REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC PETITION 19 OF 2021

KILLIAN MWAJANJI MWANDORI & 8 OTHERS ..... PETITIONERS

VERSUS

ALI NDORO WEDA & 7 OTHERS ..... RESPONDENTS

RULING

1. The Notice of Motion dated 6th May 2025 has been placed before this court for determination. It is seeking the following orders:

    a. *The County Surveyor and the Land Registrar do conduct boundary demarcation in respect to GL15A and Nyika Reserve showing any encroachment or illegal demarcation in Nyika Reserve based on a declaration for settlement in GL5A as per the 1987 government approval for settlement of residents on GL15A;*
    b. *That this court do vary/review and/or set aside the judgment delivered on 3rd April 2025 and all consequential orders and the respondents be granted leave to file the necessary evidence that was not available at the time of determination or delivery of the judgment.*

2. The application is supported by the affidavit of **Ali Ndoro Weda** dated 6th May 2025. The grounds upon which the application is made are that there is an error apparent on the face of the record; that Nyika Reserve is not part of GL15A, that the approval for the settlement of the occupants of Nyika Reserve was done in 2020; that the demarcation and settlement exercise of GL15A in the 1980s encroached into the Nyika Reserve without any authorization; that the encroachment on the Nyika Reserve was eventually cancelled by Court; that there is necessity to review the judgment by allowing the Survey Department to identify and show the

boundaries between GL15A and the Nyika Reserve to ascertain the encroachment and illegal allotment in the Nyika Reserve, if any; that the petitioners are not community members or occupants of the Nyika Reserve and there was no committee that was formed in respect of the Nyika Reserve and later disbanded as alleged by the petitioners; that there is no evidence that the committee constituted in respect of the GL15A was disbanded against the wishes of the occupants of that land; that Nyika Reserve and GL15A are distinct plots of land with different committees and occupants/residents with equal rights to form committees in respect to their own land; that this court was misled in material facts in coming to the conclusion that the petitioner's rights were infringed; that as a result of purported illegal allocation to the Petitioners of portions of land in the Nyika Reserve based on the 1987 approvals regarding GL15A the rights of the respondents and the occupants of the Nyika Reserve were violated and their portions taken away by the petitioners; that the orders issued by this court are being enforced against the Nyika Reserve Committee which is not concerned with GL15A affairs.

The Response

3. The respondents filed a replying affidavit dated 2nd October 2025 sworn by the first petitioner. The gist of that response is that no loss will be occasioned to the applicants if the judgment of the court is implemented; that there is no new material presented before Court; that the 6th

respondent has commenced a survey of public utilities on the ground to prevent encroachment thereon; that such an application under Order 1 Rule 10, Order 45 Rules 1, 2, and 3 and Order 51 is not contemplated by the *Constitution of Kenya (Protection Of Rights And Fundamental Freedoms Practice And Procedure) Rules 2013* which are the procedural rules applicable in determination of Constitutional petitions; that prayer *number 4* in the application cannot be granted because the applicants were at all material times active participants in the petition since its filing, and nothing prevented them from availing evidence that would support their case, and the present application is an attempt to reopen the litigation and an afterthought, and that the petitioner's 177 plots are now insulated from further litigation by virtue of the judgment in this court, irrespective of whether they are in Kidutani GL15A or Nyika Reserve or in both areas.

Submissions of the parties.

4. Both sides filed submissions which I have had occasion to read and which I have considered in the preparation of this ruling.

Analysis and determination.

5. The main issues arising for determination in the present application are as follows:

    a. *Whether the application is a non-starter for being brought under Order 1 Rule 10, Order 45 Rules 1 2 and 3 and Order 51 is not*

contemplated by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure) Rules 2013 which are the procedural rules applicable in determination of Constitutional petitions;

b. *Whether the judgment of the court should be varied reviewed or set aside to allow the respondents to file the necessary evidence that was not available at the time of determination of the judgment.*
c. *Whether the court should order the County Surveyor in the Land Registrar to conduct a boundary demarcation in respect of GL15A and the Nyika Reserve to show any encroachment of the Nyika Reserve;*

6. In respect of the first issue, it has been urged that application has not been brought under the *Mutunga* rules. This court has ascertained that they are not even invoked for the application. Instead, the applicant relies on Order 1 Rule 10, Order 45 Rules 1 2 and 3 and Order 51. Order 1 rule 10 is on joinder of parties and is clearly inapplicable to the application which seeks no joinder of parties. Order 45 is on review and the it is the judgment of this court that is sought to be reviewed. Order 51 contains general provisions relating to applications.
7. Speaker of the *National Assembly v Karume [1992] KECA 42 (KLR)* held as follows:

> *"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*

8. In respect of ordinary cases decisions abound which support the position that an application should not fail for not being brought under the right provisions of the law or rules: see: *Thomas Ratemo Ongeri And 2 Others Vs Zachariah Isaboke Nyaata and Another Kisii Elc Case No 95 Of 2004 –*

[2014] eKLR And Nancy Nyamira and Another Vs Archer Dramond Morgan Ltd 2012 eKLR.

9. This being an application for review made in a Petition, it is vital to note that unlike the Civil Procedure Rules, the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules Legal Notice 117 of 2013* (*Mutunga* rules) lack provisions regarding review.

10. In *Benjoh Amalgamated Limited & Another V Kenya Commercial Bank Limited (2007) eKLR* the court held as follows:

> *"Whereas I accept that the Petition herein is indeed scandalous, frivolous or vexatious, and is an abuse of the process of court, these are legal principles which are applicable to ordinary civil suits, and there is a real danger of debasing the practice and procedure of the Constitutional Court under Chapter V (Bill of Rights) of the Constitution into a civil procedure process. I think this must be guarded against. I make the distinction that whereas principles of law found in the Civil Procedure Code comprising the Civil Procedure Act, and the Civil Procedure Rules where they are not inconsistent with the Constitution may be borrowed, care must be taken to ensure that Civil Procedure Rules are not indiscriminately invoked and applied to Constitutional applications. Under the current practice and procedure, rule 22 of those rules is adequate to invoke the legal principles of scandalous, frivolous and vexatious litigation or abuse of the court process without incorporation of orders of the Civil Procedure Rules. Reference to Order VI rules 13 (1) (B) and (D) of the Civil Procedure rules is to that extent incompetent."*

11. In this court's view, Order 45 provisions are not inconsistent with the Constitution or the *Mutunga Rules* in so far as they are meant to allow a person with a legal dispute regarding a decision of the court to present his case for review and be accorded a hearing as required by Article 50(1) of the Constitution. This court is thus persuaded that the applicant's reliance on the Civil Procedure Rules in the present petition is not an

indiscriminate application of the same but an act borne out of necessity to fill in the gap left by absence of express review provisions in the *Mutunga Rules.* Reliance on the CPR is therefore not fatal to the application before me, and the objection raised by the respondents fails.

12. Regarding the second issue which arises from ***prayer number 3*** in the application, the aim of securing a survey exercise by the County Surveyor and the Land Registrar as expressed by the applicants is to establish if there is any encroachment on the Nyika Reserve and the extent thereof. It is to be deduced that the purpose of such an exercise would be to produce evidence that would be placed before this court for rehearing of this matter with a view to arrival at a different conclusion other than that reached in the judgment issued in this matter. ***Prayer number 4*** in the application expressly seeks that the respondents be granted leave to file necessary evidence that was not available at the time of determination of the suit. In other words, prayers number 3 and number 4 are so inextricably intertwined that they must be dealt together.

13. An analysis of those two prayers discloses only two main grounds they rely on are as follows:

    a. *Error on the face of the record;*
    b. *Discovery of new matter that was not available as at the time of the determination of the petition.*

14. Starting with issue no (b) above, it is noteworthy that the County Government of Kilifi, the National Land Commission and the Kilifi County

Land Adjudication Officer were all parties to this case from inception. None of them brought in the evidence of encroachment, or extent of search encroachment in respect of the Nyika Reserve during the hearing of the petition.

15. Litigation in our jurisdiction is mainly adversarial. Parties have to establish their case by the evidence they call at the hearing. In the case of petitions affidavit evidence is relied on save where the court orders *viva voce* evidence to be used. The rule nevertheless applies.

16. In *National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)* the court held as follows:

> *"17. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.*
> *18. For these reasons we do not find any merit in this appeal and hereby dismiss it with costs."*

17. This court has already observed that the aim of securing a survey exercise by the County Surveyor and the Land Registrar as expressed by the applicants in the present application is meant to establish if there is any encroachment on the Nyika Reserve and the extent thereof; to avail the applicants some evidence to a rehearing of this matter with a view to persuading the court to arrive at a different conclusion. This is an exercise that ought to have been part of the hearing or proceedings before judgment.

18. The alleged encroachment having allegedly occurred in the 1980s, the County Government of Kilifi, the National Land Commission and the Kilifi County Land Adjudication Officer had, during the pendency of the present case, surveyors under their employ, and nothing prevented the said respondents from getting their surveyors onto the ground for the purpose of securing evidence that could have been instrumental in establishing that there was encroachment of the Nyika Reserve. Nothing also prevented the 1st to 5th respondents', who are natural persons, from contracting private surveyors for the same purpose.

19. This is a petition that was filed in the year 2021 and decided in the year 2025. I find that the respondents had sufficient time and opportunity to secure and present the kind of evidence they are now seeking before this court before it made its decision and that they failed to do so.

20. It is in the public interest that litigation should come to an end, and should not be dealt with in installments. When a person has been granted an opportunity to be heard as the respondent where in the present case, if they fail to take up that opportunity and exploited to the full by presenting the evidence, which is at their very doorstep, they cannot be heard to come pleading after the decision has been made in the matter that the case should be reopened in order for them to take up that same evidence and bring it to court. Where the opportunity has been availed to a litigant to present evidence in a suit, and he neglects to do so without good reason, and a decision is made on the basis of the only evidence

available, the court makes firm findings on the issues before it in the final judgment thus rendering those issues *res judicata*, only subject to appeal, where such right lies. For that reason, prayers **number 4** and **5** in the application cannot be granted.

21. Regarding alleged error on the face of the record, it was submitted for the applicants that the petitioners have not denied that some of the members of the Nyika Reserve moved to court to block the process of settlement on GL15A that had spilled over to the Nyika Reserve; that while GL15A was subjected to demarcation in the 1980s, the Nyika Reserve was approved for settlement in 2020; that the two areas had their own separate committees; that the petitioners have not denied that their rights in GL15A ends at the boundary with the Nyika Reserve, and that any activity that overflowed into the Nyika Reserve under the *aegis* of settlement on GL15A is a violation of the rights of the members or occupants of the Nyika Reserve; that **paragraph 7** of the replying affidavit to the petition *identified the portions of land which fell on the Nyika Reserve while the Nyika Reserve had not yet been approved for settlement*.

22. In *National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)* it was also held as follows:

> *"16.A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the*

court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

23. First, at this point, it is worthy of note that the petition before court was not about boundaries between GL15A and the Nyika Reserve. The petition concerned the propriety of the ascension of the 1st to the 5th respondents into the membership of a committee that would determine among others who was entitled to be allocated land within the GL15A, and the overflow of demarcation and settlement into the Nyika Reserve came second. To demonstrate that, the orders sought in the petition were as follows:

"a. That a declaration be and is hereby issued that:
i)The 1st to 5th respondents are conflicted and a cannot discharge their mandate effectively; and
ii)The appointment of the 1st to 5th the respondents violates Article 10, 47, and 73 of the Constitution;
b. An order of certiorari bringing to this court for purposes of quashing and to quash the appointment of the 1st to 5th respondents to the Mtwapa-Kidutani Land Settlement Committee;
c. Costs of the petition.

24. In its final judgment in the present petition, the court finally ruled as follows:

"70. With the blatant exhibition of partiality in favour of a section of the residents arising primarily by virtue of their shared kinship or ethnic origin with them, the 1st -5th respondents have in their own replying affidavit already provided this court with sufficient criteria for their disqualification from that Committee. Given the circumstances of this case, a reasonable, fair-minded and informed member of the public would not expect the 1st – 5th respondents to be impartial in their decisions regarding the suit land in relation to the petitioners. This court needs look no further for any ground for their disqualification.

71.It is categorically clear that the circumstances of this case have left this court satisfied that real mischief and real prejudice will, in all human probability, result if the 1st -5th respondents were left to serve in the Committee appointed on 20th November 2020. I find that the rights of the petitioners under Articles 10, 73(2) and 27(1) & (2) of the Constitution of Kenya 2010 have been violated and are threatened with continued violation.

72.In the circumstances I find that there is merit in the petition dated 23rd August 2021 and the same is allowed in terms of prayers no (a) (i) and (ii), (b) and (c) thereof. The costs shall be borne by the respondents jointly and severally."

25. Secondly and more importantly, in its decision, this court had analyzed the evidence given by affidavit by government officers to the effect that both GL15A and the Nyika Reserve are Government Land and agreed with them. To demonstrate this, the court stated as follows at **paragraph 64** of its judgment:

"64. When considered wholistically for their effect, the contents of Francis Obiria Oseko's affidavit further reinforce this court's finding herein above that perchance the petitioners are in occupation of land within either GL15A and the Nyika Reserve, they are rightfully in such occupation and they are entitled to allocation of land therefrom. The 1st -5th respondents oppose the settlement of the petitioners on the land they are said to occupy, be it in GL15A or in the Nyika Reserve and therefore the reinforced finding herein places the 1st – 5th respondents at a deserved disadvantage with regard to their participation in any Committee that would administer the affairs of identification or verification of beneficiaries to any process that would lead to eventual alienation of individual titles to any person."

26. It was on the basis of the finding that the petitioners were entitled to land, whether in the GL15A or in the Nyika Reserve, that the appointment of the 1st to the 5th respondents to the committee that would oversee the distribution of land, which could affect the petitioner's right, was subjected to the test as to whether it was in violation of the Constitution,

and the court returned a positive finding on that issue, stating as follows in **paragraph 67:**

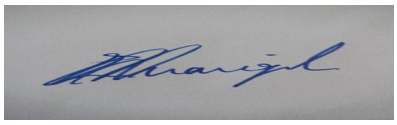
> *"67. In the context of the present petition, a proper interpretation of Article 50(1) of the Constitution 2010 is that any membership in a decision-making body of persons whose prior utterances or public expressions have made it clear the manner in which they would determine the disputes that will be placed before them in future renders them unsuitable for the task of such determination. The unsuitability for the task is also exacerbated by the presence of a personal dispute between the proposed members of that Committee and any beneficiaries of the allocation who may be required to bring a dispute before him or her. The obvious question that arises is how he may decide alone or, if among others, vote in such a dispute and whether his or her personal interests are likely to influence such solo decision, or vote, as the case may be, and actualize the conflict."*

27. This court therefore finds very little justification for the applicants' perception that the evidence intended to be brought up in the expected rehearing of the petition perchance the judgment was set aside as urged. The land having been identified as government land, the issues that the applicants have focused on in their application have centered around the court's reasoning for disqualification of the committee members and the boundaries between GL15A and the Nyika Reserve. The court having found out on the merit that the two parcels were government land, it mattered not whether the boundary between them was established or not before the conclusion of the case. Whether or not the land the respondents were settled on was government land, and whether the court's findings that the respondents were entitled to such land, can now only be canvassed in an appeal.

28. It is quite apparent that going by the facts established by the court regarding the status of the land such an identification of the boundary, perchance allowed, would in any event be futile; that all that was of consequence at the judgment stage was that the government committed itself to allocating the persons who are resident on the ground parcels of land to settle them and that they have lived with the legitimate expectation that they would finally be issued with titles to those plots by the government; that their eviction from the parcels they have held for so many years would be in violation of the Constitution. That being a merit decision, it is not, in line with the *National Bank of Kenya Ltd* decision (supra), subject to review but to an appeal, and for that reason *per se*, the application before Court ought to fail.

29. The upshot of the foregoing is that the application dated 6th May 2025 lacks merit and it is hereby dismissed with costs to the petitioners.

Dated, signed and delivered at Malindi on this 5th day of March, 2026.



MWANGI NJOROGE,

JUDGE, ELC, MALINDI.