



**Yiari v Inspector General of Police & 3 others (Constitutional Petition 4 of 2017) [2024] KEHC 14541 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14541 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CONSTITUTIONAL PETITION 4 OF 2017  
AK NDUNG’U, J  
NOVEMBER 20, 2024**

**BETWEEN**

**LEKEMARIO HENRY YIARI ..... PETITIONER**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**2. THE CABINET SECRETARY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**4. COUNTY GOVERNMENT OF LAIKIPIA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner’s case is set out in a petition dated 22/08/2017 and filed on 23/08/2017. He averred that when the British came to Kenya, they displaced pastoralist community out of Laikipia to pave way for large ranches and farms. Due to 2017 drought, the pastoralist communities from Samburu, Pokot, Turkana and the Maasai were forced to move thousands of their cattle into Laikipia pasture areas bordering ranches and conservancy areas which have occurred periodically even during previous drought. In 2017 however, the government responded by conducting security operations whereby the security forces killed the animals and destroyed the properties of the pastoralists.
2. That the legal basis of the petition is Article 29 of *the Constitution* which provides right to freedom and security and not to be subjected to any form of violence, torture or be treated in a cruel, inhuman or degrading manner. Article 43 which grants every person economic and social right, to be free from hunger and have adequate food. That Article 56 require the State to put in place affirmative action programmes to ensure minorities and marginalised group have special opportunities in economic fields. That Article 61 states that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals whereas Article 60 states that the land shall be used and



managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the principles of equitable access to land and security of land rights. That in accordance with Article 63, community land vest in and is held by communities identified on the basis of ethnicity, culture or similar community interest. Further that Article 260 recognises pastoralists as marginalised community and Article 174 provides for objects of devolution which include to protect and promote the interest and rights of minorities and marginalised communities.

3. He averred that the pastoralist in Laikipia County are marginalised community which has been unable to fully participate in the integrated social and economic life of Kenya and that the Laikipia government has failed in protecting and promoting the interests and rights of pastoralists as there are no affirmative action programmes designed to ensure that pastoralists are provided special opportunities in economic fields.
4. That in accordance with Article 2(5) and (6) of *the Constitution*, Kenya is a party to International Covenant on Economic, Social and Cultural Rights which commits it to work toward granting of economic, social and cultural rights. That every person is obligated to respect and defend *the Constitution* as per Article 3(1); Article 10 lays the value of governance, Article 19(1) (2) provides the purpose of the bill of rights, Article 19(3)(a) states that the rights and fundamental freedoms in the bill of rights belongs to each individual, Article 20(1) (2) provides that the bill of rights applies to all law and binds all State organs and all persons, Article 20(3) mandates court to develop laws to give effect to the bill of rights and adopt interpretation that favors the enforcement of rights, Article 21(1) mandates the State and State organs to respect and promote rights and fundamental freedoms and Article 27(1) states that every person is equal before the law and has the right to equal protection and equal benefit of the law and Article 28 states that every person has inherent dignity and the right to have that dignity protected.
5. The reliefs sought are as follows;
  - i. A declaration that the confiscation, killing and seizure of livestock belonging to the pastoralist community within Laikipia County is unconstitutional and amounts to inhuman and degrading treatment.
  - ii. An order directed at the Respondents to ensure security of the pastoralist community and their livestock within Laikipia County and to cease and stop the confiscation, killing and seizure of livestock or interfering with the peaceful grazing of livestock by pastoralist within community land in Laikipia County.
  - iii. An order directed to the Respondents for compensation to the pastoralist community for all the livestock seized, confiscated, killed and/or maimed by its agents within Laikipia County.
  - iv. An order directed to the Respondents to put place affirmative action programs designed to ensure that pastoralists are provided special opportunities in economic fields that protects and promotes the interest and rights of pastoralists.
  - v. The court be pleased to give further orders/ and or directions as it may deem fit to meet the ends of justice.
  - vi. Costs of the suit to be dispensed with in public interest.
6. The petition is supported by an affidavit of the Petitioner herein. He averred that the police have been wreaking havoc on pastoralist community in Laikipia county by confiscating, killing and seizure of their livestock which has severely disrupted and devastated their livelihood and which left them hungry and destitute. That Article 174 of *the Constitution* states that one of the objects of devolution is



- to protect and promote the interests and rights of the minority and marginalised communities and currently there are no affirmative action programs designed to ensure pastoralist are provided with special opportunities in economic fields as county of Laikipia has not promoted the interest and rights of pastoralists.
7. In opposing the petition, the Respondents filed grounds of opposition dated 22/01/2018 and opposed the petition on account that the petition is fatally defective for want of compliance with mandatory practice and procedure in that the same has not been pleaded with the requisite precision and specificity. It has not met the evidential burden to prove that the alleged killing and/or confiscation of the livestock was orchestrated by the 1st to 3rd Respondents. That the petition aims to defeat the cause of justice by seeking to interfere with the constitutional and lawful discharge of the duties of the Respondents. The Petitioner failed to prove the nature of the directives issued to the national police and by whom and has failed to demonstrate the nature of the specific grievances he has against the 1st to 4th Respondent. That the 1st and 2nd Respondents have always acted within their lawful mandates in order to provide security to Kenyan citizens and that the court should not be used to hinder or curtail the lawful operations and functions of independent bodies and institutions.
  8. They also filed a replying affidavit dated 3<sup>rd</sup> April 2018 sworn by Henry Kipkosgei Barmao, the director of operations Kenya Police Service in which he averred that the cabinet secretary for interior and coordination of national government declared Ol Moran division and other wards of Laikipia County as disturbed and dangerous vide a legal notice no. 21 dated 07/03/2017. The said declaration was necessitated by rising incidences of insecurity in those areas caused by illegal invasion and destruction of crops on private land by armed pastoralists. That the inspector general of police published a gazette notice no 2496 dated 17/03/2017 whereby he notified members of the public in affected areas to surrender all arms in their possession with immediate effect. What followed was an intensive security operation where armed illegal grazers were smoked out of private land in Ol Moran division and Laikipia Nature Conservancy.
  9. That during election period, security details were reduced and this led to invasion of privately owned ranches and farms in Survey, Olmotonyi, Ratia, Mutamaiyu, Mutarakwa and Wangwaci by pastoralists from Samburu, Wamba/Isiolo. They also invaded privately owned small scale farms destroying food crops. Numerous complaints were made to the police which prompted the police to carry out a security operation in the affected areas with the aim of restoring peace and order. That on 01/11/2017 while heading to the affected areas, the police were attacked by illegal herders who opened fire and engaged the police officer in a shootout. The herders took cover amidst their livestock and as a result, 25 livestock were killed and fifty were injured.
  10. He averred that after the shootout, no one made a report to the police regarding the shooting of the livestock. That the illegal herders were to blame for the death of the livestock since they were the one who confronted the security officers. He deponed further that no order of compensation should be made since the herders had illegally invaded private lands causing massive destruction to farms owned by small scale farmers which was contrary to the legal notice and gazette notice issued earlier. Further, compensation should not be made since it was the illegal herders who used their livestock as a shield when they opened fire to the security officers.
  11. The Petition was canvassed by way of written submissions. Counsel for the Petitioner opened his submission by asserting that section 338 of the Penal Code makes it an offence to kill, wounds or maim an animal.
  12. It was his contention that the action of confiscating, killing and seizure of the livestock was not only contrary to the law but disrupted and devastated the livelihoods of pastoralist communities who have



no other alternative for sustenance. They were left hungry and destitute which had a negative effect to the entire community. That Article 1(2) of International Covenant on Economic, Social and Cultural Rights which Kenya is a party to, requires States to undertake to guarantee that the rights in the Covenant be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Further that section 2 of the African Charter on Human and People's Rights states that every individual is entitled to the enjoyment of the rights and freedoms under the charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin etc. He quoted Article 3, 29, 43, 10, 19(1)(2), 19(3)(a), 20 (1)(2), 20(3), 21(1), 27(1) and 28 of *the Constitution*.

13. As to whether the affected pastoralists are entitled to compensation for all the livestock that were confiscated, killed and maimed, he submitted that Article 23 of *the Constitution* provides that a court can grant appropriate relief when confronted with a case of violation of rights. Reliance was placed on the case of *Fose vs Minister of Safety & Security* (1997) ZACC 6 where the court observed that appropriate relief will be relief that is required to protect and enforce *the Constitution* and the court may have to fashion new remedies to secure the protection and enforcement of those rights. Further reliance was placed on the case of *Hoffman vs South African Airways* (2000) ZACC 17; 2001 (1) SA 1 (2000) 12 BLLR 1365 (CC) and *Kate vs MEC for the Department of Welfare, Eastern Cape* (2005) 1 All SA 745 (SE).
14. He submitted that this court in arriving at the appropriate relief must consider Article 1(1) and 1(3) of *the Constitution* of Kenya. That Article 22 (1) gives every person a right to approach the court complaining of infringement of rights whereas Article 23 (3) states that a court may grant appropriate relief including declaration of rights, a conservatory order and order for compensation.
15. As to whether there is need for affirmative action programs, he submitted that Article 260 recognizes pastoralist as marginalized community and pastoralist community in Laikipia are marginalized and has been unable to fully participate in the integrated social and economic life of Kenya. That Article 56 require the State to put in affirmative action programs designed to ensure that minorities and marginalized groups are provided special opportunities in economic fields and therefore, the State is obliged to ensure that where the prevailing circumstances disadvantage the marginalized, there are affirmative action programs designed to ensure that minorities and marginalized group participate in sphere of life.
16. Further, Article 61 states that all land belongs to the people of Kenya collectively as a nation, as communities and as individuals and Article 63 states that community land shall be held by communities identified on the basis of ethnicity culture or similar community interest. That *the Constitution* places a duty on the State to ensure that there are in place affirmative action programs aimed at ensuring that minorities and marginalized groups are not disadvantaged as was expressed in the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others vs Attorney General & another* (2011) eKLR that the concept creates an obligation that minority should be given preference to make up for a history of discrimination.
17. That Article 174 states that the object of devolution is to protect and promote the interests and rights of minorities and marginalized communities but the County of Laikipia has failed in protecting and promoting the interests of the pastoralists as there are no affirmative action programs designed to ensure pastoralists are provided special opportunities in economic fields. Reliance was placed on the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs Kenya*, 276/2003 where the African Commission on Human and Peoples Rights noted that indigenous people need recognition and protection of their basic human



- rights and fundamental freedoms and the case of Rangel Lemeiguran & others vs Attorney General & others (2006) eKLR whereby the court affirmed the existence of indigenous people and ruled that they had the right to influence the formulation and implementation of public policy and the case of Centre for Minority Rights Development & 2 others v Attorney General & 2 others; Independent Electoral & Boundaries Commission (Interested Party) (2022) eKLR where the court stated that the State is obligated to observe, respect, protect, promote and fulfil the rights and fundamental freedoms and directed the respondents to put in place measures guaranteeing the full enjoyment of those rights with specific attention to minorities and indigenous people.
18. In rejoinder submissions, counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that during the election period, security presence was reduced in some part of Laikipia and this saw the invasion of illegal grazers who sneaked their livestock into ranches and farms which led to destruction of crops. Complaints were made to the police who conducted an operation to flush out the invaders on 01/11/2017 whereby the officers intercepted a few herds and when they tried to drive the livestock out, they were confronted by heavily armed illegal herders and a shootout ensued and as a result, 25 cows were killed and 50 injured.
  19. Counsel submitted that in a constitutional litigation, a party that alleges violation of his rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation as was held in Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272. That the Petitioner has not demonstrated whether and how the actions of the police constituted abuse of the process and they did not prove malice or bad faith on the part of the police. That the mere statement of violation of rights do not amount to actual violation without proof of violation. That the petition did not meet the standard of a constitutional petition in that the Petitioner did not demonstrate how their rights and fundamental freedoms were violated, infringed or threatened by the Respondents and did not produce evidence to demonstrate the alleged violation.
  20. It is submitted that the Petitioners did not demonstrate with specificity how and who deprived them of their rights as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not violate their rights. That in accordance with section 51 of the *National Police Service Act*, the police had a duty to investigate any complaint and they conducted the operation in order to bring sanity. That the police engaged in a gun fight after a number of armed Samburu Morans confronted the officers. The morans took cover during the exchange in between the livestock and the livestock were injured and others killed. Further, the Respondent's agents were acting in accordance with Legal Notice Number 21 dated 07/03/2017 which had declared Ol Moran Division and other locations as disturbed and dangerous. That the Respondents' agents were also acting in accordance with Gazette notice number 2496 of 15/03/2017 which declared certain areas as dangerous and prohibited the inhabitants of those areas from possession of arms. Therefore, the pastoralist communities were in contravention of the prohibition and they were a danger to others and the police acted according to their mandate and their action were well within their powers as per sections 24 and 27 of the *National Police Service Act*.
  21. That the Respondents' agents were responding to complaints that illegal grazers had invaded small scale farms destroying the crops. That it is the role of the police to aid the public, maintain law and order, preserve peace and protect life and property and that is what the police did and during that operation, the police were able to arrest and drove away cattle that were illegally grazing and recovered illegal ammunition. Therefore, the rights and freedoms of the Petitioners were not violated and in fact, the Respondents acted to ensure that the rights of Kenyan Citizens were realized.
  22. As to whether the Petitioner is entitled to compensation, the counsel submitted that section 107(1) and (2) of the *Evidence Act* places the burden of proof on the Petitioner. Further that court decisions cannot be based upon the unsupported hypothesis. She submitted that Article 40 protects property belonging to an individual or an association and the Petitioners failed to prove that the livestock belonged to them.



- No evidence was produced to show the animals that were killed and the destroyed properties belonged to them and they failed to produce an OB or a police report on the seizure, killing and maiming of the livestock and they failed to report the specific person who took the animals. They did not reveal the amount of damage that was caused.
23. Further, that the operation was necessary in that a number of police men and civilians were killed and others were injured, vehicles were torched and properties were damaged and therefore, the law should not be used to compensate and benefit persons guilty of criminal activities. That the remedies sought are not appropriate in a constitutional petition as the law should be used to address the wrongs to avoid the same from happening in future. That the primary purpose of a constitutional remedy is to vindicate guaranteed rights and deter future infringements and that award of damages is secondary and should be made in most appropriate cases as was held in *Stanley Munga Githunguri v Kenya National Highways Authority & 2 others* (2017) eKLR. That court can award damages where there is infringement of rights but the quantum of compensation will depend upon the facts and circumstances of each case as was held in *MWK vs AG & 3 others* (2017) eKLR. She submitted that the Petitioners are not entitled to any remedies sought since they have not established ownership and has not quantified the violation.
24. As to whether the pastoralist communities are entitled to affirmative action programs, she submitted that the State has an obligation to offer affirmative action to marginalized group but however, the Petitioner has raised the issue with the wrong government agency since the 2<sup>nd</sup> Respondent is not mandated with the function of creating affirmative programs. She concluded by stating that the complaint on constitutional infringement is without any evidential basis and therefore misconceived and unfounded. Further, the State has an obligation to ensure affirmative action but however, the social and economic rights of marginalized communities can only be addressed as far as the resources of government can allow.
25. I have considered the Petition, the affidavit evidence and the rival submissions by the parties herein. The issues for determination crystallize to;
- i. Whether the Petition has met the Constitutional threshold?
  - ii. Whether the respondents violated the fundamental rights and freedoms of the pastoralist communities from Samburu, Pokot, Turkana and the Maasai in Laikipia County?
  - iii. Whether the petitioner is entitled to compensation?
  - iv. Whether the pastoralist communities are entitled to affirmative action programs?
26. Article 258 (1) of *the Constitution* grants the Petitioner the right to institute proceedings in relation to violation of *the Constitution*. This Article provides thus;
- “Every person has the right to institute court proceedings, claiming that this Constitution has been violated, or is threatened with contravention”.
27. Article 23 (1) of *the Constitution* confers this court with jurisdiction to determine whether the rights conferred in *the Constitution* has been violated by stating thus;
- “The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringements of, or threat to, a right or fundamental freedom in the Bill of Rights.”
28. In exercising this jurisdiction, this court is mandated to grant appropriate relief. The Article provides;



Article 23(3) provides

“In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory orders
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.”

29. Article 165 (3) (d) of *the Constitution* states as hereunder:

“Subject to clause (5), the High Court shall have –

- (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –
  - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
  - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under Article 191.”

30. Article 165(3)(d) of *the Constitution* donates to this Court the jurisdiction to entertain any challenges concerning the failure to comply with any constitutional and statutory obligations.

31. The question whether the petition meets the Constitutional threshold is pivotal and the burden of proving violation or threat of violation is upon the Petitioner as was established in *Anarita Karimi Njeru v Republic* [1979] eKLR where it was held that a petition must satisfy the evidential burden that a specific right exists and which right has been violated or restricted, besides pleading the same with reasonable particularity and precision. This was reiterated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. In addition, it is also settled that the Petitioners must patently express the manner in which the Respondents have violated their rights as was stated in *Matiba v Attorney General* [1990] KLR 666.

32. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submitted that the petition failed the requirement as it did not state the alleged constitutional provisions violated and the acts or omissions complained of with



reasonable precision as espoused in the celebrated cases of *Anarita Karimi Njeru v Republic (No.1)* (1979) 1 KLR where the court stated that;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should 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.”

33. In the instant petition, while the Petitioner has cited several Articles of *the Constitution*, he did not however state whether the said Articles were contravened or not. He did not give particulars of the violation and did not also give particulars on how the Respondents violated the said Articles of *the Constitution*.
34. He only averred that the pastoralist in Laikipia County are marginalised community which has been unable to fully participate in the integrated social and economic life of Kenya and that the Laikipia government has failed in protecting and promoting the interests and rights of pastoralists and there are no affirmative action programmes designed to ensure that pastoralists are provided special opportunities in economic fields.
35. Having keenly read through the petition, it is manifestly clear that the petition consists of a generalised complaint by the Petitioner on behalf of the Pastoralist communities ranging from the taking away of their land by the British settlers paving way for large ranches and farms. It is the Petitioner's case that the land ownership that occasioned the expulsion of the pastoralists explains their local grievances today.
36. It is alleged that lack of pasture occasioned by the drought in 2017 forced the communities to move tens of thousands of cattle into the Laikipia pasture areas bordering ranches and conservancy areas. It is urged that the Government of Kenya responded by conducting security operations in the affected areas in which security forces killed animals and destroyed property.
37. The Petitioner's case is based on alleged confrontation between the pastoralists and the Respondents' agents which arose after the Pastoralists moved their animals to Laikipia pasture areas bordering ranches and conservancy areas. Other than stating that such migrations occur periodically, there is no indication that the pastoralists were entitled to move to that land. Without a clear pleading that they were so entitled, the infringement of a constitutional right complained of becomes blurred.
38. The identity of those whose rights were violated through killing of the animals is not given and the specific loss is not cited. What emerges from the facts presented is a clear case of competing rights to land. Despite evidence from the respondents that the communities had invaded private land and that they resisted removal through fierce exchange of fire between them and the police, this evidence was not answered in a further affidavit or otherwise. More importantly, the Petitioner has failed to particularise whether the 'communities' were attacked in their rightful land to establish whether the police infringed on their rights.
39. This was important for reason that the police have the mandate under Section 24 of the *National Police Service Act* to among others, provide assistance to members of the public when in need, maintain law and order, protect life and property and to preserve and maintain public peace and security.
40. For the pleadings by the Petitioner to have met the constitutional threshold, he ought to have demonstrated that the police acted outside their mandate. No attempt was made to demonstrate that the police acted outside Legal Notice Number 21 dated 7<sup>th</sup> March 2017 and Gazette Notice No. 2496 dated 15<sup>th</sup> March 2017.



41. What this Petition in my view attempts to do is to assert rights over land by the pastoralist communities through what in their view is their marginalisation in allocation of land resource. This country has elaborate land law that Governs the ownership, occupation and use of land. Ownership of land is legally recognized. Under Article 61(2) of *the constitution*, land in Kenya is classified into public, community or private. Most Kenyans even in communities other than the pastoralist communities feel disentitled in matters land and resources. Of note is that where land is owned legally the same is protected. Any perception of disentitlement can only, in my view, be achieved through legislative action to amend the law to achieve desired equity in ownership of land.
42. *The constitution* Under Article 68 sets the duty of Parliament in that regard in very clear terms ;
68. Parliament shall;
- (a) revise, consolidate and rationalize existing land laws;
  - (b) revise sectoral land use laws in accordance with the principles set out in Article 60(1); and
  - (c) enact legislation—
    - (i) to prescribe minimum and maximum land holding acreages in respect of private land;
    - (ii) to regulate the manner in which any land may be converted from one category to another;
    - (iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;
    - (iv) to protect, conserve and provide access to all public land;
    - (v) to enable the review of all grants or dispositions of public land to establish their propriety or legality;
    - (vi) to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land; and
    - (vii) to provide for any other matter necessary to give effect to the provisions of this Chapter.
44. It follows therefore that the duty to rationalize and bring equity in ownership and use of land in Kenya is squarely placed at the door of parliament and it is through such necessary intervention that the palpable fears of disentitlement amongst sections of the population can be allayed.
45. In essence therefore anyone who would graze in another’s land without permission cannot successfully plead a violation of his constitutional right since such a complainant would in essence be infringing on the right of another.
46. In the end, it is hard to figure out what the exact grievance by the Petitioner is. Is it the taking away of the pastoralist’s land by the British, or is about the events of the aftermath of the drought in 2017 and were the police not entitled to protect other citizens whose land had been occupied? The existing facts only serve to show that what the Petitioner seeks on behalf of the pastoralist communities is land reform which in my view as alluded to hereinabove would call for legislative action.



47. As regards the complaint that currently there is no affirmative action programmes designed to ensure to ensure the pastoralists are provided special opportunities in economic fields and the devolved government the County of Laikipia is not protecting and promoting the interests and rights of the pastoralists, it is not pleaded with the necessary precision what affirmative programmes ought to be in place and have not been actualised and neither is it pleaded with clarity how the devolved government, Laikipia County is not protecting and promoting the interests and rights of the pastoralists.
48. The petition did not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. Apart from citing omnibus provisions of *the Constitution*, the petition provided neither particulars of the alleged complaints and the manner of alleged infringements.
49. It is not lost on me, and as expounded by Mr Mboya in his submission that the subject communities are a minority group and as held by the court in *Federation of Women Lawyers & 5 Others, vs Attorney General & Another* [2011] EKLK, minority should be given preference to make up for a history of discrimination that has placed them at an unfair disadvantage and such is meant to compensate for past injustices and lingering effects. This, and without purporting to make an exhaustive list, would include preferential treatment in education, health, resources and job opportunities.
50. Indeed, *the Constitution* leaves no room for a lacuna in this regard by providing a full Article making provisions for minorities and marginalised groups in Article 56.
51. A word of caution though. Despite the need for this preferential treatment of the minority, the law of the land applies to all and such preferential treatment would not for example include taking someone's land because one is a minority who has no land. As stated earlier, redress for such disentanglement would only be achieved through legal means and as observed, through legislative action.
52. In the end I must reach the conclusion that the petition as framed fails the test in *Anarita Karimi Njeru v Republic*.
53. Am fortified in this finding by the holding of the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission (Civil Appeal 290 of 2012)* [2013] KECA 445 (KLR) (Civ) (26 July 2013) (Judgment) which I hereby quote from in extensor;

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru*



(supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). 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. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

54. Having so found, the other issues for determination become moot and I need not delve into them.
55. With the result that the petition herein fails and is dismissed. This being a public interest litigation, there shall be no orders as to costs.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A.K. NDUNGU**

**JUDGE**

