REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC PETITION NO. 8 OF 2019

JOHNSON LESANYANE ECHWA.....1ST PETITIONER
JAMES AKORO.....2ND PETITIONER
LOYO EYANAE.....3RD PETITIONER
REGINA LOKIRION EKIDOR.....4TH PETITIONER
EKIRI AKUT EKORI.....5TH PETITIONER
RACHEAL KAMURAKE TIOKO.....6TH PETITIONER
EMONI EPEM ECHWA.....7TH PETITIONER
LOKOLONYOI LOCHI ECHWA.....8TH PETITIONER
JANE AKENO KOOLE.....9TH PETITIONER
ANNA AKENO.....10TH PETITIONER
NARO KAMURAKE MICHAEL.....11TH PETITIONER
ELIZABETH LOSANYANA ECHWA.....12TH PETITIONER

(Suing on behalf of TURKANA COMMUNITY from Kanamkemer Ward, Kanamkemer

Location, Nawoitorong Sub-Location and living along River Turkana)

VERSUS
COUNTY GOVERNMENT OF TURKANA.....1ST RESPONDENT

THE GOVERNOR, COUNTY GOVERNMENT OF TURKANA.....2ND RESPONDENT

JUDGMENT

Introduction.

1.The petition dated 5/11/2019 by the petitioners herein seeks orders against the respondents which are set out verbatim as hereunder:-

(1) A declaration that the petitioners and the Turkana Community of Elelea, Lolupe, Nayuu, Ngariemriemet, Atiir Lulung, Lokitela Side, Lokorimoe-Eereng, Lopirpira, Napu, Ataparaningolea, Ataparamaritoit, living along River Turkwel and Chokochok within Turkana County are entitled to all that piece of land as it is community land solely belonging to the petitioners of the Turkana Community;

(2) A declaration order that the intended and or allocation of the community land in Elelea, Lolupe, Nayuu, Ngariemriemet, Atiir Lulung, Lokitela Side, Lokorimoe-Eereng, Lopirpira, Napuu, Ataparaningolea, Ataparamaritoit, living along River Turkwel and Chokochok within Turkana County is illegal and unlawful and an abrogation of the Constitution;

(2) A permanent injunction to restrain the respondents or any other party from interfering with the petitioners and the Turkana Community living in Elelea, Lolupe, Nayuu, Ngariemriemet, Atiir Lulung, Lokitela Side, Lokorimoe-Eereng, Lopirpira, Napuu, Ataparaningolea, Ataparamaritoit, along River Turkwel and Chokochok within Turkana County with their ownership, occupation, use and interest over the community land or otherwise from allocating or attempting to evict the petitioners and other residents from the community land or from issuing title deeds or in any other way alienating he community land other than to the petitioners and other residents;

(3) A declaration order that the intended and or allocation of the community land in Elelea, Lolupe, Nayuu, Ngariemriemet, Atiir Lulung, Lokitela Side, Lokorimoe-Eereng, Lopirpira, Napuu, Ataparaningolea, Ataparamaritoit, along River Turkwel and Chokochok within Turkana County threatens and violates the petitioners' right to ownership of community land;

(4) An order that the said land is community land and/or held under native title in terms of Article 63(1) and (2) of the Constitution of Kenya belonging to the petitioners, successors and other bonafide Turkana residents;

(5) An order directed to the Government of Kenya to immediately survey the suit land and proceed to issue title deeds to the petitioners and other bonafide Turkana residents of the suit land.

(6) Costs of this petition;

(8) Any other or further relief or orders that this court may deem fit to grant.

The Petitioners' Case

2. The petition is supported by a supporting affidavit sworn on 27/5/2019 by the 1st petitioner on his behalf and on behalf of other petitioners herein.
3. According to the petition, the petitioners belong to the local communities living in Elelea, Lolupe, Nayuu, Ngariemriemet, Atiir Lulung, Lokitela Side, Lokorimoe-Eereng, Lopirpira, Napu, Ataparaningolea, Ataparamaritoit, River Turkwel and Chokochok within Turkana County; their ancestors were the owners of the said lands which have for long been grazing lands for the local communities; they aver that they are therefore entitled to legitimate ownership of the said lands through successive inheritance from their forefathers and as indigenous people they are entitled to protection of the Constitution; however the 1st respondent and its agents have moved into the parcels of land currently occupied by the petitioners and have commenced the process of surveying, mapping and erecting of beacons for purposes of allocating the said land to private developers. The petitioners also allege that they have learnt from newspaper reports and public statements by various public officers and "through visits" that the allocation of land in the mentioned areas has already commenced. They are apprehensive that they and other residents will be displaced and subjected to irreparable loss and social disruption by the allocation of the land to private developers. It is alleged that the private developers are presently erecting beacons and fences on the land along River Turkwel in readiness to taking possession. The petitioners state that the alleged land allocation, is being conducted without public participation, public dissemination of information, environmental impact assessment report, in secrecy and in total disregard of the fact that the land is community land; the exercise, they state, raises their apprehension of eviction and jeopardizes their livelihood. It is stated that the respondents' activities are unconstitutional arbitrary, null and void and should be halted.
4. The petitioners further allege as follows: that Article 29 grants right to security of the person and this right is now threatened as the distrust created by the respondents' activities may lead to a breach of the peace; that Article 40 grants the right to property and the petitioner's right to property is now threatened; that Article 43 grants the right to the highest standard of health including health care services and that right is now threatened; that the 2nd respondent refused or neglected to preserve the land considered as community land and which had always been utilized and considered as such; that the 2nd respondent refused to respond to the resident's queries in respect of the actions complained herein before regarding the suit land; that the 1st respondent has a responsibility to ensure the activities complained of do not occur. That community lands vest in the communities it identifies with and it is wrong for the respondents to attempt to dispose of the petitioners' community land; that the respondents are also in violation of Article 174 of the Constitution. A copy of what is said to be a petition to the 1st respondent, written by the petitioners and dated 26/4/2019 is exhibited in the supporting affidavit.

The Respondents' Response
5. The respondents filed a replying affidavit sworn by the 1st respondent's Director of Physical Planning in reply to the petition dated 26/7/2019. His response is that the respondents have no intention of allocating the land situate in the areas mentioned by the petitioners; that the respondents have not made any public announcements concerning such alleged allocation; that they have not commenced any survey, mapping or erection of beacons and no fencing has been done by any private developers and that the petitioners' allegations are not supported by any evidence.

6. The respondents filed a response to the petition dated 26/7/2019. In that document they deny the contents of the petition and state that the allocation of land is a function of the national government and that county governments only regularize ownership of the land through survey and mapping as per Section 8(b) of part 2 of the 4th schedule in the Constitution of Kenya 2010. They also aver that community land in Turkana County remains unregistered to date and the 1st respondent is a mere trustee thereof on behalf of communities entitled thereto and that if the land were to be allocated, the process would only commence after endorsement by the community.

The petitioners' supplementary affidavit.

7. A supplementary affidavit was sworn by the 1st petitioner in response to the replying affidavit of the 1st respondent's Director of Physical Planning mentioned above. In so far as it is relevant to this petition, that same states that there is no evidence that the Director Of Physical Planning of the 1st respondent had authorization to swear the affidavit by the respondents and that upon the filing of the petition and the obtaining of the injunctive orders the respondents' agents began removing and destroying the beacons already placed on the land. Photographs of some erected and some allegedly destroyed beacons are exhibited in the affidavit.
The respondents' further replying affidavit.

8. This was filed in reply to the supplementary affidavit of the petitioners. It is sworn by the Director Of Physical Planning of the 2nd respondent who states that he has authority of the respondents to swear the affidavit and that the petitioners have failed to prove any of their allegations in the petition.

SUBMISSIONS

The Petitioners' Submissions

9. The petitioners filed their submissions on 13/12/2019. They recapitulated the matters set out in their petition. They averred that this court has jurisdiction to hear the matter and that they have locus standi; they allege that Article 10 of the Constitution has been infringed with regard to them because the respondents have failed to adhere to the national values and principles of governance which apply to all persons whenever they enact, implement or make public policy decisions. They aver that in complementing Article 10 of the Constitution, Section 87 of the County Governments Act provides for citizen participation in county governments and stipulates the principles for such participation. The petitioners further aver that the respondents, by their admission of trusteeship, and having failed to deny that the suit land is community land, are estopped from denying the claims, or asserting that they are not aware of any illegal allocation of the community land. In regard to Article 40 the petitioners aver that the actions of the respondents are contrary to the law and they should be declared unlawful in so far as

they limit, restrict, deprive the petitioners of the suit land. The petitioners aver that Article 42 has been violated in that the respondents have failed to eliminate processes and activities likely to endanger the environment. The petitioners allege that Article 47 and Article 63 of the Constitution have been violated in so far as the respondents are said to have failed to involve or seek the consent of the people of Turkana County before the alleged allocation. They aver that that action is tantamount to disposing of the suit land without compliance with the Constitution.

10. The petitioners aver that the precautionary principle of international law as enunciated in the 1990 Bergen Ministerial Declaration on Sustainable Development applies to this case.

11. It is further stated by the petitioners that under Article 63 of the Constitution community land is identified on the basis of ethnicity culture and community interest and the suit land falls under the category of community land. Citing the case of Thuku Kirori & 4 Others Vs The County Government Of Muranga Muranga Petition No 1 Of 2014 (2014) eKLR, and Mada Holdings Ltd t/a Fig Tree Camp vs County Council Of Narok – Narok HCJR No 122 of 2011, (2012) eKLR, they aver that state organs are duty-bound to consult communities and stakeholders before making decisions affecting the environment; they further allege that the mapping and laying of beacons and allocation thereof without participation of community members is inconsistent with the Constitution. They aver that the nature of the rights of members of each community, individually and collectively, have not been specified in the process.

12. Citing the case of Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR the petitioners maintain that their pleading has met the threshold required of a petition.

13. The petitioners maintain that the respondents never adhered to the provisions of Article 10(2) (a) of the Constitution as the petitioners' views were allegedly never sought.

14. Citing the case of Bitange Ndemo Vs Director of Public Prosecutions & 4 others 2016 eKLR the petitioners aver that the orders of declaration sought should be granted. They maintain that injunctive orders should issue as sought against the respondents as they stand to suffer considerable prejudice from their actions described in this petition. They aver that public interest is at the core of this dispute.

15. The petitioners urge the court to allow the petition and grant the orders sought with costs.

The Respondents' Submissions

16. The respondents filed their submissions in response to the notice of motion for conservatory orders on 6/12/2019 but failed to file their submissions on the main petition as directed by the court on 6/11/2019. It is also noteworthy that they had in their response which doubled up as a response to both the petition and the motion, they denied the activities pleaded by the petitioners.

DETERMINATION

Issues for Determination

17. The issues that arise in this petition are as follows:

(a)Whether the petitioners have established a violation of their rights under the constitution by the respondents.

(b)What orders should issue.

The issues are discussed as hereunder.

a. Whether the petitioners have established a violation of their rights under the constitution by the respondents.

18. Section 107 (1) of the Evidence Act provides that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist and the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

19. For this court to address the issue of whether the provisions of the Constitution, or how, the same are said to have been violated or threatened, it must first delve into the factual matrix underlying the claim, and establish whether the facts as pleaded by the petitioner have occurred, or have occurred in the manner pleaded. Without the existence of the facts as pleaded, or if the facts are proved to be incorrect, the court's inquiry into whether violation of rights has occurred may not be well founded. Mativo J observed in Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR:

> "Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

20. The position laid down in Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154 is that when a party approaches the court alleging a violation of their rights they must "set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." . This rule is basically reflective of the court's reliance on well drafted pleadings to enable it determine issues arising in a petition.

21. In the Mumo Matemu case (supra), the Court Of Appeal observed as follows:

> "…the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court… Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle"

22. Having had reference to the courts' approach to the burden of proof and manner of proof as herein above it is now time to delve into the merits of the petitioners' claims.

23. Community land is defined by the Constitution. Article 63 provides as follows:

> "63.Community land
>
> (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
>
> (2) Community land consists of—
>
> (a) land lawfully registered in the name of group representatives under the provisions of any law;
>
> (b) land lawfully transferred to a specific community by any process of law;
>
> (c) any other land declared to be community land by an Act of Parliament; and
>
> (d) land that is—
>
> (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
>
> (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
>
> (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.
>
> (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
>
> (5) Parliament shall enact legislation to give effect to this Article."

24. The legislation that emanates from Article 63(4) of the Constitution, governing the manner of disposal or use of community land is the Community Land Act. No. 27 of 2016. Section 2 thereof defines community land as follows:

> "Community land" means includes—
>
> (a)land declared as such under Article 63(2) of the Constitution;
>
> (b)land converted into community land under any law;"

25. It is crystal clear from the petitioners' pleading that their grievance is that what they term as the community land handed down from their ancestors and held in trust for them by the 1st respondent is being illegally allocated by the respondents to persons the petitioners refer to as private developers.

26. There is affidavit evidence of the 1st petitioner which is intended to support the factual claims and it must be examined for its probative value.

27. In the respondents' affidavit evidence, it is not denied that the petitioners are residents of Turkana County or that they are in occupation of the suit land. The respondents have admitted that the suit land is community land and that the 1st respondent holds the land in trust for the petitioners under Article 63(3) of the Constitution. However the respondents have denied having any intention, or having expressed any such intention in the media or otherwise, or having implemented the decision if any, to allocate the land in the areas mentioned by the petitioners. They have also denied that they have commenced any such survey mapping and beaconing of the suit land. Indeed the respondents' main challenge to the petition is premised on the paucity of evidence to support the allegation that the surveying, mapping, beaconing and fencing of the suit land is ongoing, and they term the petitioners' claims as false.

28. The affidavit filed with the petition reiterates the claims in the petition; the only annexture that was attached to that affidavit was the

petition written by the petitioners addressed to the 1st respondent and copied to the 2nd respondent, the County Commissioner, Turkana County, the National Land Commission, the CEC Lands, Turkana County and the Regional Commissioner. It is signed by the 1st petitioner and 26 others, some of whom appear to be petitioners herein. The gist of that petition to the 1st respondent, which is dated 26/4/2019 is that the petitioners are aware of intended allocation of the suit land by the 1st respondent without any consultation with the local community and that the 1st respondent is warned against such course of action which would have adverse consequences on the local citizenry and the environment. The said petition seeks a consultative meeting to facilitate inter alia the protection of customarily held community land through a titling process, and to enhance understanding of how to best support the Turkana community efforts to protect the land along River Turkwel and the kind of support they require, ensuring conservation of natural resources along the river.

29. Apparently unsettled by the reply filed by the respondents that there is no evidence to support their claims the petitioners filed a supplementary affidavit on 14/10/2019. That affidavit posits that the petitioners do not have to wait until their rights with regard to the suit land are violated in order for them to approach the court. Is this an implied admission that their first affidavit contained no sufficient evidence to support the claims on which the petition was initially premised? In my view, that is the case. In the same supplementary affidavit the petitioners also maintain that their right to own community land is now threatened with violation and exhibit evidence to demonstrate the extent of the threat. That evidence comprises of photographs as well as a certificate under Section 106(B) (4) of the Evidence Act Cap 80. The photographs bear on their face the longitudinal and latitudinal co-ordinates of the site of photography. Most of them show what appear to be metallic rods of various dimensions stuck into the ground, with some showing what appears to be a riverine ecosystem in the background. However there is no expert opinion that the photographs were taken on the suit land and the person who executed the certificate under the evidence act is not the deponent of the affidavit. In brief, there is nothing before court to demonstrate that the co-ordinates on the photographs refer to areas comprising of the suit land. It should also not be gainsaid that the photographs do not have on their face any feature that would identify the respondents as the erecters of the beacons portrayed in them. That action having been denied by the respondents it is the opinion of this court that the petitioners have not established that the respondents erected the beacons or that they were involved in the alleged surveying or mapping of the suit land, if it ever took place.

30. To exhibit the subject photographs and refer to them as evidence of the threat to the petitioner's land rights is in my view not sufficient proof that the beacons were erected by the respondents or that the photographs were taken from within the suit land. Evidence demonstrating the proper nexus between the erection and the actions and intentions of the respondents regarding the suit land is a necessity if this court is to find that they were involved in the impugned exercise, without which finding this court must not find them culpable for the alleged violations of or threats to the petitioners' constitutional rights.

31. In my view then the basic factual matrix upon which this court's investigation into the validity of claims of alleged violation of constitutional rights by the respondents would have proceeded having not been established, this court has no ground upon which to inquire as to whether any of the petitioners' rights under the various articles of the Constitution have been infringed upon or are under threat of infringement and this petition must fail.

CONCLUSION

(b)What Orders should issue?

32. The petition dated 27th May 2019 seeks numerous orders. It is clear from the foregoing analysis that the prayer for a permanent injunction can not issue against the respondents as no case against them has been proved to the required standard. The Declaration sought that the intended allocation is unlawful and an abrogation of the Constitution and threatens or violates the petitioner's rights to ownership of community land is also unmerited for similar reasons.

33. The issue that remains is whether the other prayers namely, for a declaration and a mandatory order against the national government should issue.

34. I will deal with the prayer for a mandatory order first as it seems the easiest to dispose of.

35. The Constitution of Kenya at Article 1 provides for two levels of government, namely government at the county level and government at the national government. Article 1(4) provides as follows:

> "(4) The sovereign power of the people is exercised at—
>
> (a) the national level; and
>
> (b) the county level."

36.The distinctiveness of these two levels of government is to be seen in the provisions of Article 6 which provides as follows:

> "6. Devolution and access to services
>
> (2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."

37. On the basis of the above constitutional provisions alone, it is clear to see that the sins of the government at the county government can not be foisted on the shoulders of the government at the national level, and the vice versa. The self-inflicted thorn engendered in the omission to include the national government as a party in the petition denied the petitioner an opportunity to plead any threat of or actual violations against the national government, or other justification for the prayer for a mandatory order directed at the national government.

38. Previous court decisions have upheld the position that a party is bound by their pleading and no orders may validly issue that are not premised on pleadings. In the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR which was an election petition and whose dicta in my view also applies not only to this petition but to all litigation, held as follows:

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings….."

39. In the decision in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR the Kenya Court Of Appeal concurred with the holdings in the case of Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD Vs. NYASULU [1998] MWSC 3, (in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings") in which article it had been stated as follows:

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

40. The Court Of Appeal also approved of the dicta in the Ugandan case of Libyan Arab Uganda Bank For Foreign Trade And Development & Anor Vs. Adam Vassiliadis [1986] UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in Jones Vs. National Coal Board [1957]2 QB 55 that;
"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

41. On the basis of the above precedents this court finds that the inclusion of a prayer against the national government, a non-party to the suit, is unjustified. Without any pleading against the national government, the order sought for the national government of Kenya to immediately survey the suit land and issue title deeds to the petitioners can not issue.

42. The petitioners have included two more prayers for declarations: that they and the Turkana community of Elelea, Lolupe, Nayuu, Ngariemriemet, Atiir Lulung, Lokitela Side, Lokorimoe-Eereng, Lopirpira, Napu, Ataparaningolea, Ataparamaritoit, living along River Turkwel and Chokochok within Turkana County are entitled to all that piece of land as it is community land, and an order that the said land is community land and/or held under native title in terms of Article 63(1) and (2) of the Constitution of Kenya belonging to the petitioners, successors and other bonafide Turkana residents;

43. In my view, these prayers last mentioned are predicated upon the assumption that the land in question is properly identified demarcated and defined for the purposes of this petition. However nothing of the sort has been accomplished by the petitioners in their petition and affidavit evidence. The Constitution recognizes at least three categories of land and the spatial arrangement of land parcels in a county may be a kaleidoscope many land units of different classifications. This court would be shooting in the dark if it ventured into a determination of the above issues without any concrete evidence of the extent and boundaries of the land mentioned. For that reason these prayers too must be rejected.

44. The upshot of the foregoing is that the petition has no merit and the same is dismissed. However, as the petition involves matters of great public interest, the parties will bear their own costs of the petition.

Dated, signed and delivered at Nairobi via Teleconference on this 7th day of May, 2020.

MWANGI NJOROGE

JUDGE

ELC, Kitale.

Judgment read in the absence of the petitioners and the respondents who had been adequately notified of the judgment date.

MWANGI NJOROGE

JUDGE,