REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 7 OF 2017

IN THE MATTER OF ARTICLE 22 (1)

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 10, 60, 63,189 AND THE 4TH SCHEDULE OF

THE CONSTITUTION OF KENYA 2010.

BETWEEN

COUNTY GOVERNMENT OF MERU……................................…1ST PETITIONER

HON. PETER GATIRAU MUNYA ……………………...…….......2ND PETITIONER

AND

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

TIGANIA EAST SUB-COUNTY………................................…1ST RESPONDENT

THE HON. ATTORNEY GENERAL……..…......................…. 2ND RESPONDENT

CYPRIAN KAUME M'MUKIRIA

ISAAC MWIRIA

FESTUS GITIRIKIA THAINE LUTHIRANGA

JEREMIAH NTHOKU MUNYORI

ZACHARY NDEGWA

JOHN NTIRIMITI IMUTI

KARITHI PARTRICK LITHARA

DABASO BORU DIKA BERU

JAMES KANAMPIU M'INEBU

MARGARET KIRITO M'MUYORI

STANLEY LAICHENA

JOHN KANGORO

PAUL KOBIA ABUTU

STANLEY KOBIA TWARINGA

PHILLIP MWITI EGWETA

JULIUS MUTHIORI NTHILI

LUKE MUNGANIA INEBU – BEING THE COMMITTEE MEMBERS

J U D G M E N T

DESCRIPTION OF THE PARTIES

1. The 1st Petitioner is the County Government of Meru as enshrined in the Constitution of Kenya.

2. The 2nd Petitioner was the then Governor of the County Government of Meru (as at the time the petition was filed and heard in court).

3. The 1st Respondent is the Land Adjudication and Settlement Officer for Tigania East Sub County whose duties include supervising land adjudication, issuing land adjudication notices and constituting Land Adjudication Committees.

4. The 2nd Respondent is the Principal Legal Advisor to the Government of Kenya charged with among other responsibilities the duty to diligently, impartially, objectively and competently advise the Government on Legal matters and represent it in legal proceedings.

5. The 1st Interested parties are local residents from Muthara Ward and they allegedly occupy the land within Ngare Maua/ Gambella Adjudication Section. They are apparently representing over 10,000 families.

6. The 2nd Interested Party is the Kenya Electricity Generating Company (Kengen).

LITIGATION HISTORY

7. On 11th March 2016, the 1st Respondent issued a notice establishing Ngare Mara/Gambella Adjudication Section. This is the heart of the dispute. Petitioners claims that the law was not followed particularly section 8(1) of the Community Land Act.

8. The 1st petitioner avers that it is currently undertaking various crucial projects within the declared adjudication section i.e the proposed planned townships of Turingwi "A" and Turingwi "B", and a general service unit college, hence the dire need for the 1st Respondent to work with the petitioners before commencing adjudication and constituting the Land Adjudication Committee, as township planning is a devolved function under the Constitution of Kenya.

PETITIONER'S CASE

9. The Petitioners case is that under article 63(3) of the constitution, any unregistered community land shall be held in trust by the county governments on behalf of the communities for which it is held, and that the law applicable in the management of such land is the Community Lands Act.

10. Section 8(1) and (2) of the Community Land Act has been cited where it is provided that;- " Subject to this Act and any law relating to adjudication of titles to land, the Cabinet Secretary shall, in consultation with the respective county governments, develop and publish in the Gazette a comprehensive adjudication programme for purposes of registration of community land.(2) The Cabinet Secretary shall, in consultation with the county government ensure that the process of documenting, mapping and developing of the inventory of community land shall be transparent, cost effective and participatory."

11. To date the said adjudication programme has not yet been formulated and gazetted as envisaged in the Act and the Petitioners aver that such a programme is a prerequisite step before commencement of adjudication.

12. Petitioners have also made reference to Section 3 of the Land Adjudication Act CAP 284. They aver that the proviso states that a County Government in which a particular ascertained community land vests may request for the application of CAP 284 on such land, meaning that such adjudication may only be initiated at the request of the County Government.

13. In compliance with its constitutional and statutory duties, the County Government of Meru through the County Assembly resolved on the 8th of May, 2015, that the County Department of Land Planning should engage the National Land Commission and the Cabinet Secretary with a view of establishing Adjudication sections within Meru County one of them being Ngare Mara/Gambella section which was Trust land held in trust by the county on behalf of the community.

14. Petitioners learnt that on the 11th of March 2016 the District Land Adjudication Officer, Tigania East District (Sub-County), issued a Notice of establishment of an Adjudication Section namely Ngare Mara/Gambella Adjudication Section without officially communicating with the county government, without consultation, devoid of any public participation , and that section 8(1) of the Community Land Act was not complied with.

15. 1st Petitioner states that it is currently undertaking various crucial projects within the declared adjudication section i.e; the proposed planned townships of Turingwi "A" and Turingwi "B. (town ship planning is a function of devolved government). 1st Petitioner also states that it has various public utilities and facilities operated by the Meru County Government that are located within the proposed adjudication section. These facilities include Matabithi Early Child Education Centre (ECED), Kadebene ECED, Ntulele ECED, health centres and a proposed General Service Unit Training College of which the Applicant (Meru County) had already set aside a piece land totalling to about 100 acres for the said purpose within the proposed Adjudication area.

16. Petitioners aver that these projects may stall and that they must be closely guarded against unscrupulous individuals who may irregularly grab public land in the name of Adjudication, and hence there is a dire need for the 1st Respondent (DLASO) to work with the petitioners before commencing adjudication and constituting the Land Adjudication Committee.

17. Petitioners aver that the decision of the District Land Adjudication Officer, Tigania East Sub-County is made without adhering to the legally set procedures and is thus a nullity .

The petitioners' prayers are as follows;

18. A Declaration that the 1st Respondent decision of establishing an Adjudication section over Ngare Mara/ Gambella area without consulting and involving the County Government of Meru and the Citizens living in the area in question amounts to a violation of Article 10 (2), 60(2) and 63(3) of the Constitution of Kenya.

19. A Declaration that the 1st Respondent decision of constituting a land Adjudication Committee over the Ngare Mara/Gambella adjudication section within Meru County consisting of the following individuals: Cyprian Koome, Margaret Kirito, Paul Kobia, Agnes Iyane, Kobia Mbao,Julius Muthiomi,

Phillip Igwela, Zachary Ndegwa, Karith Lithira, Pestus Luthirengu, Ntiritimi and Kanyeru M'Imubwu, is ultra vires being a violation of Article 10(2), 60(1), 63(3), 189(1) and Part 2 of the 4th Schedule of the Constitution of Kenya.

20. An order be issued quashing the decision by the 1st respondent expressed in their letter of 11th March 2016 establishing an Adjudication section for Ngare Mara/Gambella Adjudication Section;

21. An order be issued Quashing the decision by the 1st respondent of constituting a Land Adjudication Committee over the Ngare Mara/Gambella Adjudication Section, that includes the following individuals.

22. The 1st Respondent be compelled to lawfully and procedurally declare the Ngare Mara/Gambella Adjudication Section and reconstitute the Land Adjudication Committee in consultation & with the concurrence of the applicant and in Compliance with the Community Land Act and the Land Adjudication Act.

23. A Declaration that the 1st respondent is obliged to act lawfully, fairly and reasonably in the exercise of their respective statutory mandate.

24. The Honourable court be pleased to issue such orders, directions as may be necessary to safeguard and prevent the contravention of the Constitution of Kenya 2010 by the 1st Respondent.

25. That the costs of this Application be provided for.

Case For The Respondent;

26. The case for the Respondent is contained in the replying affidavit of one Ouru K. Obingo, who is the Tigania East sub County Land Adjudication and settlement officer. The averments contained therein are as follows;

27. That the Land Adjudication Act defines an adjudication area as any area under section 3(1) of the Act. The referred Section states that this is any area of Trust Land.

28. Respondents state that the Land in question was Trust land as per description in the Land Adjudication Act, Cap 284 held by the Petitioner‘s Predecessor County in trust for the residents in the area. The declaration of the adjudication section was therefore made under the existing Act Cap. 284, Laws of Kenya which was and is still operational.

29. Respondents aver that the Land Adjudication act has not been invalidated by enactment of the Community Land Act 2016.

30. That on 8th March, 2016, the issue of Ngare Mara Adjudication section was discussed by Ouuru Obingo, the County Principal Secretary – One Gikunda and the Land Adjudication Director at Maua in the presence of the Cabinet Secretary. Ouro Obingo then personaly gave the pro forma invoice for Ngare mara Adjudication section to the said Mr. Gikunda.

31. Ouro Obingo states that on 9th March, 2016, at a public rally at Kadebene trading Centre, the 2nd Petitioner ordered the general public to lynch him for failing to declare the section as an adjudication section in his presence and the order was almost being executed by the hooligans were it not for the prompt intervention of two Administration Police Officers who rescued him.

32. Respondent therefore state that petitioners were aware that all the Adjudication procedures were dully observed, for which, the declaration was ready and set for 11th March, 2016.

33. The respondents aver that in an adjudication process, Demarcation becomes the genesis of all planning. Such Demarcation does not deprive the landowners their rights but allows them to ascertain the same. As such, even the 78 military barracks are demarcated.

34. Pursuant to the Land Adjudication act, Respondents aver that the appointing authority of the Adjudication Committee is the District Land Adjudication Officer and that due process was followed whereby the land owners elected the families sub-units to be represented and thereafter elected members of their choice in the presence of Provincial Administration Officers. Ouro states that he has no roots in Meru to go as far as knowing the sub-families.

35. Respondents aver that the communities living within the area were in agreement before the Deputy County Commissioner that it is demarcation which can clear the cattle rustling menace.

36. The demarcation exercise is already under way and has been received positively by the area residents and that so far 229 parcels have been demarcated. The process is not in competition with already organized entities.

37. Respondents aver that the adjudication process does not deprive the Petitioners of its mandated role of planning but it is assisting identifying rights and mapping the rights including reservation for the utilities.

38. Respondents also state that the adjudication is a people driven exercise where Adjudication and Demarcation officers merely give technical guidance.

39. Respondents claim that the Community Land Act has mandated the Office of Director of land Adjudication and Settlement to complete the ongoing Adjudication work in sections which were declared under Cap 283 and 284 Laws of Kenya within a period of three years.

40. In support of their case, the respondents availed the following documents as exhibits. Notice to all Chiefs Tigania East Sub-County, Notice declaring Ngare Mara/Gambella Adjudication Section and List of sub-units in the section and committee members.

41. The Respondents aver that the Petition is frivolous, mischievous and is, full of conjecture and lacks evidential matter critical for determination of the issues raised. It is also averred that the orders sought are untenable and should not be issued .Respondents pray that the petition herein be dismissed with costs to the respondents.

CASE FOR 1ST INTERESTED PARTY

42. The case for the 1st interested party is contained in the affidavit of Cyprian Kaume Mukira sworn on 26th may 2017. He is the chairperson of the Gambella Ngare Mara Adjudication Committee. The averments there in are as follows;

43. All the interested parties are local residents mainly from Muthara ward. They are about 10,000 families and they have occupied, developed and established homes on the suit land. These families came to be in occupation of the suit land through a process known as gathering as early as 1950s and by 1970s the entire area was fully occupied.

44. By 1985 the area was established as a fully-fledged administrative block complete with schools, polling stations, dispensaries, police stations, chiefs and other social amenities available for the benefit of the residents ordinarily residing on the suit land.

45. Some of these established institutions include;

46. Schools Gambella Primary School, Ntulili Primary School, Kisima Primary School, Mwero-o-Malia Primary School, Ntulii secondary school and Matibithi primary

47. Provincial Administration Gambela Location with two sub-locations namely Chumbili Sub-location and Gambella Sub-Location, Ngaremara location with two sub-locations namely Turingwi Sub –Location

and Kisima Sub-Location.

48. Health Amenities Matibithi dispensary and Kandebene dispensary.

49. Police Stations & Other Security Apparatus Gambella Police Station, Lowangila Police Station, Gambela A.P Camp, Tractor AP Camp and Rapid Deployment Force at Gambella.

50. Dams Mbataru dam, Kaangu dam, Matibithi dam and Two boreholes at Ntulili

51. Markets Kandebene Market and Gambella Marke

52. Polling Stations Turingwi Primary School polling station, Mwera –o-Malia primary school polling station, Kisima Primary Station polling station and Ntulili Primary school Polling station.

53. Residents of the affected area were sensitized about the adjudication exercise. For instance, on 11th March, 2016 there were two major venues to elect committees one at Ntangilia and another one at Mwero-o-Malia. Residents elected committee members of their choice in a free and fair environment in the presence of the land officers, the administration offices, all the area Chiefs and the Deputy Commissioner.

54. The committee was sworn in by the district land Adjudication and settlement officer at the District Head Quarters on 27th April 2016 and later inducted in readiness to commence the exercise.

55. Sometimes in March 2016, a team was sent from the ministry of lands comprising of surveyors and demarcation officers and they commenced the process of dividing the landing.

56. Initially Ngare Mara/ Gambella Adjudication section was part of a vast chunk of land then known as the northern Grazing area comprising of other adjudication sections namely Rwarera (North Imenti), Akithi (Tigania West), Tigania East) and Liliba (Igembe).

57. However, the land within the Northern Grazing area was never meant to remain as public or community land for communal use as purported by the Petitioners in their petition. The land was set aside and earmarked for occupation and private use by individual land owners who are the local residents of the area.

58. As early as the year 2009, the other sections of the northern grazing area to wit Rwarera, Akithi and Liliaba were declared adjudication sections long time ago and after due process the residents of these areas were issued with title deeds thus securing the ownership of their land parcels, and it is only Muthara region which has been left behind in acquisition of title deeds due to bad governance.

59. The residents have allegedly been discriminated by successive Governments since independence by failing to issue Title Deeds.

60. Due to the proximity of the suit land to major projects such as the LAPSET, Isiolo resort city and the Isiolo airport, unscrupulous officials of the defunct Meru County Council and the successive County Government have previously made attempts to deprive and subdivide the Applicants' said land and allocate them to cartels and cronies. The residents had then petitioned the National government for intervention. They also instituted the High Court of Meru Judicial Review No. 100 of 2010 in an attempt to stop the land grabbing.

61. The interested parties aver that their journey of acquiring title deeds has been bumpy, long, expensive, tasking , and it would be frustrating for them to miss lifetime opportunity on the account of a frivolous and malicious petition which does not serve any of their interest. The issuance of the title deeds is hence long overdue.

62. The 1st interested party states that the applicable law is the Land adjudication act.

63. Once it became apparent to them that the defunct local Government and the successive County Government were out to frustrate their efforts to acquire title deeds, the residents organized themselves into units whereby they invited the Deputy County Commissioner who presided over several consultative meetings with the residents and a petition to declare the area as an adjudication section was forwarded to the Ministry of lands.

64. Pursuant to and in response to petitions by the residents, and further to transparent consultations with the full participation of the people, the Adjudication department in conjunction with the department of survey mapped the Ngare Mara/Gambella area , at a cost of approximately Ksh. 534,781/= and also developed a world view imagery of the area which was sent to the Director of Survey for approval.

65. That further in the spirit of public participation and transparency, The Sub-County Land Adjudication and settlement officer wrote to the chiefs of Ngare Mara and Gambella asking them to invite members of the public to a public baraza to be held at Mwero maila Church grounds whose aim was to publicize the declaration and description of the boundaries for the proposed Gambella/Ngare Mara Adjudication Section.

66. That the said public baraza was widely published and well attended by thousands of local residents and in the presence of the Deputy County Commissioner, Chief, County Government officials and Ministry of Lands, it was unanimously agreed that the declaration of the area as an Adjudication section was long overdue and it was for the benefit of the residents that the said process should kick off with utmost speed.

67. The interested parties state that the petitioners are obviously not acting for the benefit of the community and the Petition has caused anxiety and tension amongst the residents, who view it as a direct affront and violation of their right to acquire and own property as provided under Article 40 of the constitution.

CASE FOR THE 2ND INTERESTED PARTY;

68. Kenya Electricity generating company (KENGEN) is the second interested party. Its case has been advanced by its legal officer, one GEORGE D. AKELOLA through his affidavit of 6/6/2017. He states as follows;

69. THAT pursuant to provisions of Article 63 (2) (iii) of the Constitution , Community Land is defined as land lawfully held as trust land by the county governments ,hence the 1st Petitioner holds all the unregistered community land including the suit property Ngare Mara/Gambella on behalf of the community.

70. By a letter dated 8th April, 2011, the 2nd interested party requested the County Council of Nyambene to allow it to access the trust land and develop a wind farm in the land measuring approximately 17,300 acres.

71. By another letter dated 10th June, 2011, the 1st Petitioner through the County Council of Nyambene responded to the 2nd interested party's letter confirming that its request to use and develop a wind farm on the trust land measuring approximately 17,300 acres had been approved

72. That as a result, the 1st Petitioner and the 2nd interested party reduced their intentions into a Memorandum of Understanding. According to the said Memorandum of Understanding, the 1st Petitioner was to ensure availability of the land under its possession free from encumbrances to the 2nd interested party, and accord the latter party the necessary support for purposes of successful implementation of the said Wind Power Project.

73. By a letter dated 3rd December, 2014, the 1st Petitioner appreciated the efforts put by the 2nd interested party towards implementation of the Wind Power Project, and forwarded a list of seven names

of persons who would form the implementation Committee as per cause III of the Memorandum of Understanding between the parties.

74. In compliance with the law, the 1st Petitioner through the County Assembly resolved on 8th May, 2015 that the County Department of Land, ICT and Planning should engage the National Land Commission with a view of establishing adjudication sections within Meru County. In the said resolution, Ngare Mara/Gambella, the disputed land herein was listed as one of the Adjudication Sections to be established.

75. That the National Lands Commission by a letter dated 22nd February, 2016 appreciated the proposed project by the 2nd interested party and in that light invited the 2nd interested party to a meeting which was held on 25th February, 2016, for the purpose of sharing information with other stakeholders regarding its proposed investment in the wind subsector in the county.

76. In line with the Land Adjudication Act which makes provisions for the administration of the adjudication of any area of Trust land designated by the Minister, and in compliance with the said petitioner's resolution dated 8th May, 2015, the Sub- county Land Adjudication and Settlement Officer Tigania East issued a notice dated 11th March, 2016, declaring Ngare Mara/Gambella as an Adjudication Section

77. That the issuance of the said notice was in compliance with the provisions of Section 5 of the Land Adjudication Act, and the same was not subject to any other Act.

78. That the provisions of section 8 (1) of the Community Land Act do not impose any condition on the Cabinet Secretary to develop and publish in the Kenya Gazette, a comprehensive adjudication programme before the Adjudication Officer can issue a notice declaring Adjudication Section, as alleged by the Petitioners.

79. That the statutory mandates of the Cabinet Secretary and the Adjudication Officer are distinct and are governed by different Acts of Law.

80. That section 8 of the Community Land Act is dependent on the Land Adjudication Act, and consequently, the comprehensive adjudication programme cannot be developed and Gazetted by the Cabinet Secretary before the Adjudication Section is declared by the Adjudication Officer.

81. Further, the 1st Petitioner contradicts itself when it states that it is currently undertaking various projects within the declared adjudication section, yet it passed a resolution on 8th May, 2015 as stated above, listing the said section, Gambella and NgareMara as one of the intended adjudication areas.

82. That section 30 (1) of the Land Adjudication Act barres the petitioners from instituting any civil proceedings concerning an interest in land in an Adjudication Section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of the Land Adjudication Act.

83. It would be premature for the Petitioners to claim any interests in the adjudication area until the process of adjudication is finalized.

84. The Cabinet Secretary is aware of the intended project by the 2nd interested party, and through a letter dated 3rd May, 2016, wrote to the Cabinet Secretary, Ministry of Land, Housing and Urban Development, conveying its support for the 2nd interested party, and urging the Ministry to set aside Ngare Mara/Gambella area for the wind farm project by the 2nd interested party.

85. That the whole process of adjudication was initiated by the Petitioners who have been coordinating with the relevant authorities as evidenced in the documents attached to the affidavit of the deponent here in, and it would be improper to attempt to stop this legal process which it has been aware of and cooperated in from the onset.

SUBMISSIONS

86. The petition was argued by way of Written Submissions which were subsequently highlighted by advocates for the parties, whereof the submission are neither short nor lengthy. The authorities relied upon and supporting documents however form a voluminous bundle to the extent that the file is already appearing old. I do thank the counsels for these fruitful submissions.

PETITIONERS SUBMISSIONS:-

87. Petitioners have raised four issues for determination set forth as follows:-

Whether this Court has jurisdiction to hear the matter and whether the Petitioners have locus to institute the suit.

88. Petitioners aver that there is no provision in either the constitution or the National Land Commission which purports to oust the jurisdiction of the Court to determine a land dispute. It is argued that the petition is properly before this Court in line with the provisions of article 165 of the Constitution. The case of Kilewa Limited & Anor. V. Commissioner of lands & 3 others [2015] e KLR has been cited in support of this point.

89. Petitioners further state that they have approached the Court properly as this case can be termed as a case brought in public interest. Reference has been made to article 258 & 22 of the Constitution as well as the cases of: Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] Eklr, Mining temoi & another vs. governor of county of bungoma & 17 others and the case of Kenya bankers association & others vs. minister for finance [2002] 1klr 61 .

90. Petitioners contend that the constitution has expanded the horizons of locus standi, where any person now has the right to bring an action in public interest, and where breach of the Constitution is threatened in relation to a right or fundamental freedom.

Whether the land in question is unregistered Community land, which law is applicable?

91. Petitioners aver that the land in question is Trust Land which fits the description set out under Article 63(2) (d) iii, of the Constitution. The Petitioners state that this land has always been Trust Land held by the County Council of Nyambene but now vests in the County Government of Meru.

92. Petitioners further state that the Adjudication Process should be conducted under the now enacted Community Land Act which is quite elaborate and sensitive to the special nature of the Community Land.

93. Petitioners allege that under Section 48 of the Community Land Act, the Cabinet Secretary may make regulations for the purposes of ensuring a better and proper manner of effecting this act. Under; section 48(2), the regulations are supposed to prescribe among other issues, the procedures of recognition and registration of parcels of community land rights and the requirements for investment partnership.

Whether the Adjudication Process has been commenced in flagrant disrespect of the Constitution, the land Act, Adjudication Act, Trust Land Act and Community Land Act.

94. Petitioners have submitted that under the land Adjudication Act, it is critical for the County Government to make a request in the initiation of the Adjudication Process. It has been submitted that the land Adjudication Officer proceeded to invoke the provisions of section 5 of the aforementioned Act, without ascertaining that the County Government had made the request. Petitioners have cited article 183 1 (c) of the Constitution stating that only a county executive can manage and coordinate functions and therefore, the resolution of the County Assembly can’t be used to violate the law.

95. It is also contended by the Petitioners that no order was made by the Minister as stipulated under

section 3 of the Land Adjudication Act, and hence there was no basis upon which the 1st Respondent declared the land as an Adjudication Section. Petitioners therefore aver that the 1st Respondent acted ultra-vires.

96. Petitioners have cited the case of Gitson Energy Limited v Francis Chachu Ganya & 6 others [2017] eKLR where the Court of Appeal upheld the decision of the High court quashing the decision of the Commissioner of Lands relating to the setting aside of 60,705 hectares of Land in Bubasi Location for the purpose of Gitson Energy. The court stated the following: "There was a clear procedure set out in law on how to set apart trust land. The then County Council of Marsabit flouted and ignored that process completely against the law and proceeded to set apart 150000 acres of trust land without consulting the residents of the affected area".

97. Petitioners further submit that the 1st Respondent did not bother to even formerly notify the County Government about the said declaration, yet the 1st Petitioner is constitutionally charged with the functions of County Planning, development, land survey, mapping, boundaries and fencing.

whether there was public participation.

98. Petitioners have submitted that Public Participation in matters Governance in this country is now a key Constitutional principle that is provided for under Article 10 of the Constitution of Kenya.

99. Petitioners have submitted that there was no public participation and that the county government got to know about the declaration notice via informal means. The 1st Respondent totally excluded the County Government from the process.

100. In support, of the Principle of public participation, Petitioners have relied on Article 61 (1) of the Constitution: "all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals".

101. Reference has also been made to the Advisory opinion In the matter of National Land Commission 2015 Eklr Advisory Opinion Reference no. 2 of 2014, Thuku Kirori & 4 Others v. County Government of Murang'a Petition No. 1 of 2014; [2014] eKLR, Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others, Petition No. 532 of 2013 (Robert Gakuru Case), Agricultural, horticultural and forest industry training board vs. Aylesbury mushrooms ltd [1972] 1 all, Centre For Rights Education And Awareness(Creaw) & 7 others vs. Attorney General [2011] Eklr and Tinyefuza vs. attorney general, constitutional appeal no. 1 of 1997 amongst others.

102. What the petitioner is emphasizing is that public participation flows from the supremacy and sovereignty of the Kenyan people.

RESPONDENT'S SUBMISSIONS

103. Respondents raise three issues: -

What Is The Applicable Law:
Respondent content that the Community Land Act came into force on 21.09.16 while the provisions of the Land Adjudication Act had been invoked 6 months earlier. Respondent hence claim that the applicable law is the Land Adjudication Act (Cap 284) as opposed to Community Land Act. It is argued that no provision of the Community Land Act has retrospective application.

104. Respondents concede that Article 63(3) of the Constitution, vests unregistered community land in trust by the 1st petitioner (County Government) on behalf of the community but that the proviso should be read together with sub article 2 (d) "land that is- (i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) Ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) Lawfully held as trust land by the County Government, (3) Any unregistered community land shall be held in trust by County Government on behalf of the

communities for which it is held.

105. Respondents therefore contend that Article 63(3) is not in conflict with the Land Adjudication Act since the latter's main object is to provide for ascertainment of and recording of rights and interest in TRUST LAND.

Whether the petition is competent?

106. Respondent contend that the jurisdiction of the court has not been properly invoked, and hence the remedies sought are not available to the petitioner.

Are the actions of the Adjudication Officer ultra vires?

107. The respondent has submitted that the Land Adjudication Officer acted within his powers as provided for under the Land Adjudication Act, particularly Section 5, Section 6 and 20 of the Act. It has been argued that the whole process of adjudication is participatory and that the Act has appeal mechanisms. Respondent urged the court to guard the interest of the local inhabitants.

108. Respondents finalized their submissions by stating that the petition is a non-starter, is mischievous and is against public interest and the same should be dismissed with costs to respondents.

1ST INTERESTED PARTY'S SUBMISSION

109. The issues raised by the 1st Interested Party are five.

Whether this Petition is properly before the Court

110. It is argued that Petitioners are challenging the Adjudication process and therefore the matter ought to have been filed as a Judicial Review Motion and not a Constitutional Petition citing Anarita Karimi and Njeru vs. The Republic (1976-1980)KLR 1272.

111. 1st Interested Party contend that Petitioners must prove the nature of the violations, who has violated the Constitution and in what manner.

In whose interested is the petition filed?

112. It is averred by the 1st Interested Parties that it is not clear in whose interest the petition is brought. The 1st interested parties aver that they are the owners of the land and hence as between their interest and those of the Governor, then the interests of the 1st Interested Party should prevail.

Who owns the land? Who is in occupation of the land?

113. 1st Interested Parties state that the Suitland is not idle as it is occupied by over 10,000 families who have lived on that land since time immemorial. These people are the ones who stand to benefit from the process of adjudication, where the land will undergo transition to be converted to private use. The fall back on this point is Article 6, “that land belongs to the people”, and not the other way round and therefore the County Government has no rights of its own.

Whether the land in question is Community Land.

114. It has been argued for the 1st Interested Parties that Petitioners have not fulfilled the requirements of Article 63 of the Constitution that for a claim of community land to hold, article 63(1) requires clear identification of communities in terms of ethnicity, culture, or similar Community interests which Petitioners have failed to demonstrate. It is also argued that Article 63(2) (3) and 4 sets out the various qualification of Community land and the persons to whom it belongs which qualification the Petitioners have failed to meet and further, that no Act of Parliament had declared the land to be Community Land at

the time of Adjudication process . In support of this averment, 1st Interested Parties have relied on the case of Satrose Ayuma and 11 others vs. Railways Staff Retirement Benefit Scheme Pet. No. 65 of 2010 NRB.
The 1st Interested Party has further cited Article 43(1) (b), Article 28, Article 19 (2) , Article 20 (3) (4) and Article 259(1) of the Constitution.

Is the Adjudication process perpetuating historical Injustices?

115. The 1st Interested parties argue that any alleged issues of historical injustices to allocation of land is a matter for investigation by the National Land Commission. The 1st Interested parties therefore claim that the Petitioners by neglecting the National Land Commission deprived the 1st Interested parties the opportunity to fully put up their respective defences, pursuant to the provisions of the National Land Commissioner Act 2012. On this point, the 1st Interested parties have cited the case of Silas otuko vs. hassan ali joho & 3 others (mombasa petition no. 44 of 2013).

116. The 1st Interested parties contend that "Clearly, but for the Political intentions and selfish gains at the expense of a portion of the Kenyan population within Muthara, the Petition before this Court is premature, the Petitioners having missed the correct and initial procedural step that should have been followed, before finding its way to this Court".

2ND INTERESTED PARTY'S SUBMISSIONS

117. The 2nd Interested Party associated itself with the Submissions of the Respondent on the issue of applicable law. It also associated itself with the Submissions of the 1st Interested Party on the averment that the Petitioner ought to have approached the Court by way of Judicial Review.

118. The 2nd Interested Party is urging the Court to keenly look at the Affidavit of one George D. Akelola where it is alleged that the Petitioner admits that the land exist and that Kengen had asked for the Land to generate Power. It is alleged by Kengen that the Petitioner and confirmed that the land only requires adjudication process to be undertaken. However, the Petitioner has painted a picture of empty land devoid of people. Kengen therefore poses a question "When will the process begin and when are we going to get land to generate power for Kenyans". Kengen further states that the Petitioners did not disclose the issues coming out in the Petition and it appears that the County Government is capable of giving land at will.

119. Kengen has urged the Court to see Page 5 clause 6 (1) in the memorandum of understanding where it indicates what the Petitioners state they can do.

120. Kengen also states that there is nothing wrong with the adjudication process as it is the County Assembly of Meru which had resolved to have the area as an adjudication area.

121. Kengen further argues that the component of finance needs to be looked at as the Court needs to guard public funds which have been earmarked for the adjudication process.

122. Kengen submits that the trust land to be adjudicated is identified in accordance with section 5 of the Land Adjudication Act. It is averred that the 1st Respondent acted within its statutory mandate provided under Section 5 of the Land Adjudication Act, and did not step outside the field of operation entrusted to it.

123. It was on the basis of the resolution by the 1st petitioner county assembly, and the statutory mandate imposed by section 5 of the Land Adjudication Act that the 1st Respondent issued a notice dated 3rd May, 2016 declaring Ngare Mara/Gambella as an adjudication section.

124. Further, Kengen contends that reading of Section 8 (1) of the Community Land Act does not impose any condition that such a notice shall only be published by the 1st Respondent only after the gazettment of a comprehensive adjudication programme by the Cabinet Secretary. The statutory mandates of the

Cabinet Secretary and the Adjudication Officer are distinct and are governed by different Acts of Law.

125. Further, Kengen submits that the said section of the Community Land Act is SUBJECT TO the Act and any other law on adjudication of titles relating to land, which is the Land Adjudication Act in this case. Kengen therefore contends that the provisions of Section 8 (1) of the Community Land Act are dependent on the Land Adjudication Act as relates to the process of adjudication, and consequently, the comprehensive adjudication programme cannot be developed and Gazetted by the Cabinet Secretary before the Adjudication section is declared by the Adjudication Officer. Reference has been made to the case of Real Deals Limited & 3 Others v Kenya National Highways Authority & Another & another [2015], where the court held that; ‘’ In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority.’’

126. Kengen also has raised an issue with the petitioners claim that they are currently undertaking crucial projects being the proposed planned townships of Turingwi ‘’A’’ and ‘’B’’, on the disputed adjudication area.

127. Kengen contends that Section 6 of the Community Land Act stipulates the roles of the County Government. The Act does not give any powers to the County Government to covert such land for its own use. Therefore, if the county Government intends to take possession or compulsorily acquire a part of any trust land which it holds in trust for the community, then the due process of acquiring the same should be followed as stipulated under the Land Adjudication Act.

128. Kengen submits that the Land Adjudication Act sets out the procedure to be followed by parties in having their claims recorded whenever an adjudication section is declared and further also sets out the procedure to be followed by any party who has been or is aggrieved by the adjudication process. See section 13 of the Act.

129. Kengen has urged this court to protect and uphold the law by allowing the adjudication process to continue, with a view to protect the interests of the community.

DETERMINATION

130. I have considered all the argument raised herein including the submissions of the parties and I sum up the issues for determination as follows:-

a) Whether this Court has jurisdiction to hear the matter, whether the Petitioners have locus to institute the suit.

b) Whether the land in question is unregistered community land.

c) Which law is applicable. (The Constitution, Community Land Act, Land Adjudication Act Trust Land Act).

d) Whether the Adjudication process has been commenced in flagrant disrespect of the law.

e) Whether there was Public Participation.

f) In whose interest is the petition filed?

WHETHER THE COURT HAS JURISDICTION TO HEAR THE MATTER, WHETHER THE PETITIONERS HAVE LOCUS TO INSTITUTE THE SUIT.

131. The gist of this Petitioner is the Notice of 11:03:16 which established Ngare Mara/Gambella as an Adjudication Section. Petitioners aver that the notice was issued in violation of the law, that there no consultation and no public participation. Respondent and the Interested Party on the other hand aver that

this Court has no jurisdiction to entertain the Petition as the issues raised are in the ambit of Judicial Review as what is being challenged is the process of adjudication.

132. I find that indeed some of the issues raised here in are in the ambit of judicial review. Such issues include the allegation that the decision of the 1st Respondent, who is the District Land Adjudication and Settlement Officer- Tigania East Sub County (DLASO), was ultra-vires. Other issues are those touching on the composition of the committee, as well as the issue of consent under section 30 of the Land Adjudication Act.

133. However, an issue has arisen as to whether the suit land is unregistered community land, who and how such land should be managed, and what is the law applicable. . A petition, like the present one is the proper forum to determine these issues.

134. I am also in agreement with Petitioner's submissions that the case is one brought in public interest as outlined in article 258 1 & 2 of the Constitution; see Michael Osundwa Sakwa v. Chief Justice and President of Supreme court of Kenya and Another (supra) and case of Mining Temoi & Another v. Governor of County of Bungoma and 17 others (Supra).

135. I find that the proceedings herein do not just touch on the land Adjudication Act. Constitutional issues have been raised and other statutes have been referred to including the Community Land Act. It was therefore not necessary for the petitioners to get the consent under section 30 of the land adjudication Act. It therefore follows that the petition is properly before this court and petitioners have locus standi to institute these proceedings.

WHETHER THE SUIT LAND IS UNREGISTERED COMMUNITY LAND?

136. The 1st Interested party avers that no Act of parliament had declared the land to be community land at the time of Adjudication process. It is also averred that for the claim of community land to hold, then there is a requirement for clear identification of communities in terms of ethnicity, culture, or similar community interest as set out in article 63 (1) of the Constitution. 1st Interested Party contends that Petitioners have not demonstrated that the land in question is unregistered community. The 1st Interested party does not however state in which category of land the Suitland falls under.

137. The other parties, Petitioners, Respondents and 2nd Interested Party are in agreement that the Suitland is unregistered community land.

138. The land in question is definitely not registered hence the adjudication process. The history of the Suit land as given by the 1st interested party, is that the community members have been using this land for decades pursuant to a process known as gathering of the land. Their ultimate goal is to get title deeds. Isn't this enough evidence that the community members have similar community of interest?

139. The 1st interested party's claim appears to be anchored on ancestry. The claim therefore falls under article 63(2)(d) of the constitution. The Suit land is hence unregistered community Land.

APPLICABLE LAW

140. To start off this analysis is the question; who owns the Suit land. The answer is to be found in article 61 (1) of the Constitution which stipulates that: "All land in Kenya belongs to the people of Kenya collectively as a nation as communities, and as individuals".

141. The owner of the land, (In the present case, the community) remains the central feature in so far as the dispute is concerned.

142. Section 63 2(d) of the constitution provides that; "Community Land consists of land that is –(i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines". (ii) Ancestral lands and lands traditionally occupied by hunter-gatherer communities. (iii) Lawfully held

as trust land by the county governments”.

But not including any public land held in trust by the County Government under Article 62 (2).

143. Article 63(4) 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”.

144. Pursuant to provisions of article 63 (5) “parliament shall enact legislation to give effect to the article”. From this provision, the Community Land Act came to be.

145. The upshot of the foregoing provisions of the Constitution is that, unregistered community land held in trust by the County Government doesn’t remain in that state indefinitely. It is subject to the dynamisms provided for under article 63 (4) of the Constitution.

146. As rightly submitted by the Petitioners, the various provisions of the Constitution must be read together in order to get a proper interpretation.

147. In the ADVISORY OPINION REF. NO. 2 OF 2014, the Supreme Court observed that “This Court has previously held that Constitutional Interpretation has its distinct features, as compared to ordinary statutory interpretation, the former consistently enacting substance and intent rather than form…….. The Constitution is to be interpreted in a holistic manner that entails reading it alongside other provisions, and considering the historical perspective, purpose and intent of the provisions in question”.

148. It means that in resolution of the dispute at land, article 63 of the constitution must be read alongside and against other provisions of law in order to arrive at a just and fair conclusion.

149. Pursuant to provision of Article 63 (4) of the Constitution, the legislation specifying the nature and extent of the rights of community members in so far as the present dispute is concerned is primarily the land Adjudication Act and the Community land Act. The Trust Land Act is no longer applicable as it has been repealed by Community Land Act.

150. For the Petitioners, it is argued that the applicable law is the Community Land Act. They have cited Section 8 (1) and 2 where it is stipulated that: “ (l) Subject to this Act and any law relating to adjudication of titles to land, the Cabinet Secretary shall, in consultation with the respective County Governments, develop and publish in the Gazette a comprehensive adjudication programme for purposes of registration of community land. (2) The Cabinet Secretary shall, in consultation with the county governments ensure that the process of documenting, mapping and developing of the inventory of community land shall be transparent, cost effective and participatory.”

151. Respondents on the other hand aver that the application of the Land Adjudication Act has not been invalidated by the enactment of the Community Land Act of 2016. Respondent further contends that the Community lands Act came into force on 21.09.16 while the provisions of the Land Adjudication had been invoked 6 months earlier.

152. The preamble of the Land Adjudication Act provides that it is “AN ACT of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto”.

153. The Community land Act on the other hand has its preamble reading as follows; “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”.

154. Section 46 (1) and (2) of the Community Land Act provides that:-“Unless the contrary is

specifically provided in this Act, any right, interest, title, power, or obligation provisions acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall be deemed to have been acquired under this Act. Unless the contrary is specifically provided in this Act or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition in community land, any such transaction shall be continued in accordance with the provisions of this Act"

155. Section 2 of the Transitional Provisions of the Community Land Act provides that: - "All rights, obligations and contracts which, immediately before the coming into operation of this Act, were vested in or imposed on a former institution shall be deemed to be the rights, obligations and contracts of the registered community".

156. Section 8 of the transitional provisions of the Community Land Act stipulates: - "Nothing in this Schedule shall be construed as giving exemption to the application of the provisions of Article 63(4) of the Constitution".

157. The importance of the ascertainment and recording of rights in unregistered community land can be discerned from the fact that the two main statutes dealing with the adjudication process (the Land Adjudication Act and Land Consolidation Act) were not repealed by the enactment of Community Land Act, yet other legislation dealing with Community Land for instance, The Land (group Representatives) Act Cap 287 and Trust Land Act (Cap 288) have been axed.

158. As rightly argued by the Respondent, no provisions of the community land Act have retrospective application. In the present dispute, the adjudication process had commenced 6 months before the coming into force of the Community Land Act (in September 2016).

159. It is clear that the Community Lands Act was meant to provide a seamless transition in so far as management of community lands is concerned. The two statutes, (the Community Lands Act and the Land Adjudication Act) operate in harmony and are not in conflict. Further, I find that the Community Land Act did not oust the application of the Land Adjudication Act and Land Consolidation Act in matters of adjudication. If the drafters of the Community Land Act had intended that only Community Land Act in matters Adjudication would apply, nothing would have been easier than to axe off the two acts.

WHETHER THE ADJUDICATION PROCESS WAS COMMENCED IN FLAGRANT DISRESPECT OF THE LAW?

(a) Application of Section 8 of Community Lands Act.

160. The Petitioners have argued that Section 8 (1) of the Community Lands Act was not complied with, that the 1st Respondent could not purport to exercise powers appertaining to adjudication before the Cabinet Secretary and the Meru County Government had been consulted and developed a comprehensive Adjudication programme.

161. However, I find that the Notice establishing Ngare mara/ Gambella as a adjudication Section had been issued in March 2016 before the coming into force of the Community Lands Act. The saving and transitional provisions already cited also give guidance on how the adjudication process is to be conducted during the period of transition. The allegation by the Petitioners that section 8 of the Community Land Act was flouted therefore is unfounded.

(b) Application of Section 3 of Land Adjudication Act.

162. At the heart of this dispute is the interpretation of Section 3 of the Land Adjudication Act, where it is provided that "1) The Minister may by order apply this Act to any area of community land if—(a) the county government in whom the land is vested so requests; and (b) the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered".

163. Petitioners contend that Respondents invoked provisions of Section 5 of Land Adjudication Act (on establishment of Adjudication Sections) without complying with Section 3 of the Land Adjudication Act.

164. The first issue to consider is whether the 1st Petitioner made a request pursuant to provisions of section 3(a) of the Land Adjudication Act?

165. It is apparent that the County Assembly of 1st Petitioner on 08:05:15 made a resolution for the department of land, ICT and planning to engage the N.L.C with a view of establishing adjudication sections.

166. The 2nd Interested Party has given an account of its engagement with the Petitioners' predecessors, the County Council of Nyambene as the former wanted to develop a wind farm. The 2st Interested Party avers that the Memorandum of Understanding between it and Petitioners culminated in the County Assembly of 1st Petitioner's resolution of 8.5.15.

167. The foregoing is a confirmation that the Petitioners were in the picture regarding the proposed Adjudication process. I however find no evidence of a formal request made by the 1st Petitioner.

168. The second issue to consider is whether the Minister had considered it expedient that the rights and interests of the persons in the land should be ascertained and registered and whether he made an order?

169. The 1st interested Parties who are the alleged residents of the area have given a detailed account of how other areas in the vicinity to wit Rwarera Akithi and Liliaba were declared Adjunction Sections long time ago and that the residents of these areas have even been issued with title deeds. The 1st Interested parties aver that it is only their region called Muthara which has been left behind in acquisition of tile deeds due to bad governance.

170. As for the 1st Respondent "the issue of Ngare Mara Adjudication was discussed by him, the County Principal Secretary one Mr. Gikunda and the Land Adjudication director at Maua in the presence of the cabinet secretary.

171. The foregoing in addition to the meeting of 8.3.16 in Maua is an indication that the Minister had considered the issue.

172. However, there is no express order, or any formal document showing that the minister acted upon the consideration set out in Section 3 of the Land Adjudication Act.

173. My conclusion is that there were no formal request by the County Government and there was no formal order by the Minister to have the area declared as an adjudication section.

174. Should the court then proceed to invalidate the process of Adjudication and allow the Petition?. After an in-depth , holistic and careful analysis of the present dispute , and after delving unto the roots of the adjudication process, I find that there are factors which stand in the way of invalidating the process. I proceed to analyze the forth the said factors as follows;

(a) Interpretation of the Law;

175. The present situation is one where the Court is dealing with an extremely emotive issue, land. The Court is alive to the fact that the suit land is occupied, yet the rights and interest of the residents have never been formerly ascertained. Against this background the law ought to be interpreted in a holistic manner.

176. In the ADVISORY OPINION REFERENCE NO. 2 OF 2014, the Supreme Court, while considering the meaning of holistic interpretation of the constitution, had made reference to the case of: "In the Matter of Kenya National Commission on Human Rights Sup. Ct. Reference No. 1 of 2012, [2014] eKLR, where

the same court had observed as follows; “But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

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

178. Article 20(4) provides that “in interpreting the bill of rights, a Court or tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom”.

179. In GATIMU KINGURU V MUYA GATHANGI [1976] Kenya L.R 253, it was stated that “In interpreting a statute, in the absence of an express provision to that effect, it is always wrong for the court to whittle down the rights and privileges of the subject. The court’s task is to protect the rights and privileges of the people, not to clip and shear them”.

180. The word used in Section 3 of the Land Adjudication Act is MAY and not SHALL regarding what the minister is required to do. Further, the proviso (section 3) does not state in which manner the request and order is to be made.

181. Pursuant to provisions of article 159 2 (d) “Justice shall be administered without undue regard to procedural technicalities”.

182. My conclusion on this issue is that the absence of a formal request by the 1st petitioner and an order by the minister should not hinder the quest for substantive justice for the people of Kenya particularly the Community members who are set to benefit from the Adjudication process.

(b) The historic aspect of the adjudication process

183. The Land Adjudication Act came into force in June 1968. Its purpose was to ensure that rights and interest in land were ascertained. 50 years down the line the process of ascertaining and recording of rights has never commenced at Ngare Mara. Why is that so?. Neither the Petitioners, nor the Respondent have shed light on this issue.

184. The 1st Interested Parties have given a detailed account of what has befallen the area residents. It is averred that there are about 10, OOO families who have occupied the area (mainly Muthara Ward) from as early on 1950. The residents came to settle on the land through a process known as GATHERING. That by 1985, there was a fully-fledged administrative block complete with schools, polling stations, dispensaries, Police stations, Chiefs centers, markets, dams etc.

185. The Petitioners do confirm that indeed there are public utilities on the ground for instance, ECED schools and health centers. Surely there would be no need for schools health centers and other such amenities if there were no people residing in this area. The land is hence not idle land though petitioners have painted a picture of an empty vast land devoid of people.

186. In an article “Land Tenure Reform and changes in land use. by “Thomas Smucker”, it was quoted that “The objective of the individualization of tenure is to increase tenure security through the state-sponsored adjudication of rights, thereby creating incentives for improved land management and increased productivity…
Land tenure is often considered as a “bundle of rights”, indicating that the holder of tenure may possess any of a suit of use rights such as cultivation or extraction of resources (Hahn 1998). The nature of a system of land tenure relation can be categorized with reference to the breadth, duration, and assurance of

rights (place et. Al. 1994). The breadth of rights refers to uses and resources and encompassed and the condition under which such use is granted. The duration of rights refers to the length of time for which tenure is granted. The assurance of rights consists of the certainty with which land use and tenure rights that are granted will not be prematurely interrupted or denied…. The current process of reform entails the adjudication of land rights to individuals… and the registration and titling of adjudicated parcels. The implications of these reforms for individual households and for changes in land-use systems continue to be of central importance to rural development in Kenya".

187. This write up aptly captures the impact of the adjudication process. The individualization of land tenure is something held dear by Kenyans, where the ultimate goal is for one to hold on to a document known as a title deed. This certainly brings about social economic dynamics in terms of increased security, easier and greater land productivity, certainty in inheritance rights and it generally reduces land conflicts.

188. I am certain that petitioners are aware of this history. It is in the public domain (regarding the quest for title to land). The question then is, what have the petitioners done to ensure that the community members will get their titles to the land In Ngare Mara?. What have the petitioners done towards the implementation of the County Assembly Resolution of 2015? Nothing much. Going by this petition, the Petitioner is not keen on dealing with this historic aspect of the adjudication process. If anything, allowing this petition would only perpetuate historical injustices for the people of Muthara/ Ngare Mara.

(c) Principle of Legitimate Expectation.

189. Legitimate expectation is but one variant aspect of the duty to act fairly; see Msagha vs. Chief Justice and 7 others Nairobi HCMCA No. 1062 of 2004 (2006)2 KLR.

190. In Keroche Breweries Limited & 6 others v Attorney General & 10 others [2016] eKLR, G V Odunga adopted the position by De Smith, Woolf & Jowell, in "Judicial Review of Administrative Action" 6thEdn. Sweet & Maxwell page 609 where it is stated: "A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

191. In R vs DEVON COUNTY COUNCIL ex parte P. BAKER, [1995] 1 ALL ER, Lord Simon Brown stated that: "….it is the interest rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness...".

192. The land in question is not idle land. It is has been occupied by the community members since time immemorial and that is why there are political , social and economic infrastructures already in place .The 1st Interested Party have a legitimate expectation that they will get title deeds. This expectation has been there for decades. The community members can only acquire rights of proprietorship after the process of ascertainment of rights and interests in the land has been accomplished through the adjudication process.

193. However, such legitimate expectation stands to be thwarted should the adjudication process be halted.

(d) Principle of intra and inter-generational equity.

194. The Principles of intergenerational and intra-generational equity are enshrined in Section 18 (a) (iv) of the Environment and Land Court, No. 19 of 2011 where it is stated: "In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles – (a) The principles of sustainable development, including- the principles of intergenerational and intra generational equity.

195. In Peter K. Waweru v Republic [2006] eKLR the High Court comprised of a three judges bench stated that; “Intra-generational equity involves equality within the present generation, such that each member has an equal right to access the earth’s natural and cultural resources. In our view this includes the balancing of the economic rights of the town dwellers with the rights of the down-stream dwellers to use unpolluted water. If the balance is achieved the chances of achieving inter-generational equity shall have been enhanced. ...”

196. E. Brown Weiss, a well-known writer on the subject in his work on “ Fairness to future generations un university press, 1989 at pp 36 – 37 has defined the intergenerational principle in these words ;“The proposed theory of intergenerational equity postulates that all countries have an intergenerational obligation to future generations, as a class, regardless of nationality ... There is increasing recognition that while we may be able to maximize the welfare of a few immediate successors, we will be able to do so only at the expense of our more remote descendants,………….” The same author in his works “In Fairness to Future Generations and Sustainable Development." American University International Law Review 8, No. 1 (1992): 19-26. Stated that ;“. As members of the present generation, we are both trustees, responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves. .... In the intergenerational context, people have planetary rights and obligations which derive from their relationship with past and future generations. Intergenerational rights are present in all generations whether they are immediate successive generations or more distant.

197. I now pose this question; Did the petitioners taken into account the principle of intra and intergenerational equity while bringing forth this petition?. How does the present and future generations stand to benefit by halting the adjudication process?. The answer can be conceptualized from what has happened in the past (or what did not happen). The act, the Land Adjudication Act came into force in 1968.For the last 50 years, successive generations have been waiting for their rights and interests in the land to be ascertained as envisaged in the act but sadly this never came to be.

198. How comes, in other areas like Rwarera and Akiithi, apparently in the same vicinity have benefited from Adjudication. Why it is that Ngare Mara area has been left behind. What is apparent is that without ascertainment of rights and interests in the land the communities would not be able to fully utilize the land in terms of social economic benefits.

199. Successive generations have inherited a desolate, uncertain, bumpy, long and expensive journey of life in their quest to have rights of proprietorship. The generations to come face a bleak future if this petition was to be allowed.

((e) The right to development

200. Close on the heels of the intra and intergenerational equity is the Right to development. The United Nations in their General Assembly Resolution 41/128, Declaration on the Right to Development, A/RES/41/128 (4th December 1986) available from undocs.org/A/RES/41/128 under Article 1, defines the right to development as “ an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be realized…”

201. The right to development is therefore an integral part of fundamental human rights. The community ordinarily residing on the suit land are entitled to enjoy this right.

202. In order to achieve remarkable progress towards implementation of the right to development, there is a need to have effective development policies and programmes. One such programme is the one being undertaken by the 2nd interested party.

203. The mandate of the 2nd Interested Party is to inter alia “generate Power”. This would certainly promote economic growth not just for the County government of Meru but even for the entire nation.

204. It is notable that development especially economic development, facilitates the enjoyment of all human rights, acting like a spring board to propel human beings to greater and higher standards while on planet earth. It follows that allowing the petition would actually curtail the enjoyment of the right to development.

(f) Component of finance

205. It is apparent that public funds have been pumped into the ongoing process. The Petitioner has been aware of this process for quite some time. In paragraph 9 of the Petition, petitioners aver that they learnt about the Notice of March 2016 several months after it had been issued. But there is no explanation as to when they learnt about this notice and how?

206. The present Petition was filed on 5.4.17 more than a year after the Notice was issued. Petitioners ought to have been candid on when they learn about the notice considering that it is a Constitutional requirement to guard public funds; see article 201 (d). “Public money shall be used in a prudent and responsible way”.

(g) The stage in which the process has reached.

207. According to Respondent, the adjudication process is already underway, it has been received positively by area residents and that so for 229 parcels have been demarcated.

208. I am conscious of the fact that the Community Lands Act has pegged the time to declare an area as an adjudication area at 3 years; see Section 46 (6) of the Community Lands Act.

209. If this petition was allowed and the adjudication process is halted, then there is a real risk that the time lines would throw the process into disarray even if there is a window for extension. The court must guard against this risk.

210. The Petitioner should therefore be at the forefront of supporting the process and ensuring that it runs smoothly, instead of calling for the disbandment of the entire process altogether. However, the 1st Respondent ought to mid wife the Adjudication Process right from the word go to ensure that there is full compliance with the law. My findings are that the Adjudication Process should continue despite the shortcomings in compliance with Section 3 of the Land Adjudication Act.

PUBLIC PARTICIPATION

211. I am in agreement with Petitioners contention that “Public participation in matters Governance is now a Key Constitutional Principle as provided under article 10 of the Constitution”. The Petitioners have availed very relevant and useful authorities on this issue.

212. The question however is, who should be complaining that there was no public participation?. The petitioners contend that the residents were not involved.

213. The residents on the other hand (1st Interested Party’s) have given a detailed account of the Community engagement with the stake holders in so far as the Adjudication process is concerned. The 1st Interested party explained how they have pursued the issue of adjudication over a long period of time. In one such letter, (MM 5), some residents were writing to the minister of state in the provincial administration and internal security on 21.09.11 expressing their concern that the land was being alienated without proper procedures.

214. The residents state that out of their persistence, there was transparent consultations with the full participation of the people, the adjudication department and the department of survey which had mapped out the Ngare Mara area.

215. The 1st Interested Party also contend that the area residents had been sensitized about the impending

process through their Chiefs.

216. I have seen a document MMI, which is a list of the land owners with their identification particulars and signatures grouped into various sub units.

217. There is also “MM 7” a letter by Ouro (Respondent) informing Chiefs of the area to disseminate information on the impending adjudication process.

218. It is from this participation of the people that the Committee was formed. “MM 8” is a document containing the Committee members selected from each sub unit. The Petitioners have not availed any evidence to counter what has been availed by the residents and the Respondent. Not even one resident has complained that they were not aware of the process.

219.The present case is distinguishable from the Gitson Energy (supra) case in that in the later case, the residents were not consulted.

220. The allegation that there was no public participation is therefore unfounded.

IN WHOSE INTEREST IS THE PETITION FILED?

221. Article 63(3) of the Constitution places the 1st Petitioner in a fiduciary relation with the Community. The Petitioners are supposed to act for the benefit of the owners of the land. However, from the evidence emerging from this Petition it is not clear in whose interest the Petition has been filed.

222. The 1st Interested Parties have stated that they have been discriminated by successive Governments since independence by failure to issue the residents with title deeds. They have given an account of how they had to file High Court JR. NO. 100 OF 2010 (Meru) in a bid to stop the land grabbing that had set in due to the proximity of the Land to the LAPSET PROJECT, Isiolo Resort City and Isiolo Airport, perpetrated by unscrupulous officials of the defunct Meru County Council. The residents also averred that the Successive County Government had previously made attempts to deprive and subdivide the land and allocate it to cartels and cronies?

223. The Petitioners have not commented on these allegations, not even the existence of the case Judicial Review 100 of 2010. What the Petitioners have done is to paint a picture of an empty land devoid of people.

224. The Petitioners claims that there are proposed projects including townships known as Turingwi ‘A’ and ‘B’ etc. The proposed projects cannot however be a justification to halt the adjudication process, since the adjudication process does take into account the provision of public utilities.

225. The Land Adjudication Act has on elaborate mechanism upon which the claims are anchored on. The claims are made in accordance with Section 13 of the Land Adjudication Act. It is not a free for all scenario. The Public utilities will still remain under the care of the Petitioners. I find that the adjudication process is long overdue. There is no justification at all as to why Muthara/Ngare Mara region should lag behind in the process of acquisition of title deeds.

CONCLUSION

226. I find that this Petition has no merits, the same is dismissed with costs to Respondents, 1st interested parties and 2nd Interested Party.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 1st FEBRUARY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Miss Kingu for Respondent Present

Ashaba for 1st Interested Parties Present Akelola H/B for Mbugua Kamau for 2nd Interested Party present

No Appearance for Petitioners

HON. L. N. MBUGUA

ELC JUDGE