



Mwariama & 18 others (Suing on their own behalf and on behalf of about 3,000 residents of Timau Area in Buuri West Sub-County, Meru County) v National Land Commission & 5 others; County Commissioner, Meru County & another (Interested Parties) (Environment & Land Petition E010 of 2020 & 1 of 2022 (Consolidated)) [2022] KEELC 13286 (KLR) (5 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E010 OF 2020 & 1 OF 2022 (CONSOLIDATED)**

CK NZILI, J

OCTOBER 5, 2022

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 2, 3, 10, 35, 40, 42, 43, 46, 47, 50(1) & 56 (E), 60, 62, 63, 69, (1) (H), 73, 75 & 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF GOVERNMENT LANDS ACT (CAP 280), LAND ACQUISITION ACT (CAP 295), THE AGRICULTURE ACT (CAP 318 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT (NO. 4 OF 2003) THE COMPANIES ACT (CAP 486); THE PUBLIC HEALTH ACT (CAP 242 OF THE LAWS OF KENYA) AND THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT (CAP 387)

BETWEEN

**JOEL MWARIAMA & 18 OTHERS PETITIONER
SUING ON THEIR OWN BEHALF AND ON BEHALF OF ABOUT 3,000
RESIDENTS OF TIMAU AREA IN BUURI WEST SUB-COUNTY, MERU
COUNTY**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
CABINET SECRETARY FOR LANDS & PHYSICAL PLANNING 3RD
RESPONDENT**



DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
NYAKIO HOLDINGS COMPANY LTD 5TH RESPONDENT
KARARI WAMBUGU GITUMBI 6TH RESPONDENT

AND

MERU COUNTY INTERESTED PARTY
COUNTY COMMISSIONER, MERU COUNTY INTERESTED PARTY

JUDGMENT

1. Before the court are two petitions, Petition No E010 of 2020 consolidated with Petition No 1 of 2022, the lead file being Petition No E010 of 2020 pursuant to a consent of the parties and an order made on March 8, 2022.

A. The first petition

2. The 1st petitioner through a petition dated December 17, 2020, the petitioners describing themselves as citizens, stakeholders, whistleblowers and public spirited individuals suing on their own behalf and that of over 3000 residents of Timau in Buuri West Subcounty and the entire Kenyan public filed this petition against the National Land Commission, Attorney General, Cabinet Secretary Land, Director Public of Prosecution, Nyakio holdings Co Ltd, Karani Gitumbo herein after the 1st-6th respondents and Meru County and County Commissioner, Meru County as interested parties.
3. They based their claim under Articles 2, 10, 35, 40, 43, 46, 47, 50(1), 56(e), 60, 73, 75 of the *Constitution*. The 1st petitioner sought the courts assistance for over 70 acres said to be public land allegedly illegally grabbed by the 5th and 6th respondents. It was averred the 5th & 6th respondents through a temporary occupation licence occupy a portion of LR 2890 Timau adjacent to LR No 7452 (hereinafter the subject land) Timau alleged to have expired, unlawful, illegal and unenforceable since the subject land is public property.
4. It was averred that around July 16, 2000, two hundred persons including the petitioners, residents, stakeholders, political leaders, religious leaders, provincial administration and members of public others decided to clean up community land measuring approximately 70 acres in Timau but the 5th and 6th respondents allegedly used police officers from Laikipia County to stop the said lawful action over the subject public land yet the 5th and 6th respondents hold no certificate of title over the said land.
5. The petitioners averred that the subject suit premises belong to the 1st interested party holding in trust for the public, but unfortunately it was in the process of issuing title deeds to the petitioners and respondents in Timau slums including Riverside Mukari, Kwa Joshua, Kongoni and Kairiri Buuri West Sub County.
6. The petitioners averred that they lack social amenities such as sewage system, dump sites and cemetery yet the subject land has been lying idle and risks being transferred to the 5th & 6th respondents, who have refused to surrender it to the 1st interested party for the said social amenities.
7. It was averred that the 2nd interested party wrote a letter dated July 9, 2020 through Deputy County Commissioner Buuri West Subcounty to the 1st respondent advising it that the subject property was public land reserved for the said amenities and confirming that during a public participation exercise



- for spatial town planning the community offered the said parcel to the town planner to include it for the aforesaid social amenities EPZ and enclosed a good plan for Timau Town by the 1st interested party; who put and identified beacons to the said subject property to the petitioners.
8. It was averred that the subject property was in Meru County but adjacent to the 5th & 6th respondents land which is in Laikipia County which to the public and the 5th & 6th respondents cannot claim ownership thereof.
 9. The petitioners averred that the extend the government through the respondents failed to and continues to fail to fully recover the subject property from the 5th and 6th respondents on behalf of the public, the rights of the petitioners as to non-deprivation of land, housing, adequate food, clean water, social security, education, good sanitation, fair administrative action and fair hearing of disputes continue to be infringed or violated. Further, especially given that public land shall not be disposed of or otherwise used except as per an Act of Parliament. It is averred their rights have been violated to the extent that the respondents purported to transact on the subject land despite the 5th & 6th respondents having no legitimate interest over it; colluding with the Commissioner of Land (hereinafter the National Land Commission) hence violating further Articles 2, 3, 10, 40, 43, 60, 50, 62, 64, 69, 73, 75 and 232 of the Constitution, by converting public land into private land; by failing to specify the nature and terms of its disposal and use; the 4th respondent failing to investigate and prosecute the 5th and 6th respondents for commuting illegalities and lastly, for failing to provide adequate access to information on the dealings over the subject land.
 10. The petitioners averred that the 1st respondent should be ordered to perform its functions over the management of public land including, an initiation of investigation on historical injustices and an oversight role on land use and planning.
 11. It was averred that by a report dated August 14, 2012 by the National Assembly Departmental Committee on Land and Natural Resources, it was recommended that the subject land be reverted to the public, in order for the 1st interested party to finalize its development plans for Timau Town so as to plan the subject property for public amenities which report has never been challenged by the 5th & 6th respondents.
 12. The petitioners sought for (a), declaratory orders that the 1st respondent had a legal obligation to safeguard public land and to ensure its alienation or use was for public common good, (b), declaration that the subject land was public land; and any purported alienation by the 5th & 6th respondents through an alleged temporary occupation license was illegal, unlawful and unenforceable in law; (c), injunction restraining the respondents from damaging, converting, using, transferring to the 5th & 6th respondents or any other private entity except the subject land; (d), a mandatory order directing the 1st respondent to revoke any title documents or temporary occupation license issued in favour of the 5th & 6th respondents for 70 acres of public land; (e), mandatory order directing the 1st respondent to perform its statutory duty and forthwith issue title documents in favour of the 1st interested party to hold the subject land in trust for the petitioners and the public; (f), an order directing the 1st interested party to finalize its development plans for Timau Town and include the subject land for public amenities. (g), General damages and compensation for the losses suffered by the petitioners due to the unconstitutional acts of the respondents and lastly (h), order directing the 4th respondents to investigate the 5th & 6th respondents who are reasonably suspected to have committed criminal offences regarding the subject land.
 13. The petition was supported by a verifying affidavit of Joel Mwariama sworn on December 17, 2021 regurgitating the contents of the petition attaching an authority to sue, the affidavit had annexures such



as the photos of some of the petitioners at the suit premises, letter dated July 9, 2020, maps, proposed development plans and the National Assembly Departmental Report dated August 2012 marked as JM “1”.

14. Alongside the petition, the petitioners filed a notice of motion dated December 17, 2020 in which they sought for conservatory orders pending the hearing of the petition, out of which the court issued some interim conservatory orders on February 10, 2021.
15. The 5th & 6th respondents entered appearance on February 5, 2021 and responded by filing a notice of motion dated February 1, 2021 in which they sought for a stay of execution of the orders issued on December 22, 2020 in favour of the petitioners and requested for the file to be transferred and be consolidated with Nyeri ELC petition No 7 of 2020 Nyakio holdings Co Ltd v NLC & another.
16. The application was supported by an affidavit of Karani Wambugu Gitumbi stating that one Daudi Wambugu Gitumbi purchased LR No 1452 within Laikipia County which land enjoyed a Temporary Occupation Licence (TOL) issued in 1936 for a land measuring 50 acres adjoining it, for purposes of creating a water intake point and which was fenced together with LR No 745 as one entity.
17. It was averred that on July 16, 2020, the 2nd interested party, its employees and or agents unlawfully damaged part of the 5th respondent’s perimeter fence, gained access into and dumped several heaps of litter on the subject property.
18. Further, it was also averred that the 2nd interested party allegedly incited some youths who threatened to invade the subject land yet it should have been the first one in ensuring that law and order was maintained at all times. It was averred that on July 27, 2020, the 5th respondent filed Nyeri ELC No 7 of 2020 whereby the court granted an interim order that the existing status quo pertaining to the subject land as at July 23, 2020 should be maintained and no more interference should occur with the subject land.
19. Additionally, It was averred that the aforesaid petition revolved around the use of the subject land in the temporary occupation licence measuring approximately 50 acres which fell under the Laikipia County to the East was Timau Township, to the North Ngusishi river, to the west being Plot No 7452 and to the south being Timau river.
20. Similarly, it was averred that the TOL was created for purposes of sourcing water from Timau river so that it could build a water intake point for 5th and 6th respondents the farm in LR No 7452 since Ngusishi river was a seasonal river and could not serve the water demand which was required for purposes of farming for LR No 7452 since the TOL was at the best point to have a water intake point, whereby the water could flow from the Ngusishi river gravitationally, and which the licensee had enjoyed for the 50 acres.
21. It was averred that vide letters dated May 5, 2010, December 22, 2008, June 24, 2018, November 10, 2006, July 10, 2002, February 5, 1998, September 19, 1997, February 26, 1997, December 2, 1970 and November 20, 1970, the said licensee followed up with the 1st interested party’s predecessor, the Commissioner of Lands to have the TOL converted and or the subject land covered by the TOL to be allotted to the 5th respondent on a long-term lease.
22. It was stated that upon the demise of licensee, the 5th respondent acquired the subject property through inheritance together with all the rights and benefits, *inter alia*, the TOL on the adjoining land measuring 50 acres which was fenced together with LR No 7452 as one entity. The said TOL has not been revoked to date by any of the respondents and or the interested parties.



23. The 5th & 6th respondents averred that it was apparent that the petition herein was initiated at the behest of the 2nd interested party, given it did not respond to the petition in Nyeri while the 2nd interested party was basically trying to find something to hold on to as its defence to the said petition in Nyeri, that the prayers sought in this petition were at variance with the ones in the Nyeri petition hence the need to be heard by one court so as to avail conflicting determination of the same subject matter which may cause great embarrassment to the court, similar to the two interim orders already issued in the two files which were creating a lot of confusion to the parties hence the need for stay.
24. The 2nd & 3rd respondents and the 3rd interested party entered appearance and filed grounds of opposition dated March 18, 2021 and filed on June 21, 2021.
25. The first ground was that the petition was fatally defective, misconceived, mischievous, unsustainable and otherwise an abuse of the court process; that the issue raised and orders sought were untenable in law for lack of evidence in support; that the subject land fell under Timau area Meru County; that the application was frivolous, vexatious and an abuse of the court process.
26. The 1st interested party filed on replying affidavit on June 21, 2021 sworn by JM Paul stating that LR No 2890 was land situated in Timau Township planned, budgeted and zoned for various uses as per the intergrated strategic urban development by the County Assembly of Meru. He annexed a copy marked as JMP “5” with some of the public purposes and utility land falling under the land allegedly the 5th & 6th respondents possess a TOL. The interested party denied issuing any TOL as alleged by the petitioner since they lacked such mandate or powers. It was averred they were strangers to the allegations by the petitioners of land grabbing of public land by the 5th & 6th respondents; that in any event the power to alienate or allocate public land fell under the 1st respondent hence the orders sought against them were untenable as the planning and implementation of development plans was an administrative function which was subject to the availability of fund among other factors. It urged that the orders being sought in the petition be denied and the petition be dismissed with costs.

B. 2nd Petition

27. Via an amended petition on August 13, 2020 Nyakio Holdings Co. Ltd (herein after the petitioner) describing itself as a limited liability company incorporated under the laws of Kenya with registered offices in Nanyuki, sued the National Land Commission 1st respondent and the County Commissioner Meru as the 2nd respondents.
28. It averred that as successors in ownership of LR No 7452 within Laikipia County initially bought by the late Daudi Wambugu Gitumbi in 1970 and which land enjoyed a TOL issued in 1936 with respect to the parcel of land measuring approximately 50 acres adjoining to the land LR No 7452, created for purposes of creating a water intake point serving the said LR No 7452 and which fenced together as like one entity hereinafter the subject property.
29. It was averred that the location of the TOL had Timau township to the East, Ngusishi river to the north, Plot No 7452 to the west and Timau river to the south.
30. The petitioner averred that the TOL was created for the purposes of sourcing water from Timau river so that it could build a water intake point for the petitioners farm in LR No 7452 since Ngusishi river was seasonal and could not serve the water demand required for purposes of farming in LR No 7452 and therefore the TOL was to serve the farm because it was the best point to have a water intake point so that the water could flow from river Timau gravitationally.



31. It was averred that vide several correspondences between November 20, 1970 to May 5, 2010, the late licensee had followed up with the 1st respondent's predecessor, the Commissioner for Land to have the subject land covered by the TOL allocated to the petitioner on a long-term lease but the 1st respondent had never responded to the said request(s).
32. It was pleaded that upon the demise of licensee, the petitioner acquired the subject land through the process of inheritance together with all its rights and benefits *inter alia*, the TOL on the adjoining land measuring 50 acres and as at the time of the acquisition the subject land was still fenced as part and parcel of the land known as LR No 7452 as one entity and that the said TOL had never been revoked by the respondents.
33. The petitioner averred that on July 16, 2020, the 2nd respondent, its employees and or agents unlawfully damaged part of the petitioner's perimeter fence on the subject land, gained access therein and dumped heaps of litter on the subject property. Similarly, it was averred that the 2nd respondent also incited a group of youths who threatened to invade the subject land yet the 2nd respondent should have been the one to making sure that law and order was maintained at all times.
34. The petitioner at paragraph 15 of the amended petition averred that the 2nd respondent's actions were illegal and in contravention of the Constitution in that it had a right to be treated in a credible and accountable manner was a right to fair administrative, natural justice, a right to property, the right to clean and healthy environment under Articles 10, 40, 43, 47 & 50 of the Constitution.
35. As a consequence of the destruction of the perimeter fence the petitioner's averred its farm was faced with a lot of insecurity threats, animals in the farm could stray outside and cause damage to the members of public and likewise animals from Timau Township could gain entry to the farm to its detriment.
36. The petitioner averred that the 2nd respondent did not give it a chance to be heard before damaging the perimeter fence, gaining entry and or dumping litter on its land which was negligent on its part by not undertaking any impact assessment report to ascertain the environmental impact and the effects posed by the dumping and burning of garbage on the subject property.
37. Further, it was averred that the 2nd respondent failed to act in an accountable manner so as to ensure that it did not interfere with the petitioner's rights as per Articles 10, 40 and 97 of the Constitution.
38. The petitioner averred that it had at all material times, a reasonable and legitimate expectation that the 1st respondent would complete the process which was stalling before its predecessor so that the subject land covered by the TOL be allotted it on a long-term lease and since the respondents are subject to the Constitution, the petitioner urged the court to intervene for its rights as guaranteed by the Constitution were under danger of violation.
39. The petitioner averred that the reason why the TOL was created still was holding to date and there was absolutely no reason why the respondents should have interfered with the status of the property forming part of the TOL which subject property was not available for allocation to any other person(s) and that by maintaining the current position it would be more useful to the petitioner's LR No 7452 and the members of public in general as the farm which was served with the water intake point helped to conserve the environment for the good of the public at large.
40. It was averred that the TOL had been in existence for the past over 80 years and that the respondents were estopped from now denying the petitioner a chance to use the TOL as the purpose for which the TOL was created for was still valid.



41. The petitioners went on to state that the purposes for which the TOL was created would not subsist any time soon and that it was therefore prudent that the 1st respondent be directed to allot the subject property to the petitioner since it had unreasonably delayed in allotting the subject property to the petitioner, bearing in mind the aforementioned correspondence running from 1970 to 2010; and given that the respondents were subject to the Constitution, national values and principles as they discharge their duties with regard to the area falling under the TOL, the respondents were duty bound to make a decision with regard to the use of the said subject property, and that the decision must amount to a fair administrative action; it must be accountable and must be a credible one.
42. The petitioners averred that the respondents had failed to uphold the said principles in that: its request had not been acceded to for a formal allocation, in an accountable manner; the 1st respondent's had allowed the TOL to subsist for over 80 years, and that they had acquired prescriptive rights or easement rights; and that the 1st respondent and its successors in title had in the process represented to the petitioner that the said subject land subject to the TOL was available to its owners for the purpose of a water intake point and that the petitioner and its predecessors acting on the said representation had developed the said 50 acres. Thus, it was averred that it would be unjust for the petitioner to be capriciously removed from the occupation of the said subject property without any due process being followed.
43. The petitioner averred that the acts of the 2nd respondents and its agents were illegal, a nullity, it amounted to condemnation before hearing contrary to rules of natural justice under Article 50 of the Constitution, the decision denied it the right to quiet and peaceful use and occupation of the suit land under Article 40 of the Constitution and that any decision made regarding the subject land under TOL without due process and in compliance with the right to fair administrative action under Article 47 of the Constitution was invalid and or illegal.
44. Therefore, the petitioners averred that it was apprehensive that if the 1st respondent was not directed to register it as the legal proprietor of the subject land adjoining LR No 7452 under the TOL, the respondents would allot the said subject land to third parties at the great prejudice to it.
45. The petitioner therefore prayed for remedies that; (a) a declaration do issue that the respondents have violated Articles 10, 40, 43, 47, 50, 69 and 70 of the Constitution; (b) a declaration that the petitioner was entitled to enjoy the use of the TOL over the parcel of land measuring approximately 50 acres, adjoining land LR No 7452 Laikipia County; (c) an order directed at the 1st respondent to register the petitioner as the owner of the subject land which falls within the TOL measuring approximately 50 acres adjoining LR No 7452; (d) permanent injunction restraining the respondents, their agents and employees from interfering with the petitioners quiet use and occupation of the subject land parcel known as LR No 7452 and the land falling with the TOL measuring approximately 50 acres; (e) an order directed at the OCS Timau Police Station to enforce the terms of any order that may be issued by the court.
46. In support of the petition, Karari Wambugu Gitumbi swore an affidavit on July 23, 2020, largely regurgitating the contents of the petition. He attached a copy of the deed plan certificate of title for LR No 7452 as annexure marked KWG "1" correspondence documents as annexure marked KWG "2", confirmation of grant for the estate of the late Daudi Wambugu Gitumbi as annexure marked KWG "3" photographs showing the damaged fence and the deposited refuse as annexure KWG "4" copy of the sketch map as annexure KWG "5", and an OB Report No 9/18/7/2020 over the invasion as annexure KWG "6" respectively.



47. The 1st respondent opposed the petition through a notice of preliminary objection dated February 12, 2021 on the basis that the petitioner lacked locus standi to lodge the petition; it was based on a TOL issued to a third party and not the petitioner; it disclosed no cause of action against the respondents since a TOL was personal to the licensee and created no interest capable of being transferred; the petition amounted to an abuse of court's process since the petitioner was indirectly laying claim of ownership of public land; it was bad in law, misconceived and fatally defective.
48. The 2nd respondent opposed the petition through grounds of opposition dated September 14, 2020, on the basis that it was mischievous, a gross 'abuse' of court process, it was improperly joined in the petition contrary to the Act No 1 of 2013; it did not deal with land issues, it was not suited; the petitioner had not demonstrated how the 2nd respondent was involved and if allowed it would negate the principles under the [National Government Coordination Act](#) and Articles 131 (1) (b) and 132 (3) (b) of the [Constitution](#).

C. Written submissions

49. With leave of court, parties herein agreed to dispose of the two petitions by way of written submissions based on the respective pleadings, exhibits and submissions on points of law.
50. Following this, the petitioners in the 1st petition relied on their written submissions dated March 4, 2022, the 1st respondent (NLC) relied on its written submissions and authorities dated April 27, 2021, while the 5th & 6th respondents in Petition No E010/2020 who are also the petitioners in (Pet. 1 of 2022) relied on written submissions dated October 16, 2020. The 2nd respondent relied on a filed list of authorities dated April 23, 2021 and the 1st interested party relied on its written submissions dated March 2, 2022. Further, parties were given an opportunity to make oral highlights regarding their written submissions.
51. Mr Kurauka counsel for the petitioners in Petition No E010/2020 submitted that the court is clothed with jurisdiction to hear and grant the prayers sought under Article 162 2(a) of the [Constitution](#) as read together with Section 4 and 13 of the [Environment and Land Act](#).
52. Regarding the facts and the grounds of the petition, the court was urged to rely on the same as set out in the petition, affidavits and annexures thereto. The petitioners urged the court to find that they possessed locus standi under Article 22, 23 & 258 of the [Constitution](#) as affected residents in Timau Buuri Subcounty wherein the subject land was public in nature, held by the 1st interested party in trust for them and who were suffering for lack of social amenities and that upon the expiry of the TOL held by the 5th & 6th respondents, the latter were trespassers, purporting to process title documents yet the petitioners were supposed to be enjoying the public land.
53. It was submitted that the Hon. Attorney General and the interested parties were in support of the petition and the other respondents had not challenged or controverted the averments by the petitioners.
54. As concerns the 5th & 6th respondents, counsel submitted that they did not tender any title documents, an expired TOL was not proper document of ownership, that no evidence of a grant and or development was tendered and lastly that an individual could not acquire lawful title in respect of public land or allege adverse possession of the subject land, hence the 5th & 6th respondents were land grabbers and the court should frown upon their illegal occupation of the subject land.
55. The petitioners submitted that while Article 40 of the [Constitution](#) protected private land but does not protect trespassers in line with Section 4(2) Cap 22 [Limitations of Actions Act](#) and the [Trespass Act](#) Cap



- 403 Laws of Kenya. So given the petitioners had rights to public amenities which are lacking and could only be established in the subject land the petitioners rights override those of the 5th and 6th respondents who had no protectable rights over the subject land superseding the public interest.
56. Mr. Kurauka advocate submitted that the law and the facts herein supported the grant of the reliefs sought namely Articles (1), (3), (10), (40), 60, 67 and 232 of the Constitution. Reliance was placed on Andrew Omutata Okoiti & 30 others v Hon. AG & 9 others (2012) eKLR citing with approval Dr. Evans Kidero v Andrew Omtatab Okoiti & 30 others (2012) eKLR, AG v Zinj Ltd (2021), KECS 23 (KLB) CO 3 December (2021) judgment, Dr. Ben Mutungi Muthiora v Marion Muthamia Kiara (2021) eKLR.
 57. The 1st respondent (NLC) have submitted that the petition was premised on a TOL issued in 1936 by the then colonial government to Mr H Goodhind toward a 50-acre piece of land adjoining LR No 7452. It was submitted that a TOL under Section 40 (1) of the repealed Government Land Act Cap 280 laws of Kenya which provided for licences to occupy unalienated government land for temporary purposes could be granted by the Commissioner of Lands and could with consent of the Commissioner of Lands be transferred by the licensee and the transfer and the consent thereto shall be endorsed on the license, now replicated under Section 20 (1) & (4) of the Land Act 2012.
 58. Therefore, the interested party submitted that a TOL could not be inherited through the normal process of succession since it was personal in nature. Reliance was placed on Runda Coffee Estates Ltd v Ujagar Singh (1966) EA 568, Kericho ELC Case No 10 of 2015 Eunice Njoki Kiruri (suing as the legal administrator of the estate of the late Nabashon Gichu Muchembe) v Richard Kipruto Koech, Faraj Mabarus v JB Martin Glass Industries & 3 others (2005) eKLR.
 59. The 1st respondent therefore submitted that once the licensee passed on, the subject property reverted back to the government when the original land owner transferred the suitland to a third party, the subject land became public land, and that the continued occupation by the petitioner amounted to trespass; it could not purport to use a constitutional petition to claim public land since the law provided for the procedure to be followed when converting public to private land.
 60. The 1st respondent further submitted that a TOL did not and was not capable of creating an interest in the suit property except that it granted a licence to occupy or use the suit property temporarily on the terms and conditions contained therein, hence the petition was misconceived both in fact and in law, it discloses no cause of action or right against the 1st respondent, and the petitioner lacked locus standi.
 61. Further the 1st respondent submitted that the petition served upon it lacked supporting documents including a copy of the TOL certificate of registration and the management agreement between the petitioner and the registered owner of the suit properly making it incurably defective.
 62. The 2nd & 3rd respondents and the 2nd interested party, County Commissioner of Meru also the 2nd respondent in the Petition No 1 of 2022, in support of its grounds of opposition dated March 18, 2021, relied on the list of authorities dated April 24, 2021 namely Sections 12 & 18 of the Civil Procedure Act. Victoria Katuku suing as the legal representative of the estate of Eunice Mueni Muthamba v Jessin Kay Enterprises & 2 others (2017) eKLR, Chrispinus Munyane Papa & another v NEMA & another (2018) eKLR, Hangzhou Agrochemical industries Ltd v Panda flowers Ltd (2012) eKLR and David Kabungu v Zikarenga & 4 others Kamaba HCCS 36 of 1995.
 63. The 1st interested party, (Meru County) submitted that the fact that the subject land was public land, its locality and the planned use of the land was not in dispute.



64. Further, it was submitted that the alienation of public land to private must be done with regard to the public interest, common good and not vice versa hence the rights of Timau residents with respect to the zoned area comprising of the land under TOL were paramount and ought to be considered. Needless to say, it was submitted that the TOL did not make sense in the circumstances especially due to the zoning for public purpose and utilities, following its expiry and in line with Articles 62 (1) (a) (b) (c) & (d), (4) (2) & (4) of the Constitution the land was not available for any alienation. Reliance was placed in Chemey Investments Ltd v AG & 2 others (2018) eKLR KACC v Lima Ltd & 2 others (2019) eKLR.
65. As regards the prayers, the 1st interested party submitted there was already an integrated Strategic Urban Plan (SUP) of duly approved by the County Assembly of Meru, showing how the subject land had been assigned and or reserved for various public use, utilities and purposes which was an administrative issue subject to the availability of resources. The interested party urged the court to grant the prayers sought.
66. The petitioners in Pet No 1 of 2022 submitted that evidence by way of affidavit which was not controverted is to be deemed as admitted based on Standard Resources Group Ltd v AG & 2 others (2016) eKLR, Peter O Nyakundi & 68 others v Principal Secretary State Department of Planning Ministry of Devolution & Planning & another (2016) eKLR, David Katana Shafi Grewal Kaka (2014) eKLR.
67. The petitioners submitted that a TOL under Section 2 of the Land Act was a permission allowing a licensee to do some act in relation to the land comprised therein which would otherwise be a trespass but did not include an easement or a profit.
68. It was submitted that under the law, the 1st respondent and its successor in office were empowered to grant or revoke TOL under Section 40 (1) & (3) of the repealed Government Land Act.
69. The petitioner submitted that the letters in pages 10, 17 & 18 of the petition dated 20.11.70 and December 22, 2008 to the successor of the 1st respondent consented to the transfer of the TOL in favour of the late Daudi Wambugu Gitumbi upon whose demise, the petitioner had acquired the subject land through succession together with the rights and benefits therein.
70. The petitioner submitted that under Section 40 of GLA now repealed, the government was required to give notice to the licensee to terminate the license if it so intended to terminate but the 1st respondent did not serve any such notice, actions by the 2nd respondent were Ipso facto null and void without compliance with national values and principles under Articles 10 & 47 of the Constitution as to fair hearing and fair administrative action before the invasion, trespass and the damage.
71. Reliance was placed on Nyongesa & 4 others v Egerton University College Civil Appeal No 90 of 1989 on the applications of natural justice as part of the Kenyan culture in the settlement of controversies; Commissioner of Lands v Kunste Hotel Ltd (1997) eKLR on due notice and right to be heard before the 2nd respondents acts of damage invasion and the dumping of garbage which was reflective of a picture of recipe for lawlessness, chaos, anarchy & disorder and the encouragement of such route by the 2nd respondent which was an affront to good governance rule of law and constitutional rights, as to fair hearing, access to justice and right of the protection of property.
72. Regarding the correspondence, the petitioner submitted that the 1st respondent, failed to respond to the letters, has not filed any documents to show a better use of the subject land other than the TOL created use and above all, the failure to determine the petitioner's application within the requirements of Articles 10 & 47 of the Constitution hence the reason the court should intervene since the 1st respondent had over the years failed to give any proper or valid reason(s) or for that matter any reason(s)



why such an allotment and or issuance of a valid certificate of title, could not and cannot be done, more so, it was submitted that the 1st respondent had both the statutory and constitutional mandate to issue proper certificate of ownership to deserving entities.

Therefore, it was submitted that its silence was evidence of lack of accountability, transparency and credibility which translated to unfair practice of administrative action infringing on its rights to property under Article 40 of the *Constitution*. Reliance was placed on *Keroche Industries Ltd v KRA* cited with approval in *Republic v DC Langa District & another Ex parte Kibera Community Self-help Programme (K)* (2014) eKLR on the concept of legitimate expectation which was a higher public interest.

73. The petitioner submitted that it had a reasonable and legitimate expectation that the 1st respondent as a state organ would fairly and reasonably attend to its application, but the predecessor of the 1st respondent had unreasonably failed to react to the requests and or reminders and so has been the successor herein.
74. It was submitted that it therefore finds itself in the circumstances that only, the court could direct the 1st respondent to act. Further, the petitioner submitted that given the longevity of time the government had allowed it to the subject property to use and enjoy the TOL in which case certainly it had created a genuine, reasonable and legitimate expectation that the Government of Kenya would formalize such an offer to one that would create definite rights of ownership in its favour. Reliance was placed on *Commissioner of Lands v Kunste* (supra) on the obligation on the Government of Kenya to consult or hear a party prior to the decision to allot the subject land to a third party; Pollard, P Group Worth and Hughes, 4th edition *Constitutional and Administrative Law* page 583 on the doctrine of legitimate expectation and *CCK & 5 others v Royal Media Services & 5 others* (2014) eKLR.
75. The petitioner submitted that the decision by the 2nd respondent to dump heaps of garbage on the subject property held by the petitioner was an affront to Article 47 of the Constitution, on *Fair Administrative Action Act*, rule of natural justice, its legitimate expectation to be treated fairly and in a reasonable manner, and to respond to the request within a reasonable time.
76. Further, the petitioner submitted that procedural legitimate expectation rested on the presumption that a public authority would follow a certain procedure in advance of a decision being taken and that while adjudicating legitimate exception, courts follow a two-step approach by asking the questions as to whether an administrative action created a reasonable expectation in the mind of an aggrieved party, and if the answer is in the affirmative, the 2nd question was whether that expectation was legitimate.
77. In the instance case, the petitioner urged the court, just like in the *Kunste* case (supra) to determine whether the petitioner was entitled to be allocated the land covered by the TOL since the reason why the TOL was created still held to date and that there were absolutely no good reasons why the respondent should interfere with the status of the subject property forming part of the TOL which should not be available for allocation to anyone else, and that by maintaining the position it would be more useful to the owner of LR No 7452 and the members of public in general as the farm helped to conserve the environment for the good of the public at large.
78. The petitioner submitted that the law did not allow the 1st respondent to delay its decision to the application spanning from 1970-to date, which was contrary to Article 47 of the *Constitution* more so when the respondents had produced no evidence of a better use of the subject land than the current use which had been obtaining for over 80 years and to deny them the subject land would be against the constitutional purposes. Additionally, it was submitted that where there were two competing equities,



the latter in time prevails hence the current use by the petitioner should prevail since the purpose for which the TOL was established still subsists.

79. As to the incitement, the petitioner submitted that, that was an act of unlawfulness and the 2nd respondent should have upheld the national values, principles and fair administrative action and that the County Commissioner, the 2nd respondent should be told the perpetuated criminal acts were illegal and it should not have interfered with the subject land but instead, the 1st respondent should have acted fairly and fully in considering the petitioner's application, taking into account the length the occupation, the locals affected thereon and the need that was there in 1939 which has been a constant need over the last eighty years and which was in the situation more needy as concerns water needs of the farm.

D. Oral highlights

80. Over and above the written submissions, Mr. Gikandi Ngibuini counsel for the petitioner in Pet No 1 of 2022 emphasized that the respondent had offered no evidence of the replanning of the subject land by way of survey maps and since the respondents were looking for extra land for social amenities what is good for the goose is also good for the gander and hence could take away the TOL without the revocation.
81. Mr Ngibuini submitted that going by the correspondence tendered before court, the doctrine of estoppel comes in and it was not open for the respondents to deny they never made such legitimate representation to the petitioner in line with Section 120 of the *Evidence Act* Cap 80 Laws of Kenya. Reliance was placed on *Njeri Mwobi v Kimani Njoroge* (2013) eKLR Counsel submitted that in age of Articles 10 & 47 of the *Constitution*, the respondents and the government could make promises and later on conduct themselves as if the said promise were a children's play.
82. Mr Ngibuini Counsel emphasized that there was no public interest as alleged in the matter and urged the petition be allowed.
83. Mr Kurauka, learned counsel for the petitioners in Pet No E010 of 2020 submitted that the TOL got expired, was no longer tenable, and that it was not a title document as per Section 23 (1) of Registration of Titles Act now repealed *Cap 281*, that gave rider on titles issued since none was issued to the petitioner in Pet No 1 of 2022.
84. Counsel emphasized that the subject land fell under the Meru County and should have engaged County Commissioner Meru. Counsel further submitted that given the interest of his clients over the public land the doctrines of estoppel and adverse possession do not apply to public land going by the annexed case law, emphasizing the role of the court in protecting public land by ordering it reverts to the public, and in this instance, the petitioner in Pet No 1 of 2022 had no title deed but an expired TOL, had never paid any consideration to purport to claim the public land which was protected under Articles 47 and 65 of the *Constitution*.
85. Concerning public interest, Mr Kurauka advocate submitted that superior courts have held any person may approach a court to agitate for a right more so in this instance where over 3000 families in Timau area were desirous of social and recreation facilities with the only available land being the one allegedly occupied by the petitioner in Pet No 1 of 2022.
86. Counsel therefore urged the court to protect the public interests by granting the prayers sought in the first petition and find the 5th and 6th respondents and the petitioner in petition No 2 as trespassers.
87. Mr Kieti for the 2nd, 3rd respondents and 2nd interested party relied on the submissions filed on May 18, 2021 and drew the courts attention to the holding in *Faraj Maharva v JB Martin Glass*



Industries (2005) eKLR, while Mr Ikioo advocate for the 1st interested party associated himself with the submissions by Mr Kurauka advocate and their written submissions dated March 4, 2022.

E. Determination

88. The issues flowing from the pleadings and the submissions for the court's determination are:
- i. If petitioners have *locus standi*.
 - ii. If the two petitions have raised a constitutional question and by extension met the constitutional threshold.
 - iii. If the petitioners in Petition No E010 of 2020 have proved any breach of their constitutional rights by the 1st-4th respondents in allocating public land to a private entity in the names of the 5th and 6th respondents.
 - iv. If the 5th & 6th respondents and the petitioner in No 1 of 2022 have any protectable, enforceable, legal statutory and constitutional and rights which have been infringed by the respondents and by extension the petitioners in the 1st petition.
 - v. If the 5th & 6th respondents and the Petitioner in No 1 of 2022 have proved any breach of constitutional rights to land contained in the TOL.
 - vi. If the nature of the petitioner in Pet No 1 of 2020 rights to the subject land relate to the TOL, easement, profits and or adverse possession.
 - vii. If by allowing the petitioner in Pet No 1 of 2022 to occupy the subject land, the doctrine of estoppel, legitimate expectation and trust applies to the respondents.
 - viii. If the respondents in Pet No 1 of 2022 adhered to the national values, principles of governance, Article 47 of the Constitution and the Fair Administrative Action Act in handling of the petitioners claim.
 - ix. If the petitioners in the two petitions are entitled to the respective prayers.
 - x. What is the order as to costs.

F. The Law on Constitutional Petition

89. The law governing constitutional petitions in Kenya is Articles 22, 23, 165 & 258 of the Constitution as read together with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms 2013) Practice & Procedure Rules and Section 13 of Environment Land Court Act.
90. A party seeking for the enforcement of rights through a constitutional petition is required of under Rule (10) of the Rules thereof to disclose the status in which he brings the petition, facts relied upon, particulars and the nature of the rights breached, give details of the injury or damage suffered or likely to be suffered, state the nature of reliefs sought and any pending or previous disputes relating to the subject matter.
91. The bedrock of a petition is the factual background without which legal arguments would hang in the air with no legs to stand on. See Evans Ladtema Muswabili v Governor, County of Vihiga, County Assembly of Vihiga & 2 others (interested parties) (2021) eKLR.



92. The criteria to determine if a petition has met a constitutional threshold and complied with the law has been a subject of several cases including *Anarita Karimi Njeru ve Republic* (1979) eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. In the said decisions, the courts held a constitutional petition should set out with a degree of precision, the petitioner's complaint, the provisions infringed and the manner in which they are alleged to have been infringed threatened or violated, sufficient enough for the respondents to know exactly what the constitutional complaint is in order to reply to it. The courts held it was not enough to cite the constitutional provisions without the background facts, information and details of the alleged violation.
93. In *Godfrey Paul Okutoyi and others v Habil Olaka & another* (2018) eKLR Chacha J held that the rights conferred by a statute are not fundamental rights under the Bill of Rights and their breach should be redressed in the ordinary manner allowed by a particular statute and that a party should only file a constitutional petition if there is breach, infringement or denial or threat to a constitutional right or freedom.
94. In *Patrick Mbau Karanja v Kenyatta University* (2012) eKLR, Lenaola J as he then was held that the rights and duties of an individual and between an individual are regulated by private laws while the Constitution is as instrument of government and that duties imposed by the Constitution under the fundamental rights & freedoms clause are owed by the government of the day to the governed and that an individual or individuals could not owe a duty under the fundamental rights & freedoms provisions to another individual.

G. Locus standi

95. Article 22 (1) & (2) of the *Constitution* grants every person claiming a fundamental right or freedom has been denied, violated and or infringed or is threatened the right to institute a petition, Sub-rule (2) thereof provides that a person may act in their own interest, or on behalf of another person who cannot act in their own name or as a member of, or in the interest of a group or a class of person(s) and a person acting in the interest of one or more of its members.
96. Article 258 thereof provides that every person has the right to institute court proceedings over threatened rights, acting in person or on behalf of another, class of persons or members of a group or class of persons or in public interest of one or more of its members. A person under Article 268 of the *Constitution* includes a company, association or other body of persons whether incorporated or an unincorporated entity.
97. In this petition, the 1st respondent, the National Land Commission filed a notice of preliminary objection dated February 12, 2021 stating, that since temporary occupation license herein (TOL) was issued to a third party and not the petitioner, no cause of action was disclosed, and the petitioner herein lacks capacity to file the 2nd petition. Similarly, the petitioner in the 2nd petition faults the petitioners in 1st petition as lacking interest or capacity to bring the petition.
98. Rule 3 (1) of the Mutunga rules above stated provides that the overriding objectives as to facilitate access to justice and the need to interpret the Rules in line with Article 159 (1) of the *Constitution*.
99. In *Nation Media group Ltd & 6 others v AG & 9 others* (2016) eKLR, the court held a constitutional court should be liberal in the manner it goes around dispensing justice by looking at the substance rather than the technicality.
100. In *Ms. Priscilla Nyokabi Kanyua v AG & another* (2010) eKLR, the court held that the dominant object of public interest litigation is to ensure the observation of the provisions of the Constitution or the law which can best be achieved to advance the cause of the community or public interest



by permitting any person having no personal gain or private motivation or any other oblique consideration, but acting bonafide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in action.

101. In *Mumo Matem* (supra), the Court of Appeal stated that in the spirit of values of substantive justice, public participation, inclusiveness, transparency and accountability, the Constitution, on necessity and logic has broadened access to the courts, and that a court should not place hurdles on the access except where such litigation is hypothetical, abstract or an abuse of the court process.
102. In the 1st petition, the petitioners describe themselves as residents and citizens of Timau Area of Meru County living in Timau Township. They have stated that the subject land is public land to which they have a stake or interest in.
103. On the other hand, the petitioner in No 1 of 2022 has stated it owns and occupies LR No 7452 Laikipia County which adjoins the land governed by the TOL (hereinafter the subject property) which was allocated as a TOL in 1936 as a successor to the TOL, initial holder.
104. Article 61 (1) of the *Constitution* provides all land belongs to the people of Kenya collectively as a nation, as communities and as individuals.
105. The petitioners in the 1st petition base their claim under Articles 60, 62, 63, & 65 of the *Constitution* while the petitioner in No 1 of 2022 base its rights under Article 40 & 64 of the *Constitution*. Each of them, claim their constitutional rights to land in each capacity are under threat, have been infringed or violated by the government and the respondents.
106. In my considered view, all the petitioners in the two petitions have met the minimum threshold as to locus standi for they have demonstrated their requisite capacities, bonafides, and are possessed with an identifiable stake(s) and or interests capable of being addressed by a Constitutional Court under Articles 23 (3) & 258 of the *Constitution*. The preliminary objection on locus standi herein is therefore rejected.
107. Coming to the issue as to whether the petitions have met the minimum constitutional threshold, the petitioners in No E010 of 2020 have defined themselves as residents and or citizens of Timau Township entitled to public amenities and desirous of prudent use of and management of public land.
108. The 1st petition is anchored on Articles 2, 10, 35, 40, 43, 46, 47, 50, 60, 73, 75 of the *Constitution*. The petition has set a factual background, details the alleged manner the aforesaid constitutional rights have been threatened, violated and or are likely to be infringed by respondents. The petitioners have set out the prayers. They have supported their claims with a sworn affidavit with an authority duly signed by the fifteen petitioners with annexures showing the nexus between the subject issue, themselves and the public at large.
109. On the other hand, the petitioner in Pet No 1 of 2022 by its amended petition dated August 13, 2020 sets out the description of the parties, facts relied upon, particulars of the alleged violation, the specific constitutional rights allegedly violated and the manner of violation and the reliefs sought. The petition is also supported by an affidavit sworn by Karari Wambugu Gitumbi on June 23, 2020, with an annexure certificate of title, correspondence, certificate of confirmation of grant, photos sketch map and OB extract as annexures made KW Q 1-6 respectively. My finding therefore is that the petitioners have all met the minimum requirements under the Rules.
110. Turning to the constitutional question(s), in *John Harun Mwau v Peter Gastrow & others* (2014) eKLR the court stated: “that courts will not normally consider a constitutional question unless the existence of the remedy depends on it; if a remedy is available to an applicant under some other legislative



provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights. It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so”.

111. In *Uburu Muigai Kenyatta v Nairobi Star Publication Ltd* (2013) eKLR, Lenaola J as he then was held that where there is a remedy in civil law, a party should pursue that remedy and that not every ill in society should attract a constitutional sanction. Further the court stated that a private individual cannot maintain an action for declaration against another private individual for an alleged breach of fundamental rights provision of the Constitution.
112. In *Rapinder Kaur Atwal v Manjit Singh Amrit* Petition No 236 of 2011 the court held that a Constitution is a solemn document and should not be a substitute for remedying emotional, personal questions or mere control of excesses within administrative processes.
113. The 1st petition herein challenges the manner in which public land has been occupied, claimed and or is in the process of being claimed and or is likely to be registered in favour of the 5th and 6th respondents in an alleged breach of the petitioner’s constitutional rights not to be arbitrarily deprived of property, housing, adequate food, clean water social security, education, good sanitation, and fair administrative action.
114. The petitioners averred that the 5th & 6th respondents have purported to illegally grab and occupy about 70 acres of public land being a portion of LR No 2890 Timau which is adjacent to their Parcel. LR No 7452, allegedly based on an expired, unlawful, illegal and unenforceable TOL on a public land.
115. Further, the petitioners averred that about July 16, 2020, together with over 200 residents, stakeholders, political leaders, provincial administration leaders, community leaders, religious leaders and many others decided to clean community land measuring approximately 70 acres but were repulsed by the 5th & 6th respondents using police officers from Laikipia County.
116. The petitioners averred that the subject property belongs to the 1st interested party in trust for the public, but the 1st interested party was in the process of issuing title deeds to 5th & 6th respondents and the residents in Tigania slums, inspite of the residents lacking social amenities. They averred that the premises has been lying idle and risks being transferred to the 5th & 6th respondents who have refused to surrender the subject land to the public through the 1st interested party for said social amenities and public utilities.
117. The petitioners averred that by a letter dated July 9, 2020, the 2nd interested party wrote to the 1st respondent advising it that the subject property was public land reserved for social amenities and confirming that during a public participation for spatial town planning the community had offered the said subject property which is public land to be reserved for social amenities and the town planner was to go ahead and include it as a reserved area for cemetery, sewerage, dump site and EPZ which the 1st interested party put and identified beacons to it.
118. The petitioners averred that 5th & 6th respondents have purported to transact in the subject property despite having no legitimate interest over the subject property and with the collusion of the Commissioner of Lands, their rights were being violated, that they have purported to irregularly convert public land to private land and have therefore violated Articles 40, 62 (4), 57 (a) of the *Constitution, Police Act* on account of the 4th respondent who has failed in investigating the alleged criminal conduct of the 5th & 6th respondents; Articles 47, 50(1) 56 (e) 62(4), 69(1), 35 on right to information, and fair administrative action.



119. The questions raised by the petitioners in Petition No.1 relate to the manner of dealing with public land. The petitioners allege that the subject land is a portion of LR No 2890. Unfortunately, they have not supplied the court with any search certificate(s) or documentary evidence on who owns the said subject land if at all it is public land. Be that as it may, Article 62 of the Constitution defines what public land is.
120. Articles 62(2) vests such public land in and to be held by a County Government in trust for the people resident in the county and which shall be administered on their behalf by the National Land Commission, if it was alienated government land by 2010 as defined by an Act of Parliament at the time.
121. Article 63 of the Constitution defines community land inter alia, as land lawfully held as trust land by County Governments' but does not include any public land held in trust by the County Government under Article 62(2) thereof.
122. Article 67 therefore establishes the National Land Commission with the mandate of managing public and county governments land. Among the functions of the National Land Commission is also to initiate investigations on its own initiative or on a complaint, into present or historical injustices and to recommend the appropriate redress. The National Land Commission has also the mandate to encourage the application of traditional dispute resolution mechanism in land conflicts, monitor and oversight, responsibilities over land use planning through the county.
123. Section 8-19 of the Land Act 2012 governs the management of public land generally while Sections 20-22 thereof relates to leases, licenses and agreements on public land.
124. Section 9 of the Land Act provides that any land may be converted from one category to another in accordance with the Act or any other written law. Public land may be converted to private land subject to public needs or in the interest of defence, public safety, public order, public morality, public health or land use planning.
125. In order to manage public land, the National Land Commission is mandated to come up with governing rules under Part II of the Land Act including on allocation.
126. Section 20 of the Land Act gives the National Land Commission powers to grant a person a licence to use unalienated public land for a period not exceeding five years subject to planning principles as it may prescribe. Under Sub- Rule 2, thereof the National Land Commission may serve a notice to quit upon the licensee at any time after the expiration of nine months from the date of the licence. Sub-rule (4) thereof provides a licensee has the right to transfer the benefit of a licence granted under Section 20 thereof subject to a consent and an endorsement by the Commission. One of the implied conditions in a license is the payment of rent, royalties, taxes, rates, charges, duties, assessments as may be imposed, charged or assessed.
127. Under Section 26 thereof there are covenants and conditions binding on persons claiming a license or a grant.
128. As regards forfeiture of a license, Section 32 of the Land Act provides that on account of breach a National Government or County Government may by an application move the court to declare a license as forfeited or nullified.
129. In the event there is need to a subdivision of a leasehold, Section 34 of the Land Act provides that a National Government, or a County Government may give a reasonable notice to the holder of interests on the intended resurvey or adjustments as the case may be.



130. Further, Sections 36 of the [Land Act](#) provides that a notice of an intended lease, license or agreement on public land has to be widely publicized when such public land is available for a particular use, giving all the particulars for making an application.
131. The manner in which any unlawful occupant of a public land is to be removed is governed by Sections 152 (B) & (C) of the [Land Act](#) by giving a three months' notice in writing through a notice in the Gazette, in one newspaper and radio to all the affected persons. Once the notice is served, any affected person has a right to move to court for relief.
132. Before any eviction is undertaken after a notice has been given, proper identification of those taking part must be done, presentation of formal authorization for the action must be there, government officials must be present and it shall be carried in a manner respecting the dignity, right to life and security of those affected.
133. Under Section 155 of the [Land Act](#), the National Land Commission has powers to serve a notice upon a person unlawfully occupying public land without any right or licence under customary or statutory Law to show cause why he should not be required to vacate that land within the time and subject to any terms and conditions as to the removal of buildings. Section 155 (6) thereof provides that if no cause is shown and there is no reasonable excuse for not complying or if there is a representation, the Commission shall make a determination and inform that person by a notice who may move to court for relief. The court has powers to confirm, vary, cancel or postpone the notice.
134. Under Section 157 of the [Land Act](#), it is an offense to unlawfully occupy, or encroach on public land punishable with a fine.
135. The manner in which licenses are issued and the notice to quit for unalienated public land is governed also by Rules 9 & 10 and 63 of the [Land Registration Rules 2017](#).
136. Looking at the 1st petition herein, it is quite obvious that the issues raised therein fall under the [Land Act](#), and the National Land Commission Act as demonstrated above.
137. There is no evidence tendered by the petitioners to indicate that they ever lodged a complaint with the National Land Commission under Section 14 of the National Land Commission Act over the alleged illegal occupation by the 5th & 6th respondents on LR No 2870 or any part thereof in relation to the TOL.
138. There is also no evidence that the National Land Commission herein invoked the Land Act and served the 5th and 6th respondents with a formal notice to vacate the temporary occupied land or vacate land that is to say form LA 21 & 57 in line with Regulations 10 (1), 63(1), 64(1) and 65 of the [Land Regulations 2017](#).
139. Additionally, there is no evidence that if upon invoking the jurisdiction of the National Land Commission under Regulations 6, 8, 9, 10, 14, 16, 17, 19, 29 of the [National Land Commission \(Review of Grants & Disposition of Public Land\) Regulations 2017](#), the same were complied with and a decision made to that effect.
140. It is only after a complaint has been heard and determined that a party may appeal to this court within 14 days of the decision being made.
141. Further, it is only after the decision has been made that the National Land Commission may seek the assistance of the Police under Rule 33 thereof.
142. Article 159 2(c) of the [Constitution](#) recognizes and entrances the use of alternative dispute resolutions.



143. In *William Odhiambo Ramogi & 3 others v AG* (2020) eKLR the court held the exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the court.
144. In *Raila v IEBC ex parte National Super Alliance Kenya & 6 others* (2017) eKLR, the court citing with approval the *Speaker of National Assembly v Karume* (1992) KLR 21, held the court should encourage alternative dispute resolution and in doing so it would be sanctioning the constitutional provisions under Article 159. The petitioners have averred that they were denied access to information by the respondents. Article 35 of the *Constitution* guarantees every Kenyan the right to access of information held by the state or another person required for exercise or protection of any right or fundamental freedom.
145. The petitioners have not supplied to this court any material to show that they requested, or made a request for information to the respondents and there was non-disclosure. There is also no evidence that the petitioners after being denied the information made a complaint to the Commission on Administrative Justice (CAJ), the body with the enforcement and oversight functions before coming to court.
146. The petitioners contended that they have been in the dark as to the allocations or status of the subject land. On the other hand they seem to be saying at paragraph 7 of the petition that the 1st interested party was in the process of issuing title deeds to the petitioners and residents in Timau slums including Riverside, Mukuru Kwa Joshua, Kongoni and Kariri in Buuri Subcounty.
147. The source of this information was not disclosed. Similarly, the petitioners have not told this court if they ever lodged a complaint and or sought for particulars of the said process from the interested parties.
148. There is no doubt that access to information is a foundational human right upon which other rights must flow for citizens to be able to protect those other rights in an effective participation in the democratic governance of their country.
149. However, one has to place a request and only upon the denial and the complain, can one move to court. See *JSC v Boss Shollei* (2014) eKLR Under Section 4(3) of the *Access to Information Act*, access to information held by a public body has to be provided expeditiously and at a reasonable cost. Section 5 thereof provides that a public body shall facilitate access to information held by it, while under Section 8 a party seeking such information has to do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. Section 9 thereof provides a decision on the request to access information should be made and communicated within 21 days.
150. In *Nairobi Law Monthly v Kenya Electricity Generating Co & 2 others* (2013) eKLR, the court held the Act imposes a duty on the state with regard to the provision of information by publishing and publicizing any important information affecting the nation.
151. The court held that a requester does not have to show any particular interest or reason for their request and it was on the public body to prove that it is legitimate to deny access to information. This position was also re-affirmed in *Trusted Society of Human Rights Alliance & 13 others v JSC* (2016) eKLR.
152. In absence of any such specific request for the information my finding is the petitioners ought to have made the request. A party who has not followed upon his rights and obligations by first seeking for the right to access information and has been denied or the request ignored, should not be heard to complaint of the violation or breach of the right.



153. In my view, it was premature for the petitioners to allege lack of access to information before subjecting themselves to the [Access to Information Act](#) before complaining to court. Even though the right has inherent value, utility and recognition, a party has to be vigilant and diligent in agitating for his or her rights.
154. The court finds that the petitioners did not make a request in writing to the respondents and or the interested parties. The National Land Commission has the mandate to keep all the records of the allottees to public land under Part II of the [Land Act](#).
155. The petitioners have not demonstrated how they sought for the information and were denied the same. At paragraphs 8 of the petition, the petitioners are complaining based on laws already repealed.
156. As regards the [Public Officers Ethics Act 2003](#), and the 2nd interested party, by a letter dated July 9, 2020, the court has already stated the functions and mandate of the 1st respondent. It should have been the 1st, 2nd, 3rd & 1st interested party to advise and give the exact position of the public land.
157. It is not the mandate of the 2nd interested party to determine what is public land and what is not. The land laws do not give such a mandate to the County Commissioners. The National Government Coordination Act does not provide such powers to county commissioners.
158. Turning to the complaint that the 4th respondent has failed to investigate and or prosecute the 5th & 6th respondents for engaging in an alleged criminal activity, Section 157 of the [Land Act](#) creates offenses including on corrupt transactions.
159. There is no evidence that the petitioners filed or lodged a complaint to the police who have the mandate to investigate and or detect crime and perhaps engaged the 4th respondent before complaining before this court for non-action, under Section 24 of the [National Police Service Act 2011](#), which includes the protection of life and property, detection of crime, maintenance of law and order.
160. In absence of concrete complaints, investigations, denial of rights and evidence on lack of action by the 4th respondent in discharging their statutory and constitutional mandates, my finding is that the issues raised by the petitioners are moot, since it is not enough for the petitioners to simply inform the court that there are suspected criminal activities by the 5th and 6th respondents, having been made or lodged of if any such complaints have unearthed material which forms a basis for complaining that the 4th respondent under the [ODPP Act](#) has failed to make a decision to charge the 5th & 6th respondents with a possible land fraud.
161. In [Republic v Chief Magistrate Milimani & another Ex parte Tusker Matresses Ltd & 3 others](#) (2013) eKLR the court held that it shall take care not to trespass into the jurisdiction of the investigators or make determinations which may affect the investigation or the yet to be concluded investigations.
162. It is trite law that a constitutional court ought not usurp the mandate of independent institutions or offices established under Chapter 15 of the [Constitution](#). Suspicion of the occurrence or imminent occurrence of a crime without concrete basis cannot transform into a constitutional question.
163. The petitioners as responsible citizens, have an equal duty to report any possible criminal activities to the police and supply any incriminating and or exculpatory material to the 4th respondent and the Inspector General of the Police, upon which they may analyze the evidence, initiate investigations and proffer the necessary charges if any.
164. The ODPP and the Inspector General of Police are independent institutions which are not subject to any other person or authority except the Constitution, as they undertake their mandates.



165. This position was restated in *Republic v Commissioner of Police and another exparte Michael Monari and another* (2012) eKLR, that the police have a duty to investigate on any complaint, once one is made and would be failing in their constitutional mandate to detect and prevent crime, if there were reasonable suspicion upon investigations, a crime has been committed.
166. As the police investigate crimes the duty is also on the petitioners to supply witness statements.
167. In *Charles Okello Mwanda v EACC and 3 others* (2014) eKLR, the court held the mandate to prosecute under the *Constitution* rests with the ODPP under Article 157 (10) of the *Constitution* so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person and has the final word on it.
168. The petitioners have not demonstrated before this court that they invoked and wrote to the 4th respondents under the Office of The *Public Prosecution Act* No 2 of 2013 and who has failed to exercise its mandate, despite sufficient evidence against the 5th and 6th respondents.
169. The remedies available do not depend on the Constitution but the relevant statutes. In John Harun Mwau (supra) the court held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure must be strictly followed since there are good reasons for such special procedures.
170. In *Geoffrey Muthiga Kabira & 2 others v Samuel Munga Henry & 1756 others* (2016) eKLR, the Court of Appeal held that where dispute resolution mechanism exists outside court, the same be exhausted before the jurisdiction of court is invoked and courts ought to be the forum of last resort and not the first point of call, the moment a storm brews unless the issue touches on constitutional interpretation, especially in virgin areas or where an important constitutional value is at stake or that the mechanism is in operational.
171. In my view, the issues raised by the petitioners are issues which ought to have been lodged with the 1st, 2nd, 3rd respondents and the 1st interested party as highlighted above under the *Land Act* and the National Land Commission Act.
172. The replying affidavit sworn by JM Paul on behalf of the 1st interested party at paragraph 50 confirms who has the mandate to issue, revoke and vary TOL, the National Land Commission, 1st respondent.
173. At paragraph 6 thereof, the interested party the County Government of Meru says she is a stranger to the allegations of land grabbing by the 5th and 6th respondents. At paragraph 7, JM Paul states the alienation and allocation of public land is a function of the 1st respondent and not them.
174. At paragraph 9 thereof, the 1st interested party urges the court to find the prayers sought untenable in the interest of justice and fairness and requests the petition to be dismissed.
175. Strangely an in a clear case of dereliction of duty under the *Constitution* the *Land Act* and the National Land Commission Act the, 1st interested party in its written submissions states that they support the petition and urges the court to allow it.
176. To my mind, the petitioners have not raised any constitutional questions, but issues finding their answers through the statutory framework highlighted above, before this court's jurisdiction can be invoked.
177. In the premises I find the petitioners in the 1st petition jumped the internal mechanisms set out under the Statute and their issues are not ripe for a Constitutional court to determine. The petition is struck out with no orders as to costs.



H. 2nd petition

178. In the 2nd petition, the petitioner averred it has been in occupation and in use of LR No 7452 which its own as per a certificate of title attached to the petition and has inherited a TOL for the adjoining land measuring approximately 50 acres herein the subject property which through several letters have sought the National Land Commission, 1st respondent, to formalize but in vain. The petitioner while awaiting this action averred the 2nd respondents on July 16, 2020 caused its employees or agents to unlawfully damage part of its perimeter fence on the subject land, gained access there in and dumped several heaps of litter on the land.
179. It was averred that the 2nd respondent also incited a group of youths who have threatened to invade the subject property yet the 2nd respondent should be the one on the forefront in ensuring that law and order are maintained at all times. As a consequence, the petitioner averred the events of July 16, 2020 have posed insecurity threats and continue to do so as members of public and livestock in and out of Timau township were easily trespassing into the subject land.
180. The petitioner averred that the 2nd respondent did not give them a fair hearing before the entry and or invasions it was reckless, negligent, unlawful and did not give it a notice or consider the environmental impact, the dumpsite and the garbage would pose to the environment and its land or farm and that its rights were violated. It was not treated in a credible and accountable manner under Article 10 of *Fair Administrative Action Act* as read together with Article 47, nature justice under Article 50 was violated, security of property, right to clear, and health environment, environment all under the Constitution were violated, infringed and breached.
181. Further, the petitioner averred that having come into the subject land on a TOL and out of the correspondence exchanged there existed a reasonable and legitimate expectation that the 1st respondent would complete and or formalize the process which was stalling before its predecessor, the Commissioner of Lands so that the land covered by the TOL would be allotted to it on a long term lease, since the reason why the TOL was created still held to date and there was absolutely no reason why the respondents should interfere with the status of the suit property forming part of the TOL; which in their view was not available for allocation to any other person.
182. Further, the petitioner averred that in maintaining the subject land in its favour it would conserve the environment and by denying the petitioner a chance to use the said TOL when the purpose of its creation subsists the 1st respondent has unreasonably delayed in acting on its request, contrary to Articles 10 and 47 of the Constitution, since the respondents are duty bound to make decisions fairly, timely, accountably, credibly, efficiently and reasonably.
183. Additionally, the petitioner averred that it had acquired prescriptive rights and or right to consent over the 80 years under, Article 40 of the *Constitution* which cannot be taken away on a willy nilly basis and that due to the representation by the predecessor to the 1st respondent and the developments thereon cannot be capriciously removed from occupation without due process being followed under Article 50 of the *Constitution*. Therefore, the petitioner urged the court to find that the actions of the 2nd respondent illegal, a nullity and bordering on criminality.
184. The 1st respondent filed a notice of preliminary objection dated February 12, 2021, inter alia that the TOL was issued to a third party, the petition disclosed no cause of action since a TOL is personal and not transferable hence the petition was an abuse of the court process.
185. On the other hand, the 2nd respondent filed grounds of opposition dated September 4, 2020 that it was wrongly joined in the petition since under the *National Government Co-ordination Act* its functions do



not deal with land issues; that there was no demonstration on how the prayers sought involved it and how the petitioner would suffer and if the prayers sought were granted, it would negate the principles under the National Government Coordination Act as read together with Articles 131 (1) (b) and 132 3 (b) of the Constitution.

186. Though aware of the instant petition the petitioner's in No E610 of 2020 did not file any specific responses to this petition as to the factual issues raised therein. Based on the foregoing pleadings the question is whether the petition has raised a constitutional controversy going by the holding in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority (2016) eKLR CCK v Royal Media Services Ltd, Patrick Mbau Karanja v Kenyatta University (2012) eKLR, Republic v Paul Kihara Kariuki AG & others ex parte LSK (2020) ekLR, Chimweli Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others (2016) eKLR.
187. Looking at this petition, it is my considered view that there are several constitutional questions discernable for this court's determination among them:
- i. Whether or not the 1st respondent by failing to respond to act and or decide on the request by the petitioner for the formalization or otherwise determine the status of the petitioner as regards the TOL adjoining LR No 7452 is contrary to the petitioner's right to fair administrative action, fair hearing and its legitimate expectation.
 - ii. If the petitioner's right to property and protection of law have been infringed by the 1st respondents failure to act, on time or at all and the 2nd respondent's decision dated July 9, 2020 that the TOL expired, the land was idle, it belonged to the community, the community had petitioned for its return, a particularly committee had recommended its surrender to the community, public participation had been undertaken and made a recommendation for re-planning and resurvey for social amenities.
 - iii. Whether following the recommendations by the 2nd respondent's aforesaid, the events of July 16, 2020 were arising out of negligence, recklessness abuse of power and duty by the 2nd respondent
 - iv. If the 2nd respondents' action were illegal, unconstitutional and breached the petitioner's constitutional rights as to property, fair hearing and protection by the law and fair administrative action.

I. The Evidence

188. The burden to prove breach, infringement and violation of a constitutional right rests on he who avers under Section 107 – 109 of the Evidence Act.
189. The respondents herein have insisted that on the subject property, a TOL was issued to a third party, is not transferable and that the petitioners have no protectable interest to lodge this petition.
190. In Chief Land Registrar and 4 others v Nathan Tirop Koeh and 4 others (2018) eKLR, the court held that since there was no denial by the respondents that the original owners had beneficial interest in the suit properties, the claimants could not be barred from pursuing their individual claims and that a co-owner, co-proprietor or other beneficiaries could not be prevented or disentitled from filing a suit.



191. Further, the court held that there was no principle in law that a registered land owner, even if registered as a trustee, could not file a suit. The court proceeded to find the parties with locus on account of possession of letters of administration.
192. In this petition, the petitioner has both a title deed under its name for LR No 7452 and a confirmed letters of grant. The petitioner has also stated it is under occupation and use of the portion of 50 acres forming part of the TOL said to be public land by the respondents and petitioners in the 1st petition.
193. Further, the petitioner has invoked the doctrine of estoppel, acquiescence and acquisition of easement rights due to a long occupation of over 80 years since the subject property was granted and that the purpose of the TOL still obtains to date. On the other hand, the petitioners in No E010 of 2020 have urged the court to find the doctrines of acquiescence, adverse possession and estoppel as inapplicable in public land.
194. In Nathan Tirop case (supra) the Court of Appeal held that there can be no estoppel against the Constitution which is the supreme law of the land and that under Article 24 thereof, no one could barter away his fundamental rights and freedoms, by either acquiescing or waiving such fundamental rights and freedoms and that no citizen could by his act or conduct relieve the State or State organ or any person with the obligation to respect the bill of rights and that no State or individual can arrogate to itself a right or justification to commit a breach of fundamental rights of any citizen and or resort to the doctrine of waiver, acquiescence, inordinate delay, estoppel or similar principle as absolute defence or excuse.
195. The petitioner has averred and produced material that the 1st respondent has abdicated its responsibility and failed to determine and or process its request which has infringed on its right to fair hearing, fair administrative action and against its legitimate expectation. On the other hand the 1st respondent, though not swearing any affidavits to counter the factual backgrounds set out in the amended petitions, supporting affidavits and annexures, has urged the court to find that the TOL was issued to a third party, it was not transferable; it expired, the land reverted to the government; and that there was no endorsement of the alleged transfer or transmission under the provisions of Section 20 (1) & (4) of the *Land Act*. Reliance was placed on *Runda Coffee estates Ltd v Ujagar Singh* (1966) EA 568 *Faraj Maharus v JB Martin Glass Industries & 3 others* (2005) eKLR.
196. On its part, the petitioner's in countering the assertion relied on Attorney General v Zinj Ltd and Dr. Ben Mutungi Muthiora (supra) and has urged the court to find that the 5th and 6th respondents, the petitioner herein possesses no title to the subject property composed of the TOL and its interest if any, could not supercede public interest.
197. The interested party, the County Government of Meru has submitted that the alienation of public land to a private individual must be done with strict regard of public interest, common good and not vice versa and since the rights of Timau residents with respect to the subject property which has premises have been zoned by the County for public purposes and utilities, are paramount; the purported TOL makes no sense under the circumstances and in any event has expired. Reliance was placed on Chemney Investment Ltd (supra) and KACC v Lima Ltd (supra).
198. To counter this the petitioner has submitted that it was not involved or invited in the alleged parliamentary departmental committee meeting or the public participation held by the 2nd respondent and hence were condemned unheard contrary to the constitutional principles as set out by the court in *Nyongesa and 4 others versus Egerton University College* (1990) eKLR.



199. As to the doctrine of estoppel, the petitioner has submitted documents at pages 2, 9, 10 & 17 of the supporting affidavit to demonstrate that the Ministry of Land and Housing did confirm that the land forming part of the TOL previously issued in the late Daudi Wambugu Gitumbi now been succeeded by his heirs hence Section 120 of the Evidence Act was applicable. Reliance was placed on Serab Njeri Mwobi v John Kimani Njoroge (2013) eKLR.
200. As regards the public interest, the petitioner's submitted that given the contradiction in the letter of the 2nd respondent dated July 9, 2020, and paragraph 8 of the Petition E010 of 2020 it was apparent that the petitioners in the Petition No 1 the 1st-4th respondents therein and the interested parties were not being driven by public interest to allegedly recover the subject land but were doing so for their own private interests.
201. Further the petitioner has submitted that the 1st-4th respondents and interested parties in the 1st petition and the respondents in the 2nd petition could not possibly plan the subject land before revoking the TOL and or notifying the petitioner on the intended action, and in any event the court had not been given any evidence of the planning since annexure JMP "1" in the affidavit of the County Government of Meru, lacked probative value, and that failure to produce the evidence in its possession meant the same would be prejudicial to the interest of the holder as held in Linsales Ltd v Harun Thuo Ndungu (2010) eKLR.
202. Further, the petitioner submitted that at pages 10,11, 14 & 17 of its supporting affidavit, a land surveyor Meru, Mr PK Muriuki at page 10 recommended for the formalization of the land covered by the TOL in their favour, hence the government should not be allowed to make representation and or promises and renege on them contrary to Article 10 & 47 of the Constitution and the doctrine of legitimate expectation.
203. Section 15 (3) (b) of the ELC mandates the court to deal with historical injustices claims.
204. It is also trite law as held in Wareham t/a AF Wareham & 2 others v Kenya Port Office Savings Bank (2004) 2 KLR 91 that cases are tried and determined on the basis of pleadings made and the issues of fact or law framed by the parties or court on the basis of those pleading.
205. The court went on to state that in discharging that burden, the only evidence to be adduced is the evidence of an existence or non-existence of the facts in issue or facts relevant to the issues. It follows therefore that only, evidence of facts pleaded is to be admitted and if the evidence does not support those facts pleaded, the party with the burden of proof should fail.
206. In this petition, the petitioner pleaded it owns Parcel LR No 7452. It produced a certificate of title as annexure KWQ "1" whose map shows the adjoining parcels as LR No 2890 Timau Township and LR No's 2888/2 745 & 2889.
207. The petitioner attached KWQ "3", a certificate of confirmation of grant issued in Nyeri HCC Succession Case No 711 of 2012.
208. Annexure produced as KWQ 2 contained the letter extending the TOL by the Commissioner of Lands, approved form of transfer dated June 4, 1966, letter dated November 20, 1970 from the Water Apportionment Board to the Commissioner of Lands letter confirming the existence of the TOL at page (17), District Surveyor Meru letter dated January 26, 1997; letter to the Commissioner of Lands dated September 19, 1997, response from the Commissioner for Lands dated February 5, 1998; acknowledgment receipt and a promise to initiate investigations, a decision thereof; follow up letters dated July 10, 2002; November 10, 2006; response dated 24.6.2008 from the commissioner for lands requesting for a sketch map and notifying that there was going to be a site inspection of the parcel;



- site inspection report dated December 22, 2008 by the District land officer Meru recommending the formalization of the TOL process and lastly letter dated October 5, 2010 to the Commissioner of Land as a follow up to previous correspondence.
209. The respondents, petitioners and the interested parties in the 1st petition have not denied the existence of the said letters, reports and or objected to having received or made the said letters and the reports.
 210. Further, the 1st-4th respondents in Petition No E010 of 2020 as well as the petitioner therein have not denied the existence and legality of those documents and letters or questions their legal implications and probative value.
 211. As indicated in the Warehan case, the existence of the fact that there was a TOL issued in favour of the predecessor of the 1st respondent to the predecessor of the petitioner has not come under any challenge in these proceedings here. The same obtains to the correspondence attached to the petitioner's supporting affidavit.
 212. The language used in the in the above correspondences is plain and clear and under Section 100 of the *Evidence Act*, it is provided that when the language used in a document is plain and it applies accurately to existing facts, parol evidence may not be given to show that it was not meant to apply to such facts. See *Concord Insurance Co Ltd v Lister Gideon Kasria & others* Civil Appeal Msa No 124 of 1984 and *Njuguna Wamuti v Simeon Koimburi* (1977) eKLR.
 213. The 1st respondent in this petition and the 1-4th respondents in the Petition No E010 of 2020 cannot contradict the contents of those letters and the representations made to the petitioner herein in the process of regularizing the status of the subject land forming part of the TOL. There cannot be any assertion whatsoever that the petitioner has not been using or occupying the subject land with the knowledge of the 1st respondent and by extension the 1-4th respondents and the interested parties in Petition No E010 of 2020. My finding therefore is that the doctrine of estoppel applies to the respondents and they cannot deny clear facts and or knowledge of the occupation of the petitioner in the subject property since 1966 to present.
 214. As to whether the TOL expired by effluxion of time and or by operation of law, the process to revoke, vary, renew, review and approve a license was initially governed by Sections 40(1) of the repealed *Government Land Act*, Cap 280 and currently is provided under Sections 20 (1) and 4 of the *Land Act 2012*.
 215. Section 97 (1) of the *evidence Act* provides that when terms of a grant or any disposition of property has been reduced into a form of a document no evidence shall be given in proof of such grant or disposition except the documents itself or secondary evidence of its contents. See *Donald K Kipkorir v Mohamed A Haji* (2010) eKLR.
 216. The respondents and the interested parties have alleged the TOL expired and or was non-transferable and that the petitioner is a trespasser to the subject property who lacks any protectable interests.
 217. Unfortunately, going by the correspondence exhibited herein there is no evidence of any formal notification of termination or the revocation of the TOL as well as a notice conveying a decision to the petitioner that its request was untenable under the circumstances with reasons for that decision and additionally, confirming that the subject property had reverted to the 1st respondent for re-planning resurvey or reallocation to third parties. Additionally, there is no evidence of a request to the petitioner to vacate and hand over vacant possession of the subject property in line with the National Land Commission Act and the Land Act as well as its predecessors. Section 5 & 65 of the *RTA* on surrender



- Section 40 of the *Government Land Act* required a notice of three months to surrender the property to be duly served while Section 42 thereof related to forfeiture of a license.
218. In *Ignatius Kabiru Mwariri & 14 others v County Council of Nairobi and another* (2014) eKLR the court citing with approval *Faraj Mahaus v JB Martin* (supra) held a TOL cannot oust a certificate of title under RTA and was not sufficient to create or transfer title the guarantee or his personal representative. In *Runda Coffee Estates* (supra) the court held a TOL creates nothing which is assignable.
 219. The court held a licensee as opposed to a trespasser is entitled to a notice before the license is terminated. In *Omar & 8 others v Murania & another* (2006) IKLR (E&L) 206 the court held that by permitting a licensee to the premises it created a licensor/Licensee legal relationship a contractual license of an indefinite duration which could only be revocable upon a reasonable notice.
 220. The court found that Article 47 & 232 of the *Constitution* placed a duty on the licensor to act fairly, lawfully and reasonably in terminating the license.
 221. In *SDA Church EA Ltd Victory Church v Caleb Oma and 5 others* (2018) eKLR the court held that after an expiry of the notice the respondents were trespassers of the land with no legal rights.
 222. In *Julius Isaboke Kegoro v National Land Commission & 2 others* (2016) eKLR, the petitioner had sought to be declared as entitled to the land and for the 1st respondent to be ordered to allocate the land to him following a recommendation by the District Land Officer, District surveyor, clerk to the county and the physical planner, out of an occupation and possession for a long period of time.
 223. The court held that the petitioner had acquired a right over the subject matter under the law and would have been an affront to justice if the subject property was allocated to and or documented to any other person apart from the applicant.
 224. Further, the court held it would not be a fair administrative action if the petitioner was to be bypassed and the property to be allocated to another person which would amount to discrimination contrary to Article 47 of the *Constitution*.
 225. The court also held that the petitioner had a legitimate expectation that having been recommended for allocation of the suit property that he would truly be documented as the true owner and that there was no reason or basis to bar him from being documented as owner of the property.
 226. Applying the foregoing principles, it is quite obvious that there has been a permissive occupation of the subject property initially and that the current occupants, the petitioner herein took up the possession and occupation when the initial licensee left or passed on.
 227. Thereafter, the petitioner notified the 1st respondents' successor in title on the demise and the transfer of ownership by the initial licensee or occupation in a new capacity. The petitioner has from the evidence tendered continued to engage the relevant officers of the 1st respondent to document its occupation and or possession in vain. A recommendation was even made to the 1st respondent who acknowledged receipt of the said recommendation by the Land Registrar and who assured the petitioner it was going to be acted upon soon.
 228. In *Mwambu Mbuvi Maingi & 15 others v Kenya Education Management Institute and another* (2014) eKLR the court cited with approval *Faraj Maharus* (supra) on the proposition that prescriptive rights by way of adverse possession cannot occur on public land.
 229. The court held that even though a trespasser must give way to a lawful owner, sufficient notice to move out must be given as held in *Ibrahim Sangor Osman & another v Minister for State for Provincial Administration and another* Embu HCC No 2 of 2011 and in *Susan Waitibera Kariuki & 4 others v*



- Town Clerk Nairobi City Council & 2 others Petition No 66 of 2011 where the court found a notice of one or two days was unreasonable and unconstitutional. See also Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others (2011) eKLR.
230. The court directed a 5 months' notice be issued and the process eviction to be done in a humane manner. In Joshua Ndiritu Ndubiu v Francis Mwangi Maina (2020) eKLR the court cited with approval Satrya Investments Ltd v JK Mbugua Civil Appeal No 164 of 2004 and held that a TOL issued in 1926 could not oust the certificate of title granted under the RTA & on Dr. Joseph Ngok v Justice Moiijo Ole Keiwua & 5 others Nairobi Civil Appeal No 60 of 1997 on the proposition that land property comes into existence after a letter of allotment and a title document.
231. There is no doubt that the respondents have not revoked and or addressed the status of the petitioner in so far as documentation is concerned regarding the subject property. Instead of complying with the sections 9 – 20 of the Land Act and the Land Regulations Rules 2017, the respondents took the law into their own hand and instead assumed without notice to the petitioner, that the TOL to the subject property had expired and the petitioner was then, an illegal occupant.
232. Unfortunately, the respondents failed, the constitutional duty to give the petitioner a fair hearing and a fair administrative action before any such precipitate action.
233. Already the respondents had given an assurance to and created a legitimate expectation on the part of the petitioner that they would act reasonably and fairly. See CCK v Royal Media Services Ltd (2013) eKLR.
234. The 2nd respondent arrogated to itself powers and a mandate it did not possess under the National Government Co-ordination Act as rightly stated in the grounds of opposition dated September 14, 2020. Unfortunately, what it stated in those grounds is completely opposite of what is contained in the letter dated July 9, 2020, authored by one Asha K Kiiwa the Deputy County Commissioner Buuri West County addressed to the 1st respondent. Is it then a question of the left hand not knowing what the right hand has done? The evidence tendered shows as at July 9, 2020, the licence had neither been terminated formally nor forfeited in line with the law by the National Land Commission, the interested party. It was therefore deemed to be valid and valid especially after the representations in the letters produced as evidence herein.
235. The OB report or extract attached to the supporting affidavit by the petitioner number 9/18/7/2020 stated that about 50 people calling themselves Kazi Mtaani invaded the subject property and committed acts of damage and dumped garbage therein.
236. The court takes judicial notice that Kazi Mtaani fell under the mandate of the 2nd respondent who despite the specific averments on the fanning of the illegalities and the breach of the petitioner's rights to land at paragraphs 14 & 15, 21& 22 of the petition has not seen it wise to justify its action bordering on advocacy for disorder and or self-help contrary to its mandate under the National Government Coordination Act. The 2nd respondent appears to have called the said youth to its aid instead of seeking a legal remedy. See Muiruru Gakombi v Special Steel Mills Ltd (1993) eKLR The 2nd respondent invited the youths to enforce otherwise civil rights and hence became liable for any loss occasioned as held in Kamau Mucuba v The Ripples Ltd (1993) eKLR.
237. In my view and as it was held in David Katana Ngomba v Shafi Kaka (supra), where a party who fails to call a critical witness or respond to evidence, the court is free to draw an inference that its evidence would have been adverse to or against such a party.



238. Again, going by the decision Peter Nyakundi and 68 others (supra) failure to file a replying affidavit to challenge and or controvert the sworn averments by the petitioner that the 1st & 2nd respondents breached its rights to fair hearing, fair administrative action and protection to property, but only opted to address the issues of law, meant that the said averments remained unchallenged. The said grounds of law could not amount to a proper or valid denial of allegations made on oath concerning the specific infraction of its rights by the 2nd respondent.
239. In essence therefore, the failure by the 2nd respondent to file a replying affidavit and refute the specific allegations of its illegality, negligence and violation of the petitioners' right can only mean that those facts are admitted and stand unchallenged.
240. In *Nyongesa & 4 others v Egerton University college* (1990) eKLR, the court held that natural justice was part of Kenyan culture pertaining to the settlement of controversies and it was the duty of the court as custodian of the fundamental rights and liberties of people to curb excesses of officials and bodies that exercise administrative functions.
241. The respondents have not refuted the specific claims on for failing to accord the petitioner due process, fair administrative action, promptly and within reasonable period, make a decision one way or the other over the subject land falling under the TOL.
242. In exercising such powers, the 1st respondent is duty bound to act fairly and within the four corners of Article 47 of the *Constitution* as read together with the *Fair Administrative Action Act* in executing its mandate under the Land Act and the National Land Commission Act.
243. Unfortunately, the 1st respondent has shown utter disregard of the said laws and the regulations relating to the processing and determination of a request on review, reallocation and revocation of the license in this matter, even after the 2nd respondent made a request which eventually led to the unfortunate taking of law unto its own hands. The 1st respondent has remained silent on whether or not it has formally revoked and or issued a notice to vacate subject public land to the petitioner, and given any decision in writing and the reasons thereof in line with the constitutional and statutory requirements obtaining.
244. In *Commissioner of Lands v Kunste Hotel Ltd* (1997) eKLR the court held that the respondent had demonstrated sufficient interest which obliged there be consultation or it be heard prior to a decision to allocate the land to a third party.
245. In *Chemney Investments Ltd* (supra), the Court of Appeal stated it could not give a seal of approval to self-help, high handed tactics or the violation of the law in order to right what was perceived to be a wrong otherwise the result would be the law of the jungle and utter chaos.
246. Unfortunately, the respondents herein seem to have left the path of the law and adopted for the law of jungle through their actions. This cannot be the way to protect public interest Mr Kurauka advocate for the petitioners in Pet No E010 of 2020 has urged this court to raise to the occasion and protect public interest.
247. This court as the protector of the fundamental rights and freedoms of Kenyans has to do so by calling up all the parties to play by the Rules, laws and constitutional edicts on Fair Administrative Action, fair hearing and right to protection to property by complying with Sections 8-22 of the *Land Act* on the processing of the licence, 26 thereof on notice, 152 B Section 155 on the notice to vacate and Rules 9, 10 & 63 of the *Land Regulations Rules 2017*.



248. By failing to adhere to the above constitutional and statutory parameters, the respondents violated, threatened and or infringed on the rights of the petitioner as to fair hearing, fair administrative action and right to property.
249. In so far as the right to clean and healthy environment, the petitioner had a duty to lodge a complaint under the *Environment Management and Coordination Act* for investigations before moving to this court. There is no investigative report produced before the court in support of those averments hence I find the allegations unproved.
250. The petitioner has also sought for a declaration that the 1st respondent should register it as the owner of the subject property and its entitlement to quiet possession on an alleged apprehension that without an order the 1st respondent would allot the property to the third parties to its detriment.
251. The last letter made by the petitioner to the 1st respondent is dated May 5, 2010. This was prior to the coming in force of the 1st respondent and the National Land Commission Act on May 2, 2012.
252. Since then, up to June 2020, when this petition was filed there is no evidence that the petitioner complied with Article 68 (c) & (v) of the *Constitution*. There is also no evidence if the petitioners in Pet No E010 of 2020 filed a complaint with the 1st respondent against the petitioner herein in line with the *National Land Commission Review of (grant & disposition of public land) Regulations 2017*, in Form No NLC 01 as per Regulations 9 (1) & (3) as amended in 2020.
253. As regards the regularization of the claim, to the subject property, the petitioner was supposed to apply under Sections 3, 32 & 36 of the *Land Act 2012*, pursuant to Article 62 (1) of the *Constitution*.
254. Under Sections 162 (2) (3) of the *Land Act*, the petitioner ought to have completed and presented an application for a license or an easement and sought for a consent of transfer under Sections 143 & 144 thereof in terms of Form No LA, 19 Form LA 52 & Form No LA 20 to the 1st respondent.
255. Similarly, if the 1st respondent was objecting to the occupation, it was supposed to give a notice to vacate through the Cabinet Secretary in terms of Form No LA 21 in line with Regulations 10 (1) thereof to the petitioner.
256. The petitioner has not produced any evidence before this court that all these elementary procedures were complied with. Equally, the 1st respondent has not tendered any evidence that a formal notice to revoke or decline the request for and, or that a notice to vacate the subject property herein the public land was issued in line with the law.
257. The court cannot therefore make such declaration and hereby exercises judicial restraint until the internal mechanism of the regularization are invoked by the petitioner and a determination made thereof.
258. As to whether the TOL was still necessary to the petitioner, and if withdrawn it would occasion grave injustice and prejudice to the petitioner and the environment, the petitioner has not tendered evidence before this court, on the particulars of any developments undertaken on the subject land, details of whatever fees, levies, charges and other payments to the government for the public property, any environmental impact assessments including social impact, approval permits from the relevant government agencies and other relevant material particularly after the dumpsite was established.
259. In my considered view the court must exercise judicial restraint since such matters which ideally fall under the relevant tribunal and other quasi government agencies. The petitioner has not invoked such jurisdiction in line with Sections 28 & 29 of the *EMCA*.



260. In the circumstances obtaining and in line with Sections 4, 6 & 11 of the *Fair Administrative Action Act 2015*, I make the following orders:

1. Declaration that the petitioner's request for the regularization on the use and or occupation of the land measuring approximately 50 acres or thereabouts forming part of LR No 2890 and adjoining its LR No 7452 Timau Township Buuri Subcounty Meru be determined in accordance with the relevant land laws by the 1st respondent within 6 months from the date hereof.
2. A declaration be and is hereby issued suspending and invalidating the decision made by the 2nd respondent and communicated to the 1st respondent through a letter dated July 9, 2020 until the petitioner's request is heard, determined and a decision made by the 1st respondent in accordance with its statutory and constitutional mandate.
3. The petitioners in Pet No E010 of 2020 are at liberty to make any presentations and or objections before the 1st respondent relating to the petitioner's request.
4. Pending the hearing and determination of the request in (1) above, the *status quo* obtaining as at the date of this judgment to subsist for a period of one year.
5. This being a constitutional petition there will be no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 5TH DAY OF OCTOBER, 2022

HON. C.K. NZILI

ELC JUDGE

