



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC PETITION CASE NO. 05 OF 2017

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40
OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

JULIUS KIRIGA MUNGANIA.....1ST PETITIONER

CHARLES MUINDI GITUMA.....2ND PETITIONER

SISTO MARANGURIA MIGWI.....3RD PETITIONER

MUTIGA MIGWI4TH PETITIONER

AND

DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER THARAKA DISTRICT.....1ST RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF LANDS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

COUNTY GOVERNMENT OF THARAKA NITHI.....4TH RESPONDENT

JUDGMENT

1. THIS PETITION READS AS FOLLOWS:

TO: THE ENVIRONMENT & LAND COURT AT CHUKA

P. O. BOX 73,

CHUKA.

AMENDED PETITION

(PURSUANT TO LEAVE GRANTED ON 05TH APRIL, 2017)

The humble petition of Julius Kiriga Mungania, Charles Muindi Gituma, Sisto Marunguria Migwi and Mutiga Migwi all of Tharaka District,

Tharaka Nithi County within the Republic of Kenya is as follows:-

1. The Petitioners are male adult persons of sound mind whose address for service for purposes of this petition shall be C/O NGUNJIRI MICHAEL & CO. ADVOCATES, REHEMA PLAZA, 2ND FLOOR, KIRUKURI STREET, P. O. BOX 455-60200, MERU.
2. That the 1st Respondent is the officer in charge of Land Adjudication process in Tharaka District and is herein sued in that capacity. (service of court process to be effected through the petitioners' advocate.)
3. That the 2nd Respondent is the permanent secretary in the Ministry of Lands and sued in his capacity as such. (service of court process to be effected through the petitioners' advocate).
4. (i) That the 3rd Respondent is the Principal Legal Advisor of the Government of Kenya and sued in his capacity as such. (service of court process to be effected through the petitioners' advocates.)
ii) that the 4th Respondent is the government of Tharaka Nithi County. (Service of court process to be effected through the petitioners' advocate).
5. That petitioners are residents of Chiakariga "B" Adjudication Section within Tharaka District and they make this petition on their own behalf and that of the residents of the mentioned adjudication section and the members of the Bwairi Clan M'Gatwiki Section.
6. That it is the petitioners' assertion that the land in Tharaka District is trust land and as such all individuals belonging to the communities resident therein have a right to possession, enjoyment, use, occupation, control and / or inheritance of the same.
7. That Petitioners aver that the 1st Respondent declared Chiakariga "B" Adjudication Section vide a notice dated 27th November, 2009.
8. That the Petitioners further aver that the 1st Respondent's role in Chiakariga "B" Adjudication Section is to ascertain the rights and interests on the land thereon (which land is trust land) and transforming ownership from customary land tenure to individual ownership through demarcation, survey and registration.
9. That the petitioners aver that in the exercise of the aforesaid functions, the 1st Respondent ought to engage the residents of Chiakariga Adjudication Section in order to carry out his functions in a manner that adheres to customary law.
10. That the Petitioners aver that initially the 1st Respondent engaged the clan elders in the demarcation of individual parcels of land among the residents of Chiakariga Adjudication Section which exercise was carried out to the satisfaction of the parties involved.
11. The Petitioners aver that later, the 1st Respondent, in collusion with other individuals, secretly and fraudulently went back and re-demarcated the land and dished out the resultant parcels of land to his conspirators to the detriment of the residents of Chiakariga Adjudication Section especially Bwairi Clan – M'Gatwiki section.

PARTICULARS OF FRAUD

- i) Re-demarcating the land secretly, fraudulently and / or without the knowledge of the residents.
- ii) Dishing out the land to his conspirators.
- iii) Refusing to respond to the residents' queries in respect of his said actions.
- iv) Inciting some residents against others in order to take their land.
- v) Refusing, failing and / or neglecting to preserve the land considered as community / public land and that had been and has always been used and considered by the residents as such.
- vi) Attempting to use the provincial administration to intimidate, harass and frustrate the residents.

PARTICULARS OF DAMAGE SUFFERED BY THE PETITIONERS AND THE RESIDENTS OF CHIAKARIGA ADJUDICATION SECTION AND ESPECIALLY MEMBERS OF THE BWAIRI CLAN M'GATWIKI SECTION

- i. Sub-division of the Bwairi/Kaguru Kanini shrine which shrine borders Kijege Hill Forest and through which river Mugauka flows.
- ii. Allocating the parcels sub-divided from the said shrine to his conspirators to the detriment of the residents.
- iii. Sub-dividing the residents circumcision ground (Itaniro cultural centre).
- iv. Allocating the parcels sub-divided from the said cultural centre to his conspirators to the detriment of the residents.

12. The petitioners aver that as a result of the aforesaid, the clan's place of worship and / or sacrifices has been forcefully, fraudulently and wrongfully taken away hence their constitutional rights; inter alia, of worship, and to property have been infringed.

13. The petitioners aver that the said Bwairi/Kaguru Kanini Shrine is a water catchment area, that had been fenced by the area residents and it ought to be preserved for the benefit of the whole community.

14. The petitioners further aver that as a result of the aforesaid illegal/unlawful/wrongful/ unconstitutional actions of the 1st Respondent, some individuals (the 1st Respondent conspirators) have started felling trees and clearing bushes from the said shrine and therefore the residents are apprehensive that their God will punish them and the water catchment area will be permanently damaged.

15. The Petitioners further aver that the 1st Respondent's said actions have caused immense distrust, suspicion, and anxiety between the residents and the 1st Respondent's conspirators and the foregoing may result to breach of peace and / or anarchy since violence has already been witnessed.

16. The Petitioners aver that should the distribution / demarcation of the individual parcels of land done by the clan elders be adopted and maintained, this problem will be fully and permanently resolved.

17. The Petitioners aver that if the process of adjudication is allowed, to continue, constitutional rights of the residents of Chiakariga "B" adjudication section, and indeed Tharaka District, will be violated.

18. The Petitioners aver that there have been no previous proceedings and there is no suit pending in any court between the parties herein over the same subject matter.

19. The honourable court has jurisdiction to hear and determine this matter under the Law and Article 165 of the Constitution.

20. The petitioners' claim against the respondents is for a declaration that the 1st respondent's actions are unconstitutional, arbitrary, wrongful, null and void and therefore they should be stopped forthwith; a permanent injunction restraining the respondents, their employees, servants, agents, representatives and / or anyone else acting for and / or their behalf from continuing with the adjudication section in Chiakariga "B" Adjudication Section.

21. The 2nd respondents (sic) are (sic) illegally, unfairly, forcefully and unconstitutionally carrying out excavations, allocations, dealings and / or constructions within Chiakariga "B" Adjudication Section.

Your petitioners therefore humbly pray that judgment be entered against the respondents jointly and severally as follows:-

a) A declaration that the actions of the 1st and the 4th respondents are unconstitutional, arbitrary, wrongful, null and void and should be stopped forthwith.

b) A permanent injunction restraining the respondents, their servants, employees, agents, representatives and/ or anyone else acting for and / or their behalf from continuing with the said adjudication process unless and until they respect the rights of the petitioners or / and directed by the National Land Commission or this court.

DATED AT MERU THIS 26TH DAY OF APRIL, 2017

NGUNJIRI MICHAEL & CO

ADVOCATES FOR THE PETITIONERS

2. The 1st Respondent responded to the Petition through an affidavit sworn on 14th July, 2017 which states:

REPLYING AFFIDAVIT TO THE AMENDED PETITION

I, BENJAMIN OTIENO ODUGE the District Land Adjudication and Settlement Officer, Tharaka South/North District within the Republic of Kenya of P. O. Box 38, Marimanti do hereby make oath and state as follows:-

1. That Chiakariga "B" Adjudication Section was declared on 27.11.2009 as an adjudication section. Demarcation and survey is going on as stipulated by land adjudication act cap 284 of Kenya.

2. That Tharaka Community land is held in form of clans. These clans subdivided their land in 1960s and early 1970s.

3. That even today there are some elders who claim to be clan leaders and want to continue subdividing and allocating land to the supposedly clan members. They do not want the elected land adjudication committee and the land adjudication process to be done as per the law.

4. That the Bwairi clan allegation that we have subdivided the shrine land is untrue. Shrine land is supposed to be within Kijege Hills. The hill is gazetted and demarcation was done following the outline of the hill.

5. A shrine is a holy place and no person from the community would dare enter in that place leave alone to cultivate or to cut trees as alleged by the complainants.
6. That the clan also alleges that the shrine is a water catchment area from where Mugauku stream flows. This is true but it simply means that (sic) shrine is very deep inside Kijege Hill which is gazetted and is under the forest services.
7. That the clan has also lodged a complaint that their Itaniro cultural centre which was the circumcision ground has also been subdivided and given out to individuals unknown to them. This area is marked D in their sketch diagram. This area is undermarked on the ground and is also occupied by landowners. Demarcation need to be done in order to complete the adjudication process.
8. That when demarcation was initiated in Bwairi unit, it was only done for few days and then it stopped due to many squabbles among the clan members. Some wanted allocation of land to start afresh. This was because some clan members had sold land ad they wanted these land buyers kicked out with complete disregard of development they had done. When they realized my office was recording people as they appear on the ground they created chaos stalling the demarcation process in that unit. More than half of the work is not done in this unit we need to be allowed to complete the remaining part as provided by the law under the Land Adjudication Act.
9. That during election of land adjudication committee members Sisto Marungoria and Marigu Muchai were elected to represent the unit of Bwairi clan members. Hence when the demarcation was initiated they were present but later they withdrew from the exercise.
10. That the clan land is within Chiakariga Market which is the divisional headquarters of Tharaka South Division. Over the years the value of the land has appreciated that is why the petitioners want to repossess the land again. The 1st petitioner Julius Kiriga together with others who have since passed away sold a big portion of the clan land to willing buyers. It is these people the clan wants kicked out of these parcels. Some of the parcels are fully developed. The affected landowners are about 48. The fact can be verified on the ground.
11. That demarcation and survey is being done according to land adjudication Act Cap 284 Laws of Kenya. There is no land which is being allocated to people. Rights and interest are being ascertained as the people are settled on the ground. The petitioners were advised to lodge land committee cases to any parcel they feel was wrongly recorded to the land owners. The petitioners can only lodge committee cases before they come to this court as provided by the law.
12. That Chiakariga "B" adjudication section has 22 units. Work is complete within 19 units with 1745 parcels in the register. There are 3 units where work is remaining. They are Bwairi clan unit where work started and later stalled due to squabbles. Their clan leaders have filed this petition in the high court. There is Bashasha unit where one individual has taken over 60 acres and there are other landowners whom he calls squatters and do (sic) not want adjudication done. The other unit is called Nkorongo where 5 people have taken over land meant for 35 people by combining the parcels. These three units do not want adjudication process to be carried out. Therefore stopping the work will make 1745 people to suffer because of the self interest of some few landowners. The honourable court should allow the 1st respondent to continue with the remaining part and if the petitioners herein have any complaint they should lodge the same as required by Land Adjudication Act.
13. That Land Adjudication Act Cap 284 Laws of Kenya provides for dispute resolution mechanism where aggrieved parties file cases through land committee, arbitration board, objection, appeals to the minister and finally High Court. The petitioner should follow the same procedure.
14. That within my jurisdiction Land committee cases filed to-date are 92, we have only 4 cases out of the 92 remaining for hearing over boundaries and landownership disputes.
15. That what is deponed herein is true to the best of my knowledge, believe (sic) and information.

3. The Respondent's Replying Affidavit was responded to by the Further Supporting Affidavit of the 3rd Petitioner Sisto Marunguria Migwi sworn on **12th February, 2018**

FURTHER SUPPORTING AFFIDAVIT

I, SISTO MARUNGURIA MIGWI of P. O. Box 122 Mitunguu do hereby make oath and state as follows:-

1. That I am the 3rd petitioner with the authority of the other petitioners to make and swear this affidavit in response to the 1st respondent's affidavit sworn on 14th July, 2017.
2. That paragraph 3 of the said affidavit is false as committee members have been duly elected by the clan members and appointed by 1st respondent pursuant to the provisions of cap 283 and 284 Laws of Kenya to assist the 1st respondent in the land adjudication and settlement process but the 1st respondent has ignored them and started sub-dividing and distributing the clan land without the committee members' knowledge, consent, authority and / or involvement. The said committee members include the 3rd and the 4th petitioners.
3. That contrary to the allegations set out in paragraphs 4, 5 and 6 of the said affidavit, the shrine and Kijege hill are two separate and distinct lands/geographical positions. Further, Kijege hill is not gazetted as alleged.

4. That Mugauku stream originates from Kijege hill and passes through the shrine which is far away from Kijege hill. The shrine is swamp and covered by trees and vegetation that prevents the Mugauka stream from drying up hence being a water catchment area as its partly swampy.

5. That in response to paragraphs 7 and 8 of the affidavit, the 1st respondent has sub-divided the Itaniro cultural center land and the shrine and dished it out to individuals who he is referring to as “land owners”.

6. That Julius Kiriga (1st Petitioner) has not sold any land as alleged in paragraph 10 of the affidavit or at all, neither have any person from our clan sold land as alleged. The 1st respondent is making the said allegations in order to give our clans land to strangers under the disguise of non existence sale.

7. That in response to paragraph 9 of the said affidavit Marigu Muchai and I are land adjudication committee members, and we refused to “rubber stamp” the fraud and the theft that was being committed by the 1st respondent in our area, which fraud he has admitted to through his affidavit.

8. That contrary to the allegations contained in paragraphs 11, 12, 13 and 14 of the said affidavit, committee cases are meant to ascertain individual rights on the land, and when there is theft of public and / or community land as the case is here the only recourse is for the court to intervene and protect the collective rights and interests of the community besides exercising its supervisory jurisdiction over the whole exercise by ordering that the exercise be carried in accordance with law besides cancelling the fraudulent allocation that have already been made by the 1st respondent to his constipation (sic).

9. That whatever is deponed to herein is true to the best of my knowledge, information and belief.

4. The Petition was canvassed by way of written submissions.

5. Despite proof of proper service, the 4th Respondent did not respond to the petition.

6. The Petitioners’ written submissions are reproduced herebelow:

PETITIONERS’ WRITTEN SUBMISSIONS

YOUR LORDSHIP, the petitioners are residents of Chiakariga “B” adjudication section within Tharaka Nithi County. The 4th and 5th petitioners are duly appointed committee members within the said adjudication section.

We need not replicate the petition as its clear on the actions of the 1st respondent which have breached, and / or threatened a breach of, the constitutional rights of the residents of the said adjudication section.

Under paragraph 11 of the petition, the petitioners have raised the following main grounds:

1. That the 1st respondent has carried out re-demarcation of the land in the Chiakariga “B” adjudication section without involving the area residents.
2. That the 1st respondent has dished out, allocated to individuals and or interfered with the Bwairi /Kaguru Kanini Shrine.
3. That the 1st respondent has dished out, allocated to individuals and or interfered with the Itaniro cultural Centre/grounds.
4. The 1st respondent’s said actions have interfered with Kijege hill forest which is a water catchment area from which river Mugauka flows.

Your Lordship, we shall expound each ground as follows:

i. That the 1st respondent has carried out re-demarcation of the land in the Chiakariga “B” adjudication section without involving the area residents.

Article 60(1) (d) of the constitution of Kenya provides the principles under which land should be managed in Kenya to include transparency.

Further, section 9 of the Land Consolidation Act and section 6 of the Land Adjudication Act provides for appointment of land committee members from members of each land adjudication section to assist in the land adjudication and settlement process. The said provisions of these acts are meant to ensure transparency as required under the constitution.

In his affidavit sworn on 14th July, 2017, the 1st respondent has admitted the following:

- a) Under paragraph 2 he has admitted that land within Tharaka Districts is held in forms of clans.

b) Under paragraph 2 he has admitted that some unnamed clan elders want to participate in land sub division and allocation.

c) Under paragraph 9 he has admitted that the 3rd and 4th petitioners are duly elected committee members.

Though the 1st defendant has alleged that the 3rd and 4th petitioners withdrew from the demarcation process he has not stated the reason thereof hence the court cannot (sic) rely on what the petitioners have told the court. Further, the respondent has not told the court whether he replaced the said committee members despite the fact that cap. 283 and 284 Laws of Kenya expressly provide for the minimum number of committee members who should be appointed to enable the adjudication process to be undertaken.

Your Lordship, its therefore clear that the actions of the 1st respondent do not meet the constitutional threshold provided for under Article 60 of the constitution of Kenya hence they are in breach of the rights of the area residents.

b. That the 1st respondent has dished out, allocated to individuals and or interfered with the Bwairi/Kaguru Kanini Shrine

Article 60(1) e of the Constitution of Kenya provides for sound conservation and protection of ecologically sensitive areas.

Further, article 63 (2) (d) (i) of the Constitution lists community land to include shrines.

The 1st respondent has admitted the existence of the said shrine but alleged that it is within a gazetted hill. However, he did not attach any gazette notice.

The same is denied in the petitioners' further supporting affidavit. Therefore, there is need for consensus and involvement of the public in the protection of the said community land.

c. That the 1st respondent has dished out, allocated to individuals and or interfered with the Itaniro cultural center/grounds

The respondent has also admitted that the petitioners' sketch map is the correct one. They admit that there are alleged "owners" on the ground. These are the beneficiaries of the 1st respondent's fraudulent and unconstitutional schemes.

Conclusion

Your Lordship. We pray that you find that the petitioners have proved their case to the required standards and that you allow the petition as prayed.

DATED AT MERU THIS 12TH DAY F FEBRUARY, 2018

.....

FOR: NGUNJIRI MICHAEL & CO.

ADVOCATES FOR THE PETITIONERS

7. The Respondents' written submissions are reproduced herebelow:

RESPONDENTS' SUBMISSIONS

May it please your Lordship,

We submit as follows on the amended petition dated **26th July, 2017** in (sic) doing so our replying affidavit dated **14th July, 2017**.

We submit that there is no Constitution cause of action that has been set out against the Respondents.

According to Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013;

1. An application under Rule 4 shall be made by way of a petition as set out in Form A in the schedule with such alterations as may be necessary.

2. The petition shall disclose the following –

.....

a) The nature of injury caused or likely to be caused to the petitioner.

Your Lordship, the issue of pleadings in Constitutional Petitions has been settled by a plethora of judicial precedents. The Principle in Anarita Karimi Njeru underscores the importance of defining a dispute before court, with reasonable precision.

This means that the Petitioner must provide the particulars of the alleged complaints, the manner of the alleged infringements to properly ground a petition. In the present petition it is very general and bare (sic) assertions are made that relate to alteration of records. The particulars of alterations bare (sic) not disclosed, who altered the records is not known, the extent to which the alterations were made can only be speculated, and the nexus between the supposed alterations and fundamental rights is not established. This glaring omissions (sic) fall (sic) to establish the jurisdictional basis of the action before the court.

Your Lordship, in the absence of a constitutional cause of action against the Respondents, we submit that the Petition is defective, incompetent and an abuse of court process. We therefore urge the court to dismiss the same with costs.

Much obliged.

DATED AT MERU THIS 19TH DAY OF MARCH, 2018

J. M. KIONGO

SENIOR LITIGATION COUNSEL,

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE

8. I have considered the pleadings and the submissions proffered by the parties in support of their diametrically incongruent assertions.

9. A conspectus of the petitioners' case is:

a) Initially, demarcation of individual parcels of land in Chiakariga Adjudication was carried out to the satisfaction of the residents of the Adjudication Section.

b) Later on, the 1st respondent in collusion with other individuals, secretly and fraudulently went back and re-demarcated land in the Adjudication Section and dished out resultant parcels of land to some people to the detriment of the residents of Chiakariga Adjudication Section particularly the Bwairi Clan – M'Gatwiki Section.

c) Specifically, the petitioners claim that there has been sub-division of the Bwairi/Kaguru Shrine which borders Kijege Hill Forest and through which river Mugauka Flows and that following that subdivision parcels carved out of the shrine land have been allocated to some individuals.

d) The petitioners claim that the Bwairi/Kaguru Kanini Shrine is a water catchment area which ought to be preserved for the benefit of the whole community.

e) The petitioners claim that as a result of the aforesaid illegal/wrongful/unconstitutional actions of the 1st Respondent, some individuals have cut trees and cleared bushes which form part of the shrine and that the residents are apprehensive that their GOD will punish them and that the water catchment area will be permanently damaged.

f) The petitioners gratuitously and autonomously opine that should the distribution/demarcation of the individual parcels of land originally done by the clan elders be adopted and maintained, the problem spawned by the alleged actions by the 1st respondent would be fully and permanently resolved.

10. The Reply to the Petition by the 1st Respondent is rather general in its denial of the claims made by the petitioners.

11. The submissions filed by the respondents have avoided dealing with the claims of contravention of the petitioners' constitutional rights. The submissions say that the petition lacks constitutional integrity for the following reasons.

a) The format as decreed by Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 has not been observed.

b) The petitioners have not given sufficient particulars concerning the alleged contravention of their Constitutional rights. The respondents have proffered, as an authority, the case of Anarita Karimi Njeru Versus Republic [1979] eKLR to buttress this assertion.

12. Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 is reproduced herebelow:

“FORM OF PETITION

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court. Documents to be annexed to affidavit or petition.”

13. It is pellucid to me that the petition has satisfied all the requirements of Rule 10 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It is clear from the constitution itself and from the Practice and Procedure Rules that the Constitution of Kenya 2010 is quite liberal in as far as enforcement of fundamental rights is concerned. Indeed Rule 10 (3) envisages, in proper circumstances, the acceptance by a court of law of an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

14. This court notes that the petition raises environmental issues. These concern the alleged destruction of a water catchment area and cutting of trees and clearing of bushes which two actions are deleterious to the environment. It is clear that these claims have not been controverted by the Respondents.

15. Article 42 of the Constitution of Kenya states as follows:

“42. Every person has the right to a clean and healthy environment, which includes, the right:-

a) to have the environment protected for the benefit of the present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

b) to have obligations related to the environment fulfilled under Article 70.”

16. It is pellucid that the respondents as public officers have a duty to protect the environment. It is also their duty as decreed by Article 69 (1) (b) and (g) of the Constitution to work to achieve a tree cover of at least ten percent of the land area of Kenya and to eliminate processes and activities that are likely to endanger the environment. They also have a duty to protect and conserve the environment and ensure ecologically sustainable development and use of natural processes.

17. Section 18(a) of the Environment and Land Court Act directs this Court to be guided, inter alia, by the following principles:-

i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land;

ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;

iii) the principles of international cooperation in the management of environment resources shared by two or more states;

iv) the principles of intergenerational and intragenerational equity;

v) the polluter pays principle;

vi) the pre-cautionary principle;

18. Where there are claims that the environment is threatened, and those claims are not controverted in a probative manner, this court will be inclined to employ the precautionary principle and grant orders sought by petitioners. On this basis alone, this court is entitled to grant the orders sought by the petitioners. The Principle concerning upholding of cultural and social principles traditionally applied by any community

for the management of the environment and natural resources is also apposite. Protection of Bwairi/Kaguru Kanini Shrine through which river Magauka flows, and which is a catchment area, and the protection of the residents' circumcision ground (Itaniro cultural centre) is not inconsistent with the constitution or any written law.

19. I find that the fundamental rights of the petitioners regarding their rights to their traditional and religious beliefs have been infringed upon by the respondents. On a balance of probabilities, I accept the submissions proffered by the Petitioners.

20. In the circumstances, this petition succeeds. I issue the following orders:

- a) It is declared that the actions of the 1st and 4th Respondents are unconstitutional, arbitrary, wrongful, null and void and should be stopped forthwith.
- b) A permanent injunction is hereby issued restraining the Respondents, their servants, employees, agents, representatives and/or anyone else acting for and/or on their behalf from continuing with the said Adjudication process until the respondents respect the rights of the petitioners.
- c) Any new adjudication process should take into account public participation as required by the Constitution and the relevant laws including, and strictly in accordance with the Land Consolidation Act and the Land Adjudication Act and that process should be undertaken by any other Land Adjudication Officer, other than the Land Adjudication Officer whose actions spawned this petition.
- d) This petition being in the nature of public interest litigation, parties will not be awarded costs, meaning that they will bear own costs.

21. It is so ordered.

Delivered in open court at Chuka this **4th day of July, 2018** in the presence of:

CA: Ndegwa

Mbaikiata for AG for the Respondents

Petitioners and their Advocate absent

P. M. NJOROGI,

JUDGE.