



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC PETITION CASE NO. 04 OF 2018**

BARUA GITUMA.....1<sup>ST</sup> PETITIONER

GERRAD NJAGI MATUMO.....2<sup>ND</sup> PETITIONER

JOSEPH MUTUGI KAMWARA.....3<sup>RD</sup> PETITIONER

DELYINO MPANDA KATHENYA.....4<sup>TH</sup> PETITIONER

MISHECK MITUGO KAMWARA.....5<sup>TH</sup> PETITIONER

M'KUNGANIA MURAUKO.....6<sup>TH</sup> PETITIONER

MBAE MUCHEGE.....7<sup>TH</sup> PETITIONER

AND

THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF LANDS AND PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT

THE DISTRICT LAND ADJUDICATION OFFICER,

THARAKA NITHI COUNTY.....3<sup>RD</sup> RESPONDENT

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

VERSUS

MUGAO NJAGI

MUTUGI M'IKIARA

KAUMBUTHU GATA MUCHENGE

CINGAU KIARA

ROBERT NJERU KAMWARO

PETER KOINANGE

MURIUNGI KIARA

**ANDIRIANO MUGWIRIA**

**PARIS MBIJIWE**

**DANIEL MUCEE KARUNGI & 123 OTHERS... ..INTERESTED PARTIES**

**JUDGMENT**

1. This Petition is reproduced in full herebelow and is pasted without any alterations whatsoever, including correction of spelling or any other mistakes:

**PETITION**

To:

The High Court of Kenya

The humble petition of **the petitioners above-named** is as follows:-

**A. THE PARTIES**

1. The Petitioners are adult male residents of Gakurungu Sub location in Tharaka Nithi County, who fall under Tunyai “B” Adjudication Section. The petitioners’ address of service for the purposes of these proceedings shall be care of Jesse Mwiti Advocates, C/o Mutembei Chabari & Company, The Pearl Place, 1<sup>st</sup> Floor, Room 114, Next to Batian Hotel, P. O. Box 1365-10400, Nanyuki.
2. The first respondent is a constitutional body established by Article 67 of the Constitution and responsible for land administration in Kenya.
3. The second respondent is the Cabinet Secretary, Ministry of Lands and Physical Planning and who is responsible for matters relating to land.
4. The third respondent is the District Land Adjudication Officer, Tharaka Nithi County who is responsible for land adjudication within the County.
5. The fourth respondent is the Chief Government advisor and is sued in these proceedings in that capacity.

**B. FACTS CONSTITUTING THE CASE**

6. The relevant facts of this petition are set out in the affidavit of BARUA GITUMA filed herein.
7. It is however useful to set out the background as a foundation for setting out the grounds upon which reliefs are sought.
8. The Petitioners are true residents of Gakurungu Sub Location and they bring this petition on their own behalf and on behalf of over 400 other residents of the so called Tunyai “B” Adjudication Section.
9. The petitioners and all the other residents of Gakurungu Sub Location have lived in Gakurungu Sub Location all their lives together with their families. This is the only place they know and call home.
10. All the land in Tunyai “B” Adjudication Section is clan land owned by Ukujiu Clan, Nyaaga Clan, Kanjogu Clan and Kithuri Clan.
11. All the residents of Tunyai “B” Adjudication Section lived together in peace and harmony until sometimes in the 1990’s when a land adjudication process was conducted in the area.
12. The adjudication process was flawed and resulted to non-local residents being granted land and were issued with title deeds to land owned by the local residents of the area.
13. In other instances land owned by a particular family was subdivided and other residents who are not family members were brought in thereby displacing and dispossessing the family members.
14. Due to the nature and the manner in which the adjudication process was conducted, the residents were aggrieved and disputed the process.
15. This is more particularly because no enquiry was made of the residents’ rights, possession and occupation of the land at the time the adjudication process was conducted.
16. As a result of this disputed land adjudication process the residents have made several complaints to the relevant Government offices regarding the flawed land adjudication process and the injustice meted to the residents leading to dispossession of their ancestral land.

17. The residents who are the persons in actual occupation and possession were dispossessed of their ancestral land and the same was granted to non-local residents.

18. The non-local residents who were granted title deeds are constantly harassing and intimidating the petitioners and the other residents with the sole aim of coercing the residents to surrender their ancestral land.

19. No enquiry was made of the petitioners' rights, possession and occupation of the land at the time the non-locals were issued with title deeds by virtue of the flawed land adjudication process.

20. The petitioners' and the other residents had an overriding interest over their ancestral land being the persons in possession and actual occupation pursuant to Section 30 (g) of the Registered Land Act Cap 300(repealed) which was the law applicable at the time of the adjudication.

21. The residents have made several complaints to the relevant Government offices regarding the flawed land adjudication process and the injustice meted to the residents which resulted to dispossession of their ancestral land.

22. In the year 2016 the National Land Commission upon receipt of the various complaints made by the residents and upon holding several discussions on the matter the commission found and held that adjudication process was totally flawed as land was allocated to non-locals therefore dispossessing the true owners.

23. Consequently the commission made among others the following recommendations:-

a. That as per the Land Laws (Amendment) Act of 2016, this scheme qualifies as a historical injustice meted to the people of the subject area.

b. Similarly according to Section 160 (2) (e) (iii) of the Land Act of 2012, the so called adjudicated lands were given to absentee landlords and are eligible for reallocation to the present occupants.

c. Recall and revoke all the titles already issued within 4 weeks from today after subjecting them to public reviews.

d. After revocation of the titles that were illegally issued a fresh re-adjudication of the area be declared and proper allocation be done as per the occupation of land by the local residents.

24. The above recommendations of the National Land Commission of 23<sup>rd</sup> November 2016 have not been acted upon and the residents (sic) of continue to suffer land injustice as they are in constant harassment by the absentee landlords including facing both criminal and civil cases with a view to force them to surrender their ancestral land.

25. The residents stand to suffer irreparably if the adjudication dispute is not resolved as they will lose their ancestral land, their only source of livelihood and where they live with their families.

### **C. GROUNDS FOR THE PETITION**

26. Article 19 of the Constitution of Kenya provides as follows:

*(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies*

*(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.* (emphasis added)

*(3) The rights and fundamental freedoms in the Bill of Rights:*

*(a) belong to each individual and are not granted by the state;*

*(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this chapter; and*

*(c) are subject only to the limitations contemplated in this Constitution.*

27. Article 20 of the Constitution of Kenya provides as follows:

*(1) The Bill of Rights applies to all law and binds all State organs and all persons* (emphasis added).

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. (emphasis added).

(3) In applying a provision of the Bill of Rights, a court shall

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom. (emphasis added).

28. Article 21 (1) of the Constitution of Kenya provides as follows:

*It is a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*

29. Article 23 grants the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The court has jurisdiction to grant appropriate relief including those set out at sub article 3 thereof.

30. Article 27 of the Constitution of Kenya provides that:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(4) The State shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) (Emphasis added)

31. The petitioner's right protected by Article 27 has been infringed in that they have been discriminated upon following a fraudulent land adjudication process which had the effect of dispossessing them of their ancestral land in favour of non-local absentee landlords.

32. Article 47 of the Constitution provides in part as follows:

(1) Every person has the right to administrative action that is **expeditious, efficient, lawful, reasonable and procedurally fair.**

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action

33. Petitioner's rights under Article 47 of the Constitution have been infringed in that:

a. The land adjudication process conducted in Gakurungu Sub Location, the so called Tunyai "B" Adjudication Section was fraudulent with the aim of dispossessing the residents of their ancestral land.

b. No inquiry was made of the residents' rights, possession and occupation of the land prior to the flawed adjudication process which led to the dispossession of the residents' ancestral land. This constituted a breach of the principles of natural justice.

c. The third respondent's actions of conducting a flawed adjudication process was discriminatory upon the residents who are in possession and actual occupation by dispossessing them of their ancestral land in favour of absentee landlords.

d. The predecessor of the first respondent acted in an unfair and discriminatory manner in issuing title deeds to absentee landlords without considering the residents' rights and occupation of the land.

e. The first and second respondents acted unreasonably and unfairly by failing to act on the recommendations of the National Land Commission contained in the letter of 23<sup>rd</sup> November 2016.

f. The actions of the respondents are unreasonable in that had they considered the adverse effects such as the loss of the residents' land and as such the residents' loss of livelihood they would not have acted in the manner they did.

34. The negative effect of the respondents' actions is an infringement of the petitioner's right to own and acquire property as protected by Article 40 of the Constitution.

35. The petitioners' legitimate expectation has been breached in that,

a. The petitioners had a legitimate expectation that the land adjudication process conducted by the third respondent would be fair and reasonable.

b. The petitioners had a legitimate expectation that the predecessor of the first respondent would issue title deeds to the true residents of Tunyai "B" Adjudication Section based on actual occupation and that no title deeds would be issued to non-local absentee landlords.

c. The petitioners had a legitimate expectation that the respondents would act on the first respondent's recommendations contained in the letter of 23<sup>rd</sup> November 2016.

d. The petitioners had a legitimate expectation that the adjudication process would be fair and that the third respondent would act in the best interest of the residents to promote peace and harmony in the area.

#### **YOUR PETITIONERS THEREFORE HUMBLY PRAYS FOR THE FOLLOWING RELIEFS**

1. A declaration that the Land Adjudication process conducted in Gakurungu Sub Location in the so called Tunyai "B" Adjudication Section was fraudulent, illegal, null and void ab initio.

2. A declaration that the fraudulent Land Adjudication process conducted in Gakurungu Sub Location in the so called Tunyai "B" Adjudication Section is an infringement of the petitioners' rights under Articles 27, 40 and 47 of the Constitution.

3. An order for judicial review by way of an order of mandamus to compel the first respondent to recall all the title deeds issued in Gakurungu Sub Location, the so called Tunyai "B" Adjudication Section and thereby revoke or cancel the same.

4. An order for judicial review by way of an order of mandamus to compel the respondents to conduct a fresh and proper land re-adjudication process in Gakurungu Sub Location, the so called Tunyai "B" Adjudication Section which process should include identifying the true local residents and their actual occupation of land and there after issue fresh title deeds to the true local residents as per their land occupation.

5. Costs be awarded to the petitioners.

DATED at Nanyuki this 21<sup>st</sup> day of September, 2018.

#### **JESSE MWITI ADVOCATES**

##### **Advocates for the Petitioners**

2. Authority, dated **21<sup>st</sup> September, 2018**, has been filed for the 1<sup>st</sup> Petitioner to sign an affidavit on behalf of the others.

3. The affidavit filed by the 1<sup>st</sup> Petitioner is reproduced in full herebelow and is pasted without any alterations whatsoever, including correction of spelling or any other mistakes:

##### **AFFIDAVIT**

I, **BARUA GITUMA** a resident of Gakurungu Sub Location in Tharaka Nithi County and care of P.O Box 1365-10400 Nanyuki make oath and state as follows:-

1. I am the first petitioner herein well versed with the facts of this case. I have the authority of my co-petitioners to swear this affidavit. A copy of the authority is at page 1 and 2 of the exhibit annexed to this affidavit. ("hereinafter the exhibit").

2. My co-petitioners and I are true local residents of Gakurungu Sub Location, the so called Tunyai "B" Adjudication Section and we bring this petition on our own behalf and on behalf of over 400 other residents. A copy of the list of the residents who have authorised us to bring this petition is at pages 3 to 17 of the exhibit.

3. All the land in Tunyai "B" Adjudication Section is clan land and is owned by Ukujiu Clan, Nyaaga Clan, Kanjogu Clan and Kithuri Clan.

4. All the residents of Tunyai "B" Adjudication Section lived together in peace and harmony until sometimes in the 1980's when a land adjudication process was conducted in the area.

5. The adjudication process was flawed and resulted to non-local residents being granted land and were issued with title deeds to land owned

by the local residents of the area.

6. In other instances land owned by a particular family was subdivided and other residents who are not family members were brought in thereby displacing and dispossessing the family members.

7. Due to the nature and the manner in which the adjudication process was conducted, the residents were aggrieved and disputed the process.

8. This is more particularly because no enquiry was made of the residents' rights, possession and occupation of the land at the time the adjudication process was conducted.

9. As a result of this disputed land adjudication process the residents have made several complaints to the relevant Government offices regarding the flawed land adjudication process and the injustice meted to the residents leading to dispossession of our ancestral land. Attached hereto at pages 18 to 33 of the exhibit are documents in respect of various complaints made by the residents.

10. By a letter dated 6<sup>th</sup> October 2016 (page 34 of the exhibit) the then area Member of Parliament Hon. Alex M.M. Mwiru wrote to the National Land Commission requesting the Commission to intervene and investigate the residents' complaints regarding the adjudication process.

11. In the same year, 2016 the National Land Commission upon receipt of the various complaints made by the residents and upon holding several discussions on the matter, the commission found and held that the adjudication process was totally flawed as land was allocated to non-locals therefore dispossessing the true owners.

12. Consequently by the letter dated 23<sup>rd</sup> November 2016 (pages 35 to 37) of the exhibit the commission made among others the following recommendations:-

a. That as per the Land Laws (Amendment) Act of 2016, this scheme qualifies as a historical injustice meted to the people of the subject area.

b. Similarly according to Section 160 (2) (e) (iii) of the Land Act of 2012, the so called adjudicated lands were given to absentee landlords and are eligible for reallocation to the present occupants.

c. Recall and revoke all the titles already issued within 4 weeks from today after subjecting them to public reviews.

d. After revocation of the titles that were illegally issued a fresh re-adjudication of the area be declared and proper allocation be done as per the occupation of land by the local residents.

13. The above recommendations of the National Land Commission of 23<sup>rd</sup> November 2016 have not been acted upon and the residents of continue to suffer land injustice as they are in constant harassment by the absentee landlords who were allocated land in the area including facing both criminal and civil cases with a view to force them to surrender their ancestral land. A copy of a charge sheet from Marimanti Law Courts is at pages 38 and 39 of the exhibit while a copy of a plaint issued from Chuka Law Courts is at pages 40 to 42 of the exhibit.

14. By a letter dated 5<sup>th</sup> January 2018 (pages 43 and 44) of the exhibit our advocate enquired from the National Land Commission what steps the commission was taking towards implementing the recommendations of 23<sup>rd</sup> November 2016. No response was received to this letter.

15. By another letter dated 4<sup>th</sup> June 2018 (page 45 and 46) of the exhibit, Hon. George Gitonga Murugara the sitting area Member of Parliament enquired from the National Land Commission what steps the commission was taking to resolve the issues in dispute.

16. Despite the correspondence referred to above, the adjudication dispute has not been resolved.

17. The residents stand to suffer irreparably if the dispute is not resolved as they will lose their ancestral land which is their only source of livelihood and where they live with their families.

18. I am advised by Jesse Mwitii our advocate on record which advise I verily believe to be true that the adjudication process is improper, unlawful and unconstitutional in that:

a. It is discriminatory to the petitioners and the other residents of Gakurungu Sub Location.

b. The adjudication process was unfair and conducted in contravention of the principles of natural justice.

c. Relevant considerations were not taken into account during the adjudication process.

d. The adjudication process was conducted in breach of the residents' legitimate expectation in that residents believed that the adjudication process would be fair taking into account the residents' possession and actual occupation of land and that they would be issued with title deeds for the land they are in actual occupation.

e. The adjudication process was conducted irrationally and unreasonably in granting land owned by residents to non-local residents who are absentee landlords.

f. The flawed adjudication process was conducted in violation of the petitioner's rights protected by the Bill of Rights under the Constitution.

19. The petitioners are apprehensive that unless the orders sought herein are granted the residents will be dispossessed of their land to the great detriment of the petitioners and the residents. The petitioners are thus left exposed and it is fair and just that the orders herein sought be granted.

20. I verily believe that the petitioners have established a strong case and sufficient reasons for the court to grant the petitioners the orders sought herein.

21. There is now produced the exhibit marked "BG1".

22. Save where the source of my information otherwise appears, the facts deponed to herein are within my knowledge and are true.

4. The Attorney General filed Grounds of Opposition dated **13<sup>th</sup> November, 2018** which are reproduced in full herebelow and are pasted without any alterations whatsoever, including correction of spelling or any other mistakes:

### **GROUND OF OPPOSITION**

TAKE NOTICE that the 2<sup>nd</sup> – 4<sup>th</sup> Respondents shall at the hearing of the Petition dated 21<sup>st</sup> September, 2018 oppose the same on the following grounds, that:

1. The petitioners have been extremely indolent in filing this petition which cause of action arose sometime in the 1980's.
2. The petition is too general, lacks specificity and likely to confuse issues for the following reasons;
  - a. The adjudication process relates to specific suit parcels being transitioned to registered land.
  - b. The petitioners have not shown their respective suit parcels.
  - c. The petitioners have not demonstrated how the land adjudication/consolidation act processes negatively impacted on their interests.
  - d. Further it has not been demonstrated which processes they engaged in with regard to their individual interest and the outcome.
3. The petitioner is likely to cause administrative chaos as it seeks to unravel processes concluded decades ago and as such the orders sought are not the most efficacious.
4. The area in question relate (sic) to registered land/titles which have not been impeached through a proper judicial process.
5. The petitioner's locus to file this petition is mischievous and questionable as it is not known whether they seek to enforce communal land rights or individual interest.
6. That in the event its evident (through pleadings) that communal land is being enforced, there is no proof/evidence of being members of respective clans.
7. The petition is a non-starter and an abuse of court process.

**Dated at Meru this 13<sup>th</sup> day of November, 2018.**

**E.K. KIETI**

**SENIOR LITIGATION CUNSEL**

**FOR: HON. ATTORNEY GENERAL**

5. The Interested Parties on **4<sup>th</sup> February, 2019** filed an authority allowing Andiriano Mugwiria and Robert Njeru Kamwaro to sign all pleadings on their behalf.

6. The replying affidavit sworn on **4<sup>th</sup> February, 2019** by Andriano Mugwiria is reproduced in full herebelow and is pasted without any alterations whatsoever, including correction of spelling or any other mistakes:

**REPLYING AFFIDAVIT TO THE PETITION DATED 21/9/2018**

I, ANDRIANO MUGWIRIA of P.O BOX 2475 MERU do hereby make oath and solemnly state as follows:-

1. THAT I am an adult male of sound mind and one of the interested parties in this petition and with authority of my fellow interested parties to swear this affidavit. A copy of the authority is attached and marked as annexed as exhibit No." A.M 1"
2. THAT I swear this affidavit in response to the petition dated 21<sup>st</sup> September 2018 which I oppose strenuously.
3. THAT my fellow interested parties herein and I hail from Gakurungu sub location in TUNYAI "B" ADJUDICATION SECTION and own land parcels therein and therefore are interested in the outcome of this petition since it will affect them.
4. THAT I was among the committee members appointed during the land Adjudication Process conducted in Gakurungu sub location within TUNYAI "B" Adjudication Section and therefore well versed with this process and facts thereto. Annexed herein and marked A.M. 2 is a copy of letter of appointment of committee members .
5. THAT contrary to the petitioners allegations the Land Adjudication process conducted in Gakurungu sub location in the so called TUNYAI "B" Adjudication section was properly and legally done as per the requirements of the Land Adjudication Act Cap 284 Laws of Kenya since even an adjudication committee comprising of members of the claims (sic) living in the area namely Kanjogu- Mbao Clan, Kithuri Clan, Nyaaga Clan and Ukuujiu Clan ( attached and marked A.M.1 3 is a letters dated 27<sup>th</sup> April 1988 being Notice of Establishment of an Adjudication Section .
6. THAT further contrary to the petitioners allegations, the land Adjudication process in Gikurungu sublocation in the so called TUNYAI "B" Adjudication was all inclusive and it took along time to conclude so that the rights of the inhabitants could be protected.
7. THAT the reason why TUNYAI "B" Adjudication Section was not subdivided under the settlement scheme like the case of TUNYAI "A" and MITUNGUU settlement scheme is that the resident clans objected to the PROVINCIAL COMMISSIONER and District Commissioners then ELIUD MAHIHU and JOSEPH KANGETHE by way of writing a letter to them and explaining to them it was their area where they grazed (sic) their cattle and the government therefore reserved the area for the four clans namely NYAAGA, UKUUIJU, KITHURI and KANJUGU MBAO which had complained.
8. THAT at around 1976 as a result of population growth and the number of the cattle reducing the clan elders started consulting and discussing the essence of converting Communal Land ownership to individual land ownership which members and non members living within that section agreeing (sic) on individualization of the land.
9. THAT in 1982 four clans reported to the then District officer of South Tharaka Division a Mr. MORAYA that they were willing and ready to subdivide their land to individuals and the D.O gave them consent and he organized a meeting (Baraza) at Tunyai sublocation where he announced the said request to members of the public and following the collective agreement by all people he ordered that every clan to elect a 17 committee of 17 members which was done by the four clans.
10. THAT in 1983 the D.C (Mr. Were) convened a meeting at Tunyai sublocation and directed every clan to prepare a list of all people living within their section and submit it back to him which was done and after getting the list he convened meetings on every clans section and reading the people listed and requesting that whoever was not written to make it known so that he or she could be added to the list. This was to ensure that every person living within the Section whether a member of the clan or not and it's after establishing that every person was included that he gave the consent for the process to continue.
11. THAT the D.O also ordered the area assistant chief Tunyai Sub location to visit every homestead and record the names of people in every home which he did, the said assistant chief was known as DOMICIANO MALUNDU KIRERA.
12. THAT after this was done every clan selected another team of young men who were mandated to cut and clear all the boundaries for easy movement of surveyors and the clans started the work of subdivision from 1983 to 1985.
13. THAT the clans now under the elected committee requested for surveyors from the Government to help them record the boundaries on the maps (Aerial Photographs ) leading to the processing of Preliminary Index diagram done in 1982).
14. THAT I recall that in the year 1988 the Ministry of Lands sent a team of surveyors from Meru which included a surveyor known as Gakuru who spent many days in the area to establish boundaries of TUNYAI "B" ADJUDICATION SECTION and record them in the map.
15. THAT later also in 1988 another team of surveyors was sent to register the boundaries of individual parcels of land on the map and number them accordingly. They completed their work in 1996 and they submitted their report to the Adjudication and Settlement officer for Tharaka Nithi to help him in preparing the Adjudication Register.
16. THAT I recall that after completion and closure of the Adjudication Register , the adjudication officer came to Gakurungu sublocation in TUNYAI "B" Adjudication Section to avail the Register and the maps to the public for inspection and he announced any person who was not satisfied with any record on the register or on the map to submit a written objection within 60 days from 4<sup>th</sup> April 1997.
17. THAT 65 objections were registered and all were heard and decisions made and 11 people were unsatisfied with the verdicts and preferred Appeals to the minister in the year 2000 and all the appeals were heard and determined.

18. THAT after the determination of all these outstanding disputes it paved the way for the processing of title deeds which were submitted to the Chuka Lands office where they were collected by their owners.
19. THAT contrary to the allegations by the petitioners the adjudication process in TUNYAI “B” ADJUDICATION SECTION was not flawed as alleged and the allegations that non residents were issued with land and title deeds is false.
20. THAT the majority of residents from TUNYAI “B” ADJUDICATION SECTION are satisfied with the manner in which the adjudication process was conducted.
21. THAT even though the area member of parliament HON ALEX M.M. MWIRU wrote to the National Land Commission requesting the commission to intervene and investigate the residents complaints regarding the adjudication process I and other people who are satisfied with the adjudication process in Gakurungu Sublocation in the so called TUNYAI”B” Adjudication Section did also write to the Chairman National Land Commission on the 1<sup>st</sup> December 2016 explaining that we were satisfied with the Adjudication process. Attached herein and marked A.M 4 is a copy of the said letter.
22. THAT the letter dated 23<sup>rd</sup> November 2016 by the chairman of the National Land Commission making recommendations was made unilaterally after inducements by politicians and it is a matter of public knowledge that the said chairman is facing criminal charges arising from abuse of his office and corruption .
23. THAT during the land adjudication process within TUNYAI “B” ADJUDICATION SECTION many of the petitioners were very young people with many of them being minors and others had not been born but their parents guardians or grandparents had been allocated land.
24. THAT many of the petitioners have land parcels within TUNYAI “B” ADJUDICATION SECTION but they have declined to get their title deeds from the lands office.
25. THAT the petitioners have formed a criminal gang known as “ ATURI” whereby they are threatening people with title deeds and those who support with the adjudication process with violence and are invading their land parcels and burning their houses.
26. THAT the area member of parliament Hon. GEORGE GITONGA MURUGORA and the previous member of parliament are exploiting this issue to gain political mirrage whereby they have been trying to settle people from other areas of THARAKA like THAGICHU where he comes from to settle within TUNYAI “B” ADJUDICATION SECTION .
27. THAT further the area assistant chief of the area one STEPHEN KIBAARA KATHENYA has been encouraging people to invade other peoples land parcels since he also has origins in THARAKA NORTH but it is his mother who is from TUNYAI “B” ADJUDICATION SECTION .
28. THAT further many people who had been given land during the land adjudication process sold their parcels to other people even some from outside the area and now when their children inquire of the parents land the said parents who willingly sold allege that their land parcels were given to strangers or that the children who have now grown up and are adults invade the land parcels of those who purchased land from their parents.
29. THAT the criminal gang formed by the petitioners is engaged in the burning of peoples houses and is destroying the boundaries on the land parcels and generally encouraging lawlessness in the area.
30. THAT a brief history of the seven petitioners who have filed this petition on behalf of others is that BARU GITUMA owns land in an area known as KANJOGUNI and he has a title to the said land, GERALD NGAGI MATUMO was a minor during the period of land Adjudication but his father MATUMO was allocated land , JOSEPH MUTURI KAMWARA – he was a minor during the period of Land Adjudication but his father was allocated a parcel of land , DELYINO MPANDA KATHENYA was allocated land in TUNYAI “B” being NO. 593 MISCHECK MITUGO KAMWARA – he owns land with TUNYAI “B” Adjudication Section where he left his wife and two children and he migrated to mitunguu where he lives. M’KUNGANIA MURAUKO- he was a committee member of NYAAGA clan during the Land adjudication process .He has three wives and he left two wives on his land parcel and he went to invade land parcel NO. 168 which belongs to KIREA M’ITAMBA who is his relative but he died and his children live in Mombasa. MBAE MUCHEGE – he was a minor by the time the land adjudication was done , his older brother JULIUS KIRIMI MUCHEKE allocated land to holding trust for other siblings . He has now left this land and invaded the land of KIRUGARA being parcel NO. 405 whom they had a case with at the tribunal with but he lost .
31. THAT the copies of charge sheet and copy of plaint referred to in paragraph number 16 of the affidavit in support of the petition clearly show that the petitioners are invading other peoples land parcels but the aggrieved parties are seeking legal avenues to settle their disputes.
32. THAT in particular in Civil Suit NO. 156 OF 2018 pending at the chief Magistrates court the plaintiff and the defendants are cousins.
33. THAT if the petitioners had a genuine case, they ought to have filed a case in court seeking to stop the adjudication process but they did not since all was well by then and they are now estopped by lapse of time since the title deed were issued in the year 2005 and since then many people have sold their parcels of land, others have charged their title deed to financial institution like banks and sacco.
34. THAT the petitioners should stop generalizing their disputes but they should file separate suits against the person who he/she feels had invaded his/her land.
35. THAT there is unreasonable delay in the filing of this petition and I pray that the petition to be dismissed with costs

36. That all what is deponed to herein above is true to the best of my knowledge, information and belief.

7. The Replying affidavit sworn on **4<sup>th</sup> February, 2019** by Robert Njeru Kamwara is reproduced in full herebelow and is pasted without any alterations whatsoever, including corrections of spellings or any other mistakes.

**AFFIDAVIT IN REPLY TO THE PETITION DATED 21/9/2018**

I, ROBERT NJERU KAMWARA do hereby make oath and solemnly swear as follows:-

1. THAT I am one of the interested parties herein and hence competent to swear this affidavit.
2. THAT I swear this affidavit in reply to the petition dated 21<sup>st</sup> September 2018 which I oppose.
3. THAT I recall that in the 1990's to early 2000 I was one of those opposed to the adjudication process in Gakurungu Sub location in TUNYAI "B" Adjudication Section and in fact I had been appointed the chairman of the group locally known as "ATURI" in the area .
4. THAT I had been recruited to join the group in the year 1993 and I was invited to a meeting in Gakurungu sublocation within TUNYAI "B" Adjudication Section and when I arrived I found MISHECK MITUGO , STEPHEN KATHENYA, MPANDA CIABAIGECU ,KUNGANIA MURAUKO, KUNYITHIA THUGURI, KAIBII MAGANE, BARUA GITUMA and KARONGA who are some of the petitioners herein. They informed me that the land Adjudication process had commenced and they wished to object so that they could get land parcels.
5. THAT we had several meetings with the people who wished to object to the adjudication process and the group was named "ATURI" and we held elections and I was elected the chairman and STEPHEN KATHENYA the secretary (the current assistant Chief of Gakurungu sub location).
6. THAT on inquiring from those who were the committee members of the adjudication process I was informed that any person who was an adult by the time the land adjudication process was being done was allocated land but those who were minors, it is their parents or guardians who were allocated land.
7. THAT I continued complaining and writing many letters to the Lands Offices and the DC'S and PC'S .
8. THAT after I wrote a letter to the Lands Adjudication Offices at Embu an officer by the name NDUBI from the Provincial Land Adjudication Office in Embu Convened a meeting at Gakurungu Market and he called me as the chairman and the author of the Letter and he informed me that he had received the letter and that he had come to resolve our problems.
9. THAT the said MR. NDUBI informed me that we should stop complaining as a group, and that each one of us should write a letter listing his/her complaints and we should attach our identity card and that I receive the said documents and he told me to take them to the Provincial Land Adjudication Offices at Embu .
10. THAT I convened a meeting of the group opposed to the adjudication process (ATURI) and advised them to write individual letters to the Provincial Land Adjudication Offices at Embu complaining individually as I had been advised .
11. THAT the members of the group letters wrote letters and handed them to me to forward to the Provincial Land Adjudication Offices at Embu
12. THAT in total a total of 409 letters were written but in all the 409 letters the complainant was that they were denied land parcels but foreigners were given.
13. THAT shortly after I was summoned by MR. NDUBI in Embu and gave me a list of those letters and he gave me a list of people who were given land from the adjudication process.
14. THAT from that list I confirmed that 333 of the complaints were minors during the period of the adjudication process and 76 were adults , but out of 76, the majority of them had been allocated land.
15. THAT my name was in the list together with the land number that I was allocated.
16. THAT I learnt that all the people who had convinced me to join the group had been allocated land.
17. THAT I found out that I was misled by them and I had misled other people.
18. THAT I realized the land had been fairly allocated and everyone who met all the requirements and was living there was allocated land. I realized that there was hidden interests . I therefore decamped this group together with many people.
19. THAT after I decamped the group became inactive for many years but later it was revived and they started using the letters that I hand written as evidence but I state that I was wrongly advised to write those letters and I apologized and I disown the letters that I

wrote and to date I state that the group is made up of people who did not qualify to be allocated land and there is political influence and since the assistant chief was a member of this group before he become an assistant chief, after he was appointed an assistant chief he is actively using his government position to campaign for the group.

20. THAT if the petitioners had a genuine case, they ought to have filed a case in court seeking to stop the adjudication process but they did not since all was well by then and they are now estopped by lapse of time since the title deed were issued in the year 2005 and since then many people have sold their parcels of land, others have charged their title deed to financial institution like banks and sacco's.

21. THAT the petitioners should stop using the letters that I wrote before I hand become enlightened and decamped from those opposed to the adjudication process. Which they have marked as NO. 21 to 22 and NO. 25 to 27 in their list of documents in support of petition and Annexed and Marked J.N.K 1 and 2.

22. THAT the petitioners should stop generalizing their disputes but they should file separate suits against the person who he/she feels had invaded his/her land.

23. THAT there is unreasonable delay in the filing of this petition and I pray that the petition to be dismissed with costs.

24. THAT all what is deponed to herein above is true to the best of my knowledge, information and belief.

8. Barua Gituma on behalf of the petitioners filed a supplementary affidavit sworn on **21<sup>st</sup> March, 2019** which is reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes:

### **SUPPLEMENTARY AFFIDAVIT**

*(In Support of the Petition and the supporting affidavit dated 21<sup>st</sup> September 2018 and in response to the Interested Parties' Replying Affidavits dated 4<sup>th</sup> February 2019)*

**I, BARUA GITUMA** a resident of Gakurungu sub location in Tharaka-Nithi County and care of Post Office Box 1365-10400, Nanyuki do make oath and state as follows: -

1. **THAT** I have seen, read, understood and have had the contents of the Replying Affidavit sworn by Robert Njeru Kamwara and dated 4<sup>th</sup> February 2019 (**hereinafter referred to as Robert Njeru's Affidavit**), and the Replying Affidavit sworn by Andriano Mugwiria and dated 4<sup>th</sup> February 2019 (**hereinafter referred to as Andriano's Affidavit**) explained to me by my advocates on record, Messrs Jesse Mwiti Advocates.

2. **THAT** in a holistic response to the entirety of the two affidavits and having regard to facts known to me and all the Petitioners herein, I wish to state that the two affidavits are a futile attempt by the interested parties to hoodwink the court into shutting its eyes to the vile and well-calculated scheme that led to the disinheritance of land in Tunyai B from its legitimate and true beneficiaries.

3. **THAT** in a joint response to Paragraphs 4 and 5 of **Andriano's affidavit**, the Petitioners wish to state that the process leading to the appointment of the said committee members, including the deponent, was a clandestine affair. The community members were not informed or involved in the process leading to the appointment of the said Committee members.

4. **THAT** in response to Paragraphs 6 of **Andriano's affidavit**, the Petitioners wish to state reiterate that the process of Land adjudication in Gakurungu sub location in the so called Tunyai B adjudication scheme was not all inclusive and did not take into account the rights of the inhabitants at all. Had this process been all inclusive and sensitive to the rights of the inhabitants, then the report of the National Land Commission dated 23<sup>rd</sup> November 2016 would not have declared it as a historical land injustice as per the Land Laws (Amendment) Act, 2016. (**Annexed and marked as BG-1 is the report of the National Lands Commission dated 23<sup>rd</sup> November 2016**)

5. **THAT** in a further response to Paragraphs 6 of **Andriano's affidavit**, I wish to state that if at all the process of adjudication sought to protect the rights of the inhabitants of Tunyai B as the interested parties claim, then there would not have been multiple complaints to various government institutions over the said process. (**See page 18,19,20,21,24, 25, 28, 31 and 34 of the Petition**)

6. **THAT** in a wholistic response to Paragraphs 7,8,9,10,11,12,13,14,15,16,17 and 18 of **Andriano's affidavit**, I wish to state that the Petitioners are strangers to these averments. The Petitioners have no idea how the land adjudication process was instigated, who instigated the land adjudication process and when the said process was instigated. The Petitioners were neither consulted nor informed of the intended process. The Petitioners were compelled to participate in the adjudication process by the local administrative leaders including the Chiefs and assistant chiefs including one Domiciano Malundu Kirera and Nchundu Ngoci.

7. **THAT** in a comprehensive response to Paragraph 19 of **Andriano's affidavit**, the Petitioners reiterate that the land adjudication process in Tunyai 'B' section was flawed due to the following:

a. Non-residents were issued with land within Tunyai 'B' adjudication scheme. Such nonresident beneficiaries include Ann Njeri Mwangi (Parcel No: 640), Joseph Nyaga Wangai (Parcel No: 189 & 190), Nathaniel Kilonzo (Parcel No: 616), Stephen Gitari (Parcel No: 404) among others.

b. Parcels of land allocated to the true members of the community were subdivided illegally into subplots, issued with discordant

parcel numbers and illegally allocated to non-residents. For example, Parcel No. 632 where the Petitioner (Barua Gituma) (No: 1 of annexure BG-3) was born and lived all his life has been subdivided into parcels no. 634 and 640 which were allocated to non-residents. Parcel No. 430 where David Njeru Maingi (No. 4 on annexure BG-3) was born and grew up was subdivided in parcels no. 440 and 738 and issued to non-residents.<sup>61</sup>

***(Annexed and Marked BG-2 is a list of aggrieved residents alongside the non-resident land owners and the discordant land parcel numbers.)***

8. The committee members appointed during the said land adjudication process including the deponent used their privileged positions for personal aggrandizement. According to the Clan customs, each homestead was to produce one adult under whom all the property was to be registered in trust for the entire family.

a. The deponent, who was a committee member of the Nyaaga Clan, allocated himself and his sons, who were minors then, several parcels within the adjudication section at the expense of the true beneficiaries of the property. Peter Gitonga Murugu also known as Gitonga Mugwiria (*No. 68 of the Interested Parties List*), Samuel Nthiga (*No. 107 of the Interested Parties List*) and Daniel Nyaga Murugu are sons of Andriano Mugwiria, the deponent. They were allocated parcels of land during the adjudication process yet they were minors at the time. Samuel Nthiga was allocated parcel no. 93 and parcel no. 176 (***No. 52 and 94 of annexure BG-2***) against the interests of Daniel Nyamu Kithaka and Joseph Mwathi Mikua respectively. Gitonga Mugwiria was allocated parcel no. 562 against the Salesio Muuru Muchege (***No. 237 of annexure BG-2***). Daniel Nyaga Murugu was allocated parcel no. 136 against the rights of M'Mugambi Ndathe.

b. Daniel Simba Kirera, who was a committee member of the land adjudication and who was representing the Ukuujiu clan, allocated parcels of land to his children who at the time were minors. Gerald Gitonga and Susan Kawira Simba are children of Daniel Simba Kirera. Gerald Gitonga was allocated parcel No. 394 against the interests of Jeremiah Muthengi Murithi while Susan Kawira Simba was allocated parcel No. 316 against the interests of Priscilla Kayuki Kanyaru. (***See No. 252 and 244 of annexure BG-2 respectively***)

c. Ayub Ngoci Muga, who was a committee member and a representative of the Kithuri clan in the land adjudication process. He used his privileged position to acquire parcels of land for himself, his siblings, his wife and his children who were minors. He procured registration of parcels of land in the names of his children although they were minors at the time. His children are Benson Nchundu Ngoci, Daniel K Ben and Nickson Kimathi Nchundu. His sister is Peris Nkuene Benson and his wife is Margaret Ngoci Ndoko. Ayub Ngoci Muga allocated unto himself parcel No. 596 against the interests of Nyaki Gitonga (***No. 242 of annexure BG-2***). Benson Nchundu Ngoci was allocated parcel No. 600 which diffused six original parcels of land Katherinya (***No. 100 to 105 of annexure BG-2***). Daniel K Ben was allocated parcel No. 591 against the interests of Jackson Mwito M'Irango (***No. 239 of annexure BG-2***). Nickson Kimathi Nchundu was allocated parcel No. 594 against the interests Patrick Mbogo Kajiita (***No. 98 of annexure BG-2***). His sister Peris Nkuene Benson was allocated parcel No. 46 against the interests of Peter Mwangangi Mugwika (***No. 265 of annexure BG-2***). His wife Margaret Ngoci Ndoko was allocated parcel No. 701 against the interests of Andrew Nyamu M'Migwi (***See No. 220 of annexure BG-2***)

9. **THAT** in response to paragraph 20 of **Andriano's affidavit**, the Petitioners state that none of the residents from Tunyai B section is satisfied with the manner in which the land adjudication process was conducted except the few that benefited from the flawed process. To express their displeasure with the adjudication process, the said residents have, since 1988, made several complaints to various state agencies and offices seeking to have the said adjudication process.

a. In 1988, the Petitioners visited the then District Officer's office to protest the appointment of committee members for the Tunyai 'B' Adjudication section appointed vide the letter dated 28<sup>th</sup> April 1988 (*Annexure AM-2 of Andriano's affidavit*).

b. In 1995, a delegation of the clan elders of Tunyai 'B' adjudication section visited the Provincial Commissioner of Eastern Province to forward the Community's grievances over the adjudication. The Provincial Commissioner directed the District Commissioner to visit the adjudication section and assess the grievances.

c. On 21<sup>st</sup> July 1997, the residents of Tunyai 'B' through their lawyers, the firm of Njiru Boniface & Company Advocates wrote to the District Adjudication Officer, Tharaka Nithi indicating their objection to adjudication process for Tunyai 'B' section and requesting for the cadastral map and adjudication register to enable them make objections to be presented to the District Adjudication Officer. (***Annexed and Marked BG-3 is a copy of the letter dated 21<sup>st</sup> July 1997 addressed to District Adjudication Office by the firm of Njiru Boniface & Company Advocates***)

d. On 18<sup>th</sup> March 1998, the residents of Tunyai 'B' through their lawyers, the firm of Njiru Boniface & Company Advocates wrote to the District Adjudication Officer, Tharaka Nithi seeking for consent to move to the High Court for the orders that they be served with the cadastral map and adjudication register of Tunyai 'B' adjudication section.

e. In 2000, the Petitioners, through their chairman Robert Njeru Kamwara, wrote to the Permanent Secretary/Secretary to the Cabinet and Head of Civil Service complaining about the land adjudication process in Tunyai 'B' adjudication section. The then Permanent Secretary/Secretary to the Cabinet and Head of Civil Service, through one Felix J Mugabe, wrote back acknowledging receipt of the complaint and advising that the same had been forwarded to the Permanent Secretary, Ministry of Lands and Settlement for action. (***Annexed and Marked BG-4 is a copy of the letter dated 24<sup>th</sup> May 2000 addressed to Gakurungu residents from the office of the secretary to cabinet and head of civil service.***)

f. In 2000, the Petitioners wrote to the Njonjo Commission of Land Inquiry complaining about the land adjudication in Tunyai 'B' and requesting the Commission to investigate the claims. ***(Annexed and Marked BG-5 is a copy of the letter dated 22<sup>nd</sup> June 2001 addressed to the Njonjo Land Commission by Robert Njeru Kamwara on behalf of Tunyai 'B' Residents)***

g. In 2002, the Petitioners wrote to the Permanent Secretary of Provincial Administration and Internal Security complaining about Tunyai 'B' adjudication section anomalies and seeking the government's intervention. ***(Annexed and Marked BG-6 is a copy of the letter dated 4<sup>th</sup> January 2002 addressed to the Permanent Secretary, Provincial Administration and Internal Security by Robert Njeru Kamwara on behalf of three hundred and one (301) Gakurungu residents)***

h. On 10<sup>th</sup> October 2002, the Commission of Inquiry into the Land Law Systems of Kenya wrote to the Permanent Secretary, Provincial Administration & Internal Security forwarding the Tunyai 'B' adjudication section complaint for action. ***(Annexed and Marked BG-7 is a copy of the letter dated 10<sup>th</sup> October 2002 addressed to the Permanent Secretary, Provincial Administration and Internal Security by the Commission of Inquiry into the Land Law System of Kenya)***

i. On 3<sup>rd</sup> April 2005, Tunyai 'B' residents, through their Chairman, Robert Njeru, wrote to the Minister for Lands and Settlement complaining about the adjudication process, the problems associated with the flawed process and seeking the land to be returned to the original owners. ***(Annexed and Marked BG-8 is a copy of the letter dated 3<sup>rd</sup> April 2005 addressed to the Minister for Lands and Settlement by Robert Njeru Kamwara on behalf of Tunyai 'B' residents)***

j. In 2015, Tunyai 'B' residents wrote to the Cabinet Secretary of Lands and Housing complaining about the adjudication process of Tunyai 'B' section. They highlighted the injustices they suffer as a result of the flawed process and praying for the process to be corrected. ***(Annexed and Marked BG-9 is a copy of the letter dated 26<sup>th</sup> February 2015 addressed to the Cabinet Secretary Lands and Housing by Gerald N. Matumo on behalf of Tunyai 'B' residents)***

k. On 5<sup>th</sup> June 2015, residents of Tunyai 'B' Adjudication section wrote to the Land Registrar, Tharaka Nithi County expressing their displeasure at the manner in which the land adjudication was carried out, decrying the injustices meted upon as a result of the flawed land adjudication, and appealing for the rectification of the process. ***(Annexed and Marked BG-10 is a copy of the letter dated 5<sup>th</sup> June 2015 addressed to the Land Registrar, Tharaka Nithi County by the petitioner on behalf of Tunyai 'B' residents)***

l. On 6<sup>th</sup> October 2016, residents of Tunyai 'B' Adjudication section, through Tharaka Constituency member of Parliament, Hon. Alex M.M. Mwiru, wrote to the National Land Commission forwarding the community's grievances on the land adjudication and requesting the Commission to investigate the claims in an effort to rectify the injustices. ***(Annexed and Marked BG-11 is a copy of the letter dated 6<sup>th</sup> October 2011 addressed to the National Land Commission by the area MP on behalf of Tunyai B residents.***

10. **THAT** in response to paragraph 21 of **Andriano's affidavit**, the Petitioners state that the deponent and thesection of Gakurungu's residents who wrote to the National Land Commission on 1<sup>st</sup> December 2016 claiming that they were satisfied with the land adjudication process represent the interests of the minority who benefited and enjoy the fruits of the flawed adjudication process. They include non-residents and land grabbers.

11. **THAT** in response to paragraph 22 of **Andriano's affidavit**, the Petitioners state that National Land Commission is an independent body established under the Constitution and consists of a chairman and eight (8) other members who make decisions jointly and collectively in the exercise of the Commission's mandate. Whether or not the chairman is facing criminal charges is a non-issue in this case as the independence and impartiality of the Commission as a whole has not been impugned.

12. **THAT** in response to paragraph 23 of **Andriano's affidavit**, the Petitioners state the allocation of the land was done unfairly. Most community members were disinherited of whole or substantial pieces of the original ancestrallands which were later issued to non-residents.

13. **THAT** in response to paragraph 24 of **Andriano's affidavit**, the Petitioners confirm that they have declined to get the title deeds of the adjudicated section due to the fact that the adjudication process was flawed and despite their complaints about the anomalies, the said are yet to be addressed. The Petitioners reiterate that they will only accept title deeds resulting from a transparent, fair and just adjudication process.

14. **THAT** the Petitioners deny the contents of paragraph 25 of **Andriano's affidavit**. In response, Petitioners state that 'ATURI' is not a criminal gang but an association of community residents i.e. Gakurungu residents, who comprise of the Petitioners herein. The word 'ATURI' is a Meru word that means "RESIDENTS".

15. **THAT** the Petitioners refute the contents of paragraph 26 and 27 of **Andriano's affidavit**. In a joint response, the Petitioners state that the statements are malicious and baseless allegations meant to tarnish the names of the community's leaders, undermine their selfless efforts to serve the interests of the community and hoodwink this Honorable court into thinking this is a political issue which it isn't the case.

16. **THAT** the Petitioners deny the contents of paragraph 28 of **Andriano's affidavit**. In response, the Petitioners state that the statements are nothing but blatant lies. The strangers who acquired land interests in Tunyai 'B' Adjudication Section did so during the adjudication process being complained about.

17. **THAT** the Petitioners deny the contents of paragraph 29 of **Andriano's affidavit**. The Petitioners state the statements are baseless accusations whose intention is to paint the peaceful and law abiding residents of Gakurungu as criminals. If at all the Petitioners believe in lawlessness, then they would not have insisted on a legal process to address the injustices meted upon them since 1980s.

18. **THAT** the Petitioners conclusively dismiss the contents of paragraph 29 of **Andriano's affidavit** as flagrant fabrications. In response to the said statements the Petitioners states as follows;

a. Barua Gituma is a bonafide resident of Tunyai 'B' adjudication section. He was born in Gakurungu location and has been living there since. He has no other land contrary to the Interested Parties' claim. He is therefore entitled to land in Tunyai B.

b. Gerald Njagi Matumo was not a minor during the period of land adjudication. He was born in 1966 and therefore at the time of the adjudication, he was an adult. Gerald Matumo was dispossessed of his inheritance during the adjudication process and his interests registered as parcel No. 751 to Bernard Muriithi M'Rukaria and Parcel No. 768 to Sabella Mwari M'Ringera. (*Annexed and Marked BG-12 is a copy of Gerald Njagi Matumo's identity card.*)

c. Delyino Mpanda Kathanya was born and has lived all his life on the parcel of land registered as No. 596. He was dispossessed of this parcel and his interests registered as parcels No. 596 to Ayub Ngoci M'Muga and Parcel No. 595 to Murimi Mwamba. (*See No. 86 of Annexure BG-2.*)

Parcel No. 593 does not belong to Delyino Mpanda Kathanya as registered. The registration was done as part of the scheme to disinherit of his lawful inheritance.

d. Misheck Mitugo Kamwara, M'Kungania Murauko, Mbae Muechege and Kirimi Muechege are bonafide residents of Tunyai 'B' born in the Tunyai 'B' and who have lived there all their lives.

19. **THAT** the Petitioners dismiss the contents of paragraph 32 of **Andriano's affidavit** as mere accusations. The Petitioners further state that the particulars of Civil Case No. 156 of 2018 are not of interest to this Court and neither do they concern this particular Petition.

20. **THAT** in response to paragraph 33 of **Andriano's affidavit**, the Petitioners affirm that they have been vigilant in trying to assert their rights. The Petitioners have explored all legal institutions and lawful mechanisms before they approached the Court as has been demonstrated in annexures under paragraph 8 of this affidavit.

21. **THAT** in response to paragraph 34 of **Andriano's affidavit**, the Petitioners state that this is not an individual issue since it pertains to injustices meted out to an entire community due to a flawed process whose effects have ravished an entire community.

22. **THAT** in response to paragraph 35 of **Andriano's affidavit**, the Petitioners state that they have been advised by their advocates on record, advice they verily believe to be true, that their Petition is ripe and timely as their constitutional rights are continuously being violated and infringed upon.

23. **THAT** the Petitioners humbly pray this Court to dismiss **Andriano's affidavit** and allow the Petitioner's Petition.

24. **THAT** in a joint response to Paragraphs 1, 2,3,4, 5, 6,7, 8,9,10,11 & 12 of **Robert Njeru's affidavit**, I wish to confirm the contents thereof.

25. **THAT** in a joint response to paragraph 13, 14 and 15 of **Robert Njeru's affidavit**, I wish state that the Petitioners are strangers to this information and the deponent's claim that the complainants were minors is a spurious claim. The fact that one is a minor is not a ground of disinheriting one from one's legitimate inheritance. Further, as elucidated under Paragraph 7 (c) of this affidavit persons who were minors were allocated land. How comes the Petitioners were left out? In any case, there is no evidence that has been presented to Court to back this claim.

26. **THAT** I wish to deny the contents of paragraph 16, 17 and 18 of **Robert Njeru's affidavit**. In further response, I wish state that at no time had the Petitioners misled the deponent. He was at all material times acting in our behalf because he knew the truth and was convinced that we had legitimate claims. Unfortunately, the deponent was compromised with material gains along the way hence the change of heart.

27. **THAT** I wish to vehemently deny the contents of paragraph 19 of **Robert Njeru's affidavit**. In further response, I wish to state that 'ATURU' group in which the Petitioners are members is an association of residents of Tunyai 'B' Community who feel aggrieved by the flawed land adjudication process of Tunyai 'B' Adjudication section. It is not driven by political interests.

28. **THAT** I wish to deny the contents of paragraph 20 of **Robert Njeru's affidavit**. In response, I wish to state that the Petitioners have been vigilant in trying to assert their rights. The Petitioners have explored all legal institutions and lawful mechanisms before they approached the Court as has been demonstrated in the annexures under paragraph 8 of this affidavit. In any case, this claim is not extinguished by lapse of time as the Petitioner's constitutional rights are continuously being violated and infringed upon. The title deeds were acquired unlawfully. It is public knowledge that there have been numerous objections to the process of adjudication years before the title deeds were issued. Therefore, anyone who charged the illegally acquired land must brace for the consequences.

29. **THAT** in response to Paragraphs 21 of **Robert Njeru's affidavit**, I wish to state that letters the deponent wrote did so on behalf and under the direction of the Petitioners. The deponent was the Petitioners' representative as far as the letters are concerned. The contents of the

said letters are purely expressions of the feelings and wishes of the Petitioners as relayed through the Deponent.

30. **THAT** in response to paragraph 22 of **Robert Njeru's affidavit**, the Petitioners state that this is not an individual issue since it pertains to injustices meted out to an entire community due to a flawed process whose effects have ravished an entire community.

31. **THAT** in response to paragraph 23 of **Robert Njeru's affidavit**, the Petitioners state that they have been advised by their advocates on record, advice they verily believe to be true, that their Petition is ripe and timely as their constitutional rights are continuously being violated and infringed upon.

32. **THAT** the Petitioners humbly pray this Court to dismiss **Robert Njeru's affidavit** and allow the Petitioner's Petition.

33. **THAT** the land in Tunyai B is community land and as such all individuals belonging to the communities resident therein have a right to possession, enjoyment, use, occupation, control and / or inheritance of the same.

34. **THAT** myself and all the petitioners are and have been lawful residents of Tunyai B by virtue of being the sons and daughters of our fore/ancestral fathers who were the owners of this land.

35. **THAT** several Petitioners have been issued with eviction notices requiring them to vacate the land they have lived on all their lives and which they inherited from their forefathers. ***(Annexed and Marked BG-13 (a-e) are copies of eviction notices issued to various residents by non-residents.)***

36. **THAT** several Petitioners have had malicious court cases instituted against them in an effort to flush them out of their ancestral lands. ***(See pages 38 – 42 of the petition.)***

37. **THAT** this honourable court has made a judgment in favour of a party who has been a resident of Tunyai B adjudication section against a party who was a registered owner and declared the adjudication process irregular and cancelled the title deed. ***(Annexed and marked BG-14 is a copy of the judgment)***

38. **THAT** myself and all the petitioners are entitled to legitimate ownership of all the land in Tunyai B by virtue of the indigenous title bequeathed to us through successive inheritance from our forefathers.

39. **THAT** Article 63 of the Constitution of Kenya guarantees the rights of communities to their lands and territories.

40. **THAT** 3<sup>rd</sup> Respondent's role in Tunyai "B" Adjudication Section was to ascertain the rights and interests on the land thereon (which land is community land) and transform ownership from customary land tenure to individual ownership through demarcation, survey and registration.

41. **THAT** the 3<sup>rd</sup> Respondent ought to have engaged the petitioners and other residents of Tunyai Adjudication Section in order to carry out his functions in a manner that adheres to customary law.

42. **THAT** 3<sup>rd</sup> Respondent and members of the adjudication committee working under his direction and authority took advantage of our community's marginalization to conduct a fraudulent adjudication process .

#### **PARTICULARS OF FRAUD**

- a) Subdividing parcels of land without knowledge of the residents.
- b) Allocating parcels of land to persons who do not live on the said parcels of land.
  - a) Displacing and dispossessing the true clan members of their ancestral lands and allocating it to themselves and non-residents who are persons from outside the adjudication section.

NO.	PUBLIC LANDS	PLOT NUMBERS/ GRABBERS
1.	Gachaine School Primary	17 private plots axed from this land. Karigi Mathanje –Plot No. 18 Andriano Mugwiria-Plot No. 16
2.	Rwakarai School Primary	Patricia Mutiria Kamuu Robert Nyaga Ngerene Martin Nyaga Kamwara
3.	Ikumbu School Primary	Kajiita M’Mwathi Ayub Ngoci Muga
4.	Kamariru School Primary	Displaced from its original land to Kirima Hill
5.	Gakurungu Market	Kaburu Mwithi Mugao Njagi Manthi Mwithi Rukungi M’Mungania Damacio Nyaga Mbwiria Samuel Nthiga Murugu
6.	Kathigu School original land Primary	Robert Njeru Kamwara Benson Nchundu Ngoci Catherine Nyaga
7.	Ikumbu Hill	Plots No. 239, 240,241,621, 620,619,618,617, & 517
8.	Muura Hill	Plots No. 246, 249, 250, 667, 887, 666, 890, 891, 644, 654, 653,656, 664, 506, 251, 887, 888, 889, 657, 658, 659, 660, 895, 233, 225, 226,227,228, 229, 230 & 231.
9.	Kamukanya Hill	Plots No. 663, 716, 679, 211, 58, 54, 53, 49, 48, 717,39, 40,41,42, 61, 60 and 59.

respond to the residents’ queries in respect of the said adjudication process.

c) Omitting some members of the Clan from the adjudication register inorder to dispossess them of their land.

d) Inciting some residents against others in order to take their land.

e) Refusing to preserve public land eg and that had been and has always been used and considered by the residents as such.

f) Using physical force and the provincial administration to intimidate, harass and frustrate the community members that expressed discontents at the process.

43. **THAT** the actions 3rdRespondent and the adjudication committee have occasioned gross damage to the petitioners and residents of Tunyai B adjudication section.

**PARTICULARS OF DAMAGE SUFFERED**

- a) Encroachment and sub-division of public lands for private use namely;
- b) Dispossession of ancestral lands from residents of Tunyai 'B'.
- c) Encroachment of ancestral lands by non-residents.

44. **THAT** the National Land Commission through a report dated 23<sup>rd</sup> November 2016 made the following findings;

- a. The adjudication process that was declared in 1963 was totally flawed, thereby displacing and dispossessing the true clan members.
- b. The officers involved opted to allocate themselves and their cronies big parcels, thereby sidelining the true residents of the subject area.
- c. The adjudication process seems to have been done on the table rather than on the ground, leading to a lot of complaints from residents, including omitting names of the locals from the register.
- d. The local people in the Tunyai adjudication section were disinherited of their ancestral land.
- e. There was no justification for aliens to be allocated land in the subject area.
- f. A number of public utility plots that had been set aside were also allocated to and grabbed by people who were not residents of Gakurungu location.

45. **THAT** the said Land Commission through a report issued on 23<sup>rd</sup> November 2016 made the following recommendations;

- a. That as per the Land Laws (Amendment) Act 2016, this scheme qualifies as a historical land injustice meted to the people of the subject area.
- b. Similarly, according to Section 160 (2)(e)(iii) of the Land Act 2012, the so called adjudicated land was given to absentee landlords.
- c. Recall and revoke all the titles already issued within four (4) weeks from today after subjecting them to public reviews.
- d. Identify and review the few local people who were rightly allocated the land to confirm their status on the land and to match the numbers they were given with the actual position on the ground.
- e. After revocation of the titles that were illegally issued, a fresh re-adjudication of the area be declared and proper adjudication be done as per the occupation of land by the local residents and the confirmation mentioned in 4 above.
- f. All titles that were issued to lands covering public utilities are being revoked immediately, as per the provisions of section 155 (2) of the Land Act of 2012 and section 152 A, B& C of the Land Laws (Amendment) Act of 2016. The County Government of Tharaka Nithi County and county commissioner should immediately move in and fence off the public utility parcels and secure them.
- g. Titles to be issued to the proper and deserving allottees as fast as possible including for public utility plots. *(See BG-1)*

46. **THAT** in compliance with the NLC recommendations, the illegal occupiers of public utilities land received notices which were acted upon by various government agencies. *(Annexed and marked BG-15 (a-b) is a copy of the NLC letter dated 23<sup>rd</sup> November 2015 and the Tharaka Nithi County Commissioner's letter dated 19<sup>th</sup> December 2016)*

47. **THAT** the land registrar Tharaka Nithi County complied with NLC directives and issued restrictions on all the land involving the disputed adjudication section. *(Annexed and marked BG-16 is a certificate of official search of one of the parcels of land in the adjudication section)*

48. **THAT** the Petitioners' petition is made genuinely and in the interests of justice particularly for the residents of Tunyai 'B' adjudication section who have been born, brought up and still live on the same land.

49. **THAT** I make this affidavit seeking the Petitioners' petition dated 21<sup>st</sup> September 2018 to be allowed and the orders therein granted.

50. **THAT** the facts deponed to herein are true and within my personal knowledge save wherein otherwise expressly stated.

9. The parties canvassed the petition by way of written submissions.

10. The petitioners' submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes.

## **PETITIONERS SUBMISSIONS**

1. These are the petitioners' submissions in respect of the petition dated 21<sup>st</sup> September 2018.
2. The background to this matter is set out in the detailed affidavit of Barua Gituma sworn on 21<sup>st</sup> September 2018 and filed on the same day and the supplementary affidavit of Barua Gituma dated 22<sup>nd</sup> March 2019 and filed on 26<sup>th</sup> March 2019 in support of the Petition and in response to the interested parties' replying affidavits both dated 4<sup>th</sup> February 2019 and sworn by Andriano Mugwiria and Robert Njeru Kamwara.
3. The petition is opposed by the replying affidavit of Andriano Mugwiria (**hereinafter Andriano's Affidavit**) sworn on 4<sup>th</sup> February 2019 and filed on the same day as well as that of Robert Njeru Kamwara Mugwiria (**hereinafter Robert Njeru's affidavit**) sworn on 4<sup>th</sup> February 2019 and filed on the same day.
4. The Petition is opposed by the grounds of opposition dated the 13<sup>th</sup> day of November 2018 and filed on the 14<sup>th</sup> November 2018 by the 4<sup>th</sup> Respondent, the Attorney General.

### **1. THE PARTIES**

5. The petitioners are adult residents of Gakurungu Sub Location in Tharaka nithi County who fall under Tunyai "B" Adjudication section and they bring this petition on their own behalf of over 400 other residents of the so called Tunyai "B" Adjudication Section.
6. The first respondent is a constitutional body established by Article 67 of the constitution and responsible for land administration.
7. The second respondent is the cabinet secretary, ministry of Lands and Physical planning who is responsible for matters relating to land.
8. The third respondent is the District land adjudication officer; Tharaka nithi county who is responsible for land adjudication within the county.
9. The fourth respondent is the Honorable Attorney general and is the government chief legal adviser.

### **B. BACKGROUND OF THE CASE**

10. The following facts are not contested by the respondents as they have been admitted through the replying affidavits filed by the respondents and the interested parties.
  - a) The Tunyai "B" adjudication scheme was initially clan land. started in 1983 as clan land when the residents from the four clan agreed on conversion of the land from communal land ownership to individual tenure system as the land was originally a grazing zone but population growth and reduction in cattle had led to a need to individualize land tenure.
  - b) The section comprises residents from four clans namely: Ukuujiu, Nyaaga, Kanjogu and Kithuri.
  - c) The petitioners herein and their parents had gathered the land when it was virgin land have been in occupation and using it ever since.
  - d) The provincial administration agreed and after many meetings, the clans were requested to provide a list of all people living within their section and submit to him after which verification was done to ensure all residents clan and non clan members were accounted for.
  - e) The go ahead on subdivision was given and it took place from 1983 to 1985 which each clan providing young men to help clear and mark boundaries for ease to surveyors so as to establish boundaries of Tunyai b Adjudication section and record the same in the maps.
  - f) The notice of establishment of the adjudication section was made on the 27<sup>th</sup> April 1988 by the Senior Land Adjudication and Settlement officer Meru.
  - g) The land Adjudication officer for Meru adjudication area issued a notice appointing 16 people as committee members of the Tunyai 'B' adjudication section on 28<sup>th</sup> April 1988.
  - h) Being clan land, the adjudication was to be premised on granting land to the already settled members of the community and the adjudication register being made to take into account the existing and known boundaries of the residents.
  - i) Each clan was to be represented by a chairman and a committee with Pastor Daniel Samba Kirera for Ukuujiu clan, Mr. Peter Muchai Muchege for Nyaaga clan, councilor Zakaria Mwithi Kinantu for Kanjogu clan and Snr Chief Benson Ncundu Ngoci for Kithuri clan.
  - j) The chairmen chose Mr. Muchai as their overall chairman.

k) The clan members had resolved that the existing resident's shamba boundaries be maintained and that the adjudication register that was to be made was to allocate the land as the residents had always lived with the boundaries being intact and that the selected committee members were to swear an oath of allegiance to truth and honesty.

l) However Chief Benson Ngoci, the Kithuri clan chairman in cahoots with the other chairmen and guided by ulterior motives overruled the oathing.

m) Before the clan elders could finish preparing the shamba boundaries for each clan, the overall chairman went and moved the office to Tunyai market and abdicate the clan meeting places and started subdividing the land and selling the parcels to non residents.

n) The clan elders complained and this set off a flurry of communication that is annexed to the affidavit of the petitioners sworn by Barua Gltuma.

o) The clan elders sent delegations to government offices to complain over the process and the matter dragged on without a solution for many years.

p) The register of boundaries of individual parcels on the map and the numbering was completed by the surveyors in 1996 and the report submitted to the third respondent to prepare an adjudication register for objections and appeals to be made.

q) The aggrieved residents objected to the Tunyai B register and paid for the objections.

r) The aggrieved residents sent complaints to the commission of inquiry into the land system and on being dissatisfied with many memoranda and complaint letters.

s) The title deeds were finalized and submitted to Chuka Registry in 2005 despite the many complaints.

11. The issues arising in this petition are as follows:

a) Whether the petitioners have established a violation of its rights

b) Whether the petitioners aggrievement on the land adjudication process in Tunyai 'B' Adjudication scheme is an historical injustice

c) Whether the petitioner is entitled to the prayers sought in this petition.

### **C. WHETHER THE PETITIONERS HAS ESTABLISHED A VIOLATION OF ITS RIGHTS**

12. The Petitioner's complaints of the violation of the following rights by the respondent:

a) The Right against discrimination as enshrined under Article 27 of the constitution.

b) The right to property as enshrined under Article 40 of the constitution

c) Right to fair administrative action as guaranteed by Article 47 of the constitution

#### **a. The Right against discrimination as enshrined under Article 27 of the constitution.**

13. Article 27(1) of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

14. Equality includes the full and equal enjoyment of all rights and fundamental freedom, see article 27 (2) of the Constitution. The Constitution through Article 27 (4) requires the state not to discriminate directly or indirectly against any person on any ground.

15. The petitioner's rights as protected by Article 27 of the constitution has been infringed in that select persons and their families have benefitted from an adjudication process that should have benefitted all the residents of the community. Residents who were given position of trust and duty to the other residents benefitted and received undue advantage over those in lesser positions in the society. They went ahead to sell parcels of land to outsiders thus disinherit the actual owners who were and are still in occupation of the land. This undue treatment has been admitted by the interested parties who are part of the beneficiaries under paragraph 33 of the replying affidavits which admits the benefits they have received from having the tiles including taking loans whereas the actual owners have been left destitute.

16. The respondents have acted contrary to Article 10 (1) (a) of the Constitution in breach of national values and principles. The national values and principles of governance in the constitution bind all state organs, state officers, public officers, and all persons whenever they enact, apply, interpret laws, make or interpret or implement public policy decisions.

17. The national value and principles of governance under Article 10 (2) of the constitution inter alia include participation of the people, human dignity, equity, social justice, equality, human rights, non- discrimination, good governance, transparency and accountability.

18. The gist of the Petitioner's affidavits proves that the adjudication officers and the chosen chairmen who controverted the process failed to carry out their most important duty on adjudication by failing to show the clan members their parcels and the numbers allocated leaving the actual residents landless and as squatters in people's lands.

19. The grounds of opposition filed by the respondents have not rebutted the factual existence of a long-running problem in the adjudication section that has led the aggrieved residents to this court and the same ought to fail.

20. Indeed the right to fair administrative action inherent to the petitioners can only be remedied through this court which is vested with the authority over land and boundary matters in the exercise of its judicial authority under Article 159 of the Constitution.

**b. Violation of the petitioner's right to property as enshrined under Article 40 of the Constitution.**

14. Article 40 (1) of the constitution guarantees the petitioner the right to acquire and own property of any description in any part of Kenya.

15. Article 40(2) of the Constitution prohibits Parliament from enacting a law that arbitrarily deprives a person of property of any description or of any interest in or right over any property of any description or limit or in any way restricts the enjoyment of any right under this Article on the basis of any grounds specified or contemplated in Article 27 (4).

16. The negative effect of the adjudication register as presently constituted following the flaws process led by a few selfish individuals is an affront and an infringement to the Petitioner's right to own property and acquire property as protected by Article 40 of the constitution in that:

a) What was indeed an ancestral land meant to pass on to the petitioner was taken away by strangers and well oiled tycoons thus disinheriting the petitioners.

b) Land tenure that was being individualized to offer the petitioners land holding titles which could even take out loans as access to capital was taken away.

c) Among the petitioners many have been issued eviction notices, some arrested, taken to court and even served jail terms due to frivolous claims on their property which indeed they reasonably have as attested by annexures in the affidavit of Barua Gituma

17. The petitioners are already suffering immense prejudice owing to the violation of its right by respondents and unless the orders sought in the petition are granted, the prejudice will have continued unabated much to the petitioner's detriment.

18. The losses suffered by the petitioner have been set out in detail in the petition but briefly include:

a) Various non-residents who were not party to the adjudication scheme have, unlawfully and illegally trespassed, invaded and gained forceful ingress on the suit land without the consent of the Petitioners

b) The same buyers and non-residents who benefitted have been subleasing the suit land to unsuspecting 3<sup>rd</sup> parties as well as taking out loans using the land as security thereby risking depriving the Petitioners of their rightful ownership, possession, occupation and peaceful use of the land.

c) The adjudication scheme officials including the unscrupulous clan chairmen have acted in total disregard of the Petitioners legal rights to own land, have the same protected and to have peaceful enjoyment and have continued to trespass and are currently threatening to forcefully evict the Petitioners from the land.

d) There has been intense tension in the area sometimes leading to bloodshed due to eviction notices on residents served by non-residents claiming occupation.

e) There have been long running cases since the title deeds were issued based on charges of trespass and many residents have been jailed and others are still in court.

f) The Petitioners are at risk of losing their native land where they have for long time grazed their animals and undertook subsistence farming and due to the adjudication officials' acts and/or omissions they have suffered and continue to suffer irreparable loss and damage.

g) The national Land Commission has found after a thorough investigation, that the adjudication process that was undertaken indeed is an historical injustice that should be righted to allow the residents to enjoy their constitutional rights that have been so long been violated.

**c. Violation of the right to fair administrative action as guaranteed by Article 47 of the Constitution**

19. Article 47 of the Constitution provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

20. In the case of **PZ Cussons East Africa Limited vs Kenya Revenue Authority (2013) eKLR**, Majanja J held that "It is incumbent upon

an organ which has a monopoly over the discharge of administrative action that affects the rights of others that it carries out its duties in a fair and procedural matter”

21. Further in the case of **Republic Of Kenya V Kenya Revenue Authority Ex-Parte La.B International Kenya Limited Misc Civil Application No 82 Of 2010 Ojwang J** (as he then was) held that by article 47 of the Constitution of Kenya, persons such as the petitioners have a right to fair administrative action which must not be denied whether by the respondents or by other government agencies and mechanisms to which the respondent may happen to be operationally attached.

22. Ascertainment of rights in community land must follow the process envisaged by the Land Adjudication Act. Ascertainment of rights and interests and the individualization of the tenure for Tunyai ‘B’ Adjudication Scheme should have been followed as under the land Adjudication Act. The processes outlined by the Act are very important. I and one cannot claim that the right to ownership of land when that right has not been ascertained through the laid down procedure and as this happened leading to non-residents having been allocated land is a clear violation of the right to fair administrative action.

23. Article 47 on the right to fair administrative action inculcates Article 60(1) (d) of the constitution of Kenya provides the principles under which land should be managed in Kenya to include transparency.

24. Further, section 6 of the Land Adjudication Act provides for appointment of land committee members from members of each land adjudication section to assist in the land adjudication and settlement process. The said provisions of these acts are meant to ensure transparency as required under the constitution.

25. In his affidavit sworn on 20<sup>th</sup> March 2019, Barua Gituma the petitioner has admitted the following:

a) Under paragraph 7 he has admitted that land within Tunyai ‘B’ settlement scheme was earlier held in forms of clans.

26. The petitioners’ affidavit clearly shows that the winners of the adjudication process were the chairmen chosen by the respondents and their cronies.

27. Your Lordship, it’s therefore clear that the actions of the respondent do not meet the constitutional threshold provided for under Article 60 of the constitution of Kenya hence they are in breach of the rights of the area residents.

28. Whereas, it is admitted that the area where the subject parcel of land is situated is an adjudication section pursuant to the notice issued on 28<sup>th</sup> April 1988 by the District Land Adjudication Settlement Officer, Meru District, and the said process for was completed in 2005 was issued with title pursuant to Section 30 (5) and 6 of Land Adjudication Act, (herein after referred to as Cap 284).

29. MY LORD we submit that the land adjudication officer did not determine that the land exists and to whom it belongs to. This is the conclusion of adjudication process.

30. Any person who had a claim in respect to the subject parcel of land had a chance and/or opportunity pursuant to Section 13 read with Section 26 to make an objection and if not satisfied with the decision in respect of the objection must have filed an appeal with the Minister pursuant to Section 29 of Cap 284. This court does not have before it any evidence that the Defendants exercised the right to objection or appeal hence can at best be deemed pure trespassers against whom a remedy of injunction and/or preservation orders must be available to the Petitioner to preserve and protect his property and his rights thereof.

31. The Adjudication Act, Cap 284 provides for the process of adjudication. Some of the relevant provisions are set out and explained herein under.

32. For avoidance of doubt we refer YOUR LORDSHIP to Sections 13 which refers to the process followed to ascertain interest.

33. **THE SECTION PROVIDES AS FOLLOWS:**

***13. (1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.***

***(2) Every person whose presence is required by the adjudication officer, demarcation officer, recording officer, committee or board shall attend in person or by a duly authorized agent at the time and place ordered.***

***(3) If any person who is ordered to attend fails to attend in person or by a duly authorized agent, the demarcation, recording, adjudication or arbitration, as the same case may be, may proceed in his absence.***

***(4) If the demarcation officer or the recording officer considers that a person who has not made a claim has an interest in land within the adjudication section, he may, but is not bound to, proceed as if that person had made a claim.***

***(5) where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.***

34. Section 14 on its part require the demarcation officer to give warning of the intended demarcation and recording of claims and of the time

and place at which it well begun to notify all persons who will be affected by the demarcation and recording.

35. **Section 17** refers to general power of demarcation and survey officers to enter land within the adjudication area for purposes of demarcating or surveying any parcel therein and may summon any person who can give information regarding the boundaries of a parcel to point out the boundaries.

36. We also refer to court to the duties of officers involved in demarcation (section 15 on Duties of demarcation officer), Section 16- Duties of survey officers, Section 19 duties of recording officer.

37. **Section 20** functions of committee section 21 decision of committee section 22 functions of arbitration board.

38. **Section 23** refer to the preparation of adjudication record which record shall contain information of

a) Member of the parcel of land as shown on the demarcation map and its approximate area.

b) A record of:

i. Name and description of the owner with particulars of restriction of his power of dealing with it.

ii. Where the land has been set apart, the year and number of Gazette Notice by when and the purpose for which the land was set.

iii. When land is recorded under section 23(2)(e) As being the ownership of the county council, the fact that land shall remain Trust Land.

c) Particulars of rights under Section 23(2) (e)

d) Name of guardian, nature of disability if a minor the age of any owner or person under a disability

e) The date on which the form is completed.

39. After the form is signed by chairman and the executive officer of the committee and by the owner of each interest in the parcel of his authorized agent, no alteration shall be made in it except as provided by Section 27(1) or section 29(3) of the Act.

40. **Section 24** refers the demarcation map and the adjudication record as the ADJUDICATION REGISTER. On completion of adjudication record,

a. A duplicate of the same shall be delivered to Director of Land Adjudication

b. Display of the original adjudication register for inspection at a convenient place within the adjudication Section and giving notice that the adjudication register has been completed and may be inspected at that place during a period of 60 days from date of notice pursuant to Section 26 any person aggrieved by the contents of the adjudication register within 60 days of the date upon which the notice of completion of the adjudication register is published shall object to the adjudication officer in writing saying the respect in which the adjudication register is incorrect or incomplete.

c. **Section 26A** the Adjudication officer shall prepare a No Objection register in respect of any land not **section 28**subject to objection upon expiring of time for lodging objection

d. The No objection register and a copy of the duplicate adjudication register shall then be forwarded to the chief land registrar for purposes of registration under.

e. **Section 27** provides for alteration of register on finalizing of objection and appeal

f. **Section 28** provides that the chief land registrar shall cause registrations to be effected in accordance with the adjudication register

g. **Section 29** provides that an appeal to the determination of objection shall be lodged within 60 days after date of determination. The appeal shall be done to the minister.

h. Then is no evidence that the process stated and/or described above did not complete and/or that the interests over the subject land was not established and time lines for objection or appeal have not lapsed and register has not become final

41. Article 60(1) (d) of the constitution of Kenya provides the principles under which land should be managed in Kenya to include transparency.

42. Further, section 9 of the Land Consolidation Act and section 6 of the Land Adjudication Act provides for appointment of land committee members from members of each land adjudication section to assist in the land adjudication and settlement process. The said provisions of these acts are meant to ensure transparency as required under the constitution.

43. Despite the existence of the land committee members, they went ahead to con the other residents and abdicate on their responsibility to be neutral and work the land.

#### **D. Whether the first registration can be cancelled**

44. Your lordship, in light of Section 26 (1)(a) and (b) and Section 80 of the Land Registration Act we submit that the many fraudulent owners having been obtained fraudulently can be cancelled and the register be recertified. Section 80 (1) states:

*“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”*

45. Likewise, section 80(1) states:

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme*

46. The same sentiments were echoed in **Esther Ndegi Njiru & Another Vs Leonard Gatei (2014) eklr** where the court held:

*“Under the Land Registration Act a first registration is not accorded the protection previously accorded to it under the repealed Registered Land Act. The case of KURIA GREENS LIMITED –VS- REGISTRAR OF TITLES & ANR, (2011) e KLR referred to the court by the plaintiff to support the proposition that the court cannot interfere with a first registration even where fraud, misrepresentation or mistake is proved was decided before the coming into force of the Land Registration Act and it is my view that it no longer can be good law as regards the sanctity of title. As I observed earlier on section 80 of the Land Registration Act and section 26 1(a) and (b) does not shield a first registration in the manner it was shielded under the repealed Registered Land Act. My view therefore is that where fraud or mistake is proved even what would qualify to be a first registration would under the provisions of the Land Registration Act be liable to be rectified and/or cancelled.*

47. Your lordship, in the case of **Joyce Nkatha Musa Versus Samwel Kaumbutu M’Ayoia & # Others (2012) eklr** the court held that proceedings under the Land Adjudication Act,

*“It must be remembered that the proceedings under the Land Adjudication Act (Cap 284) are special proceedings within the context of that Act. That under the Land Adjudication Act (Cap 284) Laws of Kenya, the land being gathered and demarcated are still under customary law and it is those rights that should be ascertained before registration is effected and title issued under the Registered Land Act (Cap 300).”*

48. From the foregoing thus, whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the constitution coupled with the provision of section 26(1) (a) and (b) of the Land Registration Act places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search.

49. The petitioners submit that the respondents were under a duty to ascertain the rights of the residents as being in occupation of the suit land from time immemorial before registration was effected and title issued.

50. The third respondent did not do this and he failed in his duty to register the actual residents who were in occupation of the land and possession thereof.

51. The petitioners to their utmost astonishment found after the adjudication process that where they had lived since time immemorial was registered in other people’s names.

52. This was in utter disregard of the residents’ proprietary interest in the land they were occupying and by sheer negligence, the third respondents failed to register the same against the residents against the standard procedure which demands that they consult the features on the ground and interview the people on the ground including neighbors while drawing the adjudication maps.

53. The non-residents who benefitted have tried myriad of ways to dispossess the occupants of the land in many cases including instituting criminal cases against various persons as averred in the further affidavit of Barua Gituma sworn on 20<sup>th</sup> March 2019.

54. This honorable court has pronounced itself on some disputes on the suit property including in **Chuka Elc Case No 208 Of 2017 Lucy Karauki Kirambia Vs Muthengi M’mwathi and Two Others** where the third respondent in this matter who had been a defendant failed/refused to file a defence the court held

*“The fact that the disputed land had not been registered in the name of the deceased Peter Muriungi (deceased) even though there was evidence that he and his family had occupied the land, is on a balance of probability, proof that there was fraud by the 1<sup>st</sup> and 2<sup>nd</sup> defendants through collusion and conspiracy to illegally acquire the suit land.”*

#### **E. Role of National Land Commission in revoking the adjudication process.**

55. Articles 67 and 68 of the Constitution as read together with s.14 of the National Land Commission Act (Cap 5A) clearly empower the National Land Commission(NLC) to review grants and dispositions of public land. It was not the intention of Kenyans as we adopted the Constitution or the intention of Parliament as it promulgated the National Land Commission Act (Cap 5A) that the mandate of the NLC be limited to public land. The NLC was to review “grants and disposition”, effectively meaning land already alienated and which would not, on the face of it, be available as public land. The NLC mandate was all about reviewing public land converted to private land to ascertain whether it was regularly and lawfully acquired.

56. In this particular adjudication section, the National Land Commission received complaints from the Tunyai B Adjudication section residents. After undertaking investigations, the NLC wrote issued a report on the findings dated 23rd November 2016 as follows:

- a) The adjudication process that was declared in 1983 was totally flawed, thereby displacing and dispossessing the true clan members.
- b) The officers involved opted to allocate themselves and their cronies, big parcels, this sidelining the true residents of the subject area.
- c) The adjudication process seems to have been done on the table rather than on the ground, leading to a lot of complaints from residents, including omitting names of locals from the register.
- d) The local people from Tunyai adjudication section were disinherited of their ancestral land.
- e) There was no justification for aliens to be allocated land in the subject area.
- f) Most of the people allocated the adjudicated land, indeed more than 90% percent are not from the local area.
- g) A number of public utility plots that had been set aside were also allocated to and grabbed by people who were nonresidents.

57. The NLC gave out recommendations that included:

- a) That as per the Land Laws (Amendment) Act of 2016, this scheme qualifies as a historical injustice meted to the people of the subject area.
- b) According to section 160(2)(e) of the Land Act of 2012, the so called adjudicated land were given to absentee landlords and are eligible for re-allocation to the present occurred.
- c) Recall and revoke the titles already issued within 4 weeks from today after subjecting them to public reviews.
- d) After revocation of the titles that were illegally issued, a fresh adjudication of the area be declared and proper allocation be done as per the occupation of land by the local residents and the confirmation

58. The NLC by the same letter revoked all titles that were issued to lands covering public utilities and revoked them immediately as per section 155 (2) of the Land Act of 2012 and section 152, A, B, C of the Land Laws (Amendment) Act of 2016.

59. The Petitioner submits that the NLC is the body that was to be given the mandate to review such grants or dispositions by Parliament and is not only supposed to deal with public land that was illegally or irregularly allocated after the promulgation of the Constitution but even before. That is what the Kenyan people wanted as discerned from the Ndung'u Commission Report and the National Land Policy, which preceded the Constitution.

60. Thus the NLC position on this issue buttresses the Petitioners claims that this process was shoddily done, irregular and this our ought to intervene and help remedy a mistake done by corrupt and inefficient officials.

61. It is the petitioner's submissions that the respondents and the interested parties should have judicially appealed the finding by the National Land Commission that the matter was one which was an historical land justice and that the grounds of opposition filed by the fourth that the petitioners should have sought another forum should thus fail. They cannot purport that the petitioners were time barred yet the NLC conducted an investigation and supported the petitioners' assertions. Thus the grounds of opposition adduced by the fourth respondent are bad in law and should fail.

62. The National Land Commission has powers to investigate any alleged historical land injustice and make any appropriate recommendation. In doing so, the National Land Commission can hold inquiries for purposes of carrying out the above stated investigations. In this matter after carrying an investigation and inquiry, the National Land Commission has already concluded that the land in issue was acquired irregularly or there is any historical injustice. It may just be an alleged historical injustice and after the investigation and inquiry, the said Commission may come up with appropriate recommendation that might assist in unlocking the dispute herein. This assertion is

supported by the finding by Justice Gacheru in **Republic V National Land Commission & Another Exparte Mbo-I-Kamiti Farmers Company Ltd [2018] Eklr.**

63. In **R V National Land Commission Ex Parte Holborn Properties Ltd [2016] e KLR**, the view advanced by the court was that the NLC was enjoined to review any such land that was once public but had been converted to private to ascertain whether it was legally and regularly acquired.

64. As was stated in the case of **Belgo Holdings Ltd V National Land Commission & Another [2017] eKLR**

*“... Unalienated land remains public land. It has no Grant to be reviewed. Clearly, the intention of both the Kenyan people and the legislature when they promulgated the Constitution and the National Land Commission Act respectively was that the 1<sup>st</sup> Respondent [NLC] would have some power, albeit limited, to have an appraisal of any Grant hence the power to review Grants”*“.

64. The NLC’s jurisdiction over private land is however not a carte-blanche. Caution must be exercised and where it is common cause, as in this case, that the land in question is private land but it is alleged that the NLC is acting ultra vires, the court must closely interrogate whether the NLC has crossed the line. Thus while it cannot be simply stated that the land is private land thus jurisdiction is absent in so far as the NLC is concerned, it also cannot be simply stated that the mere fact that the land was previously public land grants the NLC jurisdiction over all disputes touching on the title or grant to such land as upheld in **Registered Trustees of the Arya Pratinidhi Sabha, E.A V National Land Commission & Another [2016] eKLR**.

65. Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.

66. The NLC cannot review what public land is still, according to the records. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done.

67. It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the NLC with a view of recommending to the Registrar to revoke the title.

#### **F. Whether the petition is legally in court in the proper form**

68. The constitution in Article 22 (1) provide for the filing of a suit for the enforcement of the fundamental rights in court, and further provides in article 22 (3) b that the fees for the filing of the suit be kept to the minimum and that in article 22(3) “C” no fee may be charged for commencing the proceedings”, and in Article 159 (2) the constitution of Kenya, enjoins this court to go to the substance of the petition before it, as opposed to technicality of whether this matter has been brought by way of plaint or petition. In my respective submission under the petition the court has wide powers to grant the prayers sought.

69. In the petition, once the facts have been established, which the petitioner submits they have, the petitioner is entitled to the prayers sought, and in particular prayer (c) and invite the court to order the land registrar Tharaka Nithi County to cancel the to cancel the adjudication process in Tunyai B adjudication process.

70. Your Lordship, the issue of pleadings in Constitutional Petitions has been settled by a plethora of judicial precedents. The Principle in **Anarita Karimi Njeru** underscores the importance of defining a dispute before court, with reasonable precision as held in **Bethwel Omondi Okal V Board of Trustee Telposta Pension & 2 Others [2017] eKLR**.

71. This means that the Petitioner must provide the particulars of the alleged complaints, the manner of the alleged infringements to properly ground a petition. In the present petition it is very general and be (sic) assertions are made that relate to alteration of records.

72. In this petition the particulars are as pleaded in the affidavit of Barua Gituma on 14<sup>th</sup> September 2018 and a supplementary affidavit dated 20<sup>th</sup> March 2019, the particulars of the complaints have been elucidated and include:

- a) The adjudication process that was declared in 1983 was totally flawed, thereby displacing and dispossessing the true clan members.
- b) The officers involved opted to allocate themselves and their cronies, big parcels, thus sidelining the true residents of the subject area.
- c) The adjudication process seems to have been done on the table rather than on the ground, leading to a lot of complaints from residents, including omitting names of locals from the register.
- d) The local people from Tunyai adjudication section were disinherited of their ancestral land.
- e) There was no justification for aliens to be allocated land in the subject area.
- f) Most of the people allocated the adjudicated land, indeed more than 90% percent are not from the local area.

g) A number of public utility plots that had been set aside were also allocated to and grabbed by people who were non-residents.

73. The particulars of alterations bare (sic) have been disclosed, and the court can induce who altered the records and it is clear the extent to which the alterations were made

74. The nexus between the alterations on the adjudication register and fundamental rights is clearly established. This all helps to establish the jurisdictional basis of the action before the court.

75. Section 18(a) of the Environment and Land Court Act directs this Court to be guided, inter alia, by the following principles: -

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

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

*iii) the principles of international cooperation in the management of environment resources shared by two or more states;*

*iv) the principles of intergenerational and intra-generational equity;*

*v) the polluter pays principle;*

*vi) the pre-cautionary principle;*

76. The NLC having found that the adjudication seprocess was irregular, this petitioner submits that these courts has all the authorities bestowed on it by Article 159 of the Constitution and the guiding principles in the court's exercise of authority and make a finding for the petitioner.

77. In this matter, the multiplicity of suits both criminal and civil cases have led to a myriad of judicial decisions all arising from the flawed adjudication process. As shown by the supplementary affidavit of Barua Gituma dated 20<sup>th</sup> March 2019, there have been convictions arising from purported trespass cases and in other cases acquittals.

78. In the **Lucy Karauki Kirambia Vs Muthengi M'Mwathi Muthigu. ELC Case No 208 Of 2017** the dispute between the parties was the ownership of the suit property in the Tunyai B adjudication section. In his ruling, Justice Gikonyo found that there was on a balance of probability that the defendants had perpetuated fraud to disposes the plaintiff who had been in occupation of the land.

79. The Petitioners submit that this petition which has clearly set out the gross violations and the particulars of fraud perpetuated against the residents offers the best remedy to end what promises to be a never ending dispute.

80. Further as earlier submitted, your lordship, in light of Section 26 (1)(a) and (b) and Section 80 of the Land Registration Act we submit that the many fraudulent owners having been obtained fraudulently can be cancelled and the register be recertified. Section 80 (1) states:

*“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”*

#### **G. Whether the petitioner is entitled to prayers sought in the petition**

81. The respondents during this process demonstrated a clear lack of transparency and accountability on the part of providing the proper title deeds of the residents.

82. The Respondents have not adduced any evidence to show how aliens and nonresident members came to own the land in question and be part of the adjudication process.

83. In view of the submissions above, the respondents conduct amounts to an infringement of the Petitioners' rights as protected by Article 47 of the Constitution.

84. Contrary to the allegations at paragraph 22 of the interested parties affidavit to the effect that the petitioners should stop generalizing their disputes and should file separate suits against the invaders, the recommendation of the National land Commission was clear on this matter and the plethora of communication over the years by residents disputing the adjudication process is what makes the petitioner resort to court action when it becomes clear that there was no intervention in the matter.

85. There is no time limit within which a party should approach the court for redress regarding the violations of its fundamental rights and freedoms. However, the petitioner appreciates that a party should come to court within a reasonable time. The petitioner and the stakeholders' attempts at resolving this issue has not been successful and the petitioner is entitled to apply to this court for redress.

86. We submit that the petitioners have demonstrated violation of its constitutional rights and urge the court to exercise its powers under Article 23 (3) of the Constitution to grant the prayers sought in the petition.

87. We pray that the petition be allowed with costs to the petitioners.

**DATED** at Nanyuki this 28<sup>th</sup> day of March 2019.

**JESSE MWITI ADVOCATES**

**Advocates for the Petitioners**

11. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents' submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes:

**2<sup>ND</sup> – 4<sup>TH</sup> RESPONDENTS SUBMISSIONS**

Your Lordship, on behalf of the 2<sup>nd</sup>-4<sup>th</sup> Respondents, we submit as follows:

The Honourable Court is seized on a Petition dated 21<sup>st</sup> September 2018 supported by the affidavit of one Barua Gituma of even date. Their main grievance relates to the Land Adjudication Process. These are set out in Paragraph 11-16 of the petition. Based on these grounds, several prayers are sought.

In response, the 2<sup>nd</sup>-4<sup>th</sup> Respondents raised several grounds of opposition vide grounds dated 13<sup>th</sup> November 2018. We now proceed to set out our arguments.

1. The Petitioners have been extremely indolent in filing this petition which cause of action arose sometime in the 1980's.

Your Lordship, the Honourable Courts attention is drawn to paragraph 11 of the Petition and paragraph 7 of the Supporting Affidavit. These two paragraphs expressly set out when the cause arose which in their own words is "sometimes in the 1980's when the Land Adjudication process was conducted in the area".

On when the Petition was filed, it's evident on its face that it was on the 21<sup>st</sup> September 2018. A quick calculation shows that **38 years** have lapsed since the cause of action arose. This delay is extremely excessive and falls squarely within the confines of the doctrine of delay and laches. The effect of this delay cannot be overstated. The respondents have been severely prejudiced by the late filing of the petition. To this end the annexure by the interested party would suffice. Annexure '**AM 2**' of Paragraph 4 of the replying affidavit shows, among other issues, that 99% of the Committee members are deceased. The Petition is largely anchored on the actions and/or omissions of the committee members.

This delay notwithstanding the petitioners have not preferred any reasonable explanation for the excessive delay given the effect on the respondents. The doctrine of laches and delay is embedded on public policy. In **Johnstone Ogechi –VS- The National Police Service [2017] eKLR** the Honourable Court had this to say about time limit for filing a constitutional petition.

**“clear statutory provisions that set time limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the constitution whether the proceeding before the court is an ordinary action or petition or other proceedings.**

We submit your Lordship that this ratio decidendi is sound law since the constitution acknowledges that no right is absolute and is subject to limitations prescribed by law, including the constitution itself. Further the jurisdiction of the Honourable Court is equally defined by statute and lastly public policy militates against goading a party with state claims.

Your Lordship, on the issue of generality of pleadings/petition we forcefully submit that indeed the petition is too general, lacks specificity and is likely to confuse issues. The following issues reinforce our arguments.

i) The Adjudication process relates to specific suit parcels being transitioned to registered land.

The long Title of the Land Adjudication Act provides for the purpose set to be achieved by the legislative scheme. Its overall goal is the **“ascertainment and recording of rights and interests in Trust land and for purposes connected therewith and purposes incidental thereto”**. To this end a very elaborate process is provided for under the Act. Of utmost interest in this regard is the final phase provided for under Section 28 that relates to the action by the Chief Lands Registrar. And extract provides that:

**“Upon receiving the adjudication register under Section 27 of this Act, the Chief Land Registrar shall cause registration to be effected in accordance with the adjudication register”**.

Once the adjudication register is received by the Land Registrar the transition from Trust Land to Registered Land is actualized. Title to the suit property is acquired and protectable now under Article 40 of the Constitution.

In the instant suit, none of the petitioners had produced any evidence demonstrating their interest in any parcel of land. It would have been expected that for any right to purportedly have been violated it needs to be specified as to its existence and with backed up with evidence to reinforce the allegations. That yawning gap has not been sealed by any of the Petitioners. Thus our two grounds tie at this point, that no

right or interest capable of being registered has been demonstrated and evidenced by any of the petitioners. There is no collective rights and interest registrable under the Land Adjudication Act and as such untenable to lump their claims together. The suit land is further not a settlement scheme.

Your Lordship, our 3<sup>rd</sup> ground that the petitioners have not demonstrated how the Land Adjudication/Consolidation Act **process** negatively impacted on their interest becomes live at this juncture. It has been highlighted herein that the Land Adjudication Act sets out the process of ascertaining rights and interest in Land. It equally contains an elaborate appeal mechanism where a party is aggrieved by the various levels of decision making provided therein.

In the instance suit, which mechanisms were employed by the petitioners left to conjecture as well as the outcome. The petitioners are merely using the petition as a smoke screen that conceals their mischief. At the very least the petitioners should have demonstrated the processes they followed and then proceed to impeach the provisions of the Act. Once again what the petitioners did pursuant to the provisions of the Act is uncertain, what the outcome is, is unknown and how the process negatively impacted on their interest is a moot issue.

Your Lordship, despite these yawning gaps in the petition, it would be remiss if we do not mention critical facts emerging from the 8<sup>th</sup> Interested Parties Affidavit. The 8<sup>th</sup> I.P. Adriano Mugwiria depones in paragraph 4 of his affidavit that he was among the committee members of 'Tunyai B' adjudication Section. To this end, a letter of appointment of committee members is annexed as 'AM2'. In it the 8<sup>th</sup> interested party is listed as the 3<sup>rd</sup> committee member. Further close to the 3<sup>rd</sup> member is Kungania, Marauko who is the 6<sup>th</sup> petitioner herein. We are equally reliably informed that the 16<sup>th</sup> committee member, Kamwara Kairanya is father to the 5<sup>th</sup> Petitioner Misheck Mitugo Kamwara. A number of issues can be gleaned from these disclosures by the 8<sup>th</sup> interested party. That there was indeed a committee constituted in terms of Section 5 of the Land Adjudication Act. With this committee a series of processes is triggered in terms of the Act. All these processes are self auditing. It has not been demonstrated how the petitioners utilized the same up to and including the Appeal to the Minister in terms of Section 29 of the said Act. Further, the petitioners have not disclosed their role as committee members, in particular the 6<sup>th</sup> petitioner. This demonstrates bad faith and offends the doctrine of he who comes to equity must come with clean hands. The 8<sup>th</sup> interested party has seemingly been candid but was part of the mischief of the purported impeachment of the adjudication of 'Tunyai B'. The petition is laced with mischief; abuse of court process and at the very least a contest between erstwhile committee members. Court processes should not be annexed to such conduct but should be related to genuine individual processes. A case in point is **Chuka ELC No. 208 of 2017** annexed as 'BG 14' in the Petitioners Supplementary Affidavit. The suit was about an individual suit parcel in the impugned section. The court granted the orders sought as fraud had been demonstrated. That course has not been pursued by any of the petitioners.

Your Lordship, our further arguments relate to the following issues. the scope of the orders sought in the petition. The orders sought are very extensive and not in public interest. The mechanism set out in the Land Adjudication Act sought to preserve the public interest by availing entities to adjudicate claims. This was not utilized by any of the petitioners further given the orders sought being of a judicial review nature, it's trite law that the gravity of such orders can be withheld, even if warranted, where their issuance would cause administrative chaos and as such the orders not being the most efficacious.

Further Section 25 and 26 of the Land Registration Act, sets out the rights of a registered proprietor of land and provides for limited grounds for sustaining a challenge. The petitioners need to pleas and prove that any title registered in favour of another party was procured irregularly, illegally or unprocedurally and further show that the person who have title were party to such ills. That legally tenable approach has not been pursued by the petitioners. They have not shown any reason why they could not move court through regular proceedings by way of a plaint, where oral evidence would be called. Affidavit evidence as in this case would not be appropriate and efficacious.

Lastly, as it has been argued herein, the adjudication process contemplates preserving individual interest in land. The petitioners purport to file the petition on behalf of 400 other residents of 'Tunyai B' Adjudication process. Whether it's individual or communal interest being constitutionally enforced is uncertain. If it's individual titles the clear procedure for redress is set out in the Land Adjudication Act, which should strictly be followed. If at all its community land being preserved then that cannot be done over registered title, also over an area which has already been adjudicated and most importantly Article 63 of the Constitution must be invoked and pleaded. With regard to the latter process the defined structures of the Community Land Act must also be adhered to.

In view of the foregoing and in totality of the issues raised, we urge this Honourable Court do dismiss the petition dated 21<sup>st</sup> September 2018 with the appropriate orders as to costs.

We are duly obliged.

**DATED at MERU this .....16<sup>th</sup> ..... DAY OF .....May..... 2019**

**E.M. KIETI**

**SENIOR LITIGATION COUNSEL**

**FOR: HON. ATTORNEY GENERAL**

12. The Interested Parties' submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes:

**INTERESTED PARTYS SUBMISSIONS**

Your Lordship, the petitioners filed the petition dated 21<sup>st</sup> September 2018 seeking various prayers being 5 prayers set forth at page 8 of the

petition being.

1. A declaration that the Land Adjudication process conducted in Gakurungu sub location in the so called TUNYAI “B” Adjudication Section was fraudulent, illegal, null and void ab initio.
2. A declaration that the fraudulent land Adjudication process conducted in Gakurungu sub location in the so called TUNYAI “B” Adjudication Section is an infringement of the petitioners’ rights under Articles 27, 40 and 47 of the constitution.
3. An order for Judicial Review by way of an order of Mandamus to compel the first respondent to recall all the title deeds issued in Gakurungu sub location, the so called TUNYAI “ B” Adjudication Section and thereby revoke or cancel the same.
4. An order for judicial Review by way of an order of Mandamus to compel the respondents to conduct a fresh and proper Land re-adjudication process in Gakurungu sub location , the so called TUNYAI “ B” Adjudication section which process should include identifying the true local residents and their actual occupation of land and thereafter issue fresh title deeds to the true local residents as per the land occupation.
5. Costs be awarded to the petitioners.

Your Lordship the said petition was supported by two affidavits sworn by one BARUGA GITUMA one sworn on the 21<sup>st</sup> September 2018 and another supplementary affidavit sworn on 21<sup>st</sup> March 2019.

Your Lordship, the petitioners in their affidavits in support of the petition allege that the adjudication process was flawed and resulted to non – local resident being granted land and were issued with title deeds.

Your Lordship the interested parties opposed that petition by way of filing to replying affidavits one by ANDRIANO MUGWIRIA sworn on the 4<sup>th</sup> February 2019 and another affidavit sworn by ROBERT NJERU KAMWARA sworn on the 4<sup>th</sup> February 2019 .

Your Lordship , the said ANDRIANO MUGWIRIA deponent has deposed that he was among the committee members appointed during the Land Adjudication Section and that the land Adjudication process conducted in Gakurungu sub location within TUNYAI “B” Adjudication process was conducted properly and it was legally done as per the requirements of the Land Adjudication Act Cap 284 Laws of Kenya since even an adjudication committee comprising of members of the clans living in the area namely KANJOGU- MBAO- CLAN, KITHURI CLAN, NYAAGA CLAN and UKUUJIU CLAN had been appointed.

The said affidavit your lordship gives a chronology of events during the adjudication process, your lordship this process commenced in the 1970’s and culminating in the government through the land Adjudication Department of the Ministry of Lands establishing an Adjudication Section in TUNYAI Sub location.

Your Lordship this is a gradual process and all the safeguards were followed and in fact 65 objections were filed and heard and even 11 people filed appeals to the minister.

Your Lordship, it is only after the said process was followed that the government issued title deeds.

Your lordship in the affidavit deposed by ROBERT NJERU KAMWARA he clearly states that he was among the chairman of the said group whereby he wrote many letters to government offices complaining of the adjudication process. He clearly deposed that when he wrote a letter to the land Adjudication offices at Embu office from that office went to listen to their grievances and advised them to stop complaining as a group but each person should complain individually by writing letters individually . He clearly deposed that 409 letters were written and it was confirmed that from these number 333 were minors at the time of the adjudication process and that 76 were adults and that of the 76 the majority of them had been allocated land it is from that he decamped from this group when he realized his mistake.

Your Lordship , we submit that the petitioners’ don’t have a genuine claim since the Adjudication process was conducted and concluded and the cause of action arose in the 1980’s , it is too general, the adjudication process relates or concerns specific land parcels as registered in the register and it has not demonstrated which process they engaged in with regard to their individual interest and the outcome and that this petition has been sponsored by politicians to increase their political visibility in the area to serve their selfish interest .

In conclusion we urge this honourable court to dismiss this petition with costs. We rely in the case of MERU HIGH COURT CIVIL SUIT NO. 6 OF 2009, KANAMPIU M’RIMBERIA – VRS – JULIUS KATHANE & 3 OTHERS.

DATED AT MERU THIS.....1<sup>st</sup> .....DAY OF.....May.....2019

.....  
**FOR: KAMENYI KITHINJI & CO.**

**ADVOCATES FOR THE INTERESTED PARTIES /APPLICANTS**

13. I frame the issues for determination in this petition as:

- a) Are the petitioners entitled to a declaration that the Land Adjudication process conducted in Gakurungu Sub-Location in Tunyai 'B' Adjudication section was fraudulent, illegal, null and void ab initio?
- b) Are the petitioners entitled to a declaration that the apposite adjudication process is an infringement of the petitioners' rights under Articles 27, 40 and 47 of the Constitution?
- c) Are the petitioners entitled to a Judicial Review order of mandamus to compel the first respondent to recall all title deeds issued in Gakurungu Sub-Location, Tunyai 'B' Adjudication Section and thereby revoke or cancel them?
- d) Are the petitioners entitled to a Judicial Review order of mandamus to compel the respondents to conduct a fresh and proper land re-adjudication process in Gakurungu sub-location, Tunyai 'B' Adjudication section which process should include identifying the true local residents and their actual occupation of land and thereafter issue fresh title deeds to the true local residents as per their land occupation?
- e) Who will be condemned to pay costs?

14. I have carefully considered the pleadings, documents, submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. Regarding the authorities proffered by the parties, I do not need to regurgitate the principles they espouse as those principles have been elaborated upon in the written submissions (op.cit) which have been reproduced in full in the earlier part of this judgment. I opine that the said authorities are good precedents in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. I have, nevertheless, taken into account the principles they espouse when determining this petition.

15. At the outset, I note that this petition raises weighty issues. However, I opine that the petitioners, the Interested Parties and the Respondents are making conflicting assertions. The Interested Parties say that the adjudication process was conducted properly whereas the petitioners claim that the adjudication process was improperly conducted. The respondents take issue with the extent to which the petitioners participated in the adjudication process. Indeed, the petitioners do not come out clearly as to what extent they followed or even exhausted the dispute settlement processes contained in the Land Consolidation Act and in the Land Adjudication Act. The 1<sup>st</sup> petitioner claims that committee members, including Andriano Mugwiria, an Interested Party, misused their privileged positions for personal aggrandizement.

16. All parties seem to be in agreement that the impugned Adjudication process took place a long time ago. At paragraph 11 of the petition, the petitioners state: "**All the residents of Tunyai 'B' Adjudication Section lived together in peace and harmony until sometimes in the 1990's when a land adjudication process was conducted in the area.**" At paragraph 4 of the 1<sup>st</sup> petitioner's affidavit, it is stated: "**All the residents of Tunyai 'B' Adjudication Section lived together in peace and harmony until sometimes in the 1980's when a land adjudication process was conducted in the area.**" Be it as it may, whether the impugned adjudication process took place in the 1980's or 1990's, it took place long time ago.

17. I find that the issues raised by all parties in this petition cannot be effectively settled through the parties' assertions. It is the word of the petitioners against the word of the respondents. It is also the word of the petitioners against the word of the Interested parties. It would have been better if the assertions raised in this matter were heard in another forum where all pertinent issues could be brought out, identified and canvassed effectively.

18. Article 67, 2(e) of the Constitution mandates the National Land Commission to initiate investigations on its own initiative or on a complaint into present or historical land injustices and to recommend appropriate redress.

19. At paragraphs 22 and 23 of their petition, the petitioners assert that the National Land Commissions made a determination concerning the claims they make in this petition. They rely on a letter dated 23<sup>rd</sup> November, 2016 addressed to the Chairman, Land Administration Committee, National Land Commission, by Professor Mohammad A. Swazuri, Chairman of the National Land Commission. The said letter is reproduced in full herebelow.

ARDHI HOUSE

1<sup>ST</sup> NGONG AVENUE

P. O. BOX 44417,

NAIROBI

Ref: NLC/CHAIRMAN/VOL.VXIII/138 Date: 23<sup>rd</sup> November, 2016

CHAIRMAN LAND ADMINISTRATION COMMITTEE

**NATIONAL LAND COMMISSION DISPUTE OVER TUNYAI B ADJUDICATION SCHEME, THARAKA NITHI COUNTY**

The NLC has received complaints from the residents of Gakurungu Location in the Tunyai B adjudication section. This has been made through discussions, memorandum and meetings at various fora.

The Commission was also seized of the matter when we were inaugurating the local County Land Management Board in early 2015 at Kathwana, the headquarters of the County.

It has emerged that:

1. The adjudication process that was declared in 1983 was totally flawed, thereby displacing and dispossessing the true clan members.
2. The Officers involved opted to allocate themselves and their cronies big parcels, thereby sidelining the true residents of the subject area.
3. The adjudication process seems to have been done on the table rather than on the ground, leading to a lot of complaints from residents, including omitting names of the locals from the register.
4. The local people in the Tunyai adjudication section were disinherited of their ancestral land.
5. There was no justification for aliens to be allocated land in the subject area.
6. Most of the people allocated the adjudicated land, indeed more than 90 percent are not from the local area.
7. A number of public utility plots that had been set aside were also allocated to and grabbed by people who were not residents of Gakurungu location.

### **RECOMMENDATIONS**

1. That as per the Land Laws (Amendment) Act of 2016, this scheme qualifies as a historical injustice meted to the people of the subject area (copy the relevant sections).
2. Similarly, according to Section 160(2) (e) (iii) of the Land Act of 2012, the so-called adjudicated lands were given to absentee landlords, and are eligible for re-allocation to the present occupants.
3. Recall and revoke all the titles already issued within 4 weeks from today after subjecting them to public reviews.
4. Identify and profile the few local people who were rightly allocated the land to confirm their status on the land and to match the numbers they were given with the actual position on the ground. This shall be implemented within two weeks by the NLC, DLASO of Tharaka Nithi, the CEC for lands of the County Government of Tharaka Nithi and County Commissioner of the same.
5. After revocation of the titles that were illegally issued, a fresh re-adjudication of the area be declared and proper allocation be done as per the occupation of land by the local residents and the confirmation mentioned in 4 above.
6. All titles that were issued to lands covering public utilities are being revoked immediately, as per the provisions of section 155 (2) of the Land Act of 2012 and Section 152 A, B, C of the Land Laws (Amendment) Act of 2016. The County Government of Tharaka Nithi and the County Commissioner should immediately move in and fence-off all the public utility parcels and secure them, after verification by the county and district surveyors and planners. These parcels include all public primary and secondary schools, public dispensaries, public markets, livestock holding areas etc.
7. After all the above have been achieved, titles to be issued to the proper and deserving allottees as fast as possible, including for public utility plots.
8. All officials involved in this fraudulent allocations should be identified, summoned and disciplinary action taken against them, including but not limited to criminal prosecution as per the laws of Kenya.

Please deliberate and let us have your concurrence on the above proposal for necessary action to proceed.

Thank you.

**Prof. Muhammad A. Swazuri, Phd, OGW**

**Chairman, National Land Commission and**

**Associate Professor of Land Economics**

20. The last paragraph of the letter states; ***“Please deliberate and let us have your concurrence on the above proposal for necessary action to proceed.”*** It is clear from this statement that the letter the petitioners are relying upon to buttress their claim is inchoate and pellucidly not determinative. What it contains are the recommendations to the Land Administration Committee by the Chairman of the National Land Commission. On the evidence provided by the Petitioners, the National Land Commission did not make the recommendations that the petitioners claim they made.

21. I decline to make orders in terms of Reliefs Numbers 3 and 4 for orders of mandamus as the process the petitioners claim took place was never completed.

22. I also decline to issue orders of declaration in terms of Reliefs 1 and 2 in the petition as their claim is based on an inchoate process.

23. The petitioners are advised to go back to the National Land Commission so that the inchoate process demonstrated by the letter dated 26<sup>th</sup> November, 2016 addressed to the Chairman of the Land Administration Committee by the Chairman of the National Land Commission can be concluded, of course, with the participation of all stakeholders.

24. It is hereby reiterated that all the reliefs sought in this petition are denied.

25. Regarding costs, I find that this petition evinces strong veneers of Public Interest Litigation. For this reason, parties will bear their own costs.

26. Orders accordingly.

Delivered in open Court at Chuka this **13<sup>th</sup> day of November, 2019** in the presence of:

CA: Ndegwa

Mwiti for Petitioners

Kiongo for 2<sup>nd</sup> to 4<sup>th</sup> Defendants

Kiongo h/b Kaimenyi for the Interested Parties

**P. M. NJOROGE,**

**JUDGE.**