



**Murema Farmers Company Limited v Mwai Company Limited & 2 others
(Petition 5 of 2018) [2023] KEELC 20668 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

PETITION 5 OF 2018

A OMBWAYO, J

OCTOBER 5, 2023

BETWEEN

MUREMA FARMERS COMPANY LIMITED APPLICANT

AND

MWAI COMPANY LIMITED 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

DISTRICT LAND REGISTRAR NAKURU 3RD RESPONDENT

JUDGMENT

Introduction

1. Murema Farmers Company Limited (hereinafter referred to as the petitioner) commenced this suit vide a Petition dated 24th April 2013 and amended on 2nd May, 2013. In the amended Petition, she avers that to be a limited liability company with its offices at Subukia and it is a registered company under the company act CAP 486 Laws of Kenya and that she is the legal owner of all that parcel of land known as L.R No 10120/1 and No 10120/2 Subukia formerly known as L.R No 10120 Subukia having purchased the said parcel(s) of land vide a sale agreement dated 23rd June, 1971. The Petitioner contends that the 1st Respondent herein in collusion with the 2nd and 3rd Respondent fraudulently obtained title deed in relation to L.R No 10120/1 Subukia and No 10120/2 Subukia respectively and that the 1st Respondent used all means available to destroy the Petitioner's documents in relation to the parcels of land afore-quoted. The Petitioner avers that the 1st Respondent on having destroyed the Petitioner's document, it proceeded to unceremoniously evict the bona fide members of the 1st Petitioner out of the parcel of land aforequoted (sic) namely L.R No 10120/1 Subukia and Subukia L.R No 10120/2. The Petitioner also avers that the Petitioner's claim was well provided and exhibited in the judgement delivered in the Nakuru High Court Civil Case No 77/2009 in which case the High Court could not grant the Petitioner Judgement in its favour due to limitation of time as spelt out in



section 7 of the Limitation of action Act. The Petitioner further avers that due to the 1st Respondent's act, the Petitioners point of refuge and point of reference as a matter of enforcing its rights is via this petition. The Petitioners prays that it be declared and ordered that:

- a. The Petitioners are the rightful and legal owners of all those parcels of land known as L.R No 10120/1 and No 10120/2 Subukia.
 - b. The 2000 acres 2011 acres in relation to L.R No 10120/1 and No 10120/2 be restored to the Petitioner.
 - c. The 2nd and 3rd Respondent be compelled to cancel and take out fresh title deeds in the names of the Petitioner herein.
 - d. The Petitioners fundamental rights and freedom spelt out in Article 22, 23, 40 (3) (a) (b) (i), (ii), 4, 165 and 262 (19) were infringed.
 - e. A perpetual injunction restraining the Respondent herein either by itself, its servants and/or agents from taking possession, subdividing, allowing and/or disposing all those parcels of land known as L.R No 10120/1 and No 10120/2 Subukia.
 - f. The costs of this petition be awarded to the Petitioner.
 - g. Such other orders as the honourable court may deem fit.
2. The 1st Respondent filed an Answer to the Petition and amended Petition that was received by the Court on 16th December, 2013. The 1st Respondent states that that the Applicant has not exhibited any proof to demonstrate that it is a limited liability as alleged and puts the applicant to strict proof. The 1st Respondent also states that none of the plots known as LR No 10120/1 Subukia and L.R No 10120/2 Subukia both formerly known as L.R No 10120 Subukia have at any time been owned by the alleged Applicant and the 1st Respondent puts the Applicant to strict proof thereof. The 1st Respondent avers that there does not exist any land sale agreement entered into on 23rd June 1971 to dispose of the land to the Applicant and the 1st Respondent puts the Applicant to strict proof thereof. The 1st Respondent denies the contents of the Petition that allege acts of fraud and destruction of documents which are alleged to have belonged to the Applicant as there are no particulars of fraud and destruction of documents to support the allegations raised.
3. The 1st Respondent avers that the Applicant raises mere allegations and has failed to substantiate all that it has alleged as no particulars have been pleaded hence there is no claim that can be sustained as the magnitude of the evictees are not demonstrated. The 1st Respondent admits that there was a case in the High Court of Nakuru H.C.C.C 77 of 2009 filed by the Applicant against the 1st Respondent but was dismissed and the Applicant has not appealed the said judgement and it now brings this Petition and amended petition as an around about way of reviewing the said judgement to validate an already spent cause and this Petition and amended petition should not be sustained.
4. The 1st Respondent avers that the Applicant by its claim seeks to give credence to a situation that has been disposed of by law and the Petition and amended petition should be dismissed with cost as the facts alleged therein to support the prayers sought do not render the much needed credibility. The Hon Attorney General filed a Notice of Appointment of Advocates dated 12th February, 2014 appearing for the 2nd and 3rd Respondents.



5. On 26th January, 2021, the 3rd Respondent filed a response to the Petition and it denies each and every allegation contained in the Petition. The 3rd Respondent denies that the Petitioner is the legal owner of LR 1020/1 and 1020/2 Subukia and puts the petitioner to strict proof thereof. The 3rd Respondent denies the claim of collusion in toto and puts the Petitioner to strict proof. The 3rd Respondent states that it shall seek an opportune time to move the court to strike out the instant petition as the same is incompetent by virtue of being res judicata. The 3rd Respondent prays that the Petition be dismissed with costs to the 3rd Respondent.

Applicant's Evidence

1. The Petitioner produced the documents attached to his list of documents dated 27th February, 2020 as follows;
 - a. Certificate of Incorporation Murema Farmers Company Limited.
 - b. Change of Name, Form 19 and Annexure
 - c. Minutes of the meeting of 2019 and 2018 annexures and list of members
 - d. Land rent payment 16/6/2015
 - e. Provincial C.I.D Headquarters letters to Murema Farmers Company Limited
 - f. Last page of sale agreement signed by Oswald Vere Hodge and Peter Muchene Ndegwa
 - g. Letter by Kenya Anti-Corruption Commission
 - h. Letter dated 8th October 1974 to the registrar of Companies
 - i. Letter dated 26th October 1974 by the Registrar in response to the 1st respondent letter
 - j. Initial memo dated 3rd January, 2006
2. During the hearing of the Plaintiff's case, Robison Peter Ndegwa testified as PW1. It was his evidence that he is a peasant farmer and the chairman of the Plaintiff company. He testified that the company has filed the present petition. He testified that he swore the affidavit in support of the amended petition and also swore a supplementary affidavit on 9th September, 2022. PW1 testified that he filed a bundle of documents dated 27th February, 2022 and wished to rely on his sworn affidavits and the bundle of documents and prayed for orders as per the amended petition. PW1 was cross-examined by the counsel for the 1st Respondent and he testified that at the present time he resides in Subukia location at Kihoto Farmers and has resided at Kihito farmers since 1974.
3. It was PW1 testimony that he was the founder chairman of the Petitioners company and the company was registered in 1974 and the original certificate is not with him. He testified that it is one of the documents that was taken away. He testified that he was born in 1940 and went to school up to the equivalent of present day Standard 8. He also testified that he went to Kiambu-Gikambura.
6. He testified further that the company Murema Farmers Company Limited was land buying company and after the incorporation the board members were himself, Solomon Mugui Muchonde, Crispin Jogo Kiongo (treasurer), David Arap Tererer (Secretary), Philip Ndegwa (Vice- Secretary), Simon Karuiki Kiume, Mungai Njomo & Serem Arap Chuma. He testifies that all board members who started the company other than himself are dead. That they were collecting money and banking at KCB-Nakuru and he does not have any bank documents as they were taken by the persons who took the land. That a new group was formed (New Kihang'a Farmers Co) and the new group had their



own board and this group is the one which withdrew their money in the bank account and they raised a complaint but did not get anywhere. He referred to minutes of meeting of 19th November, 2019 annexed to bundle of documents and at Agenda 11 there is change of name from New Kihanga Farmers Co Ltd and the resolution to change was not adopted. It is his testimony that the New Kihanga Farmers Co Limited were using their registration certificate. He testified that Julius Maina (now deceased) was the secretary of New Kihanga Farmers Company limited and the changes were about the year 1975. He testified that they knew about the changes in 2019. That Murema Farmers was changed to New Kihanga Farmers Co (1977) Limited as per the change of name filed in the bundle of documents. He was shown registrar's search dated 9th March, 2022 which shows Murema Farmers Company Limited is a private company with one director John Mwangi Njambi and stated that Murema Farmers Company Limited was still there. He could not recall what the former president directed in 1994 regarding dissolution of companies. He testified that by 1994, they had not gotten the land and therefore they could not settle their members. They had paid the money for purchase of the land to Dagamarose in 1971 and he is one of the persons who signed the sale agreement. He referred to the jurat of the agreement annexed to the bundle of the petition indicating the persons who signed the agreement and the first page of the agreement and the jurat appears were typed differently and the font size is different. According to PW1 testified the Jurat page was by way of typewriter whereas the first page is computer generated. PW1 also testified that they executed the sale agreement at the offices of Dagamorose Nairobi and they have 600 shareholders. He testified that the list attached in the bundle of documents shows 349 members and they have a member register but have not issued any share certificate. He testified that the annexed list shows the active members of Murema Farmers Company limited. According to the witness, some of the original members have died and their children have stepped into their shoes and PW1 referred to a letter dated 22nd September, 2004 and states that the letter indicates the documents were taken by the person who had purchased the land and the letter does not indicate what documents were taken. He testified Muchene is also his name and that Murema Farmers never got title to the land. It was his testimony that their land was taken in 1974 and that was when the documents were also taken and they were evicted from the land about 1975 or thereabout.

7. PW1 was cross examined by counsel for the Attorney General and he explained that they bought the land in 1971 from a settler and had a sale agreement which he exhibited. He confirmed that they did not carry through the process of sale to transfer and they had not gone to the land board as their documents were taken in 1974 by the 1st Respondent's agent.
8. PW1 was reexamined and he testified that the documents were taken forcibly from their office by the (Criminal Investigations Department) CID and they later indicated the documents were taken by the 1st Respondent. PW1 testified that they did not have the completion documents to enable them to register the transfer and it has taken them this long to sort out the matter because the person involved was a powerful person in government and they have complained to Ardhi house, (Kenya Anti-Corruption Commission) KACC and other offices. PW1 stated that he cannot explain how the company changed to New Kihanga Farmers Co Ltd and he was in custody when the changes were done. He also stated that the 1st Respondent had wanted to have their company deregistered but the registrar declined. PW1 explained that their company was intended for purchase of land to settle their members and the deceased members in the company are replaced by their children. He confirmed that they paid money for the purchase price of Ksh 400,000/= and the 1st Respondent has never shown how he purchased the property. He stated that he got the agreement from Ardhi House and both names Robinson Peter Ndegwa and Peter Muchene refer to him. On 9th December, 2021 after PW1's testimony, the Court directed that the witness summons be issued to the Registrar



of companies to attend court to produce records relating to the Petitioner and the Attorney General was given leave of 60 days to file any documents that he may deem appropriate.

1st Respondent's Evidence

9. The 1st Respondent produced its further list of documents dated 27th January, 2021 as follows;
 - a. Copy of Certificate of Incorporation
 - b. Copy of letter to Murema Farmers Company limited dated 9th March, 2020.
10. On 8th March 2023, DW1 testified that he is a representative of Mwai Company Limited and his name is James Mwai Mathenge. He has been a director for over 20 years and the company is registered and he has authority to represent the company and he produced that authority as 1st DEX 1 (a-d) and the certificate of incorporation as 1DEX 1 (e). It was his testimony that he knows the Petitioner when they came to court and this is not the 1st time they have claimed against him. He testified that they claimed in August 2006 and they went to the land tribunal and goes on to produce exhibit 1 DEX 2.
11. DW1 testified that he was taken to court by a group of individuals and they were claiming adverse possession and they were fourteen and the case was dismissed for non-prosecution. He testified the case was 162 of 2006 and produces exhibit 1 DEX-3. DWI also produced the judgment by Justice Omondi as exhibit 1DEX 4 and testified that the parties in all matter are related and the land belongs to Mwai Ltd and the land is known as LR No 10120/1 and 10120/2 and he has copies of title 1DEX 5a and 1 DEX 5b.
12. It was his testimony in examination in chief that exhibit 1st DEX 5 (a) represents 365.6 Ha and 1st DEX 5 (b) represent 430.4 Ha. He testifies that they produced the land from sides farm ltd and the two parcels were not acquired at the same time and that the Petitioners are making false allegations and there is no signature for the farm and there have never been any. He testifies that in 1974, he was in school in O- levels and he found Mwai ltd owning the land.
13. He did due diligence and when he was taken to court, he did a search of the company and found that the company Munene F.C Ltd did not exist. Surprisingly in March 2020, it was registered as a company and it was incorporated in March 2020. It was his testimony that John Mwangi and Njambi were the Directors and John Mwangi is not amongst the members on certificate. DW1 produced the documents as DEX 7 (a) and 7 (b) when the petition was filed the company did not exist. DWI testified that he has met John Mwai and he found out that John Mwai exists and he met him in Nairobi.
14. According to the witness, the Petitioner is not the owner of the land as Mwai Ltd is the registered owner. The land does not measure 2000 acres, it measures 363.6 Ha and translates to 898.45 acres. He also testified that the 2 parcels measures 430.4 Ha which translates to 1063.52 acres and they do not compare with the Plaintiff's claim. He testified that is not what Mwai owns and his title should not be cancelled. He testified that they have no connection with his title and the Petition to be dismissed with costs.
15. DW1 was cross examined by the counsel for the Petitioner and he stated that he does not remember when he became a director and when the matter was taken by the tribunal, he was a non-executive director. DW1 explained that the member was his father Isagla Mwai Mathenge and Grace Gacheke Mwai. He confirmed that his father was a provincial commissioner in the Rift Valley province and his father was a peaceful person in government. He stated that he cannot conclude that the Company existed but the letters show that the company was in existence.



16. DW1 stated that Mwai bought the company and he does not know that there is a sale agreement and he does not believe that it is slightly over 400,000/= and this was in 1973-1974 when he was in school. He stated that all his documents are held by the bank.
17. DW1 was shown exhibit 1 DEX 5 (a) and the land is 383.6 acres. He explained that he made a mistake and all documents were presented to the trustee and the land was subdivided. He stated that all the documents were not in his possession and they are with standard chartered bank and he does not have them.
17. DW1 explained that he is aware of the complaint to the Kenya Anti-Corruption Commission (KACC) and on 19th October, 2005, his father was in the Intensive Care Unit (I.C.U). He also testifies that the information came from the police and it was signed by PCIO.

Issues for Determination

18. On 8th March, 2023, the Court directed that the Petitioner to file and serve submissions within 21 days and the Defendants to do likewise within 21 days upon service. The Petitioner filed submissions on 3rd July, 2023
19. The Petitioner submits that the 1st Respondent illegally, fraudulently and through a corruption scheme acquired the mother title to the two properties formerly known as L.R 10120 Subukia. The Petitioner submits that the 1st Respondent is not entitled to the rights under Article 40 of *the Constitution*.
20. The Petitioner contends that pursuant to Article 21 (3) of *the Constitution*, all state organs and public officers including this honourable Court have an obligation to address the needs of vulnerable groups who include older members of society. The Petitioner submits it's a company incorporated by a group of vulnerable people in 1971, all older members of the society, some of whom have (sic) since during the trial of this Petition.
21. The Petitioner believes that its members stand to risk the investments which they made at their prime age in the hope of their children enjoying the fruits of their hard labour and oppression in the hands of colonialists. It is the Petitioner's submission that these people represented by the Petitioner suffered great injustice in the hands of the new power holders after independence and it is the obligation of this court to address this oppression.
22. The Petitioner relies on Article 22 (3) (b) and (d) of *the Constitution* on the enforcement of the Bill of Rights and submits that this Court is guided by these rules in determining the current dispute to prevent serious miscarriage of justice and submits that despite the events that are the subject matter of this suit arising between 1971 and 1975, and in spite of the Petitioner not having initiated the action until 2009 when the first suit was filed at the High Court in Nakuru, this Court has an obligation to observe the rules of natural justice and not unreasonably deny the petitioner the prayers it so earnestly seeks simply on the basis of lack of initiative between 1975 and 2013.
23. The Petitioner submits that this Court will recognize that the founding member of the 1st Respondent, as its name suggests, is the late Isaiah Mwai Mathenge, a powerful provincial commissioner in the Jomo Kenyatta government and Daniel Moi's government and the petitioner had no means to access justice until after a change in government and political circumstances.
24. The Petitioner relies on Article 40 (6), Article 21 (2) and Article 68 of *the Constitution*. The Petitioner also relies on Section 26 (1) of the *Land Registration Act* No 3 of 2012 and submits that whereas the 1st Respondent has the title to the suit properties, the titles issued therein were acquired through



- fraudulent misrepresentation, illegally, unprocedurally and through a corrupt scheme which the 1st Respondent was a party and its founding member, the late Isaiah Mwai Mathenge instigated.
25. The Petitioner relies on the judgement in *Merit Development Limited v Lenana Investment Limited & 2 others* [2018] Eklr and further admits that having alleged fraud in the acquisition of the title to the suit properties, it has the obligation to prove the fraud.
 26. The Petitioner relies on the cases of *John Kirianyoni v Paul Ntomiaka M' mujuri* [2021] Eklr and *Christopher Ndaru Kagina v Esther Mbandi Kagina & another* [2016] Eklr
 27. The Petitioner submits that the decision of Justice Omondi in High Court civil suit 77 of 2009 found that the 1st Respondent had illegally and irregularly acquired the suit properties and whereas the learned judge did not make an order in favour of the Petitioner due to the statute of limitations, the judge had the opportunity to analyze the evidence presented by the parties and concluded that the Petitioner had demonstrated with sufficiency that the 1st Respondent was not entitled to L.R No 10120 Subukia as the title was acquired fraudulently.
 28. The Petitioner submits that there are no transfer instruments availed by the 1st Respondent showing how L.R No 10120 Subukia devolved from S.O.V Hodge to the 1st Respondent. It is the Petitioner's submission that during cross examination the 1st Respondent's witness who is the son to Mr. Mathenge did not produce any sale agreement or evidence of payment to the farm owner and he could not tell the Court how much the 1st Respondent paid for the land. The Petitioner asks how the 1st respondent acquired the land and submits the answer can only be that it was through an illegal and corrupt scheme that cannot be protected by law.
 29. The Petitioner also submits that it has produced a copy of the sale agreement between Mr. S.O.V Hodge's Sidai Farm Limited and the Petitioner duly signed and witnessed by the late Francis Da Gama, an advocate dated 23rd June 1971 and the Petitioner did provide evidence of payment which was made through the Petitioner's account that was maintained with KCB Bank account number 20055582678.
 30. The Petitioner submits that through its representative Peter Ndegwa, has given an uncontroverted account of how they were unlawfully detained at Subukia Police Station at the behest of Isaiah Mwai Mathenge, the founder of the 1st Respondent, Mr. Ndegwa led the same evidence in the civil suit as in this petition that the transfer documents duly executed by the transferor, Mr. S.O.v Hodge, were confiscated by the police officers while he and his members were in detention.
 31. The Petitioner submits that the 1st Respondent representative James Mwai Mathenge only rebuttal to this testimony was that he was a young person when the said events occurred and he denied having knowledge but does not deny that those events occurred.
 32. The Petitioner submits that they have produced a letter by Isaiah Mwai Mathenge, the 1st Respondent patriarch dated 8th October, 1974 addressed to the then Registrar of Companies seeking to have the Petitioner deregistered and suggesting that its chairman Mr. Peter Ndegwa, and other directors were defrauding the public selling portions of the suit properties and the patriarch claimed that he had bought the suit property in 1973 from Mr. and Mrs. S.O. v Hodge.
 33. The Petitioner submits that the letter raises pertinent questions as to why the 1st Respondent's patriarch would seek to have the Petitioner de-registered rather than institute a suit in court to stop the petitioner from defrauding the public as alleged and this is tacit evidence that the Petitioner was lawfully registered at the time of purchase.



34. The Petitioner submits that indeed the registrar of companies wrote back to the 1st Respondent's patriarch on 26th October 1974 advising him that if at all there were allegations of fraud, he had the liberty to lodge a criminal complaint against the petitioner and its directors and yet no action was taken against the petitioner by the 1st Respondent's patriarch.
35. The Petitioner also submits that Justice Omondi in the civil suit rightfully questioned the 1st Respondent's title and found that if indeed the 1st respondent lawfully acquired the property from S.O v Hodge, the 1st Respondent ought to have produced the transfer documents including the sale agreement, transactional documents, transfer instrument signed by the vendor and yet none of these documents exist in the land file with the 3rd Respondent and the 3rd respondent did not lead any evidence to shed light on this matter.
36. The Petitioner submits that the Petitioner has submitted that it has produced correspondences between itself and the Directorate of Criminal Investigations in which the C.I. D officer named Amos N Chege wrote on 22nd September, 2004 acknowledging all the transfer documents seized had been taken, stating that;Your clients are aware of who took the documents. And that the letter confirms that the 1st Respondent's patriarch took the documents which is further proof of fraud propagated by the 1st Respondent patriarch.
37. The Petitioner submits that upon the Petitioner alleging and proving that no documents of transfer existed between Mr. S.O v Hodge and the 1st Respondent or its patriarch and upon proving that the patriarch acquired the property illegally through a corrupt scheme, the burden of proof shifted to the 1st Respondent to prove that it acquired the title legally.
38. The Petitioner relies on Section 109 of the *Evidence Act*, Cap 80 and the case of Esther Kabugi Njuguna v Martha Chebet & 3 others [2020] Eklr and submits that the 1st Respondent's witness did not deny any of the allegations against his father who founded the family holding company, Mwai Limited.
39. The Petitioner submits that the issue in contention is that the certificate of titles issued on the suit properties were acquired fraudulently and through a corrupt scheme and it is not enough for the 1st Respondent to produce the same titles in contention as evidence of ownership and the 1st Respondent had the obligation to produce all the transactional documents relating to the transfer showing how the transaction was carried out and none of these have been forthcoming.
40. The Petitioner submits that the 1st Respondent has waved to this Court the titles and claimed that the fact they lived on the properties for more than 40 years without disturbance then their titles are indefeasible and they urge the court to be guided by the Supreme Court's recent decision in petition No 8 (E010) of 2021 Dina Management Limited v County Government of Mombasa & 5 others [2023] (unreported)
41. The Petitioner also urges this Court to be guided by the foregoing and the 1st Respondent cannot allege that it was a bona fide purchaser and that it did not know of the Petitioners claim and the letter by the patriarch addressed to the Registrar of Companies discredits that.
42. The Petitioner submits that the evidence produced showing fraudulent acquisition of the suit properties puts the allegations beyond reasonable doubt. It is the Petitioners submission that the 1st Respondent is excluded from claiming the right to property pursuant to Article 40 (6) of *the Constitution* and Section 26 (1) (a) and (b) of the *Land Registration Act*, 2012.
43. The Petitioner submits that it is entitled to the right to property under Article 40 (1) of *the Constitution* which has been breached by the 1st Respondent's unlawful and fraudulent acquisition.



44. The Petitioner relies on the case of Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware limited & another [2018] Eklr and submits that the obligation of this court is to ensure that the right of the lawful and rightful proprietor of the property does not suffer the injustice of losing their properties simply because someone else is holding an illegally acquired title.
45. The Petitioner relies on Article 23 (3) of *the Constitution* of Kenya and submits that the petitioner is entitled to a declaration that it has the right to the suit properties as subdivided (formerly known as L.R No 10120 Subukia) and a permanent injunction barring the 1st Respondent from entering, trespassing or continuing to stay on the suit properties.
46. The Petitioner submits that it has discharged its burden of proof showing that it entered into a sale agreement and paid for the acquisition of the suit properties by adducing evidence of the sale agreement dated 23rd June 1971 duly executed by Mr. Stephen Oswald Vere Hodge for the vendor and Peter Muchene Ndegwa, Njogo Kiongo and David Arap Terer for the purchaser. The sale agreement was witnessed by deceased advocate, Mr. Francis Da Gama of Francis Da Gama & Co Advocates.
47. The Petitioner relies on Section 29 of the repealed Registration of Titles Act, Cap 281 and submits that the 3rd respondent did not produce any transfer instrument executed by Mr. S.O. v Hodge and lodged with the land registry in Nakuru which would have removed any doubt on the purported sale agreement between Sidai Farm Limited and the 1st Respondent. The Petitioners also submit that the 1st respondent also claims to not have any record of the transfer instruments conferring it title to the mother property.
48. The Petitioner therefore submits that it is entitled to the right to property under Article 40 (1) of *the Constitution*.
49. The Petitioner submits that the 1st Respondent is not entitled to protection under Article 40 pursuant to Article 40 (6) of *the Constitution* and submits that the appropriate remedies in the circumstances to rectify the grave and overdue mistake on the land register is to order for a cancellation of the certificates of title issued to the 1st Respondent and a rectification of the land register to reflect the name of the Petitioner as the owner of the property.
50. The Petitioner further submits that it is entitled to an order directing the Deputy Registrar of this Court to execute any instrument required by the 2nd and 3rd Respondents to effect the changes. The Petitioner relies on Section 80 of the *Land Registration Act*, 2012 and the case of Republic v Chief Land Registrar & another Ex-parte Yosabia Kerubo Manyura [2018] Eklr and submits that this court is uniquely placed to ensure that the petitioner and its members finally get access to justice after 52 years of waiting to enjoy the fruits of their investment in the suit properties.
51. The Petitioner submits this Court in exercising its judicial authority to ensure that justice is done irrespective of status and not delayed. The Petitioner submits that its moment of justice has been delayed for half a century and no amount of damages can help them recover the lost time and only an order made under Section 80 (1) of the *Land Registration Act* would do so.
52. The 1st Respondent filed its submissions on 8th August, 2023 wherein he submits that the it is clear that the name purportedly used in this Petition does not belong to the Petitioner so therefore it does not have capacity to present this Petition. The 1st Respondent relies on the judicial decision of **Kipsiwo Community Self Help Group vs The Attorney General and 6 others [2013] eklr**. The 1st Respondent submits that it produced in support of its evidence exhibits 5 (a) and 5(b) titles to the suit property whereas the Petitioner only claimed ownership based on an alleged sale agreement. She submits that the 3rd Respondent did not place any document before this Honorable Court to show that



it did recognize the title that the 1st Respondent holds to date. It is the 1st Respondent's submission that the 3rd Respondent in its response to the Petition at paragraph 4 of the same denies that the Petitioner is the owner to the two parcels. The 1st Respondent relies on Section 26 (1) of the [Land Registration Act](#) No 3 of 2012 and submits that in the course of the entire hearing of the Petition by viva voce evidence there was no evidence produced to demonstrate that the 1st Respondent held both titles being the product of any fraudulent acts as particularized in the exception of section 26 (1) of the [Land Registration Act](#) No 3 of 2012.

53. The 1st Respondent submits that neither has the Petitioner demonstrated it ever came into occupation or use of the lands in question. It submits that the Petitioner has not also put before court anything to show that they were ever registered as owners of the parcels in question and that the Petitioner alleges fraud which it did not make any particulars of hence it has failed to prove and the authorities it has relied on clearly state that fraud must be strictly proved. The 1st Respondent relies on the judicial authority of *R.G Patel vs Lalji Makanji* 1957 EA
54. The 1st Respondent submits that in the circumstances therefore, the first prayer to the Petition should fail and be dismissed with costs as nothing has been placed before court to demonstrate the right to own the land parcels L.R No 10120/1 and L.R No 10120/2.
55. The 1st Respondent submits that in the event that a decision is rendered that the Petitioner does not exist, then the Petition will instantly fail. The 1st Respondent also submits that if this Honourable Court should find that the provisions of Section 26 (1) of the [Land Registration Act](#) adequately address and point to the rightful owner to the two parcels of land that shall be in favour of the 1st Respondent.
56. The 1st Respondent submits that in the circumstances, the Court will not be obliged to restore to the Petitioner land it has never taken possession of nor even owned. It submits that on the prayer that the 2nd and 3rd Respondent to be compelled to cancel registration of the suit property to the 1st Respondent is not supported in any proven way so to direct. The 1st Respondent further submits that there is no basis for that.
57. It is also the 1st Respondent's submission that on the prayer for perpetual injunction the Petitioner has not in any way demonstrated in any form whatsoever that the 1st Respondent intends to subdivide dispose the parcels in question. The 1st Respondent also submits that with regards to possession, the 1st Respondent has had possession from 1974 and 1984 of the two parcels of land to date and the parcels in question are lands under the 1st Respondents productive use.
58. The 1st Respondent submits that on the question of the Petitioners Fundamental Rights and Freedoms under Articles 22, 23, 40 (3) (a) (b)(i)(ii) 4, 165 and 262 (19) of [the Constitution](#) of Kenya, Article 22 just provides that a person has a right to institute an action in a court of law. Article 23 proffers jurisdiction to the High Court to protect the bill of rights.
59. The 1st Respondent also submits that Article 40 (3) (a) (b) provides what the state is not to do in relation to one right in property. Article 40 (4) talks of compensation to persons who may be deprived of their land. The 1st Respondent submits that the Petitioner in its amended petition did not outline any particulars of whatever violations they allege to have been occasioned against them by the 1st Respondent and that this Petition does not meet the threshold of a Constitutional Petition. They rely on the judicial decision of *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* Civil Appeal 290 of 2012.



60. The 1st Respondent submits that the Petition before the honorable court greatly falls short of attaining the threshold of a constitutional petition and the court should find in favor of the 1st Respondent and dismiss the Petition with costs.
61. The 2nd Respondent and 3rd Respondent did not file any submissions.

Analysis and Determination

62. It is my considered view that the main issue arises first for determination is whether the petitioner has capacity to lodge the petition. The 1st Respondent contends on whether the Petitioner exists as an incorporated company and whether it has capacity to lodge this Petition. The 1st Respondent submits that reference to the 1st Respondents exhibits 7 (a) and 7 (b) it is clear that the name purportedly used in this Petition does not belong to the Petitioner so therefore it does not have capacity to present this Petition. The Court notes that in the Petitioners List of Documents dated 27th February, 2020; the Petitioner has adduced a change of name and a CR 19 Form which indicates that Murema Farmers Company Limited was changed to New Kihanga Company Limited with the sanction of a special resolution and approval of the Registrar of Companies. The Certificate of Change of name is dated 5th August, 1977. The Court notes that there is a CR 19 form adduced by the Petitioner/ Applicant addressed to the Registrar of companies and it refers to Murema Farmers Company Limited/ New Kihanga Company Limited.
63. The 1st Respondent questions the capacity of the Petitioner by adducing both the Certificate of Incorporation of Murema Farmers Company Limited and a correspondence letter from the Registrar of Companies dated 9th March, 2020. According to the letter, Murema Farmers Company Limited as of 9th March, 2020 had only one director or shareholder who is listed as John Mwangi Njambi.
64. During the hearing of the Petitioners case PW1, Robison Peter Ndegwa upon cross examination referred to minutes of meeting of 19th November, 2019 annexed to bundle of documents and at Agenda 11 where there is change of name from New Kihanga Farmers Co Ltd and the resolution to change was not adopted. He explained that the New Kihanga Farmers Co Limited were using their registration certificate. He confirmed that Julius Maina (now deceased) was the secretary of New Kihanga Farmers Company limited and the changes were about the year 1975. He explained that they knew about the changes in 2019.
65. PW1 also confirmed that Murema Farmers was changed to New Kihanga Farmers Co (1977) Limited as per the change of name filed in the bundle of documents. PW1 was shown registrar's search dated 9th March, 2022 which shows Murema Farmers Company Limited is a private company with one director John Mwangi Njambi and his response was that Murema Farmers Company Limited was still there.
66. This Court notes that the Petitioner has adduced the Minutes of the Meeting of 2019 annual general meeting held on 19th November, 2019 where at Minute 11.0 it states:

“The members were informed that the previous leadership had changed the name of the company without the approval of members. On proposal by John Waweru Chege and seconded by Peter Wathiga, it was unanimously resolved that the name “Murema Farmers Company Limited” be retained for the purposes of originality and identification.”
67. Based on the evidence adduced, this court notes that the Petitioner stopped at that point and never went ahead to regularize the process at the Registrar of Companies. The Court also notes that in the



referenced Nakuru High Court Civil Case No 77/2009 judgment, the court expressed itself as follows at page 12 paragraph 2:

“Whether the Plaintiff was registered as a Company or not, and whether it possessed the legal capacity to transact, does not in my view negate the fact that various individuals got together in the name of Murimi with a view to purchasing parcel No LR 10120 whose certificate was described as No 16688 of 1st August, 1965.”

68. This Court takes cognizance of the fact that this instant petition relates to violation of the constitutional rights. The identity of both parties is a relevant element in substantiating a constitutional claim.

69. The Court also notes that the rules of locus standi have been greatly relaxed after enactment of *the Constitution* of Kenya 2010. The Court of Appeal in the judicial decision of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR espoused as follows: -

...this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process.

..... We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the locus standi to file the Petition. Apart from this, we argue with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*....

70. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22(3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013... “the Mutunga Rules” to inter alia, facilitate the application of the right of standing..... The rules reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated, infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of *the Constitution*.

29. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reasons of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*.”

71. This instant Petition however introduces a new dimension as the Petitioner /Applicant has come to court with a title which is not theirs. Based on the Defence Exhibit 7 a and Defence Exhibit 7 b produced by the 1st Respondent, the records from the Registrar of Companies show that one John Mwangi Njambi was a majority shareholder and director of the said company and he is not part of this Petition. The court has looked at the list of members produced by the Petitioner in its list of documents dated 27th February 2020 and notes that James Mwangi Njambi is not listed as a member.



72. Further, in the judicial decision of *Kipsiwo Community Self Help Group v Attorney General And 6 Others* [2013] eKLR, it was espoused:

“I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because *the Constitution* allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”

73. Taking cue from the above judicial decision, legal capacity is paramount in filing a constitutional petition and in this case the Petitioners have failed to demonstrate that they are indeed registered as Murema Farmers Company Limited. This Court also takes guidance from Article 22 and 260 of *the Constitution* of Kenya 2010.

Article 22 of *the Constitution* is drawn as follows:

- “(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
- (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—
 - (a) the rights of standing provided for in clause (2) are fully facilitated;
 - (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
 - (c) no fee may be charged for commencing the proceedings;



- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
 - (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.
- (4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

Article 260 of *the Constitution*, which is the interpretative section, defines “person” as follows:

“person” includes a company, association or other body of persons whether incorporated or unincorporated”

74. Given the circumstances, I have no option but to strike out the petition as having been filed without capacity. Ultimately, the Petition is struck out with costs. it is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF OCTOBER, 2023

A O OMBWAYO

JUDGE

In the presence of:

Anyega Ondieki for the petitioner.

Mr Mbeche for the 1st Respondent.

Mr Rotich for the 2nd and 3rd repondents

