



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CONSTITUTION PETITION NO. E013 OF 2021

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS AS ENshrINED UNDER ARTICLES 1, 10, 19, 21, 22,
23, 24, 40, 47, 94, 95, 114, 124 AND 125 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 3 OF 2012

AND

IN THE MATTER OF THE DECLARATION OF NGAREMARA/GAMBELLA ADJUDICATION AREA

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF SECTIONS 107 – 120 OF LAND ACT 2012

AND

IN THE MATTER OF LAND ADJUDICATION ACT CAP 284

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

PRACTICE AND PROCEDURE RULES

BETWEEN

JOSHUA KATHAWE1ST PETITIONER

GOFFREY L. KARARI2ND PETITIONER

JOSEPH KIRABUNU 3RD PETITIONER

ANDREW K. KIOLINGO 4TH PETITIONER

JAMES K. IGWETA 5TH PETITIONER

ROSE KINYA TOMA	6 TH PETITIONER
STEPHEN MUNGANIA	7 TH PETITIONER
FLORENCE K. KAUYURI	8 TH PETITIONER
STEPHEN LIMBERE	9 TH PETITIONER
JULIUS KARITHI	10 TH PETITIONER
GODFREY MITHIKA	11 TH PETITIONER
JULIUS KABIRA	12 TH PETITIONER
FRANCIS MWENDA	13 TH PETITIONER
GERALD TULATIA	14 TH PETITIONER
JOHN M'ITABARI ELONGI	15 TH PETITIONER
STEPHEN LAIBUNI	16 TH PETITIONER
JOHN KUBAI	17 TH PETITIONER
JAMES M'IMANYARA	18 TH PETITIONER
MERCY MAKENA	19 TH PETITIONER
M'MAERIA IMAU	20 TH PETITIONER
OSMAN DIMA DUBA	21 ST PETITIONER
ALIW HASSAN ALI	22 ND PETITIONER
ABDI M. JUKA	3 RD PETITIONER
HUSSEIN GOLICHA GODANA	24 TH PETITIONER
ADAN HASSAN	25 TH PETITIONER
ADAN BIDO KULA	26 TH PETITIONER
ADAN GALMA WAQO	27 TH PETITIONER
MOHAMED ALI ILMI	28 TH PETITIONER
ADAN MAMO ELEMA	29 TH PETITIONER
JOEL MUTUKU NDUNDA	30 TH PETITIONER
SHUKRI DENG KARA	31 ST PETITIONER
MOHAMED BONAYA RACHA.....	32 ND PETITIONER
JAMILA ALI GALGALO	33 RD PETITIONER
DABASO BORU DILA.....	34 TH PETITIONER
ABEY ENOY GUYO	35 TH PETITIONER

MAHAD ADAN SHONE	36 TH PETITIONER
SHARIFF MOHAMED RASHID.....	37 TH PETITIONER
BORU ABDI HASSAN	38 TH PETITIONER
ADAN GUOY KOTILE	39 TH PETITIONER
ZAINAB ROBA	40 TH PETITIONER
YUSSUF WAKO DOGO	41 ST PETITIONER
IBRAHIM KHALIF ALI	42 ND PETITIONER
HALIMA FOFLE HAYOTA	43 RD PETITIONER
HUSSEIN KURAA ADANO	44 TH PETITIONER
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SADIA MAALIM HASSAN	51 ST PETITIONER
HAJIRA HASSAN	52 ND PETITIONER
SULTANI ALI	53 RD PETITIONER
AMINA MOHAMED.....	54 TH PETITIONER
ISSACK ABDULLAHI	55 TH PETITIONER
KALTUMA MAALIM ALIOW.....	56 TH PETITIONER
ADAN AHMED	57 TH PETITIONER
MOULID ALI DIBA	58 TH PETITIONER
SOMO BORU	59 TH PETITIONER
HALAKE TADICHA	60 TH PETITIONER
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HAWA ISSAK ABDI	62 ND PETITIONER
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ABDI WARIO	71 ST PETITIONER
HASSAN ALI BILA	72 ND PETITIONER
ALI ABDI.....	73 RD PETITIONER
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YUSSUF MOHAMED GALGALO	76 TH PETITIONER
HASSAN MOHAMED	77 TH PETITIONER
ABDULLAHI MOHAMED GALGALO	78 TH PETITIONER
MOHAMED HASSAN HUSEEIN	79 TH PETITIONER
AMINA MOHAMED WARIO	80 TH PETITIONER
ADAN MOHAMED OSHOW	81 ST PETITIONER
ADEI MOHAMED OSHOW	82 ND PETITIONER
MADINA WAKO KUTU	83 RD PETITIONER
MOHAMED ABDI SHUKRI	84 TH PETITIONER
STEPHEN KUBANIA	85 TH PETITIONER
KIIYA MBEU	86 TH PETITIONER
STEPHEN GAING'A	87 TH PETITIONER
MARTIN LARUI	88 TH PETITIONER
STANLEY KARITHI	89 TH PETITIONER
MOSES MWONGELA	90 TH PETITIONER
FRANCIS MUKARIA	91 ST PETITIONER
JOHN M'ITABARI	92 ND PETITIONER
DAVID MBURUGU	93 RD PETITIONER
FRANCIS MUCHIRI ITHANG'ATHA	94 TH PETITIONER
KALAINA KACHIUKI	95 TH PETITIONER

JOSEPH M'TUAILANDU	96 TH PETITIONER
LUCY KANANU.....	97 TH PETITIONER
MARTIN MUTABALI	98 TH PETITIONER
ANN GAITI	99 TH PETITIONER
HENRY MUTWIRI CHABARI	100 TH PETITIONER
SAMUEL MUTHEE	101 ST PETITIONER
M'MUTURA IKURI	102 ND PETITIONER
PETER MWENDWA	103 RD PETITIONER
MWETI NGERA	104 TH PETITIONER
M'MUIORIA M'IMALANYI	105 TH PETITIONER
JEREMIAH LINTARI	106 TH PETITIONER
M'ITABARI M'MUTEA	107 TH PETITIONER
STANLEY KILINGO	108 TH PETITIONER
JOHN M'IMUTI	109 TH PETITIONER
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JAMES KATHAWE.....	119 TH PETITIONER
PATRICK MUCHUI	120 TH PETITIONER
AGNES INO KOBIA	121 ST PETITIONER
PETER MUGAMBI	122 ND PETITIONER
REBECCA KARIMI	123 RD PETITIONER
JOYCE MAINGI	124 TH PETITIONER
CHARLES NJILATHIA.....	125 TH PETITIONER

NICHOLAS MWENA	126 TH PETITIONER
FRIDAH KARAMBU	127 TH PETITIONER
STEPHEN MURIIRA	128 TH PETITIONER
STEPHEN MBERE	129 TH PETITIONER
ANDREW KOBIA	130 TH PETITIONER
JAMES KANAKE	131 ST PETITIONER
JULIUS MURIKI	132 ND PETITIONER
DANIEL KOBIA	133 RD PETITIONER
HALLARIA MWARI	134 TH PETITIONER
MARGARET MWONJARU	135 TH PETITIONER
MOSES THAMBURA.....	136 TH PETITIONER
SAMUEL MUTHEE	137 TH PETITIONER
JAMLICK MUTUA.....	138 TH PETITIONER
DAVID MURIRITHIA	139 TH PETITIONER
JOSHUA MURITHI	140 TH PETITIONER
STEPHEN MBAABU	141 ST PETITIONER
JAMES MBIWA.....	142 ND PETITIONER
PETER MUTHEE	143 RD PETITIONER
JOSPHAT M'MWETI	144 TH PETITIONER
JOSEPH KARANKI	145 TH PETITIONER
MARTIN LARUI M'ITUMBIRI	146 TH PETITIONER
FRANCIS MUTHURI	147 TH PETITIONER
ALAN NDIRITU	148 TH PETITIONER
MWATHWANA M'ABURUKI.....	149 TH PETITIONER
PETER LABUTANI	150 TH PETITIONER
LUKE MUNGANIA INEBU	151 ST PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF LANDS	1 ST RESPONDENT
THE CABINET SECRETARY MINISTRY OF DEFENCE	2 ND RESPONDENT
THE CHIEF OF THE KENYA DEFENCE FORCES.....	3 RD RESPONDENT

THE DISTRICT LAND AND SETTLEMENT OFFICER

TIGANIA EAST DISTRICT 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

A. APPLICATION

1. The petitioners through an application dated 25.4.2021 brought the under **Rules 3 (1), 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, ArticleS 22, 23, 40 and 165 of the Constitution** pray for conservatory orders restraining the respondents and the interested parties from evicting, acquiring, alienating, disposing and in any other way interfering with the petitioners peaceful possession and occupation of the parcel of land situate in Gambella/Ngaremara adjudication area Tigania East District pending the hearing of this petition. The application is supported by an affidavit sworn on 28.4.2021 by Joshua Kathawe.

2. The grounds are that the subject land was transformed from customary land to private land ownership through the declaration of Ngaremara/Gambella adjudication section; the respondents have illegally developed part development plans, deed plans and lease title **No's 27098 and 7019** over the land claiming ownership rights; the respondents have dug a continuous trench and cordoned over 17.535 acres to keep off the petitioners from the land; the respondents are in the process of forcefully evicting and or acquiring the land; there is an alternative land for the respondents vide **Gazette Notice No. 3210 of 1977** which the respondents failed to occupy; there are extensive developments belonging to the petitioners and that the respondents are ill intentioned in illegally acquiring the land.

3. In the support of the application, the petitioners have attached annexure marked **JK "2"**, a letter dated 10.6.2009 requesting the defunct Nyambene County Council for the land and the objection thereof as **JK "3"**, copy of declaration of the adjudication section dated 11.3.2016 as annexure **JK "4"**, copy of map showing individual parcel numbers already recorded as **JK "5"**, respondents interests were also ascertained and noted as **JK "6"** as comprising 720 acres, gazette notice dated 31.10.1977 as annexure **JK "7"**.

4. Further, the petitioners rely on degazettement of the parcel the 2nd and 3rd respondents declined to take up as per Gazette Notice No. 46 of 4.2.2021 as **JK "8"**, bundle of photographs showing the continuous deep trench as **JK "9"** and a copy of map showing the respondents earmarked area of influence as **JK "10"**

B. RESPONSE

5. The 3rd respondent has opposed the notice of motion through a replying affidavit sworn by Captain Julius Meso on 28.5.2021.

6. The first reason was that Isiolo Barracks was alienated vide Gazette Notice No. 3210 of 31.10.1997 annexed as **JM "1"** based on coordinates therein.

7. Secondly, it is stated the 2nd and 3rd respondents took over possession or occupation of the land in 1970 with 78 Tank Battalion headquartered there of the armored Brigade requiring vast land for training purposes.

8. Thirdly, that the land was surveyed in 2003 following which deed plans and a subsequent lease certificate was issued in favour of the 1st respondent. He attached the same as an annexure **JM "2", JM "3" and JM "4"** respectively.

9. Fourthly, it was averred that the process of constructing high level beacons was initiated and completed in 2019 eliciting no objection from the petitioners.

10. Fifthly, he stated the 2nd and 3rd respondents were aware of the attempts by the County Government of Meru to declare an adjudication section allegedly dubbed Gambella/Ngaremara covering Isiolo Barracks land including the land titled to the 1st respondent. That they raised an objection causing suspension of the process since it was not practically and legally tenable to do so over land already reserved for public purposes and in which a certificate of title already existed.

11. Sixthly, it was averred a purported land adjudication process could be a basis of the proprietary rights of the petitioners especially where it touches on land reserved for public purposes and which was already surveyed and titled.

12. Seventhly, it was averred the trenching process was for security purposes to deter the threat of Vehicle Borne Explosives Devices (VBEDs).

13. Lastly, the 2nd and 3rd respondents aver there was no fraud in acquiring the land, the setting apart, surveying and tilling was done lawfully and procedurally hence the petitioners had no proprietary worthy protecting by way of conservatory order's since their alleged loss or damage was qualifiable and compensable in monetary terms notwithstanding the statistics given by the petitioners were not supported by any tangible evidence.

C. SUBMISSIONS

14. With leave of court, parties were directed to canvass the application through written submissions to be filed by 13.12.2021. It was only the petitioners who complied with the deadline, which submissions are dated 17.11.2021 and filed on 22.11.2021.

15. The petitioners submit they have demonstrated a prima facie case aimed at enhancing their constitutional values and objects of their rights if the reliefs are granted, and if the same are not granted, the substratum of the petition will be rendered nugatory and that it is in the public interest to grant the orders sought.

16. The petitioners rely on:-

a) **Keroche Breweries Ltd & 6 Others –vs- Attorney General & 10 Others [2016] eKLR.**

b) **County Government of Meru & another –vs- District Land Adjudication & Settlement Officer Tigania East Sub-County & 18 Others [2018] eKLR.**

c) **Olympic Sports House Ltd –vs- School Equipment Centre Ltd [2012] eKLR.**

d) **Payless Car Hire & Tour Ltd –vs- Imperial Bank Ltd [2012] eKLR**

e) **Kanorero River Farm Ltd & 3 Others –vs- National Bank of Kenya [2002] 2 KLR 207.**

D. THE PETITION

17. The application is based on the petition dated 28.4.2021. At paragraph 8, the petitioners aver they are residents and land owners of land parcels within Ngaremara/Gambella adjudication section bringing the petition on their own behalf and on behalf of residents and land owners within Ngaremara/Gambella adjudication area occupying land measuring 17.537 acres since time immemorial which is described as private/individual land.

18. It is averred the land was initially held in trust but in 1972 it was leased to Meru Ranching Cooperative which belonged to the community through the petitioners for purposes of wildlife, cultural and tourism land use and promotion now transformed into an adjudication section with effect from 2016. It is averred the land was adjudication stage and the petitioners had already ascertained their rights, which are recorded and issued with individual parcel numbers, while awaiting the determination of objection if any before issuance of title deed.

19. It is averred the 2nd and 3rd respondents with no colour of right, are claiming ownership of the entire land and have dug a deep continuous trench cordoning off over 15.535 acres so as to keep off the petitioners from accessing the land and that verbal and stern warnings had been given that they vacate the suit land immediately otherwise unknown consequence would occur to them.

20. The petitioner aver the respondents' forcefully acquired the suit land, surveyors have been deployed to demarcate the land and that all this has been done without public participation, in total disregard of the private and public institutions and developments on the suit land by the petitioners and this amounts to breach of the petitioners' constitutional and statutory rights.

21. The petitioners pray for: declaration the suit land comprising approximately 17,535 acres is private and individual land; declaration that acts of the 1st, 2nd and 3rd respondents' of forceful eviction and entry and or setting up security equipments or facilities or interference with the petitioners peaceful occupation contravenes **Article 40 of Constitution** and national values and principles and the petitioners' legitimate expectations; invalidation and nullification of the 1st, 2nd and 3rd respondents lease titles **L.R. No. 27098 and L.N No. 7019** part developments, plants and developments thereof; declaration that the actions and decisions of the 1st, 2nd and 3rd respondents in respect of petitioner's parcels of land within Ngaremara/Gambella adjudication area to move into the suit land are unconstitutional; consentatory order restraining the 1st, 2nd and 3rd respondents from evicting, entering into, remaining, acquiring, maintain possession, use occupation, alienating and or in any way interfering with the petitioners' quiet possession and enjoyment of their properties; prohibition against the intended forceful acquisition and or dealing with the petitioners' property and declaration that the process procedures and manner employed by the 1st respondent to alienate the whole of the petitioners' property in favour of 2nd and 3rd respondents is contrary to law.

E. ANSWER TOPETITION

22. In response to the petition, the 2nd and 3rd respondents have sworn a replying affidavit by Captain Julius Meso on 4.11.2021.

23. The first ground is that the issues raised by the petitioners are substantive issues of law and evidence regarding whether Part Development Plans, deed plans and title deed in respect to **L.R No's 27098 and 7019** were acquired lawfully which cannot be determined through a Constitutional Petition without occasioning miscarriage of justice and prejudice to the respondents.

24. The second issue is that the issues raised in paragraph 17, 19, 20, 21, 22, 23 (1), 33 (3) and 33(4) of the petition as to validity of titling Constitutional issues hence the petition are not an abuse of the court process.

25. The third ground is that the petition does not specify any alleged Constitutional provisions and the manner of breach hence greatly prejudices the respondents to offer a substantive response thereof.

26. The fourth response is that the respondents deny that the subject land has been private land since time immemorial and aver the petitioners have concealed the legal evolution of the land in that the land was by **Gazette Notice No. 3210 of 31.10.1977** reserved for the Armed Forces with clear delineations and demarcations of the land as described in the Gazette Notice complete with coordinates and physical features ascertainable on the ground by the court. The notice is annexed as **JM 1 A – E**.

27. The fifth ground is that the Ministry of Defence has been in continuous use and occupation of the land since 1970, the first documentation of the land being the setting apart in 1977 and given that the interest in the parcels of land have been with the Armed Forces, by dint of reservation, use and occupation in 1970, it is apparent the alleged declaration for an adjudication section over the land in 2008 was void **ab-initio** and that the land could not possibly transform from customary land to private land as alleged in paragraph 15 of the petition.

28. The respondents continue to state the land, in view of the history above falls under **Article 62 (1) (a) and 1 (b) of the Constitution** as at the effective date of the Constitution, it was public land for all intentions and purposes. That when they became aware of the alleged efforts by the County Government of Meru to declare it an adjudication section, an objection was lodged resulting in the suspension of the process. Consequently the petitioners in law and in fact could not possibly allude to any proprietary rights from a process which never commenced and or was incomplete and which in any event was extinguished by operation of law and the Constitution. Therefore, it could not override pre-existing interests in land.

29. Further, the respondent's aver the setting apart and the acquisition on their part was regular, lawful and the leasehold title 12 213242 for 99 years effective from 1.11.2000 over L.R 27098 for the land A.K.A. 78 Tank Battalion, measuring 8223 ha. and L.R No. 750 was issued regularly and that the ongoing survey, beaconing, fencing, tilling or otherwise regularization by the 1st respondent came up at the wake of the realization that the suit property was at the verge of being illegally grabbed by intruders including the petitioners herein.

30. Similarly, the respondents aver the re-establishment of beacons and the construction of high level reference beacons was done in 2018 and there were no objections from any of the petitioners.

31. The respondents aver the use of the land is for purely public purposes being training for purposes of preparing the Defence Forces to execute their mandate of defending the sovereignty and territorial integrity of the Republic of Kenya as mandated under **Article 341 of the Constitution** contrary to allegation of private use in paragraph 26 of the petition. Additionally, the respondents aver the petitioners have no right of use and occupation of vacant land set aside for military use that they wrongly deemed abandoned or up for grabs.

32. It is averred the 2nd respondent has been in use and occupation and the petitioners and others have allegedly illegally occupied and used the suit property and now want to use the court's intervention to divest the 1st respondent of the right to and interest in the suit property, which attempts to put national security and safety in jeopardy as it will affect the critical military training and that, though to an ordinary citizen the land appears vast, the parcels are functionally small given the nature of equipments used for training on the respective parcels.

33. The respondents aver the title in favour of the armed forces cannot be invalidated on account of public participation since the interest of Ministry of Defence pre-existed the interest of allegedly conferred by the alleged adjudication process. Again the respondents state a false and fictitious data at paragraph 24 of the petition allude to grabbers who are encroaching public land to seek to reap where they have not sowed and have come to court with unclean hands. That there is nothing unlawful in the fencing and trenching in the interests of the larger public by preserving public land meant for use by the defence forces.

F. ISSUES FOR DETERMINATION

34. The issue commending themselves for determination are:-

a) **If the petitioners are entitled to conservatory orders.**

b) **If the petition meets the threshold of a Constitutional Petition.**

G. CONSTITUTIONAL MANDATE

35. **Article 165 2 (B)** mandates a High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

36. **Articles 21, 22 and 23** grants the High Court powers and authority to implement, uphold and enforce the bill of rights and grant appropriate reliefs such as declaration of rights, injunctions, conservatory orders, declaration of invalidity of any law, order for compensation and orders of judicial review.

37. **Article 22 (3)** mandates the Hon. Chief Justice to make rules to guide courts proceedings under this Article.

38. Through L.N. 117/2013, the Hon Chief Justice passed the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**.

39. **Rule 10** requires a petition to disclose the name and address of the petitioner, facts relied upon, Constitutional provisionS violated, nature of cause or likely to be caused, details of civil or criminal cases pending; signatures and reliefs sought.

40. **Rule 11** requires a party to support his petition through an affidavit and is mandated under **Rule 11 (2)** to attach any document(s) he may wish to rely upon.

41. **Rule 15** requires the Hon. Attorney General or any state organ within 14 days to respond by way of a replying affidavit and attach any documents to rely upon to the replying affidavit.

42. **Rule 23** grants the court powers to issue conservatory or interim orders for an application made by way of notice of motion or by informal documentation.

43. The petitioners urge this court to issue conservatory orders. The threshold for conservatory orders was established by the Supreme Court of Kenya in **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR.**

***“Conservatory orders be a more decided public – law connotation; for these are orders and facilitate ordered functioning within public agencies, as well as uphold the adjudicatory authority of the court, in the public interest. Conservatory orders therefore, are not, unlike interlocutory injunctions linked to such private – party issues as “the prospects of irreparable harm” occurring during the pendency of a case or high probability of success*”**

Conservatory orders, consequently should be granted on the inherent merit of a case bearing in mind the public interest, proportionate magnitudes and priority levels attributable to the relevant causes.”

44. In **Centre for Rights Education & Awareness (CREAW) and 7 Others –vs- Attorney General [2011] eKLR,** the court held a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

45. In **Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 Others [2015] eKLR,** the court held it was not enough to show an arguable case for one to be granted conservatory orders but must go ahead and demonstrate evidence of likelihood of success beyond speculative basis frivolous, grumbles, fanciful, hopeless, offensive, lacking bona fides, embracing, ambiguous, unintelligible or states immaterial matters prejudicing fair trial.

46. Coming back to the petition, as stated above, the 2013 Rules provides for the format of a constitutional petition.

47. The petitioners to be entitled to a grant of conservatory orders must demonstrate that the substantive petition is hinged on a claim that a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened as held in **Hon. Kanini Kega –vs- Okoa Kenya Movement & 6 Others [2014] eKLR.**

48. The petitioners have raised issues that the respondents have embarked on the process of forcefully evicting and or cordoning of their parcels of land in Ngaremara/Gambella adjudication section with a view of alienating their parcels of land whose interests and rights have been ascertained and parcel numbers issued to them.

49. Other than a notice to establish Ngaremara/Gambella Adjudication Section in Gambella location Amuthumba Division, Tigania East Sub-County dated 24.2.2016 by the Sub-County Land Adjudication & Settlement Officer Tigania Sub-County and an unauthenticated map attached to the petition, the petitioners have not provided this court with any material to show when their alleged claims to land were recorded by the demarcation officer under **Section 13**, or a copy of adjudication register under **Section 23**, demarcation map under **Section 24** and or a published notice of the process for objections under **Section 3 (1) of the Land Adjudication Act Cap 284 Laws of Kenya.**

50. The petitioners have annexed a letter dated 7.7.2008 relating to setting apart for military use **PDP Ref. MN/2150/01/004 A and B.**

51. The 1st, 2nd and 3rd respondents aver they lawfully and legally acquired the title to IR 213242 L.R 27098 dated 1.11.2000 which is attached as annexure JM “3” to the replying affidavit sworn by Captain Julius Meso on 4.11.2021.

52. The certificate of title was sealed on 14.10.2019 both under the **Land Registration Act 2012** and the **Land Act 2012**. It was as a culmination of a process of setting apart in line with **Sections 8, 9 and 69 of the Trust Land Act**. The setting apart started with a by **Gazette Notice No. 3210** dated **31.10.1977** under the **Trust Land Act Cap 288** in favour of the 1st respondent.

53. Under **Sections 24, 25 and 26 of the Land Registration Act**, a certificate of title is to be taken by a court of law as a prima facie proof of ownership in favour of the designated proprietor except on account of fraud, illegality, mistake or misrepresentation.

54. The petitioners have not pleaded fraud, illegality, misrepresentation or mistake in the manner in which the respondents took possession, occupation and or acquired the land.

55. The petitioners seek for conservatory orders to stop the respondents from enjoying their rights as title holders which are protected under **Sections 24, 25 and 26 of Land Registration Act, the Land Act and Article 40 of the Constitution**. The petitioners have not adduced any evidence to show they have had their rights if any, ascertained and or recorded under the **Land Adjudication Act Cap 284**, if at all the notice to declare an adjudication section for Ngaremara/Gambella was legal and or valid.

56. In **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others [2003] eKLR,** court held a prima facie case is established if on material presented before a tribunal a right is established to have been infringed so as to call the other party for a rebuttal.

57. The petition does not indicate the constitutional rights or freedoms which are denied, infringed, and threatened to the petitioners by the respondents

58. Over and above that the petition does not give particulars of injury occasioned and or likely to be incurred at all as in *Martin Nyaga Wambora –vs- Speaker of the County Assembly of Embu & 3 Others [2014] eKLR*, the court held the danger must be real, imminent, evident, true, actual and not fictitious such that it deserves immediate remedial attention or redress by the court. The court held an alleged threatened violation that is remote or unlikely will not attract the court’s attention.

59. The petition is directed at the 1st, 2nd and 3rd respondents as holders of title deeds issued by the Chief Land Registrar. The petitioners have not sued the issuer of the title deeds and perhaps questioned the manner or legality on which the titles were issued.

60. Having found the 1st and 2nd respondents have valid title deeds, the next question is under what basis the petitioners are occupying the land so as to allege that their rights have been infringed, violated and or threatened.

61. **Sections 152 A and 155 of the Land Act** prohibits any person from unlawfully occupying public, private or community lands. **Sections 152 C and 152 D & E Land Act** provides the manner of carrying out eviction from public, community and private land.

62. Under **Section 152** any person served with a notice under the above **Sections**, has a right to seek relief in court. Similarly, under **Sections 152 (G)**, there are mandatory procedures during the eviction.

63. As regards public land, the mandate to issue the notice is bestowed upon the National Land Commission under **Section 152 (C) of the Land Act. Section 155 of Land Registration Act** sets up an elaborate process to be undertaken before the court’s jurisdiction is invoked under **Section 155 (10) of the Act**.

64. Additionally, **Rules 63, 64, 65, 66, 67, 68 and 70 of the Land Regulations 2017**, the procedures and manner of eviction which have to be adhered to by any person(s) or bodies intending to evict illegal occupants from their parcels of land is set up

65. From the foregoing, it is evident the petitioners have not made any complaints as regards the alleged forceful eviction if any in so far as the statutory provisions above. There is no evidence presented before this court of any notice of eviction by the 1st, 2nd and 3rd respondents.

66. Further, there is no evidence that the petitioners have any legal, valid or superior title over and above the ones held by the 1st, 2nd and 3rd respondents.

67. Thirdly, there is no doubt whatsoever the land belonging to the Kenya Defence Forces falls under protected area as established under **Article 241 of the Constitution** whose responsibility is for defence and protection of the sovereignty and territorial integrity of Kenya.

68. Further, there is no material before the court that the petitioners have lodged a complaint with the National Land Commission over any alleged forceful eviction for investigations and reprieve.

69. In *Centre for Rights Education & Awareness CREAW & Another –vs- Speaker of the National Assembly & 2 Others [2017] eKLR*, the court held the purpose of conservatory orders is to prevent violation of rights and fundamental freedoms and to preserve the subject matter pending hearing and determination of the petition.

70. The respondents have valid title deeds unlike the petitioners who have nothing to show that they are entitled to the subject land. The legality of the title deeds has not been pleaded in terms of **Section 24, 25 and 26 of the Land Registration Act**. The mere fact that the petitioners have brought a petition does not entitle them conservatory orders as a matter of right.

71. On the issue of irreparable loss and damage, the petitioners have alleged undertaken developments on the suit land. Be that as it may, the developments therein if any are quantifiable and able to be compensated by way of damages.

72. The real damage or loss the petitioners’ are likely to suffer or prejudice must be balanced against the public interest and security implications pertaining to the respondents’ parcels of land.

73. Similarly, on the balance of convenience, I find the same tilts in favour of the respondents who have a superior title to the land.

74. In the premises, the application 25.4.2021 is dismissed with no orders as to costs.

75. Parties to comply with **Order 11** and list the matter for hearing within 45 days from the date hereof.

Orders accordingly

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

IN PRESENCE OF:

KIETI FOR 1ST, 4TH AND 5TH RESPONDENTS

MISS GITONGA FOR PETITIONER

MISS AYUMA FOR MUGIRA FOR 2ND AND 3RD RESPONDENTS

COURT ASSISTANT – KANANU

HON. C.K. NZILI

ELC JUDGE