



**Endorois Welfare Council v Cabinet Secretary Ministry of Environment,
Climate Change and Forestry & 4 others (Environment and Land Petition
E01 of 2025) [2026] KEELC 432 (KLR) (4 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 432 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND PETITION E01 OF 2025

MAO ODENY, J

FEBRUARY 4, 2026

**IN THE MATTER OF ARTICLES 22, 23, 40, 42, 63, AND 258 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE COMMUNITY LAND ACT NO. 27 OF 2016

AND

**IN THE MATTER OF FOREST CONSERVATION AND MANAGEMENT ACT
2016**

AND

IN THE MATTER OF LAND GAZETTE NOTICE NO. 1470 OF 3 RD MARCH 2016

BETWEEN

ENDOROIS WELFARE COUNCIL PETITIONER

AND

**THE CABINET SECRETARY MINISTRY OF ENVIRONMENT, CLIMATE
CHANGE AND FORESTRY 1ST RESPONDENT**

THE KENYA FOREST AUTHORITY 2ND RESPONDENT

THE COUNTY GOVERNMENT OF BARINGO 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT



JUDGMENT

1. By a Petition dated 14th February 2025, the Petitioner herein filed a Petition against the Respondents seeking the following orders:
 - a. A declaration that Arabal Location is community land within the meaning of Article 63 of *the Constitution*, and that the County Government of Baringo holds it in trust for the community until registration is completed under the *Community Land Act*.
 - b. A declaration that consultation with the National Land Commission was mandatory before the declaration of Mukutani Forest which is part of Arabal Location and Community land to be a public forest Pursuant to Section 31(2) of the *Forest Conservation and Management Act*, 2016.
 - c. A declaration that the gazettment of Arabal Location as a forest under Gazette Notice No. 1470 of 3rd March 2016 was unconstitutional, unlawful, null and void ab initio.
 - d. A declaration that any dealings with or any decisions concerning Arabal Location community land rights can only be undertaken in consultation and with participation of the Endorois Community in compliance with Articles 10,63, and 232 of *the Constitution*.
 - e. An Order of Certiorari to quash Gazette Notice No. 1470 of 3rd March 2016, which purported to establish Arabal Location as a forest.
 - f. A permanent injunction restraining the respondents, their agents, or any persons acting under their instructions from evicting, displacing, or interfering with the Petitioners' use occupation, and enjoyment of the community land within Arabal Location.
 - g. Damages for violation and/or threatened violation of the Petitioner's constitutional rights.
 - h. Any other or further reliefs as may be appropriate to protect and preserve the rights of the Endorois Community over Arabal Location community land.
 - i. Costs of the Petition.

PETITIONER'S CASE

2. The Petitioner is a community-based organization registered with the Registrar of Societies to protect the interests, rights and, welfare of the Endorois indigenous minority community. The community is indigenous to eight locations in Baringo South, Arabal location, Mukutani Ward, Baringo South Constituency. The Petitioner stated that the Petition is brought on the Petitioner's own behalf and on behalf of the community affected by the purported conversion and gazettment of community land under Gazette Notice No. 1470 of 3rd March 2016.
3. The Petition was supported by the Affidavit of Richard Kamingóror who is the CEO of the Petitioner and stated that the Gazette Notice No. 1470 of 2016 covered community land known as Mukutani Hills Block and Lemaitai Hills Block, comprising approximately 13,195.8 hectares, as forest land.
4. The petitioner contends that the alleged conversion of land into forest land was carried out without public participation, due process, and in total disregard of the rights of the Endorois community under Articles 10, 40, 42, and 63 of *the Constitution*, as well as the provisions of the *Community Land Act*,



2016. He further stated that the Endorois community has historically occupied and utilized land in Arabal Location for grazing, settlement, cultural practices, and other community livelihood activities.
5. According to the Petitioner, in April 1997, the Government commenced an adjudication process in Arabal Location under the Land Adjudication Act, demarcating approximately 105 farms, but the process was later disrupted due to insecurity.
 6. It was the Petitioner's case that in 2014, a section of individuals from the neighboring Iichamus community allegedly initiated a request to the Ministry of Environment to gazette part of Arabal Location as forest land, and that the members of the Endorois community and other residents who stood to be directly affected by such a move were never consulted.
 7. In response, over 500 residents from Arabal area, including political leaders, wrote to the National Land Commission and lodged a formal objection via a community petition dated 23rd October 2015, where they objected to the proposal on the grounds that: there the concerned Arabal location community was not consulted; there was no public participation conducted as required before such an exercise could be undertaken; that the initial residents who had been displaced from the area as a result of cattle rustling activities in the area were not consulted yet they still retained interest in the land; that part of the land earmarked for conversion is an already adjudicated area of Ngelecha Sub Location since the year 1997; that the area had existing public utilities like schools, dispensaries, boreholes, churches and private property which were not taken into consideration.
 8. The Petitioner further stated that the County Government of Baringo, also wrote to the then Cabinet Secretary for Environment, Natural Resources and Regional Development Authority, honorable Professor J. Wakhungu on behalf of the Endorois community objecting to the proposed gazettment of the community land and the letters were copied to the National Land Commission, and that despite these objections, Gazette Notice No. 1470, was issued on 11th March 2016, purporting to declare the subject land as forest land.
 9. The petitioner contends that the gazettment was irregular, discriminatory, and failed to comply with the constitutional and statutory requirements for converting unregistered community land into forest land, hence violated their rights.
 10. The Petitioner's CEO Mr. Richard Kamingóror, filed a further Affidavit in response to the 2nd Respondent's Replying affidavit sworn by Evans Kegode Aluda on 21st May 2025, and stated that the gazettment process of Mukutani forest was not a community- driven initiative but rather an action initiated by certain government officers without involving the Endorois community who are the inhabitants of the land. The members of the community were displaced from their ancestral land and were neither consulted nor involved in the gazettment process.
 11. Mr. Kamingóror further deponed that if the Iichamus community planned and undertook the process of gazettment of Mukutani forest land, then the same was done without the knowledge, involvement, or concurrence of the Endorois community, despite the land being part of their ancestral community land. It was his contention that the due process was not followed and in particular, the matter was not tabled for discussions by the Baringo County government as required by law and all the leadership of the Baringo County government as well as the Endorois community objected to the gazettment.
 12. According to the Petitioner, the Respondent made vague statements with the word "sometime" in reference to meetings which are vague and not context specific as no distinct date is provided thereby casting doubt on the accuracy and likelihood and intention of such meetings.



13. The Petitioner further stated that on 30th March 2016 the Chair of the National Land Commission wrote to the then Cabinet Secretary, Ministry of Environment, water and Natural Resources suggesting the suspension of the gazette Notice pending a round table discussion with all stakeholders but the advice was not heeded.

1ST 2ND AND 5TH RESPONDENTS' CASE

14. The 2nd Respondent filed a replying Affidavit sworn by Evans Kegode Aluda, the Ag. Manager Forest Survey & Information management, Kenya Forest Service dated 21st May 2025, and stated that the gazettment was a community-driven initiative to reserve community land as a forest reserve.
15. He stated that the community approached the Forester Marigat in 2013, and sought advice on reservation of the area for conservation, of which they cited displacement and destruction of water catchment area as the main concern. It was his disposition that the community made a presentation at the international colloquium held in Eldoret in March 2015 where the community highlighted the following specific reasons for gazettment of the hills as a forest:
- a. Politically instigated conflicts with Pokot neighbors and displacement of the community from their ancestral land since the year 2005.
 - b. Denial of community to access sacred sites of cultural importance,
 - c. Degradation of the water catchment and riparian vegetation upstream,
 - d. Increasing poverty due to loss of traditional livelihood sources arising from the displacement of populations and displacements from homes.
16. Mr. Kegode deponed that the community resolved to address the various challenges through conservation of the hills by gazetting Mukutani Forest as a state forest and that the community belied that they would be guaranteed the following:
- a. Peace and security in the region in the long run,
 - b. Required access to the cultural sites
 - c. Improved water flows for domestic and irrigation purposes from the rivers emanating from the hills,
 - d. Economic empowerment through ecotourism and other non-consumptive uses of the forest.
 - e. Opportunities for infrastructure and general development
 - f. Community participation.
17. He further deponed that the due process was followed in the gazettment of the suit land as in 2013, Marigat Forester organized field visit for the Kenya forest Service Officers from Headquarters and that sometime in November 2013 staff in the company of Baringo County Survey Department met the County Lands Adjudication Officer, Zonal Forest manager, Forester Marigat, MCA Mukutani and the Chief Mukutani, whereby the County Surveyor identified the boundary with Laikipia and the Ngelesha Registration section.
18. According to Mr. Kegode, KFS Officers met with elders in Sirata village Mukutani division in 2013 and in 2014 a reconnaissance survey was done and the two block were identified and demarcation was done. That the recommendations were sent to the Kenya Forest Service Headquarters and the National Land Commission wrote a letter dated 13th March 2015 to initiate the gazettment process.



19. He also deponed that in 2015 the boundary survey was conducted, the two blocks surveyed with a total area of 13,195.8 Ha approximately, boundary Plan No. 175/437 and Draft schedules were prepared in July 2015, checked and authenticated/approved by the Director of Surveys, and finally in November 2017 Mukutani Forest was gazetted vide Legal Notice No 166 of 2017 (Legal Notice No 265).

PETITIONER'S SUBMISSIONS

20. Counsel for the Petitioner filed submissions dated 25th July 2025, and identified the following issues for determination:
- a. Whether the land measuring approximately 13,195.8 hectares delineated on Survey plan No. 175/437 and gazetted as Mukutani Forest on 11th March 2016 was community land.
 - b. Whether the National Land Commission was adequately consulted prior to the gazettelement of the land as forest land, and whether the conversion and gazettelement of the 13,195.8 hectares of community land as forest land followed due process.
 - c. Whether there was adequate public participation as required in law in the conversion and gazettelement of community land as forest land.
 - d. Whether the petitioner is entitled to the reliefs sought.
 - e. Who pays the costs of the petition?
21. On the first issue as to whether the land measuring approximately 13,195.8 hectares delineated on Survey Plan No. 175/437 and gazetted as Mukutani Forest on 11th March, 2016, was community land, counsel relied on the definition of Community land as provided for under Article 63 of *the Constitution* and submitted that the suit land is community land as the land is occupied and used by the Endorois community identified by ethnicity and cultural practices.
22. Mr. Akang'o further submitted that suit land is owned by the Endorois community as community land under communal form of holding as per Section 4(1) of the *Community Land Act* which provides that community land in Kenya shall vest in the community.
23. On the 2nd issue as to whether the National Land Commission was adequately consulted prior to the gazettelement of the land as forest land, and whether the conversion and gazettelement of the 13,195.8 hectares of community land as forest land followed due process, counsel submitted that the lawful process of conversion of land leading to its gazettelement was not adhered to thereby contravening Article 40 of *the Constitution*.
24. Counsel also relied on Section 22 of the *Community Land Act* which provides for conversion of community land to public land, which is vide, compulsory acquisition, transfer or surrender. It was counsel's submission that the gazettelement was neither of the above and relied on the case of Patrick Musimba v National Land Commission & 4 others [2016] KEHC 5956 (KLR), where the court outlined the process of compulsory acquisition.
25. Counsel submitted that compulsory acquisition is initiated by the national or county government through the Cabinet Secretary or the relevant County executive Committee Member and in this case neither of the two initiated the process, the purported conversion of land cannot be deemed to constitute compulsory acquisition.
26. Additionally, that the process could not constitute a transfer as the applicable legal procedures were not followed. Section 22 (1) (b) of the *Community Land Act* provides for transfer as one of the methods



- through which community land may be converted to public land but subsection 4 imposes two major restrictions for the transfer to be valid. It provides that community land shall not be transferred without prior approval by the members of the registered community in a community meeting and that the transfer should be in line with the [land Act](#), and any other applicable law.
27. It was counsel's submission that there are steps to be followed before conversion which were not complied with and from the 2nd Respondent's replying affidavit sworn by Evans Kegode, he deponed that the process of conversion was through surrender and that it was community driven initiative to reserve the community land as a forest reserve.
 28. Counsel relied on Section 19 of the [Community Land Act](#) (Regulations), 2017 which stipulates the procedure to be followed for the conversion of community land to public use through surrender.
 29. Mr. Akang'o stated that the procedures under the above Section was reaffirmed in the case of National Land Commission v Afrison Export Import Limited & 10 others [2019] KEELC 4569 (KLR), where the court outlined the process for surrender of community land, and submitted that the Endorois community was expected to convene an assembly of its members and come up with a resolution supported by two thirds of the assembly to set aside the land for conversion to forest land. The petitioner contended that they were excluded from the process resulting in the issuance of a letter of objection to the NLC and the Cabinet Secretary Ministry of Environment, Climate Change and Forestry upon discovery of the intention to gazette their land as a forest.
 30. Counsel further relied on Section 19(5) of the [Community Land Act](#) which provides that approval from the National Land Commission is required before community land can be converted for public purposes and the NLC upon being made aware of the intention to convert the community land to forest land in a letter dated 31st March 2015 and received in the offices of Kenya Forest on 20th April 2015, in the 2nd Respondent's replying affidavit, the NLC requested consultations between itself and the Kenya Forest Service to initiate a process of determining the type of forests required and the extent of conservation needed in the area.
 31. It was counsel's submissions that there is no evidence that such consultations or further engagement were ever undertaken between the Director, Kenya Forest Service and the NLC as suggested in the letter, and instead, what followed was the gazette on 11th March, 2016 of Mukutani Forest vide gazette Notice Number 1470.
 32. According to counsel, following the Gazette Notice dated 11th March 2016, the NLC issued an objection on 30th March 2016, outlining several conditions that were to be met before any further steps could be taken. The objection cited concerns raised by Baringo County leadership, including the presence of public utilities such as schools, a dispensary, churches, dams, boreholes, and an irrigation scheme, which could not legally be incorporated into a forest reserve.
 33. Additionally, counsel cited Section 19(3) of the [Community Land Act](#) which requires approval from the relevant county government and in this case, Baringo County Government, as custodian of unregistered community land, issued a letter dated 30th March 2016 objecting to the gazette and expressly requesting that the Gazette Notice be revoked. The objection brings to question whether there was approval and concurrence/consensus of the community.
 34. Similarly, on 24th March 2016, seven (7) Members of Parliament from the area also wrote to the Cabinet Secretary, Ministry of Environment and Natural Resources, objecting to the gazette, but the same proceeded in complete disregard of the required approvals, the objections raised by the county government, the contributions and objections of the Endorois community as well as the recommendations and conditions set out by the National Land Commission.



35. Counsel relied on the case of *Dina Management Ltd vs County Government of Mombasa & Another* [2023] KESC 30 (KLR), where the Supreme Court held that where the required procedure is not followed, leading to violation of *the Constitution*, any resulting action cannot stand as valid in law. The petitioner contends that the failure to follow the prescribed procedure in the alleged surrender process amounts to a violation of constitutional and statutory requirements, thereby invalidating the entire process and any actions arising from it.
36. On the third issue as to whether there was adequate public participation as required in law in the conversion and gazettelement of community land as forest land the petitioner submits that the process failed to meet the threshold of the principles of public participation as defined in law, as the Endorois community, being the inhabitants and rightful beneficiaries of the land, ought to have been included in the process to ensure their interests were protected and their views considered.
37. Further that the Baringo County Government, as the custodian of unregistered community land on behalf of the community, was a necessary party and should have been consulted. Additionally, the National Land Commission, as a responsible agency for management and administration of all unregistered trust land pursuant to section 5(2) of the *National Land Commission Act* was required to be engaged, therefore the omission of these key stakeholders renders the process fundamentally flawed.
38. Counsel noted from the purported community meetings that the same were not inclusive as the list of the attendees were exclusively members of the Iichamus community, despite the fact that mainly the Endorois community inhabits the Arabal location. Further that the list of names merely contains names, ID numbers and signatures with no mention of the date, venue or time of the alleged meeting. There was no notice or invitation to the public or verifiable method of how the said meeting was convened, who called it and whether it was open to all affected persons.
39. Additionally, counsel pointed out that the National Land Commission wrote a letter dated 31st March 2015 where it emphasized the need for consultation between Kenya Forest Service and relevant stakeholders, but there is no evidence that this was done prior to the gazettelement. This led the community to raise an objection through a petition delivered to the NLC on 11th November, 2015 and CS Ministry of Environment, signed by over 400 residents expressing their opposition. However, the objections raised, were ignored without reason or feedback from the respondents.
40. Mr. Akang'o submitted on the principles of public participation, and relied on the Supreme Court case of *British American Tobacco Kenya PLC 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) (26 November 2019) (Judgment) and the case of *Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties)* (Constitutional Petition E473 of 2023) [2024] KEHC 8436 (KLR) (Constitutional and Human Rights) (12 July 2024) (Ruling), and stated that the process fell short of the constitutional and legal threshold for public participation, as it lacked clarity of the subject matter, reasonable notice, proper sensitization of the affected community, facilitation for meaningful engagement, inclusivity and fair representation, transparency, and due consideration of public views with reasons for the rejection.
41. Counsel therefore urged the court to find that the Petitioners is entitled to the reliefs sought together with costs.

1ST 2ND AND 5TH RESPONDENTS'SUBMISSIONS

42. Counsel for the 1st 2nd and 5th Respondents identified issues for determination as follows:



- a. Whether the land subject to gazette Notice No. 166 of November 2017 establishing Mukutani Forest is situated in Arabal location or Mukutani location?
 - b. Whether the gazettment process under gazette Notice No. 166 of November 2017 complied with the constitutional and statutory requirements for public participation and community consultations?
 - c. Whether consultation with the National Land Commission was mandatory before gazettment of Mukutani Forest as a public forest under Section 31 (2) of the *Forest Conservation and Management Act*?
 - d. Whether the gazettment of Mukutani Forest under gazette Notice No. 166 of November 2017 was constitutional lawful and valid?
 - e. Whether the Petitioner has demonstrated any violation of constitutional rights warranting the reliefs sought/
43. On the first issue, counsel submitted that one of the fundamental issues in this Petition is the geographical location of the land subject of the gazettment under Gazette Notice No. 1470 of 11th March 2016. That the Petitioner contends that the gazetted area, comprising Mukutani hills block and Lemaitai block totaling 13,195.8 hectares, is situated in Arabal location rather than Mukutani location.
 44. Counsel submitted that the actual survey and demarcation of land boundaries fall within the purview of the Survey of Kenya as provided for by the *Survey Act* and *Land Registration Act*. Counsel asserted that due process was adhered to ensuring the precise location was gazetted, which was done by a multi-tiered verification process involving several competent authorities. That therefore the Petitioner's assertion that the land is situated in Arabal location lacks evidential foundation.
 45. On the second issue on whether the gazettment process complied with the constitutional and statutory requirement for public participation, counsel submitted relied on Article 10 (2) of *the Constitution* on national values and Articles 118 and 69 on public participation. Counsel also cited Section 31 of the *Forest Conservation and Management Act* 2016 which provides for the creation and management of public forests
 46. Ms. Nyambura submitted that the Act specifically empowers the Cabinet Secretary to gazette public forests upon recommendation by the board of Kenya Forest Service and in consultation with the National Land Commission, following proper technical and administrative processes. Therefore the public participation process was both comprehensive and inclusive and that the gazettment was initiated by the Ilchamus community themselves responding to their legitimate concerns about environmental degradation and destruction of critical water catchment area.
 47. Counsel relied on the cases of Poverty Alleviation Network and Others v President of the Republic of South Africa and Others (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010) and Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another [2017] eKLR, on the principles of public participation and submitted that the 2nd respondent applied the established legal principles to the gazettment process in this case. Additionally there was adequate notice and that the participation was meaningful.
 48. Ms. Nyambura further submitted that it was not mandatory to consult with the National Land Commission for all forest gazettments and that the process having been initiated by the Ilchamus community, it follows that the land was not unalienated as it was subject to community occupation and use. Counsel therefore stated that the land subject to gazettment does not fall within the categories



specified in Section 31(2) of the *Forest Conservation and Management Act* that would trigger the mandatory consultation requirement with the National Land Commission.

49. Additionally, on the issue of whether the gazettelement was valid, counsel relied on Article 69 of *the Constitution* and submitted that the gazettelement directly serves as an environmental protection objective to protect the critical water catchment areas
50. Counsel therefore concluded that the gazettelement was valid and met the process of the threshold for public participation and urged the court to dismiss the Petition with costs to the Respondents.

ANALYSIS AND DETERMINATION

51. The Petitioner and the Respondents gave an elaborate background to the Petition which has been helpful to the court since the Petition was canvassed by way of affidavit evidence and submissions. The documents attached have also illuminated the genesis of the gazettelement leading to the current dispute.
52. Flowing from the Petition and the Affidavits, the issues for determination in this Petition are as follows:
 - a. Whether the land measuring approximately 13,195.8 hectares delineated on Survey plan No. 17Sl437 and gazetted as Mukutani Forest on 11th March 2016 was community land.
 - b. Whether the National Land Commission was adequately consulted prior to the gazettelement of the land as forest land, and whether the conversion and gazettelement of the 13,195.8 hectares of community land as forest land followed due process.
 - c. Whether consultation with the National Land Commission was mandatory before gazettelement of Mukutani Forest as a public forest under Section 31 (2) of the *Forest Conservation and Management Act*?
 - d. Whether there was public participation as required in law in the conversion and gazettelement of community land as forest land.
 - e. Whether the petitioner is entitled to the reliefs sought.
 - f. Who pays the costs of the petition?
53. On the first issue as to whether the land measuring approximately 131195.8 hectares delineated on Survey Plan No. 1751437 and gazetted as Mukutani Forest on 11th March, 2016, was community land, it is not in dispute that the suit land was community land.
54. This is admitted by the Respondents that the process of conversion of the suit land to forest land was community led who were identified as the Iichamus whom they alleged approached Marigat Forester to help in the conservation and converting the community land into a state forest. This was elaborately explained in the 2nd respondent's replying affidavit sworn by Evans Kegode Aluda, who deponed that the community resolved to address the various challenges through conservation of the hills by gazetting Mukutani Forest as a state forest and that the community believed that they would be guaranteed peace, security, access to cultural sites, improved water flow for domestic and irrigation purposes, economic empowerment.
55. What was the purpose of engaging the community if they did not have a stake in the land? The Petitioner stated that the Endorois community has historically occupied and utilized land in Arabal Location for grazing, settlement, cultural practices, and other community livelihood activities. The Endorois fall within the definition of community land as provided for under Article 63 of *the Constitution* as follows:



- (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
- (2) Community land consists of--
 - (a) land lawfully registered in the name of group representatives under the provisions of any law;
 - (b) land lawfully transferred to a specific community by any process of law;
 - (c) any other land declared to be community land by an Act of Parliament; and
 - (d) land that is--
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities;

or

 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).
- (3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.
- (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
- (5) Parliament shall enact legislation to give effect to this Article.

56. Therefore there is no doubt that the land which is the subject matter of this suit is community land. Counsel for the respondents submitted on an issue whether the gazetted suit land is situated in Arabal location or Mukutani location, this is an issue that never arose in the replying affidavit and there was no map or any other evidence adduced on the issue for determination. It can therefore not be raised in submissions as the petitioner may not be able to clarify the same. The respondent raised the issue of the geographical location which counsel said was done by experts but there was no evidence to rebut the claim that the suit land is situated in Arabal location.

57. On the 2nd issue as to whether the National Land Commission was adequately consulted prior to the gazettelement of the land as forest land, and whether the conversion and gazettelement of the 13,195.8 hectares of community land as forest land followed due process, there are laid down procedures of conversion of land from community land to public or private and vice versa. If such procedures are not followed then the process is flawed and contravenes the rights of the parties who are affected by the anomaly.

58. Section 22 of the *Community Land Act* provides for ways in which community land can be converted to public land, namely; vide compulsory acquisition, transfer or surrender. It is noted from the 2nd respondent's replying affidavit sworn by Evan Kegode that the process of conversion was through surrender as it was a community-driven initiative. If that was the case, then the respondents should have complied with the provisions of Section 19 of the *Community Land Act* (Regulations) 2017



which stipulates the procedures for conversion of community land to public use through surrender as follows:

59. Section 19. Setting a community land for public purposes:
- 1) A community may through the resolution of at least two thirds, of the community assembly set aside land for an identified public purpose
 - (2) Where the intended public purpose that was not in the approved development plan, the community shall consult the relevant authority responsible for county planning for direction.
 - (3) Upon recommendation from the planning authority, the community shall cause the preparation of a physical development plan for the land to be set aside and forward the plan to the relevant county government for approval.
 - (4) The approved physical development plan for the land to be set aside for public purpose shall be forwarded to the National Land Commission for publication in the Gazette within fourteen days.
 - (5) After publication in the Gazette, the Commission shall reserve the land to the relevant public entity in accordance with the *Land Act* Cap. 280.
60. The respondents submitted that they complied with the requirements for gazettelement of community land as a state forest. It is interesting to note that the respondent gave conflicting evidence and submissions. The Respondent stated that there was adequate consultation with the stakeholders and the National Land Commission prior to gazettelement, but counsel submitted that the land subject to gazettelement does not fall within the categories specified in Section 31(2) of the *Forest Conservation and Management Act* that would trigger the mandatory consultation requirement with the National Land Commission.
61. From the evidence it is clear that after the people became aware of the gazettelement, National Land Commission wrote a letter dated 30th March 2016, outlining several conditions that were to be met before any further steps could be taken. The objection cited concerns raised by Baringo County leadership, including the presence of public utilities such as schools, a dispensary, churches, dams, boreholes, and an irrigation scheme, which could not legally be incorporated into a forest reserve.
62. It is evident that there were many objections to the gazettelement as can be seen from the letters written by NLC, the Baringo County government and specifically that on 24th March 2016, seven (7) Members of Parliament from the area also wrote to the Cabinet Secretary, Ministry of Environment and Natural Resources, objecting to the gazettelement, but the same proceeded in complete disregard of the required approvals, the objections raised by the county government, the contributions and objections of the Endorois community as well as the recommendations and conditions set out by the National Land Commission.
63. This shows that the gazettelement did not adhere to the laid down procedures of due process and constitutional and statutory imperatives. This was impunity at play.
64. On the issue whether there was meaningful public participation, prior to the gazettelement of the community land as forest land, Article 10 (2) a of *the Constitution* outlines public participation as one



of the national values and principles of governance which bind all state organs and public officers. Similarly Article 69(1) (d) of *the Constitution* on the other hand provides that:

...the State shall encourage public participation in the management, protection and conservation of the environment.”

65. The Supreme Court case of *British American Tobacco Kenya PLC 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) (26 November 2019) (Judgment)* established the following guiding principles for public participation as follows:

- i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- ix. Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.



66. Similarly, in the Court of Appeal case of Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR, the court held that:

[20]“...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. *The Constitution* in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation,..”

67. The court also emphasized that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation. That is, people must be accorded an opportunity to participate in the legislative process and this is a question of fact to be proved by the party that was required to comply with this constitutional requirement that indeed there was compliance.

68. From the minutes that were attached to the replying affidavit by the respondent, the heading indicated that it was for Ilchamus community leaders, whose names and ID numbers were affixed together with their signatures. I notice that all the persons who attended knew how to write and their signatures were almost similar. No one thumb printed. This means that the level of literacy is very high or there was a criterion of choosing only those who could read and write.

69. There were no attachments of notices of invitation for the meetings, whether there was adequate notice for the people to attend and where. These records are important for transparency.

70. In the case of Richard Owuor & 2 others (Suing on behalf of Busia Sugarcane Importers Association versus Cabinet Secretary, Ministry of Agriculture Livestock, Fisheries and Cooperatives & 8 others [2020] eKLR, Justice Mrima made the following observations:

“Consultations or stakeholder’s engagement tends to give more latitude to key stakeholders in a given field to take part in the process towards making laws or formulations of administrative decisions which to a large extent impacts on them. That is because such key stakeholders are mostly affected by the law, policy or decisions in a profound way. Therefore, in appropriate instances a Government agency or a Public Officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholder’s engagement...”

71. Even if the Respondent was to submit that they consulted the leaders or representatives, which leaders did they consult and yet the same leaders raised objections but their objections were ignored. This is fortified by a petition that was filed in the National Assembly to the Public Petitions Committee by the Baringo residents challenging the declaration of Mututani as a public forest. The committee established that there was insufficient public participation and a lack of consultation with the National Land Commission and all the affected communities which directly contravened *the Constitution* and the *Forest Conservation and Management Act*. The recommendations might not be binding to the court but are persuasive as this issue has been in the limelight where while this matter was pending in court a school was demolished on the suit land.

72. Having found that there was lack of public participation prior to the gazettelement of the community land to a forest, it follows that the respondents did not adhere to the laid down procedures of conversion of community land to public land.



73. If the affected communities and the respondents so wish to convert the community land to public forest, then they are at liberty to follow the laid down procedures under the *Community Land Act*, *Forest Conservation and Management Act*, with the real members of Endorois community, through transparency, and meaningful participation not box ticking. I therefore find that the Petitioner is entitled to the orders sought and issue the following specific orders:
- a. A declaration is hereby made that Arabal Location is community land within the meaning of Article 63 of *the Constitution*, and that the County Government of Baringo holds it in trust for the community until registration is completed under the *Community Land Act*.
 - b. A declaration is hereby made that consultation with the National Land Commission was mandatory before the declaration of Mukutani Forest which is part of Arabal Location and Community land to be a public forest Pursuant to Section 31(2) of the *Forest Conservation and Management Act*, 2016.
 - c. A declaration that the gazettement of Arabal Location as a forest under Gazette Notice No. 1470 of 3rd March 2016 was unconstitutional, unlawful, null and void ab initio.
 - d. A declaration is hereby made that any dealings with or any decisions concerning Arabal Location community land rights can only be undertaken in consultation and with participation of the Endorois Community in compliance with Articles 10,63, and 232 of *the Constitution*.
 - e. An Order of Certiorari is hereby made to quash Gazette Notice No. 1470 of 3rd March 2016, which purported to establish Arabal Location as a forest.
 - f. A permanent injunction restraining the respondents, their agents, or any persons acting under their instructions from evicting, displacing, or interfering with the Petitioners' use occupation, and enjoyment of the community land within Arabal Location.
 - g. Costs of the Petition to the Petitioner.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF FEBRUARY 2026.

M. A. ODENY

JUDGE

