and 7(1) of the [Trust Land Act](#) (now repealed) were complied with. That the conditions set out under 7(1) of the [Trust Land Act](#) (now repealed) were clear that the President had to be satisfied that the requirements under section 117 and 118 of the [Constitution](#), 1969 had been met.
27. Counsel's further argument was that the suit property did not form part of crown land before December 12, 1963 and was therefore improper for the national government to allocate the same to the said Respondents in the first place.
28. Further, counsel submitted that the [Constitution of Kenya, 2010](#) under article 40(6) and section 26 of the [Land Registration Act](#) provide for impeachment of titles procured fraudulently, by mistake or misrepresentation, and that the rights under article 40(1)(2)(3) and (4) could not be protected where a title is found to have been unlawfully acquired. Counsel cited the cases of [National Land Commission v The AG & 7 others](#), Advisory Opinion Ref No 2 of 2014; [Isack M'inanga Keibia v Isaaya Theuri M'lintari and another](#) [2018] eKLR; [Martha Chelai and another v Elijah Kipkemoi Boiywo & 2 others](#) [2019] eKLR; and [Elijah Mukeri Nyangwara v Stephen Mungai Njuguna & another](#), Eldoret ELC No 609B of 2012.



29. On whether the allocation of the suit property of the 4<sup>th</sup> and 5<sup>th</sup> respondents was done with less regard to the law, counsel argued that the said respondents were not members of the Giriama community and had no land rights derived from section 208 of the 1963 Constitution of Section 118 of the 1969 Constitution. Counsel added that in any case, consent from the Land Control Board was a requirement under Section 8 of the then Land Control Act, before acquiring agricultural land. No such consent was produced before this court, not even by the 8<sup>th</sup> -10<sup>th</sup> respondents. Counsel relied on the case of Aliaza v Saul (Civil Appeal of 2017); [2022] KECA 583(KLR).

## 2<sup>nd</sup> Respondent's Submissions

30. Counsel for the 2<sup>nd</sup> respondent identified five issues for determination. First, whether the petitioner has *locus standi*. Counsel's argument on this issue was that an association registered under the Societies Act was not a legal entity with capacity to sue or be sued and could only do so through its officials or trustees as it was held in the case of African Orthodox Church of Kenya v Charles Omuroka & another [2014] eKLR.
31. Counsel added that the provisions of article 22 and 260 of the Constitution of Kenya, 2010 did not negate the fact that a society cannot be sued or sue on its own and relied on the cases of Kirinyaga United Bar Owners Association v County Secretary Kirinyaga County Government & 6 others [2014] eKLR; Kisipwo Community Self Help Group v Attorney General & 6 others [2013] eKLR.
32. Counsel further submitted that the petition was supported by an affidavit sworn by one Peter Ponda Kadzecha, who neither had no authority of the Petitioner to do so nor were there any resolutions or minutes authorizing him to swear the affidavit. Counsel also relied on the case of Senti Kumi Community Self Help v Kenya Maritime Authority & another [2019] eKLR.
33. On the second issue as to whether the petition raises constitutional issues of violation of rights, in order to meet the threshold for constitutional petitions, counsel submitted that apart from quoting the articles of the Constitution said to be infringed, the petitioner failed to demonstrate with precision the manner in which the 2<sup>nd</sup> respondent violated the said articles and cited the case of Mumo Matemu v Trusted Society of Human Rights and 5 others [2013] eKLR.
34. Counsel submitted that by virtue of section 107 of the Evidence Act, it was upon the petitioner to adduce evidence to prove proprietary interests over the suit property, in order to claim breach of their rights and relied on the case of Manase Guyo & 260 others v Kenya Forest Services [2016] eKLR, and stated that the petitioner failed to discharge the burden of proof. Counsel argued that the copies of identity cards produced by the petitioner did not support their claim that the members of the community moved back to the suit property in 1964.
35. Counsel submitted that having explained the process which the 2<sup>nd</sup> respondent acquired the parcel, and the fact that the 2<sup>nd</sup> respondent occupied the land from 1973 without any interference, the petitioner had failed to demonstrate how the 2<sup>nd</sup> respondent violated their rights. That the petition did not provide any particulars of the alleged complaint and the manner of infringement as is required in such cases and as established in the case of Anarita Karimi Njeru v Republic [196-1980] KLR 1272.
36. Counsel urged the court to dismiss the petition with costs to the 2<sup>nd</sup> respondent.

## 8<sup>th</sup> -10<sup>th</sup> Respondents' Submissions

37. Counsel identified three issues for determination namely, whether the petition meets the threshold of constitutional petition on which counsel relied on the case of Anarita Karimi [*supra*] and Mumo



*Matemu* [supra] where it was held that a person seeking redress in a matter that involves the *Constitution*, that person was to set out with a reasonable degree of precision that of which they complain of, the provisions said to have been infringed and the manner which they are alleged to be infringed. Like the 2<sup>nd</sup> respondent, it was counsel's argument that the petitioner failed to discharge that burden.

38. On the second issue as to whether the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents violated any of the petitioner's rights, counsel submitted that section 17 of the then Land Titles Act provided that all land situated in an area to which the Act applied and to which had no claim for ownership was deemed to be Government land. The suit property therefore and all land that was not private within the coastal region could not be said to have been trust land as alleged by the petitioner.
39. Counsel submitted that the allegation of infringement of article 27 on the respondents' part was not proved same as all the allegations on degrading treatment. He relied on the case of *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR.
40. Lastly, on whether the petitioner was entitled to the reliefs sought, counsel submitted that the 8<sup>th</sup> respondent reasonably acted within its mandate to register the grants forwarded to them. It was only upon the 8<sup>th</sup> respondent to satisfy himself that the requirements for registration had been met as was the reasoning in the South Africa Court of Appeal case *Kemp and others v WYK and others*.
41. Counsel added that the petition was premature for failure of the petitioner to exhaust other remedies under the *National Land Commission Act* which establishes the National Land Commission, for purposes of investigating such claims as the present one. Counsel relied on the case of *Beekay Supplies Limited and Another v Attorney General & another* [2017] eKLR and urged the court to dismiss the petition.
42. The 4<sup>th</sup> interested party's submissions were largely a replica of what was deposed in their replying affidavit, I need not reiterate the same.

### **Analysis and Determination**

43. Having considered the petition, affidavits, submissions and authorities presented before the court, I find that the following issues arise for determination.
  - i. Whether the petitioner had the requisite *locus standi* to institute and maintain this petition.
  - ii. Whether the petitioner has any interest over the suit property to warrant this court's protection.
  - iii. Whether the grants and titles to the suit property were unlawfully issued to the 1<sup>st</sup> -5<sup>th</sup> respondents.
  - iv. Whether the petitioner's constitutional rights have been infringed.
44. The petitioner herein described itself as an association registered pursuant to the *Societies Act*, Laws of Kenya. There is a certificate of registration to that effect. One of the petitioner's objectives as observed in their Constitution is to enhance restoration, protection and management of their resources for socio-economic development. Further, under paragraph 15 of the petition, the petitioner indicated that it filed the instant petition as a person acting in the public interest and advancing the interest of communities and vulnerable group of persons. The petitioner urged that article 22, 258 and 260 of the *Constitution of Kenya* empower it to institute such proceedings for the interest of its members and the public at large.



45. On their part, the respondents argued that an association such as the Petitioner is not a juristic person with the capability to sue or be sued on its name but only through the trustees and officials.
46. Article 22 of the Constitution provides that:
1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or threatened.
  2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
    - a. a person acting on behalf of another person who cannot act in their own name;
    - b. a person acting as a member of, or in the interest of, a group or class of persons;
    - c. a person acting in the public interest; or
    - d. an association acting in the interest of one or more of its members
47. The first issue for determination is whether the petitioner has *locus standi* to bring this suit on its own behalf and that of the members of the community.
48. In the case of Law Society of Kenya v Commissioner of Lands & others, Nakuru High Court Civil Case No 464 of 2000, the court held that;-
- “*locus standi* signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau & others v City Council of Nairobi (1982) KAR 229, the court also held that; -
- “the term *locus standi* means a right to appear in court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings”.
49. It follows that if a party does not have a right to appear or be heard then such a party in other words does not have *locus standi*. The petitioner described itself as a registered society under the Societies Act laws of Kenya.
50. In the case of Mavoko Land Development Company Limited v Mlolongo Catholic Church & 2 others [2022] eKLR where the court held that it is trite that a society registered under the Societies Act, including religious organizations, can only sue or be sued through its officials.
51. It was similarly held in the case of Kisumu ELC Case No 225 of 2014, Evans Otiende Omollo v School Committee Union Primary School & another (2015) eKLR where Kibunja J stated that; -
- “The parties described as defendants herein do not exist as they are not legal entities under the Basic Education Act capable of being sued or to defend this suit. He further stated at paragraph 5 that 'having found that the four named defendants are nonexistent as entities capable of being sued, the court finds that to allow the suit as filed to continue to further hearing would be an abuse of the courts' process”
52. The court cannot bend the law to accommodate the petitioner's claim where the law says that an association registered under the Societies Act can only sue through its officials. The courts having pronounced in many cases that that is the law and procedure unless the petitioner is envisaged in the interpretation of a person as provided for under article 260 of the Constitution and article 22 which



deals with the infringement of the bill of rights which unfortunately the petitioner does not fall as I will explain shortly.

53. However, i will look at the petition as the petitioner has filed many cases in its name in violation of procedure.
54. The petitioner’s main contention was that the suit property formed part of the Giriama community ancestral land, therefore not available for setting apart or allocation by the government. That the government’s actions amounted to historical land injustice.
55. In the case of *Manase Guyo & 260 others v Kenya Forest Services* [2016] eKLR, said to be directly in issue with the present petition, the court expressed as follows;-

“The right to enjoyment and acquisition of property is recognized under article 40 of the *Constitution of Kenya, 2010*. However, in order to claim a breach of the right to property a petitioner has to clearly demonstrate the manner in which such property is acquired. The authors of Halsburys Laws of England, 4th Edition (Re-issue) Volume 8(2) paragraph 165 noted at page 25 –

“25. the protection under the *Constitution* of the right to property does not obtain until it is possible to lay claim in the property concerned...an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law.”

56. A claim for ancestral land finds its basis under article 63 of the *Constitution* which provides as follows; -
  1. Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
  - (2) Community land consists of—
    - a. land lawfully registered in the name of group representatives under the provisions of any law;
    - b. land lawfully transferred to a specific community by any process of law;
    - c. any other land declared to be community land by an Act of Parliament; and
    - d. land that is—
      - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
      - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
      - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under article 62(2).
  - (3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.
  - (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.



57. The applicable definition in this case would therefore be article 63(2)(d). It follows therefore that the burden of proving that the suit property herein was ancestral land and that the respondents were unlawfully registered as proprietors lay squarely on the petitioner. In an effort to discharge that burden, the petitioner gave a narration of the history of Witu people as written by one Mr Raymond Thoya and his brothers. The narration is marked PPK-2 in the annexed documents.
58. The argument of the petitioner was that because the Giriama people were the first people to settle on the suit property, and later displaced during the Shifta invasion in 1964, then they have a right to the suit property. The respondents opposed this claim asserting that there was no evidence to prove such allegations. On this point, I agree with the respondents. There is no evidence that any of the members of the petitioner resided on the suit property before the grants were issued to the 1<sup>st</sup> -5<sup>th</sup> respondents.
59. The document marked as PPK-2 does not state with precision that the members of the petitioner occupied the suit property. Indeed as pointed out by the 2<sup>nd</sup> respondent, that document's authenticity could not be verified. It is trite that when one is presenting a constitutional petition, then they must back it up with cogent evidence. The petitioner failed to do so.
60. The allegation by the petitioner was that the grants and titles issued to the 1<sup>st</sup> -5<sup>th</sup> respondents were unlawfully issued. Article 64 of the Constitution defines private land to consist of
- a. Registered land held by any person under any freehold tenure;
  - b. Land held by any person under leasehold tenure; and
  - c. Any other land declared private land under an Act of Parliament.
61. The right to own land in a private capacity is therefore protected and cannot be taken away without good reason or just compensation. Section 26 of the Land Registration Act, 2012 provides that;
- the certificate of title issued by the Registrar shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
62. It is also trite law that allegations of fraud must be pleaded and strictly proved in a case where fraud is alleged. It is not enough to infer fraud from the facts. See Kinyanjui Kamau v George Kamau (2015) eKLR. In the replying affidavit filed by the 8<sup>th</sup>-10<sup>th</sup> Respondents, the Land Registrar produced the official records pertaining to the suit property. In the absence of any evidence of illegality, I see no just cause to interfere with the respondents' right to ownership of the suit property.
63. To constitute a breach, a petitioner must demonstrate with a degree of precision the provisions breached, the breach and the manner in which the provisions were breached. In the case of Anarita Karimi Njeru v Republic [*supra*] cited by the parties herein, the court expressed as follows; -
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that



justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

64. The petitioner mentioned articles which they claimed to have been infringed as 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 40, 43, 47, 52, 56, 60, 61, 63, 64, 67, 68, 69 and 258 of the [Constitution of Kenya, 2010](#). Articles 27, 28 and 29 guarantee the right to equality and freedom from discrimination, the right to human dignity and the right to freedom and security of a person. Article 40 guarantees the right to property. 43 the right to social and economic rights and 47 the right to fair administrative action. Save for laying out these provisions, the petitioner did not give any evidence as to how each of the respondents violated these rights. for instance, the petitioner alleged that some of its members were being subjected to degrading treatment contrary to articles 27, 28 and 29, to wit, arbitrary arrests and being drugged on mud. There was however no evidence to this effect. The petitioner did not name any victims or perpetrators of those acts.
65. The petitioner or the members of its communities, have failed to demonstrate their interest in the suit property therefore I am not convinced that their rights under articles 40, 43 and 47 were violated.
66. I have considered the petition, submissions by counsel and find that the petitioner did not have and *locus standi* to institute this petition in the first place. It is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 10<sup>TH</sup> DAY OF JULY 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

