



**Murusi & 15 others v County Government of Marsabit & 3 others  
(Petition 007 of 2021) [2022] KEELC 3664 (KLR) (6 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3664 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
PETITION 007 OF 2021**

**PM NJOROGE, J**

**JUNE 6, 2022**

**BETWEEN**

**LERUK MURUSI ..... 1<sup>ST</sup> PETITIONER**  
**LECHEKU ARIGELE ..... 2<sup>ND</sup> PETITIONER**  
**LEKONO BERNARD ..... 3<sup>RD</sup> PETITIONER**  
**LEADO STEPHEN LTERIAS ..... 4<sup>TH</sup> PETITIONER**  
**LTETIAN LERUPES ..... 5<sup>TH</sup> PETITIONER**  
**JIMMY LENEPE ..... 6<sup>TH</sup> PETITIONER**  
**JAMES MARLENI ..... 7<sup>TH</sup> PETITIONER**  
**LPIRIKON NEEPE ..... 8<sup>TH</sup> PETITIONER**  
**PATRICK KURAKI ..... 9<sup>TH</sup> PETITIONER**  
**SAMUEL LOIBARBAN ..... 10<sup>TH</sup> PETITIONER**  
**FRANCIS LEADUMA ..... 11<sup>TH</sup> PETITIONER**  
**DANIEL BURCHA ..... 12<sup>TH</sup> PETITIONER**  
**ASUNTA ..... 13<sup>TH</sup> PETITIONER**  
**LENJODODO MAIDAT LOLBALANGA ..... 14<sup>TH</sup> PETITIONER**  
**LETEYON NURE ..... 15<sup>TH</sup> PETITIONER**  
**RENDILLE PROFESSIONAL ASSOCIATION ..... 16<sup>TH</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MARSABIT ..... 1<sup>ST</sup> RESPONDENT**  
**CHIEF OF THE KENYA DEFENCE FORCES ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. This application was filed at Meru on March 1, 2021. The file was transferred to Isiolo when the Judiciary established an ELC Court.
2. The application seeks the following orders:
  - a) That this Application be certified urgent and be heard ex parte in the first instance for purposes of allocating a priority inter-partes hearing date.
  - b) That this Application be heard in priority to any other matter in this Petition.
  - c) That this Honourable court be pleased to certify this matter as one raising substantial questions of law under *inter-alia* Article 165 (4) of the Constitution, Community Land Act No 27 of 2017, Wildlife Conservancy Act 47 of 2013, National Land Commission Act No 5 of 2012 and hence should be heard by an uneven number of Judges, being not less than three, assigned by the office of Honourable Chief Justice.
  - d) That this Honourable Court be pleased to refer this matter to the office of the Chief Justice for empanelment of a bench as provided for by Article 165 (4) of the Constitution.
  - e) That the costs of this Application be in the cause.
3. The application is supported by the Affidavit of Lenjododo Maidat Lolbalanga, a resident of Marsabit County sworn on February 25, 2021. The Application is supported by the following grounds:
  1. That there is a pending petition and an Application before this court filed by all the Petitioners including the 8<sup>th</sup> to 6<sup>th</sup> Petitioners certified urgent seeking to stay any or any further invasion, Conversion, take-over, and use of disputed land
  2. The Application together with the main petition involves weighty matters of Constitution and statutory interpretation. The 8<sup>th</sup> to 16 Petitioners aver that they ought to be heard by a bench of not less than three (3) Judges of this Honourable Court as provided for under Article 165 (4) of the Constitution.
  3. The 8<sup>th</sup> to 16<sup>th</sup> Petitioners stand to suffer prejudice if this Application is not heard on a priority basis.
  4. The application is urgent as:
    - a) The parent Application proposed for consideration by three (3) Judges has already been certified urgent.
    - b) The threat of further invasion, expansion, waste to the land by the Respondent continue and persist unless resolved substantively soonest, preferably by a bench of at least 3 judges.
  5. The 8<sup>th</sup> to 16 Petitioners propose to seek determination by at least 3 judges the questions *inter-alia*:-



- A. Whether the Respondents can plead National Security and or the muscle of the military/Kenya Defence Force to circumvent the need for compliance with substantive and procedural law, noting that there was no emergency and noting that there was opportunity, necessity and time within which all the procedural and substantive law could be observed.
- B. Whether interest in land can be created in favour of the Respondents without
- (i) A resolution by a County Assembly (ii) deliberation and resolution by Community Assembly/Community Management Committee under the [Community Land Act](#). 2, Act No, 27 of 2016. (iii) public participation in respect of Community Land under Article 63, Constitution, [Community Land Act](#), Act No. 47 of 2016 and Section 34 and 4<sup>th</sup> Schedule. (iv) having the Cabinet secretary responsible for Wildlife Conservancy and Management endorsing the acquisition/alienation (v) de-gazettment of the implicated parcel (vi) presenting to Parliament the project for deliberations and resolutions.
- C. Whether community land interests can be unilaterally passed out by a County Governor, without involving County assemblies, the affected communities and County Assembly/Community Management Committee in the face of the provisions of Article 63 Constitution, Community Lands Act No 27 of 2016, and both Section 34 and 4<sup>th</sup> schedule.
- D. Whether the land parcels implicated in the proceedings [the 2500 Hectares and or 5000 Hectares] are community land parcels within the intended meaning by the relevant laws that include the [Community Land Act](#) No. 27 of 2016. Wildlife Conservation and Management Act, Act No 27 of 2016, Wildlife Conservation and Management Act, Act No 47 of 2013 and Articles 63 of the [Constitution](#).
- E. Whether the Petitioners, the Rendille and the Samburu were prejudiced and violated by none observation of the law which would accommodate and give them an opportunity to be heard as a matter of natural justice and as prescribed in law in inter-alia Article 47 as to fair administrative action and 63, [Constitution](#), [Community Land Act](#), Act No 47 of 2016 and by section 34, and 4<sup>th</sup> schedule, [Wildlife Conservation Management Act](#) No 47 of 2013 inclusive of the requirements:
- (i) For publication in the gazette, and in a national and local newspaper and radio.
  - (ii) Address/location to which oral, written, and other representation can be sent.
  - (iii) Specification of the date by which representations could be made.
  - (iv) Not make any decision on proposed project earlier and before expiry of 60 days from the date of publication.
  - (v) Making available at reasonable cost relevant copies of documents relevant to the proposed project.
  - (vi) Making gazette, newspapers, and radio publications at intended decision and reasons for the decision, with access to inspect the documents.



- (vii) Hold public meeting before concluding and finalizing the decision on the proposed project.
  - (viii) Failing to take into account and consider the objections raised including the critical and sensitive cultural use of the land portions, animal migration, critical habitat, bio diversity, and environment balance.
  - (ix) Degazettment of the parcel before entry and use by the Respondent.
- F. Whether the Petitioners, [the Rendille and Samburu) have been denied the protection, denied the rule of law, denied their legitimate expectations, and denied fair administrative action of law in the failure to use, or otherwise involve National land Commission [NLC], the Cabinet Secretary and the Act. Wildlife Conservancy and Management Act and their procedures in the purported acquisition.
- G. Whether the Petitioners, rights in law stand breached by (i) failure to obtain environmental and social economic impact assessment report and advise under the National Management and Coordination Act as to the proposal before acquiring, entering, taking possession and using the parcel. (ii) failure to obtain parliamentary National Assembly resolution to exercise and take away an otherwise Wildlife Conservancy, under the *Wildlife Conservation and Management Act*, Act No 47 of 2013.
- H. Whether the Petitioners, are violated by the failure to take into account and accommodate objections raised to the acquisition on account of the sensitive, delicate, and fragile cultural, and environmental, ecosystem of inter-alia the pastoralist community that owns the land, the water and pasture access and the wildlife, and their movements corridor, human-animal conflicts, grazing fields, water catchment strategic status of the specific parcel seized, effect on the live hoods of the communities considering the singular fertile nature of the area, and the dependency on the space for the community's camels, sheep, goats and cattle and the likely resultant human and animal malnutrition.
- I. Whether the take up of the parcel by the Respondents is discriminatory of the Petitioners, the Samburu and Rendille peoples, their environment, their social rights and their land in the different treatment directed at them attributable wholly to their ethnicity, their land, their levels of literacy, poverty levels, economic capacity, and political clout, in unilaterally taking up their land, outside the provisions of law, a process that other Kenyan persons are not made subject to. Denying the Petitioners, the Rendille people, and their land privileges' and advantages provided in law which are accorded to other Kenyan peoples; whereof the discrimination is not founded on any reasonable and lawful distinction.
- J. Whether the Petitioners, the Rendille, and the Samburu have been denied:-
- I. The benefit of the: International instruments to which Kenya is party to including the "United Nations [UN] Declaration of Rights of Indigenous People" requiring a "free, prior and informed consent in all legislative measures on land taken from the indigenous people.
  - II. The *Constitution of Kenya*
  - III. *Environment Management and Co-ordination Act* (NEMA) 199



- IV. [Wildlife Conservation Act](#), 47 of 2013, (5)
  - V. [Community Land Act 2016](#).
  - VI. The NLC Act and the [Community Land Regulations, Act](#) No 5 of 2013.
  - K. Whether the Petitioner's Property rights have been violated by the failure: to assess, offer and pay fair compensation as prescribed by law, including the [Constitution](#), NLC Act, [Community Land Act](#), Act No 27 of 2016, and [Land Act](#) No 6 of 2012.
6. The issues at hand are weighty and complex. There are high community interests, the scope and extent of Community Land viz-a-viz public land in law.
  7. The land parcel in issue relates to:-
    - i. Lives, Livelihoods, culture and ecosystems of an entire community of over, 100,000 Kenyan people unique in their identity and who should be considered in public interest.
    - ii. Challenge as to state interest being made to overrides interest of vulnerable and marginalized communities.
    - iii. State agencies disregarding existing laws in the name of people's security interest to damage fragile ecosystems and livelihoods of poor and vulnerable communities that depend on the implicated ecosystem.
    - iv. The affected community being discriminated against by being treated differently from other Kenyans, owing probably to their level of literacy, poverty, sophistication, political clout, marginalization, and lack of influence.
  8. The petitioner's Applicants meet the legal threshold for grant of orders to refer the matter to the Chief Justice for Constitution of a panel of at least 3 judges. The threshold which they meet as demonstrated in the petition and the Application include the test as held in the case of [Director of Public prosecutions v Peter Aguko Abok & 35 others](#) [2020] eKLR that:
    - I. This Court's authority to make the orders sought is anchored in both Article 165(3) (a) (b) and (4).
 

"Sub- Article (3) provides that-subject to Clause 5, the High Court shall have-

      - a. Unlimited original Jurisdiction in criminal and civil matters.
      - b. Jurisdiction to determine the question whether a right or fundamental freedom in the bill of Rights has been denied, violated, infringed or threatened;
      - c. Jurisdiction to hear an appeal from a decision of a tribunal appointed Under this constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
      - d. Jurisdiction to hear any question respecting the interpretation of this [Constitution](#) including the determination of-
        - I. The question whether any law is inconsistent with or in contravention of this constitution.



- II. The question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- III. Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of governments; and
- IV. A question relating to conflict of laws under Article 191; and
- e. Any other jurisdiction, original or appellate, conferred on it by legislation.

Sub-Article 4 – Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

- II. “When considering whether there is sufficient ground/s to issue a certificate referring the matter to CJ, the court is duty bound to take into account whether there is a substantial question of law to warrant empanelment of uneven number of judges, to determine this aspect comprehensively, courts have articulated the issue in various forums and basically agreed on certain salient legal considerations to be taken into account. Such parameters were outlined in the case of County Government of Meru v Ethics and Anticorruption Commission (2014) eKLR where the court stated as follows;
  - i. The grant of a certificate under Article 164 (40) of the Constitution is an exception rather than the rule.
  - ii. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet it is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.
  - iii. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.
- III. “Similar position was held in Martin Nyaga Wambora and others vs. Speaker County Assembly of Embu & 4 others where the court summarized factors for consideration before referring a file for empanelment of a bench as follows:
  - a. Whether the matter is complex
  - b. Whether the matter raises a novel point
  - c. Whether the matter by itself requires a substantial amount of time to be disposed of.
  - d. The effect of the prayers sought in the petition and
  - e. The level of public interest generated by the petition.



- IV. “The above principles can generally be traced to an Indian Supreme Court decision in *Chunilal v Mehta The Century Spinning And Manufacturing Co* AIR 1962 SC 1314 where it was held;

“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion or alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”

9. The issues in this case are not ordinary. They are matters that other courts have not addressed themselves to in the context of this case. In the persuasive case of *Director of Public Prosecutions v Peter Aguko Abok & 35 others* [2020] eKLR the court states that a court cannot refer a matter to the Chief Justice if the matter is ordinary, not complex, and severally addressed by courts. The court stated that

“There must be an extremely deserving case and circumstances that require the input of extra brains to be able to resolve a weighty matter touching on a complex or novel issue or substantial question which in ordinary circumstances a single judge cannot manage without great difficulty.”

10. In the circumstances and context of this cause the Petitioners submit that they have made a good cause of reference to the office of the Chief Justice to constitute a panel of at least 3 judges. The petitioners’ petition is complex, novel, and requires substantial time to resolve. The effects of the prayers sought will have far reaching effects on both sides to the petition, and the case has extreme public interest especially to the communities affected, the Samburu and the Rendille
11. All factors considered the case is deserving of consideration by at least 3 judges.

Dated at Nairobi February 25, 2021

Katwa & Kemboy

Advocates for the 8<sup>th</sup> to 16<sup>th</sup> Petitioners/applicants

4. The Application was canvassed inter-alia, by way of written submissions and grounds of opposition. The parties also highlighted their submissions on January 31, 2022. A ruling was scheduled to be delivered on March 28, 2022 but because of the ELC Judges training at Mombasa which coincided with the date fixed for Ruling, the Ruling date was rescheduled to June 6, 2022, today.
5. The 8<sup>th</sup> to 16<sup>th</sup> Petitioner’s applicants in their written submission stated as follows:

Facts of the Case

- i. The disputes relate to acquisition of land about 5,000 acres by the military in Marsabit County, Karare Ward area occupied by mainly the Samburu and the Rendille Communities.
- ii. The petitioners have been in occupation of all the land in Karare- Songa ward since time immemorial.



- iii. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents approached the 1<sup>st</sup> Respondent and requested to be given land within Karare Ward for the purpose of camping and range activities. After holding a series of meetings with the Community elders, the elders agreed to give them a portion. They were dissatisfied with the portion and requested an alternative land. The elders rejected the proposal as the new site is cultural and biologically diverse, a critical area of importance and sensitive to the community.
  - iv. Even after the elders rejected the proposal, the respondents forcefully seized and took over the land claiming that the land in question is a public land and they have the right over the public use. This is contrary to the public interest and public participation.
  - v. According to the Petitioners the parcel is community land within the provisions of Article 63 of the Constitution. However according to the Respondents, the parcels are public land by reason of gazette notices of 936 of September 24, 1948 and No 48 of September 28, 1948.
6. The 8<sup>th</sup> to the 16<sup>th</sup> Petitioners propose to seek determination by at least 3 judges on the questions *inter-alia*;
- A. Whether interest in land can be created in favour of the Respondents without (i) A resolution by a County Assembly (ii) deliberation and resolution by Community Assembly/Community Management Committee under Community Land under Article 63, Constitution, Community Land Act, Act No 27 of 2016 (iii) public participation in respect of Community Land under Article 63, Constitution, Community Land Act, Act 47 of 2016 and Section 34 and 4<sup>th</sup> Schedule, Wildlife Conservancy and Management Act, Act No 47 of 2013. (iv) Having the Cabinet secretary responsible for Wildlife Conservancy and Management endorsing the acquisition/alienation (V) de-gazettment of the implicated parcel (vi) Presenting to parliament the project for deliberations and resolutions.
  - B. Whether and or the land parcels the proceedings [the 2500 Hectares and or 5000 Hectares] are community land parcels within the intended meaning by relevant laws that include the Community Land Act, Act No 27 of 2016, Wildlife conservation and Management Act, Act No 47 of 2013 and Articles 63 of the Constitution.
  - C. Whether the Petitioners, rights in law stand breached by (i) failure to obtain environmental and socio economic impact assessment report and advice under the national management and Coordination Act as to the proposal before acquiring, entering, taking possession and using the parcel. (ii) failure to obtain parliamentary national Assembly resolution to exercise and take away an otherwise Wildlife Conservancy, under the wildlife conservation and Management Act, Act No 47 of 2013.
  - D. Whether community land interests can be unilaterally passed out by a County Government, without involving County assemblies, the affected communities and County Assembly/Community Management Committee in the face of the provisions of Article 63 Constitution, Community Lands Act, Act no. 27 of 2016, and both section 34 and 4<sup>th</sup> Schedule.
  - E. Whether the petitioners, the Rendille and the Samburu were prejudiced and violated by non observation of the law which would accommodate and give them an opportunity to be heard as a matter of natural justice and as prescribed in law in inter-alia Article 47 as to fair administrative action by Section 34, and 4<sup>th</sup> Schedule, Wildlife Conversation Management Act No 47 of 2013 inclusive of the requirement:
    - i. For publication in the gazette, and in a national and local newspaper and radio.



- ii. Address/location to which oral, written, and other representation can be sent.
  - iii. Specification of the date by which representation could be made.
  - iv. Not make any decision on proposed project earlier and before expiry of 60 days from the date of publication.
  - v. Making available at reasonable cost relevant copies of documents relevant to the proposed project.
  - vi. Making gazette, newspapers, and radio publication of intended decision, with access to inspect the documents.
  - vii. Hold public meeting before concluding and finalizing the decision on the proposed project.
  - viii. Failing to take into account and consider the objections raised including the critical and sensitive cultural use of the land portions, animal migration, critical habitat, bio diversity, and environmental balance.
  - ix. Degazettment of the parcel before entry and use by the respondents.
- F. Whether the petitioners, (the Rendille and Samburu) have been denied the protection, denied the rule of law, denied their legitimate expectations, and denied fair administrative action of law in the failure to use, or otherwise involve National Land Commission (NLC), the Cabinet Secretary and the Act. *Wildlife Conservancy and Management Act* and their procedures in the purported acquisition.
- G. Whether the petitioners, are violated by the failure to take into account and accommodate objections raised to the acquisition on the account of the sensitive, delicate, and fragile cultural, and environmental, ecosystem of inter-alia the pastoralist community that owns the land, the water and the pastures access and the wildlife, and their movements corridor, human-animal conflicts, grazing fields, water catchment strategic status of the specific parcel seized, effect on the live hoods of the communities considering the singular fertile nature of the area, and the dependency on the space for the community's camel, sheep, goats and cattle and the likely resultant human animal malnutritions.
- H. Whether the take up of the parcel by the Respondents is discriminatory of the Petitioners, the Samburu and Rendille peoples, their environment, their social right and their land in the different treatment directed at them attributable wholly to their ethnicity, their land, their levels of literacy, poverty levels, economic capacity, and political clout, in unilaterally taking up their land, outside the provisions of law, a process that other Kenyans persons are not made subject to. Denying the Petitioners, the Rendille people, and their land privileges and advantages provided in laws which are accorded to other Kenyan peoples; whereof the discrimination is not founded on any reasonable and lawful distinction.
- I. Whether the Petitioners, the Rendille, and the Samburu have been denied;-
- i. The benefit of the: International instruments to which Kenya is party to including the “United Nations (UN) Declaration of Rights of Indigenous People” requiring a “free, prior and informed consent in all legislative and administrative measures on land taken from the indigenous people”.
  - ii. The *Constitution of Kenya* safeguards.



- iii. [Environmental Management and Co-ordination Act \(NEEMA\) 1999](#) safeguards.
  - iv. [Wildlife Conservation and Management Act](#), 47 of 2013, (5) safeguards.
  - v. [Community Land Act](#)}} 2016, safeguards.
  - vi. The NLC Act and the [Community Land Regulations, Act](#) No. 5 of 2012 saafeguards.
- J. Whether the Respondent can plead National Security and or the muscle of the military/Kenya Defence Force to circumvent the need for compliance with substantive and procedural law, noting that there was no emergency and noting that there was opportunity, necessity and time within which all the procedural and substantive law could be observed.
- K. Whether the Petitioner’s property rights have been violated by the failure: to assess, Offer, and pay fair compensation as prescribed by law, including [the Constitution](#), NLC Act, [Community Land Act](#), Act No 27 of 2016, and [Land Act](#) No 6 of 2012.
7. The Petitioners’ case is mainly as to procedure of acquisition, and especially on lack of participation by County Assembly, lack of Environmental Impact Assessment, and other procedural dictates.
8. The 8<sup>th</sup> to 16<sup>th</sup> Petitioners/Applicants submit that some of the weighty questions of law warranting the need for at least 3 judges relate to the complexity of the case, the high community interest, the legal scope and extent, Community Land, vis-a-vi public land in law, the powers of County Government over conveying community land, the scope of Environmental impact projects certifications, and public land vis-a-vi Community land claims on land to which Wildlife Conservancy law applies. There is also the question as to whether the Kenya Defence Force as party and or whether a plea of public security and even without any emergency is a justification to circumvent and substitute procedural laws, including public participation, environmental Impact Assessment, and de-gazettment.
9. The issues at hand are weighty and complex. There are high community interests, the scope and the extent of Community Land viz-a-vi public land in law.
10. The allegations in issue relate to:-
- i. Lives, livelihoods, culture and ecosystem of an entire community of over 100,000 Kenyan people unique in their identity and who should be considered in public interest.
  - ii. Challenges as to state interest being made to override interest of vulnerable and marginalized communities.
  - iii. State agencies disregarding existing laws in the name of people’s security interest to damage fragile ecosystems and livelihoods of poor and vulnerable communities that depend on the implicated ecosystem.
  - iv. The affected community being discriminated against by being treated differently from other Kenyans, owing probably to their level of literacy, poverty, sophistication, political clout, marginalization, and lack of influence.
11. The substantial questions of law raised deserve substantial consideration by preferably a panel of uneven number of judges before a decision is reached.
12. In determining whether the issues are pertinent enough to be a substantial question of law the Petitioners invite the Court to be guided by the holdings cited by learned Judge Lenaola J (as he was then) in [Eric Gitari v Attorney Genener & Another](#)(2016) eLKR where he stated that;-



- a. On Substantial question of law”, case law has provided apt guidance in determining the same.
- b. In the case of *Sir Chunilal v Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd* 1962 SC 1314 the Supreme Court of India determined the term thus:

“ A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”

- c. Similarly, in *Martin Nyaga and Others v Speaker County Assembly of Embu and 4 Others and Amicus* [2014]eKLR, the court articulated that the Principles applicable when making a declaration under Article 165 (4) include; whether the matter is complex; whether the matter raises a novel point; whether the matter by itself requires a substantial amount of time to be disposed of; the effect of the prayers sought in the Petition and the level of public interest generated by the Petition.

Regarding the above, this court in *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 3 others* [2016] eKLR held thus:

“.....although factors such as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question on law, the Courts have also indicated that none of these factors are singly decisive and that the list is not exhaustive.”

- d. In addition, Lesiti J in *Amos Kiumo & 2 others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 others* [2014] eKLR opined thus:

“ ....there must be something more to the substantial question than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents.”

- e. The 8<sup>th</sup> to the 16<sup>th</sup> petitioners also note that although one may be in agreement with the above descriptions, they only serve to offer appropriate guidance. That is why Onguto J in *Del Monte Kenya Limited v County Government of Muranga 7 2 others* [2016] eKLR held thus:

“ The question as to whether there exists a substantial question of law, even if one adopted the definition in the Chunilal Mehta Case, is left to the individual to judge to determine depending on the circumstances and unique facts of each case.”

13. The Petitioner states that the issues affect more than just the Petitioner and that they are of public importance. The issues at hand are weighty and complex. They are of high community interest, the scope and extent of Community Land vis-a-vis public land in Law portend novel issues.



- a. On this subject, Onguto J in *Del Monte Kenya Limited v County Government of Muranga & 2 others* [2016] eKLR held thus:
- “Where the Petition raises or deals with an issue of public importance then the balance tilts in favour of empanelment especially if it is also an issue, the determination whereof would affect the rights of both the individual parties as well as the public at large or it is an issue which is yet to be determined and settled by the court or a court superior in hierarchy.”
- b. This Court similarly in *Kalpana H Rawal v Judicial Service Commission & 3 Others* [2015] eKLR held thus:-
- “I should reiterate that the public importance of a matter is a consideration in determining whether a substantial question of law has been raised.”
- I am in agreement with the above holdings and applying them to the Petitioner’s contention, I resolve that this matter indeed affects more than the Petitioner. The entire LGBTIQ Community would be affected by the decision and this, considering the discussion above on the status of the members of this community in the Republic, is no small exploit. Ultimately therefore, in my view, the matters raised in the Petition are weighty and have importance consequences. In addition, the emotive nature of the issue is also bound to impact on varied actions assumed subsequent to determination of the matter.”
- c. The Court of Appeal has recognized this criteria. Hon. Justice Musinga, Gatembu and Murgor in *Okiya Omtatah Okiiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 Others* [2017] eKLR in the Court of Appeal held that: -
- “We are fully in agreement with that approach. The position we take whilst embracing the test by the Supreme Court of India in *Sir Chunilal v Mehta and Sons Ltd vs The Century Spinning and Manufacturing Co. Ltd* is that each case must be decided on its own facts and circumstances. No factor alone is decisive. A party seeking certification must lay a basis for the certification. Further, certification under Article 165 94) of the *constitution* is a matter in the judicial discretion of the court. Such discretion must however, be exercised on sound basis.”
14. The Petitioners/ Applicants submit that they meet the legal threshold for grant of orders to refer the matter to the Chief Justice for Constitution of a panel of at least 3 judges. The threshold which they meet as demonstrated in the Petition and the Application include the test as held in the case of *Director of Public Prosecutions v Peter Aguko Abok & 35 others* [2020] eKLR that:
- I. “This Court’s authority to make the orders sought is anchored in both Article 165 (3) (a) (b) and (4)
- “Sub-Article (3) provides that-subject to Clause 5, the High Court Shall have-
- a. Unlimited original jurisdiction in criminal and civil matters;
  - b. Jurisdiction to determine the question whether a right or fundamental freedom in the bill of Rights has been denied, violated, infringed or threatened;



- c. Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from officer, other than a tribunal appointed under Article 144;
- d. Jurisdiction to hear any respecting the interpretation of this constitution including the determination of-
  - I. The question whether any law is inconsistent with or in contravention of this Constitution;
  - II. The question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this constitution;
  - III. Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - IV. A question relating to conflict of laws under Article 191; and
- e. Any other jurisdiction, original or appellate, conferred on it by legislation.

Sub-Article 4 – Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

15. Some of the aspects qualifying this case as raising substantial questions include the hereunder.
16. The 8<sup>th</sup> – 16<sup>th</sup> Petitioners submit that the Application to empanel uneven number of judges meets the criteria proposed by the High Court and the Court of Appeal. The questions to be answered by the consideration of the Application show that: - they are of general public importance and concerns. The public include the Rendille and Samburu Community, the general Kenyan public who discuss the matters of protection of property rights, the County Government of Marsabit, the Kenya Defence Forces, the Cabinet Secretary Ministry of defence, the investigators, Prosecutors, Magistrates and at large the judiciary.
17. The fate of the Orders will implicate rights of multiple parties in different ways including those of the Petitioners’ to protection of property rights and the County Government’s vested responsibility to act in trust of the community in management of community land. The matter has not been settled by Superior Courts, and it is not a mere matter of applying principles. The questions are not free of difficulty, and are open to alternative views. The questions are complex. Novel points have been raised. The questions in the circumstances of this review are unique.
18. The issues in this case are not ordinary. They are matters that other courts have not addressed themselves to in the context of this case. In the persuasive case of *Director of Public Prosecutions v Peter Aguko Abok & 35 others* [2020] eKLR the court states that a court cannot refer a matter to the Chief Justice if the matter is ordinary, not complex, and has severally been addressed by courts. The court stated that “There must be an extremely deserving case and circumstances that require the input of extra brains to be able to resolve a weighty matter touching on a complex or novel issue or substantial question which in ordinary circumstances a single judge cannot manage without great difficulty.”



19. It is in the interest of justice considering all the issues, for the Chief Justice to empanel at least three (3) judges to entertain the review application.
20. All factors considered the case is deserving of consideration by at least 3 judges
21. In support of its submissions, the 8<sup>th</sup> to 16<sup>th</sup> Petitioners rely on statutes, Rules, legal literature precedents and any other relevant legal provisions including: -
  - a. [\*The Constitution of Kenya, 2010\*](#) .
  - b. [\*Community Land Act\*](#), Act No 27 of 2016.
  - c. Wildlife Conservancy and Management Act, Act No. 47 of 2013
  - d. *Erick Gitari v Attorney General & Another* [2016]EKLR
  - e. *Sir Chunilal v Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd* 1962 SC 1214 he Supreme Court of India
  - f. *Martin Nyaga and Others v Speaker County Assembly of Embu and 4 others and Amicus* [2014] eKLR.
  - g. *Amos Kiumo & others v Cabinet Secretary Ministry of interior & Coordination of National Government & 3 others* [2014] eKLR
  - h. *Del Monte Kenya Limited v County Government of Muranga & 2 others* [2016] eKLR  
SUBPARA i.  
*Kalpna H Rawal v Judicial Service Commission & 3 othes* [2015] eKLR
  - j. *Okiya Omtatab Okoiti & another v Anne Waiguru – Cabinet Secretary Devolution and Planning & others* [2017] eKLR
  - k. *Director of Public Prosecutions v Peter Aguko Abok & 35 others* [2020] eKLR.
22. The first Respondent’s submissions state as follows:

### Issue for Determination

- i. The only issue that falls for determination is whether the issues raised by the applicant fall under the scope of substantial issues of law to warrant empanelment.
- ii. Article 165 (4) of the [\*constitution of Kenya 2010\*](#) provides that:
 

“ Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice”
- iii. The court of Appeal in [\*Okiya Omtatab Okoiti & another v Anne Waiguru Cabinet Secretary, Devolution and Planning & 3 other\*](#) (2017) eKLR laid out the guidelines for Certification under 165(4) of the [\*Constitution of Kenya\*](#) as follows:
 

“ ..... Drawing therefrom, we adopt, with modification, the following principles:

“(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the



determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) the matter to be certified must fall within the terms of Article 165(3)(b) or(d) of the Constitution;
- (vi) the applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”
- iv. the decision whether or not to empanel a bench of more than one judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitution and statutory provisions.
- v. The applicants aver that the Petition has raised substantial points of law to warrant this Honorable Court to refer the matter to the Chief Justice to empanel a bench to hear and determine the Petition. The Court in Stanley Livondo v Attorney General (2020) eKLR, defined a substantial point of law as follows:

The law as to what amounts to a substantial question of law is now well settled. In sir Chunilal v. Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co. 1962 AIR 1314 the elements of substantial questions of law were stated follows:

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or the privy council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea is palpably absurd the question would not be substantial question of law.”

- vi. The Petitioners allege that their rights as enshrined under Article 63(1), (2), 62(1) (g), 40 and 23 of the constitution of Kenya have been infringed upon by the Respondents. The fact that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution does in itself does not warrant the empaneling of a bench. The court must go further and satisfy itself that the issue also raises a substantial question of law. An allegation for breach of fundamental rights does not qualify the matter as raising a substantial question of law.
- vii. We submit that the Petition does not raise any substantial points of law. The Petitioners allege that the suit property is community land. The Respondents have responded to the said Petition and aver that the suit land is public land. The question that will be answered to determine this Petition is whether the suit land is either community or public land; and whether the procedural law applicable was breached if the court finds that the land is indeed community land.
- viii. There is no dispute as to the classifications of land in Kenya as public, community and private land. The categories of land in Kenya have been laid out under article 61 of the Constitution of Kenya. Further to the provisions of the Constitution, the Land Act and



the Community Land Act have been enacted by the Legislature. Therefore, the instant Petition only invites this Court to applying those principles that have already been laid out in the Constitution and the aforesaid Acts of Parliament.

- ix. In J Harrison Kinyanjui v Attorney general & another (2012) eKLR Majanja J. deliberated as follows on the question of what is a substantial issue:

“Therefore, giving meaning to “substantial question” must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by the judges”

- x. Public interest and national importance are by themselves not necessarily grounds for the empaneling of a bench of not less than three judges as these are matters which the Court deals with on a daily basis. To make a determination on whether or not to refer the matter to the Chief Justice pursuant to Article 165(4) of the Constitution solely on public interest and national importance would amount to elevating such matters to a different class from other disputes and that in my view would amount to unjustified discrimination in dispute resolution mechanisms.

- xi. In Wycliffe Ambesta Oparanya & 2 others v Director of Public Prosecution & another (2016) eKLR, Odunga, J stated that:

“25. In my view a High Court Judge ought not to shy from his Constitutional mandate of interpreting and applying the constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought to be exercised lightly.”

- xii. It was also observed in Wanjiru Gikonyo v Attorney General & another; Kajiado county Governor and 4 others (interested parties) (2020) eKLR, the interpretation of the Constitution is a task that can be ably undertaken by a single judge. In this regard it was held that:

- xiii. The granting of a Certificate under Article 165(4) of the constitution of Kenya is the exception rather than the rule. In this case, the Applicant has not demonstrated any substantial question in the Petition that will require empanelment as under Article 165 (40 of the Constitution of Kenya.

- xiv. The High Court has jurisdiction as provided for under the Constitution of Kenya to hear and determine this Petition and we urge this Court to shy away from the exercising this Constitutional mandate.

- xv. In the instant Application, there are no novel issues and/or substantial issues of law that have been raised. The issues and questions raised in the petition are not so complex to raise a substantial question of law requiring the setting of a bench of three judges. These are the kind of matters that confront judges on a regular basis. The issues call for



the application of constitutional and legal principles to the facts of the case at hand. Those constitutional and legal principles are already established and a single judge can apply them.

- xvi. The Respondent submits that he Petitioner's application is without merit and prays it be dismissed with costs.

Dated At Nairobi This July 21, 2021

Sagana, Biriq & Company Advocates

Advocates For The 1<sup>st</sup> Respondent

7. The 1<sup>st</sup> respondent also field grounds of opposition in the following Format

1<sup>st</sup> Respondent's Grounds of Oppositon

Take Noticethat the 1<sup>st</sup> Respondent herein opposes the Petitioners Application dated February 25, 2021 on the following grounds:

1. That the issues raised in the Petition are neither novel nor complex so as to raise a substantial question in law to require the empaneling of a bench. The petition raises the kind of matters that confront judges on a regular basis.
2. That the questions raised in the Petition relate to the various classification of land in Kenya. The principles governing public and /or community land are well established and this Honorable Court is only required to interpret the provisions as laid out in the Constitution of Kenya, the Community Land Act and the Wildlife Conservancy Management Act as it relates to the facts of this case.
3. That the allegations of breach of fundamental rights is a prima facie case of public importance, however, allegations of breach of fundamental rights alone do not amount to a substantial question in law requiring the empanelment of a bench.
4. That certifying that the matter raises a substantial question of law solely on the grounds of public interest and national importance would amount to elevating such matters to a different class from other disputes and that would amount to unjustified discrimination in dispute resolution mechanisms.
5. That each High Court judge, has authority under Article 165 of the constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provision of Article 165(4), the decision of a three Judge bench is of equal force to that of a single exercising the same jurisdiction.

Dated At Nairobi this July 21, 2021

Sagana, Biriq 7 Company Advocates

Advocates For The 1<sup>st</sup> Respondent

23. The positions taken by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are similar. The 2<sup>nd</sup> Respondent is the Chief of Staff of the Kenya Defence Forces and the 3<sup>rd</sup> Respondent is the Cabinet Secretary, Ministry of Defence. The two are represented by Counsels employed by the Kenya Defence Forces.
24. The 1<sup>st</sup> Interested Party has filed grounds of opposition which take the following format  
Grounds of Opposition



Take Notice that the 2<sup>nd</sup> interested Party's shall at the hearing of the application dated February 25, 2021 oppose the same on the following grounds: -

1. The applicants have not met the threshold for this petition to be referred to the Chief Justice under Article 165(4).
2. The grant of certificate under Article 165(4) of the constitution is an exception rather than the rule. The power to refer a suit to the Chief Justice for empaneling of an uneven number of judges must be the exception.
3. It is not disputed that a High Court Judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three judge bench is of equal force to that of a single judge exercising the same jurisdiction and thereby, in the circumstance, no justification for empaneling of three or more judges as requested.
4. The issues and facts raised in the petition and the response are not so complex or difficult to the extent that they can be said to raise a 'substantial question of law' worthy of a reference for the setting up of a three-judge bench.
5. The Petitioner's Application is vexatious, frivolous, an abuse of the Court's process and amount to a fishing expedition.

Reasons Whereof the 2<sup>nd</sup> Interested parties prays that the application be dismissed with costs.

Doreen Mutunga

Advocate for the 2<sup>nd</sup> Interest Party

25. The parties highlighted their written submissions on January 31, 2022. Their submissions were congruent with their diametrically divergent assertions raised in their pleadings and submissions.
26. During highlighting Senior Counsel Kigen, representing the Petitioners submitted that;
  - a. The suit raised Complex Issues.
  - b. The Suit would require a substantial amount of time to be disposed of.
  - c. The order for empanelment of a 3 Judge Bench would be for the benefit of Justice.
  - d. The Suit raised a high level of Public Interest.
  - e. The Issues raised in this Petition have not been determined with finality by the Court of Appeal or by the Supreme Court.
27. Mr Kigen argued that the land was Community Land notwithstanding a 1948 Gazette notice which declared it a Wildlife Conservancy but left the Rendille and Samburu Communities within the said land. As the Rendille and Samburu Communities were in possession of the subject land, the 1948 Gazettement was incapable of dispossessing them of their ancestral land.
28. Mr Kigen said that a 3 Judge Bench would consider his claim that 3 Acts of Parliament had been violated. He says that contrary to what is required by the KWS ACT, the purported allocation to KDF was not referred to parliament. He also said that there was no environmental impact assessment in accordance with the NEMA ACT and that the National Land Commission was not consulted.

He proffered that National Security grounds could not allow the KDF to operate above the law.



29. Mr Kigen told the Court that the taking over of the land belonging to the Rendille and Samburu Communities was an existential threat and that they would lose 35 Per cent of their domestic animals and that 250,000 households would be blocked from their lifestyles. He contended that the two Communities had lost 150,000 acres of their land to the Lake Turkana Wind Project. He concluded that there were compelling reasons for empanelment of a 3 Judge bench by the Honourable the Chief Justice.
30. M/S Nelima who represented the other petitioners told the Court that she fully associated herself with the pleadings, submissions and the views espoused by Senior Counsel Katwa Kigen.
31. Colonel Mugira, who represented the KDF reiterated the views espoused in their pleadings and submission that there was no need for empanelment of a 3 Judge Bench as this would unduly delay the hearing and determination of this suit. He was unequivocal that a single Judge had similar authority to that one of a 3 Judge Bench. He contended that empanelment of a 3 Judge bench ought to be an exception rather than a simple mechanical process. He proffered that the suit was a simple land matter concerning land given to the KDF in Marsabit. To him, the only issue was if the Land was Community Land or Public Land. He opposed empanelment of a 3 Judge Bench.
32. Mr Kimathi for the Attorney General, the 4<sup>th</sup> Respondent, associated himself fully with the position taken by Colonel Mugira, who represented the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
33. After carefully considering the pleadings and the submissions proffered by the parties, I agree with Senior Counsel Kigen that this suit raises Complex and novel issues which have not been determined with finality by either the Court of Appeal or the Supreme Court. The case has overriding and overarching public concerns and its determination will have great consequences for the Rendille and Samburu Communities, whichever way it is decided.
34. I, therefore, allow prayer C in the application and hereby certify this matter as one raising substantial questions of law under, inter alia, Articles 165 (4) and 163 of the Constitution and other statutory provisions including the Community Land Act, No 27 of 2017, the Wildlife Conservancy Act, No 47 of 2013, and the National Land Commission Act of 2012 and I, therefore, find that the Petition should be heard by an uneven number of Judges being not less than three to be assigned by the Honourable the Chief Justice.
35. I recommend that the Honourable the Chief Justice, in her wisdom, considers the empanelment of a 3 Judge Bench to hear and determine this petition.
36. I hereby direct the Deputy Registrar of this Court to forward this file to the Honourable the Chief Justice through the Presiding Judge of the Environment and Land Court so that the Chief Justice can Consider the Empanelment of a 3 Judge Bench.
37. Costs of this application shall be in the cause.

**DELIVERED AT ISIOLO THIS 6<sup>TH</sup> DAY OF JUNE, 2022 IN THE PRESENCE OF:**

Court Assistant: Balozi

Katwa Kigen for 9<sup>th</sup> to 18<sup>th</sup> Petitioners

Colonel Mugira for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

**HON. P. M. NJOROGE**

**JUDGE**



PETITION NO. 007 OF 2021 – RULING 15

