

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT**  
**MIGORI**  
**CONSTITUTIONAL PETITION NO. 2A OF 2021**

**IN THE MATTER OF ARTICLES 2(1), 4(1), 10, 22, 23, 40(1), 47,  
61 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF  
ARTICLES 10,12, 40(1) AND 47 OF THE CONSTITUTION OF  
KENYA, 2010**

**BETWEEN**

**JACKSON MAGOIGA MARIBA.....1<sup>ST</sup>**

**PETITIONER**

**LUCAS TABU MARIBA.....2<sup>ND</sup>**

**PETITIONER**

**JOHN WANKURU MARIBA.....3<sup>RD</sup>**

**PETITIONER**

**TOBIAS MERENGO MARIBA all suing on their own behalf and  
as the Legal Representatives of the estate of MICHAEL  
MARIBA HERENGO MWITA alias MARIBA MERENGO  
(deceased).....4<sup>TH</sup> PETITIONER**

**ANTHONY CHACHA MWITA.....5<sup>TH</sup>**

**PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY  
OF LANDS AND PHYSICAL PLANNING.....1<sup>ST</sup>**

**RESPONDENT**

**CABINET SECRETARY, MINISTRY  
OF FOREIGN AFFAIRS.....2<sup>ND</sup>**

**RESPONDENT**

**HEAD, KENYA INTERNATIONAL**

**BOUNDARIES OFFICE.....3<sup>RD</sup>**

**RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup>**

**RESPONDEDNT**

**JUDGEMENT**

**1.** The Petitioners approached this court vide a Petition dated 17<sup>th</sup> June 2021 seeking the following orders;

**a) A Declaration that the Petitioners' rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya,2010 have been infringed by the Respondents in the manner pleaded hereinabove.**

**b) A declaration that the exercise of fresh demarcation of the Territorial Boundary between Kenya and Tanzania in 2018 was unconstitutional to the extent that it involved extension of the Tanzania border into parts of land that fell within the Kenyan Territory and contravened Articles 4(1) and 61(1) of the Constitution of Kenya 2010.**

**c) An order that the Respondents jointly and severally do pay to the Petitioners compensation for their land lost as a result of the extension of the Kenya-Tanzania International Boundary as follows;**

**i) 1<sup>st</sup> Petitioner, Jackson Magoiga Mariba- Kshs. 578,220/=.**

**ii) 2<sup>nd</sup> Petitioner, Lucas Mariba- Kshs. 5,222,840/=.**

**iii) 3<sup>rd</sup> Petitioner, John Wankuru Mariba- Kshs. 300,150/=**

**iv) 4<sup>th</sup> Petitioner, Tobias Merengo- Kshs. 446,315/=**

**v) 5<sup>th</sup> Petitioner, Antony Chacha Mwita- Kshs. 3,441.950/=**

**Total - Kshs.**

**9,989.475/=**

**d) Costs of the petition and interest on (c) above from the date of filing this petition.**

2. The Petition was filed alongside a verifying affidavit where the Petitioners adopted the contents of the Petition as the content of the Affidavit.
3. The brief facts underlying the petition are that the late Michael Mariba Merengo Mwita Alias Mariba Merengo (deceased) was the registered owner of the parcel of land known as Title No. Nyabasi/Busonga/719 measuring approximately 5.31 Hectares and the Petitioners are the beneficial owners of the said parcel of land being Title No. Nyabasi/Busonga/719 as administrators of the estate, whereas the 5<sup>th</sup> Petitioner is the registered owner of the parcel of land known as Title No. NYABASI/BUSONGA/531 measuring approximately 0.78 Hectares.
4. The Petitioners allege that sometime between March 2018 and September 2018, the Kenyan Government, through the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, embarked on a joint exercise with the Government of Tanzania to freshly demarcate the International Boundary shared between the two Countries. The said exercise involved among other things, survey of the extent/limit of the Kenya/Tanzania Boundaries, erection of Pillars to indicate the freshly demarcated Boundaries and re-affirming of the existing Boundaries. The exercise conducted by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents resulted in unlawful extension of the Tanzanian border into parts of Kenya territory that previously formed part of parcels of land known as NYABASI/BUSONGA/531 and NYABASI/BUSONGA/719 hereinafter referred to as the "the suit Properties". The Petitioners now contend that the 1<sup>st</sup> and 3<sup>rd</sup>

Respondents did not protect the interest of the Petitioners with regard to the suit Properties and further, that they have failed to value the portions of the suit Properties as a result of the extension of the Kenya-Tanzania Boundary into Kenya to facilitate prior compensation as stipulated in law.

5. The Petitioners contend that they wrote to the 4<sup>th</sup> Respondent on 6<sup>th</sup> August, 2019 informing him of the infringement to their rights and their entitlement to compensation for the loss of their properties and developments resulting from a direct consequence of such breach but the 4<sup>th</sup> Respondent has not only failed to compensate the Petitioners but has also failed or ignored to respond to the notice/demands. The Petitioners listed the portions of the suit properties that were adversely affected by the Boundary extension are as follows:

**1) 1<sup>st</sup> Petitioner, Jackson Magoiga Mariba's portion affected by the said Boundary extension measures approximately 0.432 Hectares, the 1<sup>st</sup> Petitioner had constructed his home, comprising a Semi Permanent House which served as his matrimonial home and additionally, he had 1000 Young Blue Gum Trees and other improvements, all the developments being valued at Kshs. 578,220/=.**

**2) The 2<sup>nd</sup> Petitioner, Lucas Mariba's portion of land affected by the extension measured 0.54315 Hectares. He had built a Permanent House which served as his matrimonial home, a permanent detached Guest House, and an incomplete Permanent House. The portion of land also had 1,600 Young Blue Gum Trees, 3 Banana Stalks, 4 Avocado Trees, One (1) Mango Tree and 450 Medium Blue Gum Trees. All this valued at Kshs. 5,222,840/-.**

- 3) The 3<sup>rd</sup> Petitioner, John Wankuru Mariba's portion of land affected by the Boundary extension measured approximately 0.143 Hectares. On the land were 52 Banana Stalks. All these together with other improvements on the land are valued at Kshs. 300,150/=.**
- 4) The 4<sup>th</sup> Petitioner, Tobias Merengo's portion of land affected by the said Boundary extension measured approximately 0.13 Hectares. On the land were 14 Pawpaw Trees, 49 Banana Stalks, 22 Coffee bushes, 31 Cypress Trees (Medium). All developments were valued at Kshs 446,315/ =.**
- 5) The 5<sup>th</sup> Petitioner, Anthony Chacha Mwita's parcel of land known as Title No Nyabasi/Busonga 531 was affected by the Boundary extension measured approximately 0.33 Hectares. The land had 98 Mature Blue Gum Trees, 667 Blue Gum Trees, 11 Banana Stalks and 10 Grevillia trees. AH developments were valued at Kshs 3,441,950/=.**
6. The Petitioners contended that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents actions was done without complying with the law, more specifically Articles 10,12, 40 and 47 of the Constitution and was a violation of the Petitioners' rights. The Respondents' actions also violated the provisions of Articles 4(1) and 61(1) of the Constitution of Kenya 2010. The Petitioners laid out the constitutional foundation for the petition and the injuries suffered by the Petitioners for which they seek the compensation and declaratory orders.

#### **Respondents' grounds of opposition**

7. The Respondents filed a grounds of opposition dated 13<sup>th</sup> December 2024 in opposition to the Petition. They opposed the Petition on the following grounds;

- 1) That the court lacks jurisdiction to grant the prayers sought in the petition as provided under Article 162 and 164 of the Constitution of Kenya 2010 and the Environment and Land Court Act.**
- 2) That the Petition is fatally incompetent as the same lacks an affidavit in support of the Petition sworn by the Petitioners and duly commissioned by commissioner of oaths and is defective as there is no evidence to support the prayers sought in the petition.**
- 3) That the Petition does not outline with precision and specifically how the Respondents have violated the Petitioners constitutional rights as was espoused under the Locus classicus case of Anarita Karimi Njeru vs Republic (1979) eKLR.**
- 4) That the Petition offends the provisions of Section 18, 19, 20 and 85 of the Land Registration Act and as such, the same is a non-starter, bad in law and on abuse of court process.**
- 5) That the Petition does not disclose any acts of omission and/commission of the Respondents in the performance of their constitutional duties and discloses no cause of action against the Respondents.**
- 6) That the Petition is untenable, devoid of substance, frivolous, vexatious, without substance, instituted in bad faith and the Petition as filed is full of falsehood, and misrepresentation of facts specially tailored to mislead the honourable court to obtain orders unjustly.**
- 7) That the reliefs sought by the Petitioners against the Respondents are misconceived, unmerited and are not supported by factual and technical evidence, expert reports or the Law.**

**8) That the Petition is defective, Incompetent and bad in law, lacks merit and is gross abuse of the process of this Honourable Court brought in bad faith.**

**9) That the Petition is premature and the Petitioner has not exhausted available remedies and relevant statutory avenues available to him prior to instituting these proceedings as provided under The Constitution of Kenya 2010 and the lienee offends the doctrine of exhaustion.**

### **1<sup>st</sup> Respondents' Replying Affidavit**

**8.** The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by Charles Ngetich. He averred that from the outset, the Petition is defective, incompetent and bad in law on the grounds that it lacks an affidavit in support of the Petition, sworn by the Petitioners and commissioned by a commissioner of oaths and is defective as there is no evidence to support the prayers sought in the petition. Further, that it does not outline with precision and specifically how the Respondents have violated the Petitioner's alleged constitutional rights as was espoused in Anarita Karimi Njeru vs Republic (1979) eKLR and the Petition does not disclose any acts of omission and commission of the Respondents in performance of their constitutional duties and discloses no cause of action against the Respondents. Additionally, that the reliefs sought are misconceived, unmerited and are not supported by (actual evidence or the Law. He urged that the Petition is premature and the Petitioner has not exhausted all available remedies and relevant statutory avenues available to him prior to instituting these proceedings as provided under the Constitution and the relevant statutes. In view of the above, he stated, the court lacks jurisdiction to grant the prayers sought in the petition as provided under Article 162 of the Constitution.

**9.** The deponent averred that the international boundary between Kenya and Tanzania was established long before the land adjudication process started and the land registration cannot go beyond the international boundary. Further, that he is aware that there was an exercise in 2018 which was carried out by a multiagency team jointly by Kenya and Tanzania to re-affirm the international Boundary between Kenya and Tanzania. That the adjudication process started in the year 1970, was completed and titles issued on 6/3/1978 and it has been more than 45 years from the time the adjudication process was completed hence the suit is time barred. He annexed and marked as "CN1 (a)" and "CN1 (b)" copies of the adjudication records with respect to parcel No's 271 and 275 respectively. He urged that the suit properties are not first registrations arising out of the land adjudication process of the Busonga adjudication section, annexing and marking as "CN2 (a)" and "CN2 (b)" copies of the Green cards. He deposed further that from the records held at the Lands Office, he was not aware of any objections during adjudication and appeals by the Petitioners or previously registered proprietors to the 1<sup>st</sup> Respondent over the adjudication process with reference to the suit properties as prescribed under the Land Adjudication Act.

**10.** The deponent averred that LR No. NYABASI/BUSONGA/271 was originally registered in the names of MARIBA MARENGO and the land parcel LR No. NYADASI/BUSONGA/271 was later subdivided into LR No. NYABASI/BUSONGA/666 and LR No. NYABASI/BUSONGA/667 annexing and marking as "ON3" a copy of the mutation form dated 25/4/1994 and "CN4 (a)" and "CN4 (b)" are copies of search dated 29/11/2024. Parcel LR No. NYABASI/BUSONGA/666 was further subdivided into LR No. NYABASI/BUSONGA/719 and LR No. NYABASI/BUSONGA/720, annexing and marking as "CN5 (a)" and "CN5 (b)" copies of the

searches dated 29/11/2024 and parcel No. LR No. NYABASI/BUSONGA/719 is currently registered in the names of Mariba Marengo. The records held at the lands office indicate that the parcel of land LR NO NYABASI/BUSONGA /531 is a partition from an original parcel LR No NYABASI /BUSONGA/275 and was initially registered in the names of Mwita Marengo and Ngendi Marengo during the adjudication process, who made an application to have the parcel of land LR No NYABASI /BUSONGA/275 partitioned. He annexed and marked as "CN 5" a copy of the application for partition dated 13/11/1977. The partition resulted to LR No NYABASI/BUSONGA/530 and LR No NYABASI /BUSONGA/531, annexing and marking as "CN 6" a copy of the mutation form dated 2/12/1977. Mwita Marengo became the registered proprietor of LR No. NYABASI /BUSONGA/531 annexing and marking as "CN7" a copy of the original title deed) and "CNB (a) and (b)" copies of searches dated 9/5/1970 and 27/8/1981 respectively. Upon the death of Mwita Marengo, a certificate of confirmation of grant was Issued to Antony Chacha Mwita vide Siaya PMC Succession Cause No. 86 of 2006, annexing and marking as "CN9" a copy of the certificate of confirmation of grant, the land was registered in the names of Antony Chacha Mwita annexing and marking as CN10 (a) a copy of the Application to be registered as proprietor by transmission and "CN 10(b)" a copy of the transfer by personal representative. He pointed out that the suit parcels of land are found on preliminary Index Diagrams PID -map sheets 28 and 29 respectively and that the two map sheets fall along a straight line depicting the international boundary. He annexed and marked as "CN11 (a)" and "CN11 (b) B" are copies of the PID maps.

- 11.** He stated that parcel no LR No NYABASI /BUSONGA/531 which is on map sheet 29 does not border the international boundary,

however parcel nos. NYABASI/BUSONGA/405 NYABASI/BUSONGA/414 and NYABASI /BUSONGA /296 are on the border between Tanzania and Kenya. Further, that parcel LR No NYABASI /BUSONGA 719 does not exist as the same has also been further subdivided and though the original parcel of land LR No. NYABASI /BUSONGA/271 on map sheet 28 is along the Kenya Tanzania border, the boundaries of the said parcel of land do not go beyond the international boundary. He pointed out that the Petitioners have not sought the services of the office of the Land Registrar nor the office of the director of surveys to determine any interference to the original boundaries as required by law before seeking redress in court hence the petition is premature. In the absence of such findings or a report by the land registrar and the surveyor, the extent of interference or loss of land as claimed by the Petitioners cannot be determined.

- 12.** He deponed that the Respondents are not in a position to compensate the Petitioners as the institution mandated to investigate Historical injustices relating to land if at all and to consider and recommend compensation is the National Lands Commission which is not a party in this suit. That nevertheless the issue of compensation does not arise as the Government has not acquired the suit parcels of land nor has it caused the loss of land by the petitioners. He prayed that the petition be dismissed with costs.

### **Petitioners' Supplementary Affidavit**

- 13.** The Petitioners filed a Supplementary Affidavit dated 14<sup>th</sup> April 2025 sworn by Jackson Magoiga Mariba, the 1<sup>st</sup> Petitioner. He deponed that the Respondents' assertion that the petition is incompetent and defective for alleged lack of an affidavit in support of the petition is not true as the petition was supported by his Verifying Affidavit sworn on 29<sup>th</sup> June, 2021. Further, that the

lack of a supporting affidavit would not render the Petition incompetent as the petition contains sufficient details demonstrating the issues that require determination by the Court. The deponent further averred that the assertion that the petition is premature on account of alleged failure by the Petitioners to exhaust available statutory and administrative remedies is not only misconceived but also fails to appreciate the unique constitutional nature and gravity of the issues raised in the petition.

**14.** The deponent averred that there exists no other effective or available avenue through which the violations raised in this petition can be addressed. He urged that the assertion by the Respondents that this petition is time-barred is baseless because the petition does not arise from the land adjudication process that was completed in 1978 but rather from a joint boundary demarcation exercise conducted between March and September 2018 by the Governments of Kenya and Tanzania which involved fresh surveying of the international boundary, erection of new border pillars and re-affirmation or alteration of the previously existing boundaries. It is the re-affirmation and alteration of the existing boundaries that triggered the constitutional violations now complained of.

**15.** The deponent urged that the Respondents have purported to discredit the Petitioners' titles by alleging that the parcels are not first registrations which line of argument is misplaced, as the Petitioners' complaint does not lie in the technicalities of registration but in the actual displacement and dispossession of the Petitioners through the actions of State officers and agencies in a boundary demarcation exercise conducted in 2018, a matter squarely within the realm of constitutional redress. Additionally, that the assertion that the petition is premature for allegedly

failing to first engage the offices of the Land Registrar and the Director of Surveys is unfounded and irrelevant in the peculiar and grave circumstances of this case because the Petitioners are not challenging a mere boundary dispute between private parcels and neither are they seeking routine administrative intervention to correct a surveying error but the Petitioners are challenging the outcome of an intergovernmental international boundary demarcation exercise carried out jointly by the Governments of Kenya and Tanzania in 2018, a political and diplomatic process that led to the displacement of the Petitioners from their suit properties without due process.

### **Petitioners' Submissions**

- 16.** The Petitioners filed submissions dated 16<sup>th</sup> April 2025. Counsel urged that the contention by the Respondents that the court lacks jurisdiction to grant the prayers sought in the petition has no basis and pointed out that the Respondents has previously raised the same objection on jurisdiction and the High Court dealt with the same and delivered a ruling on 26<sup>th</sup> May, 2022. The Respondents did not appeal against that decision and the issue of jurisdiction is now *res judicata*. Further, that the other contention that the petition is fatally defective for lack of supporting affidavit is equally lacking in merit for reasons that the petition is actually supported by the Verifying Affidavit of Tobias Merengo Mariba sworn on 29<sup>th</sup> June, 2021 and, that it is not necessary that a petition must always be supported by an affidavit, citing the holding in *Pharis Ndung'u Chege & 4 Others -vs- The Attorney General & 4 Others* [2018] eKLR, the Environment and Land Court in support of this submission.
- 17.** Counsel urged that the objection founded on the decision of *Anarita Karimi Njeru vs Republic* [1979] KLR has no basis because the Petitioners have given specific and precise details of the

manner in which their constitutional rights to own and keep property have been violated and the remedies they are seeking for the violations are clearly defined. There is no ambiguity or lack of clarity with regard to the violations alleged in the petition. As for the allegation that the petition offends the provisions of Sections 18, 19, 20 and 85 of the Land Registration Act, Counsel urged that these provisions deal with jurisdiction of the Land and Environment Court over disputes relating to boundaries, as between individual land owners. These provisions have nothing to do with determination or alteration of international boundaries between nations, like in the instant case. Further, that the contention that the petition should be supported by technical or expert evidence is not a basis for any valid objection to the petition. In any event, the petition herein is supported by factual and expert evidence by a Land Economist which is contained in the Valuation Report prepared by Adomag Valuers & Associates and dated 24<sup>th</sup> November 2018.

- 18.** Counsel submitted that there are facts which have been proved by the Petitioners to wit; that the Petitioners are all Kenyan Citizens by birth, that the 1<sup>st</sup> to 4<sup>th</sup> Petitioners were at all material times the beneficial owners of the parcel of land comprised in Title No. NYABASI/BUSONGA/719 measuring approximately 6.31 Hectares, as administrators and beneficiaries of the estate of the late Michael Mariba Merengo Mwita; that the 5<sup>th</sup> Petitioner was at the time material to this petition the registered owner of the parcel of land comprised in Title No. NYABASI/BUSONGA/531. Further, that the Government of the Republic of Kenya and the Government of the Republic of Tanzania carried out a joint boundary demarcation/review exercise between March and September 2018 and one of the results of this exercise was that

the suit properties were ceded by the Government of Kenya to form part of the Republic of Tanzania. They stated that they had also established that the Petitioners have, as a consequence of the said boundary review/demarcation, lost the suit properties which now form part of Tanzania; That the suit properties were, as at the time of filing this petition, cumulatively valued at Kshs. 9,989,475/=, inclusive of developments erected and standing thereon.

- 19.** The Petitioners case is that in view of these proved facts, they are aggrieved by the failure by the Respondents to protect their rights to own and keep the suit properties as enshrined under Articles 40, 61 and 64 of the Constitution of Kenya, 2010. They urged the court to grant the prayers cited, placing reliance on the decision from the High Court in India to wit; the case of *Sudhansu Mazumdar & Others -vs- C. S. Jha, Commonwealth Secretary and Other* [AIR 1967 CAL 216].
- 20.** The petitioners urge that they have provided detailed valuation Reports for the suit properties in support of their prayer for compensation to the tune of Kshs. 9,989,475/= in special damages. The Valuation Report by Adomag Valuers & Associates dated 24<sup>th</sup> November 2018 is annexed to the Verifying Affidavit as Exhibit 3. Further, that apart from the special damages, the Petitioners are also entitled to general damages to compensate them for the inconvenience and suffering they have been exposed to from the time they lost their land. They were rendered landless by the Respondents' acts of omissions and commission as from the year 2018 to date. Counsel submitted that an award of Kshs. 5,000,000/= to each of the Petitioners as general damages will be reasonable. They urged the court to allow the Petition with costs.

### **1<sup>st</sup> and 5<sup>th</sup> Respondents' Submissions**

**21.** The 1<sup>st</sup> and 5<sup>th</sup> Respondents submitted that there exists no cause of action against the 5<sup>th</sup> Defendant who acquired a portion of the L.R BUKIRA/BWISABOKA/217 by way of sale just like the Plaintiff as alleged. That the Plaintiff submitted that he acquired the claimed 6 Hectares of land from the beneficiaries of the estate of the late NGOINA MAGASE who had no legal capacity to sell the same yet the law is very clear that any dealing on a deceased person's estate before confirmation of a grant is null and void. They urged that the Suit land herein known as L.R BUKIRA/BWISA80KA/217 is still registered in the names of the late NQOINA MAGABE yet the orders sought for herein can only be issued against the registered owner of the Suit Land hence this matter ought to have been dismissed with cost even before hearing.

**22.** They submitted that this entire suit has no legal leg to stand on since the 1<sup>st</sup> Defendant is not the registered owner of the suit land while the 5<sup>th</sup> Defendant lacks the requisite capacity or locus standi to be sued as he is not the legal administrator of the estate of the late Ngoina Magabe. They reiterated that the orders sought are bogus and baseless since the registered owner of the suit Land is deceased therefore the Plaintiff and the Plaintiffs allegations that he has been in peaceful in an uninterrupted occupation of a portion of the suit land is mischievous, false and an abuse of Court Process. They prayed that the suit be dismissed with costs.

### **Analysis and Determination**

**23.** The Respondents took issue with the form of the Petition, urging that it is fatally incompetent for having a verifying affidavit instead of a supporting affidavit. The Petitioners on their part contended that the same is not a mandatory requirement for the filing of a Petition. Therefore, the first germane issue for

determination is; Whether the Petition meets the threshold for a constitutional petition

**24.** Rule 11 (4) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, also known as the **Mutungu Rules** provides:

**“(1) The petition filed under these rules may be supported by an affidavit.**

**(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”**

**25.** The question that arises, from the above provisions, therefore, is whether the use of a Verifying Affidavit instead of a Supporting Affidavit renders the Petition fatally defective. Noting that the provisions are not couched in mandatory terms, it is my considered view, and guided by the provisions of Article 159(2)(d) of the Constitution to the effect that this court should not rely on technicalities to determine matters over the need to do substantive justice, that the defect is not fatal.

**26.** The purpose of the affidavit is to place before the court or a quasi judicial body or other relevant forum, evidence that the Petitioner may seek to rely upon in the Petition and therefore, to dismiss the Petition on the grounds of the verifying affidavit would be an affront to justice.

**27.** The Court, faced with a similar issue in **Maiyo & another v Attorney General & 6 others (Constitutional Petition 17 of 2022) [2025] KEHC 19093 (KLR) (19 December 2025) (Judgment)** held through Lady Justice E. Ominde as follows;

**“In considering the above cited provisions of the law and more particularly Sub-Rule 4, it is abundantly clear that under the Mutungu Rules, it is envisaged that**

applications such as the one before the court can even be made orally. This in my considered opinion underscores the fact that contrary to the submissions made by Counsel for the Respondents on the need by any such Petitioner to strictly comply with the Rules of procedure in the filing of these kind of Petitions, the contrary is the case and that noncompliance with these rules does not in any way render such a Petition fatally defective.

Further, the Court also takes note of the fact that under the provisions of Rule 11 of the same said Rules, it is not mandatory that such a Petition be supported by an Affidavit by dint of the fact that the operative word as herein underscored is may which then renders the application of the same not mandatory.”

28. Having found that the verifying affidavit is sufficient for the Petition to be sustained, the next issue is whether the it meets the legal threshold. In **Anarita Karimi Njeru vs Republic (1979) eKLR** the court set out the legal threshold for a Constitutional Petition thus;

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

29. The Court of Appeal restated this principle in the case of **Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** as follows:

**“(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1<sup>st</sup> respondent.**

**It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”**

- 30.** The Petitioners set out the Constitutional basis of the Petition in the body of the Petition and adopted the contents as forming part of the affidavit. However, I take issue with this averment as the purpose of an affidavit is to provide a sworn statement of evidence: an affidavit is to present evidence in court as a deposition. Pleadings do not constitute evidence. Evidence constitutes oral testimony which may be supported by

documentary evidence or depositions in affidavits or written witness statements adopted in evidence on oath.

**31.** Therefore, it would have been prudent for the Petitioners to depone to the particulars, as set out in the Petition, with annexures relevant to the actions alleged to have caused a violation of the Petitioners' Constitutional Rights. That notwithstanding, the same is not fatal to the form of the petition.

**32.** In **Khen Kharis Mburu v Inspector General of Police Service & 3 Others [2019] eKLR** the Court held: -

**“One of the cardinal principles in Constitutional litigation is that a party who claims that a right or fundamental freedom has been violated, is being violated or is threatened, must plead with accuracy and precision demonstrating the right violated or infringed, the article of the constitution violated and the jurisdictional basis for it. That is, it is now an established principle of law that anyone who wishes the Court to grant a relief for violation of a right or fundamental freedom must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it.”**

**33.** Other than stating the alleged actions that have resulted in the alleged violations, I have carefully looked at the Petition, the Petitioners have not provided this court with any proof of the alleged joint exercise to freshly demarcate the International boundary between Kenya and Tanzania. The Petitioners leaned towards providing the evidence of the value of the property they allegedly lost due to the alleged actions that resulted in the infringement of their rights, instead of providing the court with proof that the alleged actions occurred. There is a difference

between the two: cause and effect. The Petitioners dwelt on the alleged effect rather than starting with laying the basis through the cause. That is to say, the particulars pertaining the dates of the demarcation are steeped in generalities and therefore lack precision.

**34.** It was upon the Petitioners and not the court to establish the alleged periods of violation. The court cannot determine the period of the alleged violation that the Petitioners allege and further, given the magnitude of such an exercise of demarcating a boundary, it is peculiar that the Petitioners could not provide the court with any documentation or communication by the government on said exercise.

**35.** Needless to say, and this Court took judicial notice of that fact under **Section 60(1)(h)** of the **Evidence Act** that the border between Tanzania and Kenya is known and has not changed in the recent past. The Section provides that, *“The courts shall take judicial notice of the following facts— natural and artificial divisions of time, and geographical divisions of the world, and public holidays.”* The boundary between Kenya and Tanzania is a geographical division of the world. It is known by everybody in the world as to its extent. It was demarcated during colonial times. Moreover, **Article 5** of the **Constitution** provides that, *“Kenya consists of the territory and territorial waters comprising Kenya on the effective date, and any additional territory and territorial waters as defined by an Act of Parliament.”*

**36.** That territory has not been changed or published for change. Therefore, in the event that there was any re-demarcation of the same, there would be some form of evidence available as demarcating international boundaries between countries are matters of international importance.

Any change of the Boundary of Kenya would be a matter of public importance and notice, which would require not only public participation by a national referendum as provided for under **Article 255(1)(b)** of the **Constitution 2010**.

**37.** Further, the Respondents provided evidence that the adjudication of the suit parcels was conducted in 1978 and subsequent sub divisions over the years resulted in the portions that comprise the current suit parcels. In the absence of any evidence from the Petitioners, on the occurrence of the said demarcation, the court is not in a position to determine the alleged violations.

**38.** In **Leonard Otieno v Airtel Kenya Limited [2018] eKLR** it was emphasized that:

**It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”**

**39.** The Supreme Court reiterated the position in **Wamwere & 5 Others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment)** and held:

**66. The two superior courts below were of the unanimous view that a petitioner bears the burden to**

**prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes.**

**40.** Section 107 of the Evidence Act on the burden of proof. The provision stipulates:

**107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**41.** Additionally, Section 109 of the Evidence Act elaborates on the onus of proof by stipulating that:

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

**42.** Other than alleging that there was interference with the original boundaries, the Petitioners have not tendered any evidence on the same. In the Petition, they allege that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents moved into their and marked huge portions of their land indicating the boundary and further, that they wrote to the 4<sup>th</sup> Respondent on 6<sup>th</sup> August 2019 informing him of the infringement of their rights but no evidence was tendered in this regard. At this point I revisit the purpose of the supporting affidavit, which was to enable them present evidence of the actions complained of, which they failed to do and therefore, they

ultimately failing to meet the legal threshold for a Constitutional Petition.

- 43.** The upshot of the foregoing is that the Petition lacks merit and is dismissed in its entirety with costs to the Respondents.

**Judgment dated, signed and delivered virtually via the Teams Platform this 11<sup>th</sup> day of March 2026.**

**HON. DR. IUR F. NYAGAKA**  
**JUDGE**

**In the presence of,**

Mr. Amuga for the Petitioners

Ms. Opiyo State Counsel for the Respondents