



**Isiolo Ground Users Association (Suing through its Officials; Hussein Haji Abdullahi (Chairman), Abikar Mohamud Osman (Secretary) and Dabaso Boru (Treasurer) & another v Isiolo Sand Transporters Association & 3 others; National Environment Management Authority, Office of the County Director of Environment Isiolo & another (Interested Parties) (Petition E001 of 2023 & Environment and Land Petition 002 of 2022 (Consolidated)) [2025] KEELC 6464 (KLR) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6464 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ISIOLO**  
**PETITION E001 OF 2023 & ENVIRONMENT AND**  
**LAND PETITION 002 OF 2022 (CONSOLIDATED)**

**JO MBOYA, J**  
**SEPTEMBER 16, 2025**

**BETWEEN**

**ISIOLO GROUND USERS ASSOCIATION (SUING THROUGH ITS OFFICIALS; HUSSEIN HAJI ABDULLAHI (CHAIRMAN), ABIKAR MOHAMUD OSMAN (SECRETARY) AND DABASO BORU (TREASURER) ..... PETITIONER**

**AND**

**ISIOLO SAND TRANSPORTERS ASSOCIATION ..... 1<sup>ST</sup> RESPONDENT**  
**ISIOLO SAND LOADERS ASSOCIATION ..... 2<sup>ND</sup> RESPONDENT**  
**COUNTY GOVERNMENT OF ISIOLO ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY, OFFICE OF THE COUNTY DIRECTOR OF ENVIRONMENT ISIOLO ..... INTERESTED PARTY**  
**THE MINISTRY OF LIVESTOCK ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH**  
**ENVIRONMENT AND LAND PETITION 002 OF 2022**

**BETWEEN**

**ISIOLO HOLDING GROUND USERS ASSOCIATION (SUING THROUGH ITS OFFICIALS; HUSSEIN HAJI ABDULLAHI (CHAIRMAN),**



**ABIKAR MOHAMUD OSMAN (SECRETARY) AND DABASO BORU  
(TREASURER) ..... PETITIONER**

**AND**

**MARSH CONSTRUCTION COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF ISIOLO ..... 2<sup>ND</sup> RESPONDENT**

### **JUDGMENT**

1. The Petitioners in respect of Petition Number E 001 of 2023 [the lead Petition] approached the court vide Petition dated 2<sup>nd</sup> May 2023; and wherein the Petitioners have sought the following reliefs;
  - i. A declaration that the Respondents are in violation of the Petitioner’s right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations as guaranteed in Articles 42, 69, and 70 of *the Constitution* of Kenya 2010.
  - ii. An order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, its agents, servants, assignees and/or anyone at their behest from entering, trespassing, harvesting sand, excavating murrum or otherwise engaging in any other activities of land and environment degradation and other acts or omissions that are harmful to the environment of all that area known as Isiolo Holding Ground within Isiolo County within the Republic of Kenya.
  - iii. An order compelling the 3<sup>rd</sup> Respondent with consultation of the Interested Party herein to take measures to prevent or discontinue any act or omission that is harmful to the environment of all that area known as Isiolo Holding Ground within Isiolo County within the Republic of Kenya.
  - iv. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to provide adequate compensation to the Petitioner for the violation of the rights to clean and healthy environment under Articles 70(2)(c) and 70(3) of *the Constitution* of Kenya 2010.
  - v. All necessary and consequential orders or directions be given.
  - vi. The costs of this Petition be provided for.
  
2. Similarly, the Petitioner herein had also filed another petition, namely; Meru ELC Petition Number E 007 of 2020. The said petition was subsequently transferred to the Environment and Land Court at Isiolo and same was re-numbered as Petition No. 002 of 2022. Vide the Petition under reference, the Petitioner sought the following reliefs;
  - i. A declaration that the Respondents are in violation of the Petitioner’s right to clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations as guaranteed under Articles 42, 69, and 70 of *the Constitution* of Kenya.
  - ii. An order of injunction to restraining the 1<sup>st</sup> Respondent, its agents, servants, assignees and/or anyone at his behest from entering, trespassing, harvesting



sand, excavating murram or otherwise engaging in any other activities of land and environment degradation and other acts or omissions that are harmful to the environment of all that area known as Isiolo Holding Ground within Isiolo County within the Republic of Kenya.

- iii. An order compelling the 2<sup>nd</sup> Respondent and the National Environment Management Authority (NEMA) to take measures to prevent or discontinue any act or omission that is harmful to the environment of all that area known as Isiolo Holding Ground within Isiolo County within the Republic of Kenya.
  - iv. An order compelling the 1<sup>st</sup> Respondent to provide adequate compensation to the Petitioners for the violation of the right to a clean and healthy environment under Articles 70(2)(c) and 70(3) of *the Constitution* of Kenya 2010.
  - v. Such other orders that this Honorable court may deem fit.
  - vi. Costs of this application and any other relief this Honorable Court may deem just and fit to grant.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in respect of Petition E 001 of 2023 do not appear to have entered appearance or filed any pleadings. For good measure, no pleadings and or responses on behalf of the said respondents are obtainable from the record of the court.
  4. The 3<sup>rd</sup> Respondent duly entered appearance and thereafter filed a replying affidavit dated 9<sup>th</sup> November 2023; and wherein the 3<sup>rd</sup> Respondent contended inter alia that the disputed grounds constitute part of the land under the jurisdiction of the county government. Furthermore, the 3<sup>rd</sup> Respondent also posited by virtue of the Fourth Schedule of *the Constitution*, same is mandated to superintend the activities being undertaken on the disputed ground and to ensure that the natural resources thereunder are exploited and utilized for the benefit of all the communities resident in Burat Ward- Isiolo County.
  5. The 1<sup>st</sup> Interested Party filed a Replying Affidavit sworn by Edward Menza on 17<sup>th</sup> July 2023 and wherein the deponent averred that same is the county director of environment-National Environment Management Authority Isiolo County. To this end, the deponent contended that same is therefore conversant with the facts of the matter. Moreover, the deponent averred that the 1<sup>st</sup> Interested Party had issued an Environmental Impact Assessment License to the Petitioner to enable same to undertake excavation of murram and harvest sand from Isiolo Holding Ground [the disputed land].
  6. It was the further averment by the deponent of the affidavit that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been undertaking excavation of murram and sand from the disputed ground, albeit without the permission of the Petitioner. Similarly, it has been averred that the actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are being undertaken without the requisite authority/approval of the 1<sup>st</sup> Interested Party. To this end, the deponent has deponed that the 1<sup>st</sup> Respondent proceeded to and issued a cessation order directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stopping the harvesting of sand.
  7. Notwithstanding the foregoing, the deponent of the affidavit on behalf of the 1<sup>st</sup> Interested Party has ventured forward and posited that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have ignored and disregarded the directives by the 1<sup>st</sup> Interested Party [NEMA] and proceeded with illegal extraction of murram and harvesting of sand. Instructively, it has been contended that the actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents constitute environmental degradation and hence ought to be stopped.



8. The 2<sup>nd</sup> Interested Party filed a Replying Affidavit sworn on 23<sup>rd</sup> November 2023 and wherein same included a cross-petition. According to the Replying Affidavit on behalf of the 2<sup>nd</sup> Respondent, the disputed land, namely; Isiolo Holding Ground, was specially set aside vide Legal Notice for use by the Ministry of Agriculture and Livestock Development. Furthermore, it was averred that on the basis of the Legal Notice, the disputed ground constitutes public land occupied, held, and or being used by an organ of the government. In this regard, the deponent of the Replying Affidavit has contended that the disputed ground falls within the purview of Article 62(2)(b) of *the Constitution*.
9. Furthermore, the deponent of the affidavit on behalf of the 2<sup>nd</sup> interested Party has averred that the disputed ground does not form part of public land under the jurisdiction of 3<sup>rd</sup> Respondent [County Government of Isiolo]. In this regard, it has been posited that the 3<sup>rd</sup> Respondent therefore has no authority and/or mandate to sanction and, or authorize excavation of murrum and harvesting of sand from the disputed ground. In any event, it has been contended that the action of the 3<sup>rd</sup> Respondent of sanctioning the resumption of sand harvesting from the disputed land was contrary to the directives of the 1<sup>st</sup> Interested Party.
10. Moreover, the deponent of the Replying Affidavit on behalf of the 2<sup>nd</sup> Interested Party has also averred that the offensive activities being undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with the approval of the 3<sup>rd</sup> Respondent are contrary to the mandate of the Ministry of Agriculture and Livestock Development who are the lawful owners of the suit ground.
11. On the basis of the said Replying Affidavit, the 2<sup>nd</sup> Interested Party has posited that the actions by the Respondents constitute a threat to the right to clean and healthy environment. Consequently, the 2<sup>nd</sup> Interested Party has supported the claim by the petitioners.
12. It is worthy to point out at this juncture that the cross-petition which was filed by the 2<sup>nd</sup> Interested Party was the subject of directions by the court and in particular same [cross-petition] was struck out vide the ruling of the court rendered on 24<sup>th</sup> February 2025. For good measure, the court found and held that an interested party, the 2<sup>nd</sup> Interested Party not excepted, cannot originate or propagate a cross-petition. Moreover, the court held that a cross-petition is the exclusive preserve of a Respondent and not otherwise.
13. The subject petition raises similar issues to petition number 002 of 2022. To this end, the parties covenanted to have the two petitions consolidated and disposed of together. Suffice it to state that the two petitions were thereafter consolidated and the instant petition [Petition No. E 001 of 2023] was designated as the lead file.
14. Other than the foregoing, the advocates for the parties also covenanted to canvass the petition based on affidavit evidence. In addition, the parties also agreed to file and exchange written submissions.
15. Flowing from the agreement by the advocates for the parties, the court proceeded to and issued directions pertaining to the hearing and disposal of the [2] petitions. The court ordered that the petition shall proceed on the basis of affidavit evidence. Besides, the court also ratified the proposal by the parties to file and exchange written submissions. Moreover, the court also circumscribed the timelines for the filing of written submissions.
16. The Petitioners filed written submissions dated 17<sup>th</sup> June 2025 and wherein the petitioners adopted the contents of the petition and reiterated the averments contained in the supporting affidavit. Furthermore, the petitioners ventured forward and canvassed two [2] key issues, namely, whether the respondents' acts are in violation of the petitioner's rights as envisaged under Articles 42 and 69 of



the Constitution, and whether the petition is merited to warrant the reliefs sought as envisaged under Article 70 of the Constitution 2010.

17. Regarding the first issue, learned counsel for the Petitioner has submitted that the disputed ground, namely; Isiolo Holding Ground was duly gazetted and set apart under the Trust Land Act. Furthermore, it has been submitted that the land in question was set apart to be utilized by the Ministry of Agriculture and Livestock Development for the purposes of establishing livestock infrastructure. To this end, it has been submitted that the disputed grounds therefore comprise of public land under the jurisdiction of the National Government.
18. In addition, learned counsel for the petitioner has submitted that the petitioner herein entered into a Memorandum of Understanding with the Ministry of Agriculture and Livestock Development on 25<sup>th</sup> February 1993. In particular, it was posited that the Memorandum of Understanding bequeathed the disputed grounds to the petitioners to manage same on behalf of the Ministry of Agriculture and Livestock Development. For good measure, learned counsel for the petitioners has adverted to and highlighted the terms of reference and the mandate of the petitioner under the Memorandum of Understanding.
19. Learned counsel for the petitioners has further submitted that by virtue of the Memorandum of Understanding with the Ministry of Agriculture and Livestock Development, it is the petitioner who has the exclusive mandate over the usage of the disputed ground, including excavation of murrum and harvesting of sand. Besides, it has also been posited that the petitioner is also chargeable with ensuring that the environment is restored and rehabilitated to avert environmental degradation.
20. Notwithstanding the fact that the disputed ground is public land belonging to the national government and the terms of the memorandum of understanding, it has been submitted that the 3<sup>rd</sup> Respondent herein has since proceeded to and authorized the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to excavate murrum and harvest sand from the suit ground. According to the counsel for the petitioners, the 3<sup>rd</sup> Respondent has no authority to authorize and sanction excavation of murrum and harvesting of sand from the disputed land, which is stated to fall within the auspices of the National Government. To this end, learned counsel has referenced the provisions of Article 62(2) (b) of the Constitution.
21. Other than the foregoing, learned counsel for the petitioner has also submitted that the sanctioning of sand harvesting and excavation of murrum from the disputed ground by the 3<sup>rd</sup> Respondent has culminated in unsustainable environmental degradation. In this regard, learned counsel for the petitioner has posited that the actions by the Respondents jointly and or severally constitute a violation of Articles 40(2) and 69 of the Constitution.
22. Turning to the second issue, learned counsel for the petitioners has contended that the actions and or activities of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have contributed to environmental degradation and violation of the petitioners' right to clean and healthy environment. Furthermore, it has been posited that the actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are being undertaken in contravention of the directives of the 1<sup>st</sup> Interested Party [NEMA]. Simply put, it has been submitted that the actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are therefore illegal and unlawful.
23. Moreover, learned counsel for the petitioner has submitted that the 3<sup>rd</sup> Respondent who has sanctioned the actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, has no mandate to do so. For coherence, it has been contended that the actions by the 3<sup>rd</sup> Respondent are in contravention of the 4<sup>th</sup> Schedule of the Constitution, which provides for the functions of both the National Government and the County Government. In particular, it has been submitted that environmental conservation is the exclusive preserve of the National Government.



24. Arising from the foregoing, learned counsel for the petitioners has therefore invited the court to find and hold that the actions by and on behalf of the respondents have violated the rights of the petitioners to clean and healthy environment. To this end, counsel has implored the court to invoke the provisions of section 3(3) of the Environment Management and Coordination Act [1999] and Article 70 of *the Constitution* and thereafter to grant appropriate reliefs.
25. Additionally, learned counsel for the petitioner has also contended that in matters pertaining to violation of the right to clean and healthy environment, the claimant is not enjoined to demonstrate/ prove the occurrence of damage, harm, and or injury. Instructively, it has been submitted that a court of law is mandated to intervene and avert actions and or omissions that are bound to violate the right to clean and healthy environment.
26. Finally, learned counsel for the petitioner has submitted that the court is seized of the requisite jurisdiction to issue appropriate remedies including compensation. As pertains to what constitutes appropriate remedy, learned counsel has cited and referenced the holding in the case of Mohamed Ali Badi & Others vs the Attorney General & 11 others (2018) KEHC and David M. Detei vs Orbit Chemical Industries Limited (2014) KEHC, respectively.
27. Flowing from the foregoing, learned counsel for the petitioners has therefore implored the court to find and hold that the petition beforehand is merited and thus same ought to be allowed. Furthermore, learned counsel has posited that the petitioner is therefore entitled to the reliefs sought including compensation.
28. The 3<sup>rd</sup> Respondent filed written submissions dated 19<sup>th</sup> June 2025 and wherein same has raised and canvassed two [2] key issues for consideration and determination by the court. The issues raised by the 3<sup>rd</sup> Respondent are namely; whether the petition as framed sets out with reasonable degree of precision the principles underscored in Anarita Karimi Njeru vs Republic [1976-1980] KLR 1272; and whether the petition dated 2<sup>nd</sup> May 2023 is merited.
29. Regarding the first issue, learned counsel for the 3<sup>rd</sup> Respondent has submitted that the petitioners herein have neither pleaded nor particularized the manner in which its rights to clean and healthy environment have been violated by the 3<sup>rd</sup> Respondent.
30. Further, and in any event, it has been submitted that other than Part B of the petition which speaks to the constitutional and legal foundation of the petition, the petitioner has not highlighted the requisite particulars to demonstrate the nexus between the 3<sup>rd</sup> Respondent and the claims adverted to. Furthermore, it has been submitted that the petition beforehand merely speaks to the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of harvesting sand from the suit property. However, it has been contended that the 3<sup>rd</sup> Respondent does not harvest the sand and hence the contention by the petitioner is not legally tenable.
31. In support of the submissions that the petition does not comply with the rule of precision and particularity; learned counsel for the 3<sup>rd</sup> Respondent has cited and referenced the decision in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR and Anarita Karimi Njeru vs The Republic (1979) eKLR, respectively.
32. As pertains to the second issue, learned counsel for the 3<sup>rd</sup> Respondent has submitted that the instant petition is premised on the misconception that the Petitioners herein are the owners of the disputed property on basis of Memorandum of Understanding entered into between the Petitioner and the Ministry of Agriculture and Livestock Development. Nevertheless, it has been submitted that the disputed grounds fall within the jurisdiction of the 3<sup>rd</sup> Respondent who has the exclusive authority to



superintend the exploitation and utilization of the resources obtaining thereon for the mutual benefit of the residents/communities in Burat Ward.

33. Additionally, it has been submitted that the disputed properties fall under the custody of the 3<sup>rd</sup> Respondent and under the purview of the Department of Livestock. In this regard, it has been submitted that the Petitioner has no authority to purport to seek exclusive rights to the extraction of murrum, harvesting of sand, and exploitation of the natural resources contained on the disputed ground.
34. In view of the foregoing, learned counsel for the 3<sup>rd</sup> Respondent has submitted that the Petition, beforehand, other than being premature and incompetent, is also devoid of merits. To this end, learned counsel has invited the court to dismiss the petition and to vacate the conservatory orders which were issued by this court [differently constituted] on 29<sup>th</sup> May 2023.
35. The 2<sup>nd</sup> Interested Party filed written submissions dated 23<sup>rd</sup> July 2025 and wherein same has adopted and reiterated the contents of the replying affidavit sworn by Dr. Richard Kyuma. Furthermore, learned counsel for the 2<sup>nd</sup> Interested Party has ventured forward and highlighted seven [7] key issues.
36. Firstly, learned counsel for the 2<sup>nd</sup> Interested Party has submitted that Isiolo Holding Ground [the Disputed Ground] constitutes public ground which has been under continuous operation and control of the State Department for Livestock Development. To this end, learned counsel has referenced gazette notices numbers 1127 and 1827 of 1989. In so far as the disputed ground constitutes public land, it has been submitted that the said land falls within the auspices of the National Government and not the County Government. Moreover, learned counsel has submitted that there exists a decision rendered vide HCC No. 11 of 1995, which confirmed that the suit property belongs to the Ministry of Agriculture and Livestock Development.
37. Secondly, it has been submitted that the Ministry of Agriculture and Livestock Development [which is a state organ] entered into a Memorandum of Understanding [MOU] with the petitioner herein whereby the Petitioner was granted rights over the suit property. To this end, learned counsel has cited and referenced the MOU dated 25<sup>th</sup> February 1993.
38. Owing to the entry into and execution of the MOU between the Ministry of Agriculture and Livestock Development and the Petitioner herein, it has been contended that the Petitioner was granted exclusive rights to use the disputed grounds by promoting control and sustainable sand harvesting and ensuring environmental restoration and rehabilitation.
39. Thirdly, it has been submitted that arising from the MOU under reference, the petitioner herein sought and obtained an Environmental Impact Assessment License from National Environment Management Authority [NEMA] to undertake murrum excavation and sand harvesting from the disputed grounds. In this regard, it has been submitted that it is the Petitioner that is authorized to undertake the harvesting of sand from the suit property while ensuring environmental rehabilitation.
40. Fourthly, it has been submitted that the 3<sup>rd</sup> Respondent [County Government of Isiolo] has no authority and, or control over the suit property which falls under the jurisdiction of National Government by dint of Article 62(2)(b) of *the Constitution* 2010. Nevertheless, it has been submitted that even though the suit property does not fall within the jurisdiction of the county government, the county government has proceeded to and sanctioned murrum excavation, sand harvesting and other activities on the disputed ground. Notably, it has been posited that the action by the 3<sup>rd</sup> Respondent is illegal, unlawful and ultra vires.



41. Fifthly, it has been submitted that the 3<sup>rd</sup> Respondent has also sanctioned the resumption of sand harvesting from the disputed ground contrary to and in violation of the directives by the 1<sup>st</sup> Interested Party. In this regard, it has been contended that the 3<sup>rd</sup> Respondent cannot sanction and authorize illegalities.
42. Sixthly, learned counsel for the 2<sup>nd</sup> Interested Party has submitted that even assuming that the disputed ground fell within the jurisdiction of the 3<sup>rd</sup> Respondent, it has been submitted that the 3<sup>rd</sup> Respondent does not have the authority to sanction activities that are bound to occasion environmental degradation. In any event, it has been submitted that the 3<sup>rd</sup> Respondent is enjoined to comply with its constitutional mandate including the implementation of specific national government policies on natural resources and environmental conservation.
43. Finally, it has been submitted that the land in question is public land designated for specific purpose[s] under the Ministry of Agriculture and Livestock Development and the petitioner herein holds a crucial mandate for ensuring sustainable management and environmental protection. In this regard, learned counsel has posited that the impugned actions by the respondent constitute unlawful trespass and environmental degradation.
44. As a result of the foregoing, learned counsel for the 2<sup>nd</sup> Interested Party, has supported the petition by the Petitioner. Moreover, learned counsel has curiously prayed for judgment to be entered in favor of the Petitioner and furthermore that a declaration be issued that the 3<sup>rd</sup> Respondent's actions were/are ultra vires.
45. Having reviewed the petition; the supporting affidavit and the annexures thereto; the responses by the adverse parties; and upon taking into account the written submissions filed on behalf of the designated parties and having considered the applicable law, I come to the conclusion that the determination of the subject petition turns on four [4] key issues, namely; whether the petition has been pleaded with requisite precision, particularity, and specificity or otherwise; whether the 3<sup>rd</sup> Respondent [County Government of Isiolo] acted in contravention of the Fourth Schedule of *the Constitution* in sanctioning/ approving sand harvesting and related activities from the disputed grounds or otherwise; whether the petitioner's right to clean and healthy environment has been violated in the manner alleged or otherwise; and whether the petitioner is entitled to the reliefs sought [if any] or otherwise.
46. Before venturing to address the thematic issues, which have been highlighted in the preceding paragraph, there is one issue which has been brought into play by the learned counsel for the 2<sup>nd</sup> Interested Party vide the Replying Affidavit and written submissions. The issue herein touches on whether the disputed ground forms public land under the jurisdiction of the National Government by dint of Article 62(2)(b) of *the Constitution* 2010; or whether same is public land falling within the jurisdiction of the County Government under the provision of Article 62(2) of *the Constitution*.
47. Learned counsel for the 2<sup>nd</sup> Interested Party has submitted that Isiolo Holding Ground was set aside vide Legal Notices No. 1127 and 1827 of 1987 and thereafter same was placed under the custody, use, and or control of the Ministry of Agriculture and Livestock Development. Furthermore, it has been submitted that by virtue of the fact that the suit property is occupied and was being used by the said ministry, same is therefore public land falling under the jurisdiction of the National Government.
48. Additionally, learned counsel for the 2<sup>nd</sup> Interested Party has also submitted that there exists a decision of the High Court issued vide HCC No. 11 of 1995 between Kipsoi Kinyanga; Stephen Ole Toki and Isaac Kinga Gitonga vs Director of Livestock and wherein it is stated that the Plaintiffs' suit was



- dismissed and that by virtue of the dismissal of [sic] the suit[proceedings; the suit property belongs to the Ministry of Agriculture and Livestock Development.
49. On the other hand, learned counsel for the 3<sup>rd</sup> Respondent has submitted that the suit property [disputed ground] is public land which falls within the jurisdiction of the County Government of Isiolo and thus the County Government of Isiolo has exclusive authority to superintend the exploitation and utilization of the resources thereon for the benefit of the communities living/residents in the subject area.
  50. I beg to state that the issue as to whether the suit property is public land belonging to the National Government and thus falling under the provision of Article 62(2)(b) of *the Constitution* or otherwise was not one of the issues raised for the determination by this court. For good measure, the issue under reference has been smuggled vide the replying affidavit sworn on behalf of the 2<sup>nd</sup> Interested Party and thereafter amplified vide the written submissions. Nevertheless, I beg to state that if the 2<sup>nd</sup> Interested Party was keen to agitate such an issue, then it behooved the 2<sup>nd</sup> Interested Party to either apply to be enjoined as a co-respondent and thereafter raise a cross-petition.
  51. On the other hand, the 2<sup>nd</sup> Interested Party was also at liberty to file own constitutional petition [subject to advice] and thereafter generate whatever issue including the claim of whether the disputed land is public land belonging to the National Government or otherwise.
  52. Moreover, there is no gainsaying that the 2<sup>nd</sup> Interested Party was and is at liberty to escalate the question as to whether the suit property is public land belonging to the National Government or otherwise to the National Land Commission which is the body chargeable with the administration and management of public land [see Article 67(2) of *the Constitution* 2010].
  53. Be that as it may, it is instructive to observe and underscore that a court of law can only deal with and engage with an issue that has been brought before it for determination in a conventional manner. Pertinently, it behooved the 2<sup>nd</sup> Interested Party and by extension the Honorable Attorney General to stick to the prescribed mechanisms for raising and canvassing claims and issues before a court of law. In addition, I wish to underscore that no new issue can be raised vide submissions.
  54. It is old learning that submissions cannot take the place of pleadings or evidence. To this end, the Parties must learn to restrict themselves[s] to the issue[s] pleaded and not to expand the scope of same by craft; and submission[s]. [See Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR); and Ogando v Watu Credit Limited & another [2024] KEHC 3074 (KLR)].
  55. Flowing from the foregoing; and taking into account the established position of the law that an interested party cannot propagate an issue outside the purview of the main suit, I decline to entertain the question of whether the disputed ground is public land under the National Government or public land under the County Government of Isiolo. For good measure, the issue as to ownership of the disputed ground must await its due time [if at all].
  56. There is also another incidental issue flowing from the submissions of the 2<sup>nd</sup> Interested Party, namely; whether the Ministry of Agriculture and Livestock Development [being a state organ] could enter into a MOU with the Petitioner and thereby bestow upon the Petitioner exclusive rights to excavate murrum; harvest sand, and undertake assorted activities on the disputed ground. It is not lost on me that if [and I say if] the disputed ground is public land under the occupation and use by a state organ, then such land must be utilized in accordance with the prescribed purpose. Furthermore, the prescribed purpose cannot be altered and, or changed without due regard to the provisions of Article 62(4) of *the Constitution*.



57. For ease of reference, the provisions of Article 62(4) of *the Constitution* stipulate thus;
- “Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.”
58. Quite clearly, the Memorandum of Understanding dated 25<sup>th</sup> February 1993 and which the 2<sup>nd</sup> Respondent has referenced to be giving/conferring the petitioner the sole mandate to regulate activities on the suit property, is questionable. Its validity and constitutionality must also await the opportune time. However, there is no gainsaying that any action that contravenes *the constitution* is invalid. [See Article 2(1) and 2(4) of *the Constitution* 2010]. It is also instructive to reiterate the import and tenor of Article 10(1) and 20(1) of *the Constitution* that enjoins the state, state organs and all persons to observe, comply with and or always adhere to the provisions of *the Constitution*.
59. Back to the issues for the determination. I beg to start with the first issue, namely; whether the petition has been pleaded with the requisite precision and particularity or better still, whether the petition satisfies the rule in Anarita Karimi Njeru vs Republic (1979) eKLR or otherwise.
60. Learned counsel for the 3<sup>rd</sup> Respondent has submitted that the petition beforehand does not satisfy the requirement of precision and specificity as highlighted vide the Anarita Karimi Njeru case. In particular, it has been submitted that other than the constitutional and legal foundation of the petition which has been pleaded under part B; the petitioner has failed to stipulate/ particularize the manner in which the 3<sup>rd</sup> Respondent has infringed its rights and fundamental freedoms. To this end, the 3<sup>rd</sup> Respondent has therefore contended that the petition is premature and incompetent.
61. The petitioner herein has not found it appropriate to respond to the said submission by and on behalf of the 3<sup>rd</sup> Respondent. Furthermore the 2<sup>nd</sup> Interested Party has also skirted the issue.
62. I beg to highlight that it is incumbent upon every petitioner, the Petitioner beforehand not exempted to ensure that the petition is well pleaded. In particular, the petitioner is called upon to plead and highlight the provisions of *the constitution* which are said to have been infringed; violated; breached; or threatened with violation. For good measure, the provisions of *the constitution* under reference must be isolated with clarity.
63. It also behooves the petitioner to venture forward and to highlight the parties who have violated the designated provisions of *the constitution*. Similarly, the identity of the culprits must be captured precisely to enable a court of law to deal with the designated culprits.
64. Thirdly it is also old learning and trite that the petitioners must particularize the way provisions of *the constitution* have been breached by the designated culprits. The requirement for particulars herein will go along way to enable the culprits [read the adverse party] to understand the nature of complaint[s] being propagated and thereby be ready to respond appropriately. In addition, it will also enable the court to precisely understand the legal and factual claims being canvassed; and thereafter be able to offer redress, where apposite.
65. The proposition highlighted in the preceding paragraph[s] was succinctly and aptly expounded by the Five-Judge bench of the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR) where the court stated thus;
- “
- “(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence,



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

- (42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (*supra*) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.

The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

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

66. Has the petition beforehand complied with the rule as pertains to precision? The petition has clearly alluded to the failure by the 3<sup>rd</sup> Respondent to comply with the provisions of *the Constitution*, and particularly the Forth schedule of *the constitution*. Furthermore, it has been contended that the actions by the 3<sup>rd</sup> Respondent in sanctioning and approving excavation of murram and harvesting of sand by 1<sup>st</sup> and 2<sup>nd</sup> Respondent was *ultra vires*. Thereafter, the petitioner has also contended that the 3<sup>rd</sup> Respondent has violated its rights by inter alia degrading its land and environment by harvesting sand. [See paragraphs 45 and 46 of the Petition].
67. As to whether or not the allegations captured at the foot of paragraphs 45 and 46 of the Petition are provable is a different issue. However, a reading of the said paragraph[s] demonstrates/ shows that the petitioner has provided the particulars underpinning its claims. Furthermore, the petitioner has also adverted to the Forth Schedule of Constitution; as well as various articles inter alia, Articles 42, 69, and 70 of *the Constitution*.



68. To my mind, the petition beforehand meets and satisfies the threshold that was highlighted in the case of *Anarita Karimi Njeru vs Republic (1979) eKLR*. To this end, I do not share the sentiments and submissions by the learned for the 3<sup>rd</sup> Respondents.
69. Turning to the second issue, namely; whether the 3<sup>rd</sup> Respondent [County Government of Isiolo] acted in contravention of the 4<sup>th</sup> Schedule of *the Constitution* in sanctioning/approving sand harvesting and related activities from the disputed grounds or otherwise, it has been contended that the 3<sup>rd</sup> Respondent acted ultra vires by authorizing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to resume excavation of murram and harvesting of sand within Isiolo Holding Ground.
70. For ease of understanding and for purposes of context, it is important to reproduce the contents of paragraph 45 of the petition.
71. Same states as hereunder;
- “The 3<sup>rd</sup> Respondent in total disregard of the law and in breach of *the constitution* of Kenya, specifically, the fourth schedule and the existing MOU acted ultra vires and purportedly issued a notice to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents authorizing them to resume their illegal activities of sand harvesting and excavation of murram within Isiolo Holding Ground.”
72. What I hear the Petitioner to be complaining of is to the effect that 3<sup>rd</sup> Respondent has no authority to sanction and approve excavation of murram and sand harvesting within Isiolo Holding Ground. The contention herein is based on two grounds, namely; that the disputed property is public land belonging to the national government; and two the petitioner has a MOU with the Ministry of Agriculture and Livestock Development.
73. I wish to address the issues herein sequentially. Firstly, the disputed ground falls within the jurisdiction of Isiolo County and hence the issues as pertaining to environment conservation and by extension sand harvesting and murram excavation fall within the constitutional purview of the county government. [See Part 2[10] of the Fourth Schedule of *the Constitution* of Kenya 2010].
74. Additionally, the murram whose excavation and the sand whose harvesting underpins the current petition constitutes the natural resources whose exploitation and utilization ought to benefit the communities residing within the County of Isiolo and by extension all Kenyans [see Article 69 (1) (a) and 69(1)(h) of *the Constitution* of Kenya 2010]. In this regard, the Petitioner cannot purport to claim exclusivity as against the County Government of Isiolo and the rest of the users.
75. It is also instructive to take cognizance of the Environmental Management and Co-ordination (Sand Harvesting) Regulations of 2024 which authorize the County Governments, including the 3<sup>rd</sup> Respondent herein to engage with approvals and licensing of sand harvesting.
76. For coherence regulation 5 of the Environmental Management and Co-ordination (Sand Harvesting) Regulations of 2024 stipulates thus;
- “5. Functions of County Environment Committees
- Each County Environment Committee shall:
- (a) maintain a register of sand dealers;
- (b) receive and determine proposals and requests presented by the ward sand harvesting committees;



- (c) advise the respective Governor on the structure and operations of sand harvesting and related activities;
- (d) ensure that sand harvesting activities are compliant with the Act and any national norms and standards;
- (e) ensure sustainable exploitation and utilisation of sand resources and other excavated material;
- (f) collaborate with other environmental agencies in management of environment;
- (g) formulate environmental conservation programmes in relation to sand harvesting;
- (h) co-ordinate and disseminate information on sand harvesting activities to ward sand harvesting committees within the County;
- (i) receive and determine grievances presented by the ward sand harvesting committees;
- (j) designate sand harvesting sites in accordance with the provisions of the Act and these Regulations;
- (k) designate sand harvesting sites at a radius of at least one hundred metres away from critical infrastructure such as bridges and roads;
- (l) facilitate the designation of roads for accessing the designated sand harvesting sites and keep such roads in a proper state of maintenance and repair; and
- (m) recommend to the respective Governor designated sand harvesting areas and sites for Gazettement subject to public participation, including suspension of sand harvesting from depleted or degraded sites.”

77. Though the regulations under reference came into force in the year 2024 long after the filing of the two [2] petitions herein, it suffices to state that same are important in regulating harvesting of sand going forward. To this end, this court cannot close its eyes and make a decision that is likely to run contra the said regulations.

78. Other than the foregoing, the contention that the 3<sup>rd</sup> Respondent acted ultra vires is predicated on [sic] the existence of a Memorandum of Understanding giving the petitioner exclusive rights to harvest sand and excavate murrum from the disputed ground. However, it is worthy to recall and reiterate that in so far as the disputed ground is public land, any disposition or change of use thereto must accord with Article 62(4) of *the Constitution* 2010. Moreover, it is imperative to highlight that public land and the resources thereunder [the murrum and sand on the disputed property] cannot be exclusively claimed by the petitioners herein. Such kind of a scenario would be antithetical to the principles, objects, and values of *the Constitution* underpinned by Articles 10 and 69 of *the Constitution* 2010.

79. My answer to issue number 2 is to the extent that to the approval and sanction by the 3<sup>rd</sup> Respondent for excavation of murrum and sand harvesting within the disputed grounds did not violate the fourth schedule part 2. On the contrary, the county government is mandated to implement specific national



government policies on natural resources and environmental conservation, including soil and water conservation and forestry. [see Part 2(10) of the Fourth Schedule of *the Constitution* 2010].

80. Regarding the third issue, namely; whether the petitioner’s right to clean and healthy environment has been violated in the manner alleged or otherwise, it is important to recall and reiterate that the crux of the petitioner’s complaint is to the effect that the harvesting of sand and excavation of murram from the disputed ground have violated its right to clean and healthy environment. In particular, the petitioner has posited that the acts complained of have violated its right to a clean and healthy environment because the respondents are excavating murram and harvesting sand for personal and financial gain while avoiding environmental responsibility.
81. Furthermore, the petitioner has ventured forward and enumerated [sic] the environmental responsibilities being evaded by the respondents. Same are highlighted/enumerated at the foot of paragraph 46 of the petition.
82. Be that as it may, it is not lost on me that the petitioner herein has neither tendered nor produced before the court any environmental audit report showing how the excavation of murram and the harvesting of sand have violated the right to clean and healthy environment. For good measure, it is one thing to allege breach and violation; and another thing to prove the breach. I am alive to the fact that under Article 70(3) of *the Constitution*, 2010; what an applicant must not prove is that loss or injury has been incurred or suffered.
83. However, it is incumbent upon the applicant and in this case the Petitioner, to demonstrate the breach or the violation, which is distinct from loss or injury. Instructively, a petitioner like the one before the court is still called upon to discharge the burden of proof as pertains to allegations and or averments placed before the court.
84. To buttress the foregoing proposition, it suffices to reference the holding of the Supreme Court [ the apex Court] in the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), where the Supreme Court stated as hereunder;

“ 49. Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

50. This Court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of



the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.”

85. Other than the fact that the petitioners have not tendered and placed before the court any environmental audit report demonstrating breach of the right to clean and healthy environment, it is also not lost on me that the petitioner itself has been undertaking similar activities on the disputed grounds. In fact, the petitioner procured and obtained an Environmental Impact Assessment license for purposes of sand harvesting from the 1<sup>st</sup> Interested Party.
86. Additionally, the Petitioner herein has annexed a letter from the 1<sup>st</sup> Interested Party dated 22<sup>nd</sup> March 2016 and wherein the County Director of the 1<sup>st</sup> Interested Party adverts to the fact that any sand harvesting or transporting without a valid receipt from [sic] the petitioner will be deemed to be illegal.
87. To my mind, what comes out from this petition shows and or exhibits a tacit conspiracy between the Petitioner, 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Interested Party whose purport is meant to individualize the benefit[s] arising from the exploitation of the natural resources obtainable from the disputed property which is public land. Furthermore, it is also apparent that there is a concerted effort to confer some collateral advantage[s] and privilege[s] to the petitioner over resources that should be exploited for the benefit of the people of Kenya.
88. I am afraid that the petitioner has neither proven nor demonstrated breach/violation of its right to clean and healthy environment. If anything, the contention by the petitioner amounts to seeing the speck in the eyes of the opponent, namely; the respondents, but not the log in its own eye. I say this because the petitioner wants to exclusively benefit from sand harvesting, but does not want the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and the rest to do so.
89. Moreover, the Petitioner herein is craving for the latitude to continue extracting fees for harvesting of sand and excavation of murram from the disputed ground for its own financial benefit. Surely, such an endeavour constitutes unjust enrichment from natural resources that belong to the people of Kenya. [See the preamble of *the Constitution*, 2010].
90. Before concluding on this issue, I am reminded of the biblical teaching in Mathew 7:3-5 that states thus;
- “Why do you look at the speck of sawdust in your brother’s eye and pay no attention to the plank in your own eye? How can you say to your brother, ‘Let me take the speck out of your eye,’ when all the time there is a plank in your own eye? You hypocrite, first take the plank out of your own eye, and then you will see clearly to remove the speck from your brother’s eye.”
91. Next, is the issue as pertaining to the reliefs/remedies [if any] that ought to be granted in favor of the petitioner. The petitioner herein has sought a plethora of reliefs starting with a declaration that the respondents have violated its right to clean and healthy environment as provided for under Article 42 of *the Constitution* 2010.
92. I beg to highlight that the petitioner and all other individuals are entitled to partake of the right to clean and healthy environment. Indeed, a clean and healthy environment is the cornerstone to the enjoyment of all the other human rights and fundamental freedoms. Absent clean and healthy environment, one cannot talk about the right to life, right to health, right to food and right to clean and safe water. The right to clean and healthy environment is paramount [see Peter K. Waweru v Republic [2006] KEHC 3202 (KLR)].



93. However, before a court of law can venture forward and return such a declaration, it behoves the applicant to tender and place before the court evidence in proof of the violation of the right in question. In respect of the instant matter, I am afraid that the petitioner has not discharged the burden of proof. To this end, the declaration sought is not available.
94. Notwithstanding the foregoing, I beg to clarify that the Respondents and 1<sup>st</sup> Interested Party are still enjoined to ensure that their actions and activities are undertaken in consonance with the provisions of inter alia Article 69 of *the Constitution*; the provisions of Section 58 and 59 of the Environment Management and Coordination Act 1999 [2015], and the Environmental Management and Co-ordination (Sand Harvesting) Regulations of 2024.
95. The petitioner has also sought an order of injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from entering upon, trespassing, harvesting sand, and excavating murrum from the disputed ground. I beg to state that the issuance of such an order [if at all] shall be contrary to the objects, values, and principles enshrined in Article 69(1)(a) which underpin the position that natural resources must be sustainably exploited for the benefit of the people of Kenya. Nevertheless, the aspect that pertains to environmental restoration and rehabilitation must be subject to continuous audit and monitoring by National Environment Management Authority and the County Government.
96. The Petitioner has also sought for an order to compel the 3<sup>rd</sup> Respondent in consultation with the 1<sup>st</sup> Interested Party to put in place measures and mechanisms aimed at averting any action harmful to the environment. Nevertheless, I beg to underscore that the National Environment Management Authority (NEMA) is clothed with the requisite mandate to ensure that any action or omission that threatens the environment is suitably redressed. [See sections 108 and 109 of the *Environmental Management and Co-ordination Act* 1999[2015]].
97. The petitioners have sought for an order to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to provide adequate compensation for violation of the right to clean and healthy environment. Be that as it may, it suffices to recall that I have since found and held that the petitioners did not demonstrate violation of the right to clean and healthy environment. On the other hand, it is also imperative to highlight that learned counsel for the petitioner did not make any submission on the question of compensation. For good measure, no amount was spoken to and or submitted upon.
98. Other than the foregoing, I also wish to observe that any compensation would be tantamount to rewarding the petitioner for the resources which ought to be exploited and utilized for the benefit of all.
99. I have pointed out elsewhere hereinbefore that such a scenario would be tantamount to unjust enrichment. It will be inequitable. The national values and principles of governance enshrined in article 10(2)(b) of *the constitution* and in particular social justice and equity; will frown upon such an order.

### **Final Disposition.**

100. Having considered the various perspectives and the facets that were highlighted in the body of the Judgement, it must have become crystal clear that the petition beforehand is not merited.
101. If anything, the petition before hand appears to have been intended to achieve a collateral advantage and merely to benefit the petitioner as pertains to the exploitation and utilization of the natural resources obtained on the disputed ground.
102. In the upshot, the final orders that commend themselves to the court are as hereunder;
  - i. Petition No. E 001 of 2023 be and is hereby dismissed.



- ii. Petition No. 002 of 2022 be and is hereby dismissed.
- iii. Each Party shall bear own costs of the proceedings.
- iv. For the avoidance of doubt, the conservatory orders issued on 29<sup>th</sup> May 2023 be and are hereby discharged.

103. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2025**

**OGUTTU MBOYA, FCIArb; CPM [MTI-EA].**

**JUDGE**

In the presence of:

Hussein/Mukami – Court Assistant

Mr. Caleb Mwiti for the Petitioner

Mr. Omore for the 3<sup>rd</sup> Respondent

Ms. Kahuria for the 1<sup>st</sup> Interested Party

Mr. B. Kimathi [Principal Litigation Counsel] for the 2<sup>nd</sup> Interested Party

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