

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCLPET NO. E001 OF 2025

MATHEWS ONDIEK CHIAGRA 1ST PETITIONER
SILVANUS OWINO KOY2ND PETITIONER

VERSUS

KCA UNIVERSITY1ST RESPONDENT
NATIONAL LAND COMMISSION2ND RESPONDENT
COUNTY GOVERNMENT OF KISUMU3RD RESPONDENT
MINISTRY OF LAND, PUBLIC WORKS,
HOUSING & URBAN DEVELOPMENT4TH RESPONDENT
DIRECTOR OF SURVEY OF KENYA 5TH RESPONDENT
ATTORNEY GENERAL6TH RESPONDENT

J U D G E M E N T

1. The Petitioners approached the court vide the amended petition dated 12th June, 2025, seeking orders of;
 - a. A declaration be issued that the petitioner’s rights, individually and in association with other members of the family/Kanyakwar community to property as guaranteed in Articles 40, 50 & 63 of the Constitution of Kenya 2010 and in Section 75 of the former

Constitution of Kenya was infringed by the 3rd Respondents' action in allocation part of the Petitioners land situated at Kanyakwar Kisumu town to the Paramount Investment Ltd Respondent and in issuing development plans thereon.

b. A declaration be and is hereby issued that the Petitioners' rights, individually and in association with other members of the family/Kanyakwar Community to property as guaranteed in Articles 40, 50 & 63 of the Constitution of Kenya 2010 and in section 75 of the former Constitution of Kenya was infringed by the 2nd, 3rd and 4th Respondents' action in allocation of part of the Petitioners land situated at Kanyakwar Kisumu town to TROPICAL INSTITUTE OF COMMUNITY HEALTH AND DEVELOPMENT TRUST and in issuing title and Land Reference Number 24810.

c. A declaration be and is hereby issued that the 1st Respondent does not have a valid title and did not acquire a good title to the suit property known and referenced as KISUMU LR 24810, also known as KISUMU LR 33887.

- d. A declaration be and is hereby issued that all the parcels of land situated at Kanyakwar area in Kisumu County belong to the Petitioners and their family to the exclusion of the 1st, 2nd, and 3rd Respondents.
- e. An order of Certiorari be and is hereby issued quashing the allocation by the 3rd Respondent to Paramount Investment Ltd of the portion of land known and referenced as Unadjudicated Community Ancestral Land of the People of Kanyakwar Community, also known as Kisumu Municipality PDP NO. N9/98/73 situated at Kanyakwar in Kisumu County, forming part of the Petitioners' and people of Kanyakwar land.
- f. An order of Certiorari be and is hereby issued quashing the allocation by the 2nd, 3rd and 4th Respondents to TROPICAL INSTITUTION OF COMMUNITY HEALTH AND DEVELOPMENT TRUST land known and referenced as KISUMU LR 24810, also known as KISUMU LR 33887, situated at Kanyakwar in Kisumu County, forming part of the Petitioners' and people of Kanyakwar land.

- g. An order of Certiorari be and is hereby issued quashing the allocation by the 2nd, 3rd, and 4th Respondents to the 1st Respondent and subsequent issue of title to land known and referenced as KISUMU LR 24810, also known as KISUMU LR 33887, situated at Kanyakwar in Kisumu County, forming part of the Petitioners' and people of Kanyakwar land.
- h. An order of vacant possession of the said portion of land and the eviction therefrom of the 1st Respondents.
- i. Costs of the Petition be provided for.
- j. Any other order that this Honourable Court may deem fit and just in the circumstances.

2. The Petitioners' case is that in 1976, the government, through the District Commissioner, issued a notice of intention to acquire land under the then Constitutional provisions and the Trust Land Act, now repealed, vide Gazette Notice No.3400, wherein the Kanyakwar Community was invited for compensation. That a land valuation that was conducted was flawed and only served the government's interest and not the interests of the rightful land owners. That subsequently the

land was not distributed equitably, but instead it was handed over to political loyalists and senior government officials. That the Municipal Council conducted yet another round of fraudulent balloting allocating the land to politicians and Municipal staff, hence sealing the fate of the Kanyakwar people.

3. The Petitioners complain that the 1st Respondent is unlawfully and forcefully trespassing and encroaching and laying claim over unadjudicated Community ancestral Trust Land of the people of Kanyakwar Community known as KISUMU MUNICIPALITY PDP NO.N9/98/73 vide a title known as KISUMU LR 24810/KISUMU LR 33887. That the 1st Respondent has commenced an unlawful eviction process, having served the Petitioners with a notice dated 8th July, 2024. That the 1st Respondent and its agents continue to cause gross violation of the constitutional rights of the people of Kanyakwar Community.

4. The Petitioners further claimed that the government did not compensate them as per the Gazette Notice No.3400 of 1976. That Gazette Notice No3400 was never implemented, and the intended parcels of land were never transferred to Kisumu

County Council, and that the same never remained the property of the Kenyan government. The Petitioners pleaded that their constitutional rights to property under Article 40 and right not to be treated in a cruel and degrading manner under article 29(1) and 29(f) have been violated. The Petitioners, therefore, sought the court's intervention.

5. The 1st Respondent opposed the application vide the contents of the Replying Affidavit sworn by Michael Ingutia on 25th September, 2025, and the annexures thereto. The case of the 1st Respondent is that it acquired a good and competent title in respect of the suit land from Tropical Institute of Community Health. That the Petitioners lack the capacity to lay claim over a community land without authority from its members; hence, the petition was incompetently lodged and unworthy of consideration. That the 1st Respondent effectively purchased the suit land from the Tropical Institute of Community Health and Development Trust and is a bona fide purchaser for value, and that no collusion on the title was made between the 1st and 3rd Respondents.

6. The 1st Respondent averred that in 2016, the 1st Respondent filed a suit against persons who were on the property to be

declared trespassers and for vacant possession, which case was consolidated with KISUMU CMC ELC NO.101 OF 2010 and KISUMU ELC NO.E11 OF 2020. That parties entered into a consent which was adopted as an order of the court on 6th December, 2023 vide which parties agreed that all claims regarding the suit land be relinquished and the land be vacated immediately failure to which forceful eviction would commence and the 1st Respondent to pay an all inclusive sum of Kshs.7,000,000/- in full settlement of the consolidated sum which sum the 1st Respondent paid in full. That the petition is an attempt to reopen the case.

7. The 1st Respondent averred further that due to incessant incidences of trespass, it became necessary for the 1st Respondent to identify the beacons and immediately commence fencing of the property. That later, due to the survey process, the registration number of the suit land, namely LR 24810, changed to LR NO.33887, which measures 6.408Ha, as the 1st Respondent had to cede a portion of the land that overlapped with adjacent land and a road reserve. The 1st Respondent urged the court to dismiss the petition with costs to the 1st Respondent.

8. The 2nd Respondent also opposed the petition vide the Replying Affidavit sworn by Brian A. Ikol on 22nd September, 2025. The 2nd Respondent denied the claim in the petition. It challenged the Petitioners' capacity to bring the petition for lack of authority to sue from the members of the Kanyakwar Community. It averred that the prayer to have allocation of land to Tropical Institute of Community Health and Development quashed without the said organization being a party in the petition and being heard amounts to an injustice. That a determination on the historical injustices was made by the 2nd Respondent in 2019. And that this matter has already been heard by the 2nd Respondent under the provisions of section 15 of the National Land Commission Act. That there has to be finality to suits. The 2nd Respondent prayed for the costs of the petition.

9. The 3rd Respondent filed no response to the petition.

10. The 4th, 5th and 6th Respondents opposed the petition vide the grounds of opposition dated 1st July, 2025 filed by the Attorney General. It was their case that the Petitioners have not demonstrated that they have exhausted the alternative dispute resolution mechanisms available under the National

Land Commission Act No.5 of 2012, that the Petitioners have not proven ancestral rights, historical ownership or customary tenure over the parcels in question, that the allocation of the land was done within the legal confines and that the allegation of irregularity has not been substantiated, and that the Petitioners have not established the irregular or procedural impropriety attributed to the 4th, 5th and 6th Respondents.

They sought that the petition be dismissed.

Submissions

11. The petition was heard by way of Affidavit evidence and written submissions. The Petitioners filed an undated document titled " Response to the 1st, 2nd and 6th Respondents" as submissions, and the 1st Respondent filed written submissions dated 24th November, 2025, through the firm of Prof. Ojienda & Associates. The other parties in the matter filed no submissions.

Issues for Determination

12. From the pleadings and Affidavit evince filed and the submissions made, the following emerge as the issues for determination;

- (a) Whether or not the Petitioners have the capacity to sue on behalf of the People of the Kanyakwar Community.
- (b) Whether the Petitioners have any valid claim over the suit property,
- (c) Whether the Petition is *res judicata*,
- (d) Whether the 1st Respondent has a good title over the suit property.
- (e) Costs.

Analysis and Determination

13. The first issue for determination is whether or not the Petitioners have the capacity to sue on behalf of the People of Kanyakwar Community. The heading of the amended petition shows that the petition concerned the matter of Land Historical Injustices of the people of the Kanyakwar Community. The Petitioners, as part of the background of the petition, narrated in paragraphs 33 to 40 of the petition what they term as historical land injustices against the people of Kanyakwar Community and concluded that the people of Kanyakwar Community remain steadfast in their demand for justice. Their claim against the 1st Respondent was based on

alleged unlawful and forceful trespass or encroachment of the 1st Respondent onto a land that they described as unadjudicated community ancestral trust land of the people of Kanyakwar Community.

14. It was submitted on behalf of the 1st Respondent that the Petitioners lacks locus standi to lay a claim over the suit property as individuals without the authority of the members of the Kanyakwar Community. Counsel relied *inter alia* on the authority of *Kitelo & 2 Others (suing as representatives of Ogiek/Ndorobo Community of Mr. Elgon -vs- County Government of Bungoma & Another [2022] KEELC 4901 (KLR)* and submitted that the following elements must be shown in order for one to enjoy locus standi in such a case namely; that the Petitioners are members of the community, that they must have served as representatives during adjudication and that they have the authority from the members to act on their behalf. Counsel submitted that in the present case, the Petitioners fail to meet this test as they exhibited no authority to act on behalf of the People of Kanyakwar Community.

15. On behalf of the 2nd Respondent it was deposed to in paragraph 4 of the Replying Affidavit that although the

petition was phrased as though representing the entire Kanyakwar community members, the said members have not signed any authority to act or request for their representation in this petition. That the members of people of Kanyakwar Community remain undisclosed.

16. The Petitioners in the undated document filed by the 1st Petitioner in person and titled “1st Petitioner’s response in response to 1st, 2nd and 6th Respondents” claimed that he brought the petition on his own behalf and as a son and family member of the late Mzee Chiagra Atago, who lived in Kanyakwar.

17. I have carefully perused all documents placed before the court in this matter. I find no evidence of any authority by the People of Kanyakwar Community to the Petitioners, authorizing them to bring the petition. There is no evidence of who the People of Kanyakwar Community are. The law has provided ways for various categories of litigants to approach the court. A party that comes to the court seeking the enforcement of private rights on behalf of another party must demonstrate that he/she has the authority of the other to do so. I find that the petitioners in the present petition, who seek

recovery of land and enforcement of individual land rights on behalf of the People of Kanyakwar Community, lack the locus standi to bring the petition.

18. The second issue for determination is whether or not the Petitioners have any valid claim over the suit property. The Petitioners claimed in the amended petition that their rights to property and the rights of the People of Kanyakwar Community to the suit land have been violated by the Respondents. The basis of the claim is that the suit land was unlawfully taken from them, that they have not been compensated for the land, and that the 1st Respondent has unlawfully and forcefully trespassed or encroached onto the land. The 1st Petitioner stated in the response to the 1st, 2nd, and 6th Respondents that the land he and his community claim had neither been adjudicated nor acquired compulsorily by the government so as to allow the government to issue grants under any law against his interest and the interest of his family and community.
19. It was the case of the 4th, 5th, and 6th Respondents that the Petitioners had not proven ancestral rights, historical ownership, or customary tenure over the property in question.

That the allegation of irregular allocation of the land had not been demonstrated.

20. On behalf of the 2nd Respondent, it was deposed in the Replying Affidavit that the Petitioners did not establish the approximate acreage of the part of the land that they claim. That their claim was confusing as to whether the land claimed was allocated to the Respondents, the Tropical Institute of Community Health and Development Trust, or Paramount Investment Limited. In paragraph 41 of the petition, the Petitioners claim that they and their ancestors had been residing on unadjudicated community ancestral trust land of the people of the Kanyakwar Community for more than 7 decades vide a title known and referenced as KISUMU LR 24810/KISUMU LR 33887.

21. I, however, find no evidence in the documents presented before the court by the petitioners that connects them, their families, or their community to the suit land. The documents filed by the 2nd Respondent show that the National Land Commission heard the claim by inter alia Kanyakwar Kogolla clan, who complained that they were evicted from their land in the year 1978 to pave the way for the expansion of the

town without any form of compensation. One of the documents attached to the 2nd Respondent's Replying Affidavit is a copy of Kenya Gazette Notice No. 6863 dated 17th July 2017 containing a report of public hearings of land disputes in Kisumu, one of them being in regard to the Kisumu/Kanyakwar area. It shows that the Commission heard a dispute brought by the Kanyakwar Kogolla clan concerning illegal acquisition of their land. Some of the findings of the Commission were that the Kanyakwar Kogolla clan and other groups, who also had similar disputes, had no claim on the land. The Commission recommended that they pursue their claim under section 15 of the National Land Commission Act as a Historical Injustice. The document shows that the Commission ordered the individuals or groups who had invaded the Kanyakwar land to vacate the properties with immediate effect.

I find that in view of these findings by the 2nd Respondent and in the absence of any evidence connecting the Petitioners herein, who claim to be acting on behalf of the Kanyakwar community, to the suit land, the Petitioners have no valid claim to the suit land.

22. The next issue for determination is whether or not the petitioners' claim is res judicata. The 1st and 2nd Respondents have referred the court to previous litigations and the determinations thereof. These include the determinations done by the 2nd Respondent as contained in Kenya Gazette Notice No. 6863 dated 17th July 2017, and the court cases numbers KISUMU CMCEL CASE NO. 101 OF 2017 and KISUMU ELC NO E11 OF 2020, which, according to the 1st Respondent, were consolidated and determined vide the consent order dated 6/12/2023. The existence of the previous litigation and the determination thereof, and the fact that they related to the suit land herein and the claim by or on behalf of the Kanyakwar Community has not been denied by the petitioners.

As held in *ET vs A-G & another (2012) eKLR*, relied on by the 1st Respondent, the petitioners herein are trying to bring the same action which has been determined, and this contravenes the doctrine of res judicata as contained in section 7 of the Civil Procedure Act.

In view of the previous litigation and determinations concerning the claim by Kanyakwar Community over the suit

land, I find that the petition herein is res judicata. The Petitioners ought to pursue the avenue provided by the 2nd Respondent under sections 14 and 15 of the National Land Commission Act if they have not yet done so.

23. On whether or not the 1st Respondent has a good title to the suit land, the 1st Respondent has explained the root of its title to the suit land. It has in its possession documents of ownership thereof. It produced the land sale agreement dated 31/10/2006, the certificate of title dated 28/8/2025, and the Lease dated 31/7/2025, among other documents. The 1st Respondent has referred the court to previous court determinations, vide which people who had invaded the land consented to move out of the land after the 1st Respondent paid an agreed amount of Kshs.7,000,000/.

I find that the 1st Respondent has a good title to the suit land and its right to land is entitled to protection pursuant to Article 40 of the Constitution.

24. Regarding costs of the petition, under section 27 of the Civil Procedure Act, costs follow the event.

Conclusion

25. Based on the determinations herein namely; that the Petitioners lack locus standi to bring the petition; that the suit is res judicata and that even when considered on merit, the Petitioners have not demonstrated that they have any valid claim over the suit land, and that the 1st Respondent has a good title to the suit land, the court finds that the Petitioners have not proved their claim on a balance of probabilities.

26. The claim as presented vide the amended petition is hereby dismissed. Costs are awarded to the 1st, 2nd, 4th, 5th, and 6th Respondents.

Orders accordingly.

Judgment dated and signed at Kisumu and delivered virtually this 24th day of March, 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

1st Petitioner present in person.

Ochieng h/b for Prof Ojienda Sc for the 1st Respondent

Kithunka for the 2nd Respondent.

Otieno Aluoka for the 3rd Respondent.

Juma for the 4th, 5th, and 6th Respondents.