



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**CONSTITUTIONAL ELC PETITION E004 OF 2021**

**IN THE MATTER OF ARTICLE 63 AND 67(e) OF THE  
CONSTITUTION OF KENYA RELATING TO HISTORICAL  
INJUSTICES OVER LAND PARCEL NO. 1748**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLES 43(1) (b) (c)  
AND (d) AND 28 OF THE CONSTITUTION OF KENYA  
RELATING TO FORCED EVICTIONS OF 2500 MEMBERS OF  
AKAMBA TRIBE FROM THEIR LAND IN KIIMA KIU  
KALANZONI IN MAKUENI COUNTY**

**AND**

**IN THE MATTER OF ARTICLES 2(6),19,20,21,22,23, 26,29,  
39,40 AND 48**

**AND**

**IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL  
DECLARATION OF HUMAN RIGHTS (UDHR), ARTICLE 11 OF  
THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL  
AND CULTURAL RIGHTS (ICESCR), ARTICLE 17 OF THE  
INTERNATIONAL COVENANT ON POLITICAL AND CIVIL  
RIGHTS, AND ARTICLE 18 OF THE AFRICAN CHARTER ON  
HUMAN RIGHTS AND PEOPLES' RIGHTS (ACHPR)**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES 2014 RULES 3, 4, 5, 9  
AND 10**

**BETWEEN**

**JOSEPH MIUTUKU KALII, PETER KISOLO MWAVU AND  
PAULINE MWIKALI KAAZOO (Suing as Chairman, Secretary  
and Treasurer of Mamukii Society) on behalf of 2500  
SOCIETY MEMBERS SQUATTERS AND EVICTEES FROM  
MAKALA FARM L.R. No. 1748.....PETITIONERS**

**=VERSUS=**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup>  
RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup>  
RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup>  
RESPONDENT**

**MAKUENI COUNTY GOVERNMENT.....4<sup>TH</sup>  
RESPONDENT**

**STANLEY SONS LIMITED.....5<sup>TH</sup>  
RESPONDENT**

**JUDGMENT**

1. The Petitioners instituted this Petition dated 26<sup>th</sup> April 2021, seeking the following orders:-

- a) A declaration that the Petitioners' fundamental right to housing, shelter, safe drinking water, sanitation, adequate food, and health have been violated.***

***b) A declaration that the Petitioners are entitled to redress for suffering historical injustices over their land at Kiima Kiu which was expropriated by the Colonial Government referenced as L.R. No. 1748.***

***c) A declaration that the Petitioners are the true legal owners of land parcel No. 1748 Kiima Kiu by virtue of Indigenous Customary Law and Native title, and the issuance of the title to their land in 1948 by the Governor of Kenya Colony did not extinguish their native title to the land.***

***d) A declaration that the title issued to Robin Woodcraft Stanley over the land parcel No. 1748 on 7<sup>th</sup> April 1948 is null and void and without any legal effect at all.***

***e) An order that the title issued to Robin Woodcraft Stanley on 7<sup>th</sup> April 1948 and all subsequent entries be cancelled.***

***f) An order that the title for land parcel No. 1748 be issued to the Trustees of Mamukii Society.***

***g) Costs of the suit.***

2. The Petition is supported by the affidavit of Joseph Mutuku Kalii, sworn on the even date.
3. The 1<sup>st</sup> Respondent filed its response dated 13<sup>th</sup> March 2024.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Notice of Appointment dated 18<sup>th</sup> May, 2021 but did not file any response to the Petition.

5. The 4<sup>th</sup> Respondent opposed the Petition through its response dated 19<sup>th</sup> April 2022.
6. The 5<sup>th</sup> Respondent filed its response dated 4<sup>th</sup> April 2022 in opposition to the Petition.
7. The Petition proceeded by way of viva voce evidence.

### **THE PETITIONERS CASE**

8. The Petitioners called fourteen witnesses in support of their case. PW1 Joseph Mutuku Kalii, adopted his witness statement dated 1<sup>st</sup> April 2022 and his verifying affidavit sworn on 26<sup>th</sup> April 2021 as his evidence in chief.
9. He testified that he is the Chairman of the Petitioners Society which comprises 2500 members residing along the railway line. He told the court that their land was appropriated during his childhood. He further testified that their parents, grandparents, and ancestors lived in five villages within the suit property, namely Yoani, Kisesini, Mwia, Kawenye, and Ndaatai, where they practised their traditional way of life. It was his testimony that his father and grandfather lived on the suit property and that his grandfather, Kamweli, is buried in Yoani village, which is located within the suit property. He further stated that they usually visit the graves of their ancestors which are situated within the suit land.
10. He further testified that sometimes in 1928, Robin Woodcraft Stanley, who was by then the farm manager of a white settler by the name Kitale, carried away their livestock, including

20,000 heads of cattle, 150,000 goats, 100,000 sheep, and 22000 chickens, thereby crippling the community's economic life.

11. He testified that between 1931 - 1946 Robin Woodcraft Stanley in the company of colonial police staged brutal attacks against the community including killing members, raping women and castrating men.
12. That sometime in 1946 at around 3 a.m Robin Woodcraft Stanley brutally evicted their parents from the suit property and razed down the villages. He further stated that the community was driven to Kiu railway station. He went on to state that on 7<sup>th</sup> April 1948, the government of Kenya Colony issued a grant to Robin Woodcraft Stanley consisting of their land while their members continued to camp at the railway line where they reside to date.
13. He went on to state that after they were evicted from the property, they now live along the railway and lack access to schools, restrooms, or hospitals, forcing them to travel to Machakos or Nunguni to obtain these services. He asserted that their community has never stopped agitating for their land.
14. He faulted the NLC and the County Government of Makueni for failing to address their complaint of historical land injustice. He further stated that they presented their claim in court based on the advice from the Governor and the NLC.

15. On cross-examination by Ms. Mango, he testified that he was born in Machakos. He further testified that his parents told him they were evicted from the suit land in 1947. He reiterated that his father took him to his grandfather's grave, which is located within the suit land.
16. On cross-examination by Mr. Kuyo, he testified that the Society's officials were charged with the offence of trespass and malicious damage to property. He confirmed that the 5<sup>th</sup> Respondent is the registered proprietor of the suit property.
17. He told the court that they began advocating for the suit property before 2018 and formally established the group on 22<sup>nd</sup> October 2019, specifically for the purpose of reclaiming their land. He also stated that he was not aware whether Kiamuka Society had filed a claim for historical injustice.
18. He stated that although the Petitioners representatives had approached the County Assembly regarding their claim to the suit property, he confirmed that there was no evidence to show that they had submitted a formal complaint to the County Assembly. He acknowledged that the resolution passed by the County Assembly was made on behalf of Kiamuka Society.
19. He testified that his community endured severe attacks carried out by Robinson Woodcraft Stanley, with support from the colonial police. He also stated that he had no documents to prove that his father and grandfather lived on the suit land.
20. In re-examination, he testified that the charge sheet in the Criminal Case Nos. 225 of 2021 and 233 of 2021 indicate that

the 5<sup>th</sup> Respondent is the owner of the suit land. He further testified that the 5<sup>th</sup> Respondent inherited the suit land from his grandfather, also known as Makala, who took it from them. He reiterated that they had filed their claim with the NLC and added that they are not part of the Kiamuka Society.

21. PW2 David Muema Mbungu adopted his witness statement dated 3<sup>rd</sup> May 2021 as his evidence in chief. He testified that he was born in 1942 in Kiima Kiu, although his Identity Card indicates that he was born in 1948.
22. He further testified that they were forcibly evicted from the suit property sometime in 1946 at around 3 a. m by Robin Woodcraft Stanley who was then employed as the farm manager by F.O.B. Wilson. That after the eviction, they fled to Kiu railway line, where they established their residences and have remained to this day.
23. He stated that efforts to return to their land on 4<sup>th</sup> December, 2021, were blocked by the OCPD and the OCS Salama Police Station. He asserted that they are the owners of the suit land and that they had established shrines (mathembo) at Yoani, Mambiti, Mwia, and Kwa Mwitiki. He also stated that the graves of their ancestors are located within the disputed property.
24. On cross-examination by Ms. Mango, he testified that his grandfather died in 1935 and his father in 2002, and both are buried on the suit property, although he had no documents to substantiate this claim.

25. On cross-examination by Mr. Kuyo, he testified that although he was born in 1942, the officer who issued the Identity card recorded his date of birth as 1<sup>st</sup> January 1948.
26. He reiterated that he was present when they were forcibly evicted from the suit property in 1946. He stated that he reported the matter to Hon. Mathew Mutiso, who convened a meeting with the District Commissioner and requested the 5<sup>th</sup> Respondent to vacate the suit land, since it is their ancestral land, but there was no report to that effect. Additionally, he mentioned that they attempted to reclaim their land on 12<sup>th</sup> April 2021 but were forcibly removed by the police.
27. On further cross-examination by Dr. Musau, he confirmed that his identity card indicates he is from Ngambaa Kiima Kiu Mulili Location. He stated that people from Ngambaa, Mulili, and Ulu formed Mamuki Society, which later submitted a Petition to the County Assembly.
28. In re-examination, he stated that he was landless and was currently residing along the railway line.
29. PW3 Aliman Ramadhani adopted her witness statement dated 3<sup>rd</sup> May 2021 as her evidence in chief. It was her testimony that she was born in 1925 in Kwa Kaseve village in Kiu.
30. She further testified that the suit property belongs to their parents. It was her testimony that they grew up on the suit property but were later forcibly evicted by Robin Woodcraft Stanley, who confiscated their livestock and took them to Athi

Slaughter House. She further stated that the Police escorted them to the railway line, where she resides to date.

31. On cross-examination by Dr. Musau, she testified that she was born in Kasikeu Sultan Hamud, while her husband was born in Kiu. She further testified that she could not recall when they were evicted from the suit property. She also testified that Robin Woodcraft Stanley and the police took their cows and handed them over to the Kenya Meat Commission.
32. PW4 Dorcas Mwikali Lau adopted her witness statement dated 3<sup>rd</sup> May 2021 as her evidence in chief. She informed the court that she was born in 1920 on Wilson Kitale's farm. She told the court that she knew Robin Woodcraft Stanley very well because he had employed her. She further testified that he shot her goats and saw him shooting Kiua for failing to salute him. According to her, Robin Woodcraft was a cruel man who used to harass women sexually.
33. On cross-examination by Dr. Benjamin Musau, she reiterated that she was born on a farm in Kiima Kiu, owned by F.O.B. Wilson Kitale. She further testified that her father and husband used to work on Wilson Kitale's farm. Additionally, she testified that Robin Woodcraft Stanley employed many of them to work on the farm after taking over from Kitale. It was her testimony that Robin Woodcraft burned down her house within the suit land.
34. PW5 Kalekye Kilonzo adopted her witness statement dated 3<sup>rd</sup> May 2021 as her evidence in chief. It was her testimony that

she was born in Yoani village, which is located within the suit property. She further testified that her deceased parents are buried on the suit property. She also testified that she was among the women who Robin Woodcraft Stanley raped. She told the court that they were forcibly evicted from the suit property, and she now lives with her grandchildren in Ulu along the railway line.

35. PW6 Zakayo Kabisu Mulele adopted his witness statement dated 1<sup>st</sup> April 2022 as his evidence in chief. He informed the court that he was born in 1942 in Muya, within Kiima Kiu, although his Identity Card indicates that he was born in 1950.
36. He further testified that Robin Woodcraft Stanley, also known as Makala, evicted them from the suit property.
37. On cross-examination by Dr. Musau, he testified that he is a member of Mamuki Society and denied any knowledge of Kiamuka Society. He further testified that he joined Mamuki Society to reclaim his land.
38. In re-examination, he stated that Makala evicted him from his land, seized his livestock, and that he was currently residing along the railway line.
39. PW7 Kyuweu Musuni adopted her witness statement dated 17<sup>th</sup> May 2021 as her evidence-in-chief. She told the court that she was born in Yoani village and was 90 years old. She went on to state that she lived with her parents, siblings, and grandparents in the suit property before they were forcibly

evicted in 1946 by Robin Woodcraft Stanley and they were currently residing along Kiu railway station.

40. On cross-examination by Dr. Musau, she testified that she is a member of Mamukii Society and denied any knowledge of Kiamuka Society. She further testified that she was among those who invaded the suit property, but she ultimately left the court to decide the matter. She admitted that she had no documents to show that she had lodged any complaint regarding the suit land.
41. PW8 Grace Katunge Mutava adopted her witness statement dated 3<sup>rd</sup> May 2021 as her evidence in chief. She testified that she was born in 1948 in Kiu Makindu, although her ID card indicates that she was born in 1952. It was her testimony that her father told her that Makala killed her two brothers. She further testified that following their eviction, she was currently residing along the railway line.
42. On cross-examination by Dr. Muasu, she reiterated that her father told her that Robin Woodcraft Stanley killed her brothers.
43. On cross-examination by Ms Mango, she testified that in 1948, Makueni was part of Machakos District. She further testified that her father took her to her grandmother's grave in Kiima Kiu, although she had no documents to confirm that she was actually buried on the suit property.
44. On cross-examination by Mr. Kuyo, she testified that she was born in Makindu, near Kiu, and denied any knowledge of Kiamuka Society.

45. PW9 Pauline Mwikali Kaanzo adopted her witness statement dated 1<sup>st</sup> April 2021 as her evidence in chief. She testified that she is the Treasurer of Mamukii Society.
46. It was her testimony that in November 2019, they established a group consisting of 2500 members to assist the vulnerable members of society who had been evicted from the suit property to reclaim their land. She further testified that in 2021, they entered the suit land but were arrested and charged before the Kilungu law courts.
47. On cross-examination by Ms. Mango, she testified that they raised a complaint regarding the suit property with the County Assembly and denied any knowledge of the Kiamuka Society. She further testified that her grandfather lived on the suit property.
48. On cross-examination by Mr. Kuyo, she testified that Mamukii Society was established in 2018 and registered on 22<sup>nd</sup> November, 2019. She reiterated that their complaint was forwarded to the County Assembly. It was her testimony that they started agitating for their land before 2018. She maintained that they were evicted from the suit property by the police.
49. On cross-examination by Dr Musau, she testified that she was born in Mbooni in 1973 and was married in Kiima Kiu.
50. In re-examination, she reiterated that they had submitted their complaint to the County Assembly, which passed a motion requiring the NLC to investigate. She also stated that she had

raised the issue during a public participation session at Kwa Kathoka.

51. PW10 Ali Athumani adopted his witness statement dated 17<sup>th</sup> May 2021 as his evidence in chief. He testified that he was born in 1940 in Yoani village, Kiima Kiu, although his Identity Card states that he was born in 1945. He further testified that in 1946, they were forcibly evicted from their homes within the suit property by armed policemen, put on a train, and then left at Makindu railway station, where they still reside in extreme poverty.
52. On cross-examination, he testified that Makala evicted them from the suit property in 1946/1947.
53. PW11 Esther Mumini Mutuku adopted her witness statement dated 1<sup>st</sup> April 2022 as her evidence in chief. She testified that she was born in Kwa Katila, Ndaatai. She further testified that the white man burned down their houses.
54. On cross-examination, she testified that she had previously resided in the suit property. She further testified that Makala burned down their houses.
55. PW12 Joseph Kingoo Kimuyu adopted his witness statement as his evidence in chief. He told the court that he was born in 1945 in Yoani village, Kiima Kiu. He further testified that Makala evicted them from the suit property and took their livestock. He went on to state that after their eviction from the suit property, they settled along the railway line where they reside to this day.

56. On cross-examination by Ms. Mango, he testified that his parents had told him they were evicted from the suit property in 1946.
57. PW13 Ruth Mbesa Kimenyi adopted her witness statement dated 3<sup>rd</sup> May 2021 as her evidence in chief. It was her testimony that she was born in 1950 and that her parents used to live in Ndaatai. She testified that Makala evicted them from the suit property, and they took refuge along the railway line, where they still reside to date.
58. On cross-examination by Dr Musau, she testified that she knew Makala because they both lived on the same farm. She further stated that she has not filed her complaint with any other organization and denied any knowledge of Kiamuka Society.
59. PW14 Torokasi Kamanthe David adopted her witness statement dated 1<sup>st</sup> April 2022 as her evidence in chief. She informed the court that Makala evicted them from the suit property.
60. On cross-examination by Mr. Kuyo, she testified that her parents and grandparents lived on the suit property. She further testified that the policemen evicted them from the suit property and that the white men took away people's wives.

### **THE 1<sup>ST</sup> RESPONDENT'S CASE**

61. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Brian Ikol in response to the Petition. However, the 1<sup>st</sup> Respondent did not call any witness in support of its case.

62. The deponent averred that on 6<sup>th</sup> September 2018, the 1<sup>st</sup> Respondent received a historical land injustice complaint at their Makueni Office, where the claimants alleged that they were deprived of their property. Upon reviewing the claim, the 1<sup>st</sup> Respondent concluded that it involved a historical land injustice, as it related to a grievance arising from the breach of the claimants' ancestral and customary rights of ownership over the suit property.
63. He stated that the incident took place between 15<sup>th</sup> June, 1895, and August 27, 2010, and remains unresolved. Neither actions nor omissions by the claimants constitute surrender or renunciation of their land rights. The injustice was caused by colonial occupation, which led to the displacement of the claimants from the ancestral land they once inhabited.
64. He further averred that on 29<sup>th</sup> October 2018, the 1<sup>st</sup> Respondent commenced investigations into the claim and undertook a fact-finding process with the 4<sup>th</sup> Respondent and agreed to determine the precise acreage of the disputed property. The proposed survey, which was to be conducted under the leadership of the 4<sup>th</sup> Respondent, was not carried out as scheduled because the 5<sup>th</sup> Respondent presented an order prohibiting the exercise.
65. He deposed that a preliminary inquiry scheduled for 13<sup>th</sup> November 2013 was not conducted because the 5<sup>th</sup> Respondent produced a court order prohibiting the inquiry.

66. He contended that the nature of the claim in the Petition constitutes a historical land injustice rooted in the impacts of colonial occupation and the consequent appropriation of 1540 hectares of the disputed land.

### **THE 4<sup>TH</sup> RESPONDENT'S CASE**

67. The 4<sup>th</sup> Respondent called one witness in support of its defence.

Jackson Charo Daudi, the Chief Officer in Charge of Lands and Urban Development for Makueni County, adopted his statement, sworn on 18<sup>th</sup> January 2023, as his evidence in chief. He also produced the documents attached to his affidavit in support of his evidence.

68. It was his testimony that on 29<sup>th</sup> October 2018, the 1<sup>st</sup> and 4<sup>th</sup> Respondents, together with the Office of the County Commissioner, held a public participation baraza to address the issues surrounding the suit property. Among the issues raised was a request to revoke the grant issued to the 5<sup>th</sup> Respondent on the grounds that the 5<sup>th</sup> Respondent was a beneficiary of historical land injustice.

69. He further testified that the 4<sup>th</sup> Respondent requested verification of the size of the suit property because the Petitioners doubted the size indicated in the lease. Subsequently, the 4<sup>th</sup> Respondent appointed three surveyors to conduct the survey and informed the 5<sup>th</sup> Respondent's family of

the intended survey. He testified that the Petitioners did not produce documents in support of their claim. He asserted that the 4<sup>th</sup> Respondent has no authority over the suit property as it is registered in the 5<sup>th</sup> Respondent's name.

70. On cross-examination by Dr. Musau, he testified that Kiamuka Society wrote a letter to the National Land Commission dated 25<sup>th</sup> September 2019, complaining about the suit property.

71. He further testified that Mamukii Society has never approached the County Government.

72. On cross-examination by Mr. Njiru, he testified that he was not aware of the decision made by the County Assembly or the NLC. He acknowledged that the County Assembly had referred this matter to the NLC and stated that he had not attended any meetings convened by the NLC.

73. He further testified that he was aware that Kiamuka Society, not Mamukii Society, had lodged a complaint with the Governor. He also stated that he was not aware whether Joseph Kalii had presented his Petition to the MCA of the region or if the MCA had presented it to the County Assembly. He testified that after they received the complaint from Kiamuka Society, they organised a public baraza, where it was agreed that the County Government has no role in private land and the matter was referred to the NLC.

### **THE 5<sup>TH</sup> RESPONDENT'S CASE**

74. The 5<sup>th</sup> Respondent called one witness in support of its defence.

Robin Alan Stanley adopted his witness statement and his response to the Petition dated 4<sup>th</sup> April 2022 as his evidence in chief. He also produced documents in his list filed on 13<sup>th</sup> April 2022, in support of his evidence.

75. He told the court that he is the Managing Director of the 5<sup>th</sup> Respondent. He testified that the Petitioners' claim against the 5<sup>th</sup> Respondent began after his father passed away on 12<sup>th</sup> July 2018. It was his testimony that his grandfather was born in South Africa in 1879 and later migrated to Kenya in the early 1930s.
76. He testified that on 1<sup>st</sup> October 1947, Robin Woodcraft Stanley acquired an indefeasible title to the suit property measuring 5,048 acres under the Crown Lands Ordinance, in consideration of a premium of Kshs.37,860.
77. He further testified that on 29<sup>th</sup> May 1975, Robin Woodcraft Stanley transferred the suit property to the 5<sup>th</sup> Respondent, following which the Government of Kenya issued a title to the 5<sup>th</sup> Respondent under the Registration of Titles Act (Repealed).
78. He maintained that a certificate of title issued under Section 23(1) of the Registration of Titles Act (repealed) and Section 26(1) of the Land Registration Act is conclusive proof that the purchaser is the absolute and indefeasible owner of the land.
79. According to him, the Petition herein is sub judice and an abuse of the court process as it raises similar issues as those in ELC Case No. 8 of 2020. He argued that the Petitioners have used

the same references as in the Kiamuka suit and that the parties in both case have not sufficiently distinguished themselves.

80. He further testified that the Petitioners have no proprietary rights over the suit property as there is no evidence to show that the Petitioners, their parents, grandparents, or ancestors ever occupied or possessed any part of the suit property at any relevant time.

81. He denied the allegations that the Petitioners' ancestors' graves were on the suit property, asserting that even if such graves exist, there is no evidence to prove that they belonged to the Petitioners' ancestors. He maintained that the existence of graves does not grant the Petitioners ownership rights over the suit property.

82. He testified that the Petitioners did not provide a genealogy to verify their ancestry nor demonstrate that their parents, grandparents, or other ancestors previously owned the suit property. He asserted that, contrary to the Petitioners' claim that the suit property is communal land, the property has never been subjected to alienation under native land or indigenous customary law.

83. He denied the allegations that Robin Woodcraft Stanley committed atrocities against the Petitioners' ancestors in 1928 since he was serving as a 2nd Lieutenant in the Natal Caribbean in South Africa at that time. He testified that Robin Woodcraft Stanley arrived in Makueni District in 1937 and,

therefore, the accusations of cattle raiding are meant to evoke the court's sympathy.

84. On cross-examination by Mr Njiru, he reiterated that his grandfather purchased the suit property. He also confirmed that he obtained a conservatory order against the NLC from investigating their land, which led Kiamuka Society to withdraw its complaint and file a claim for historical land injustice.

85. He denied the allegations of rape involving his grandfather or that he took livestock belonging to the Petitioners. He testified that his grandfather, who was a manager at FOB Wilson, purchased the property through proper channels. He further testified that he was in possession of the suit land where he lives with his family.

86. In re-examination, he reiterated his evidence as above. He also stated that there was nothing in their family record to suggest that any brutality had occurred on the land.

87. On 19<sup>th</sup> March 2024, the court visited the locus in quo and observed that the area was extensive. There were neighbouring villages and residents living along the railway line.

## **THE PETITIONERS SUBMISSIONS**

88. The Petitioners filed their submissions dated 24<sup>th</sup> March 2024.

On their behalf, Counsel outlined the following issues for the court's determination: -

- a. *Whether there is a historical injustice in the 5<sup>th</sup> Respondent's occupation of Land Parcel No. 1748 Kiima Kiu.*
  - b. *Whether the Petitioners have proved their occupation of the suit land.*
  - c. *Whether the Petitioners are entitled to ownership of land Parcel No. 1748 by virtue of indigenous customary law and native title.*
  - d. *Whether land parcel No. 1748 should vest in the Petitioners.*
  - e. *Whether the title issued to Robin Woodcraft Stanley over land parcel No. 1748 on 7<sup>th</sup> April 1948 is null and void.*
  - f. *Whether the Petitioners' human and constitutional rights have been infringed.*
  - g. *Whether the Petitioners are entitled to redress for suffering historical injustice over their land at Kiima Kiu by having their title in the name of the 5<sup>th</sup> Respondent revoked and a new title issued to the Petitioners.*
  - h. *Whether the Petitioners are parties in MAKUENI ELC NO. 8 of 2020 MARY WAENI MUTUSE VS STANLEY & SONS LIMITED & ANO.*
  - i. *Who should bear costs?*
89. On the first issue, Counsel submitted that the 1<sup>st</sup> Respondent acknowledged in its response that the Petitioners' claim for historical land injustice had met the conditions outlined in Section 15 of the Land Laws (Amendment Act) 2016. Based on this acknowledgement, Counsel contended that the title issued to the 5<sup>th</sup> Respondent is null and void.

90. Counsel submitted that the 1<sup>st</sup> Respondent did not complete investigating the Petitioners' claim because the 5<sup>th</sup> Respondent obtained an injunction prohibiting it from concluding the inquiry.

91. Counsel further submitted that the 5<sup>th</sup> Respondent admitted the averments contained in the 1<sup>st</sup> Respondent's response to the Petition, as he did not request to cross-examine the deponent or object to the production of the documents. To support this argument, Counsel relied on the case of **Kenya Akiba Micro Finance Limited v Ezekiel Chebii & 14 others (2012) eKLR**, where the court held that:-

***“.....a statement made on oath should, as a matter of fact, be expressly denied on oath. If not challenged, it remains a fact and the truth of the matter.”***

Further reliance was placed on the case of **Karuru Munyororo vs Joseph Ndumia Murage & ano Nyeri HCCC No. 95 of 1988.**

92. Regarding the second issue, Counsel submitted that it would be unfair to require the Petitioners to produce a title for the suit land, because it is ancestral land that was inhabited by their ancestors prior to British colonization.

93. Counsel submitted that the site visit conducted on 19<sup>th</sup> March 2024 confirmed that the Petitioners are the rightful owners and had been in possession of the land before being forcibly evicted, as they were able to identify the boundaries, shrines, villages, and gravesites on the suit land. Counsel further

submitted that the court observed homesteads and other surrounding villages, which indicates that other natives occupied the entire area.

94. Regarding the third issue, Counsel submitted that the doctrine of native title stipulates that the rights of indigenous peoples are deemed to have continued under British sovereignty and after independence, unless they are explicitly extinguished. To reinforce this point, reliance was placed on the case of **Mabo v. Queensland (No.2) (1992) 1975 CLR.**

95. According to Counsel, the Petitioners are entitled to ownership of the suit property because they occupied the land for many years before 1895 and acquired customary rights that persisted after the establishment of the Colony in 1920, and these rights have not been extinguished.

96. Counsel argued that the Petitioners' rights were not forfeited during the colonial era because they owned their land under a communal ownership system, whereby land belonged to the entire community.

97. It was further argued that, during the relevant period, no land in Kenya had been adjudicated, since all land was communal and everyone was aware of their parcel of land. Counsel urged the court to take judicial notice that land in Kenya had not been adjudicated.

98. Counsel submitted that the 1<sup>st</sup> Respondent acknowledged in its response that the Petitioners are the rightful owners of the suit land. Counsel contended that the Petitioners' claim is based on

ancestral domain rights. Counsel further submitted that the Petitioners are entitled to own the suit land under the doctrine of native title and indigenous customary rights because the Respondents did not present any evidence to show that the Petitioners lost their land rights.

99. Regarding the fourth issue, Counsel submitted that, contrary to the Respondents' claim, the suit land was not terra nullis at the time of colonization because the Petitioners were already residing there and practicing their traditional way of life on the suit land.

100. Counsel further argued that the suit land qualifies as community land under Article 63(2) of the Constitution because it was owned collectively by the Petitioners. Counsel submitted that the Petitioners lived in villages within the suit land, where they raised livestock and engaged in farming. Counsel further submitted that the Petitioners meet the criteria of a community as outlined in Section 2 of the Community Land Act.

101. Regarding the fifth issue, Counsel submitted that the 5<sup>th</sup> Respondent failed to prove the validity of the title transferred to it by Robin Woodcraft Stanley. To support this argument, reliance was placed on the case of **Munyu v Hiram Gathiha Maina Civil Appeal No. 239 of 2009**, where the court held that:-

***“...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 and all legal interests which would not have been noted in the register.”***

102. Counsel also argued that the 5<sup>th</sup> Respondent's title violates the Petitioners' human rights and dignity, as well as those of their families. To support this claim, Counsel relied on Section 26(1) of the Land Registration Act.

103. Counsel submitted that the 5<sup>th</sup> Respondent failed to call the Land Registrar or any other witness to prove that the title was issued lawfully. Counsel relied on Section 107(1) of the Evidence Act to assert that the 5<sup>th</sup> Respondent did not present documentary evidence showing how it acquired the title to the suit property, which clearly suggests that the acquisition was unlawful and should be revoked.

104. Counsel further submitted that the 5<sup>th</sup> Respondent did not present any evidence to show that a survey was conducted or if the community was involved in surveying the suit land. Counsel also argued that there was no evidence to suggest that the adjudication process was carried out.

105. Counsel argued that, unlike the 5<sup>th</sup> Respondent, the Petitioners were able to identify the exact location of the suit property, including the graves and shrines, during the site visit. Counsel also argued that the court observed the homesteads and other villages surrounding the suit property. Counsel contended that the title issued to Robin Woodcraft Stanley is invalid because the Petitioners are the rightful owners under the doctrine of

native titles as they have not extinguished their rights over the land.

106. Regarding the sixth issue, Counsel submitted that the Petitioners' human and constitutional rights have been violated since 1928 and continue to be violated to this day.
107. Counsel further submitted that in 1928, Robin Woodcraft Stanley, who was employed as a farm manager for a white settler at that time, forcibly confiscated the Petitioners' livestock, which was estimated to include 20,000 cattle, 150,000 goats, 100,000 sheep, over 3000 donkeys, and approximately 22,000 chickens.
108. It was submitted that between 1931 and 1946, the Petitioners suffered brutal attacks by colonial armed police under the orders of Robin Woodcraft Stanley.
109. In 1946, Robin Woodcraft Stanley, along with colonial police, raided the Petitioners' homes at 3 a.m. and violently attacked them, forcing them to flee to Kiu railway station.
110. Counsel submitted that, as a result of the said acts, the Petitioners' rights under Article 40(2)(3) of the Constitution were violated because they were forcibly evicted from their land and the title was issued to Robin Woodcraft Stanley.
111. The Petitioners also claimed that their rights under Articles 25, 26, 28, 29, 39, and 47 of the Constitution were breached as they were subjected to brutal attacks, including rape, castration, maiming, and some were even killed.

112. It was further submitted that the 1<sup>st</sup> Respondent violated the Petitioners' rights under Article 48 of the Constitution by failing to investigate and address the injustices they faced.
113. Counsel argued that the Respondents violated the Petitioners' rights under Article 43 of the Constitution, as read together with Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights, because they were forcibly removed from their land and left at the railway line in Kiu without any food or shelter.
114. Counsel further argued that the Petitioners' rights under Articles 37, 38, 43, 51, 52, and 58 of the United Nations Basic Evictions and Displacements were violated because they were neither given notice before the eviction nor provided with resettlement options afterward. Counsel contended that the conduct of the 5<sup>th</sup> Respondent in forcefully evicting the Petitioners amounts to a historical injustice.
115. It was submitted that the Petitioners have demonstrated how their rights were violated. To support this argument, reliance was placed on the case of **Anarita Karimi Njeru v Republic (1979) KLR 154.**
116. Regarding the sixth issue, Counsel submitted that, arising from the actions of Robin Woodcraft Stanley, the Petitioners are entitled to the orders sought in the Petition.
117. Counsel further submitted that the Petitioners sought the court's intervention due to the failure by the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup>

Respondents to investigate the matter promptly. Counsel also submitted that this court has jurisdiction to grant the orders sought. To this end, reliance was placed on **Article 21 of the Constitution**, which provides that:-

***“It is the fundamental duty of the state to observe, respect, promote and fulfil rights and fundamental freedoms in the Bill of Rights.”***

Further reliance was placed on the case of **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others (2018) eKLR**, where the court held that:-

***“On the question whether a court should await investigations and recommendations by the NLC before it can entertain a claim founded on historical injustices, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustices, whether or not NLC is seized of the matter.....”***

118. On the seventh issue, Counsel submitted that the 5<sup>th</sup> Respondent did not adduce any evidence to show that the Petitioners are parties in Makueni ELC No. 8 of 2020 - Mary Waeni Mutuse v Stanley & Sons Limited & Another. It was submitted that the Petitioners are members of Mamuki Society and not Kiamuka Society.

119. In conclusion, Counsel urged the court to allow the Petition with costs to the Petitioners.

## **THE 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

120. The 1<sup>st</sup> Respondent filed its submissions dated 5<sup>th</sup> July 2024.

On behalf of the 1<sup>st</sup> Respondent, Counsel submitted that the only issue for determination is whether the Petitioners have met the threshold for the grant of the orders sought.

121. Counsel submitted that the 1<sup>st</sup> Respondent has the authority to initiate investigations on its own or based on complaints regarding present or historical land injustices. To buttress this point, Counsel relied on Article 67(2)(e) of the Constitution, Section 15 of the NLC Act, and on the case of **Kenya National Chamber of Commerce & Industry - KNCC1 (Muranga Chapter) & 2 others vs Del Monte Kenya Limited & 3 others.**

122. Counsel further submitted that the Petitioners' claim is essentially a historical land injustice that was properly presented to the 1<sup>st</sup> Respondent for investigation, but was not concluded because a full inquiry was prevented. Counsel maintained that this court has jurisdiction to hear and determine the Petitioners' claim.

123. To support this argument, reliance was placed on the case of **Kipsiwa Community Self-Help Group vs. Attorney General & 6 others (2013) eKLR.** Further reliance was placed on the case of **Chief Land Registrar & 4 others v. Nathan Tirop Koech & 4 others (2018) eKLR.**

124. Counsel argued that the Petitioners' claim that their ancestors resided on the suit land but were dispossessed during the colonial period is based on the doctrine of ancestral domain rights, and should not be disregarded.

125. Counsel submitted that the 1<sup>st</sup> Respondent, upon processing the Petitioners' claim, was satisfied that it involved a claim of historical land injustice. Counsel further submitted that in reaching this conclusion, the 1<sup>st</sup> Respondent considered the following grounds:

- a. *The grievance occasioned by a violation of the Claimants' ancestral and customary rights of ownership over the suit land on the basis of law and declaration.*
- b. *It occurred between June 1895 and 27<sup>th</sup> August 2010 and had not been sufficiently resolved by 27<sup>th</sup> August 2010.*
- c. *No action or omission on the part of the claimants amounted to surrender or renouncement of the right to the suit land.*
- d. *It was occasioned by colonial occupation and resulted in the displacement of the claimants from their ancestral land, which they had occupied then.*

### **THE 4<sup>TH</sup> RESPONDENT'S SUBMISSIONS**

126. The 4<sup>th</sup> Respondent filed its submissions dated 25<sup>th</sup> November 2024.

On its behalf, Counsel submitted that the issue for determination is whether the 4<sup>th</sup> Respondent failed in its legal duty to protect the Petitioners' interest in the suit land.

127. Counsel submitted that the Petitioners have no genuine grievance against the 4<sup>th</sup> Respondent as they failed to prove that the suit land is communal land.

128. Counsel further submitted that the Petitioners failed to prove their ancestry, as they did not show that their parents, grandparents, or ancestors possessed the suit land as claimed.

129. Counsel argued that the 1<sup>st</sup> Respondent is the entity responsible for investigating and resolving matters related to historical land injustices, not the court. To support this argument, reliance was placed on the case **of Ledidi Ole Tauta & others v. The Hon AG & 2 others (2015) eKLR.** Counsel submitted that the Petitioners have not demonstrated that the NLC has completed investigating their complaint and made a decision, but have instead approached the court to determine a matter that is pending before the NLC.

130. Counsel submitted that the 5<sup>th</sup> Respondent is the registered owner of the suit property, as there was no evidence indicating that it acquired the land unlawfully or fraudulently. To buttress this point, reliance was placed on the case of **Dina Management Limited v County Government of Mombasa & 5 others Petition 8(E010) of 2021.**

131. Concluding his submissions, Counsel urged this court to dismiss the Petition with costs.

## **THE 5<sup>TH</sup> RESPONDENT'S SUBMISSIONS**

132. The 5<sup>th</sup> Respondent filed its submissions dated 26<sup>th</sup> November 2024.

On behalf of the 5<sup>th</sup> Respondent, Counsel outlined the following issues for the court's determination:-

- a. *Whether the Petitioners' historical land injustice claim is merited?*
- b. *Whether the Petitioners' constitutional rights have been violated?*
- c. *Whether the Petition is sub judice, given the pendency of Makueni ELC No. 8 of 2020, Mary Waeni Mutusi & others v Stanley & Sons Ltd & another?*
- d. *Whether the Petitioners are entitled to the reliefs sought?*

133. On the first issue, Counsel submitted that this Court has jurisdiction to hear and determine a claim for historical land injustice. To support this point, reliance was placed on the case of **Chief Lands Registrar & 4 others v Nathan Tirip Koech & 4 others (2018) eKLR.**

134. Counsel submitted that the Petitioners' claim of ownership of the suit property is based on the concept of native title discussed in the Australian High Court case of **Mabo v Queensland (No. 2) (1992) 175 CLR.** Counsel argued that the court in the case of **Gaitho & 203 others v Utheri wa Lari Company Limited & another (Land Case 77 of 2016)**

**(2023) KEELC 98 (KLR) (19 January 2023)** declined to accept the argument that colonial dispossession is a valid reason to declare a registered title invalid.

135. According to Counsel, the suit property, having been assigned a title in accordance with the law, became private land registered under the name of Robin Woodcraft Stanley and was subsequently transferred to the 5<sup>th</sup> Respondent, who holds an indefeasible title to said property.

136. Counsel relied on Section 107 of the Evidence Act to submit that the Petitioners did not adduce any evidence to show that they occupied the suit property on or before 1947. To buttress this point, reliance was placed on the case of **Civil Appeal No. 345 of 2000 Ann Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (2004) eKLR** as well as on the case of **Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank (2004) 2KLR 91.**

137. Counsel contended that the Petitioners relied on anecdotal evidence and ambiguous oral testimony regarding the events that purportedly occurred in the 1940s, without any supporting evidence.

138. Counsel further contended that the Petitioners failed to produce any documentary or genealogical evidence to establish their ownership or occupation of the suit property at the time of the purported colonial expropriation.

139. Counsel submitted that the Petitioners failed to prove both an infringement of ancestral rights and continuous occupation or a

direct historical connection to the land as required by Section 15 of the NLC Act.

140. According to Counsel, the Petitioners did not demonstrate in their evidence that their parents, grandparents, or ancestors occupied any part of the suit property at any relevant time and, therefore, they do not have any proprietary rights to the suit property.
141. Counsel submitted that the Petitioners' claim that community villages surround the suit property does not prove past occupation of the suit property. Counsel urged the court to take judicial notice that each parcel of land must necessarily be adjacent to another.
142. Counsel further submitted that the Petitioners claim of graves on the suit property was not proven even during the site visit and there was no evidence that the unclaimed graves belonged to the Petitioners' ancestors. Counsel submitted that the Petitioners did not provide their genealogy to demonstrate that their parents, grandparents, or ancestors previously owned the suit property.
143. Counsel argued that the Petitioners' claim that the 1<sup>st</sup> Respondent proved a historical injustice against them is inaccurate, as the 1<sup>st</sup> Respondent would not have made a decision because the Petitioners had not filed a claim with the NLC.
144. According to Counsel, the claim for historical land injustice was filed by Kiamuka Society, and not the Petitioners.

Consequently, the 5<sup>th</sup> Respondent filed Makueni ELC Petition No. 5 of 2018 to stop the 1<sup>st</sup> Respondent from hearing the complaint. It was submitted that Kiamuka Society later withdrew the complaint, which led to Petition 5 of 2018 being compromised in terms of prayer Nos. b and c.

145. Counsel argued that the claim that the 5<sup>th</sup> Respondent did not cross-examine the deponent on the contents of the affidavit is inaccurate, as the Petition proceeded by way of viva voce evidence. To support this argument, Counsel referenced the case of **Trust Bank Limited v Paramount Universal Bank Limited & 2 others.**

146. It was submitted that the Petitioners' claim based on indigenous or native customary law cannot be sustained without concrete evidence. To support this argument, reliance was placed on the case of **Federation of Women Lawyers (FIDA Kenya) & 4 others v. The Attorney General & 2 others 2016 eKLR**, where the court held that:

***“.....without evidence to show that indeed their ancestral rights were breached, the 2<sup>nd</sup> - 5<sup>th</sup> Petitioners cannot purport to be in a better position to speak on behalf of their ancestors who were alive and even worked on those farms as at the time the initial registered owner of the suit land made his claim.”***

Further reliance was placed on the case of **Parkire Stephen Munkasio & others v Kedong Ranch (2015) eKLR** and on

**Charo Kazungu Matsere & 273 others v Kencent Holdings Limited & another (2012) eKLR.**

147. Counsel submitted that the Petitioners did not present any evidence to show that their ancestors' rights were violated when Robin Woodcraft Stanley purchased the suit property in 1948, establishing it as private land.
148. Counsel further submitted that the Petitioners have not challenged the legality of the 5<sup>th</sup> Respondent's title to the suit property. Counsel emphasized that the burden of proof rests with the Petitioners and that nothing prevented them from summoning the Land Registrar to appear in court. Counsel argued that the issue of historical land injustice is unrelated to the 5<sup>th</sup> Respondent's ownership of the suit property.
149. Counsel relied on Sections 25 and 26 of the Land Registration Act and on the case of **Charles Karathe Kiarie & 2 others v. Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others (2013)**, which was quoted with approval in Dr. **Joseph Arap Ngok v. Justice Moiyo Ole Keiwua & 5 others**, to submit that the 5<sup>th</sup> Respondent's title is indefeasible and can only be challenged on the grounds of fraud or misrepresentation if the registered owner is proven to be a party.
150. Counsel argued that the alleged violation of human rights and dignity is not a basis for challenging the validity of a title deed. Counsel further argued that although the Petitioners claim that

the 5<sup>th</sup> Respondent obtained its title illegally, they did not allege fraud or misrepresentation by the 5<sup>th</sup> Respondent.

151. Counsel submitted that the Petitioners have no valid claim of historical land injustice or evidence to show how, when, and who took away their land. To support this argument, Counsel cited the case of **Gaitho & 203 others, supra**, to submit that the indefeasibility of a title under Section 26 of the Land Registration Act overrides the provisions relating to historical land injustice under Section 15(2) of the NLC Act. Further reliance was placed on the case of **Henry Wambega & 733 others v Attorney General & 9 others (2020) eKLR**. According to Counsel, the Petitioners have not provided any basis to demonstrate their claim of historical land injustice.

152. Regarding the second issue, Counsel submitted that the Petition is based on vague complaints of rights violations that lack factual support. Counsel submitted that the Petitioners did not specify how the alleged acts violated their constitutional rights or how these acts amounted to forced evictions.

153. It was further submitted that the Petitioners failed to provide details on how these acts violated Articles 28, 47, 25, 26, 29, and 43 of the Constitution. Counsel submitted that the Petitioners did not specify how these Articles were violated, by whom, or establish any link between the Respondents and the alleged violations of their constitutional rights. To buttress this argument, reliance was placed on the cases of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others**

**(2013) EKLR and Dr. Rev. Timothy Njoya v The Hon Attorney General and Kenya Review Authority (2014) eKLR.**

154. Counsel submitted that the 5<sup>th</sup> Respondent acquired the suit property for valuable consideration under the Crown Land Ordinance. Counsel further submitted that the Petitioners did not allege any unlawfulness on the part of the 5<sup>th</sup> Respondent in acquiring the suit property, nor present any evidence to support their claim of ownership.
155. Counsel argued that the purpose of Article 40 of the Constitution is to protect legally acquired property and prevent the state from depriving any person of their property. Counsel further argued that Article 40 does not apply in this case since the Petitioners' claim is not based on the unlawful acquisition of their property.
156. It was further submitted that the Petitioners did not elucidate how the registration of the 5<sup>th</sup> Respondent on the suit property contravened the Constitution.
157. On the third issue, Counsel submitted that the Petition herein is sub judice as it raises similar issues as those in Makueni ELC No. 8 of 2020.
158. In conclusion, Counsel submitted that the Petitioners are not entitled to the reliefs sought.

**ANALYSIS AND DETERMINATION**

159. Having considered the Petition, the responses, the evidence on record, and the submissions by the parties, the following issues fall for determination:-

- a. *Whether this court has jurisdiction to hear and determine a claim for historical land injustice?*
- b. *Whether the Petitioners are entitled to the orders sought in the Petition?*
- c. *Whether the instant Petition is sub judice to Makueni ELC Case No. 8 of 2020.*

**WHETHER THIS COURT HAS JURISDICTION TO HEAR AND DETERMINE A CLAIM FOR HISTORICAL INJUSTICE**

160. The Petition herein is based on a claim for historical land injustice and violation of constitutional rights. The 4<sup>th</sup> Respondent submitted that this court lacks jurisdiction to consider claims related to historical land injustices. According to the 4<sup>th</sup> Respondent, the National Land Commission (NLC) is the only authority empowered to investigate and resolve any claims related to historical land injustices. The 4<sup>th</sup> Respondent also contends that the Petitioners have not demonstrated that the NLC has completed its investigation of their grievance or rendered a decision on the matter. To buttress this point, reliance was placed on the case of **Ledidi Ole Tauta & Others v. The Hon. Attorney General & Others (2015) eKLR**, where the court stated as follows:-

***“In our view, it’s the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The court is not the appropriate organ to carry out the investigations and/or inquiry, and where the law has made provision for a state organ or institution to carry out a specific function, that institution should be allowed to carry out its mandate. The court should not usurp the roles of other state institutions.....”***

161. On their part, the Petitioners and the 1<sup>st</sup> Respondent asserted that although the NLC is the body authorized to initiate investigations into past land injustices and recommend appropriate redress, this court still has jurisdiction to determine this Petition. The 5<sup>th</sup> Respondent maintained that this court has the requisite jurisdiction to entertain a claim based on historical injustice.

162. In addressing the issue of jurisdiction, the Court of Appeal in the case of **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others**, stated as follows:-

***“On the question of whether a court should await investigations and recommendations by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice, whether or not the NLC is seized***

***of the matter. Our conviction stems from a reading of Article 67(2) of the Constitution***

***The Article provides that NLC can investigate present or historical land injustices. We lay emphasis on the word “present”.***

***If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not the courts of law. This would prima facie render the ELC redundant. We do not think this was intended to be so. Our view is fortified by section 15(3)(b) of the NLC Act, which permits the ELC to deal with historical injustice claims capable of being addressed through the ordinary court system.***

***Further, there is nothing in the 2010 Constitution or in the NLC Act ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice.”***

163. Similarly, in **Kenya Chamber of Commerce & Industry - KNCC1 (Muranga Chapter) & 2 others vs Del Monte and 3 others; County Government of Kiambu(Interested Party) (2020) KELC 2258 (KLR)**, the court held that it has jurisdiction to hear and determine claims related to historical injustice. Further, in the case of **Kipsiwo Community Self**

**Help Group vs Attorney General & 6 others (2013) eKLR,**

Judge Munyao stated as follows:-

***“.....I have not seen anywhere in the Constitution or in the NLC Act which provides that a person cannot initiate a constitutional petition based on a perceived historical injustice and that the NLC has a monopoly on such mandate.”***

164. I fully agree with the authorities cited above. Anyone who identifies a violation of a constitutional provision or right is entitled to file a constitutional Petition and seek appropriate relief.

165. Based on the foregoing, I find that this court has jurisdiction to hear and determine claims based on historical land injustice, such as the one before the court.

**WHETHER THE PETITIONERS ARE ENTITLED TO THE ORDERS SOUGHT IN THE PETITION.**

166. The Petitioners are seeking a declaration that they are entitled to redress for the historical injustices suffered over their land, the suit property herein, which was expropriated by the colonial government.

167. The Petitioners asserted that they had submitted their claim for historical land injustice to the NLC for investigation and appropriate redress. However, before the 1<sup>st</sup> Respondent could

proceed with the investigations, the 5<sup>th</sup> Respondent obtained an injunction restraining it from concluding the inquiry.

168. The 1<sup>st</sup> Respondent confirmed in its response that upon processing the claim, it was satisfied that the Petitioners' claim was in the nature of a historical land injustice. In this regard, the 1<sup>st</sup> Respondent attached a claim of historical land injustice dated 28<sup>th</sup> August 2018 to its response.

169. On the other hand, the 5<sup>th</sup> Respondent argued that the 1<sup>st</sup> Respondent would not have rendered a decision as the Petitioners had not submitted their claim in the first place. The 5<sup>th</sup> Respondent asserted that the claim for historical injustice was submitted by Kiamuka Society and not by the Petitioners. The record clearly shows that the claim for historical land injustice over the suit property dated 28/08/2018 was submitted to the NLC by Kiamuka Society and not by Mamukii Society.'

170. The Petitioners did not present any evidence to demonstrate that they had submitted a claim for historical land injustice to the NLC for investigation and appropriate redress. Consequently, their claim that the 1<sup>st</sup> Respondent determined their claim had satisfied the criteria for a historical land injustice is therefore unfounded.

171. Be that as it may, this court is called upon to determine whether the Petitioners have proved their claim for historical land injustice. Article 67(1) of the Constitution establishes the National Land Commission. Article 67(2)(e) stipulates that one

of the functions of the National Land Commission is to initiate investigations, either on its own initiative or based on a complaint, into present or historical land injustices and to recommend appropriate redress.

172. Section 15(2) of the NLC Act defines historical injustice as a grievance which-

- a. Was occasioned by a violation of right in land on the basis of any law, policy declaration, administrative practice, treaty, or agreement;**
- b. Resulted in displacement from their habitual place of residence;**
- c. Occurred between June 15, 1895, when Kenya became a protectorate under the British East African Protectorate, and August 27, 2010, when the Constitution of Kenya was promulgated.**
- d. Has not been sufficiently resolved and subsists up to the period specified under paragraph (c );**
- e. Meets the criteria set out under subsection 3 of this section.**

173. Section 15(3) of the NLC Act stipulates that a historical injustice claim can only be admitted, registered, and processed by the Commission if it satisfies the following criteria:-

- a. It is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice.**

- b. the claim has not or is not capable of being addressed through the ordinary court system on the basis that-**
- i. the claim contradicts the law that was in force at the time when the injustice began**
  - ii. the claim is barred under section 7 of the Limitation of Actions Act (cap 22) or**
- c. The claimant was either a proprietor or occupant of the land upon which the claim is based.**
- d. no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and**
- e. It is brought within five years from the date of the commencement of this act.**

174. The Petitioners contended that their ancestors were the original inhabitants of the suit land and therefore, they are entitled to ownership based on indigenous and native customary rights.

175. The Petitioners testified that their ancestors lived in five villages within the suit property, namely Yoani, Kisesini, Mwia, Kawenye, and Ndaatai. According to them, their ancestors were dispossessed of the suit land during the colonial era by Robin Woodcraft Stanley. The Petitioners testified that they were forcibly evicted from the suit property by Robin Woodcraft Stanley sometimes in 1946 at about 3 a.m. They asserted that the suit land was communally owned by the community, which

practised its traditional way of life and had its homes, places of worship, and shrines within the suit land, and therefore meets the threshold of what constitutes a community and community land.

176. The Petitioners asserted that their parents and ancestors are buried on the suit property. They argued that their rights had not been extinguished despite colonization. To buttress this argument, reliance was placed on the case of **Mabo vs Queensland (No.2) (1992) 175 CLR.**

177. Based on the foregoing, the Petitioners sought a declaration that they are the legal owners of the suit property by virtue of indigenous customary law and native title.

178. The 4<sup>th</sup> Respondent argued that the Petitioners did not prove their claim that the suit property is community land because they failed to demonstrate their ancestral lineage or that their parents or grandparents owned the land, as alleged.

179. The 5<sup>th</sup> Respondent argued that, in the absence of concrete evidence, the Petitioners' claim cannot succeed.

180. The doctrine of native title posits that the rights of indigenous people are considered to have continued under British rule and after independence unless they are explicitly extinguished. The Petitioners claimed ownership of the suit land based on their prolonged occupation prior to 1895 and maintained that they have not relinquished these rights. They argued that the issuance of the title to their land did not extinguish their native title.

181. In the case of **Henry Wambega & 733 others vs Attorney General & 9 others (2020) KEELC**, Justice Munyao held that:-

***'Land issues are complex and are unique to each country. It follows that each country enacts laws that suits its circumstances. We cannot impose what has been held in one jurisdiction into our country for our circumstances could be different. Taking the example of Australia, Australia has a large population of European origin, with the native Aboriginal and Torres Strait Islander people representing only 3.3% of the population. It will follow therefore that there would be no reason in ensuring the protection of this minority group. The situation in Kenya is radically different, with the native inhabitants being the overwhelming majority.'***

182. I fully agree with the case cited above. The doctrine is not applicable in Kenya as the native inhabitants are the majority.

183. Section 15(3) explicitly states that a claim of historical injustice must be verifiable with cogent evidence. In the matter at hand, the Petitioners did not provide their genealogical tree to prove their ancestry or demonstrate that their ancestors had occupied the suit land. The Petitioners alleged that sometime in 1946, they were forcibly evicted by Robin Woodcraft Stanley at around 3 a.m. and fled to Kiu railway station. The statements recorded by the Petitioners are similar, and it has not been

shown whether they were living in the same village within the suit property. The Petitioners did not present evidence in support of their claims that their ancestors had occupied the suit property. Similarly, the Petitioners failed to present any evidence of dispossession.

184. During the site visit, the Petitioners, through the evidence of PW1, failed to prove the existence of their ancestors' graves on the suit land.

185. The Petitioners argued that they owned the land communally and therefore it fell under the category of Community land. To support this argument, they relied on Article 63(2) of the Constitution and Section 2 of the Community Land Act and. The Petitioners produced copies of their identity cards, which show that they originate from different sub-locations within Machakos District as it existed at that time. The identity cards also show that they were issued prior to the promulgation of the Constitution. Based on the evidence on record, the Petitioners did not establish that the suit property was owned communally.

186. Based on the foregoing, I find that the Petitioners have not demonstrated their historical connection to the subject property.

187. The Petitioners sought a declaration that the title issued to Robin Woodcraft over the suit property is null and void, and consequently, all the subsequent entries should be cancelled.

188. It is not in dispute that the 5<sup>th</sup> Respondent is the registered proprietor of the suit land. The Petitioners contended that the 5<sup>th</sup> Respondent failed to prove the validity of the title transferred to it by Robin Woodcraft Stanley. They further contended that the 5<sup>th</sup> Respondent failed to call the Land Registrar to verify the title, which clearly suggests that it was obtained illegally and should therefore be revoked. The Petitioners pointed out that there was no evidence that the land adjudication process had been carried out.
189. Conversely, the 4<sup>th</sup> Respondent acknowledged that the 5<sup>th</sup> Respondent is the registered owner of the suit property. It was further asserted that the Petitioners failed to present any evidence to support their claim of ownership or to demonstrate that the 5<sup>th</sup> Respondent obtained its title through fraudulent means.
190. The 5<sup>th</sup> Respondent testified that his grandfather purchased the suit property for Kshs 37, 850/= . In this regard, he produced the gazette notice and the title for the suit property. The record shows that Robin Woodcraft Stanely was registered as the proprietor of the suit property under the Crown Land Ordinance. The Crown Land Ordinance was a law that established the framework for land ownership and management under British colonial rule, which marked the beginning of the introduction of land ownership in Kenya. The title was later transferred to the 5<sup>th</sup> Respondent under the Registration of Titles Act(Repealed).

191. Section 24(a) of the Land Registration Act provides for the interest conferred by registration. It provides as follows;

***Subject to this Act;***

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

192. Section 25 of the Land Registration Act provides for the rights of a proprietor. It provides as follows:-

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

193. Section 26 of the Act provides that:-

***The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or***

***endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-***

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b. where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.”***

194. These provisions confer rights and privileges to the registered landowner and specify circumstances under which these rights can be revoked.

195. The 5<sup>th</sup> Respondent obtained its title under the RTA (now repealed). The provisions of Section 15(2) of the NLC Act addressing historical injustices were enacted after the RTA was repealed. These provisions are subordinate to the existing law under the RTA (repealed), as they do not override the provisions regarding the indefeasibility of title under the RTA and its successor laws.

196. In the case of **Parkire Stephen Munkasio & 14 others (Suing on their own behalf and on behalf of their families and all the Masaai community living on land reference no. 8396(I.R 11977) situated in Kedong v Kedong Ranch Ltd and 8 others (2015) KEHC 2531 (KLR)**

Justice Munyao Sila, when faced with a similar case, stated as follows:

***“The Petitioners made arguments that this land forms part of community land. I am afraid it does not. The***

***land is private land in the hands of Kedong Ranch. In fact it became private land way back in 1950 and has remained so all along. It matters not that the Petitioners believed that their land was at one point or another the ancestral land of the Masai or the ancestral land of the Petitioners. The land is now private as provided by our Constitution, which is the supreme law of this country”.***

197. In the matter at hand, the land became private property in 1947 and has remained so ever since. The Petitioners did not present any evidence to demonstrate that the title was obtained fraudulently to enable this court to revoke it. As a result, the 5<sup>th</sup> Respondent's title remains indefeasible.
198. The Petitioners sought a declaration that their fundamental rights were violated. Article 22(1) of the Constitution grants every person the right to initiate proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened.
199. When a party files a Constitutional Petition alleging that its rights and fundamental freedoms have been violated, the claim must be clear, the violation must be identifiable, and the Respondent must be identified as the violator.
200. In the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**, the court laid down the substantive test to be applied when making a finding on whether the alleged

violation formed the basis of the Petitioner's complaint and held that: -

***“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”***

201. This position was reaffirmed by the Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, where the court held that: -

***“(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20, and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged***

***that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.***

***We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.”***

202. Further, the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** held that: -

***“[349] ...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”***

203. Based on the foregoing, the Petitioners are required to demonstrate the nature and manner of the infringement, as well as the extent of the injury, loss, and damage they have suffered. The Petitioners assert that their human and constitutional rights have been violated from 1928 to the present day.
204. The Petitioners are seeking a declaration that their fundamental rights under Article 43 of the Constitution, Article 25 of the Universal Declaration of Human Rights, Article 11 of the International Covenant on Economic, Social, and Cultural Rights, and the African Charter on Human and Peoples' Rights have been violated. Article 43 of the Constitution outlines economic and social rights and guarantees every person the right to the highest attainable standard of health, including reproductive health care, adequate and accessible housing with reasonable sanitation, and adequate food of acceptable quality and freedom from hunger.
205. Article 25 of the Universal Declaration of Human Rights provides that everyone has the right to a standard of living adequate for health and well-being, including food, clothing, housing, and medical care, and necessary social services, along with the right to security in cases of unemployment, sickness, disability, widowhood, old age, or other circumstances beyond their control.
206. Article 11 of the International Covenant on Economic, Social, and Cultural Rights recognizes the right to an adequate

standard of living, encompassing adequate food, clothing, and housing, as well as the continuous improvement of living conditions.

207. The Petitioners argued that after they were forcibly evicted from their land, they were left at Kiu railway without food or shelter, where they still reside and have no access to water, schools, medical care, and live in extreme poverty. They produced photographs of their makeshift homes and shanties. Although the cited rights are protected by law, the Petitioners did not show how the Respondents violated these rights.

208. The Petitioners also claimed that their property rights under Article 40(2)(3) of the Constitution were violated. The right to own and acquire property is protected by Article 40 of the Constitution, which stipulates as follows:

**Subject to Article 65, every person has the right, either individually or in association with others, to acquire property-**

***(a) of any description; and***

***(b) in any part of Kenya.***

**(2) Parliament shall not enact a law that permits the state or any person-**

***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***

***c) to limit or in any way restrict the enjoyment of any right under this article on the basis of any grounds specified or contemplated in Article 27(4).***

***(3) The state shall not deprive a person of property of any description, or an interest in, or right over, property of any description, unless the deprivation-***

***(a) results from an acquisition of land or an interest in land or conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***(b) is for public purpose or in public interest and is carried out in accordance with the Constitution and any Act of Parliament that-***

***(i) requires prompt payment in full, or just compensation to the person; and***

***(ii) allows any person who has an interest in, or right over that property of access to a court of law.***

209. The purpose of Article 40 is to protect the right to acquire and own property and prevent the state from depriving any person of their property without due process and without prompt payment of compensation. In the matter at hand, the suit property is private land owned by the 5<sup>th</sup> Respondent. There is no evidence that the 5<sup>th</sup> Respondent fraudulently acquired the suit property. Similarly, there was no evidence that the state had deprived the Petitioners of their property. This Article does not apply because the Petitioners' claim is not based on the

unprocedural acquisition of property without due process or without just compensation.

210. The Petitioners alleged that the historical land injustices led to the violation of their rights under Articles 25, 26, 29, and 39 of the Constitution. Article 26(1) of the Constitution states that every person has the right to life. The Petitioners claimed that Robin Woodcraft, along with the colonial police, carried out brutal attacks resulting in the death of some of their ancestors. However, the Petitioners did not provide any evidence to support this claim.
211. The Petitioners further asserted that their rights, as outlined in Articles 28, 29, and 39 of the Constitution, were violated. Article 28 stipulates that every individual possesses inherent dignity and has the right to have that dignity respected and safeguarded, while Article 29 grants every person the right to freedom and security of the person. Article 39 guarantees the right to freedom of movement, the right to leave Kenya, and the right to reside in any part of Kenya.
212. The Petitioners claimed that Robin Woodcraft Stanley inflicted torture, murder, castration, and rape on them, their forefathers, and ancestors, violating their dignity, personal security, and freedom of movement. However, they did not provide strong evidence to support these claims. They failed to present concrete proof showing how these rights were violated.
213. The Petitioners further claimed that the 1<sup>st</sup> Respondent violated their rights under Article 48 of the Constitution by failing to

investigate and address the injustices they suffered. Article 48 requires the state to guarantee access to justice for everyone. The Petitioners faulted the NLC and the County Assembly of Makueni for failing to address their claim for historical land injustice. The Petitioners did not demonstrate that they presented their claim for historical land injustice to the 1<sup>st</sup> Respondent for investigation and appropriate redress. The 1<sup>st</sup> Respondent clarified in its response that the claim for historical land injustice relating to the suit property was presented by Kiamuka Society and not by the Petitioners. Similarly, the 4<sup>th</sup> Respondent confirmed that the Petition presented to the County Assembly was submitted by Kiamuka Society and not by the Petitioners.

214. The Petitioners also alleged that their rights under Articles 37, 38, 43, 45, 51, 52, and 58 of the United Nations “Basic Principles and Guidelines on Development-Based Evictions and Displacements” were violated because they were not given any notice prior to the eviction, nor provided with alternative resettlement. The above principles are a set of human rights-based standards that aim to prevent forced evictions linked to development projects and to protect individuals and communities from their negative impacts. The Petitioners did not adduce any evidence to support this claim.

215. The 5<sup>th</sup> Respondent alleged that the Petition herein is sub judice as it raises similar issues as those in ELC No. 8 of 2018. Section 6 of the Civil Procedure Act outlines as follows:

***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed”.***

216. It is obvious that the *sub judice* rule applies where another suit or proceeding is pending in another Court relating to the same parties or their privies over the same subject matter. The rationale behind sub judice rule is to prevent conflicting orders emanating from two or more different courts over the same matter.

217. The Petitioners denied any knowledge of Kiamuka Society. The 5<sup>th</sup> Respondent did not demonstrate that the instant Petition is sub judice to Makueni ELC Case No. 8 of 2018. Moreover, Section 6 of the Civil Procedure Act provides that where it is found that the suit is sub judice, the other suit should be stayed.

218. In the end, I find that the Petition is devoid of merit and the same is hereby dismissed. Each party to bear its own costs

.....  
**HON. T. MURIGI**  
**JUDGE**

**JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**IN THE PRESENCE OF: -**

Wambua Kilonzo for the Petitioners

Dr. Benjamin Musau, appearing together with Mr. Kuyo and Ms. Munyoki

For the 5<sup>th</sup> Respondent

Ms. Makaba for the 4<sup>th</sup> Respondent.

Ahmed - Court assistant

ORIGINAL