



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

PETITION NO.2 OF 2019

MOHAMMED HUSSEIN YAKUB.....1ST PETITIONER
HASSAN ADOW HUSSEIN.....2ND PETITIONER
BILLOW SALAT HASSAN.....3RD PETITIONER
GUJOW ABDULLAHI ABDIRAHMAN.....4TH PETITIONER
ABDIASIS ROBLE MOHAMUD.....5TH PETITIONER
NUR ALL.....6TH PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MANDERA.....1ST RESPONDENT
THE NATIONAL LAND COMMISSION.....2ND RESPONDENT
THE KENYA AIRPORTS AUTHORITY.....3RD RESPONDENT
MINISTRY OF TRANSPORT & INFRASTRUCTURE.....4TH RESPONDENT
THE NATIONAL ENVIRONMENT
MANGEMENT AUTHORITY.....5TH RESPONDENT
THE ATTORNEY GENERAL.....6TH RESPONDENT

JUDGEMENT

INTRODUCTION

Parties

1. The Petitioners have described themselves as the citizens of Kenya and residents of Karo town within Mandera County, the 1st Respondent is the County Government of Mandera established under Article 176 of the Constitution of Kenya, the 2nd Respondent is the National Land Commission established under Article 167 of the constitution, the 3rd Respondent is the Kenya Airports Authority established under the Kenya Airports Authority Act, the 4th Respondent is the Ministry of Transport and Infrastructure , the 5th Respondent is the National Environmental Management Authority and the 6th Respondent is the Attorney General.

2. The petitioners filed this petition together with an application under certificate of urgency on 11th March, 2019 seeking conservatory orders restraining the 1st, 2nd, 3rd and 4th Respondents from acquiring, alienating, disposing and in any way dealing with communal land within Karo town except in accordance with Article 63(4) of the Constitution and the Community Land Act,2016. The parties herein opted to argue the petition abandoning the application with the extension of the interim conservatory orders granted.

3. The petition herein dated 11th March, 2019 is supported by the affidavit of Hassan Adow Hussein sworn on even date seeking the following orders and declarations;

1) A declaration that land in Mandera County and specifically Karo Town is communally owned and should be dealt with only in accordance with Article 63 of the Constitution of Kenya, 2010 and the Community Land Act, together with the Regulations thereto.

2) A declaration that the County Government of Mandera, the 1st respondent herein, in advertising **Tender No. MCG/OT/115/2018-2019** for proposed construction of KARO Airstrip (runway) in Mandera East and Tender No. MCG/OT/122/2018-2019 for proposed construction of Airstrip at KARO in Mandera East Sub-County; both being public projects intended to be implemented on community land acted ultra vires the provisions of part 2 of the fourth schedule of the Constitution of Kenya, which provides for the functions of the County Government.

3) A declaration that the decision by the County Government of Mandera, the 1st respondent herein to advertise **Tender No. MCG/OT/115/2018-2019** for proposed construction of KARO Airstrip (runway) in Mandera East and Tender No. MCG/OT/122/2018-2019 for proposed construction of Airstrip at KARO in Mandera East Sub-County; both being public projects intended to be implemented on community land violates Article 63 of the Constitution of Kenya and the Community Land Act, 2016 and therefore null and void.

4) A declaration that failure by the 1st, 3rd and 4th respondents to conduct an Environmental Impact Assessment Study on the intended construction of airstrips in Karo Town, Mandera County and submit a report to the 5th respondent was illegal.

5) A declaration that failure by the 5th Respondent to gazette an Environmental Impact Assessment Study report on the intended construction of airstrips in Karo Town in Mandera County, if any, was /is illegal.

6) A conservatory order do issue restraining the 1st, 2nd, 3rd and 4th respondents from acquiring, alienating, disposing and in any way dealing with the Mandera County's Communal land and specifically, Karo Town, except in accordance with the provisions of Article 63 of the Constitution, the Community Land Act, 2016 and the regulations thereto.

7) That an order of Certiorari do issue to remove into this Honourable Court and quash the decision by the 1st respondent to irregularly advertise Tender No. MCG/OT/115/2018-2019 for proposed construction of KARO Airstrip (runway) in Mandera East and Tender No. MCG/OT/122/2018-2019 for proposed construction of Airstrip at KARO in Mandera East Sub-County; both being public projects intended to be implemented on community land.

8) That an order of mandamus do issue compelling the 1st Respondent to withdraw the advertisement of Tender No. MCG/OT/115/2018-2019 for proposed construction of KARO Airstrip (runway) in Mandera East and Tender No. MCG/OT/122/2018-2019 for proposed construction of Airstrip at KARO in Mandera East Sub-County; both being public projects intended to be implemented on community land.

9) That an order of prohibition do issue prohibiting the 1st respondent from vetting the application submitted by bidders for Tender No. MCG/OT/115/2018-2019 for proposed construction of KARO Airstrip (runway) in Mandera East and Tender No. MCG/OT/122/2018-2019 for proposed construction of Airstrip at Karo in Mandera East Sub-County; both being public projects intended to be implemented on community land.

10) That an order of prohibition do issue prohibiting the 1st, 3rd and 4th respondents from advertising any tenders to be implemented on Mandera County's Community Land, specifically Karo Town, except in accordance with the provisions of Article 63 (4) of the Constitution, the Community Land Act, 2016 and the Regulations thereto and the EMCA Act, 1999.

11) That this Honourable court be pleased to issue any other appropriate orders and directions or relief as it may deem fit and just to defend, uphold and protect the Constitution.

4. In response to the petition, the 1st Respondent filed a response to the petition vide a replying affidavit sworn on 8th May, 2019 by Abdifatah Ogle the 1st Respondent Chief Officer for roads and Transport. They also filed their written submissions dated 30th July, 2019 and filed on 31st July, 2019 and list of authorities filed on 19th June, 2019.

5. The 2nd and 5th Respondents have not participated in these proceedings. The 3rd Respondent filed a replying affidavit sworn by Katherin N. Kisila and sworn on 7th June, 2019 in opposition to the petition.

6. The 4th and 6th Respondent filed a Replying affidavit sworn by Ester Koimet sworn on 31st July, 2019 and filed on 2nd August, 2019 and also filed written submissions of even dates.

Petitioner's case

7. The petitioners are seeking this court to make the foregoing declarations and orders pursuant to the 1st Respondent move inviting bidders vide Tender No. **MCGG/OT/115/2018/2019** for proposed construction of KARO Airstrip (runway) in Mandera east and Tender No. **MCG/OT/122/2018-2019** for the proposed construction of airstrip at KARO in Mandera east sub-county.

8. The petitioners allege that they became aware of the intended construction of the said airstrip on the said piece of land vide a newspaper advert stating they were not notified or engaged over the same by the 1st Respondent and that it failed to meet public participation requirement.

9. It is their position that the subject parcel of land that the intended airstrip is to be constructed forms part of the communal land and therefore the Respondents failed to follow the legal process set out in the Constitution, Community Land Act, 2016 and regulations thereto and the Land Act, 2012.

10. They allege that the tenders for construction of the airstrip was advertised without consultation with the public or affected persons through proper procedure or due process of allocating or acquiring communal land for public purpose.

11. In addition, they allege that the residents of KARO area where the said airstrip is to be constructed objected to the said construction vide a letter dated 26th February, 2019 addressed to the commissioner, where they allege that they are livestock owners whose lives solely depend on nomadic lifestyle and therefore they do not need an airstrip.

12. Further, it is their position that the responsibility of construction of airports and airstrips is a function of National Government and not the 1st respondent as provided for under the Constitution part 1(18)(g) and (h) and Part 2 which provides for the respective functions of the two levels of government, arguing that even if the role of the county extends to construction of airstrip, the 1st Respondent failed to act in accordance with section 6(6) of the County Government Act which provides for efficiency, effectiveness, inclusivity and participation of the people in the exercise of its powers and performance function.

13. It is their position that the Respondents action to advertise the tender for construction of an airstrip at Karo area without the proper procedure envisaged under the Constitution, the Community Land Act and the Land Act violates the rights of the residents of KARO and specifically violates the following Article of the Constitution, Articles 2(1) which provides for the supremacy of the constitution binding all persons and state organs at both levels of government, Article 10(2)(a) and (c) which provides for the national values and principles which include participation of the people, good governance, integrity, transparency and accountability, Article 35(1) and (2) on access of information, Article 40 on protection of property, Article 47 on right to fair Administrative Action, Article 60 which provides for use and management of land in a manner that is equitable, efficient, sustainable and in accordance with the principles of inter alia security of land rights and transparent and cost effective administration of land and Article 63 on dealings with community land.

14. The other statutes allegedly violated by the Respondents are the Community Land Act, 2016 and regulations thereto, in respect to violation of the Community Land Act, the petitioners claim that Section 22(1) of the Act provides for three ways in which community land may be converted to public land which include compulsory acquisition, transfer or surrender.

15. In this case they allege that the law was violated and that the 1st Respondent arbitrarily allocated unspecified land in terms of size and location in Karo town for a public purpose without notifying the public, the project affected persons or the Mandera Community members including the petitioners.

16. The laws allegedly violated include, the Land Act, 2012, which at section 37 provides for the management of the community land in accordance with the law pursuant to Article 63 of the Constitution. The Fair Administrative Action Act, at section 5(1)(a) and (b) where it provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interest of a group of persons or the general public an administrator shall issue public notice inviting public views and consider all views submitted in relation to the matter. The County Government Act, 2012 at section 6(6) which provides that in exercise of its powers the county government shall ensure efficiency, effectiveness, inclusivity and participation of the people. And the Environmental Management and Co-ordination Act, 1999 which at sections 57A, 58 and 59 requires the submissions of an environmental impact assessment report, which they allege was never submitted.

1st Respondent case

17. The 1st Respondent in their response allege that the subject parcel of land where the intended airstrip is to be constructed at KARO area is a public land that had been set aside for public use and does not constitute community land under Article 62(2)(d) of the Constitution.

18. In addition, they allege that the same is 3 Kilometers from Karo town and less than 20 kilometers from Mandera town and that the allegations that the land is used for grazing is baseless. And that the subject land has been considered suitable by the various government agencies, as the current airstrip has been encroached causing inconveniences to flights.

19. Further, they challenged the petitioner's locus to institute this petition alleging that they are from murule tribe yet the said parcel of land belongs to corner tribes who have not initiated communal claim to the land.

20. Additionally, they allege that the petitioners are not members of a registered community as envisaged under section 7(2) of the Community Land Act, 2016 which they allege is a requisite condition precedent to the recognition and protection and registration of community land rights. And that there has been no adjudication and registration of the said land as community land under section 8(6)(a) of the Act as such.

21. In regard to the contestation that it is not their role to construct airstrips, they refuted the claim alleging that it is within their mandate under Part 2 Paragraph 5,8 and 11 of the Fourth schedule of the Constitution.

22. On public participation, they allege that the intended construction of the airstrip was one of the key infrastructure projects proposed by the county residents at public consultative forums in the preparation of the County Integrated Development Plan 2018/2022.

23. In respect to the allegation that there was no environmental impact assessment, the 1st respondent denies the same arguing that the environmental impact assessment was undertaken and produced the said report.

3rd Respondent case

24. The 3rd Respondent opposed the petition averring that the process to relocate the current Manderu airstrip from its present location was commenced by Department of defence in the year 1985, this was until 25th February, 2015 when the 1st Respondent wrote to them requesting for technical assistance over the intended construction of the airstrip at Karo area, which was selected for its suitability and due to the fact that it was not subject to community land rights as the land was at all times deemed as public land.

25. They averred that the 1st Respondent confirmed the availability of land at Karo area measuring 4300 acres (1,740Ha) and issued an allotment letter in their favour, where they went ahead and requested them to prepare Part Development Plan in compliance with the Physical Planning Act to enable the processing of title deed in their favour.

26. In addition, they stated that the PDP plan is yet to be prepared by the 1st Respondent, and therefore title to the subject land has not been issued to them and therefore they have not proceeded with the issue of Environmental Impact assessment.

27. It is their contention based on the above that they do not have title to the said parcel of land and that they have nothing to do with the said tenders as advertised for the construction of the said airstrip.

28. Further, they averred that the parcel of land in question is public land as envisaged under Article 62 of the Constitution and does not meet the requirements for recognition of a community as provided for under the Community Land Act to wit sections 7(1) and 8 of the same. It is their contention that the petitioners are only interested in compensation under section 5(4) of the Community Land Act where community land is compulsorily acquired, and that in any event the land is held by the 1st Respondent in trust and therefore if there was to be any compensation then it's the 1st Respondent who ought to negotiate.

29. In sum, he urged the court to dismiss the petition as the benefits to be accrued from the construction of the said airport at Karo area outweighs the prejudice suffered by the petitions and therefore the project ought to be allowed to proceed.

The 4th and 5th Respondents

30. The 4th and 5th Respondents averred that the intention to relocate the current Manderu airstrip was initiated by the Department of Defence, which is occasioned by the fact that aircrafts flying to Manderu overfly both Ethiopian and Somalia airspace during takeoff and landing. The multi-agency team after a reconnaissance visit settled on KARO area as the ideal place for construction of the airstrip, thereafter they advised the 1st Respondent to delineate the said land for the purpose.

31. They denied granting the 1st Respondent the responsibility nor mandate to construct the airstrip averring that the same is the role of the National Government pursuant to Schedule 4 of the Constitution.

32. Further, they averred that unadjudicated community land is managed by the County Government and that in regard to the subject land, the National Land Commission has been involved in every process.

Submissions

Petitioner's submissions

33. The petitioners in their submissions addressed four issues for determination. The first issue is as to whether the land in Manderu County and specifically, Karo town is community land and should be dealt with only in accordance with Article 66 of the Constitution of Kenya 2010 and the Community Land Act, 2016 together with the regulations thereto or if it had been dealt with prior to 2010 in accordance with section 117,118 of the repealed Constitution and the provisions of the Trust Land Act.

34. In this regard the petitioners submitted that the subject parcel of land situate at KARO where the Respondents intend to set up an airstrip is a community land which is protected as such under Article 61 and 63(2)(d) of the Constitution. They contend that 95% of the land holding in Manderu is what is referred to as trust land and that the same is held by the 1st Respondent on behalf of the communities and or tribes.

35. It is the petitioner's contention that the subject parcel of land which the Respondents intend to construct an airstrip has not been alienated in compliance with the law to wit the Constitution, the Land Act and the Community Land Act 2016. They submitted that as long as the land being a trust and remained unadjudicated, unalienated and unregistered; it belonged to the local tribes, groups, families and individuals of that area. In this they rely in the decision of Angote J. in **Bahola Mkalindi Rhigo & 9 Others vs Michael Seth Kaseme & 3 Others (2016) eKLR**

36. They submitted that they are residents of Karo area and their interest have been protected under the Trust Land Act at sections 114,115,116,117 and 118 of the repealed Constitution and Articles 40,60 and 63 of the 2010 Constitution.

37. Further, they challenged the Respondents position that the subject parcel of land had been set aside and converted as public land, submitting that no evidence had been produced to that effect, as no minutes has been tendered confirming the same and that the Part Development Plan produced is neither certified by the Director of Planning or approved by the cabinet secretary for lands. They contend that

the subject land has not been set aside as required under the Trust land Act, and that the 1st Respondent has not demonstrated that the steps for alienation of the said land into a public was followed. In this they rely in the case of **Gitson Energy Limited vs Francis Chachu Ganya & 6 Others (2017) Eklr.**

38. The gist of the petitioner's submissions in this regard is that the Respondents action herein amounts to an appropriation of the petitioner's interest and those of the Karo residents of the suit property without formal expression of intention to do so on the part of the respondents.

39. The second issue addressed by the Respondents is as to whether they have the locus to file the instant petition. They submitted that they are residents of karo town and as indigenous people of the area they have filed this petition to challenge the unilateral, unprocedural and unconstitutional manner in which the respondents purportedly intend to construct an airstrip on community land without following the mandatory laid down procedures and that they have brought this on behalf of the residents of Karo town and thus they have locus.

40. In addition, they submitted that the interest of a community over ancestral land can be pursued either collectively or individually, arguing that their right to be heard is well protected under Article 50 of the Constitution. They also rely in Article 22 and 258 of the Constitution which expanded the locus on who can file a suit alleging infringement of a right or fundamental freedom. In this they rely in the cases of **Bahola Mkalindi Rhigho & 9 Others vs Michael Seth Kaseme & 3 Others(supra)** and **Republic vs Minister for Forestry & Wildlife ex parte Charles Oduor Okelo & 5 Others (2012)Eklr.**

41. The third issue addressed by the petitioners is as to whether the Respondents conducted public participation and sensitization over the intended construction of the airstrip. They submitted that the respondents failed to undertake public or stakeholder's participation before the conceptualization of the project in contravention of Article 10(2)(a) and Article 35(1) and (3) of the Constitution. And that they only became aware of the project through the tender advert over the same.

42. In addition, they submitted that the respondents action contravenes section 5(1)(a) and (b) of the Fair Administrative Action Act, as they were not consulted over the project. They rely in the case of **Francis Chachu Ganya & 4 Others vs Attorney General and Another (2013), Gitson Energy Limited vs Francis Chachu Ganya & 6 Others(supra), Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of energy & 17 others (2015) eklr.**

43. Further, they submitted that the respondents failed to undertake an Environmental Impact Assessment contrary to section 59(1) of the National Environment Management Authority.

44. Furthermore, they submitted that the intended appropriation of the subject parcel of land by the Respondents without prompt compensation infringes their communal right to property protected under section 5(4) of the Community Land Act and Article 40 of the Constitution.

45. The final issue addressed by the Petitioners is as to whether the intended construction of the airstrip at Karo is the mandate of the 1st Respondent or the 3rd Respondent. In this regard the petitioners submitted that the 1st Respondent acted ultra vires its Constitutional mandate by purported to undertake the construction of an airstrip which is the mandate of the National government as envisaged in the Constitution. It is their position that the tenders floated by the 1st Respondent is outside the law as it amounts to them undertaking a function meant for the 3rd Respondent, who vide their affidavit averred that they did not relinquish that responsibility to the 1st Respondent. They submitted that the 1st Respondent action contravenes Article 2(1), 10(2), 189, 186(1), 201 of the Constitution and section 117 of Public Finance Management Act. In this they rely in the case of **Council of Governors & 3 others vs Senate & 53 Others (2015) eklr.**

46. In sum the petitioners submitted that although they support infrastructural development, they urged the court to enforce the law to curb the Respondents unilateral, unprocedural and unconstitutional construction of an airstrip on community land without following the mandatory laid down procedures in law, praying the court to allow the instant petition with costs.

1st Respondent submissions

47. The 1st Respondent submitted on four issues. The first issues is as to whether the parcel of land where Karo airstrip is to be constructed is public land. In this regard the 1st Respondent reiterated the contents of their response to the petition arguing that the subject parcel of land where Karo airstrip was to be constructed was land that had been set aside for public use and that it does not fall within community land envisaged under Article 63(2)(d) of the Constitution and section 8(6)(a) of the Community Land Act, 2016, arguing that the same is a public land under Article 62 of the Constitution. In support of this they relied on the produced Part Development Plan, stating that the tribe situate in the parcel have consented to the said construction and the petitioners are not members of the said corner tribes which inhabit the area.

48. The second issue addressed by the 1st Respondent is as to whether the petitioners have any legitimate claim under the Community Land Act, 2016. In this regard they submitted that the petitioners claim fails as they have not established that they are members of a registered community as provided for under section 7 of the Community Land Act, 2016 and therefore they have no locus which is a condition precedent to the recognition, protection and registration of community land rights. In this they rely in the cases of **Samuel Ndirangu & 41 others vs County Government of Baringo & 2 others (2018)e KLR** and **County Government of Meru& another vs District Land Adjudication and settlement Officer Tigania East sub-County & 18 others(2018)eklr.**

49. The third issue addressed by the 1st Respondent is as to whether the proposed construction of Karo airstrip is within the mandate of the 1st Respondent as set out under the fourth schedule of the Constitution. In this they submitted that the same is within their mandate to deal with county public works and services under Part 2 paragraphs 5,8 and 11 of the fourth schedule of the Constitution, as it gives them the mandate to manage county transport, county planning and development as well as county public works and services. In this they rely on Articles 174 and 259(4b) of the Constitution urging the court to consider the listed functions is not only limited to the listed but extends as the context demands. They further rely in the case of **of Communication Commission of Kenya & 5 Others v Royal Media Services**

Limited & 5 others(2014)e KLR and Council of Governors vs Attorney General & 4 Others(2015)Eklr arguing that the court ought to consider the objects of devolution under the constitution and find that the construction of Karo Airstrip is the mandate of the 1st Respondent.

50. The final issue addressed by the 1st Respondent is as to whether the Construction of Karo Airstrip is in line with statutory requirements. In this they submitted that the 1st Respondent adhered to all the statutory requirements to undertake the project. They submitted Environmental Impact assessment was undertaken and a report to that effect prepared, stating that it is in interest of the people of Mandera to have the airstrip constructed as part of devolved function. They rely in the Court of Appeal decision in **Council of Governors & 5 others vs The Senate & Another. (2019) eklr.**

51. In sum the 1st Respondent submitted that the subject parcel of land in which Karo airstrip is intended to be constructed is a public land and not community subject to compensation. They urged the court to dismiss the petition with costs.

The 4th and 6th Respondents

52. The 4th and 6th Respondents through their written submissions argued that Civil Aviation as a function is solely the function of the National Government, nonetheless Article 189 of the Constitution provides for relationships and cooperation between National and County Government provides that each level ought to perform its function in a manner that respects the functional and institutional integrity. They rely in the case of **Council of Governors & 3 others vs Senate & 53 Others (2015) eklr..**

53. In sum they submitted that the 1st Respondent action advertising tenders for the construction of the said airstrip was outside the law as the same is within the mandate of the 3rd Respondent, and that they had not delegated the same to them stating that it was an exercise in futility.

Issues and Analysis

In view of the foregoing, the following are the main issues for determination

- a) **Whether the petitioners have locus to institute this petition**
- b) **Whether the land in question is unregistered Community land,**
- c) **Whether the Adjudication Process has been commenced in flagrant disrespect of the Law**

Whether the Petitioners have the requisite *Locus Standi* to Institute the Suit herein

54. The 1st Respondent have challenged the petitioner's locus to file the instant petition on the grounds that the subject parcel of land situate at Karo area where the intended airstrip is to be constructed belongs to corner tribes which the petitioners do not belong to, as they come from murule tribe. Additionally, they allege that their claim cannot be subject to Community land as they are not registered as such under the Community Land Act.

55. In response the petitioners have submitted that the interest of a community over ancestral land can be pursued either collectively or individually, arguing that their right to be heard is well protected under Article 50 of the Constitution. They also rely in Article 22 and 258 of the Constitution which expanded the locus on who can file a suit alleging infringement of a right or fundamental freedom.

56. Article 22 of the Constitution provides as follows: -

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by: -

- a. ***A person acting on behalf of another person who cannot act in their own name;***
- b. ***A person acting as a member of, or in the interest of, a group or class of persons;***
- c. ***A person acting in the public interest; or***
- d. ***An association acting in the interest of one or more of its members.***

57. Article 258(1) of the Constitution provides as follows: -

(1) Every person has the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention.

58. The Supreme Court in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2014] eKLR** in regard to the above noted that: -

“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general.”

59. In view of the above, it is apparent that the locus to institute a suit challenging infringement of a right protected under the Constitution including rights protected under Article 40 of the Constitution on property can be instituted by any person challenging the infringement, and therefore I’m convinced and do find that the petitioners have locus to institute the instant petition.

Whether the land in question is unregistered Community land

60. Article 63(2) states, in so far as community land is concerned, that **community land consists of land lawfully registered in the name of groups representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; and land that is lawfully held, managed or used by specific communities, (i) community forests, grazing areas or Shrines (ii) ancestral lands and lands traditionally occupied by hunter gatherers communities or (iii) lawfully held as trust land by the county government.**

61. Article 63(3) of the Constitution provides that any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. And subsection (4) on the other hand provides that Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

62. Pursuant to Article 63(5) of the Constitution, Parliament enacted the Community Land Act No. 27 of 2016 whose preamble states: -

“AN ACT of Parliament to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes”

63. Section 2 of the Community Land Act adopts the above definition of community land as defined under Article 63(2) of the Constitution. It is conclusive that community land is land that falls within the categories mentioned in Article 63(2), is held and used by communities, and or trust land held by the county governments.

64. Applying the above definition of Community Land to the subject parcel of land in dispute, the question is as to whether the subject land is community land or public land as alleged by the 1st Respondent. Article 63(2) of the Constitution above defines Community land to consist of **land that is lawfully held, managed or used by specific communities, (i) community forests, grazing areas or Shrines.**

65. Further, Under the repealed Constitution and the Trust Lands Act, trust lands are neither owned by the Government nor by the County Councils within whose area the land falls under. The County Council simply held such land on behalf of the local inhabitants of the area. And For as long as Trust land remained adjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area. Once adjudicated and registered, Trust land is transformed into private land. That is what the provisions of Sections 114, 115 and 116 of the repealed Constitution provided.

66. The Petitioners contend that the subject parcel of land is used for grazing as they are pastoralist community and therefore, they do not need an airstrip. Based on the foregoing I’m convinced that the subject parcel land is community land as defined under the law. The 1st Respondent has not disputed that the subject land was being used as a grazing land, and nothing has been adduced evidencing that the subject land had been set aside as public land for use for purposes of public utilities like the proposed airstrip.

Whether the Adjudication Process has been commenced in flagrant disrespect of the Law

67. Section 4 of the Community Land Act (hereinafter referred to as the Act) vests the ownership of Community land in Kenya in the Community.

68. The role of the County Government in regard to Community land or unregistered community Land is provided for under section 6 of the Act, which provides:-

- 1) County governments shall hold **in trust all unregistered community land on behalf of the communities for which it is held.**
- 2) The respective county government shall hold in trust for a community any monies **payable as compensation for compulsory acquisition** of any unregistered community land.
- 3) Upon registration of community land, the respective county government shall promptly release to the community all such monies payable for compulsory acquisition.
- 4) Any such monies shall be deposited in a special interest earning account by the county government.
- 5) The respective county government shall transfer the amount and the interests earned to the communities as may be prescribed.
- 6) Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this

Act and any other applicable law.

7) Upon the registration of any unregistered community land in accordance with this Act, the respective registered community shall, assume the management and administrative functions provided in this Act and the trustee role of the respective county government in relation to the land shall cease.

8) A county government shall not sell, dispose, transfer, convert for private purposes or in any other way dispose of any unregistered community land that it is holding in trust on behalf of the communities for which it is held.

69. It is therefore apparent that the law contemplates compensation to the community where unregistered land is held in trust by the County Government, where such land is to be compulsorily acquired by the government for public use or otherwise.

70. Section 13(2) of the Act provides that any land which has been used communally, for public purpose, before the commencement of this Act shall upon commencement of this Act be deemed to be public land vested in the national or county government, according to the use it was put for.

71. Section 22 of the Act provides for the conversion of community land to public land. It may be converted through compulsory acquisition, transfer or surrender. The transfer of community land shall, subject to the approval of the members of the registered community in a community meeting, be done in accordance with the Land Act, 2012 ([No. 6 of 2012](#)) and any other applicable law.

72. Section 38 of the Act provides for Regulation of community land use planning, it provides that;

(1) Pursuant to Article 66 of the Constitution, the State shall have the power to regulate the use of any land, or interest in or right over land, in the interest of defence, public safety, public order, public morality, public health or land use planning.

(2) Despite the provisions of Part 1 and pursuant to section 22 of the Fourth Schedule to the Constitution, the management of community land shall be subject to national and county government laws and policies relating to-

(a) fishing, hunting and gathering

(b) protection of animals and wildlife;

(c) water protection, securing sufficient residual water, hydraulic engineering and safety of dams;

(d) forestry;

(e) Environmental laws;

(f) energy policy; and

(g) Exploitation of minerals and natural resources

73. Therefore having reached a finding that the subject parcel of land is community land as submitted by the Petitioners, it was therefore incumbent upon the Respondents to tender evidence before this Court confirming that the statutory legal process set down under the Constitution and the statute has been adhered to in alienating the subject land for the purpose of construction of the said airstrip.

74. I agree with the Petitioners that the 1st Respondent action in alienating the said subject parcel of land does not meet the law as those affected were not involved in the process of alienation of the subject Land. Section 22 of the Act contemplates conversion of public land through compulsory acquisition, transfer or surrender, and in this case none of the three methods of conversion has been established by the Respondents.

75. Additionally, local or resident communities are compensated promptly where such land was to be alienated for public use. Further, trust land could be set aside by a County Council for use and occupation by any person for a purpose which in the opinion of that County Council is likely to benefit the people ordinarily residing in that area or by the revenue to be derived from rent in respect thereof. The Local Government Act (repealed) mandated the councils, through their full council meetings, to make allocation of Trust land which had been set apart, with compensation to the affected parties.

76. Article 40(1) of the Constitution provides for the “protection of right to property”. Article 20(3) (b) stipulates that “in applying provisions of the bill of rights a Court shall adopt the interpretation that most favours the enforcement of a right.

77. In this regard, and in view of the above, it is my finding that the law was not followed in alienating the subject parcel of land, as the was no surrender or transfer involving the community nor was there compulsory acquisition as enshrined under the law.

Public Participation

78. The petitioners herein have also contended that the action of the respondents herein is wanting for lack of public participation. Indeed, Public participation in matters Governance is now a Key Constitutional Principle as provided under article 10 of the Constitution. The 1st

Respondent in response to this have tendered evidence in the form of questionnaires which they allege were filled as part of undertaking public participation. Additionally, they allege that they consulted the local community over the project and that they have no objection over the construction of the airstrip.

79. It is my finding that there was no adequate evidence tendered by the 1st Respondent establishing public participation. The questionnaires in my view is not sufficient. At least various minutes attesting to various meetings undertaken within the affected community in my view would suffice, otherwise in the circumstances of this case, nothing to that effect has been tendered. Consequently, it's my finding that there was no public participation.

Decision

80. In view of the foregoing, it is my finding that the instant petition is merited and is allowed with no orders as to costs.

Read, delivered and signed in the Open Court this 31st day of January, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Nyipolo holding brief Gekone for Petitioner
2. Fardowsa; Court Assistant.