Chepng'ok & 3 others (Petitioning on Behalf of Members of the Ndorobo Community Registered as Kiboroa Self - Help Group) v National Land Commission & 4 others (Environment and Land Petition 1(B) of 2024) [2025] KEELC 4681 (KLR) (17 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4681 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND PETITION 1(B) OF 2024

CK NZILI, J

JUNE 17, 2025

BETWEEN

CALEB KIPTOO CHEPNG'OK ..... 1ST PETITIONER

DAVID KESHAN NAIBEI ..... 2ND PETITIONER

JOHN SIKOI MASAI ..... 3RD PETITIONER

VINCENT KAMWANDIL NDIEMA ..... 4TH PETITIONER

PETITIONING ON BEHALF OF MEMBERS OF THE NDOROBO COMMUNITY REGISTERED AS KIBOROA SELF - HELP GROUP

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

AGRICULTURAL DEVELOPMENT CORPORATION ..... 2ND RESPONDENT

KENYA FOREST SERVICES ..... 3RD RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS ..... 4TH RESPONDENT

THE HON. ATTORNEY GENERAL ..... 5TH RESPONDENT

JUDGMENT

1. The petitioners came to court through a petition dated 28/3/2024. They describe themselves as representatives' officials and members of the Kiboroa Registered Self-Help Group, a representative and a collective voice of the Ndorobo community, which is a minority community living in Trans Nzoia County. They are seeking resettlement of the community in their ancestral land, after suffering decades of historical injustices, marginalization's, discrimination, eviction and displacement from their ancestral land. The petitioners seek:

(a) Declaration that the 2nd respondent's continued occupation of L.R No. 9431/7/1 and 9431/8 is an ongoing historical injustice on their constitutional right to access and enjoyment of their historical and ancestral land.

(b) Declaration that the 2nd respondent has no legal interest in LR No. 9431/7/1 and LR No.9431/8.

(c) Order that the 1st respondent allocates LR No. 9431/7/1 and LR No.9431/8 to them, for purposes of resettlement.

(d) Any other order that the court may deem fit to grant.

2. The petitioners' complaint is anchored on Articles 2(1), 19, 20(1), 21, 22, 23, 27, 28, 35, 40, and 56 of the *Constitution*, which have granted them fundamental rights and freedoms, binding and enforceable, to enhance their dignity and protection of property generally and in particular, as minority and marginalized groups, with the state-mandated to put in place affirmative action programs to ensure their participation and representation in governance and other spheres of life, including provision of special opportunities to develop their cultural values, languages, practices and to have reasonable access to water, health services and infrastructure.

3. Further, the petitioners aver that Articles 60 and 61 of the *Constitution* provide for the principles of land policy including equitable access, security of land rights, sustainable and productive management of land resources, encouragement of communities to settle land disputes through recognized local community initiatives consistent with the *Constitution*, and creates the 1st respondent bestowed with the mandate of inter alia, investigating claims of historical land injustices, to recommend appropriate redress and to alienate public land.

4. The petitioners aver that they are Indigenous people of the Ndorobo tribe, who historically lived in caves of Chemombut up to pre- and during the colonial days, and that immediately after independence, their representatives approached the late President Mzee Jomo Kenyatta, pleading for resettlement, who promised that their issues would be adequately addressed by the then Land Commissioner. The petitioners aver that the forest conservator was in 1966 asked to stop harassing their families and was, therefore, permitted to even till and live in the forest while awaiting government resolution of their grievances. The petitioners aver that in 1987, the Ndorobo families, among other people, were forcefully evicted by the then Rift Valley Commissioner, the late Yusuf Hajji and after several interventions, the government gave them settlement in the following settlement schemes: Reinha, Cheptanday, Kitalale, Maridadi and Dr. Bells, all within Kiboroa location.

5. Unfortunately, the petitioners aver that the resettlement process was marred with corruption and was hijacked by a few wealthy individuals, as such the petitioners aver that the Ndorobos became disadvantaged and were never resettled or settled at all. The petitioners aver that in 2002, the government through the then DC Trans Nzoia, Mr. Samuel Oreta, settled the displaced Ndorobos in the Telted location, where they were also displaced again due to internal conflicts in Mt. Elgon District, which extended to Trans Nzoia and some of their members resulted into selling the vacated pieces of their land. The petitioners aver that the Ndorobos, who were further evicted, sought temporary settlement at the Sosio forest station to herd their cattle while others were left in disarray, hence Telted location was left unoccupied to date.

6. The petitioners aver that LR. No. 9431 situated in Trans Nzoia was part of their ancestral land of the Ndorobo community and its several subdivisions including 9431/8, leaving the 2nd respondent retaining LR. No. 9431/7 in 1968. The petitioners aver that the 2nd respondent caused further

subdivisions in which 61.55 Ha being LR No. 9431/7/1 was hived off and surrendered to the government. Additionally, the petitioners aver that LR No. 9431/7 was further subdivided into LR No. 9431/8 (formerly LR No. 9431/7/2) being 677.85 Ha. The petitioners aver that they have on several occasions on behalf of the Ndorobo community, sought resettlement on LR No. 9431/7/1, and LR No. 9431/8 to no avail, simply because the 2nd respondent continues to occupy the same in bad faith, which occupation constitutes a continuing and ongoing violation of their constitutional rights and freedoms, which is historical injustice.

7. Accordingly, the petitioners aver that the 2nd respondent has failed to provide evidence of its interest in the said parcels of land, despite being called upon to do so by several parties including the 1st respondent. The petitioners pleaded that the acts of forceful eviction from the Rift Valley, making them squatters in Sosio forest to date, several appeals and resolutions with the government to have them resettled in LR No. 9431/7/1 and LR No. 9431/8, the surrender of LR No. 9431/7/1 to the government for resettlement, the waiting for the resettlement, in their ancestral land, in vain, and lack of steps to undertake it all constitute a historical claim and which has however resulted to a historical injustice, depriving them of the right to live in dignity, freedom from discrimination and marginalization and to access and enjoy to secure land rights. The petitioners aver that the 2nd respondent has acted in bad faith in that, whereas it surrendered LR No. 9331 to the government by an instrument dated 24/12/1999, it continues to possess the land knowing fully well that the land was surrendered for their resettlement, but despite being called upon by the 1st respondent to show its legal interest in said land, it has failed to do so.

8. Further, the petitioners aver that they also sought the indulgence of the Kenya Forest Service, the Directorate of Criminal Investigations and the County Commissioner, to establish the authenticity of the 2nd respondent's claim to the land, who have all confirmed that the land is for resettlement, and despite being served with evidence, the 2nd respondent has continued to possess the land, hence hindering the 1st respondent from allocating the same to the petitioners. The petitioners therefore, urge the court to observe, respect, protect, promote, and fulfill their fundamental rights and freedoms under Article 21(1) of the *Constitution*, by hearing and determining the petition to redress the denial, violation, and infringement of their fundamental rights and freedoms under Article 23(1) of the *Constitution*, 2010, by granting appropriate reliefs.

9. The petition is supported by verifying and supporting affidavits, sworn by Caleb Kitoo Chepng'ok on 28/3/2024. He has attached a copy of the certificate of registration of the group, issued on 21/4/2014 and the subsequent one under the *Community Groups Registration Act*, 2022, the *Proclamation No. 44 of 1932* and LR No. 174 of 1964, hiving off and annexing the ancestral land as a forest reserve and later central forest, copies of alienation of land surrounding Mt. Elgon forest measuring 3093 acres to the 2nd respondent, dated 1/4/1958, instrument of surrender dated 24/12/1999, letter to the 1st respondent dated 11/11/2014, copy of a letter by the 1st respondent dated 26/2/2015 to the County Land Management Board, letter by the 1st respondent to the District Land Adjudication and Settlement Officer(DLASO), letter dated 5/8/2015 to Kenya Forest Service (KFS), payment receipt of Kshs.20,000/= to Kenya Forest Service dated 1/9/2015 and its response dated 2/9/2015, a complaint to the Ombudsman dated 9/8/2016 and an acknowledgment thereto dated 21/1/2020, response to the Ombudsman dated 5/4/2018, letter dated 29/9/2016, letters from the 1st respondent dated 24/2/2017, 6/4/2017, DC's letter dated 7/4/2019, DCIO letter and the DCCs letter dated 2/5/2017, letter dated 13/6/2017, letter dated 13/6/2016 to DLASO, letter dated 7/12/2017 by the 1st respondent to the Kenya Forest Service, letter dated 18/9/2018 by Kenya Forest Service to the 1st respondent, letter dated 13/11/2018 by Kenya Forest Service to National Land Commission, letter dated 17/1/2019 by the 1st respondent, letter dated 8/2/2019 by the 2nd respondent to the

1st respondent, letters by the petitioners to the 1st respondent dated 18/7/2020, 13/2/2021 and 2/8/2021, letter dated 17/2/2022 to the Cabinet Secretary for Agriculture & Fisheries, letter to DCIO dated 10/5/2022, letter dated 24/6/2022 from Ethics and Anti-Corruption Commission, letter dated 15/3/2023 by the 1st respondent to the 2nd respondent, letter dated 31/3/2023 to the Governor, Trans Nzoia County, and lastly demand letter dated 6/4/2023, to the 1st respondent as annexure CKC 1-33 respectively.

10. The 1st respondent opposed the petition through a replying affidavit sworn by the Deputy Director of Legal Affairs & Dispute Resolution Mr. Edmond Gichuru, sworn on 8/10/2024. While appreciating its constitutional and statutory mandate, functions, and responsibilities generally and in particular, regarding historical land injustice claims as defined by Section 15(2) *National Land Commission Act*, the 1st respondent acknowledged receiving a complaint under Ref. No. (NLC/HL1/593/2019), from the petitioners, and inviting the parties to make a response together with supporting documents. The 1st respondent confirmed that it has been carrying out proceedings on the historical land injustice case, the last hearing having been conducted on 16/9/2024 at Kitale Museum in the presence of the 1st petitioner, among other parties, after which parties were directed to file submissions before a mention date. Therefore, the 1st respondent avers that it is yet to conclude the matter and indicated that it was ready to provide the court with the proceedings if it so directs.

11. The 2nd respondent opposed the petition, through a replying affidavit of Nicholas Ayugi, a Land Administrator, sworn on 20/6/2024, denying causing any suffering, loss, injustice, or discrimination to the petitioners. The 2nd respondent avers that there has been no investigation by the 1st respondent to warrant the reliefs sought by the petitioners in paragraph *6*. The 2nd respondent deposes that if there was any corruption, the petitioners should have reported the incidences or at least named the individuals whom they claim have hijacked the settlement process. The 2nd respondent deposes that paragraph *7* shows that the petitioners are aware of its mandate for which reason it acquired the land, for national interest in utilizing it, in line with the fundamental principles of law regulating land ownership, as a juristic person established under *Agricultural Development Corporation Act*, Cap 444, Laws of Kenya.

12. Accordingly, the 2nd respondent deposes that the historical background as highlighted by the petitioners in paragraphs *28*, and *57*, gives no relationship between the petitioners or their ancestors and the 2nd respondents' land, neither does it cite the 2nd respondent as a participant in the alleged historical injustices, who is in any event, is a genuine proprietor who acquired the land through purchase from Chorlim Farm Ltd as per a transfer attached as NA-1. The 2nd respondent deposes that the petitioners are propagating lies and false information by claiming that LR No. 9431 was part of their ancestral land falsely forgetting their averments in paragraphs 29-36. The 2nd respondent deposes that a similar petition was filed by the petitioners in Bungoma Petition No. 26 of 2010, then seeking its properties Nos. 5337, 5345, 5346 among others, which information the petitioners have intentionally failed to disclose, which was dismissed on 11/7/2011 as per annexed ruling as NA-2. Further, the 2nd respondent deposes that the alleged claim does not qualify for protection under Articles 40 and 62 of the *Constitution* and is therefore inappropriate for the subject land to be public.

13. The 2nd respondent deposes that the petition is brought despite having written to the 1st respondent by a letter dated 8/2/2019 in respect to a letter dated 13/11/2018, confirming its interest in the land as per annexure marked NA-3(a) and (b). the 2nd respondent deposes that the petitioners have made similar attempts to lay claim on other state agencies' properties including LR No. 9433. 9434 and 8190 which are national reserves forming part of Mt. Elgon Forest, that are gazetted and reserved as per *Proclamation No. 44 of 1932* and LR No. 174 of 1964, annexed as NA-4(a), (b), and (c).

14. The 2nd respondent deposes that the suit land was originally known as LR No. 9431, which does not qualify for any claim under ancestral rights for it was originally owned by Ronald Clifford Boy, who could grant easement rights to pass and repass along the strip with the land to Chorlim Farm Limited and who used to farm for agricultural purposes and majorly for coffee production and at no point in time it avers belonged to the petitioners or their ancestors as alleged, as per attached Easement grant marked NA-5.

15. The 2nd respondent deposes that Chorlim Farm Ltd just like Clifford Boy, could grant water installation rights, upon successful acquisition of ownership rights from Clifford Boy as per the annexed water agreement between Chorlim Farm Ltd and Arnaghery Estate Ltd, marked NA-16. The 2nd respondent deposes that the process of acquisition of the said land began in 1967, however, the 2nd respondent acquired the Chorlim Farm Ltd in 1968, by way of purchase under the Land Transfer Project of 1966/70, and the land was later transferred to Lands Ltd, a wholly owned subsidiary of the 2nd respondent, as per the annexed copy of the title and the transfer marked NA'7. The 2nd respondent deposes that the suit land underwent several subdivisions and excisions, subsequently resulting in L.R No.9431/7 and then 9331/8 as per copies of correspondences attached as NA-8(a) - (k). The 2nd respondent deposes that since acquiring the land, many organizations have taken cognizance of their ownership of the suit land and respected the 2nd respondent's proprietary rights always requesting access rights by way of lease, as per attached correspondences marked NA-9.

16. Similarly, the 2nd respondent deposes that in 1972, the Kenya Tourism Development Corporation through its letter dated 21/9/1972 requested the 2nd defendant, proposing to purchase a portion of its land measuring approximately 200 acres for establishing a lodge at Mt. Elgon National Park, in which request was granted and reviewed to 175 acres. Attached are the letters marked NA-10 and 11 respectively. The 2nd respondent avers that the portion sold to Kenya Tourist Development Corporation was surveyed by Chalan Surveyors who undertook the excision processes and submitted the head title and surrender of the 152 acres for the issuance of the new grant. Attached are the correspondence letters dated 30/3/1999, 17/8/1999, and 26/1/2004, a form of transfer, surrender, and the deed plan for excision L.R No. 9431/7/1, marked NA-12 (a-f).

17. Again, the 2nd respondent deposes that according to the repealed Land Planning Act 1968, the Development and Use of Land (Panning Regulation 1961) LR No. 9331/7/1 it surrendered to implement the change of user in exchange for a new grant for a further term to be determined by the Commissioner of Lands. Therefore, the 2nd respondent deposes that the surrender was in respect of the 152 acres and it is the said excision that resulted in Parcel No.9431/8, and the said surrender was done after a bit of advice from the Commissioner of Lands and in compliance with the then Land Planning Act, 1968 and its regulations 1961, as per the attached letters dated 22/2/1979 from the Director of Surveys, 16/10/1987, 5/3/1992 and 18/4/1996 from the Permanent Secretary, Ministry of Tourism.

18. The 2nd respondent deposes that after the issuance of a new Grant LR No. 9431/7/1 may have acquired new details and that if it at all exists, the same was disposed of and transferred to the then the Kenya Tourism Development Corporation and was no longer under the ownership and control of the 2nd respondent. The 2nd respondent avers that the surrender registered in 1999 and which has been intentionally misconstrued by the petitioners was done in respect of the change of use but not for purposes of settling or allocating it to the petitioners or the Ndorobo community as alleged. The 2nd respondent deposes that the suit land is a property of Land Limited, its subsidiary, purchased for value and gazetted as one of the special farms under the Special Farms Rule 2002, attached as annexure NA-14.

19. The 2nd respondent deposes that the issues raised by the petition related to historical land injustices as defined under the *National Land Commission Act* 2012, where the appropriate avenue to seek redress is by lodging a historical land injustice claim with its National Land Commission for admission and subsequent investigations, hence the petition is not only premature but also a fishing expedition based on hearsays, false beliefs, and stories which the court may not verify. The 2nd respondent urges the court to take judicial notice of the threats public land is faced with in the country from notorious and rogue individuals just like the petitioners who invade public land and claim ancestral or historical injustices to sell it to third parties.

20. From the court record, it appears that the 3rd - 5th respondents, filed grounds of opposition. The court on 7/11/2024 equally temporarily stayed the hearing of the petition after it was brought to its attention that the National Land Commission was also seized of the reference.

21. By way of a supplementary affidavit sworn on 27/9/2024, the petitioners through Caleb Kitoo Cheng'ok denied the contents of paragraph 3 of the affidavit of Nicholas Oyugi. He averred that the 1st respondent investigated and wrote a letter to the DCC Endebess Sub-county attached as CKC-1. Equally, as to paragraph *4*, the petitioners averred that the 2nd respondent declined the request for the release of L.R No. 9437 to be allocated to them. The petitioners insisted that the historical background is that the Ndorobo community were the initial owners of L.R No. 9431 and that when the 2nd respondent purported to purchase the land without considering the petitioners' pending complaints for resettlement on the land or the government taking into account their grievances, per annexed letter marked CKC-2.

22. The petitioners denied the contents of the 2nd respondent's affidavit in paragraph *9*, since they had never sued the 2nd respondent before any court of law over a similar claim, otherwise, the 2nd respondent should have attached the alleged petition filed at Bungoma Law Courts.

23. In addition, the petitioners aver that the allegation that L.R No. 9431/7 was gazetted has not been substantiated by way of documentary evidence. The petitioners insisted that the 2nd respondent should have brought evidence of who currently owns the two portions of the land after the subdivisions of the same following their historical land injustice complaint.

24. When this matter came for directions on 21/1/2025, the petitioners complained over the inordinate delay of the National Land Commission injustice complaint, which had been pending since 2017. Therefore, the petitioners urged the court to issue directions for the hearing of the petition based on the affidavit evidence in the petition and the responses from the respondents. The court directed that the petition be heard by way of written submissions based on the affidavit evidence on record. Parties were therefore given 30 days to upload their written submissions.

25. The petitioners rely on written submissions dated 21/1/2025. It is submitted that before filing the petition, the petitioners had sought intervention from the respondents, going by the attached correspondences, in vain, including seeking allocation of land by the 1st respondent by letters dated 12/11/2004, 26/2/2015, 3/3/2015, and 24/2/2017.

26. The petitioners submit that they were then invited to appear before the National Land Commission for a review of grant and disposition over the suit land on 16/3/2017. The petitioners submitted that they made a follow-up on the complaint by letters dated 6/4/2017, 7/4/2017, 2/5/2017, and 28/7/2017 from the Ministry of Lands and Physical Planning. Due to reluctancy from the National Land Commission and the government departments to address their grievances, the petitioners submit that they had no option but to move to court in March 2024 after waiting for action for close to ten years, and almost 7 years after the letter dated 6/4/2017 by the 1st respondent.

27. The 2nd respondent relies on written submissions dated 17/2/2025, isolating three issues for determination. The 2nd respondent submits that the petition does not meet the constitutional threshold. Even though the petition has cited constitutional articles alleged to have been infringed, the 2nd respondent submits that the particulars of the alleged infringement must be pleaded with reasonable clarity as to the nature, extent, and manner of infringement.

28. The 2nd respondent submits that although paragraphs 45-49 of the petition list particulars of the ongoing historical injustices, to have faced the petitioners' over time, evidence and particulars were lacking on how the 2nd respondent has contributed to the said historical injustices.

29. Equally, the 2nd respondent submits that although the petitioners have filed this matter as a constitutional matter, the dispute that gave rise to the petition is allegedly anchored on a promise made to the petitioners, such would fall under private law and cannot be addressed as a public land matter. The 2nd respondent submits that the recital of constitutional provisions does not in itself raise a constitutional controversy between the 2nd respondent and the petitioners to warrant the court's intervention. Reliance is placed on *Mumo Matemu & Others v Trusted Society of Human Rights Alliance & Others* [2012] eKLR.

30. The 2nd respondent submits that the petitioners cannot institute the petition, without attaching minutes and resolutions by members of the group granting them powers to institute the petition and or authorizing the petitioners to lodge one, on their behalf. Reliance is placed on *Tonkei & Others (Suing on their behalf and behalf of Inkoirero Self Help Group) v Kilusu & Another* ELC E032 of 2021 [2023] KEELC 15897 [KLR] and Kipsiwo Community Self Help Group v Attorney General & Others [KLR] eKLR.

31. In addition, the 2nd respondent submits that the promise of resettlement made to the petitioners by the then Trans Nzoia District Commissioner, Mr. Oreta, if at all the same was made, was for an illegal purpose, hence unenforceable against it, since it was never involved in the promise and that the land was not falling under the jurisdiction of the D.C, who could not make such a promise of resettling the petitioners on its land that had not been de-gazetted.

32. The 2nd respondent submits that no evidence has been tendered to show that the land referred herein was surrendered to the government by the 2nd respondent, to be available for reallocation to other parties, especially when it had bought the land for consideration in 1968 from Chorlim Farm Ltd, a transfer was effected, after being duly surveyor, and placed and registered as a special Agricultural Farm, hence the alleged promise did not confer any lawful interest to the petitioner.

33. The 2nd respondent submits that the DC was neither its official, nor was he an official from the Ministry of Agriculture, hence the petitioners have no remedy against the its land. The 2nd respondent submits that to grant the orders sought, the court would be perpetuating or promoting illegality, or an illegal contract as held in *Scott v Brown* [1892] 2QB 724 and *Attorney General v Sunderji Trading as "Crystal Ice Cream"* (1986) KLR 67.

34. The 2nd respondent submits that under the current Agricultural. Development Corporation Act and the resultant legal notices, the mandate of buying, managing, and disposal of land is vested upon the Agricultural. Development Corporation and the Ministry of Agriculture with the approval of Parliament, and therefore, no other agency of the government can bequeath or allocate land or any part thereof, unless under the Agricultural. Development Corporation Act and the legal notices.

35. Similarly, the 2nd respondent submits that such an allocation must be in terms of the Act, and always be preceded by a de-gazettement and subsequent excision of such special agricultural farms. The 2nd

respondent submits that the petitioners have withheld material facts that there was a similar petition in Bungoma Law Courts, hence the petition before the court is res judicata. Given paragraphs 4, 5, 6, 7, and 8 of the supporting affidavit, that the petitioners were living as squatters in Sosio Forest before eviction, annexure CKC-6 fully supports the 2nd respondent's case that it was the legitimate owner of the suit land.

36. The 2nd respondent submits that the petitioners have not met the parameters of the legitimate expectation doctrine, given that such expectation must first be legitimate and not illegitimate. In this case, the 2nd respondent submits that the suit land falling as gazetted special Agricultural Farms, unless de-gazetted, were not available for alienation and or re-settlement, hence the alleged promise by the DC being illegal could not give rise to any alleged legitimate expectation. Reliance was placed on *Republic v Kenya Revenue Authority & Others, Exparte Five Forty Aviation Ltd* [2015] eKLR, *Republic v Kenya Revenue Authority & Another, Exparte Krones LCS Centre EA Ltd* [2012] eKLR and in *Republic v Principal Secretary Ministry of Health & Another Exparte Apex Communication Ltd T/A Apex Porter Novelli* [2015] eKLR.

37. Mores so, the 2nd respondent submits that given the annexures attached by the petitioners to the petition, there was no single allotment letter in respect of the alleged promise made by the then Trans Nzoia DC, and neither was there any document before the court to show that the land historically belonged to the petitioners, otherwise a squatter has no privity of the estate that runs with the land as held in *Tichborne v Weir* [1892] 67 LT 735.

38. The 2nd respondent submits that the petitioners' claim was not only illegal but also based on a selective rather than constructive interpretation of the *Constitution*, especially where there exists no privity of contract between it and the petitioners and the, there was no single letter from the government, or part performance by way of possession or occupation based on the alleged and otherwise a non-unenforceable promise made a DC.

39. The 2nd respondent submits that the suit land as public land is vested in the 1st respondent, hence to entertain the petition, the court would be usurping the powers of the 1st respondent, yet the affidavit of Edmond Gichuru sworn on 8/10/2024 confirms that the National Land Commission was seized with the matter.

40. Finally, the 2nd respondent submits that the petitioners have failed to prove the alleged breach of constitutional rights and freedoms and that the issues raised herein could be solved through a civil claim but not through a constitutional petition.

41. The court has carefully gone through the petition, responses by the 1st and 2nd respondents, grounds of opposition by the 3rd – 5th respondents, and written submissions. The issues calling for my determination are:

    1. If the petitioners can institute the petition.
    2. If the petitioners are guilty of the non-exhaustion doctrine.
    3. If the petition is *res judicata*.
    4. If the petition meets the constitutional threshold.
    5. If the 1st respondent has inordinately delayed justice in investigating the complaint and recommending the appropriate redress.
    6. If the petitioners have proved a breach of their constitutional rights and freedoms.

7. If the petitioners are entitled to any constitutional reliefs.

8. What is the order as to cost?

42. The 2nd respondent has pleaded that the petitioners cannot bring the petition without Minutes or resolutions to show that they were authorized by the members of the Group to lodge, institute, and prosecute this petition. A party seeking constitutional reliefs based on an alleged breach, violation, and infringement of constitutional rights and freedoms has to meet the procedural and substantive requirements set out in Articles 19, 20, 21, 22, 23, 159, 259, and 260 of the *Constitution*, as read together with the *Constitutional of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013*, hereinafter the Mutunga Rules.

43. Rules 4, 5,8,9,10, 11, and 14 thereof provide that a constitutional petition must declare and define the capacity in which the petitioners bring it, address the specific alleged constitutional rights and freedoms, infringed, violated or breached; particularize or state the facts and particulars, manner, nature and extent of the breach, violation and infringement; specify the past and present disputes touching on the issues before court or elsewhere, place a signature and attach or accompany the petition with affidavits, and documents to support it.

44. In *Anarita Karimi Njeru v Republic* [1979] eKLR, the court said that a petitioner must plead with a reasonable degree of precision on what he complains about, the provisions said to have been infringed, and how the infringement occurred. In *Mumo Matemu v Trusted Society of Human Rights Alliance*, (*supra*), the court said due process, substantive justice, and the exercise of jurisdiction are functions based on precise legal and factual claims, that help define the issues in litigation. See also *Nasra Ibrahim Ibren v IEBC & others* [2018] eKLR and *CCK & others v Royal Media Services Ltd & Others* [2014] eKLR.

45. The respondents take the view that the petition other than citing constitutional provisions, is not pleaded with precision or specificity, the petitioners cannot sue, the issues raised do not disclose a constitutional question but rather fall under an ordinary suit, and the petition raises issues that fall for determination under the jurisdiction of the National Land Commission. Further, the respondents submit that there has been an inordinate delay and that the petitioners have no cause of action against the respondents since the land was private. Equally, the respondents submit that no nexus has been established to link the private land with the petitioner's ancestors.

46. As a starting point, courts have held that there are no limitations of time to bar the filing of constitutional petitions alleging violation of fundamental rights and freedoms unless the delay is inordinate to an extent of prejudicing the respondent as held in *Edward Akongo Oyugi& Others v Attorney General & Others* [2019] eKLR, *Nathan Tirop & Others v Chief Land Registrar and in Charles Murigu Muriithi & Others v Attorney General* [2015] eKLR.

47. Locus standi is defined in *Black Laws Dictionary* 9th Edition as the right to bring an action or to be heard before the court. Articles 22 and 258 of the *Constitution* are the cornerstone of locus standi in Kenya.

48. In Advisory Opinion Ref. No. 1 of 2017, *KNCHR v Attorney General and IEBC & Others* [2020] eKLR, the Supreme Court observed that courts must always consider whether the party seeking to move it falls under the parties decreed or has such locus standi as defined in the *Constitution*. In *Mumo Matemu* (supra), the court said it could not fashion or impose standard sanctions for locus standi places hurdles on the access to courts, except when such litigation was hypothetical, abstract or an abuse of the court process.

49. In *Wilfred Juma Wasike v Ministry of Interior & Coordination & Another* [2022] eKLR, the court cited Kipsiwo Community Self Help Group v Attorney General & Others [2013] eKLR, where it was held that the importance of locus standi is to recognize the person who seeks legal redress, and so the orders are not issued in favor or against people who cannot correctly be identified with precision. The court said that in litigation, rights, and duties will be imposed on the litigants and therefore, if the court does not know who the litigants are, then it becomes impossible for the court to enforce its orders, for it will never be clear who the beneficiary of the order was or who must obey or enforce such an order. The court said that a group could bring or be sued in a suit through its members or officials.

50. The decision in Kipsiwo Community Self Help Group vs Attorney General & Others (supra), was delivered before the Community Group Act was enacted, to recognize and incorporate groups. The petitioners have pleaded that the group initially was a self-help group until it was registered under the *Community Groups Registration Act* No. 30 of 2022, as per the displayed certificate dated 9/1/2022.

51. In my view, the petitioners have described the capacity in which they bring the petition, as members of the Ndorobo Community, a marginalized or minority group who claim that the suit land was part of their ancestral land. The petitioners have averred that they have been subjected to displacement, living as squatters, who are yet to be resettled in their ancestral land or elsewhere by the government. the *Constitution* under Article 56 expressly recognize the duties of the State as regards minorities and marginalized groups. Article 10 thereof recognizes national values and principles of governance, among them non-discrimination and protection of marginalized groups. The ethnic diversity of the people of Kenya is at the center of our Constitution. See *John Waweru Wanjohi & Others v Attorney General & 3 others* [2012] KEHC 5461 (KLR) and *Mohammed Osman Wafra & Others v Office of the President & Others*, Petition No. 77 of 2013.

52. The petitioners take the view that they are being tossed around yet State organs and entities with responsibilities to resettle them are dithering with it. Whereas the petitioners admit that the 1st respondent got seized of the complaint, it has taken it close to 10 years to hear and determine the same and recommend appropriate actions, hence that delay by itself amounts to a denial of the petitioners' rights to a fair hearing, access to justice and fair administrative actions. On the other hand, the respondents urge the court to exercise restraint, otherwise, it could be usurping the Constitutional obligations of the National Land Commission.

53. In *Nicholas v Attorney General & Others; National Environment Complaints Committee & Others (IP)* Petition E007 of 2023 [2023] KESC 113 KLR (28th December 2023) (Judgment), the court observed that redress for constitutional violation was not part of the mandate of National Environment Tribunal, Energy and Petroleum Regulatory Authority or Energy and Petroleum Tribunal and that under Section 9(2) of *Fair Administrative Action Act*, the nuanced approach should be adopted to safeguard a litigant's right to access justice, while also recognizing the efficacy and specificity of the alternative dispute resolution, since there are also exceptions under Section 9(4) of *Fair Administrative Action Act* in the interest of justice.

54. The court also held that the availability of an alternative remedy did not necessarily bar an individual from seeking constitutional relief, since that act is contingent upon the adequacy of the alternative to address the issue, the specific circumstances of each case, and the appropriateness of seeking constitutional reliefs.

55. In *KPLC v Bhoga* CA E017 of 2021 [2024] KECA 179 [KLR] (23rd February 2024) (judgment), the court observed that the doctrine of exhaustion as held in *NGOs Coordination Board v Attorney General & Others, Katiba Institute (Amicus Curiae)* [2023] KESC 17 [KLR], requires the court to exercise restraint and give a chance to the dispute resolution bodies established by the *Constitution* to

deal with such specific disputes in the first instance, while at the same time asking itself whether the alternative dispute mechanism is efficacious, appropriate and or suitable, unless there are exceptional circumstances.

56. In the African Court of Human and Peoples Rights, in the case of *Dawda K. Jawara v Gambia* ACM HPR 147/95-149/06, it was held that a remedy is considered available if the petitioner can pursue it without impediment, it is effective, it offers a prospect of success and if it is sufficient or capable of redressing the complaint.

57. In *Benson Ambute Adega & Others v Kibos Distillers Ltd & Others* [2020] eKLR, the court observed that judicial abstention or restraint is a doctrine established through common law practice that a court is vested with jurisdiction to hear and determine certain issues, can defer or refrain from issuing judgments if there are other appropriate legislative mechanisms available.

58. In *Safeplak Ltd v Henry Wambega & Others* [2019] eKLR, the court guided by *Samuel Kamau Macharia & Another v KCB Ltd & Others* Appl. No. 2 of 2021, observed that jurisdiction flows from either the *Constitution* or a statute. The court cited *Chief Land Registrar & Others v Nathan Tirop Koech* (supra) that an Environment and Land Court has jurisdiction to hear and determine any claim relating to historical injustice, whether or not the National Land Commission is seized of the matter in line with Article 67(2)(e) of the *Constitution*, and that there is nothing in the *Constitution* or *National Land Commission Act* ousting the jurisdiction of the Environment and Land Court or bars any person from prosecuting a petition before the court concerning a claim founded on historical injustice.

59. In *County Government of Kwale v National Land Commission & Others*, Petition 4 of 2022 [2024] KEELC 1166 [KLR] (5th March 2024) (Ruling), a formal application for a stay of proceedings had been made for the National Land Commission to hear an existing petition before it, that was alleged to be similar to what was before the court. The court declined to stay the proceedings.

60. Looking at the cases alluded to above, *Ledidi Ole Tauta & Others v Attorney General & 2 Others* [2015] eKLR is no longer a good interpretation of the law.

61. This court finds that it has the requisite jurisdiction to hear and determine the constitutional petition. The inordinate delay for neglecting, ignoring, and or declining to investigate and address the complaint, which the 1st respondent has not explained, as to why it has taken over 7 years to investigate and recommend appropriate redress is one of the issues raised herein as amounting to dereliction of duty or denial of justice. The respondents cannot therefore neglect to address the issues once the same was timeously lodged before the National Land Commission in 2017 and purport to object to the jurisdiction of this court without offering any reasonable explanation for inaction.

62. The next issue is whether the petition discloses constitutional questions or issues. In *CNM v WMG* [2018] eKLR, the court held that in determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful, but the question is whether the argument forces the court to consider constitutional rights or values.

63. In *Republic v Paul Kihara Kariuki, Attorney General & Others Exparte Law Society of Kenya* [2021] eKLR, it was held that courts should abhor the practice of converting every issue into a constitutional question and filing of suits disguised as constitutional petition where they do not fall anywhere close to a violation of constitutional rights.

64. Constitutional questions or issues arise where the existence of a remedy depends on or lies with the *Constitution* and not a statute. Further, it arises where in arriving at the remedy the constitutional rights or freedoms, or the role of a state organ or value or functions has to be determined through the

lenses of the *Constitution* but not on a statute. Looking at the petition, I think it raises constitutional questions or issues that are not idle, academic, or unripe for determination. See *Gabriel Mutava & Others v Managing Director, Kenya Ports Authority & Another* [2016] eKLR.

65. The petitioners have before the court exhibited a litany of correspondences, where they have sought intervention before the respondents and other state agencies, all in vain, since 2014. The petitioners' issues as raised are real but not moot. What is for determination before this court is whether or not the respondents have violated the petitioners' enumerated constitutional rights and freedoms in the petition by not resettling them in their ancestral land or any other alternative land as the *Constitution* dictates regarding landless persons. The issues raised requires this court to seek answers from the *Constitution* as to whether the respondent's conduct, acts of omission, or commission are inconsistent with the *Constitution*. Equally, the petition seeks the court to address issues concerning the roles, powers, and duties of the 1st respondent, the failure, inordinate delay, or the consequences of the inaction, delay, or dereliction of duties, when faced with a historical land injustice complaint and whether the petitioners as aggrieved parties are entitled to any constitutional reliefs or appropriate redress. Such issues fall under the determination of this court. The National Land Commission and the ordinary courts as held in *Nicholas v Attorney General* (supra), may not have the capacity to address and redress such grievances. The doctrine of restraint is inapplicable under the circumstances.

66. The next issue is whether the petitioners have pleaded and proven breach, violation or infringement of their constitutional rights and freedoms. In *Joseph Kol Nanok & Another v EACC* [2018] eKLR, the court observed that a petitioner who cites a violation of a constitution must have cogent evidence related to the alleged breaches and direct loss, damage, or injury arising out of the violation. In *CCK (K) & Others v Royal Media Services Ltd* (supra), the court held that there must be a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of the contravention or infringement.

67. Discharging the burden of proof requires that the petitioners show the manner of infringement, its nature and extent, as well as the nature and extent of the injury, loss, or damage suffered. In *John Githinji Wangombe & Others v Nyeri South Sub-County Co-operative Offices & Others* [2015] eKLR, the court cited the Uganda case of *Charles Onyango Obbo & another v Attorney General* [2004] UGSC 81, that the petitioner must prove that indeed the state or a state organ under the authority of the law, or there is an act or omission by the state which has infringed of his constitutional rights and freedoms and that once that is established, it is the duty of the state or its organ to prove that the retraction of a right is justified by the *Constitution*.

68. In *Raila Odinga & Another v IEBC & Others* [2017] eKLR, it was observed that though the legal and evidential burden of establishing facts in support of a party's case remains constant within the plaintiff during the trial, the evidential burden keeps shifting. Clear and cogent evidence is what a petitioner must bring before the court, otherwise the petition will fail, as held in *Naitore M'iburi & another v Attorney General & 2 others; Sebastian Kaaria (Interested Party)* ELC Petition No.8 of 2018.

69. Demonstration must be there of either actual infringement of a right or threat or breach of a right or freedom. See *National Assembly of Kenya vs Kina & Another* C.A No. 166 of 2019 [2022] KECA 548 KLR (10th June 2022) (Judgment). In *Judicial Service Commission v Gladys Shollei & Another* [2014] eKLR, the court addressed the implication of a fair hearing and the right to be supplied with a decision or its reason as per the dictates of Article 47 of the *Constitution*.

70. The petitioners aver that the 1st respondent has the mandate to initiate investigations suo moto, or after receiving a complaint on historical land injustices, and to recommend appropriate action in good time. It is not in dispute that the 1st respondent received a complaint under Ref. No. NLC/HLI/593/2019

from the petitioners. The 1st respondent makes an admission of this fact. It however only alleges that it held its 1st hearing on 16/9/2024, which was after this petition was filed.

71. Annexure CKC-8 shows that the 1st respondent received the memorandum from the petitioners on 12/11/2014. It then wrote to the County Land Management Board, Trans Nzoia, seeking a status report on 26/2/2015, as per annexure CKC-18. The petitioners received a response to the complaint on 21/1/2020 from the Ombudsman, who stated that they had made several reminders to the 1st respondent through letters dated 25/1/2017, 16/5/2017, 29/7/2018 and 26/3/2018, only to receive a response on 5/4/2018. This is captured in annexure CKC-18.

72. By a letter dated 24/2/2018, the 1st respondent invited the petitioners for a meeting to review grants and disposition over LR 9431 under Section 14(3) *National Land Commission Act*. In a letter dated 6/4/2017, the 1st respondent wrote to the DCC Endebess, who responded by a letter dated 7/4/2017, confirming that the forest department officially hived off the land for purposes of settling the petitioners but the 2nd respondent became un co-operative and a stumbling block in processing the documents.

73. Equally, the DCIO by a letter dated 2/5/2017 to the DCC confirmed that the petitioners are a registered SHG under Certificate No. 3667352 which letter or information was forwarded to the 1st respondent by a letter dated 2/5/2017, by the DCC Endebess. By a letter dated 13/6/2017, the petitioners wrote to the Director of Land Adjudication and Settlement Nairobi, confirming that they were now squatters in Sosio forest.

74. The 4th respondent wrote to the petitioners a letter dated 28/7/2017 and received by the 1st respondent confirming that LR No. 9431 was public land after it was surrendered by the government on 24/12/2017, hence fell under the 1st respondent –CKC-22. By a search conducted on 7/9/2017, the 4th respondent indicated the surrender to the government of Kenya. The 1st respondent, therefore, wrote a letter dated 7/12/2017 to the Kenya Forest Service regarding the petitioners' complaint which elicited a response dated 18/9/2018 giving a historical background of the complaint. The 1st respondent, therefore, wrote to the 2nd respondent by a letter dated 13/11/2018 and 17/1/2019 confirming that there was a surrender of 61.55 Ha to the government regarding LR No. 9431/7.

75. The 2nd respondent replied vide a letter dated 8/2/2019, clarifying that LR. No. 9431/7 was a gazetted special farm vide Gazette No. 37 of 13/2/2001 as per CKC.24. The record shows that the petitioners wrote annexed letters dated 18/7/2020, 11/1/2021, 2/8/2021, and 17/3/2022, all of which the 1st respondent received but failed to respond to.

76. The only action that the 1st respondent undertook after a long period was writing a letter dated 18/3/2023 to the 2nd respondent. In the absence of action, the petitioners wrote demand letters to the 1st and 2nd respondents by letters dated 7/3/2023 and 6/4/2023 to both 1st and 2nd respondents threatening a court action.

77. From the correspondences stretching from 2014, it cannot be true therefore, that the 1st respondent only received the petitioners' complaint or petition in 2019, as per its form NLC/HLI/02. It is a fact that the National Land Commission Historical Injustices Regulation 2017, was annulled by the court on 28/3/2018. Section 15(3) of the *National Land Commission Act* defines what land historical injury claims are. The petitioners had lodged the complaint from the attached correspondences in the year 2014, which was within 5 years after the *National Land Commission Act* was enacted. Historical land injustice claims have constitutional timelines within which to be lodged and determined. The petitioners had a legitimate expectation that their complaint would be investigated within a reasonable time by the 1st respondent.

78. As of the filing of the petition, the 1st respondent had not acted as per Section 15(3)(5) of the *National Land Commission Act* or given any remedies as per Sub-sections (9) and (10) thereof.

79. The tenets of fair administration action, fair hearing and access to justice under Articles 47 and 50 of the *Constitution* do require the same to be efficient, lawful, expedient, reasonable, and procedurally fair. See *Benson Wekesa Milimo v National Land Commission & Others* [2021] eKLR, *Judicial Service Commission v Justice Mbalu Mutava & Another* [2014] eKLR, *Evans Kidero & Others v F.N. Waititu & Others* [2014] and in *Republic v Hon. C.J. of Kenya & Others; Exparte Moijjo Ole Keiwua*, Nairobi HC 1298 of 2004.

80. In *JSC v Mbalu Mutava*, (supra), the court held that Article 47 of the *Constitution* marks an important and transformative development of administrative justice for it not only lays a constitutional foundation for the control of the powers of state organs and, other administrative bodies but also elevated the right to fair administrative action in the Bill of Rights, as a reflection of the national values and principles. Further, the court said that administrative actions of public officers, state organs, and other administrative bodies are subjected to Article 47(1) of the *Constitution* to the principle of constitutionality.

81. In *Kenya Revenue Authority v Export Co. Ltd* Petition 20 of 2020 KESC 31 KLR (CIV) (17th June 2022) (Judgment), at issue was whether the action of Kenya Revenue Authority to demand short levied duty almost after 4 years from its initial assessment was a violation of the respondent's right to fair administrative action and the principle of legitimate expectation. The court held that the action was irrational and did not accord with the respondent's right to fair administrative action. Secondly, the court held that a person could have a legitimate expectation of being treated in a certain way by an administrative authority even though, he had no legal right in private law to receive such treatment, and that legitimate expectation could arise from a representation or promise made by authority including an implied representation or from consistent past practice. The court said that a legitimate expectation arose where a person responsible for making a decision had induced in someone reasonable expectation that he would receive or retain a benefit of advantage. The court said legitimate expectation may take several forms including an expectation to succeed in a request placed before a decision maker or the objective from that a party may legitimately expect that before a decision that could be prejudiced was taken, one to be afforded a hearing.

82. The court said that questions of whether a legitimate expectation arose was more than a factual question, and could arise when a body by representation or past practice, had aroused an expectation that was within its power to fulfill.

83. The court said that for an expectation to be founded upon a promise or practice, by a public authority, that was expected to fulfill the expectation the guiding principles are:

    (1) There had to be an express, clear and unambiguous promise given by a public authority.

    (2) The expectation has to be reasonable.

    (3) It must be competent and lawful for the decision-maker to make.

    (4) There cannot be legitimate expectation against clear provisions of the law or the *Constitution*.

84. The petitioners' case is that their ancestral land, as a community, who used to live in caves was taken away, they were displaced or evicted, and that efforts to seek resettlement and promises made to resettle them have been broken, unfulfilled, and therefore, they have been subjected to human rights abuses by the respondents, even after indications were made that the suit land had been surrendered to the government for their resettlement.

85. The petitioners plead that the forceful eviction or displacement from their ancestral land violates their right as enshrined in the *Constitution* of Kenya, on culture, religion, natural resources, development, and non-discrimination, contrary to the *African Charter on Human and Peoples' Rights*, access to information.

86. In *Mitu-Bell Welfare Society v Kenya Airports Authority & Others* [2021] KECS 34[KLR] (11th January 2021) (Judgment), the Supreme Court held that Article 2(5) and (6) of the *Constitution* requires courts to apply international law in resolving disputes so long as it is relevant, and does not conflict the *Constitution*, local statutes or a final judgment. The *United Nations Declaration on the Rights of Indigenous People* (UNDRIP), requires the seeking of Free, Prior and Informed Consent (FPIC) in dealing with issues affecting Indigenous communities. Article 260 of the *Constitution* requires special protection of indigenous people owing to their vulnerability.

87. In *African Common Human & Peoples Right v Republic of Kenya* (Appl. No. E006 of 2012), the court observed that it is a requirement under International Human Right Law, that Indigenous people like the Ogiek, be consulted in all decisions and actions that affect their lives and that the state had an obligation to consult the Ogiek in an active and unformed manner following their customs and traditions, in good faith and using culturally appropriate procedures as required in Article 32(2) of the *UNDRIP*. The right to take part in cultural life is recognized by Article 15(1)(a) of the *International Covenant on Economic, Social and Cultural Rights* (ICCSCR). Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR), recognizes cultural and indigenous rights and protection.

88. The petitioners allege that being forced out of their ancestral land where they enjoyed customary ownership rights is unconstitutional and has infringed on their fundamental freedoms and rights. In the *Special Rapporteurs Report on the Rights of Indigenous Peoples of* (UNDO1 A/HRC/36/46), 1/11/2017, it stated thus:

> "Indigenous people are not simply victims of climate change, they are also repositories of learning and knowledge about how to cope successfully with local-level climate change. Indigenous people play a fundamental role in the conservation of biological diversity and the protection of forests and other natural resources, and their traditional knowledge of the environment can sustainably enrich scientific knowledge and adaptation activities..."

89. In *Katiba Institute v Presidents Delivery Unit & Others* [2017] eKLR, the court held that a public authority cannot deny access to information without justification. In *Tonni v KFS & Others, LSK & others (IP)* Constitutional Petition 11 of 2020 [2024] KEELC 6320 [KLR] (30th September 20204) (Judgment), the court said that the original land settlement schemes in Kenya came to be due to the transition of Kenya form a colonial state to an independent state, where they were conceived to de-racialize land ownership, and to offer land to many of those who had been displaced during the colonial time. The court said that the primary objectives were to create settlement schemes to satisfy the hunger for land for the landless, to promote political stability and to ensure sustainable agricultural productivity of the land.

90. Article 43 of the *Constitution* guarantees the petitioners economic and social rights including accessible and adequate housing and reasonable standards of sanitation, to be free from hunger, and to have adequate food for acceptable quality, clean, and safe water. Sections 134 and 135 of the *Land Act* establish the mechanism for resettlement of the landless.

91. Looking at the international, constitutional and statutory framework above, it suffices to say that the petitioners have defined the various Rights that they allege to have been violated. The correspondences

referred to above support the facts as pleaded in the petition on the various instances, stages of seeking intervention, and the failure by the 1st respondent who has the constitutional mandate to ensure that the petitioners are not subjected to breach of their right to access to justice, fair hearing, access to information, non-discrimination, determination of their complaint under the law and for fair administrative action that is efficient, procedural, fair, effective and adequate.

92. It is the petitioners' legitimate expectation that the government as per the dictates of law both internationally, regionally, and locally would find means, measures, procedures and employ resources to have them resettled and live in peace. The various letters, assurances, and promises made by government officials initially confirmed by the 1st respondent that land had been surrendered for their settlement by the 2nd respondent, cannot be said to be hollow. The role of the 1st, 3rd 4th, and 5th respondents in the resettlement of the landless is both constitutional and statutory. It is sanctioned by Sections 134 and 135 of the *Land Act*. I disagree with the pleadings and submissions of the 2nd respondent that the National Government officials who wrote those letters made the promises and gave assurances to the petitioners that they would be settled, had no authority to do so. The DCC is statutorily supposed to be the convener and chair of the resettlement committee, under Sections 134 and 135 of the *Land Act*.

93. In *Fanikiwa Ltd & Others v Sirikwa Squatters Group & Others*, Petition No. E036 (consolidated with E038 and E035), the Supreme Court held that legitimate expectation imposes a duty to act fairly and to honor reasonable expectation raised by the conduct of public authority, that it will undertake certain cause of action which it must fulfill, for purposes of promoting certainty and consistency in public administration. The court said that for an individual to invoke legitimate expectation, an expectation must have been included by some conduct of the public authority, particularly an individual who is in a situation in which it appears that the administrative conduct led him to entertain certain expectations. See *CCK & Others v Royal Media Services* (supra).

94. In this petition, the letters written by the 1st respondent and the 3rd, 4th, and 5th respondents' affidavits were clear indications that the petitioners' claim was being addressed to an extent of a land having been surrendered for that purpose. Equally, there is evidence that other schemes were established to resettle other persons apart from the petitioners. Selective resettlement of other persons also gave rise to expectation by the petitioners, that their day was on the way towards resettlement.

95. The officers of the respondents who gave those promises had the ability to give them and the capacity to act on the promises to resettle the petitioners. That is why the officers went to the extent of seeking to know the legal status of the Group, its officials, and the number of particulars, the membership. To allow the 1st, 2nd, 3rd, 4th, and 5th respondents to renege on the promise, in my view, would amount to a violation of the petitioners' legitimate expectation.

96. Article 66 of the *Constitution* grants the State powers to regulate the use of any land or interest thereof in the interest of defense, public safety, public order, public morality, public health, or land use planning. These could initiate the resettlement of the landless. Article 69(1)(a) and (b) of the *Constitution* obligates the State to ensure sustainable exploitation and utilization of resources including equitable sharing of resources.

97. The 1st, 3rd, and 4th respondents paint a picture of gloom, doom, and hopelessness, yet the *Constitution* grants them powers to resettle the landless. In *Musembi & Another v Moi Education Centre Co. Ltd & Others*, Petition 2 of 2018 [2021] KESC 50 [KLR] (16th July 2021) (Judgment), the court underscored that forced eviction generally constitutes a violation of fundamental rights and freedoms and abuse of inherent human rights and dignity, including economic and social rights under Article 43 of the *Constitution*, on which the State must ensure that such rights are not limited without reasonable

justification in an open and democratic society, based on human dignity and equality and freedoms as provided under Article 24(1) of the *Constitution*.

98. The court said that in ensuring that the right under Article 43 of the *Constitution* are protected, the State has to strike a delicate balance between the rights of those that were most affected, or vulnerable in the society and those that were in an economic disadvantage, to ensure the protection of individual and group rights and the State should have a negative obligation not to abuse or violate those fundamental rights and freedoms. The court found that the eviction was violent and did not accord with the constitutional obligations of the state to ensure that those in informal settlements were treated with dignity under Article 28 of the *Constitution*, 2010 as held in *Mitu-Bell Welfare Society*, (supra). Article 43 of the *Constitution*, obligates the state to avail resources or implement policies and standard provisions to realize the rights of the petitioners.

99. The Bill of Rights applies both vertically and horizontally. I disagree with the 2nd respondent that the petitioners have no basis to lay their ancestral customary rights on privately owned land. Conversion of land from one registration regime to the other is allowed by law and the *Constitution*. The conversion does not relieve a party of overriding interests under Section 28 (h) of the *Land Registration Act*.

100. As to whether the petitioners have proved a breach of their rights to be entitled to the reliefs sought, it is trite law that there can be no legal rights without a legal remedy, otherwise, known as ubi jus ibi remedium. In *Macharia Mwangi Maina & Others v Davidson Mwangi Kagiri* (2014] eKLR, the court observed that as a court of equity, which does not allow a wrong without a remedy, detests, unjust enrichment and therefore, a court is bound to deliver substantive rather than technical and procedural justice. The liability on the part of the respondents must be proved by the petitioners jointly and severally.

101. The displacement of the Ndorobos from the forests is a historical fact that was sanctioned by law. Under the *East African Forest Regulation 1902*, community forests were appropriated by the colonial masters and converted into government forests. Management of the forests was, therefore, transferred from local communities to the State. The Regulations provided inter alia for the gazettement and de-gazettement of forest areas, offenses, punishment of offenders, and authorized use of licenses to permit any acts, otherwise forbidden by the Regulations. The effect of the Regulations was that forest communities had to vacate their lands and had to be assimilated into neighboring communities. This act effectively therefore, curtailed the communities' rights to derive their livelihood from the forests.

102. By 1908, most forested areas had been declared forest areas by the colonial administration. These Regulations were later taken up by the *Forest Ordinances of 1911,* 1915 and 1916, which were later reviewed in 1941, to create natural reserves within forest reserves where no form of consumptive utilization was allowed in natural reserves. The *Forest Ordinance 1941*, was later reviewed in 1949 and 1954, to align with the constitutional changes taking place at the time.[i]

103. Colonial forest laws were geared towards forest preservation, excluding communities from forest management and stopping irregular allocation of forests[ii]. For instance, under Section 4 of the *1942 Ordinance*, the Minister had immense powers in forest management. He could declare by notice in the gazette any unalienated government land to be a forest area, declare its boundaries, alter the boundaries, and declare whether a forest area would cause to be a forest area, without giving reasons or involving the local communities, or giving incentives to the communities to manage the forests.

104. Through *Proclamation No. 44 of 1933*, the Mount Elgon Forest was created. The first forest policy was formulated in 1957 when White Paper No. 85 of 1957 was published. It was again restated in 1968, as

a means of preserving, managing, and protecting forests due to their value and importance in Kenya's economy[iii].

105. The Forest Ordinance later became the Forest Act, Cap 385. Through the National Food Policy Framework Sessional Peter No. 4 of 1981, the government emphasized promoting good self-sufficiency and the production of export crops. It provided the impetus for converting gazetted land into farming zones. Through Session Paper No. 1 of 1986, on economic Empowerment for Renewed Growth, emphasis was laid on the production of wheat, coffee, tea, and horticulture. The effect was an encroachment into forest areas.

106. Another development was the creation of Nyayo Tea Zones Development Corporation under President Order in 1986, later replaced by LR No. 265 of 1986, to provide forest conservation by providing buffer zones of tea and assorted tree species to check against encroachment into the forest land. It led to the clearance of large tracts of forests adjacent to forests designated as water catchment areas.

107. The 1968 policy was later reviewed per the Kenya Forest Master Plan recommendation of 1994, whose objective was to enhance the role of forests in socio-economic development and environment conservation. For the first time, local communities were recognized as part of the implementation of the objectives. It identifies the communities such as the traditional forest dwellers, forest settlers/squatters, and forest-adjacent communities.

108. Through Session Paper No. 9 of 2005, the forest policy, local communities were empowered to participate in forest management through the Community Forest Association (CFA) and in creating new forests within their localities, so that they could have a sufficient supply of wood resources for their need and selling. The CFA would, therefore, be registered to grant community user rights but not ownership of the underlying land. The Kenya Forest Act, 2005, was therefore aimed at addressing the challenges of the 1942 ordinance regarding sustainable, use or rational development and conservation of forest resources.

109. The petitioners claim that before the introduction of formal law, on land management in the forest areas, they had their cultural rules to govern the use and management of forest resources, since it was part and parcel of their identity and livelihoods. The introduction of English property laws emphasized private property and rights, which impacted negatively on traditional land tenure systems, leading to the marginalization of local communities in natural resources management, which was perpetuated through the 1930 Kenya Land Commission, otherwise known as Morris Curter Report. In this Report, it is said that the colonial settlers failed to recognize forest communities as distinct communities, despite their ancestral, territorial boundaries, being recognized by the neighboring communities[iv].

110. The Report disregarded the forest communities and went ahead to seize those lands, as state property, rendering the forest-dwelling communities landless, and leaving them at the mercy of neighboring communities for assimilation and also subject to the dominant custom of the communities who tried to assimilate them. With the subjugation and undermining of the local hunter-gatherers, and pastoralist communities, the economy was given another impromptu through the plan 1955, to modernize agriculture, through access to land as one of the tenure and the technology of production. This led further to the marginalization and deterioration of the hunter-gatherer production system and livelihood, since access to forests after gazettement was curtailed[v].

111. The Trust *Land Act* (Cap 288), was used to secure community land by making County Councils, trustees of the local communities. It provided for the creation of forest reserves as land is surveyed,

demarcated, and gazetted as either from trust land or from unalienated government land, to be managed by the local authorities, other than the forest departments.

112. A similar process would also occur under the Wildlife Conservation and Management Act (Cap 376), with regard to national reserves.

113. The National Land Policy 2009, made provisions for the recognition of community land tenure, and protection of the rights of forest communities to access, co-manage, and derive benefits from the forest. Article 63 2(b) of the *Constitution*, therefore, captures all the foregoing historical realities, by capturing land categories that had been neglected, overlooked, or disregarded since Kenyans became tenants of the Crown, through a formal legal system in general, and in particular through formal land laws. See Isaka Wainaina & Another v Murito wa Indagara & Others [1922-1923] 92) KLR 102.

114. Article 63 2(d) of the *Constitution*, defines community land broadly to include that which is lawfully held, managed, and used by specific communities as community forests, grazing areas or shrines, ancestral land, and land traditionally occupied by hunter-gatherer communities or lawfully held as trust land by county government. This marked an important paradigm shift in land governance in Kenya.

115. Therefore, it cannot be true as pleaded and submitted by the 2nd respondent that the annexation gazettement and the conversion of the suit land by the colonialists if it belonged initially to the petitioners as ancestral land, or was occupied by them before the Proclamation in 1890, 1894, 1895, 1897, 1902, 1915, 1932, their rights were extinguished forever and cannot find any basis in law and in fact.

116. Through Article 63 2(2) of the *Constitution*, forest communities who may have been deprived of their land through gazettement of forest reserves or excision, subdivisions and transfer to an individual, have a constitutional basis to lay their land rights[vi].

117. Customary rights of access to land have now found their place at the high table, with the promulgation of the *Constitution* and the *Community Land Act*, 2016. Such rights have been given equal force of law, and similar treatment as public and private land. The recognition of culture, and the rights of minorities and marginalized groups under Articles 11, 43, 56(2), 69(1)(b),(c) and (d) and the obligation placed on the state to put in place affirmative action programs to ensure that such groups inter alia develop their cultural values, languages and practices, social, economic rights attainment, use of traditional ecological knowledge, encouragement of public participation in the management, protection and conservation of the environment, has in my view cemented in the law and the *Constitution* guarantee of land rights for forest communities.

118. Despite the above law and the constitutional provisions, the petitioners allege that 24 years down the line since 2010, they are yet to enjoy their constitutional rights and freedoms, regarding resettlement. The petitioners' complaint was at the doorstep of the 1st respondent as early as 2014. It is yet to be resolved and affirmative measures put in place to resettle them in their ancestral land or through other alternative means. It is not in dispute that The *Crown Land Ordinance 1915*, land to rest the question of native land right. It created insecurity and frustrations among natives. African native reserves were created in 1921 and 1939 to silence the agitation for native land rights did not make the situation better, through the *Native Lands Trust Ordinance 1930*.

119. In *Stanley Kahahu v Attorney General* [1926] 18 KLR, the court held that both the 1930 and *1934 Native Land Trust Ordinances* recognized individual land holdings by Africans in the reserves. The *Kenya (Native Areas) Order* in Court No. 138 provided that native areas be a category of native land, temporal native reserves, and native leaseholds, to which African customary law would be applicable.

The effect of the Native Land Ordinance of 1930 was to confine displaced natives within the native reserve, hence restricting access to large forest blocks[vii]. The Native Land Registration Ordinance and the Land Control (Native Land) Ordinance, were enacted in 1959 to apply to any native area where it appeared to the Minister that adjudication, consolidation, and registration of rights, should take place and to a framework of transaction in registered land. The effect of the registration was to extinguish any right, claim, or interest to land based on customary land laws not noted in the register, as held in *Obiero v Opiyo & Others* [1972] EA 217 and *Esiroyo v Esiroyo & Another* [1973] EA 388. It also caused massive landlessness among Africans.

120. The 2nd respondent has pleaded that the historical background set out in paragraphs 28-57 of the petition gives no relationship between the petitioners or their ancestors and the 2nd respondent neither does it cite the 2nd respondent as a participant in the alleged historical injustices in any case the 2nd respondent was a genuine proprietor who acquired the land by way of purchase from Chorlim Farm Ltd, which position was communicated to the 1st respondent by a letter dated 8/2/2010 in response to theirs dated 13/11/2019 as per annexures NA-3(a) and (b). The 2nd respondent blames the petitioners for similar attempts to lay claim on LR. Nos. 9433, 9434, and 8170, which are national reserves forming part of Mount Elgon Forest gazettement and reserved as per *Proclamation No. 44 of 1932* and LN. No. 174 of 1964 as per annexure marked NA-4(a) and (b), being a response to the 3rd respondent's letter.

121. The 2nd respondent admits that the suit land was originally known as LR No.9431, initially owned by Ronald Clifford Boy, who could grant easement rights to pass and repass along the strip within the land to Chorlim Farm Ltd and who used the farm for agricultural purposes, majorly coffee production, hence it could not have belonged to the petitioners or their ancestors as per Grant of Easement annexed as NA-5 and water agreement annexure NA-6. The 2nd respondent avers that it acquired the land as per the copy of the title attached as NA-7, and subsequently subdivided it as per annexure NA-8(a) – (j). Equally, it says that it sold 175 acres to the Kenya Tourism Development Corporation as per annexures NA-10, 11, and NA-12(a)-(f), hence the reason for the surrender registered in 1999 as per annexures marked NA-13(a)-(d) and was later gazetted as a Special Farm as per NA-14. Annexure NA-4(c) is a letter from the 3rd respondent confirming that Mt. Elgon forest had 91,997 Ha as a gazetted Forest Reserve vide *Proclamation No. 44 of 1933* and as a central forest vide *Legal Notice No. 174 of 1964*. It confirms that the boundaries have been altered through amendment to the present forest area of 73957.53 Ha.

122. The 3rd respondent states in the letter that squatters have since the mid-1990s, invaded the forest until Sabaot leaders visited the president seeking land to settle Kiboroa, Teldet and Ndorobo squatters.

123. The letter states that Kabaywen Block measuring 1981.8 Ha located in Saboti forest station was declared part of Mt. Elgon Forest vide LR No. 221 of 1978 composed of LR Nos. 6469, 7405, 6443/2 11122, 9433, 11683, and 7069/1. Regarding LR No. 9431 claimed by the petitioners, and 9432, the letter states the same is not part of the Mt. Elgon gazetted Forest. In the annexure marked CKC'12, the 3rd respondent wrote a letter dated 2/9/2015 to the petitioners, stating that LR. Nos. 9433, 9434, and 8170 were part of Mt. Elgon Forest Reserve as per map of the *Proclamation No. 44 of 1932* and LR No. 74 of 1964. In annexure CKC'25, which is a letter dated 13/11/2018, from the 1st respondent, it is indicated that LR No. 9431 was leased to the Land Ltd by the government for a term of 96 years, with effect from 1/4/1958 and subdivisions were done in 1968, leaving the 2nd respondent with LR No. 9431/7, which the 2nd respondent in 1999 subdivided and lived of 61.66 Ha being LR No. 9431/7/1, which it surrendered to the government. In a response letter dated 8/2/2019, the 2nd respondent denies the alleged surrender and instead insists that LR. No. 9431/7 belongs to it as a special farm vide Gazette No. 31 of 13/2/2001.

124. In a letter dated 15/3/2023 to the 2nd respondent, from the National Land Commission, County Coordinator, Trans Nzoia, the 2nd respondent was asked to clarify the subdivision on No. 9431 and the surrender. NA-7. Is a transfer to the 3rd respondent as lessee of certificate of title for IR No. 22293 for LR No. 9431/7 measuring 3093 acres? The attached deed plan lacks the original/No. The deed plan is 85211. Annexure marked NA-12(c) confirmed there was going to be a finalization of excision in favor of Kokwo Co-operative Society Squatters. The land surveyors were referring to a letter dated 5/12/2002 from the 2nd respondent, non-payment of rates, and a boundary dispute with the squatters that had stalled the finalization of the excision.

125. Annexure CLC-5 shows that a surrender to the government in consideration of approval of the subdivision scheme are 61.55 Ha was for LR No. 9431/7. The initial land bought by the 2nd respondent from Chorlim Farm Ltd as per the lease dated 3/5/1968, was LR No. 9431/7 and 2989/1 as per survey plan No. 85211 dated 21/2/1968. Annexure marked NA-7 equally, confirms the surrender occurred in 1999.

126. The new grant as per annexure NA-8(d) was to assume LR No. 9431/7. LR No. 9431/8 is what remained for Chorlim Farm as per NA-8(d), bearing Deed Plan No. 95413. This was confirmed in a letter dated 8/7/1974 by the Land Ltd in their letter to the Kenya Tourism Development Corporation, NA-8(f), (g), (h) and (I), confirmed the same position. Equally, Annexure marked NA-12 (c) talk of the head title LR No. 9431/7 being held for purposes of finalization of the excision for Kokwo Co-operative Society Squatters that had stalled due to land rates payments to the County of Trans Nzoia and boundary dispute with the squatters as per the 2nd respondent's letter dated 5/12/2002. The land surveyors were optimistic that once the two issues were resolved, the pending transaction would be finalized.

127. Annexure NA-12(c) is the 2nd respondent's evidence before this court. Coming to Annexure NA-12(a), it relates to a transfer of LR No. 12162. The date of the transfer, seal of the transferee, and transferor are missing. The date when it was approved by the Commissioner of Lands is also missing. Equally, the date of registration and evidence of payment of stamp duty and registration fees are missing. The same position appears in Annexure marked NA-12(c). Regarding Annexure marked NA-14, it relates to LR No. 2989/1 and 9431/7, measuring 2300 and not 3043.

128. It is trite law that when a title is under challenge, all the documents towards its acquisition become key. See *Munyua Maina & Others v Hiram Maina* [2013] KECA 94 (KLR) and, *Wreck Motors v Commissioner of Land & 4 others* [1997] KECA 284 (KLR).

129. In this matter, whereas the respondents rely heavily on *Proclamation No. 44 of 1932* and *Legal Notice No. 174 of 1964*, the 2nd respondent asserts it has a protected title to the land. Article 40(6) of the *Constitution* does not extend the property that is unlawfully acquired. See *Dina Management Ltd vs County Government of Mombasa & 5 others* [2021] KECA 503 (KLR). A bona fide purchaser must prove that it acquired a valid and legal title after carrying out due diligence. The 2nd respondent has the burden to explain how a gazetted forest reserve as per the Proclamation and Legal Notice of 1932 and 1964 came to be excised in favor of Chorlim Farm Ltd to be able to sell and transfer the same to the 2nd respondent. Section 67(3) of the *National Land Commission Act* grants the 1st respondent powers to monitor the registrations of rights and interests in land.

130. In *Kenya Port Office Savings Bank Staff Retirement Benefit Scheme Registered Trustees v Attorney General & Others* (Civil Appeal 275 of 2019 [2025] KECA 438 [KLR) (7th March 2025) (Judgment), the court held that the process of de-gazettement having not been followed, the vendors did not have valid titles to pass to the subsequent purchaser, as the title they purportedly held was unlawful, illegal

and invalid. The court held that the protection of a bona fide purchaser for value does not apply where the title to the property was acquired illegally.

131. In *Timothy Ingosi & Others v Kenya Forest Services & Others* [2015] KEELC 16 [KLR], titles had been issued through a presidential decree but a de-gazettement notice had not been published, for the land initially forming part of Turbo Forest as gazetted vide *Legal Notice No. 167 of 1971*. The court observed that the procedure for de-gazettement of forest land before allocation falls under Section 4 of the *Forest Act* (repealed) by way of a notice of variation of boundaries or revocation of state or local authority forest, upon recommendation by the forest service and subsequent approval by a resolution of Parliament under Section 28 of the *Forest Act*. The court said that without altering the boundaries of the forest by de-gazettement and following due process, the land in dispute was not available for allocation and therefore, the titles issued over the suit land were and remained null and void.

132. Annexures marked NA-7 is clear that the 2nd respondent has a lessee from the government of Kenya for a term of 960 years with effect from 1/4/1958 for a land measuring 3093 acres, LR No. 9431/7 as per survey plan No. 85211 with a benefit of an easement created vide instruments registered numbers IR 6169/9, IR 19100/2 and IR 15110/5, issued by the Registrar of Titles. A memorandum thereto showed that a lease was subject to the Government Lands Act (repealed) special conditions contained in the grant registered as No. IR 15110/1 easement protected by caveat No. IR 15110/6.

133. The caveat seems to have been withdrawn per Entry No.4 on 22/10/1996. Other than as stated in paragraphs 14-16 of the replying affidavit of Nicholas Ayugi that the suit property was acquired through purchase which process began in 1967 and availing a copy of title and transfer, the 2nd respondent has not availed information on how LR No. 9431 came to being, before it was registered to the initial owner, before by Chorlim Farm Ltd, so that it could sell and transfer a valid title to it in 1968.

134. Proclamation No. 44, of 1932, the Forest Ordinance gave the boundaries of the Mount Elgon Forest Reserve as commencing at the summit of Mount Elgon on the Kenya Uganda Boundary, thence following that boundary north-easterly to the Suam River, thence bounded by that river downstream to a point about 6,700ft, west of northern corner of LR. No. 6106, thence by a straight line south-easterly to a point on the western boundary of LR. No. 6106 about 5400ft from its north-west corner, then southerly by part of western boundary of LR No. 6106 and those of LR. No. 6106/R (6433) and 6432 to the southern corner of the last portion, then by the western boundaries of LR. Nos. 6891, 6890, 6654, and 6471 to the southern corner of the land, thence by south-western boundaries of LR, Nos. 6414, 6416, 6415, 6139, 6136, and part of the southern boundary of LR, No. 5772 to the north-west corner of LR. No. 1950, thence, by the western boundary of LR No. 1950 and part of LR. No. 1951 to the intersection of the latter with the Kibewyan River which form the northern boundary of LR. No. 2066, thence that river upstream to the north-west corners of that portion, thence by the western boundaries of LR. Nos. 2066, 6440, and LR. No. 6439 to the south-west corner of the land, thence by a cut and beaconed line in a generally south-westerly direction to the Haba River (a small tributary of Musindet River), thence by the Haba River downstream for about 9500ft to its intersection with a cut and beaconed line on its right bank thence in a generally easterly direction by that cutline for about twelve miles to a beacon in Chengewa Ridge thence by north-westerly by a straight line to the forest edge on Konsetla Ridge, thence in a generally westerly direction by the top of the escarpment to the Lwagaga (Lwakaka) River which forms the Kenya - Uganda boundary, thence northerly by that boundary to a point of commencement.

135. The onus was on the 2nd respondent to show that its parcel of land does not fall within the gazetted area, covering Mount Elgon Forest Reserve. By *Legal Notice No. 23 of 2013*, Makunga Forest an area of approximately 252.53 Ha, known as LR No. 6992/2 situated 25 kilometers west of Kitale Municipality as per Boundary Plan No. 175/389 was excluded. Annexure marked NA-8(b), confirms that the

excision for the proposed lodge was from land adjoining Mount Elgon National Park. Annexure marked NA-8(j) is a survey map showing that LR No. 9431/7/1 borders LR. Nos. 9430, 9432, 7069/3, 6166, 5399, 2289/1/R, 5709, 5710/2,5712 and 7495.

136. Annexure NA-12(c) is a surrender of 61.55 Ha of LR. No. 9431/7/1, in consideration of the approval of a subdivision scheme in respect of the remainder of the premises comprised in the title. The Survey Deed Plan No. 95411 annexed as NA-12(1) indicates that LR. No. 9431/7/1 borders the Mt. Elgon National Park, and Bongai River cuts across it. Annexure marked NA-13(a) shows that there was going to be a re-grant of the excision and an indent from the Commissioner of Lands for both the surrender and change of use. These two have not been availed by the 2nd respondent if at all they were ever issued by the Commissioner of Lands.

137. An indenture is a title created under the *Government Lands Act* (repealed). In *Mwinyi Hamisi Ali v The Attorney General & Another* [1997] eKLR, the court held that registration of such surrender is evidence of surrender. There is no evidence tendered to show that other than letters, the Commissioner of Lands gave consent for the subdivision of the excision of the surrendered portion of 61.55 Ha and the approval of the change of user.

138. In *Kokwo Multipurpose Co-operative Society vs Principal Secretary, Ministry of Land, Housing & Urban Development and Others* [2015] eKLR, the petitioners had been allocated LR Nos. 6950/3, 6992/2, 7404(9433) on 19/2/1999, took possession and settled therein after paying Kshs.10,988,644/=, to the owner of the land. They were however, asked to move out in 2006, on the basis that the parcels were not available for allocation for LR No. 6950/3 had been declared part of Mt. Elgon Forest vide Gazette Notice No. 359 of 19/12/1986, hence was public land. It was also contended that the process of allocation of government forest had not been followed. The court declined to find any violation of the rights to property, dignity, equality, and security of persons since the petitioners had been given humble notice to vacate since the land was irregularly allocated 13 years after the gazettement. The court however ordered the refund of the consideration with interest.

139. In this petition, the 2nd respondent has failed the evidential burden to show that it acquired the title to the suit property in a regular, lawful complaint fashion. The 2nd respondent conveniently did not adduce evidence to show how the initial owner of the land acquired it and through which process. The initial grant was not availed, even though it is referred to in the transfer form. It is the 2nd respondent who is alleging that LR No. 9431 initially was not covered by the Proclamation area. A certificate of lease or grant would have been prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. See *Embakasi Properties Ltd & Another v Commissioner of Lands & Another* [2019] eKLR.

140. Anyone who wishes the court to believe in the existence of a fact or who would fail if no evidence were adduced by either side, has the burden to prove its existence. The root of the 2nd respondent's title was under challenge from both the 1st, 3rd, 4th, and 5th respondents after the petitioners complained in 2014 and before this court. In *Munyu Maina v Hiram Gathiha Maina* (supra), the court observed that when a title is under challenge, the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any interests which would not be noted in the register.

141. The contention by the petitioners is that as a minority and marginalized group, they have suffered decades of historical injustices, marginalization, and discrimination including eviction and displacement from their ancestral land, which the state through its officer has been aware of since approaching the first president of Kenya in 1964, who delegated the issue to the then Land Commissioner, later was handled by the Land Minister in 1966, who stopped the 3rd respondent from

harassing the families, assured them of resettlement, and were permitted to till the land in the forest while awaiting government resolution. The petitioners aver that in 1987, Ndorobo's families were among those forcefully evicted from the Rift Valley and there were settlement schemes established to resettle the evictees such as Reinha, Cheptanday, Kitalale, Maridadi, and Dr. Bells in Kiboroa location, which process was marred with corruption, was hijacked by few wealthy people and the Ndorobos were never settled.

142. The petitioners again allude to the events of 2002, when the then DC Trans Nzoia settled the displaced Ndorobos in the Telted location but were later displaced due to internal conflicts in Mt. Elgon District that extended to Trans Nzoia, further evicting them from the land and were given temporal settlement at Sosio forest. All these facts have not been disputed by the respondents. Sections 59 and 60 of the *Evidence Act*, allow the court to take judicial notice of accession to office name, titles, and functions of public offices, ordinary cause of nature, all matters of general or local notoriety, all matters of public history, literature, science or at and to resort to the aid of appropriate books or documents of reference.

143. Mackenzie in her piece[viii], traces how the visibility of use right to land was extinguished not just by the introduction of statutory law and the registration of title in the 1950s and 1960s, but as part and parcel of a struggle over who could define custom with the colonial political economy, especially in the struggle between African and European in the face of the massive alienation of fertile land to white settlers and the restriction of African to reserves.

144. K.O. Dundas in his notes on[ix] says that the earliest inhabitant of the country now occupied by the Kikuyu were the people called Ogiek or We-Ndorobo, later termed by European as Ndorobo. The Ndorobo lived mostly by the Rift Valley in the highland forest and mountainous areas, living as hunters and gatherers. They are considered a pioneering group of Kalenjins who first moved to the Rift Valley from the north[x]. Currently, they reside in the highest part of Mt. Elgon forest which is Chepkitale, Cheyuk, and Mosop. As a forest tribe, they are said to be endowed with astute hunting, gathering, tracking, and trapping techniques that help them survive in the forest. They are said to have a unique technique of making bows and poisonous arrows that they use as hunting tools. Ndorobos are said to believe in honey and herbs to cure ailments. It is said that Ndorobos believe the forest is alive, they talk to the forest, and they invoke the spirit of the forest for their protection and co-operation. They, therefore, take care of the forest for it feeds them forever. Such is the photography that the Ndorobo is said to embrace to conserve the forest. Ndorobos are said to have their own set of gods and beliefs. Ndorobos do not ordinarily own cattle and, hence are believed to be the poorest people on earth. The name itself is said to be derogatory meaning extremely poor. Ndorobos are said to value survival rather than material possessions. Originally, they are said to live a day at a time, fostering close relationships and friendships, to enable them to keep to themselves and for survival[xi]. They are believed to be the original owners of Kenya, yet they are marginalized while other tribes keep clearing the forest, Ndorobo hides deeper in the forest since they cannot have forests. The practice of animism out of this uniqueness, it is believed that the government finds it difficult to resettle the Ndorobo out of the forest[xii]. See also[xiii]. The area they occupy has been described as a neglected nation, where developmental projects remain unheard of or rather mysterious to the residents, lacking necessities of life such as water, health education, roads, and communication networks. They feel rightly forgotten[xiv] and also[xv].

145. There has been a misconception about them that they are not a true ethnic group but a collection of outlaws who have found refuge in the forests, that they are lawless poachers, that they are a drying remnant not bothering with and they are likely due to honey hunting to cause forest fires and that being lawless migrants are addicted to cattle stealing. It is said by historians that the ancestral land has been taken from them in a manner title different from the seizure of the Indian hunting ground in the United States of America, but the difference is that no Ndorobo reserves have been retained. To

this great injustice, it is said that the effect of forestry police has had a profound effect on the lifestyle of Ndorobos. Guy Teoman in his piece takes the view that the need of the Ndorobo about forest conservation needs to be relooked at and essential steps taken to return sufficient land to them for co-existence and with control. Likewise, it is suggested that after being settled, provision be made for education, health, sanitation, and other developed projects[xvi].

146. From the historical facts, it is quite evident uncertainties related to the governance of forest dwellers resulted in a problem known as the Ndorobo question in the Kenya colony[xvii]. Kenya's Session Paper No. 2 of 2009, the national land policy addresses resettlement in Kenya, particularly with land rights and tenure security. It recognizes the need for security of tenure for all Kenyans including those in informal settlements and marginalized groups. The Paper acknowledges and protects customary land rights and provides derivation rights from all categories of land rights holdings. It acknowledges and protects the rights of communities with customary land tenure system, ensuring that their rights are respected during any resettlement process. It acknowledges the government's role in facilitating land administration and pursuing fair and equitable processes for land acquisition and resettlement. The Paper emphasizes the importance of developing and implementing a comprehensive Resettlement Action Plan (RAP) when a project or development may lead to displacement or resettlement ensuring that the affected people receive appropriate compensation and assistance.

147. Compulsory land acquisition, valuation for compensation and involuntary settlement are based on the theory of social justice that acquires equity, fairness and just terms of compensation to be observed, to place the affected person in the same position as he was before the displacement for public benefit[xviii].

148. Resettlement in Kenya is governed by Articles 40, 60 1(a) and 159 of the *Constitution*, the *Land Act*, *Land (Value) Amendment Act*, *Community Land Act* 2016, The Eviction and Resettlement Guidelines 2019, *National Land Commission Act*, the *Land (Assessment of Just Compensation) Rules, 2017*, *Land Registration Act*, *Prevention, Protection and Assistance to Internally Displaced Persons & Affected Community Act* No. 56 of 2012, *Environment Land Court Act*, Environmental Management and Co-ordination Act, the *Valuers Act*, Valuation Standard, 2021 in the Blue Block, Kenha Environment and Social Safeguard Policy 2019 and the National Housing Policy for Kenya, Sessional Paper No. 3 2016.

149. The respondents take the view that the reliefs sought by the petitioners are untenable, for there is no nexus between the land claimed by the petitioners which before the 2nd respondent acquired was privately owned through easement rights being given. The petitioners, on the other hand, argue that the land formed part of ancestral land, which was illegally and unconstitutionally acquired through historical injustice, and that the 2nd respondent is perpetuating the illegality as unconstitutionality even after some 61.55 Ha were surrendered for resettlement to the government.

150. In *Kitele & Others (Suing as representatives of Ogiek/Ndorobo Community of Mt. Elgon) v County Government of Bungoma & Another* ELC No. 10 of 2020 [2022] KEELC 4901 [KLR] (26th September 2022) (Judgment), the court held that the report by the State Department of Environment and Natural Resources Report on Chepkitale National Reserve and Ogiek Community, letter dated 3/4/2002, by the PS and Secretary to the Cabinet, the land was before conversion into a national reserve trust land held by the Mt. Elgon County Council in trust for the community, hence if the conversion did not adhere to the *Constitution* and other legal provisions on conversion, the conversion was invalid, unlawful, void ab initio and unconstitutional. The court reverted the land to pre-June 2000 status. In *Francis Kemai & Others v Attorney General & Others* Nairobi HC CC No. 238 of 1979 (OS), reference was made to the government's 1991-1998 plan to settle landless persons, on humanitarian consideration that was shelled on the potential to result in environmental degradation of the forest. The court made note that out of the Easter Common report 1934, the people who were found in

Tinet Forest were Ndorobos meaning poor folk, hunters, and gatherers, inhabiting highland forest, but were dispersed to the plains, though they preferred and were accustomed to elevate places, left their refuge of foliage with greatest reluctance as in Andrew Fodders et al; *Stating Peoples and Cultures of Kenya* 1979. The court also relied on William Robert Chief's "*An Online History of the Rift Valley of Kenya up to AD 1900* [1975], that the Ogiek to Ndorobos who form part of lead a life which is environmentally conservational, but were moved out of the forested area after it was gazetted under *Forest Act*, prohibiting hunting, fishing and the disturbance of the flora and fauna except when permitted under *Forest Act* Wildlife Conservation and Management Act and *Fisheries Act*. The court observed that in grappling with our socio-economic cultural problems, rights should not be lost on the linkages between landlessness, land tenure, cultural practices and habits, land titles, land use, and natural reserves management, which must be at the heart of policy option in environmental, constitutional law and human rights litigations.

151. The habitual place of residence of the Ndorobo from the cited history and as confirmed from their pleadings is clear between June 1895 when Kenya became a Protectorate and 1964 when it became independent. The Mau forest eviction of 2004-2008 is part of Kenya's history. The petitioners take the view that their culture depends on specific geographical habitats. Currently, they are living in the Sosio forest. Access to land and land-based reserves of forests are key to their livelihood. The Report on the Government Taskforce on the Conservation of the Mau Forest refers to Ndorobo people some of whom were affected.

152. In *Joseph Letuya & 21 Others v Attorney General & Others* [2014] eKLR, the High Court ruled in favor of the community regarding the eviction and directed that the National Land Commission work with the Ogiek Council of Elders to identify land for resettlement. In the African Court on Human & Peoples Rights, Ogiek community decision of 26/5/2017, the court noted the rot of indigenous people and hunter-gathers in conservation, stating that the preservation of the man forest could not justify the lack of recognition of the indigenous status of the Ogiek nor the denial of the right associated with that status. Out of the decision involving Ogiek, a task force was gazetted on 23/10/2017 as per Gazette No. 10944.

153. In my view, the petitioners fit the description of Article 260 of the *Constitution* as a group maintaining a traditional lifestyle and livelihoods based on a hunter-gatherer economy[xix]. It is estimated that indigenous people constitute approximately 26% of Kenya. Such a group, therefore, requires their rights and freedoms enshrined in the *Constitution* to be protected, enforced, and preserved by this court. Article 67 of the *Constitution*, as read together with Section 5 of the *National Land Commission Act* and Sections 34 and 35 of the *Land Act*, expected the 1st respondent to take action and resettle the petitioners. The petitioners argue that the violation was a result of colonial occupation, independent struggle, pre-independence treaties, inequitable land adjudication process, politically motivated, controlled, conflict-based, corruption or illegal resettlement schemes and or perpetuation by the 2nd and 3rd respondents, who continue to deny them access to their ancestral land and lastly, failure by the 1st respondent to act on their complaint for over 7 years. Article 10(2)(b) of the *Constitution*, outlaw discrimination of any form, or group or peoples' protection of marginalized and minorities rights is enshrined under Article 56 of the *Constitution*.

154. Putting in place affirmative mechanism actions or programs designed to protect, respect, and uphold the petitioners' way of life, rights, and freedoms under Article 56 (a), (b), (c), (d), and (e) thereof is all that the petitioners are simply saying has been their complaint since independence leading to promises, assurances and piecemeal or short term measures by the State and its officers.

155. The petitioners allege that by virtue of being marginalized, have been disadvantaged by discrimination on one or more grounds under Article 27(4) of the *Constitution*, hence the reason that their plight has not been addressed since independence. The inordinate delay by the respondents to process the complaints since 1964, has not been addressed at all in this court. In particular, the 1st respondent has no explanation why it has not addressed the issue, or complaint even after the same was lodged in 2014. From the material presented, it is apparent that in 2014, the 1st respondent admitted the complaint as falling under a historical land injustice complaint in 2019. Such a delay is not only inordinate, unreasonable, and falling short of Article 47 of the *Constitution*, to amounts to an injustice. The *Land Act* covers the management and administration of all types of public land. Under the *National Land Commission Act*, Article 67 of the *Constitution*, is given effect. National Land Commission has a supervisory role over all public land entrusted to entities including public forests, parks, and catchment areas. Under the *Forest Conservation and Management Act*, the Kenya Forest Service has the mandate to administer all public forests including community participation through community forest associations.

156. In this petition, the 3rd respondent has not addressed the question of community forests that are excluded by Article 62(1)(g) of the *Constitution*, , as not being public land as read together with Section 77(a) *Forest Conservation and Management Act* and the Third Schedule as regard what the petitioners are claiming as their ancestral land. The petitioners urge the court to recognize communal land rights as indigenous people whose lifestyle resolves around the forest, as enshrined under Article 62(1)(g) of the *Constitution*, as land held, managed, or used by the Ndorobos as community forests, hunting and gathering land. Article 63(2) of the *Constitution* defines land lawfully held, managed, or used by specific communities as community forest, grazing areas or shrines, ancestral land traditionally occupied by hunter-gatherer communities, or lawfully held in trust land by the community as community land.

157. In *Kelly Matenya v Attorney General & Another, Council of Governors* [2019] eKLR, the court held that community Land and includes as used in Section 2 of the *Community Land Act* 'means but not limited to' as unconstitutional and must account to Article 63 of the *Constitution*. A community is identified based on ethnicity, culture, and similar community interests as per Article 63(1) of the *Constitution*. Section 2 of the *Community Land Act* defines a community as a considerably distinct and organized group of users of community land who share a common ancestry, similar culture, or unique mode of livelihood, socio-economic or common interest, geographical space, ecological space or ethnicity. Community interests are defined as the possession or enjoyment of common rights, privileges, or interests in land, living in the same geographical area, or having an apparent association, under the *Forest Conservation and Management Act*, Community definition is the same as the one used in Article 63 of the *Constitution* 2010.

158. Prof. Kameri Mbote takes the view that the notion of community interests is brought together by land principally and by land-based resources. The court takes judicial notice of the 1998 Akimuwi Commission in which the issue of resettlement of the landless was addressed, mechanism was established but brought more conflicts after traditional lands were given to new owners, instead of the indigenous people from the area whose traditional lands had been alienated by the colonial settlers, and which brought resentment.

159. The Waki Commission of post-election also addressed land, inequality, and marginalization, and how the constitutional liberty to own land anywhere exists more in theory than in practice.

160. Given all these learned lessons from history, I take the view that in determining what appropriate relief to grant to the petitioners, regard must be taken that the issues of resettlement of the landless cannot be said to be an ordinary dispute that can be handled through ordinary civil suit or as falling within the

mandate of the 1st respondent, given the limitation it has. In *McGirt v Oklahoma* [2020] US Supreme Court held that the Creek were promised not only a permanent home, that could forever be set apart, but they were also assured a right to self-government on land that would lie outside both the legal jurisdiction and geographical boundaries of any state, hence was a reservation, which the court had to enforce. In *Mabo v Queensland No. 2* (1992). 175 CLR1, the court rejected the notion that indigenous Australians had pre-existing rights before European colonization, based on their traditional laws and customs. In *Yunupingu v The Commonwealth* (2023) 298 FCR 160. 2, the court found that native title rights are property and that its extinguishment requires 'just terms' compensation. In *Wik Peoples v Queensland* [1996] HCA 40 - 187 CLR 1, the court held that Indigenous land rights or title could co-exist with pastoral leases, meaning that Indigenous people could have rights on land that were also subject to other forms of tenure.

161. In *Mitu-Bell Welfare Society* (*supra*), the court observed that under Article 2(5) of the *Constitution*, 2010, where the state is accused of either neglecting or failing its responsibility of effectuate a social, economic right to demand evidence that would exonerate the latter from liability. In this petition, the petitioners are saying that due to dereliction of duty, breach of promises for resettlement, and inaction by the state, they are now forced to live landless, and or temporarily in Sosio forest, in deplorable and inhuman conditions devoid of basic human rights.

162. In *Mitu-Bell Welfare Society* (supra), the court described habitation of the landless as an expression to an emergence of informal settlement, on private and public land, where they always face the permanent threat and eviction by the private owners or state agencies, raising a sword of title or the shield of public interest. The court said that where landless occupy public homes and establish homes therein, they acquire no title to the land but a protectable right to housing over the same. The court said that since all land in Kenya belongs to the people of Kenya collectively as a nation, communities, and individuals, it has created a special category of land known as public land, in which every Kenyan has an interest. The court said that the right to housing over public land crystallized under a long period of occupation by people who have established homes and raised families on the land since, under Article 60(11) (a) of the *Constitution*, there is a principle of equitable access to land, and therefore faced with eviction on public interest, such potential evictees, have a right to petition the court for protection, in which case under Article 23(3) of the *Constitution*, the court can craft orders to protect that right such as compensation, requirement of adequate notice before eviction and observance of human conditions during the eviction.

163. Turning to this petition, the petitioners say that annexation of their ancestral lands occurred by act of state through *Proclamation No. 44 of 1932* and *Legal Notice No. 174 of 1964*, attached as CKC-3 and 4, hence dispossessing them and went to stay in Sosio forest as squatters, after which their ancestral land was alienated and titles issued as LR No. 9431 to the 2nd respondent, since April 1, 1958, as per CKC-6, who were asked to surrender a portion to resettle them in 1999. The 2nd respondent takes the view that the suit land is a special farm gazetted vide Gazette Notice No. 37 of 13/2/2007, hence it is not public land or falling under ancestral land as alleged or at all. In *Raphel Mlewa Mkare & Others v Agricultural Development Corporation* [2016] eKLR, the court observed that the Agricultural Development Corporation was established by the Act of Parliament in 1965 to promote products of Kenya's essential inputs, under Section 12 of the *Agricultural Development Corporation Act*, to which it purchased several parcels of land in the country formerly owned by private persons, especially the ones belonging to the departing whites. Further, the court observed that the Agricultural Development Corporation or its subsidiary has been selling parcels of land acquired using public resources notwithstanding the provisions of *Agricultural Development Corporation (Special Farm Rule 2001)*. See also *Agricultural Development Corporation & Lands Ltd v Raphael Mlewa Mkare & Others* [2022] eKLR.

164. Appropriate reliefs. The petitioners' prayers are that:

(a) A declaration does issue that the 2nd respondent's continued occupation of LR No. 9431/7/1 and 9431/8 is an ongoing historical land injustice on their constitutional right to access and enjoyment of their historical and ancestral land.

(b) A Declaration that the 2nd respondent has no legal interest in LR No. 9431/7/1 and 9431/8.

(c) The 1st respondent to allocate LR No. 9431/7/1 and 9431/8 to the petitioners for resettlement.

(d) Costs be borne by the 2nd respondent.

(e) Any other relief or order as the court may deem fit.

165. Article 23 of the *Constitution* provides that in any proceedings right under Article 22 thereof, a court may grant appropriate relief, including a declaration of right, an injustice, a conservatory order, a declaration of invalidity, or any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order of compensation, and an order of judicial review.

166. In *Mirigo & 550 Others v Minister for Land & 4 Others* (Civil Appeal 277 of 2011) [2014] KECA 881 [KLR] (22nd January 2014) (Judgment), at issue was whether the appellant had any registrable interest or beneficial trusteeship in the suit property, whether a non-vested and promissory interest in land is enforceable in law, whether the doctrine of right in alieno solo was applicable in the circumstances, and whether the appellants were by definition squatters in the circumstances, whether the Bill of Rights had imposed a constitutional duty on good to allocate land to any squatter or person, and whether a promise made by the president was to alienate or allocate land is enforceable in law.

167. The brief facts of the case were that while in the enclosed of the forest department of Ontulili forest within Mt. Kenya forest in Meru in the 1970s, the petitioners had asked the then president to allocate them land from the forest since they were squatters. Following a visit to the president, the ministers in charge were instructed to earmark suitable land to be excised from Ontulili forest for the squatters. Upon allocation of 973 Ha by Gazette Notice No. 68 of 1975 and 107 of 1977, the land was taken over by a company associated with the 5th respondent, hence the suit seeking mandamus or in the alternative compensation for land.

168. The court observed that a mandamus could be issued to compel the performance of a statutory public duty if there was a demonstration showing the constitutional or statutory duty on the part of the respondent owed to the appellants that was breached. The court observed that even though the land claimed had been excised from Mt. Kenya for their benefit and registered in the names of the 5th respondent, who later transferred it to the 4th respondent, the appellant never took physical possession of the land and therefore, the failure to take possession and occupy the land meant that they were not squatters as they claimed to be. The court said that the doctrine of alieno solo recognizes various categories of rights that a third party could have over another person's land such as consents, licenses, profits restrictive covenant, overriding interest, and mortgages, but in this case, the appellant had no registrable interest or beneficial trusteeship, hence it was inapplicable, for they had no enforceable third party right over the suit land.

169. On the issue of promise, the court and mandamus could not issue to enforce a promise to do anything in the future, neither could it issue to enforce a promise, not underpinned by a statutory promise, moreover a promise could not create nor convey an interest in land. On vested interest on the land, the

court held that for an interest to vest, it had to do so within 21 days and the promise by the former president was a future promise which did not vest any interest in the suit property.

170. Moreover, the court said that it is trite law that a future interest in land is void if it is not vested within a stipulated time frame the court said although Article 28 of the *Constitution* says that every person has the inherent dignity and the right to have the dignity respected and protected, the Article did not impose a constitutional duty on the good to allocate land to any squatter or person, and likewise the provisions on social justice, equality, equity, and prevention on inclusion, cruel and degrading treatment were not meant to be used to demand land allocation from the government. The court held that it was the mandate of the National Land Commission to investigate historical land injustices and to recommend appropriate redress as per Article 67(1)(e) of the *Constitution* and that it was not the duty of the court to allocate land and more so the judicial remedy of mandamus was not created to settle ownership disputes or to confer title to land, or to interfere with the executive arm of the government concerning Chapter Five of the *Constitution*, relating to management of land as a resource or on its allocation.

171. In *Republic v National Land Commission (Kenya Airport Authority) (IP)* [2022] eKLR, at issue was the jurisdiction of the National Land Commission with regard to private land. The court observed that historical land-related injustices could take many forms such as illegal hiving off of public land and trust land. The court cited *Pati Ltd v Funzi Island Development Ltd & Others* [2021] eKLR and *Republic v National Land Commission Exparte Krystallized Salt Ltd* [2015] eKLR, that the National Land Commission is mandated by law to inquire into allegedly unlawfully acquired public land and direct the revocation of the title or regularize the disposition where it finds the land to have been illegally or irregularly converted to private property. Further, the court cited *Tom Dola & Others v Chair National Land Commission & Others* [2020] eKLR, that the National Land Commission has the mandate to review grants, and disposition of public land to establish their propriety and legality is conceived. The court made a finding that a claim relating to public law from the cited caselaw could be raised notwithstanding that such land is in the hands of private entities and therefore land being in the hand of the exparte applicant et al did not in any way made the land out of reach of a claim of public land.

172. Applying the foregoing case law to the instant petition, it is not in doubt from my finding above that the petitioners had lodged complaints with the respondents generally since 2014. In particular, the 1st respondent is on record that it is handling the complaint, Ref. No. NLC/HL/593/2019. The reason for the inordinate delay in processing and determining the same is not clear from the 1st respondent's affidavit in reply dated 8/10/2024. It is not clear if the 1st respondent placed an advertisement in the daily newspapers or otherwise indicating that it intended to conduct inquiries or investigations relating to the suit land and stated the time, date, location, and deadlines to make any representation, or present documents and or attend to the affected parties. The court has come across correspondences exchanged between the 1st respondent, the petitioners, and the 2nd, 3rd, 4th, and 5th respondents, it is not clear why it has taken the 1st respondent over 7 years to handle the complaint.

173. The delay as determined above by the 1st respondent in handling the complaint, amounts to denial of the petitioners' rights to fair hearing, and *fair administrative action act*. On the other hand, the petitioners have blamed the 2nd respondent and seek that the court declare that its continued occupation of the suit land is an ongoing historical land injustice on their constitutional rights to access and enjoyment of their historical and ancestral land, to which the 2nd respondent has no legal interest in, as it was meant for their resettlement, after the alleged surrender to the government. My finding is that the petitioners have failed to justify the grant of such reliefs. First, there are no recent official search

certificates or conclusion reports that the surrender of the 61.55 Ha was meant solely and exclusively for the beneficial interest of the petitioners.

174. Minutes or recommendations to the effect that the surrender for an approval scheme was meant for the vesting of the land to the petitioners are lacking. Secondly, whereas the petitioners alleged that the land falls within the forest land that was taken from them by the colonial government, the petitioners have been unable to avail concrete reports and maps showing that the suit land falls inside the cutline of the Mt. Elgon Forest Reserve as per the Proclamation *Order No. 44 of 1932* and *LN No. 174 of 1964*, such that the suit land was unavailable for re-allocation to private entities such as the 2nd respondent and its predecessors in title.

175. Third, the petitioners have alleged that they are currently residing in the Sosio forest and are likely to be evicted from the said land. The Premises, the area, size, locality, nature of structures, number of persons on the land, and terms and conditions of the occupation, have not been pleaded or documentary evidence availed before this court. The petitioners urge the court to declare that they are squatters who deserve rights. However, from the material before the court, the petitioners are no longer on the suit land or any part of the alleged ancestral or historical land that is associated with Mt. Elgon forest.

176. Guided by the binding decision Mirigo and 550 Others (supra), I cannot declare the petitioners' squatters on the suit land. Their interests or rights are not alieno solo in the applicable circumstances as regards the suit land. Evidence that the suit land was surrendered for their sole benefit is lacking. No interest in the land had vested in the petitioners. The alleged promise was for the future. It was not underpinned in and by any statutory provision. It did not vest within 21 years from when the promise was made. Whereas the court has held that occupation rights in informal settlements are protected by law, and the *Constitution*, a claim alleging displacement from historical or ancestral land, has a corresponding duty to agitate for his or her right diligently.

177. In *Wambega & 733 others v Attorney General & 9 others* (Civil Appeal E028 of 2020) [2024] KECA 445 (KLR) (12 April 2024) (Judgment). The 2nd- 5th respondents advanced various banking facilities to the appellants between 2010 and 2014. The appellants claimed that between 1960 and 1970, there were forced evictions of the occupants in thse suit land without regard to human life and with destruction of property, which resulted to settling the issues through political means. They termed it as an infringement if their rights due to the government failure to declared the suit land as ancestral or trust land, with their right to be resettled on it by virtue that their forefathers were the occupants before the violent evictions. They sought for loss a historical injustice or violation of their rights to property and dignity; a declaration of the land as ancestral land. Upon the dismissal of the petition, on appeal, at issue was who bore the standard of proof required in a claim of historical injustice.

178. The court observed that the standard or threshold on historical injustice claims is set out under Sections15 (3)(a) of the *National Land Commission Act*. The claim must be verifiable and acts complained of must be shown to have resulted in displacement of the claimants or other forms of historical land injustice. The court held that the evidence must be specific to the relevant issues and substantiated.

179. The petitioners did not plead and prove that efforts were made by the government to settle them in the Teldet location, but unfortunately, some of them disposed of it. Therefore, the petitioners cannot blame the government based on provisions regarding historical injustice, equality, equity, and discrimination. The duty was upon the petitioners to avail tangible and cogent evidence that the 1st respondent despite recommendation, deliberations, and material that the surrender of the 61.55 ha in 1999 was meant for them, the 2nd respondent in conjunction with the 4th respondent have neglected and or failed to facilitate the resettlement process on the suit land to their detriment. He who alleges

in a constitutional petition has to bring concrete and tangible evidence showing the nexus between the alleged breach, infringement, or threat to the rights and freedoms, the loss and damage. See *Gitobu Imanyara & Others v Attorney General* [2016] KECA 557 (KLR) and *Peter M. Kariuki v Attorney General* [2014] eKLR.

180. In *Dr. Timothy Njoya v Hon. Attorney* General Petition No. 479 of 2013. A petitioner cannot come to court to seek facts and information that he intends to use to prove his case. In *Leonard Otieno v Airtel (K) Ltd* [2018] eKLR, the court said that decisions in constitutional rights violation should and must not be made in a factual vacuum without the presentation of clear evidence in support of the violation so that the constitutional issues can be considered.

181. Whereas the petitioners have given a historical basis for their case, which has historical facts that the court has taken judicial notice of, there must be a nexus between the history, parties involved, nature, particulars, manner of infringement of rights and freedoms, by whom, and the resultant loss or damage. In this instance, though the petition is supported by an affidavit and annexures, in line with Rules 10(3) and (4) and 11 of the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013*, the documents attached were not authentic, verifiable and credible to support the cause of action as pleaded jointly and severally against the respondents.

182. While the court appreciates the lack of legal know-how on the part of the petitioners, who were acting in person, the magnitude of the issues raised in the petition, cannot be ignored and the court overlook the casual allegations made against the respondents without evidential proof to found judicial adjudication. This is not to say that the court trivializes the vigor, public spiritedness, and the pursuit of a noble venture in agitating for the rights of minorities and marginalized groups. The order that commends itself is not to dismiss the petition but to issue an order directing the 1st respondent to hear and determine the petitioners' pending complaint Reference No. (NLC/HL1/593/2019), within 6 months from the date hereof, in terms of prayer (a) of the petition, dated 28/3/2024. The court declines to issue the rest of the reliefs.

183. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17TH DAY OF JUNE 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Court Assistant Dennis

Petitioners present

Obino for Akello for the 1st respondent present

Miss. Auta for 2nd respondent present

3rd - 5th respondents absent

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