



Diocese of Meru Registered Trustees v Kenya Tea Development Agency Limited & 8 others; County Government Of Meru & another (Interested Parties) (Election Petition E003 of 2020) [2022] KEELC 2569 (KLR) (6 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELECTION PETITION E003 OF 2020**

**CK NZILI, J
JULY 6, 2022**

BETWEEN

DIOCESE OF MERU REGISTERED TRUSTEES APPELLANT

AND

KENYA TEA DEVELOPMENT AGENCY LIMITED 1ST RESPONDENT

KIOGORA MUTAI 2ND RESPONDENT

HONESTY KANYUA MANYARA 3RD RESPONDENT

ERASTUS MIRITI ERASTO 4TH RESPONDENT

FESTUS K. KATHENDU 5TH RESPONDENT

JAPHET MBURUGU 6TH RESPONDENT

JOSEPHINE KAGWIRIA 7TH RESPONDENT

MWAMBA MAGANA 8TH RESPONDENT

THE LAND REGISTRAR – IMENTI NORTH & CENTRAL DISTRICTS 9TH RESPONDENT

AND

COUNTY GOVERNMENT OF MERU INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

1. Before the court is the petition dated 25.9.2020 in which the petitioner a registered society acting in its own interest and the interests of the Poor Hand Maid of Jesus Christ registered charitable trustees and



its affiliates, said to be owning and operating St. Joseph Children's Home – Caring Home, situated on L.R No. Nkuene/Mitunguu/190 measuring approximately 100 acres but now subdivided into L.R No. Nkuene/Mitunguu/1967, 1968, 1969, 1970, 1972, 1973, 1974 and 1975 herein after the petitioner and children home respectively.

2. It is averred in 2007 the Children's Home applied for allocation of the suit premises from the predecessor of the 1st interested party and was allocated 15 acres of the suit land following which in February 2008, they constructed the children's home alongside other permanent developments after obtaining the requisite permits or approvals.
3. It is averred members of the community later on approved an additional four acres to be allocated to the Children's Home following which they built and fenced on the entire 19 acres whose developments are estimated at Kshs.100 million or thereabout.
4. The petitioner avers in July 2020 the respondents began interfering with the quiet occupation and use of the suit land by children's home and that the 2nd respondent lodged Nkubu Senior Resident magistrates ELC No. No. 49 of 2016 claiming ownership of the Suitland.
5. The petitioner avers it conducted a search at the land registry and established the suit land had been fraudulently subdivided and registered into the parcel No's L.R Nkuene/Mitunguu 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and 1975 herein after the new parcels in favour of the respondents.
6. The petitioner avers due process was not followed in subdividing and or registering the new parcels of land hence the same was and is irregular, fraudulent and illegal particularly considering the premises were meant to house destitute children who are residents of the area in the spirit of utilizing public land for the good of the members of the public.
7. The petitioner aver the land occupied by the children's home touches on all the nine subdivision of the suit land, allocated to them to advance public interest and could not therefore be subsequently re-allocated to private individuals so long as the public interest subsisted which acts would fly against the principle governing alienation, allocation, acquisition and use of public land hence was illegal, irregular and unconstitutional.
8. The petitioner avers the acts by the respondents have infringed on the hundreds of children living in the children's home, members of the community who helped establish it and the larger community members who are entitled to the right to enjoy the benefits accruing from public property and its utilities.
9. The petitioner avers the rights to dignity and security of person of the children living in the children's home and others living there have been infringed upon as they face the imminent threat of forceable eviction, being rendered destitute, homeless, losing rights to housing, shelter, education, right to clean water and loss of freedom from hunger as the children home provides the children with the aforesaid amenities.
10. The petitioner avers the children's right to property has been infringed upon which they are unlikely to enjoy after the re-allocation and registration in favour of the respondents, yet the said land is held in trust for them and for their benefit by the 1st interested party hence the said re-allocation to the respondents robs them those rights and freedoms which they now urge the court to intervene by declaring the land to be public land; invalidating the subdivisions, directing the land registrar Imenti, North South & central Districts to cancel, rectify, reverse and register 15 acres occupied by the children's home under their names or in the alternative the remaining balance of 4 acres be registered in



the name of the 1st interested party and a permanent injunction stopping the respondents from in any way whatsoever interfering with the children's homes quiet occupation and enjoyment of the suit land.

11. The petition is supported by affidavits of Sister Josephine Gakii Mwitari sworn on 25.9.2020 and 9.12.2021 respectively in which she has attached a copy of green card as Jam "1" proof of applicants and extracts of minutes dated 9.4.2008 approving the allocation as (Jam 2 (a) & 2(b) copy of a letter dated 7.2.2008 by the District commissioner as Jam "3", application for and approved building plans as Jam 5 (a) & (b); copy of plaint as Jam "6"; copies of green cards and a letter dated 5.8.2016 signed by the 1st interested party's committee executive member land produced as annexure Jam 7(a) and (b); copies of surveyor's letter/report dated 22.9.2020, sketch maps and photos as annexure Jam 8(a) (b) & (c) and lastly the application dated 24.7.2020 in the lower court for temporary injunction as annexure Jam "9" respectively.

Response

12. The petition is opposed by the 1st respondent through an answer dated 19.11.2020 accompanied by a list of documents of the even date and a replying affidavit sworn by John Kennedy Omanga on the grounds that:
 - (a) On 22.6.2005 the defunct county council of Meru leased to Kinoro Tea Factory Kionyo Tea factory and Imenti Tea Factory companies which its manages, parcel no. L.R Nkuene/Mitunguu/189 and 1975 measuring 15 acres for a term of 20 years for purposes of planting trees due to expire in 2025 hence the same was unavailable for allocation to the petitioner in 2007 and 2008 as alleged.
 - (b) By full council meeting on 13.5.2011, the council resolved to change the reservation of the two parcels from Nkuene societies and Abogeta Societies to KTDA factories following which a letter of allotment for L.R No. 1975 was issued to it as a trustee for Kinoro, Kionyo and Imenti Tea Factories Co. Ltd.
 - (c) L.R No. 190 was subdivided into parcel No's 1967-1975 in 2002 and hence the same was not available for re-allocation in 2007 or 2008.
 - (d) The 1st respondent denied the petitioner was lawfully in occupation of its parcels of land, given due process was followed in its acquisition of the land more so stating that its use of the parcel of land was public and communal given the three factories are public companies drawing shareholders from the members of the community. The 1st respondent relied on a lease dated 22.6.2005, minutes of the full council held on 13.5.2011, certificate of lease dated 18.6.2015 and a lease dated 18.6.2015.
13. Further, the 1st respondent averred there was no public interest claim demonstrated by the petition, the same was an abuse of the court process since there was in existence a clear legal process to challenge an alleged fraudulent acquisition of public land hence the petition should be struck out as held in Gabriel Mutava & 2 others v M.D Kenya Ports Authority & another [2016] eKLR.
14. The 2nd & 3rd respondents opposed the petition through replying affidavit sworn on 27.1.2021 respectively.
15. The 2nd respondent denied infringing on the rights of the petitioner given he was gifted the land parcel no. 1967 by his mother the 3rd respondent and lawfully acquired a title deed for 1.64 ha.



16. Secondly it was averred the petitioner had been using unorthodox means to stake a claim over his land by harassing his workers hence the reason he filed Nkubu PM ELC No. 46 of 2020 to stop the interference and the petition has been filed to water down the said claim which is different. Further it is averred if the petitioner only sought for 15 acres from parcel No. 1975 it defeats logic why it would not sue beneficiaries of the other portions over 100 acres in the parent title.
17. The 3rd respondent position is that the original parcel no. L.R Nkuene/Mitunguu/190 was set aside for Abogeta Societies who have not challenged the allocation to private individuals. That the petitioner only applied for 15 acres out of parcel no. 1975 and not from the parent parcel of land. That parcels no's 1967 to 1974 were allocated in 2002 before the application for allocation in 2007. That the 3rd respondent has never interfered with the St. Joseph Children Homes occupation and user of the 15 acres since she had no interest on it.
18. That Nkubu PM ELC No. 46 of 2020 is over parcel no. 1967 and not 1975 where the children's home is situated. That she did not interfere with any official records. That the petitioner deliberately put up structures on parts of parcel no. 1967 to 1974 in a scheme to steal more land than was allocated in parcel no. 1975. That the 15 acres was allocated to the petitioner as a private entity and not the public in general who is running a private institution and that community leaders had no powers to allocate land to the petitioner. That the initial parcel no. 190 was leased to the Abogeta societies initially by the defunct county council of Meru. That in 1999 the society was liquidated as per liquidation order dated 5.10.1999. That as per the minutes of the ordinary full council meeting of the county council of Meru on 6.9.2002 it was resolved the 7 families affected by the Giumpu disaster in Abogeta location to be given four acres each of the 100 acres initially leased to the defunct society. That the defunct council subdivided the parcel into the resultant subdivisions on 28.11.2002. That on 5.12.2002 the council transferred the parcel no. 1967 to Lucy Gakiru Kirimi then to 3rd respondent on 24.12.2008 and later to the 2nd respondent on 5.6.2020. That on 5.12.2002 the council transferred parcel no. 1968 to the 4th respondent and parcel no. 1969 to Johnson K. Mwamba then to 3rd respondent on 15.4.2009 and later to 5th respondent on 1.10.2015. That on 5.12.2002 the council transferred parcel no. 1970 to Magiri M'Nagana then to 3rd respondent on 24.12.2008.
19. The 9th and 10th respondents opposed the petition by a replying affidavit of CM. Makau sworn on 26.10.2021. That the initial parcel no. L.R Nkuene/Mitunguu/1910 was initially leased to the Abogeta Farmers' Cooperative Society Ltd, the beneficiaries to the land have not challenged the allocation to private individuals and that the petitioner is not and could not advance the interests of Abogeta societies and hence lacked moral authority to police the land for them or the interests of Mitunguu residents. That the petitioner was a trespasser who has disregarded land boundaries and purported to erect buildings on other people's land and out to abuse the court process through an unmerited petition.
20. That on 5.12.2002 the council transferred parcel no. 1971 to Ephantus Kaaria Mwamba then on 24.12.2008 to 3rd respondent then 5th respondent on 1.10.2015 and on 2.8.2018 it was transferred to Japhet P. Mburugu and later to Josephine Kagwiria Gitonga on 3.8.2018. That on 5.12.2002 the council transferred parcel No. 1972 to the 7th respondent while parcel no. 1973 remained in the name of the defunct council. That on 5.12.2002 the council transferred parcel no. 1974 to Sebastian Mugambi then to 3rd respondent on 9.6.2009, then to 5th respondent on 1.10.2015 and later on to Kiserian Development Co. Ltd. That on 18.6.2015 the 1st interested party issued a lease to the 1st respondent for parcel No. 1975.
21. The 9 & 10 respondents annexed copies of the liquidation order, the council minutes, mutation forms and a green card as annexures marked MM "1" "2" "3" "4" "5" respectively.



Supplementary Affidavits by the Petitioner

22. Through two supplementary affidavits sworn on 16.4.2021 and 9.12.2021 the petitioner stated the title deed produced by the 1st respondent indicated the transfers were done five years and that the said lease to the three factories was neither registered nor stamped with any date or accompanied by the necessary minutes of the council approving the award of the lease to the three companies.
23. That the allocation of Parcel No. 189 and 1975 as per the attached minutes of the full council meeting held on 13.5.2011 was done 3 years after the petitioners were allocated the 15 acres by minutes of 6th & 9th April 2008 hence the 2nd allocation was irregular for failing to recognize the previous allocation.
24. That even if the land was reallocated there was no notice in writing to the affected party of the change leading to the alteration or revocation of its 15 acres. That the attached letter of allotment dated 9.9.2011 indicated the lease term as 99 years with effect from 1.9.2011 whereas the 1st respondent's affidavit talked of a lease of 20 years beginning 22.6.2005 yet the petitioners had taken possession of the allotted parcel by the time the alleged allotment and lease was issued. That whereas the subdivision of the mother title were done and its register closed on 28.11.2002 as shown in annexure marked as Jam 7 (a), the resultant mutated parcel no. 1975 register was opened on 18.6.2015 which was a fundamental discrepancy that made the records unreliable. That the petitioner had a right to institute the petition for the destitute and most vulnerable members of the community. That the 2nd and 3rd respondents have not attached any evidence of purchase from the initial allottees Lucy Gakiru Kirimi which allegedly overlapped into its institution. That the mother title was registered on 13.5.1966 and was reserved for and not leased to Abogeta societies and if a liquidation order was made the assets would have been dealt with by the liquidator only. That any lease made was contrary to Article 62 of *the Constitution* on dealings over public land conversation to private land. That the transfer of mutated land parcels no. 1967, 1974 to the 3rd respondent between 2008-2009 was curious when the petitioner had already started construction after a lawful allocation hence they should have done due diligence on what was on the ground before acquisition more so when the 1st respondents then chairman Stephen Mutai M'Imanyara (deceased) and husband to 3rd respondent knew the facts on the ground.
25. That if there was a liquidation order in 1999 the land ought to have reverted back to the defunct county council to hold in trust for the residents of Mitunguu location.

Written submissions

26. With leave of court parties opted to dispose of the petition by way of written submissions based on the affidavits and documents on record whose deadline was 14.4.2022.
27. By written submissions dated 13.4.2022 the petitioner urges the court to find the issues for determination as whether the court has jurisdiction; if the petition meets the threshold; if the allocation was irregular or illegal; if the petition is merited and who is to bear the costs.
28. On the first issue the petitioner submits it has a right to institute the petition to address the needs of the vulnerable children under Articles 20, 22(3) and 23 (2) and 258 of *the Constitution*.
29. Reliance was placed on Mohamud Iltarakwa Kochale and 5 others vs Lake Turkana wind power Ltd and 4 others, Aaron Iltele Lesiannlam and 4 others (interested parties) (2021) eKLR.
30. Further the petitioner urges the court to find it has jurisdiction under Article (62)(2) of *the Constitution* as read together with Section 13(7) of the *Environment and Land Court Act*.



31. On the 2nd issue, the petitioner based on *Anarita Karimi Njeru vs Rep* (1976-1980) KLR 1272 and *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others* (2012) eKLR maintains the petition as presented has outlined the various infringements likely to subject the minors to eviction contrary to the best interest of the child under Article 53 of *the Constitution* and the court was being asked to balance the rights over land between the vulnerable and private individuals on public land which destitute orphans and street children utilize the same for accommodation and farming activities for sustenance. Therefore, it is submitted the right to dignity of the children if evicted and the colossal investment made on their behalf may get wasted yet they were in occupation before the alleged allocation and should be protected.
32. As to whether the allocation was irregular and or illegal it is submitted parcel no. Nkuene/Mitunguu/190 in 1965 was reserved as public land to be held for Abogeta societies as residents of Mitunguu under the Trust *Land Act* Cap 288 Laws of Kenya and was placed before the defunct council which was the predecessor of the 1st interested party in trust for locals as per Section 115 and 118 of the retired constitution and that under Section 53 of the Trust *Land Act*, gave direct powers were placed upon the Commissioner of Lands to administer the land on behalf of the county council as held in the matter to the National Land Commission (2015) eKLR and Article 61 of *the Constitution*.
33. The petitioner submitted the purported allocation and transfer of the parcels of land to the respondents was marred with irregularities since if the Abogeta Cooperative Society land was liquidated in 1999 the mother title could not become free government property and should have been distributed amongst the members of the defunct society and in absence of that it should have reverted to ordinary residents of the area. Instead on 6.9.2002 the defunct county council purported to reallocate it to anonymous seven families and on 23.10.2002 the town clerk purported to illegally alienate the trust land contrary to the Trust *Land Act* and the retired constitution into nine parcels and in violation of the rights of the residents of Mitunguu.
34. Therefore, it was submitted by the petitioner that the 7 families were only a smokescreen to attempt to mishandle public trust land and purport to give it to the 2nd and 3rd respondents who are son and wife to the former and now deceased chairman of the 1st respondent.
35. It was submitted that the alleged 7 victims of the disaster are said to have purportedly sold their land to 2nd respondent on the same day and transfer effected the same day and the remaining two families sold their parcels two months apart while the petitioner was still in occupation.
36. It was submitted that out of the seven alleged victims only two families still had title deed namely Parcel No. 1968 and 1972 being 4th and 8th respondents who have despite service opted not to respond to the petition.
37. Further it was submitted none of the purported victims have alleged that they settled or took occupation of their parcels of land unlike the petitioner, soon after the allocation.
38. As regards the 1st respondent, the petitioner submitted that there was no indication that the Commissioner of Lands followed the lease dated 22.6.2005 executed by the town clerk and gave consent for the said parties to alienate or deal with the trust land upon the subdivision or any minutes to that effect by the full council hence the lease could not form a basis for a purported change of reservation of L.R No 1975 to the 1st respondent later in 2011 particularly when 15 acres thereof had already been allocated to the petitioner earlier on, on 9.4.2008.
39. The petitioner submitted the green card for L.R Nkuene/Mitunguu/1975 indicated that several attempts were made to tamper with registry documents more so when other subdivisions from the



- mother title were opened on 28.11.2002, the one for L.R Nkuene/Mitunguu/1975 was opened on 18.6.2015.
40. This in the eyes of the petitioner was to hide the fact that it had a legally recognized interest backed by full council minutes of 9.4.2008.
 41. The petitioner submitted that going by the transfers of parcel no's 1970, 1971 and 1974 from the 3rd respondent to the 5th respondent parcel no. 1970 within a month was charged for over Kshs.5.5 million by the 5th respondent and later on for Kshs.10.5 million whereas parcel no. 1971 upon the transfer was used to secure a charge of Kshs.5.5 million on 1.10.2015. It was later discharged in 2018 and sold to the 6th and 7th respondents but shockingly and despite the transfer was used as collateral to secure a loan of Kshs.10.6 million borrowed by the 5th respondent and who purportedly transferred it to a limited liability company.
 42. The petitioner regarding the replying affidavit sworn by the C.K Makau for the 9th & 10th respondents submitted that if indeed the land registrar knew there was a liquidation order in 1999 it was irregular for him to process the sub-divisions and transfers for reserved land falling under Trust [Land Act](#) hence participated in the irregularity and illegality to convert public land to private land.
 43. Reliance was placed on Chemey Investment Ltd v Attorney General and 2 others [2018]eKLR citing with approval Arithi Highway Development Ltd v West End Butchery and 6 others [2015] eKLR.
 44. The petitioner submitted the respondents should have done due diligence that the suit land being trust land should have through public participation involved the local residents if there was any need to convert it to private land more so after they had endorsed the petitioner's request through the chief and the then area councilor.
 45. The petitioner submitted that trust land could only be dealt with under Section 114-120 of the retired Constitution as read together with section 13 of the Trust [Land Act](#) by being declared an adjudication Section under Caps 283 and 284 or by setting part which in the instance case was not complied with.
 46. Reliance was placed on Joash Onyango Oketo and 69 others vs Kenya wildlife service & 5 others (2019) eKLR, Angelo Mucee Kithira & 2 others v AG & 5 others [2017] eKLR, Mohamund Iltarakwa Kochale (supra).
 47. As to whether the petition was merited the petitioner submitted under Section 12 of the Trust [Land Act](#), it had a right to petition for the determination of the legality of the setting apart for and on behalf of the vulnerable children that they have demonstrated the purported setting apart was for the benefit of a few families and not for public purpose, no gazette notices were published to the locals on the intention local administration was not involved, and that there was no evidence the purported 7 families did reside or utilize or take up the parcels of land after the purported allocation to them.
 48. Further, it was submitted that the two families already holding title have opted not to defend the petition; a close relationship exists between the respondents demonstrating a clear intent to grab the suit land; the transfers were undervalued and subsequently charged depicting a scheme to hide their true value and lastly it demonstrated a clear violation of the retired Constitution and Sections 12, 13(2) and 53 of the Trust [Land Act](#) and which requires this court under Section 13 of the ELC Act, Articles 29, 40, 43 and 61 of [the Constitution](#) to find violation of the rights of the vulnerable street and orphaned children housed in the children's home, protectable as beneficial to the interest of the residents of Mitunguu who upon allocation by the defunct council, proceeded to take possession, invest in its development, and have a legitimate expectation to be issued with title deeds, in accordance



with the best interest of the child unlike the 1st - 8th respondents who have turned trust land into a tool for commercial enrichment by borrowing loans with title deeds belonging to trust land.

49. As regards costs, the petition submitted it was entitled to costs since the petition seeks to enforce the rights and interests of destitute children with shelter at the children's home and those of Mitunguu residents who have lost trust land.
50. Reliance was placed on *Raila Odinga and others vs IEBC, Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai and 4 others* (2014) eKLR.
51. On their part the 2nd and 3rd respondents by written submissions dated 17.5.2022 submitted the mother title green card showed the land was never held for the residents of Mitunguu but for the defunct Abogeta Coop Society Ltd and that for a party basing a claim or fraud should have filed an ordinary suit as held in *Daniel Mugendi vs Kenya University & 3 others* (2015) eKLR.
52. The 2nd & 3rd respondents submitted a claim by a private individual against other private individuals did not or could not comprise a constitutional question hence the petition fails the constitutional threshold.
53. Further the 2nd and 3rd respondents submitted the petitioner only applied for 15 acres over parcel no. 1975 and not over parcel no. 190 hence was misleading the court or failing to disclose material facts and that in any event it was in 2007 yet the mother title had been subdivided in 2002.
54. The 2nd and 3rd respondents submitted the petitioner could not seek to benefit from suit land whose origin it was still challenging more so when fraud cannot be a constitutional question and that they have come to court with unclean hands by purporting to breach the clear boundaries to the parcels of land which was a clear attempt to rubber stamp trespass.
55. Reliance was placed on *Chelimo A. Marsin and 7 others vs OCS GSU Kirindon GSU camp and 7 others* (2011) eKLR.

Issues for Determination

56. Having gone through the petition, supplementary affidavits responses and documents attached by the respective parties and the written submissions the issues calling for determination are:
 - (a) If the petition has met *the constitution* threshold falling under the jurisdiction of this court.
 - (b) If the petitioner has locus standi to file the petition for and on behalf of the Poor Hand Maid of Jesus Christ. Registered trustees the owners and the operators of a Children's Home known as ST. Joseph Children's home-caring home and the residents of Mitunguu within Meru county.
 - (c) If the defunct county council of Meru had constitutional and legal capacity to own and re-allocate land to the petitioner and the respondents.
 - (d) If the 9th and 10th respondents had legal capacity to subdivide, approve, allocate, transfer and register new parcel no. 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975 out of the initial parcel no. Nkuene/Mitunguu/190 in favour of the respondents and the interested party.
 - (e) If the petitioner has proved breach of the right to deprivation of property under Articles 40, 43 on accessible, adequate housing and reasonable standard of sanitation



free from hunger adequate food, acceptable quality clean and safe water, social security and education, Article 53 on children rights and marginalized groups and Article 47 on fair administrative action.

- (f) Whether the petitioner is entitled to the prayers sought.
- (g) What is the order as to costs?

57. Rule 4 (2) of *the Constitution* of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules (2013) provides a person bringing a petition may act on behalf of another person who cannot act in their own name or to bring a petition as a member of or in the interest of a group or class of persons; or to act in public interest or to bring a petition as an association in the interest of one or more of its members.

PARA 58.

In this petition the petitioner has defined the capacity it has filed the petition as the registered trustees under the *Societies Act*. At paragraph 28 of the petition the petitioner stated it is acting in its own interest and the interests of the Poor Hand Maids of Jesus Christ registered trustees in the interest of the hundred children living in St. Josephs Childrens Home Caring Home, the interest of the community who helped establish the children's home and the interests of the residents of Mitunguu location within Meru county.

- 59. Articles 22 2(a) (b) and 258 (2) (a) (b) (c) and (d) of *the Constitution* allows a party with the capacity to institute a petition in its own interest and that of a group of persons.
- 60. The 2nd respondent at paragraph 6, 8, 9, 10, 12 & 13 of the replying affidavit sworn on 27.1.2021 has acknowledgment the existence of the petitioner, the children's home as well as the children at the disputed premises. Further in his annexure no. KM 1 (a) and (b) the 2nd respondent did sue the Catholic Diocese of Meru and St. Joseph's Children's Home Mitunguu Parish as the defendants.
- 61. The 2nd respondent in that suit described the petitioner as a registered religious organization under the *Societies Act* with powers to sue and be sued in its name.
- 62. Similarly, in that plaint the 2nd respondent described a children's home operated by the 2nd defendant at Mitunguu area of Imenti south sub county of Meru County.
- 63. At paragraph 5 of the plaint the 2nd respondent averred he owned L.R No. 1967 which he had been given as a gift by the 3rd respondent bordering the petitioner's institution where it had built a fully functional and operational children's home.
- 64. In the attached witness statement by the 3rd respondent the 3rd respondent admitted that the institution was owned by the petitioner and had been threatened by it since 2015 following which she sent a demand letter dated 11.3.2015.
- 65. In view of this clear admission of the facts the 2nd & 3rd respondents are estopped in law to turn around and claim that the petitioner lacks locus standi or interest to institute the petition herein. My finding is that the petitioner has a demonstrable interest individually and or collectively. As a recognized person by law under Article 260 of *the constitution* by virtue of registration as a religious society the petitioner has a stake and interest for and on behalf of its membership to bring this petition, as held in John Wekesa Khaoya v A.G [2013] eKLR and Mumo Matemu supra.
- 66. Coming to the 2nd issue, Rule 10 of the Mutunga rules requires a petition to disclose the name, facts, constitutional rights and freedoms infringed, threatened to likely to be violated, nature of injury caused it or the person in whose name the petitioner has instituted the suit or in public interest case to the



- public class of persons or community, details of any previous criminal or civil cases, reliefs sought and the signature. The petition under Rule 11 may also be supported by an affidavit and attached documents.
67. In this petition, the petitioner has met the above key requirements. It has described the person(s) or class of person(s) whose rights have been threatened, details of the subject parcels of land, capacity in which it has sued and the specific reliefs sought.
 68. Over and above this the petitioner has sworn several affidavits in support and attached documents including pending suit between it and the 2nd respondent.
 69. In *Anarita Karimi Njeru supra* the court stated a petition must be specific on the constitutional provisions, he complains to have been infringed and the manner in which they are alleged to have been infringed. In *Lt Col. Peter Ngari Kagume and 7 others vs AG (2006) eKLR*, the court held a petition must be supported by tangible evidence of the alleged violation so that the court is not dealing with imaginations and speculations. In this petition the petitioners claim is that the 1st interested party predecessor in title allocated to it 15 acres of land to which it took possession and was allowed to develop for the benefit of street children and orphans. It states later on it learned the suit land was allegedly allocated and or registered in favour of the respondents contrary to Sections 13 and 53 of the *Trust Land Act* and Section 117 – 120 of the retired Constitution.
 70. The petitioner further avers there was no fair hearing or notice of the reversal of its allocation and reallocation to the respondents yet it was in occupation and has invested colossal amounts of money with a legitimate expectation that the land was theirs and would eventually be issued with a title deed. The petitioner has attached documentary evidence in support of its claim.
 71. My finding therefore is that the petition has met the constitutional threshold both in its contents and form hence the reason the respondents have been able to extensively respond to it.
 72. On the issue of jurisdiction, the respondents take the view the petition does not disclose a constitutional question, it raises issues of fraud, which ideally should be brought through a normal claim and that the same was a dispute between private individuals and that there can be no violation of rights between private individuals.
 73. In *Patrick Mbau Karanja v Kenyatta University [2012] eKLR* Lenaola J as he then was held a constitutional interpretative mandate should not be involved where other remedies are available. The court held that duties imposed by *the Constitution* were owned by the government of the day and that individuals could not owe a duty under a fundamental right to another individuals. The court further stated simple matters between individuals which are of purely civil or criminal nature should follow the route of Article 165 (3) (a) and be determined as such and that to invoke the bill of rights in matters where the state was not a party would certainly dilute the sanity of the bill of rights.
 74. A constitutional question on the other hand has been said to be one whose resolution requires the interpretation of *the Constitution* which includes a dispute as to whether any law or a conduct is inconsistent with the constitutional issues concerning the status, powers and functions of an organ of state, the interpretation of any legislation or the development of the common law which provides the spirit, purport and objects of the bill of rights. See *Republic vs Paul Kihara Kariuki AG and 2 others exparte Law Society of Kenya [2020] eKLR*.
 75. In *Chimweli Jangaa Mangale & 3 others vs Hamisi Mohamed Mwawasaa & 15 others [2016]eKLR*, the court held an ELC court has jurisdiction to determine constitutional issues of protection of the right to land as per section 13(3) of the ELC Act.



76. The respondents take the view that the issue of fraud raised by the petitioner cannot amount to a constitutional question and that the petitioner should have filed a regular suit.
77. Further the 2nd and 3rd respondents admit the existence of the Nkubu matter where they are seeking an injunction and hence the petitioner by filing the petition seeks to water down the lower court suit.
78. Looking at the petition herein the issues raised are beyond the ownership of the suit parcels of land. There is agreement between the parties that the mother title was reserved for the defunct Abogeta Cooperative Society Ltd which went under liquidation and a liquidator was appointed through a gazette notice.
79. The defunct county council however assumed ownership of the mother title and re-allocated the said land to the respondents by passing the petitioner who had initially been allocated 15 acres and had taken vacant possession earlier on than the respondents and caused major developments therein with a legitimate expectation that the defunct county council was going to issue it with title documents.
80. The petitioner now claims the process of re-allocation and the issuance of title deed was against the clear provision of Sections 117 to 120 of the retired Constitution hence the court should declare the resultant subdivisions and the transfers unconstitutional.
81. In my view therefore, the petition is beyond a land dispute between private individuals. The 9th and 10th respondents are parties to the petition for the alleged violation of Articles 28, 29, 40, 41, 43, 47 and 62 as read together with Section 117-120 of the retired Constitution.
82. My finding is that this court has jurisdiction to entertain the dispute.
83. On the issue as to whether the petition has proved the alleged violations, it is not in dispute that the defunct county council of Meru had been established and administered in accordance with the Local Government Act and the old Constitution. The disposal of property had to comply with section 117 to 120 of the old constitution and the Trust *Land Act*. See Maureen Ochieng and 4 others v Nairobi City County Government & 4 others, Anthony Tom Oluoch and (1001) others interested parties [2021] eKLR.

Undisputed facts

84. Both parties herein agree that parcel no. Nkuene/Mitunguu/190, hereinafter the mother title initially was initially reserved for Abogeta Farmers Coop Society Ltd hereinafter the society. The title was held by the defunct county council of Meru as opened on 13.6.66. There is also no dispute that a liquidation order was made by the court on 5.10.1999 under Section 61(1) of the Cooperative *Societies Act* and a liquidator appointed who was to take custody of all the properties of the defunct society for purposes of completion of liquidation. A gazette no. 5867 was made to that effect.
85. Section 65 of the Cooperative *Societies Act* provided that upon the appointment and gazette of a liquidator all the property of such society shall vest on the liquidator from the date upon which the order of cancellation takes effect.
86. Section 66 (1) provided that the liquidator shall inter alia sell the immovable property and rights of action of the society with the power to transfer the whole thereof to any person or to transfer the same parcels and or to arrange for distribution of the assets of the society in a manner when a scheme of distribution had been approved by the Commissioner and to apply to the Commissioner for his discharge from the duties of liquidator after the completion of the liquidation proceedings.



87. The existence and the role of the liquidator cannot be wished away. In Francis Mwenda & 113 others v Liquidator Abogeta Farmers Cooperative Society Ltd [2007] eKLR, the court had occasion to issue inhibition orders so as to preserve the interests of its former employees.
88. In New Kiamwangi Gumba Co. Ltd vs Kiambu Coffee Growers Cooperative Union & 2 others (2015) eKLR, the court held that upon deregistration of a cooperative it ceases to exist as a corporate body and upon cancellation all its properties vest with the liquidator as per Section 63 and 65 of the Cooperative *Societies Act*. It is only the liquidator who has capacity to deal with the property of a deregistered cooperative society.
89. In this petition the 9 & 10th respondents have not brought any evidence that the above law was complied with as at 6.9.2002 as regards approvals from the liquidator when the 1st interested party predecessor resolved to settle the landslide victims of Giumpu Disaster Abogeta location upon the suit land through a re-allocation.
90. In the ordinary full council meeting held on 6.9.2002 there is no indication that the liquidator as well as the District Cooperative Officer were present at the meeting and gave their representation on the status of the liquidation proceedings and whether an approval on distribution of the assets of the defunct society had been approved by the Commissioner of Cooperatives among which beneficiaries were the aforesaid victims and subsequently the respondent herein.
91. There is no indication that the liquidator had completed the liquidation process of the defunct society and handed over and with approval of the commissioner, the mother title to the defunct county council of Meru so as to assume ownership and or purport to re-allocate the said land to the aforesaid victims and by extension any other third party.
92. In this case there is no discharge displayed to show that as at 2002, the liquidator's mandate had expired after discharging his mandate. See Meshack Kirimi Mwithimbu and 7 others vs Liquidator Nkuene Farmers Cooperative Society Ltd and 16 others (2019) eKLR.
93. Under Section 19 of the Cooperatives *Societies Act*, a society upon registration becomes a body corporate by the name under which it is registered with perpetual succession and a common seal with the power to hold immovable property.
94. Under Section 63 thereof once that certificate of registration is cancelled the society ceases to exist as a corporate body from the date of the order. So as from 26.10.2002 there was nothing in law known as Abogeta Farmers' Cooperative Society Ltd owning L.R No. Nkuene/Mitunguu/190. The liquidator had taken over its assets and liabilities upon the order and gazettment for purposes of liquidation.
95. The order and gazettment sought for creditors and debtors to raise any issues. If the county council of Meru had any claim over one of the assets namely L.R Nkuene/Mitunguu 190, the law required the same to be raised with the liquidator and retransfer of the land to occur as per the law.
96. The consequences of putting a society under liquidation are set out under Sections 61, 62, 63 and 65 of the Cooperatives *Societies Act*.
97. In this petition the petitioner takes the view that the full council minutes and the subsequent transfer of the subject land was irregular, illegal and in breach of the rights and freedoms of the people of Mitunguu and offended not only the Trust *Land Act* but also the Retired Constitution.
98. On the other hand, the 2nd and 3rd respondents aver the members of the Abogeta community or the 7 families who were allocated the land are not complaining over the land.



99. It is trite law that one cannot pass a good title if he has none at all. The law on liquidation is set out so as to safeguard the both the private interests of the shareholders to the defunct society and the wider public interest.
100. The juristic person with effect from 5.10.1999 was the liquidator and not the defunct county council of Meru now succeeded by the 1st and 2nd interested parties. See *Keekonyokie Farmers' Cooperative Society Ltd vs Peter Mositet and 18 others* (2015) eKLR.
101. Section 224 of the *Companies Act* now repealed provided in winding up by the court any disposition of the property of the company made after the commencement of the winding up, shall, unless the court orders otherwise be void. See *Queens way Trustees Ltd vs Official Receiver and Liquidator Tanneries of Kenya Ltd* [1983] eKLR.
102. Under Section 26 (1) of the Land Registration Act, the title of a registered proprietor is prima facie evidence that the proprietor is an absolute and indefeasible owner of land but such a title can be challenged on account of fraud, misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.
103. The 9th & 10th respondents at paragraph 3 of the replying affidavit state and admit the mother title Parcel No. 190 initially belonged to the Abogeta Farmers Cooperative Society which was put under liquidation on 5.10.1999.
104. The court has set out the procedure under the Cooperative *Societies Act* and the *Companies Act* which was applicable at the time. The 9th and 10th respondents have deliberately omitted to explain to this court the implications of non-compliance with that procedure and the legal basis for the defunct County Council of Meru to allegedly assume ownership of the mother title without the consent or approval of the official liquidator and the appointing authority, the Commissioner for cooperatives. A copy of the register for the mother title indicates the land was reserved for Abogeta societies even though held by the then Meru County Council. The said land was set apart in line with Section 117 (1) (c) of the Retired Constitution for Abogeta societies. Section 13 1(c) of the Trust *Land Act* stipulated that in pursuance to section 117 (1) of the old constitution, a council could set aside land. The procedure required under Section 12 (2) of the Trust *Land Act* was to give a notice of not less than one and not more than three months to the chairman of the divisional board to consider the proposal. Subsection 2 (b) required the proposal to set apart the land to be brought to the people of the area concerned and to be informed of the day and time the meeting of the board shall take place. During the meeting the board is required to hear and record in writing the representation of all persons concerned who are present at the meeting and submit to the council about its written recommendations together with a record of representations made at the meeting for the consideration by the council.
105. In *Mohamud Iltarakwa Kochale* supra the court held that due process was not followed in setting apart the suit property for lack of a divisional board in place which it termed as a breach of the constitutional and statutory provisions on setting a part of a trust land. The court found non-compliance thereof could not be excused on account of public interest, legitimate expectation, government policy and practice.
106. As regards the lease to the 1st respondent the same is neither registered and nor signed and or sealed by the respective parties. As indicated above the subject property was still under the liquidator's mandate and there is no indication if the office of the Commissioner for Cooperatives ever authorized or consented to any transfer or lease of property belonging to a society under liquidation.



107. Further to the foregoing the said parcels of land were Agricultural land and hence subject to the land control board consents in line with the [Land Control Act](#).
108. In absence of any land control board consents for both the subdivision and transfers coupled with the lack of consents and approvals from both the liquidator and the Commissioner for Cooperatives, my finding is that the defunct county council of Meru had no authority in law to purport to re-allocate LR No. Nkuene/Mitunguu/190 to third parties and secondly to authorize the 9th and 10th respondents to approve, survey, subdivisions and authorize any transfers and registrations of any resultant title to the said parcels of land in favour of the respondents herein.
109. Consequently, any titles issued thereto by the defunct County Council of Meru without the involvement of the liquidator were ultra vires, null and void ab initio.
110. As regards the legality of the letter dated 20.12.2007 marked Jam 2(5), the Misc receipt No. 138873 and the application letter for the parcel held by the petitioner and minutes marked as Jam 2 (b). In *Philma Farm Produce & Supplies & 4 others vs AG and 6 others* [2012] eKLR the court held letters did not confer a proprietary right but was only an invitation for an offer to receive property or to be allocated property on complying with the terms and conditions stated therein.
111. In *County Council of Meru and 2 others vs PCEA Through The Registered Trustees* [2020] eKLR the court held minutes alone did not confer any proprietary interest in land since they were a mere expression of an intention to allocate land and that a resolution of the council had to be put into action or effect in order to give rise to a bundle of rights in land capable of being protected. The court also held that even if the council expressed its intention to allocate land through minutes the said land had an encumbrance as it was already reserved for Mara Experiment farms.
112. In this petition the entry of records produced by the parties for the mother title has an easement reservation for Abogeta Societies now defunct.
113. As I have found above the said Abogeta Society was placed on liquidation on 9.10.1999.
114. No evidence has been tendered to show that the liquidation order had been lifted by the time the defunct council of Meru in 2002 and 2007 was purporting to reallocate the land to the respondents and the petitioner.
115. In the circumstances obtaining, I find that the change of reservation on L.R Nkuene/Mitunguu/190 and the subsequent survey, subdivisions reallocations and transfers to the respondents were contrary to [the Constitution](#) and the statutory provisions alluded above. The same are declared unconstitutional, invalid, null and void ab initio.
116. An order is hereby issued directed at the Land Registrar Meru central cancel all the change of reservations on Parcel no. Nkuene/Mitunguu 190 and the resultant subdivisions and titles no's 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, and 1975. There will be no order as to costs given this is a public interest litigation.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 6TH DAY OF JULY, 2022

In presence of:

C/A: Kananu



Njindo for petitioner

Gichunge for 2nd & 3rd respondents

Lucy Mwai 1st respondent

HON. C.K. NZILI

ELC JUDGE

