



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITUI**

**ELC PETITION NO.9 OF 2021**

**IN THE MATTER OF ARTICLE 22(1)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR**

**FUNDAMENTAL FREEDOMS UNDER ARTICLE 19,20,21,22,**

**27,40, 47AND 50 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

1. MUTHUI KIMOTHO
2. MWANGANGI NGUVA
3. MUEMA KAKULI
4. WILLY MWINZI
5. PETER KATAMBU
6. KIMANZI MWINZI
7. MUTUA KYANGI
8. MWANGANGI MWENGA
9. MUIMI MUISYO
10. WAMBUA MBOTI
11. MUNYWOKI KIVURYA
12. SYOMONGU MUSANZI
13. KILONZI KIMWELE.....PETITIONERS

**-AND-**

1. THE SENIOR RESIDENT MAGISTRATE'S COURT AT MWINGI
2. MAMBU AUCTIONEERS
3. THE NATIONAL LAND COMMISSION
4. THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT

**5. THE REGISTRAR OF TITLES**

**6. THE HON. ATTORNEY GENERAL**

**7. MBEU GROUP RANCH.....RESPONDENTS**

**JUDGEMENT**

1. The Petitioners claim is contained in the petition dated 4<sup>th</sup> October 2013. The same is supported by the affidavit of Muthui Kimotho sworn on 4<sup>th</sup> October 2013 and a list of documents dated 18<sup>th</sup> November 2014. The Petitioners seek the following orders:

**a) A declaration that the warrant dated 12<sup>th</sup> September 2013 issued to the 2<sup>nd</sup> Respondent is unconstitutional, unlawful and illegal**

**b) A permanent injunction restraining the Respondents whether by themselves, their agents and/or servants from in any manner evicting the Petitioners from parcel of land Katse/Mbeu 1**

**c) A declaration that the 7<sup>th</sup> Respondent fraudulently acquired the title no. Katse/Mbeu/1 and that the same be cancelled.**

**d) A declaration that parcel of land Katse/Mbeu/1 is community land/trust land/ancestral land and that the Petitioners have an interest in the said land.**

**e) Any other orders that the court shall deem just.**

2. In response thereto, the 2<sup>nd</sup> and 7<sup>th</sup> Respondents filed Answer to Petition dated 10<sup>th</sup> December 2013, Replying Affidavit and a further affidavit sworn by **Benson Mukiti Mutioo** on 10<sup>th</sup> December 2013 and 20<sup>th</sup> January 2014 respectively. They further filed a list and bundle of Documents dated 8<sup>th</sup> January 2013.

3. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents did not enter appearance or file any reply to the Petition.

**The Petitioners' Case**

4. The Petitioners are residents of Mumoni Division, Mumoni District and Tia Kamuthale Division of Kyuso District, Kitui County. They claim that they bring this petition for themselves and on behalf of 3,000 people residing in the said area. They claim to occupy all that parcel of land known as Title No. KATSE/MBEU/1 (hereinafter referred to as "the suit land") situate in both Mumoni Division and Tia Kamuthale Division. The Petitioners claim the suit land and other surrounding land as their ancestral/Community land and state that they have lived and occupied the said land for a long period of time.

5. They aver that sometime in 1974 some people who do not hail from either Mumoni or Kyuso District registered the 7<sup>th</sup> Respondent with the aim and purpose of illegally acquiring land that was owned by the Petitioners. Sometime in 1982 the 7<sup>th</sup> Respondent started surveying the suit land in disregard of the Petitioners' rights and obtained **Land Title No. Katse/Mbeu/1**.

6. The Petitioners allege fraud in the acquisition of the land on the grounds that the membership of the 7<sup>th</sup> Respondent is comprised of very influential former government officials and wealthy businessmen who used their position to commence the process of survey and adjudication on the suit land when other land in Mumoni and Kyuso districts were not under adjudication. They further claim that the adjudication process was flawed and that the 7<sup>th</sup> Respondent did not pay any consideration for acquiring the land.

7. The Petitioners state that they were not party to the suit SMRCC NO.82 OF 2003 MWINGI where the court issued a warrant of eviction to the 2<sup>nd</sup> Respondent in favour of the 7<sup>th</sup> Respondent that ordered the eviction of the Defendants in that suit and further included "***their agents, relatives, servants and/or anyone claiming under them***" The said order authorized the 2<sup>nd</sup> Respondent in the following terms "***to destroy by either pulling down any structure, remove and burn any fence Consequently, you are now authorized to move into the said property and destroy by either pulling down any structures, remove and burn any fence by using reasonable force to put the said MBEU GROUP RANCH in occupation of the land aforesaid.***

***You are further ordered to give a forty-five (45) days' notice to the defendants and/or their agents /relatives or servants or anyone claiming under them."***

8. The Petitioners claim that the 2<sup>nd</sup> and 7<sup>th</sup> Respondents intend to use the said warrants to evict from the suit land the Defendants in the said suit together with other persons including the Petitioners herein. Therefore, the Petitioners claim that their rights under Articles 19,20,21,22,27,40 and 47 have been infringed or will be infringed upon unless the Court intervenes.

**The Respondents Case**

9. In response thereto, the 2<sup>nd</sup> and 7<sup>th</sup> Respondents deny all the averments in the Petition and claim that the Constitution of Kenya(2010) cannot apply retrospectively with regard to titles that were acquired before its promulgation. The Respondents deny that the suit land is the

Petitioners' ancestral land or community land. The aver that the Petitioners never raised this claim in the previous suit that they had litigated with the Petitioners parents. They state that the land was properly surveyed and land adjudication was properly done and a title deed issued.

10. The 7<sup>th</sup> Respondent claims any objections that could have been raised to adjudication of the land in her favour were raised and determined within the land adjudication process and that it is only after their title deed was issued that the parents of the Petitioners raised their claim to the land. In the Further affidavit, the 7<sup>th</sup> Respondent has given a list and court proceedings with of some of the fathers/relatives of the Petitioners that they have litigated with in the past in criminal and civil litigation to show that the Petitioners claims were dealt with by the said fathers and/or relatives. It is claimed that some of the litigation with the Petitioners relatives was done before the Petitioners were born and thus the suit herein is Res judicata.

11. It is also the Respondent's contention that there is no proof that the 7<sup>th</sup> Respondent had any influential members who influenced the adjudication process to displace the Petitioners. The 7<sup>th</sup> Respondent claims that its membership was open to anybody from the area who could buy a share.

12. The 7<sup>th</sup> Respondent further stated that there is no list of 3,000 people that the 13 Petitioners claim to represent and that there is no historical injustice that can be corrected.

13. The 2<sup>nd</sup> and 7<sup>th</sup> Respondents finally state that the eviction shall be done humanely and that it is for the Government to find the Petitioners alternative settlement but not to grab land that is already privately owned. They pray for the Petition to be dismissed.

14. The 7<sup>th</sup> Respondent further states that there was no collusion with the 4<sup>th</sup> and 5<sup>th</sup> Respondents to issue them with a title deed.

#### **Petitioners' submissions**

15. As a preliminary issue, the Petitioners Counsel submits that the two lists of documents and bundle of documents filed by the Petitioners and the 2<sup>nd</sup> and 7<sup>th</sup> Respondents ought not to be relied upon in support or opposition to the petition for the reason that the court gave directions that the matter is to be determined by way of affidavit evidence and by filing written submissions.

16. The Petitioners submitted that the suit property is community and ancestral land which was fraudulently registered in favour of the 7<sup>th</sup> Respondent. They submit that the eviction order in SRMCC NO. 82 OF 2003 dated 12<sup>th</sup> September 2013 is unconstitutional, unlawful and illegal because it is directed to them yet they were not parties to the suit and were not given a fair hearing. They also submit that no judgment or Decree was exhibited to show how SRMCC 82 of 2003 was determined and that if the said order were to be enforced, then the Petitioners would be deprived of property without due process of the law.

17. The Petitioners cited the case of **Mohinder Singh Gill vs. Chief Election Commissioner AIR 1978 SC 851** where the Supreme Court of India traced the roots of the principle of natural justice and right to hearing. They also submitted the cases of **JMK V. MWM & Another (2015) E Klr, Mbaki & Others V. Macharia (2005) 2 EA2006 and Judicial Service Commission V. Gladys Boss Shollei & Another (2014) eKLR** regarding the importance of the rules of natural justice and especially hearing of a person who is likely to be adversely affected by a decision before that decision is made.

18. The Petitioners then submitted that the title to the suit property was issued irregularly and/or fraudulently for several reasons being that the suit property is community and/or ancestral land which was not available for alienation or registration as private land. Further, no consideration was paid by the 7<sup>th</sup> Respondent in order to obtain title to the same and that the area where the suit property is situated was never declared a land adjudication section for purposes of adjudication.

19. They further submitted that there is no evidence that Sections 5,6,7 of the Land Adjudication Act was complied with in that: No notice was published to establish adjudication sections in the area., an adjudication committee was not established in respect of the area and finally an Arbitration Board was not established for the adjudication area.

20. The Petitioners submit that even if the said process was complied with, customary trust, as an overriding interest dictates that the land was registered in trust for the community including the Petitioners and cited the case of **Isack M'inanga Kiebia v. Isaaya Theuri M'Lintari & Another (2018) eKLR** stating that customary trust is an overriding interest.

#### **2<sup>nd</sup> and 7<sup>th</sup> Respondents' submissions**

21. The Respondents submitted that the Petitioners have not discharged their burden of proof of the allegations contained in the Petition. They have not proved that they bring the suit on behalf of the 3,000 other people and further they have not refuted the 7<sup>th</sup> Respondent's submission that they are the children and relatives of those they were litigating with previously.

22. The Respondents state that the Petition is res judicata since their relatives dealt with the same issue beforehand in previous suits. In support of this submission, the Respondents submitted the case of **Julius Nguli Lolia & 2 others vs. Muoka Yulu, the A.G and the National Land Commissioners HCC Petition No. 1 of 2018** where the court held that the Petition was *res judicata* because the Petitioners were trying to get that which their fathers or relatives failed to get in previous suits.

23. On the issue of adjudication, the Respondents aver that there is no evidence of wrong doing or challenge to registration of the land in the 7<sup>th</sup> Respondents name. Further they claim that there is no evidence of the acreage of the land and the areas the Petitioners allege they occupy.

24. The Respondents submitted that no evidence of the alleged fraud was tendered and the allegations of fraud remain mere allegations. They cited the cases of **Paul Itotia David-vs-MuthioNzioki in HC Succession Case No. 6 of 1992**, **Juliana Mulikwa Muindi-vs Board of Management & 2 others Makuani Civil Appeal No. 16 of 2017** and **Janet Kaphiphe Ouma & Ano. Vs Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** to show that allegations of fraud should be substantiated and supported by sufficient particulars otherwise averments of fraud remain mere allegations.

25. On the issue of Land adjudication, the Respondents submitted that during the process, those who wanted to object made their objection which were heard and the relatives of the Petitioners litigated and lost. They stated that the Petitioners have not tendered any evidence challenging the way the Land Adjudication was done. They submitted that the new Constitution was not intended to revive civil cases that were done before it came into operation. Since SRMCC 82 OF 2003 was heard and determined and no appeal was lodged by the Petitioners or their parents, then the principle of *res judicata* applies.

26. The Respondents also raised the issue of the court's jurisdiction in their submissions based on Article 67(2)(2) which provided that among the functions of the National Land Commission is to: "*Initiate investigations, on its own initiative or a complaint, into present or historical land injustice and recoverable appropriate address.*" They submit that the issues raised by the Petition can only be addressed by the National Land Commission and not the Court while citing the case of: **Ledidi Ole Tauta & Others-vs-The Attorney General and Kenya Forest Service Constitutional Petition No.47 of 2010.**

#### **Issues for Determination**

27. Having gone through the Petition and all the documents on record, I am of the view that the following issues are for determination:

- A) Did the 7<sup>th</sup> Respondent acquire **Title No. Katse/Mbeu/1** through fraud.
- B) Is the suit **Land** community land/trust land/ancestral land and do the Petitioners have an interest in it?
- C) Is the Eviction Order issued in SRMCC 82 OF 2003 unlawful, illegal or unconstitutional? Is the said order binding upon the Petitioners and can it be used to evict the Petitioners from the suit land?
- D) Is the Petition *Res judicata*?
- E) Have the Petitioners' Constitutional rights been infringed?

#### **Analysis and Determination**

28. On the preliminary issue raised by the Petitioners on the use of the list and bundle of documents filed by both the Petitioners and the 2<sup>nd</sup> and 7<sup>th</sup> Respondents, I am of the view that the listed documents cannot be disregarded in determination of the petition herein for the reason that when this suit came up for directions on 25<sup>th</sup> November 2020 the Court directed that "The petition to proceed by way of written submissions." The Court did not mention the primary documents filed by the parties that were to guide the parties in drawing the submissions and that would guide the court when determining the matter. If the Petitioners had any objection to the documents they would have raised the same and had the documents expunged from the record. I also note that the documents attached to the list of documents are mentioned in the supporting affidavits and replying affidavits, the same are vital in determination of the real issues at hand. I will therefore order that the Petitioners list and bundle of documents dated 18<sup>th</sup> November 2014 and the 2<sup>nd</sup> and 7<sup>th</sup> List and bundle of documents dated 8<sup>th</sup> January 2013 be deemed as properly on record.

29. However, it is noted that the documents listed on the Petitioners list of documents are attached to the list as a bundle whilst the following documents are missing from the 2<sup>nd</sup> and 7<sup>th</sup> Respondents bundle of documents though appearing on the list of documents;

- a) Proceedings and judgement in SRMCC 82 OF 2003 and HCCA 8 of 2005 only proceedings relating to the Preliminary objection are attached
- b) Proceedings and judgement in HCCC No. 63 of 1992
- c) Proceedings and judgement in HCCC No. 19 of 1991 and 63 of 1992 consolidated
- d) Proceedings and judgement in SRMCC 869 OF 1994
- e) Proceedings and judgement in HC RMCC 64 of 1990

**A) Did the 7<sup>th</sup> Respondent acquire Title No. Katse/Mbeu/1 through fraud?**

**B) Is the suit Land community land/trust land/ancestral land and do the Petitioners have an interest in it?**

30. It is the Courts finding that the Petitioners have not adduced evidence to support their claim that the suit land was registered in favour of the 7<sup>th</sup> Respondent fraudulently. They have not proved that the 7<sup>th</sup> Respondent is comprised of very influential former government officials and wealthy businessmen and that they used their position to commence the process of survey and adjudication on the suit property when other land in Mumoni and Kyuso districts were not under adjudication. They have further not proved that the adjudication process was

flawed. The Petitioners prayer for a declaration that the 7<sup>th</sup> Respondent fraudulently acquired the said title lacks merit and the same is for dismissal.

31. It is the Courts finding that the Petitioners have not proved that the suit land is their community/trust/ancestral land and that they have an interest in it. The Petitioners have alluded to the fact that the 7<sup>th</sup> Respondents land was acquired within a land adjudication process albeit the Petitioners claim that the process was flawed. However, no documents have been put on record to show and demonstrate the said flawed process.

32. Documents on record show that determination of rights and interests in the suit land was made through the process of land adjudication under the Land Adjudication Act CAP 248 Laws of Kenya. The Petitioners attached to their list of documents a letter dated 30<sup>th</sup> September 1981 from the Land Adjudication department Kitui District. The said letter is a notice of establishment of an adjudication section at Mbeu (Mbeu Ranch) Katse Location Kitui District under Section 5 of the Land Adjudication Act. The notice gives particulars of the land that is placed under adjudication which included the suit land. There is no evidence tendered to show that the entire region declared an adjudication area is the area allocated to the 7<sup>th</sup> Respondent or even if that were the case they have not shown how that amounts to an illegality.

33. The Petitioners have claimed in their submissions that the adjudication process was flawed because there was no notice issued under Section 5 of the Land Adjudication Act, No Adjudication committee or arbitration Board was established in respect of the adjudication area. However as noted earlier the Petitioners have exhibited a notice of declaration of an adjudication area under Section 5 of the Land Adjudication Act. It is noted that the issues of failure to establish an adjudication committee and the arbitration board was only raised in submissions and was not raised in the verifying affidavit. This is an issue of fact that I find could only be raised in evidence. I further find that the said allegation is not true as the 2<sup>nd</sup> and 7<sup>th</sup> Respondents did file in their list of documents proceedings and judgment of the Land adjudication committee dated 12<sup>th</sup> August 1982 between MwinziIkusya -vs-Mbeu Group Ranch Ltd. The said proceedings have not been challenged by the Petitioners.

34. The law in force at the time of declaration of the area an adjudication section, were Constitutional provisions of the repealed Kenyan Constitution Chapter IX. Section 115 (2) provided that;

***“Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.”***

On the application of the Land Adjudication Act to an area, Section 116 of the Repealed Constitution provided that: -

***“(1) A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land. (2) The laws to which subsection (1) applies are - (a) the Land Consolidation Act and the Land Adjudication Act; and (b) any other law permitting the registration of individual titles.***

35. From the foregoing it is clear that the declaration of an area as an adjudication section had constitutional underpinnings. Such a declaration brought to bear all the provisions of the Land Adjudication Act to a specific area. In the preamble to the act it is declared to be ***“an Act of Parliament to provide for the ascertainment and recording of rights and interests in community land (previously trust land) and for purposes connected therewith and purposes incidental thereto”***

36. The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependant upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. It is my view that at the time of filing this petition in 2013, Section 116 of the repealed constitution had come into play since the process of ascertainment and registration of rights in land under Land Adjudication Act had been completed, all rights and interests in the land had been ascertained and registered and the land had ceased to be Trust land. By the time the Constitution of Kenya 2010 was promulgated the land in dispute was no longer trust land and the Petitioners cannot claim it to be Community land. The 7<sup>th</sup> Respondent has attached to his bundle of documents proceedings and judgement of the adjudication committee under the Land Adjudication Act which show that objections to allocation of the suit land to the 7<sup>th</sup> Respondent went through the dispute resolution process provided for. From the documents provided, the Court is not able to ascertain up to what level in the dispute resolution process the claims to the disputed land went before the same was adjudged to belong to the 7<sup>th</sup> Respondent. However, it is noted that the entire dispute resolution process provided for under the Land Adjudication Act culminates in the issuance of a title deed by the Chief Land Registrar (previously Commissioner of Lands).

37. Section 29 of the Land Adjudication Act provides for the final appeal in the land adjudication process and states;

***“(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by— (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.***

38. I find that the dispute resolution process under the Land Adjudication Act was open and available to the Petitioners or the persons through whom they claim and to whom such rights, interests or other benefits in respect of the land may have accrued under the African customary law in force and applicable and vested by virtue of their tribe, group, family or individual as was provided under the then applicable constitutional or legislative provisions.

39. It is my view that the claims to the land were made and the same were heard and determined through the legally recognized process and the issue of ownership to the land was finally determined and no evidence has been placed before me to upset that position.

40. I agree with Angote Jin in the case of **Mohamed Ahmed Khalid (Chairman) and 10 Others –vs- Director of Land Adjudication & 2 Others [2013]** the court cannot substitute the established bodies which are supposed to deal with complaints relating to the land adjudication process where he held: -

*“The law that was applicable for the ascertainment of land rights and interests over trust land is the Land Adjudication Act Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the land adjudication and settlement officer, the land adjudication committee, the land arbitration board and the minister’s appeal committee*

*Indeed, before the Director signs the certificates of finality, the Land Adjudication Act provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the Adjudication register*

*The Petitioners have not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the manner in which the adjudication process was carried out.”*

*Considering that the Land Adjudication Act, Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The Petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the Land Adjudication Act, Cap 284, I find that the petition was prematurely filed.”*

41. Further, it is the Courts view that the rights and interests in property as enshrined under Article 40 of the Constitution of Kenya 2010 crystallize when the said rights and interests have been ascertained and recorded at the time when the adjudication process is concluded and a title deed is issued. Section 116 of the Repealed Constitution while dealing with the conclusion of the adjudication process provided that **when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land.**

42. As the court held in **Justus Mugaa M’Impwi v District Land Adjudication & Settlement Officer, Tigania West/East District & another [2018] eKLR**

*“... the petitioner has disguised this as a breach of his fundamental freedoms and constitutional rights. The most obvious remedy available to the petitioner after the objection was allowed by the adjudication officer was to lodge an appeal to the minister pursuant to Section 29 of the Land Adjudication Act cap 284 laws of Kenya. Having failed to exercise his right of appeal within the stipulated period, the petitioner avoided Judicial Review process to escape the limitation imposed by the statute and is now seeking an escape route through the constitution. It is imperative to note that not all grievances should warrant the filing of a petition. Constitutional jurisdiction must not be trivialized as by so doing, the value of the constitution would be diminished if it is allowed to be used as a general substitute for the normal proceedings for invoking judicial and constitutional rights. It is my view that the subject of this petition being a parcel of land which was undergoing adjudication process, **the petitioner’s rights and interest would not have crystallized into rights capable of being protected under article 40 of the constitution of Kenya 2010.** The process of appeal had not been exhausted and those rights are registered under the Land Registration Act of 2011.”*

43. At present, the 7<sup>th</sup> Respondent holds a title deed to the suit land issued on 7<sup>th</sup> January 1987 by virtue of which the 7<sup>th</sup> Respondent is the legal owner and in order to challenge that title, it was incumbent upon the Petitioners to prove the grounds for the challenge. The interests of the 7<sup>th</sup> Respondent are protected under Article 40 of the Constitution of Kenya 2010 and Section 24 and 25 of the Land Registration Act which provide for protection of rights to property;

Article 40 provides that;

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

Section 24 and 25 of the Land Registration Act provides that;

**Subject to this Act**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

***“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—”***

44. Under Section 26 of the Land Registration Act, a Certificate of title is to be held as conclusive evidence of proprietorship. In my opinion, the Petitioners have not discharged their burden of proof in order to dislodge the protection accorded to the 7th Respondent as a title holder.

**C) Is the Eviction Order issued in SRMCC 82 OF 2003 unlawful, illegal or unconstitutional? Is the said order binding upon the Petitioners and can it be used to evict the Petitioners from the suit land?**

45. The eviction warrants therein were issued by the court on 12<sup>th</sup> September 2013. They were addressed to the 2<sup>nd</sup> Respondent and are set out below;

**WARRANT TO BAILIFF TO GIVE VACANT POSSESSION OF LAND PARCEL KATSE/MBEU/1.**

(under Order XX1 Rule 30 Civil Procedure Rules.)

***“Whereas the undermentioned property in the occupancy of all the Defendants herein above has now been decreed the property of MBEU GROUP RANCH, the said defendants, their agents, relatives or servants and/or anyone claiming under them is hereby decreed to the said MBEU GROUP RANCH and whereas an order for eviction has been issued against the defendants.***

***Consequently, you are now authorized to move into the said property and destroy by either pulling down any structures, remove and burn any fence by using reasonable force to put the said MBEU GROUP RANCH in occupation of the land aforesaid.***

***You are further ordered to give a forty-five (45) days’ notice to the defendants and/or their agents /relatives or servants or anyone claiming under them.”***

46. As stated earlier, none of the parties to this suit availed to the court the proceedings, judgement and decree/order in SRMCC 82 of 2003. The only documents attached were the Complaint, Defence and the warrant. It is thus difficult to know what issues were heard and determined by the Court which culminated in the issuance of the warrant. It would appear, however, that the Petitioners do not contest the existence of the suit SRMCC 82 of 2003 and the fact that the said warrant emanated from the said suit. The Petitioners’ main contention is that they claim ownership of the land subject matter of the said suit and that they were not made parties to the suit.

47. The Petitioners contend that the order is unlawful, illegal or unconstitutional for the reason that they were condemned unheard in violation of principles of natural justice. The order of eviction is intended to apply to them and evict them since they occupy parts of the suit land and the order extends application to the Defendants ***“their agents, relatives or servants and/or anyone claiming under them.”***

48. The court is therefore called upon to determine the Petitioners’ claim that since they were not parties to SRMCC 82 OF 2003, they are not bound by the eviction orders therein. Their claim is that though not bound by the said order they are prejudiced by it since they reside on the land and are entitled to claim ownership and/or occupation of the land.

49. The Petitioners claim that the wording of the warrants shows that the 7<sup>th</sup> Respondent was aware of the presence on the suit land of other people other than the defendants in SRMCC 82 OF 2003 but in order to circumvent the process of filing a suit against them all, they chose to file suit against a few of the occupants of the land and then include in the final order all the ones not sued substantively. They claim that the Respondents’ conduct violated their rights under Article 27 and 50 of the Constitution of Kenya 2010.

50. Article 27 (1) relied on provides as follows;

***“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”***

Article 50 (1) relied on by the Petitioners for the right to a fair hearing provides as follows;

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.***

51. The current legal framework for eviction from private land is well set out in Section 152E and 152G of the Land Act No. 6 of 2012. The sections emanated from the Land Laws (Amendment) Act 28 of 2016 which made various amendments to the Land Act No. 6 of 2012. Section 152A of the Land Act starts with prohibition of unlawful occupation of land and states that ***“A person shall not unlawfully occupy private, community or public land”*** It therefore starts by restating protection of the legal rights of the lawful owner of land against unlawful occupation of land.

52. The law on eviction of persons in unlawful occupation of land is a delicate balance between the rights and interests of a title holder and the rights and fundamental freedoms of persons occupying the land albeit illegally, as enshrined in the Bill of Rights Part 2 of the Constitution of Kenya 2010 (CoK).

53. Prior to the promulgation of the 2010 Constitution, a number of case laws emerged with Courts affirming that any eviction must abide by the rule of law and principles as anchored in the CoK. In so doing, the Courts invoked the application of the general rules of international law, human rights provisions and the principles enshrined in the Constitution to protect the people who have been evicted or are about to be evicted.

54. Unlike the 1963 Independence Constitution, the 2010 Constitution under Article 2(5) and (6) recognizes the application of the general rules of international law, treaties and conventions ratified by Kenya to be part of the Kenyan law. Prior to the enactment of a legal framework on evictions, the Courts invoked international treaties, guidelines and conventions ratified by Kenya. In the case of **Kepha Omondi Onjuro & others -v- Attorney General & 5 others (2015) eKLR**, the High Court held as follows:

*“...it is imperative at this juncture to appreciate that there is no legal framework existing in Kenya guiding evictions and demolitions.... However, Article 2 (5) and (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya is part of the law of Kenya...”*

55. Similarly, in **the Mitubell Welfare Society v Attorney General and Others (Mitubell Case)** the Court held that:

*“This country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy. However, as a member of the international community and a signatory to various United Nations treaties and conventions, it is bound by such international guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Article 2(5) and (6) of the Constitution make the general rules of international law and any treaty or convention that Kenya has ratified part of the laws of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as enunciated by The United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 “The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments).”*

56. In the case of **Symon Gatutu Kimamo & 587 others V East African Portland Cement Co. Ltd(2011) eKLR** the Court, while relying on the UN General Comment No. 7 on the Right to Adequate Housing affirmed that:

*‘the prohibition of forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Human Rights Covenants’. The UN General Comment No. 7 provides for the procedural protection and due process to be followed during forced evictions which include: a) an opportunity for genuine consultation with those affected; b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; e) all persons carrying out the eviction to be properly identified; f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; g) provision of legal remedies; and h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.’*

57. The issue of evictions was further considered in the case of **William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR**

*“In **Satrose Ayuma** (supra), the High Court laid out certain principles that an evicting party must comply with. The Court, in doing so, applied international principles of law later clarified by this Court in Mitubell and which were crystallised as law in Section 152(A) – (H) of the Land Act. We reiterate that these principles were applicable to the eviction of the Petitioners as a matter of obligation by the State under international law as provided for in Articles 2(5) and 2(6) of the Constitution. The principles include the duty to give notice in writing; to carry out the eviction in a manner that respects the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property. These principles flow from U. N. Guidelines on Evictions: General Comment No.7 which in Mitubell, we stated, are “intended to breathe life into the Right to Dignity and Right to Housing under the ICCPR and ICESCR respectively”.*

58. The above case law ought to have guided the Respondents in their attempts to get the Petitioners or other persons deemed to be in illegal occupation of their land out of the said land. After having complied with the law on evictions then the Respondents would have been able to approach the court for formal orders. However, the course that the 7<sup>th</sup> Respondent took was that he filed suit in the Magistrates court in SRMCC No. 82 of 2003 and sought eviction of a number of people that were in illegal occupation of their land. They obtained the warrant of eviction which they were in the process of executing against the Petitioners as well as the Defendants in that suit. Without proceedings and judgement in SRMCC No. 82 of 2003 it is not possible to determine if the conditions to be met under the law prior to commencement of evictions were met prior to filing the suit for eviction.

59. The Petitioners thus exercised their right to institute court proceedings claiming that a right or fundamental freedom has been or was likely to be denied, violated, infringed or threatened. If the Court finds that such a right has been infringed then, Article 23(3) of the CoK mandates it to grant appropriate reliefs including a declaration of rights, an injunction, conservatory order, compensation or judicial review.

#### **D) Is the Petition Res Judicata?**

60. The 2<sup>nd</sup> and 7<sup>th</sup> Respondents claim that the Petitioners are bound by the orders as children and/or relatives of the defendants in that suit. The Respondents rely on the case of **Julius Nguli Lolia & 2 Others vs The A. G. and the National Land Commission No 1 of 2018 Makueni** for the submission that where the children of the deceased litigants who had lost a case tried to revive the case by filing a fresh Petition to challenge the previous cases the court held the suit as caught up by Res judicate under section 7 of the Civil Procedure Act since the Petitioners were trying to get what their forefathers could not get.

61. The 2<sup>nd</sup> and 7<sup>th</sup> Respondents contend that the matter is res judicata, having been determined by a court of competent jurisdiction. Section 7 of the Civil Procedure Act CAP 21 Laws of Kenya contains provisions for the doctrine of res judicata as follows:

***'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'***

62. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i) what issues were determined in the previous case;

ii) whether the issues *directly and substantially in issue in this Petition were directly and substantially in issue in the former suit*

iii) *Whether the parties were the same or between parties under whom they or any of them can claim, litigating under the same title*

iv) *Whether the court was competent to try such subsequent suit or the suit in which such issue has been subsequently raised,*

v) *Whether the issue was heard and finally decided by such court*

63. In my view it is necessary to have proceedings and judgement in the initial suit in order to determine if the issues determined in the said suit are the same issues before the present suit.

64. From the documents on record and the pleadings, the only issue that one can determine with certainty is that the Petitioners herein were not parties to the initial suit. Even if the Petitioners were the children or relatives of the Defendants in the initial suit, it is my determination that the Constitutional rights that the Petitioners claim have been infringed upon or are likely to be infringed are personal in nature. Article 20 of the CoK provides that;

***“Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom***

65. There is no evidence that the suit SRMCC 82 OF 2003 was instituted against the Defendants in a representative capacity and the orders issued in the said suit can only apply to the parties to the suit. The attempt to apply the said orders to persons who were not parties to the suit is indeed unlawful, and the same is an infringement of the constitutional rights of the Petitioners.

66. The case law cited above sets out what a forced eviction prior to enactment of Land Law (Amendment) Act 2016 would require for it to be said to be in accordance with the law and in conformity with the provisions of the International Human Rights Covenants’.

67. For the foregoing reasons, I am of the view that the issue of eviction of the Petitioners from the suit land is not *res judicata*.

#### **E. Have the Petitioners’ Constitutional rights been infringed?**

68. The Petitioners claim that their various constitutional rights have been infringed and cite Articles 19,20,21,22,27,40 and 47 while seeking legal redress through this Court. Having found that the Petitioners have failed to prove that the 7<sup>th</sup> Respondent acquired title **Title No. Katse/Mbeu/1** fraudulently, but that the eviction orders issued by the courts in the previous suits do not apply to them, I opine that the Petitioners’ rights to be heard are likely to be infringed upon if the warrants of eviction were to be executed. that they are in danger of being evicted by orders in a case where they were not given an opportunity to be heard.

69. Articles 20, 21 and 22 of the Constitution of Kenya (2010) require the courts among other public officers to enforce the Bill of Rights. This Court is therefore clothed with the jurisdiction under Articles 23 and 165 of the Constitution of Kenya (2010) to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and the Respondents contention that the court lacks jurisdiction is therefore invalid.

70. The acts of the 2<sup>nd</sup> and 7<sup>th</sup> Respondent in applying the order of eviction to the Petitioners is an infringement of the Petitioners right to equal protection of the law under Article 27 of the Constitution of Kenya 2010 which provides that; -

***“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”***

71. By application of the eviction of the order without having been heard the Petitioners are threatened with an act that discriminates against them on the ground only that they are related to the Defendants in the previous suit.

72. The said acts further infringe or are likely to infringe on the Petitioners’ rights under Article 47 on and 50 Constitution of Kenya;

***“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”***

Article 50 protects a person’s right to a fair hearing in that it provides that

***(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public***

*hearing before a court or, if appropriate, another independent and impartial tribunal or body.”*

73. The right to be heard being a fundamental right will be infringed if the Respondents are allowed to proceed with the intended eviction. The decision of the Court of Appeal in **Adolf Gitonga Wakahia & 4 Others –v- Mwangi Thiong’o (1986-89) EA LR**, in which several defendants in an arbitration pertaining to land had been condemned to lose part of their land and an award of costs had been made against them without their being heard even though they were parties to the suit, is particularly apt with regard to the right to accord all parties a hearing and not to condemn any party unheard. In his judgment, Gachuhi, Ag. J stated as follows:

*‘As a matter of law, is it just that judgment should be imposed on them without being heard? Their complaint was laid before the judge on an application to review the judgment but the court overlooked this vital allegation that vitiates the judgment. It was up to court, when it was pointed out in an application for review that judgment was entered against some defendants without being heard, to hold that the whole arbitration proceedings were a nullity in the interest of justice and the judgment should be set aside.’*

32. Justice Gachuhi went on to observe that

*‘It is basic law that no one should be condemned, to a judgment passed against him without being afforded a chance of being heard: Ruithibo v Nyingi CA 21 of 1982 unreported. The chance is by being summoned but if he is served and chose not to attend, then he should be bound by the judgment unless he can show cause why he failed to attend. Roboi Holdings Ltd v Sita 11 CA 50 of 1982. (unreported)*

### **Final Orders**

Based on the findings above I make the following orders:

A) A declaration that the intended eviction of the Petitioners from land parcel **Katse/Mbeu/1** on the strength of the warrant issued to the 2<sup>nd</sup> Respondent on 12<sup>th</sup> September 2013 or any other warrants that may be issued in **Mwingi SRMCC NO. 82 of 2003, Mbeu Group Ranch versus David Muisyo and 5 Others** is unconstitutional, unlawful and illegal.

B) Prayers B), C) and D) of the Petition are hereby dismissed.

C) Since the Petition partly succeeds each party will bear their own costs of the suit

**DATED, SIGNED AND DELIVERED AT KITUI THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021.**

**L. G. KIMANI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITUI**

**In the presence of:**

C/A S. Nzioka

Kalu Holding Brief for Mutia for the Petitioner

Masika holding brief for the 2<sup>nd</sup> and 7<sup>th</sup> Respondents

N/A for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents