

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC PETITION NO. 7 OF 2020

IN IN THE MATTER OF:

THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENshrined IN ARTICLES 1(1), 2(1), 2(2) & (3); 3(1); 10(2); 60; 73(1)(B); 185(2); AND 258(1) & 3 OF THE CONSTITUTION AND PART 2 OF THE FOURTH SCHEDULE TO THE CONSTITUTION;

IN THE MATTER OF:

THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 24, 27, 28, 29, 35, 39, 40, 42, 43, 44, 48, 53(2), 56, 60, 63 & 69 OF THE CONSTITUTION OF KENYA;

IN THE MATTER OF:

KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013;

IN THE MATTER OF:

THE UNIVERSAL DECLARATION ON HUMAN RIGHTS, 1948;

IN THE MATTER OF:

THE UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLE (UNDRIP), 2007;

IN THE MATTER OF:

THE CONVENTION ON BIOLOGICAL DIVERSITY, 1992

IN THE MATTER OF:

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966;

IN THE MATTER OF:

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966

IN THE MATTER OF:

THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS, 1981;

IN THE MATTER OF:

**THE UNECE CONVENTION ON ACCESS TO INFORMATION,
PUBLIC PARTICIPATION IN DECISION MAKING AND
ACCESS TO JUSTICE I ENVIRONMENTAL MATTERS, 1999;**

IN THE MATTER OF:

**CONVENTION ON ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN, 1979**

IN THE MATTER OF:

THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

IN THE MATTER OF:

THE COMMUNITY LAND ACT, NO. 27 OF 2016

IN THE MATTER OF:

**LAND ACT, ACT NO. 6 OF 2012, & LAND REGISTRATION ACT,
NO. 3 OF 2012;**

IN THE MATTER OF:

**THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT,
NO. 47 OF 2013**

IN THE MATTER OF:

ACCESS TO INFORMATION ACT NO. 31 OF 2016

IN THE MATTER OF:

**THE WEST POKOT COUNTY PUBLIC PARTICIPATION ACT,
2014**

IN THE MATTER OF:

**HISTORICAL AND CURRENT INFRINGEMENT OF THE
CULTURAL AND ECONOMIC RIGHTS OF THE POKOT
COMMUNITY OF ENDUGH, KASEI, SEKERR, MASOL, LOMUT
AND WEIWEI ADJUDICATION SECTION AS INDIGENOUS
PEOPLE WITHIN THE MEANING OF THE UNITED
DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE
(UNDRIP) AND THE CONSTITUTION OF THE REPUBLIC OF
KENYA, 2010**

BETWEEN

**JOHN NGIMOR AND 554 OTHERS (Suing on their behalf and on behalf of residents of
Endugh, Kasei, Sekerr, Masol, Lomut and Weiwei Ward**

in West Pokot County)

PETITIONERS

VERSUS

NORTHERN RANGELANDS TRUST.....1ST RESPONDENT

MASOL COMMUNITY CONSERVANCY2ND RESPONDENT

PELLOW COMMUNITY CONSERVANCY3RD RESPONDENT

COUNTY GOVERNMENT OF WEST POKOT4TH RESPONDENT

JUDGMENT

1. In their amended Petition of 26th October 2021, which was supported by a sworn Affidavit of John Ngimor on 27th October 2020, (sic), the Petitioners herein sought the following orders: -

- 1) *A declaration be and is hereby issued that the Petitioners' enjoyment of their rights and fundamental freedoms secured in the Bill of Rights under Articles 1 (1), 10(2) (a) (b), 27, 28, 31, 35, 39, 40, 42, 43, 44, 48 and 56 (a) of the Constitution of Kenya, 2010 in relation to; public participation, ownership and use of land, access to information and enjoyment of cultural rights have been jointly and severally threatened, infringed and/or are denied by the 1st -4th Respondents.*
- 2) *A permanent injunction be and is hereby issued stopping, prohibiting and forbidding 1st, 2nd, 3rd and 4th Respondents jointly and severally, whether by themselves, their agents, servants, representatives assignees and/or whosoever acting under their instructions/directions from entering, mapping, surveying and delineating community land, carrying out conservancy operations, importation of wildlife, evicting community members or any other activity under the Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County as signed in December 2019 between the 4th Respondent and 1st -3rd Respondents in the areas of Endugh, Kasei, Masol, Lomut and Weiwei wards within West Pokot County.*

- 3) *That to the extent that there was no meaningful public participation and/or consultation with the Petitioners, the Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable use of Natural Resources and to Promote Community Development initiatives in West Pokot County as signed in December 2019 between the 4th Respondent and 1st - 3rd Respondents, all maps therefrom and any consequential documents and agreements relating to and arising from the said Memorandum of Understanding together with the activities of the 1st – 4th Respondents thereon are unconstitutional. Consequently, the court be pleased to cancel and/or revoke the Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County as signed in December 2019 between the 4th Respondent and 1st - 3rd Respondents, all maps therefrom and any consequential documents and agreements relating to and arising from the said Memorandum of Understanding.*
- 4) *That a permanent injunction do issue against the 4th Respondent from entering into agreements on behalf of the community without undertaking public participation as mandated by law.*
- 5) *An order for mandamus compelling the 4th Respondent to facilitate the adjudication and registration of community land targeted under the Memorandum of Understanding for Collaboration in Conservation,*

*Management, Sustainable Use of Natural Resources and to Promote
Community Development Initiatives in West Pokot County signed in
December 2019 between the 4th Respondent and 1st -3rd Respondents.*

- 6) That the Petitioners be awarded general damages.*
- 7) Costs of the Petition be borne by the 1st -4th Respondents.*
- 8) Any other order(s) as this Honourable Court shall deem fit.*

PETITIONERS' CASE.

2. The Petitioners describe themselves as residents and members of the indigenous Pokot community residing on community land within the areas of Endugh, Kasei, Sekerr, Masol, Lomut and Weiwei Wards in West Pokot County, where they engage in nomadic pastoralism as their traditional way of life. They state that they own the said community land jointly and indivisibly in accordance with the provisions of the Community Land Act, 2016.
3. The Petitioners contend that the dispute arises from a Memorandum of Understanding (herein also referred to as “the MoU”) entered into between the 1st to 4th Respondents in relation to the establishment and management of wildlife conservancies within the community land. They aver that the MoU was executed without the knowledge, consent or participation of the local community, and without compliance with the constitutional and statutory requirements of public participation and free, prior and informed consent of the affected community.
4. It is the Petitioners’ case that the actions of the Respondents have resulted in the unlawful excision and appropriation of community land for private conservation purposes, thereby depriving the community of its ancestral land and grazing areas and exposing them to displacement, economic loss, and inter-community conflict. They further allege that the Respondents have withheld vital information concerning the contents and implications of the

MoU, denied the community an opportunity to participate in decision-making processes, and discriminated against women, youth, and persons with disabilities in the management of the affected land.

5. The Petitioners fault the 1st Respondent for unilaterally initiating and financing conservation activities under the impugned MoU to the exclusion of the community, and the 2nd and 3rd Respondents for purporting to act as community conservancies without any lawful mandate or representative authority. They further aver that the 4th Respondent, a public entity, failed in its oversight and due diligence obligations by endorsing and financing the MoU despite the absence of community consent and the lack of compliance with the recommendations of the West Pokot County Assembly *Ad Hoc* Committee which had advised that all activities be halted pending registration of community land and revocation of the impugned MoU.
6. The Petitioners therefore contend that the Respondents' actions/omissions violate their constitutional rights under Articles 10, 19, 20, 27, 28, 29, 35, 40, 42, 43, 44, 47, 53 (2), 56, 60, 63, 69 and 73 of the Constitution of Kenya, 2010.
7. The Amended Petition was supported by an affidavit sworn by John Ngimor on 27th October 2020 (sic), wherein he deposed that under the MoU between the 4th Respondent and the 1st–3rd Respondents, the 1st Respondent unlawfully undertook mapping and delineation of community land for private wildlife conservation without free, prior, and informed consent (see annexures JN-2 & JN-3, MoU and maps). He stated that the Respondents are also in the process of importing wildlife, causing tension and fear of eviction (see annexure JN-4, NRT Management and Community Development Plans for Masol and Pellow Conservancies).
8. John Ngimor further alleged that the 1st Respondent intends to impose unconstitutional grazing by-laws (see annexure JN-5) to disinherit the community, and despite

recommendations by the West Pokot County Assembly's *Ad Hoc* Committee to revoke the MoU and related activities, the Respondents have ignored them (see Annexures JN-6, JN-7 & JN-8: Petitions and Committee Report). He attached a protest letter dated 14th October 2020 demanding cessation of operations (see Annexure JN-9) and asserted that the Respondents disregarded the duly registered Masol Wildlife Conservancy in forming the 2nd and 3rd Respondents (see Annexure JN-10: Registration Certificate for Masol Wildlife Conservancy).

9. He contended that the MoU excluded community participation, undermined cultural and economic activities, and lacked legal safeguards. He further deposed that the County Government failed in its trustee role, that the mapping violated the right to privacy and cultural sites, and that women, youth, and persons with disabilities were excluded. He stated there were no environmental or land-use approvals and that the land remains unadjudicated. The affidavit concludes that the Respondents' actions threaten eviction, insecurity, and loss of land, and that unless the Court intervenes, the Petitioners will suffer irreparable harm.

1ST, 2ND AND 3RD RESPONDENTS' CASE.

10. In response to the Amended Petition, the 1st, 2nd and 3rd Respondents filed joint Grounds of Opposition and Replying Affidavits. The Grounds of Opposition, dated 24th January 2022, are as follows:

- 1) *The Petitioners impermissibly seek to deploy participation rights to exercise veto powers and dictate outcomes, powers which they do not have because their rights in the Suit Land rank pari passu with the Respondents' rights.*

- 2) *The Petitioners have failed to demonstrate that they have suffered any actual or threatened harm attributable to the impugned MoU so as to amount to a threat, violation or infringement of any of their rights.*
- 3) *The impugned MoU does not undermine but instead promotes attainment and advancement of the marginalized and vulnerable Community's human rights, including those of women and children.*
- 4) *Considerations of proportionality and the wider public interest militate against granting the Petitioners any of the reliefs sought.*

11. The 1st Respondent, Northern Rangelands Trust (hereinafter also referred to as “NRT”) filed a Replying Affidavit sworn on 29th January 2021 by Tom Lalampaa, who described himself as the 1st Respondent’s Chief Executive Officer (CEO). He deposed that the Petition was founded on falsehoods, deliberate misrepresentations, and a misapprehension of the 1st Respondent’s role and activities. He asserted that the 1st Respondent is a non-political, non-profit charitable trust established on 28th June 2004, with its principal objective being to support community-led conservancies in the sustainable management of natural resources, peace building, and socio-economic development.

12. The deponent explained that the 1st Respondent operates as an umbrella organization providing technical, financial, and institutional support to 39 community conservancies spread across ten counties in Northern and Coastal Kenya. He annexed a copy of the Trust Deed (see Annexure TL-1) to demonstrate NRT’s lawful establishment and charitable character; a copy of the 1st Respondent’s Guide to Establishing Community Conservancies (see Annexure TL-2) which entails its philosophy, thinking and experience; and a copy of the 1st Respondent’s Rangelands Strategy (see Annexure TL-3). He explained that the 1st

Respondent performs a purely facilitative, guiding and enabling role to ensure that communities benefit from their natural resources in a sustainable, structured and planned manner, without undermining the sacrosanct community ownership, autonomy and decisional independence of the community whose members comprise the conservancy.

13. Mr. Lalampaa further stated that the 1st Respondent, being a membership organization, requires prospective members to apply for admission in accordance with a defined set of criteria. He averred that it was in this context that the people of West Pokot approached the 1st Respondent seeking assistance in establishing conservancies. In support of this, he annexed a copy of a report marked as “Annexure TL-6” prepared by a fact-finding team in 2014, which he asserted demonstrates that free, prior and informed consent was duly obtained. The deponent denied that the Respondent’s activities have undermined peace and security in West Pokot County and exhibited a letter from the Ministry of Interior Co-ordination and National Government (see Annexure TL-6) which articulates the positive impact that the 1st -3rd Respondents have had in peace building, conflict management, supportive security operations, community engagement and mitigation of human-wildlife conflict in the region.

14. Mr. Lalampaa addressed the Petitioners’ challenge to the MoU explaining that the document was merely a non-binding framework for collaboration in the conservation, management, and sustainable use of natural resources, as well as the promotion of community development initiatives in West Pokot County. He clarified that, based on both his experience and legal advice, an MoU is neither a legally enforceable contract, nor does it constitute a project agreement, grant, concession, or confer any exclusive rights over community land.

15. He maintained that there was no evidence of land alienation as alleged by the Petitioners, since none existed. Mr. Lalampaa further stated that the MoU neither transferred any functions of the 4th Respondent to the 1st Respondent, nor did it fall within the ambit of public procurement or public-private partnerships. Rather, he asserted, it was entered into within the 4th Respondent's constitutional and statutory authority under Section 6 of the Community Land Act, 2016, which mandates County Governments to hold unregistered community land in trust for the communities.
16. He emphasized that the MoU was designed entirely for the benefit of the communities living in West Pokot and that the Petitioners had adopted a selective and misleading interpretation of it by disregarding provisions on community engagement and public participation, processes which were delayed due to the COVID-19 pandemic. He also observed that while the implementation of the Community Land Act remains incomplete across much of Kenya, including West Pokot, conservancy boards and local community leaders have been performing the functions of *de facto* community land institutions, in close cooperation with the 4th Respondent. He cited examples from Baringo County, where members of conservancy boards have transitioned into statutory community land bodies due to their experience and training. He maintained that the MoU was lawful, transparent, and aligned with both the 1st and 4th Respondents' mandates, missions, and fiduciary obligations to promote community welfare and sustainable land management.
17. In response to the Petitioners' allegations regarding participatory natural resource mapping in Masol and Pellow Conservancies, Mr. Lalampaa explained that the exercise was a legitimate and essential management tool undertaken transparently and with full participation of the local community. He averred that the Petitioners had misled the County Assembly of West

Pokot about the purpose of resource mapping, which in fact serves as a decision-making and planning instrument designed to enhance communication, public participation, and accountability between conservancy managers, communities, and stakeholders. He outlined that resource mapping empowers communities to identify, document, and manage their natural resources based on indigenous knowledge, improves transparency and collaboration, helps to avoid conflicts by integrating multiple land uses and supports the identification of community priorities in development, peacebuilding, and conservation.

18. He added that the mapping and subsequent Management and Community Development Plans for Masol and Pellow Conservancies were developed through a broad-based participatory process, validated by community members, and publicly launched in the presence of the community, chiefs, provincial administration and representatives from the Kenya Wildlife Service. The Plans identified key development priorities, including improved access to water, health, and education, promotion of peace and security, and conservation of wildlife, forests, and grasslands.

19. Mr. Lalampaa further deposed that, as advised by counsel, the mapping and planning processes are fully consistent with constitutional and statutory provisions on sustainable development and community participation, and are also mandated under the Wildlife Conservation and Management Act, 2013, which requires all conservancies to operate under approved Management Plans. He recounted that the 1st Respondent's representative, Mr. Titus Peghin, had presented comprehensive explanations and documentary evidence before the County Assembly's Ad Hoc Committee, but these were disregarded in what appeared to be a predetermined process. In conclusion, he asserted that the resource mapping activities attacked by the Petitioners were in fact measures designed to safeguard the communities'

own rights to information, participation, and sustainable land use, and urged the Court to reject the Petitioners' distorted interpretation of those lawful and beneficial initiatives.

20. Mr. Lalampaa addressed the Petitioners' allegation that the 1st Respondent intended to "import" or translocate wildlife into community land within Masol and Pellow Conservancies, terming the claim false, speculative, and entirely unsupported by evidence. He explained that, from his own experience as a former Trustee of the Kenya Wildlife Service (KWS) Board and member of its Conservation Committee, the translocation of wildlife is a highly regulated and multi-stage process requiring formal approvals, environmental assessments, and technical verification by competent authorities. He affirmed that no such process had been initiated, nor had any of the Respondents made a request for wildlife translocation, rendering the Petitioners' assertion a sensational and unfounded fabrication intended to mislead the Court.

21. He further clarified that the Management and Community Development Plans for Masol and Pellow Conservancies merely propose the establishment of community wildlife sanctuaries as a long-term development objective conceived by the community itself, inspired by the positive experiences and economic transformation observed during study tours to other community conservancies across Kenya. He emphasized that the proposed sanctuary was a community-driven vision aimed at promoting eco-tourism and sustainable livelihoods, not a present or ongoing project thus any alleged threat or violation of rights based on such a plan is purely speculative.

22. Mr. Lalampaa stated that the Petitioners' complaint to the County Assembly of West Pokot resulted in an *Ad Hoc* Committee Report which, to his knowledge, has not been tabled before the full Assembly and therefore does not amount to an official decision of the County

Assembly. He deposed that both the County Assembly and County Executive had approved the Memorandum of Understanding and the *Ustahimilivu Programme* in 2019 after extensive scrutiny, including a meeting held on 13th December 2019 at the County Tourism Office that established a Steering Committee chaired by the County CEC for Tourism and Wildlife to oversee the MoU's implementation and public participation.

23. He added that the 4th Respondent engaged the 1st Respondent as trustee of the people of West Pokot pending registration of community land. He referred to the County Assembly's initial endorsement of the project, citing the Speaker's remarks on the *Ustahimilivu Programme* proposal form annexed as Annexure "TL-9", in which the Speaker "highly recommended" the 1st Respondent as a localized organization in touch with the community and noted that Members of the County Assembly had held consultative forums with the 1st Respondent and partners.

24. Mr. Lalampaa further stated that the 1st Respondent later conducted an extensive public sensitization campaign between 31st August and 21st September 2020, including 12 radio talk shows on Kalya, Kokwo, and North Rift Radio stations, community meetings, and ongoing media monitoring to address misinformation about the *Ustahimilivu Programme* and promote community awareness. He noted that negative publicity subsided following these engagements and that the 1st Respondent continues to plan further public *barazas*, social media outreach, and radio features to enhance transparency and public participation.

25. Mr. Lalampaa explained that the *Ustahimilivu Programme*, implemented under the MoU, aims to build community resilience to drought and climate change in Kenya's arid and semi-arid regions. He annexed a Summary of the Programme and the full Project Proposal as Annexures TL-10 and TL-11 respectively. According to him, the Programme will promote

socio-economic rights such as health and food security, foster peace and stability, and strengthen devolved systems and policy implementation.

26. Mr. Lalampaa stated that the 1st Respondent remains committed to supporting the County Government of West Pokot under the MoU, annexing a further request from the 4th Respondent for climate change mitigation support (see Annexure TL-12). He averred that the Petition is incompetent and filed in bad faith, aimed solely at nullifying the MoU rather than advancing community interests. He noted that the Petitioners' letters (Annexure TL-12) contained rigid demands and no evidence of being denied information or participation. He emphasized that the projects are donor-funded, benefit marginalized communities, and that stopping them would harm public interest. He therefore urged the Court to dismiss the Petition in its entirety.

27. The 2nd Respondent, Masol Community Conservancy through the Replying Affidavit of Stephen Angari, its Chairman sworn on 17th March 2022 opposed the Amended Petition. Mr. Angari deposed that none of the Petitioners were appointed or authorized to speak on behalf of the people of West Pokot, and that the Petition lacked legitimacy and community representation. He asserted that there had been no broad community consultation before its filing and that it does not reflect the collective position of the community. According to him, the Petitioners' allegations were fictional and intended to sabotage a benevolent public-interest development partnership benefiting the people of West Pokot County.

28. He explained that the 2nd and 3rd Respondents are duly registered Community-Based Organizations (CBOs) established to facilitate planning, implementation, and monitoring of grassroots development initiatives, with registration under the Kenya Wildlife Conservancies Association (KWCA) being merely incidental. The deponent stated that the initiatives under

the impugned MoU were community-driven and led by elders, elected representatives, and opinion leaders, with technical assistance from the 1st Respondent. He maintained that the MoU was conceived as a framework for promoting community development and did not confer or transfer any proprietary interest in community land to the 1st Respondent. He referred to clauses 3.2 and 3.5(d) of the MoU, which provide for integrated land use planning and mapping without implying private acquisition or alienation of community land.

29. The deponent further averred that the Masol Conservancy operates through a democratically elected 12-member board representing four units namely Orwa, Masol, Weiwei, and Cheptulel, and ex-officio members drawn from the County and National Government, including chiefs, ward administrators, the MCA, MPDI chairperson, and the area Member of Parliament.

30. He added that the community practices nomadic pastoralism but, due to persistent drought and famine, embraced improved livestock husbandry and diversified land use to sustain livelihoods. The MoU, he said, had enabled partnerships with numerous development agencies to advance these goals.

31. Mr. Angari further deposed that the Management Plans impugned by the Petitioners were prepared through an open, participatory process and adopted at an Annual General Meeting (AGM) following a 2019 resource mapping exercise supported technically by the 1st Respondent. A report on the mapping and sensitization exercises was annexed and marked Annexure SA-1. He asserted that 1,000 copies of the Management Plan were distributed to community members to promote transparency and continuous engagement.

32. He denied that the 1st Respondent imposed itself upon the community, stating that the people of Endugh, Kasei, Sekerr, Masol, Lomut, and Weiwei voluntarily set aside portions of their

land as conservancies in 2006. He emphasized that community ownership, control, and decision-making autonomy were retained. The allegation of wildlife translocation was denied as speculative, as no sanctuary had been established.

33. He contended that the Petitioners' claims of insecurity and dispossession were unfounded, noting that no evictions had occurred or were intended. The 1st Respondent, he said, merely played a technical and supportive role in mobilizing resources, enhancing governance, and facilitating development under the MoU.

34. Regarding the *Ad Hoc* Committee Report of the County Assembly of West Pokot, Mr. Angari questioned its legal validity, averring that there was no evidence that it had been tabled and adopted by the full House. He contended that its recommendations contravened Articles 60 and 69 of the Constitution, usurped the powers of the Community Assembly under the Community Land Act, and infringed the community's right to freedom of association under Article 36. He maintained that the 4th Respondent, is the legally mandated trustee of community land, empowered to promote the impugned development programs even without the MoU. He further stated that both the County Executive and the County Assembly had approved the MoU in December 2019 after comprehensive review and participation in related meetings, study tours, and peace caravans since 2016.

35. Mr. Angari also detailed the tangible socio-economic benefits arising from the partnership, citing the European Union-funded "*Ustahimilivu Programme*," implemented through a consortium of five agencies, namely, Northern Rangelands Trust (NRT), CEFA, SOMIRENEC, E4Impact, and AMREF Health Africa, each focusing on natural resource management, agriculture, peace-building, enterprise development, and health respectively. The program's objectives, he said, aligned with the National Big 4 Agenda and the County

Integrated Development Plan (2018–2023) to enhance food security, improve nutrition, and generate sustainable livelihoods.

36. He annexed several documents evidencing positive activities undertaken under the MoU, including: training reports for livestock co-operatives and marketing associations in May–June 2021 on business modeling and livestock value chain enhancement (see Annexure SA-2); reports on revival and training of Simbol Pastoralic Group and Masol Demonstration Group in 2020 on leadership, team building, communication and conflict management, and finance and record keeping (see Annexure SA-3); Evidence of the 1st Respondent’s donation of 600 kilograms of African Foxtail grass and the demonstration exercise by the County’s Ministry of Agriculture (see Annexure SA-4); Documentation of the vaccination of 29,652 goats against CCPP in Kasei and Endugh Wards in August 2021 (see Annexure SA-5); Photographic and written evidence of irrigation schemes in Masol and Sekerr Wards and the Para Sany Irrigation Scheme in Orwa producing vegetables for nutrition and income (see Annexure SA-6); Records of AMREF’s training of community health volunteers and Community Led Total Sanitation (CLTS) sessions (see Annexure SA-7); Evidence of AMREF’s gender-sensitive WASH workshop for County Public Health Officers in May–June 2021 (see Annexure SA-8); Materials relating to the school health patrons’ sensitization in Masol Ward (see Annexure SA-9); CEFA’s distribution and monitoring of green gram and spinach seeds for mother-and-child nutrition (see Annexure SA-10); AMREF’s donation of nutrition and water purification equipment, including weighing scales and MUAC tapes (see Annexure SA-11); Documentation of community policing and early warning signs forums by SOMIRENEC in Masol, Sekerr, and Endugh Wards (see Annexure SA-12); Reports on training of conservancy rangers in peacekeeping and human-wildlife conflict mitigation (see

Annexure SA-13); Evidence of peace training for reformed warriors and women to strengthen peacebuilding structures (see Annexure SA-14); Photographs showing construction of a honey processing unit in Lomut to promote alternative livelihoods (see Annexure SA-15); and Evidence of the Wildlife Assessment exercise (see Annexure SA-16).

37. The deponent concluded that the MoU and the associated development initiatives have been conducted transparently, voluntarily, and with full community participation, yielding tangible benefits as demonstrated above. He urged the Court to dismiss the Petition as baseless, speculative, and driven by ulterior motives rather than genuine community interest.

38. In a further affidavit sworn by John Ngimor on 15th July 2022, the Petitioners responded to the averments contained in the 2nd Respondent's Replying Affidavit, reiterating their position in the Petition and disputing the factual assertions made therein. The deponent asserted that the Petitioners, as indigenous members of the Pokot community, were entitled to approach the Court for enforcement of their constitutional rights.

39. He further stated that the 2nd Respondent's response offered no evidence to support its claims and failed to demonstrate that the impugned activities had community backing. He deposed that the 2nd and 3rd Respondents, though registered as Community Based Organisations (CBOs), had no membership lists, constitutions, or community development agreements duly executed with the indigenous Pokot people. Mr. Ngimor asserted that the MoU relied on by the Respondents was not a valid community development agreement and had been conceived without public participation.

40. He further averred that the 1st Respondent was not a mere technical partner but the principal architect of the MoU, exercising extensive control over the 2nd and 3rd Respondents, and that the *Ustahimilivu Programme* was donor-funded and implemented without effective

consultation of the local community. Mr. Ngimor maintained that the alleged economic benefits of the MoU were unsubstantiated and that its implementation would unlawfully delegate functions of the 4th Respondent and adversely affect community land rights.

41. According to Mr. Ngimor, the mapping and land-use plans by the Respondents sought to allocate portions of community land for private wildlife conservation without adjudication or consent, displacing local residents and exposing them to conflict-prone areas. He denied that adequate public participation, environmental or social impact assessments had been undertaken and maintained that the MoU and related activities threatened their cultural, social, and economic rights as indigenous peoples of West Pokot County.

4TH RESPONDENT'S RESPONSE

42. On its part, the 4th Respondent filed grounds of opposition dated 6th December 2021, enumerated as follows: -

1) The Petition has no merit, it is incompetent and an abuse of the court process hence the same should be dismissed with costs.

2) The 4th Respondent is performing its statutory duties under Article 60, 63(3) & 66 of the Constitution of Kenya and Section 38 of the Community Land Act for promotion of public interest.

3) THAT any management of Community Land is subject to Article 66(1) of the Constitution of Kenya and Section 38 of the Community Land Act.

4) THAT the Memorandum of Understanding does not amount to disposing of the suit land or converting the same as provided under Sections 21, 22, 23, 31 and 32.

5) THAT the mapping exercise which has been completed is meant to plan for multiple land use under Section 29 of the Community Land Act

and Article 60 (1) of the Constitution of Kenya and not a survey to subdivide and/or transfer the suit land to third parties.

6) The Memorandum of understanding is a formal framework or guideline on how to meet set goals and it has provided for continues (sic) engagement of the community through public participation and addition of other relevant participants who may apply.

7) THAT public participation is a continues (sic) process with stages and not a one-time occurrence.

8) THAT the Memorandum of Understanding as a framework, does not provide for eviction of the members of the community in issue nor delineating their land to 3rd parties but to mitigate human wildlife conflict, plan for improved multiple use of the community land and benefit the community in all aspects.

9) THAT the Petition herein is malicious as the same is a result of leadership wrangles and a scramble for job opportunities and resources.

10) THAT the Petitioners are playing double standards by demanding a formal Memorandum of Understanding earlier and when the same is done, they are opposed. (sic)

THE PETITIONERS' SUBMISSIONS

43. In the submissions dated 14th May 2025, counsel for the Petitioners submitted that the actions and omissions of the 1st to 4th Respondents jointly and severally violated their constitutional rights under Articles 1(1), 10(2)(a)–(b), 27, 28, 31, 35, 39, 40, 42, 43, 44, 48, and 56(a) of the Constitution.

44. Counsel argued that the MoU contravened Article 63 (3) and (4) of the Constitution and the Community Land Act, as the land in question was community land to be held by the 4th Respondent in trust for the Pokot people. Counsel further argued that unregistered community land cannot be disposed of, delineated, or used without legislation and registration procedures as provided under Section 6(1) of the Community Land Act. He asserted that the 4th Respondent failed to consult the community and there being no legislation in place governing the use and delineation of community land, any actions done in relation to the MoU went against the Petitioners' rights.
45. Counsel further submitted that no public participation or Environmental Impact Assessment (EIA) preceded the signing of the MoU. He distinguished stakeholder consultation from genuine public participation, arguing that the latter entails seeking views and consent from the persons most affected by a proposed policy or agreement.
46. Counsel confirmed that from the consent filed in this Court, the Petition has been majorly compromised save for the prayers that seek a declaration that there was a breach of human rights, a permanent injunction be issued against the Respondents, an award for damages be made to the Petitioners and costs of the Petition.
47. To support his argument, counsel cited the cases of **British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017) [2019] KESC 15(KLR); Mui Coal Basin Local Community & others vs P.S Ministry of Energy and others [2015] eKLR; Isiolo Petition 6 of 2021, Abdirahman Osman & 164 Others (suing for and on behalf of residents of Merti Sub County Chari and Cherab**

Wards) vs. Northern Rangelands Trust and 8 Others; and Lorunyei & another v Attorney General & 3 others (Environment & Land Petition 1 of 2023) [2025] KEELC 3053 (KLR).

1ST, 2ND AND 3RD RESPONDENTS' SUBMISSIONS.

48. In their submissions dated 23rd June 2025, counsel for the Respondents submitted that following a consent filed in court, prayers 2,3,5 and 6 of the Amended Petition were settled, and that the issues left for determination were whether the partial consent order settled the entire substratum of the Petition upon adoption; whether, in any event, the Petitioners have substantiated their claims in respect of violations of their constitutional rights; and whether the court should make an award of general damages and costs.
49. In relation to the first issue, counsel submitted that the Petition was effectively resolved by a valid consent order dated 22nd September 2023, which vacated the MoU in its entirety. Counsel noted that the Petitioners acknowledged the existence of the consent in their submissions but nonetheless sought to pursue residual prayers premised on the same MoU. Relying on the decision in **Lavington Security Ltd v Commissioner for Co-operative Development & 2 Others [2024] KEHC 5396 (KLR)**, counsel emphasized that once a consent is recorded and adopted by a court, it carries the same weight and finality as a judgment after a full trial, thereby rendering the issues it covers spent. He further cited **Muiri Coffee Estate v Kenya Commercial Bank Ltd & Another [2014] KECA 271 (KLR)**
50. It was counsel's contention therefore that parties having voluntarily recorded the consent, the entire substratum of the Petition had been compromised and upon adoption of the same by the court, marked the issues herein settled. To counsel, the MoU issue cannot thus be re-

opened for determination of the pending prayers, which have no distinct and separate life outside the MoU. In other words, counsel argued that since the MoU had been nullified by consent, there existed no factual or legal foundation upon which the remaining prayers could be adjudicated. Counsel cited the case of **Leonard Otieno v Airtel Kenya Ltd (2018) eKLR**, as cited with approval in **Ahmed Dis Haji & 7 Others v Cabinet Secretary, Ministry of Tourism and Wildlife & 8 Others (2025) eKLR**, -

51. With regard to the second issue, counsel submitted that the claims of infringement of rights and the alleged gravity of injury inflicted upon the Petitioners were not specifically proved. Counsel argued that under Article 23 (3) of the Constitution, the court has the power to grant appropriate reliefs only where a violation has been proven. To support this argument, counsel cited the cases of **Anarita Karimi Njeru v Republic [1979] eKLR** and **Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR**.

52. Counsel further submitted that the MoU at the center of the dispute was a non-binding framework for cooperation, as evidenced by clauses 2.1 and 14 therein, which expressly stated that it did not create a legal partnership or enforceable obligations. As such, counsel maintained that the MoU could not therefore form the basis of any constitutional claim.

53. Addressing the specific alleged violations, counsel argued that there was no proof that any conservancy established by the Respondents resulted in deprivation of land as there was no compulsory acquisition, alienation or extinguishment of title. He maintained that the conservancies operate within the bound of the law and on land voluntarily designated by the local community. To counsel alleged violation under Article 40 and 63 must be established through evidence of dispossession, eviction or forced acquisition as was held in **Haji And &**

Others v. Cabinet Secretary Ministry of Tourism and Wildlife & 8 Others. Garissa ELC Petition E003 of 2024 [2025] KEELC 1239(KLR).

54. Counsel added that the Petitioners did not demonstrate how their right to public participation under Article 10 (2) had been violated by the Respondents. He referred to the 1st Respondent's account of public participation and free prior informed consent consultative process undertaken between 2015 and 2019, as narrated under paragraph 8-23 and paragraph 38-41 of the replying affidavit of Tom Lalampaa. To counsel, that process satisfied the qualitative and quantitative test of public participation established in the **Mui Coal Basin Case** [supra].
55. On cultural and equality rights (Articles 27, 28, 31, 44 & 56) counsel submitted that the conservancy model incorporated inclusive governance structures, with representation of elders, women, and youth; no exclusion or discrimination was established. Similarly, on access to information and socio-economic rights under Articles 35 & 43 counsel argued that the Petitioners had not shown any formal denial of information, and the conservancies enhanced local welfare through bursaries, peace initiatives, and water access.
56. Finally, invoking Section 18 of the Environment and Land Court Act, 2012, counsel urged the Court to balance individual claims against the public interest, sustainable development, and intergenerational equity, and to find that no violations of constitutional rights had been proved.
57. Lastly, on whether the court should make an award of costs, counsel submitted that this matter was filed in the public interest and not for personal gain. **Relying on Rai & 3 Others v Rai & 4 Others [2014] eKLR** and **Okiya Okioti Omtatah v Attorney General & 14 Others [2023] KESC 31 (KLR)**, they argued that courts should exercise restraint in

awarding costs in public interest litigation to avoid discouraging bona fide constitutional claims. Citing the **Okiya Omtatah** case (supra) they maintained that the petition was neither frivolous nor vexatious, the main issues having been settled by consent, and urged that each party should bear its own costs.

4TH RESPONDENT'S SUBMISSIONS

58. Counsel for the 4th Respondent identified four issues for determination, namely ;

- i. Whether the Petitioners' Petition is competent;
- ii. Whether the Petitioners' Constitutional rights were violated;
- iii. Whether the Petitioners are entitled to general damages compensation;
- iv. Who should bear the Costs of the Petition?

59. Counsel submitted that the Petition is incompetent for failing to meet the constitutional threshold of precision in pleadings; that the Petitioners merely cited constitutional provisions without specifying how the Respondents violated them. As was held in **Anarita Karimi Njeru** (supra) and **Mumo Matemu vs Trusted Society of Human Rights Alliance [2013] eKLR**, a constitutional Petition must clearly set out the provisions infringed, the nature of the infringement, and the manner of violation. To counsel therefore, the Petitioners' failure to do so renders the Petition defective and unsustainable.

60. Counsel further submitted that the Petitioners did not demonstrate any violation of their constitutional rights. That the MoU was executed within the 4th Respondent's mandate under Articles 60, 62(3), and 66 of the Constitution as read with Section 38 of the Community Land Act to promote sustainable land use and conservation. It did not involve any transfer or

disposal of community land contrary to Section 6 of the Community Land Act, and no evidence has been adduced to show any eviction or infringement by the Respondents. Counsel submitted that the Petitioners' allegations remained speculative and unsubstantiated.

61. On whether the Petitioners are entitled to general damages counsel submitted that while Article 23 of the Constitution provides for compensation as one of the remedies in such a claim, the applicable principles for granting such a relief were considered **VKM v RTP & 4 others (Constitutional Petition E025 of 2022) [2023] KEHC 18464 (KLR)**. That having failed to prove that their rights were violated by the Respondents there is nothing to warrant an award of general damages.

62. On the issue of costs, counsel held the view that this being a public interest litigation, each party should bear its own costs as guided by the case of **Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] KESC 6 (KLR)**

ANALYSIS AND DETERMINATION

63. Upon consideration of the Amended Petition, Supporting Affidavit, the Replying Affidavits by the Respondents, the further affidavit by the Petitioners, Grounds of Opposition and the parties' submissions, the authorities cited and the applicable law, the following issues arise for determination:

- i) **Whether the partial consent dated 22nd September 2023 recorded by the parties compromised prayers Nos. 1, 7, and 8 of the amended Petition dated the 26th October 2021; if not,**

- ii) **Whether the Petitioners' rights under Articles 1 (1), 10(2) (a) (b), 27, 28, 31, 35, 39, 40, 42, 43, 44, 48 and 56 (a) of the Constitution of Kenya, 2010 have been threatened, infringed or denied by the Respondents;**
- iii) **Whether the Petitioners should be awarded General Damages;**
- iv) **Who should bear the cost of the Petition?**

Whether the partial consent dated 22nd September 2023 recorded by the parties compromised prayers Nos. 1, 7, and 8 of the amended Petition dated the 26th October 2021;

64. Have the terms of the aforementioned Partial Consent Order compromised the prayer Nos. 1, 7 and 8 of the Amended Petition herein dated 26th October 2021?
65. We have considered the Petition. The gist of the Petitioners' case as disclosed by their Amended Petition herein is with regards to the Memorandum of Understanding (MoU) for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County signed in December 2019 between the 4th Respondent and the 1st -3rd Respondents in relation to the establishment and management of wildlife conservancies within the community land.
66. The Petitioners contend that the MoU was executed without the knowledge, consent or participation of the local community, and without compliance with the constitutional and statutory requirements of public participation and free, prior and informed consent of the affected community. The actions of the Respondents have allegedly resulted in the unlawful excision and appropriation of community land for private conservation purposes, thereby depriving the community of its ancestral land and grazing areas and exposing them to displacement, economic loss, and inter-community conflict. Further, that the Respondents

have allegedly withheld vital information concerning the contents and implications of the MoU, denied the community an opportunity to participate in decision-making processes, and discriminated against women, youth, and persons with disabilities in the management of the affected land.

67. This Petition arises from the activities of the 1st Respondent in West Pokot County where community land is largely unadjudicated. The residents are primarily nomadic pastoralists. When the 1st Respondent engaged in the formation of wild life conservancies in the areas covered by Endugh, Kasei, Sekerr, Lomut and Weiwei wards, a section of the community filed the present Petition seeking the orders already set out at the introduction to this judgment. During the course of the proceedings, a partial consent dated 22nd September 2023 was recorded as follows;

- 1) The Memorandum of Understanding for Collaboration in Conservation, Management and Sustainable Use of Natural Resources & to Promote Community Development Initiatives in West Pokot County signed in December 2019 between the 4th Respondent on the one hand and the 1st, 2nd and 3rd Respondents on the other hand (the ‘Memorandum of Understanding’) be and is hereby vacated and set aside in its entirety.***
- 2) Similarly, the Community Development Plans, maps and all other consequential documents relating to and arising from the Memorandum of Understanding be and are hereby vacated and set aside in their entirety.***

3) The 4th Respondent undertakes not to enter into any agreements for and on behalf of the residents of Endugh, Kasei, Sekerr, Lomut and Weiwei Wards in West Pokot County without undertaking public participation as mandated by law.

4) The 4th Respondent shall facilitate the adjudication and registration of the community land situated in Endugh, Kasei, Sekerr, Lomut and Weiwei Wards in West Pokot County and targeted under the Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable use of Natural Resources & to Promote Community Development Initiatives in West Pokot County signed in December 2019 between the 4th Respondent and the 1st -3rd Respondents.

68. During the hearing of the Petition on the 26th June 2025, counsel for the 4th Respondent informed the court that he had received a Notice to Act in Person and a Notice to withdraw the amended Petition both dated the 23rd November 2023. Petitioner No 489 a Mr. Phillip Lomongin confirmed that indeed they had withdrawn the Petition as per an attached list. He further stated that they had held a public participation through an alternative justice system and settled the matter with the community.

69. It is in light of the above consent and the withdrawal notice that this Court must examine the issue as to whether prayers Nos 1, 7 and 8 of the Petition are now moot.

70. It is common ground that the Partial Consent Order dated 22nd September 2023 had vacated and set aside the impugned MoU in its entirety and all the consequential documents relating to and arising therefrom. Prayer No. 1 in the Petitioners' Amended Petition dated 26th

October 2021 seeks a declaration that the Petitioners' enjoyment of the listed rights therein had been threatened, infringed and/or denied by the Respondents.

71. Indeed, in the case of **Ole Pere & another vs District Land Adjudication and Settlement Officer, Narok South & 24 others; Pere & another (Interested Parties) (Civil Appeal 79 of 2019) [2025] KECA 113 (KLR) (24 January 2025) (Judgment)**, the Court of Appeal sitting in Nakuru at paragraphs 25, 26 and 27 observed as follows in regards to a matter being moot.

“We have carefully studied the entire record. The crux of the appellants’ case as disclosed by their petition filed before the trial court is that the appellant sought to stop the adjudication process claiming that the survey work was done by a private surveyor as opposed to a public surveyor as required by Section 4 of the Act and thus the outcome thereof is null and void. Further, the survey was tainted by irregularities and illegalities. Hence, if the process of adjudication is allowed to continue uncorrected, the constitutional rights of the land owners in Naikarra/Osarara adjudication section will be violated and the damages suffered will be substantial.

It is common ground that the adjudication process was finalized and titles have since been issued to the various members.....The question which begs for an answer is whether the appellants’ petition and this appeal have been caught up by the doctrine of mootness.

The law of mootness inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. A case or issue is

considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use or when the cause of action has been lost or overtaken by intervening events. In such instance, there is no actual substantial relief which a litigant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.”

72. The Supreme Court of Kenya in the case of **Kenya Railways Corporation & 2 others vs Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment)**, while considering what it means for a case to be moot observed as follows at paragraphs 69-70:

“The Black’s Law Dictionary, 9th Edition defines a “moot case” as “a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights”, and as a verb, as meaning “to render a question as of no practical significance”. Mootness of a matter therefore arises where a live controversy no longer exists between parties to a suit and the decision of the court, in such instance, would have no practical effect. The doctrine of mootness enquires whether events subsequent to the filing of a suit

would have eliminated the controversy between the parties. This therefore begs the question, did the completion of the construction of the SGR make the issues raised by the parties to be beyond the reach of the court or is there still a live controversy?

A perusal of the orders sought by the 1st and 2nd respondents on the one hand and by the 3rd respondents on the other hand, as enumerated earlier in this judgment, reveals that they sought declaratory, injunctive, directive and an order of certiorari to quash the award of the contract to CRBC. The SGR project is now complete and was commissioned. It is for this reason that the appellate court appreciated that some of the reliefs that the 1st, 2nd and 3rd Respondents sought before the High Court were no longer available. At the time the petitions were presented to the High Court, the construction was yet to commence. Parties, however, opted to forego applications seeking interim conservatory relief aimed at stopping the construction.

In focusing on instead, pursuing the hearing of the substantive petitions, it only means that the respondents were alive to the fact that execution of the contract would have an impact on their pending petitions. The orders sought at the High Court, seeking to restrain the appellants from contracting with CRBC, and to ensure that there was no single sourcing in the procurement of the SGR are moot as they were overtaken by events, the contracts having been executed, and we so find.” (emphasis supplied).

73. Further, the Supreme Court of Kenya in **Institute for Social Accountability & Another vs. National Assembly & 3 Others & 5 Others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment)** after considering authorities on the doctrine of mootness held at paragraph 47 as follows:

“The common thread from the above decisions is that a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot.” (Emphasis Supplied).

74. Turning to the Petitioners’ Amended Petition herein, it is not in dispute that all the Petitioners’ constitutional rights alleged to have been violated by the Respondent were in regards to the process of the formation and the implementation of the impugned MoU which was vacated and set aside in its entirety by consent of parties. Indeed, as the Supreme Court of Kenya observed in the **Kenya Railways Corporation** (supra), in focusing on pursuing a Partial consent order that culminated into vacating and setting aside of the MoU and all the consequential documents relating to and arising therefrom, the Petitioners were alive to the fact that the adoption of the said Partial Consent Order as the judgement of the court would have an impact on the pending prayers Nos. 1, 7 and 8 herein.

75. It should be noted that at the time the Amended Petition herein was filed, the impugned MoU was active and that there was a process or foreseeable process of the implementation of consequential documents relating to and arising therefrom which the Petitioners allege that have or would have threatened, infringed and/or denied them the listed constitutional rights herein. Nonetheless, the parties herein, especially the Petitioners had opted to enter into a Partial Consent Order that vacated and set aside the very MoU and the implementation of the consequential documents arising therefrom.
76. Subsequently, we find that the prayer Nos. 1, 7 and 8 in the Amended Petition herein seeking a declaration that the Petitioners' rights under Articles 1(1), 10(2) (a) (b), 27, 28, 31, 35, 39, 40, 42, 43, 44, 48 and 56 (a) of the Constitution of Kenya, 2010 have been threatened, infringed or denied by the Respondents, are moot as they have been overtaken by events, the Partial Consent Order having been adopted as the judgement of the court.
77. In any case, it is trite law that once a consent is recorded and adopted by a court, it carries the same weight and finality of a judgment after a full trial, thereby rendering the court *functus officio* in that regard. In **Lavington Security Ltd v Commissioner for Co-op Development & 2 others (Civil Suit 61 of 2019) [2024] KEHC 5396 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)**, Mugambi J at paragraph 11 observed as follows:

“In my view, once parties have reached a compromise and recorded a consent, which is then adopted by the court, the case is generally considered to be resolved. Such a consent order carries the weight of a final judgment on the matter at issue. Consent orders are final and binding regarding the issues they cover with the same respect and finality”

as a judgment after a full trial. I would say that the plaint is therefore spent and not capable of being amended. (Emphasis Supplied)

78. We agree with the submissions by Counsel for the 1st to 3rd Respondents that the parties having voluntarily recorded the consent, the entire substratum of the Petition had been compromised and upon adoption of the same by the court, the issues herein had been settled. Subsequently, the MoU issue cannot be re-opened for determination of the pending prayers, which have no distinct and separate life outside the MoU. That since the MoU had been nullified by consent, there existed no factual or legal foundation upon which the remaining prayers could be adjudicated.

79. Be that as it may, we have asked ourselves if there are exceptions to the doctrine of mootness in constitutional Petitions and whether the Amended Petition herein falls within the said exceptions. Indeed, the provisions of Article 259 of the Constitution on how the Constitution should be interpreted provides as follows:

“(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance” (Emphasis Supplied).

80. Further, Section 18 of the Environment and Land Court Act provides as follows:

“In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles-

(a) the principles of sustainable development, including;

(i)the principle of public participation in the development of policies, plans and processes for the management of the environment and land;

(ii)the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural principles of natural justice resources in so far as the same are relevant and not inconsistent with any written law;

(iii)the principle of international co-operation in the management of environmental resources shared by two or more states;

(iv)the principles of intergenerational and intragenerational equity;

(v)the polluter-pays principle; and

(vi)the pre-cautionary principle;

(b)the principles of land policy under Article 60(1) of Constitution;

(c)the principles of judicial authority under Article 159 of the Constitution;

(d)the national values and principles of governance under Article 10(2) of the Constitution; and

(e)the values and principles of public service under Article 232(1) of the Constitution.”

81. In furthering the said provisions of law, can the Petitioners allege constitutional violations be determined even if the events subsequent to the filing of the Amended Petition herein have rendered the pending prayers moot? In the case of **Institute for Social Accountability** (supra) the Supreme Court of Kenya when confronted with the question as to whether the

rights of the Petitioners could be declared where the consequential circumstances had rendered the Petition moot, observed as follows at paragraphs 53 to 57:

“We further note that these declarations formed the basis of the grievances by the Respondents at the Court of Appeal. The question we ask is, whether the NGCDF Act, 2015 unequivocally addressed these issues? A plain reading of Section 3 of the NGCDF Act, 2015 reveals that it recognizes a constituency as a unit for performance and implementation of national government functions including infrastructural development. We note this provision mirrors section 3 of the CDF Act 2013 which provides that a section of the national annual budget is devoted to the constituencies for purposes of infrastructural development.

54. In addition, one of the appellants’ contention at the High Court concerned the 2.5% allocation to the CDF, we note that the provision still found itself under section 4 of the NGCDF Act, 2015 albeit on different terms. This new provision does not cure the contention as there exists some level of controversy regarding the same.

55. The doctrine of separation of powers was one of the contentious issues both at the High Court and the Court of Appeal. We note that section 53 of the NGCDF Act, 2015 establishes a Constituency Oversight Committee consisting of ‘the constituency member of the National Assembly’, among others. This means that there is still a raging controversy over the separation of powers concerns regarding the role of Members of National

Assembly in the Fund as structured in the CDF Act 2013 and replicated in the NGCDF Act, 2015.

*56. To our minds, the highlighted provisions contain some of the pertinent issues that were still raging controversies before the Court of Appeal for determination even after the coming into force of the NGCDF Act, 2015. Moreover, given that the impugned provisions of the CDF Act 2013 had also been re-enacted in the NGCDF Act, 2015, it did not unequivocally settle the issues in dispute between the parties. As such, there was still live controversy between the parties and therefore it was in the public interest to have the questions that were still raging adjudicated and determined by the Court of Appeal. In this regard, we are persuaded by the decision of the Constitutional Court of South Africa in *AAA Investments (Pty) Limited v Micro-Finance Regulatory Council & another* 2007(1) SA 343 (CC), 2006(11) BCLR 1255 (CC) where it was held at para 27 that even in cases that can be said to be technically moot, it is good practice for the court to seize jurisdiction in a matter where the law on a particular issue is not settled and the question is of critical import to the operation of government.*

57. In light of the above, we agree with the reasoning of the Court of Appeal that the same violative provisions have been re-enacted into the NGCDF Act, 2015. Therefore, the intervening legislation did not render the appeal moot because the legislation did not unequivocally address the

issues raised by the appellants. Consequently, we affirm the finding of the Court of Appeal that the appeal before that court was not moot.

82. What we hear the Supreme court saying is that just a mere occurrence of subsequent events after the filing of the Petition does not render a Petition moot. That indeed, even where the said subsequent events have somehow changed the substratum of the document forming the basis of the Petition as in the above case, the question is whether there still exist live controversy to be settled by the court.
83. Turning to the present Amended Petition, could it be said that even after the impugned MoU and the implementation of the documents arising therefrom having been vacated and set aside there still existed a live controversy to be settled by the court? One of the main grievances palpable from the Amended Petition is that the establishment of conservancies by the Respondents would occasion loss of ancestral lands and cultural identity without consultation with the Petitioners and in violation of the Community Land Act and the Constitution. Compromising prayer No. 2, meant that a permanent injunction was issued prohibiting the Respondents dealings with the community land in the 5 affected wards; a crucial adjunct of this prayer was that the Respondents would not evict any community member or carry out any other activity under the MoU on the suit land presumably until the Petitioners have consented to such.
84. Compromising prayer No. 3, in the Amended Petition meant that the parties have agreed that there was no meaningful public participation and /or consultation with the Petitioners in the execution of the MoU between the 4th Respondent and the 1st-3rd Respondents and that all the maps, agreements, and other documents arising from the said MoU are unconstitutional null and void.

85. The second clause of prayer No.3 which the parties agreed on expressly cancelled and revoked the MoU and all such consequential documents.
86. Consenting on prayer No. 5 had the result that the 4th Respondent was permanently enjoined from entering into any agreements on behalf of the community without undertaking public participation as mandated by the law.
87. Finally, under prayer No. 6 which was part of the consent, the 4th Respondent agreed to facilitate the adjudication and registration of community land situated targeted by the MoU.
88. We have found that the land is now safe. Secondly, the Petitioners' rights to public participation in any processes to be undertaken by the Respondents with regard to the subject community land have been safeguarded pursuant to the consent.
89. Having regard to the above, one must now consider that prayer no. 1 sought a declaration of the threats or infringement of the Petitioners' rights. The consent recorded as above eliminates both the alleged threat and the perceived infringement. In those circumstances even the issue of award of damages does not arise.
90. We therefore find that the Partial Consent Order rendered prayers No.1 and 7 in the Amended Petition moot.
91. Regarding the last issue as to costs, in any litigation, the court has discretion to make orders as it may deem appropriate. This being a constitutional Petition which raised issues of great public importance and which involves the safeguard of fundamental freedoms and rights of individuals under the Bill of Rights in the Constitution of Kenya 2010, we order that each party bears their own costs.

Dated and delivered via Microsoft Teams at Kitale this 30th day of October 2025.

M. A. ODENY

M.C. OUNDO

M. NJOROGE

ENVIRONMENT & LAND COURT- JUDGES