



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. PETITION NO. 2 OF 2016**

**IN THE MATTER OF ARTICLES 35 (1), 47, 62 (2), 63 (1), (2), (3) AND 67 OF THE CONSTITUTION OF KENYA**

**AND**

**THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AND FOR INTERPRETATION OF THE CONSTITUTION OF KENYA**

**BETWEN**

- NICKSON MUTINDA MUSYOKI.....1<sup>ST</sup> PETITIONER
- SILVANO NJERU.....2<sup>ND</sup> PETITIONER
- PATRICK NZESEL.....3<sup>RD</sup> PETITIONER
- FERISTER WAWIRA.....4<sup>TH</sup> PETITIONER
- WILSON MUIVA WAMBUA.....5<sup>TH</sup> PETITIONER
- ZIPPORAH WANJIRU GICHUHI.....6<sup>TH</sup> PETITIONER
- MARGARET NTHAMBA MBITHI.....7<sup>TH</sup> PETITIONER
- ANTHONY WACHIRA GITHOGO.....8<sup>TH</sup> PETITIONER
- BONIFACE MUTINDA MAKATO.....9<sup>TH</sup> PETITIONER
- JOSEPHINE THAARA.....10<sup>TH</sup> PETITIONER

*AND*

- THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT
- THE CABINET SECRETARY MINISTRY OF  
LAND HOUSING & URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT
- COUNTY GOVERNMENT OF EMBU.....3<sup>RD</sup> RESPONDENT

*AND*

**MBEERE ELDERS ADVISORY**

**WELFARE GROUP & 3 OTHERS.....1<sup>ST</sup> INTERESTED PARTY**

**JOSEPH MIANO MIIGWA & 9 OTHERS.....2<sup>ND</sup> INTERESTED PARTY**

**EMBU/MWEA RANCHING COOPERATIVE**

**SOCIETY LIMITED & 7 OTHERS.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGEMENT**

1. By a petition dated 14<sup>th</sup> April 2016 and filed on 15<sup>th</sup> April 2016, the Petitioners sought the following reliefs against the Respondents;

- a) A declaratory order that the demarcation, alienation and/or allocation of the said Mwea Settlement Scheme is unconstitutional, irregular, illegal and indeed null and void.*
- b) A declaratory order that any such demarcation, alienation and/or allocations and the subsequent issuance of titles of the said Mwea Settlement Scheme be done for and for the benefit of the residents of the Scheme and with the due consultation and participation of the Petitioners and the residents of the Scheme. (sic)*
- c) A mandatory order compelling the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to supply the Petitioners with the full list of beneficiaries, the size of land to which every individual is to be allocated together with the survey plans for the entire Mwea Settlement Scheme for scrutiny.*
- d) Any other orders that this honourable court shall deem just.*
- e) Costs of the petition be borne by the Respondents.*

2. The Petitioners, who claimed to be residents of Mwea Settlement Scheme (hereinafter called the Scheme), averred in their petition that they were aggrieved by the entire process of land demarcation, allocation and alienation within the Scheme. They contended that the said process was being conducted in violation of the Constitution of Kenya, 2010 (hereinafter the Constitution), the Community Land Act, 2016 (hereinafter the CLA) and the Fair Administrative Action Act, 2016 (hereinafter the FAAA) and other applicable laws.

3. The Petitioners specifically alleged that;

- a) The demarcation, allocation and alienation of the scheme was being done secretly and without their knowledge.
- b) The process was undertaken without public participation.
- c) The process was not transparent, fair and inclusive.
- d) They were denied access to survey plans and the list of the intended beneficiaries of the Scheme.

4. The Petitioners contended that unless the entire process of demarcation, alienation and allocation within the Scheme was halted, they and other residents of the Scheme would lose out on their share of the land. They further stated that they were not party to the alternative dispute resolution process concerning the Scheme.

5. The Attorney General entered appearance for the 2<sup>nd</sup> Respondent herein and filed grounds of opposition dated 21<sup>st</sup> April 2016 in opposition to the said petition. It was contended that;

- a) The Petitioners were guilty of non-disclosure of material facts.
- b) The process of demarcation, alienation and allocation was above board and undertaken pursuant to a consent order issued in Embu ELC Petition No. 1 of 2014.
- c) The petition had not satisfied the threshold for violation or denial of constitutional rights.
- d) The petition was frivolous, vexatious and an abuse of the court process.

6. The 3<sup>rd</sup> Respondent herein filed a replying affidavit sworn on 4<sup>th</sup> April 2018 in opposition to the said petition. The said affidavit was sworn by Josphat Kithumbu who described himself as a County Executive Committee member of the 3<sup>rd</sup> Respondent. He stated that the Scheme the subject of the petition was *L.R. No. 26461 F/R No. 317/30* which measured approximately 17,830 ha. It was his evidence that the long standing dispute was resolved through alternative dispute resolution whereby the warring parties recorded a consent order in Embu ELC Petition No. 1 of 2014 (hereinafter called petition No. 1 of 2014).

7. The 3<sup>rd</sup> Respondent stated that the said consent order paved way for the demarcation, allocation and registration of land within the Scheme as per the spatial and survey plans agreed upon by the parties. He stated that it was further agreed that the list of beneficiaries would be the one generated and agreed upon by the community and handed over to the 1<sup>st</sup> Respondent.
8. The 3<sup>rd</sup> Respondent further stated that public participation was extensively undertaken whereby at least ten (10) meetings were held with various stakeholders who included the Elders from Mwea and Makima Wards, the Embu Council of Elders, Elders representing the Mbeere and Kamba Communities, and representatives of the various clans within Embu County. The said meetings and consultations spanned about 3 years. Copies of minutes of the various meetings were annexed to the replying affidavit.
9. It was the 3<sup>rd</sup> Respondent's case that upon the National Land Commission (hereinafter NLC) being satisfied with the spatial and survey plans and the list of beneficiaries, the documents were forwarded to the Chief Land Registrar for registration and preparation of titles way back in April 2016. The titles were then processed and some of the beneficiaries had already collected theirs. The 3<sup>rd</sup> Respondent annexed copies of at least thirty (30) title deeds all issued on 5<sup>th</sup> May 2016 in respect of the scheme.
10. It was, therefore, denied that the process of demarcation, alienation and allocation was still underway. It was contended that the processing of titles was concluded a long time ago hence the petition had been overtaken by events.
11. The 3<sup>rd</sup> Respondent further contended that the instant petition could not competently challenge the titles of the individual land owners since they were not joined in the petition hence no adverse orders which could affect their proprietary interest should be made.
12. The 3<sup>rd</sup> Respondent, finally, contended that the consent order recorded in Petition No. 1 of 2014 had never been reviewed or set aside hence it was binding until and unless it was set aside. The institution of a fresh suit was said to be an abuse of the court process.
13. There was no indication on record of the 1<sup>st</sup> Defendant (NLC) having filed any response to the said petition. There was no replying affidavit or grounds of opposition on record on its behalf.
14. The 1<sup>st</sup> interested party filed a replying affidavit sworn by Eston Nyaga Nihiga on 4<sup>th</sup> April 2017. He described himself as the Chairman of the Mbeere Elders Advisory Welfare Group. He stated that he was aware of the consent recorded in Petition No. 1 of 2014 since he represented the interests of the Mbeere Community in the said petition.
15. It was the case of the 1<sup>st</sup> interested party that the Petitioners were all along aware of the process of demarcation, alienation and allocation of land in the Scheme just like the rest of the residents of Mwea Scheme. It was contended that the said process has been concluded and the beneficiaries had been registered as proprietors of their respective parcels some of whom had already collected their title deeds.
16. The 1<sup>st</sup> interested party asserted that there was adequate public participation during the entire process and that the process was conducted fairly. The court was, therefore, urged to dismiss the petition with costs.
17. The 3<sup>rd</sup> interested party filed a statement of grounds of opposition dated 28<sup>th</sup> April 2017 in opposition to the said petition. It was contended that the petition was *sub-judice* in view of the pendency of similar petitions viz Embu ELC petition Nos 1 and 3 of 2016. It was further contended that the process was open, consultative and a matter of public notoriety. It was also contended that the allegations raised in the petition were not matters suitable for determination through affidavit evidence only.
18. The 3<sup>rd</sup> interested party also filed a replying affidavit sworn on 5<sup>th</sup> March 2018 by Joram Dishon Kiama who described himself as Chairman of Embu Mwea Ranching Cooperative Society Limited. He stated that the said society had a membership of 2063 members from all walks of life and various ethnic backgrounds. He gave a lengthy history of the Scheme land and asserted that the 3<sup>rd</sup> Respondent herein undertook consultations with various stakeholders during the process of demarcation, allocation and alienation of the Scheme.
19. When the petition came up for directions on 25<sup>th</sup> July 2017, it was agreed that the said petition would be canvassed through written submissions. The parties were consequently directed to file and exchange their written submissions within specified timelines. However, by the time of preparation of this judgement, only the Petitioners, the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> interested party had filed their respective submissions. There were no submissions filed on behalf of the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> interested party.
20. In his written submissions, counsel for the Petitioners submitted that the Scheme land was community land within the meaning of **Article 63 (2) of the Constitution**. He submitted that the Scheme was designated as trust land vide *L.N. No 169 of 1970* hence it comprised community land.
21. It was submitted that the process of demarcation, alienation and allocation was not done in accordance with **Articles 63 (4) and (5) of the Constitution** because it could only be constitutionally alienated in accordance with an Act of Parliament. The relevant Act i.e. the **Community Land Act, 2016** came into force on 21<sup>st</sup> September 2016 hence the process which was undertaken and concluded by the Respondents prior to that date was unconstitutional.
22. It was further submitted on behalf of the Petitioners that even though the consent order in *Petition No. 1 of 2014* had never been set aside, the consent order could not override a constitutional provision which provided for alienation only through the Act contemplated under Article 63 (5) of the Constitution.
23. The Petitioners submitted that the process of demarcation, alienation and allocation of the Scheme land was not open, fair and

transparent. It was contended that although the 1<sup>st</sup> interested party attended most of the consultative meetings, the representatives of other communities only attended a few of such meetings. It was further contended that members of the Kamba Community were not represented at all. It was also submitted that it was difficult to establish the number of people who attended such for meetings, how the meetings were convened and the agenda for the meetings.

24. The Petitioners contended that as the Respondents had failed to exhibit copies of the pleadings in *Petition No. 1 of 2014*, it was impossible for the court to fully appreciate the nature of that petition and even the import of the consent order. It was submitted that the instant petition was vague in its reference to the property in dispute. It was also not clear which community was to provide the list of beneficiaries as per the consent.

25. On the question of the petition being *sub judice* in relation to *Petition No. 3 of 2016*, it was submitted that the instant petition was filed earlier in point of time hence it could not be caught by the provisions of **section 6 of the Civil Procedure Act (Cap 21)**. It was further submitted that the Respondents and the interested parties did not exhibit copies of the pleadings in *Petition No. 1 of 2016* to enable the court establish any relationship between that petition and the instant one.

26. It was, finally, submitted on behalf of the Petitioners that the actions of the Respondents were in violation of their right to fair administrative action under Article 47 of the Constitution of Kenya. It was contended that where administrative action was likely to materially and adversely affect the legal rights of a person, a public administrator was obliged to give advance notice of the intended action, receive views from the public and give reasons for the action taken.

27. The 3<sup>rd</sup> Respondent framed and submitted on 4 issues for determination. First, it was submitted that land comprised in the Scheme was not community land to warrant the application of the **CLA**. It was submitted that the Scheme constituted public land as defined in **Article 62 (1) and (2) of the Constitution**. It was contended that the Scheme was brought within the regime of land adjudication vide *L.N. No 577 of 2004*.

28. It was further submitted that even if the Scheme was community land at the time of demarcation, alienation and allocation, the **CLA** was not in force at the material time. The only legal regime which could apply was the one which obtained prior to the enactment of the said Act. It was contended that the said legislation could not be applied retrospectively to affect proprietary rights which had already crystallized prior to its enactment.

29. The second issue framed by the 3<sup>rd</sup> Respondent was whether the process complied with constitutional principles and whether the rightful beneficiaries were allocated the land. It was submitted that the 3<sup>rd</sup> Respondent fully complied with the national values and principles of governance stipulated in **Article 10 of the Constitution**. It was submitted that the process was transparent and inclusive and that adequate public participation was undertaken.

30. It was further submitted on behalf of the 3<sup>rd</sup> Respondent that it fully complied with constitutional provisions of **Article 62 (2)** which required it to hold public land vested in it in trust for the people who were residents of the county, and not other counties.

31. It was also contended by the 3<sup>rd</sup> Respondent that the instant petition was *sub judice* because this court held in *Petition No 1 of 2017* that those proceedings were *res judicata* on account of a previously decided suit. It was submitted that the 2<sup>nd</sup> interested party was party to the earlier petition.

32. It was, finally, submitted on behalf of the 3<sup>rd</sup> Respondent that the titles already issued to individual land owners in the Scheme were not impeachable because they were not joined as parties to the petition. It was contended that their titles were sacrosanct and indefeasible save in so far as the proprietors were proved to have engaged in fraud, illegality or corruption in their acquisition of the land.

33. The 3<sup>rd</sup> interested party submitted that the instant petition was *sub judice* and *res judicata* on account of the existence of *Petition No. 1 of 2014* and *Petition No. 3 of 2016*. It was further submitted that the Petitioners were actually involved in the process of generation of the list of beneficiaries and that some of the members they purported to represent in the petition were allocated land in the Scheme.

34. It was submitted by the 3<sup>rd</sup> interested party that the process of allocation and issuance of individual titles was concluded hence the petition had been overtaken by events. It was consequently contended that the only way of impeaching the titles was by suing all the individual property owners.

35. The 3<sup>rd</sup> interested party further submitted that the process being challenged by the Petitioners herein was conducted on the basis of a court order which was issued in *Petition No. 1 of 2014*. It was submitted that the said order has never been reviewed, set aside or appealed against. The court was urged to find and hold that the instant petition was an abuse of the court process.

36. The court has considered the petition, the affidavit in support thereof, the replying affidavits in the opposition thereto and the submissions of the parties whose submissions were on record. The grounds of opposition filed by the 2<sup>nd</sup> Respondent are deemed to have been abandoned since they were not argued. The court is of the view that the following issues arise for determination;

- a) Whether the instant petition is *res judicata* or *sub judice*.
- b) Whether the land comprised in the Scheme was public land or community land.
- c) Whether the demarcation, allocation and alienation of the Scheme land was done in violation of the Constitution.

- d) Whether the said process was undertaken secretly without the knowledge of the Petitioners.
- e) Whether the said process was undertaken without public participation.
- f) Whether the said process was transparent and inclusive.
- g) Whether the Petitioners' right to fair administrative action under **Article 47 of the Constitution** was violated.
- h) Whether the Petitioners' right of access to information under **Article 35 of the Constitution** was violated.
- i) Whether the Petitioners are entitled to the reliefs sought in the petition.
- j) Who shall bear the costs of the petition.

37. The 1<sup>st</sup> issue is whether or not the instant petition is *sub judice* or *res judicata*. *Sub judice* is a Latin phrase which simply means that the same matter is pending before a judge. In Kenya, this doctrine is captured under **section 6 of the Civil Procedure Act (Cap 21)** which provides as follows;

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

38. Before a suit can be barred on account of the rule, it must be demonstrated that there was a previous suit between the same parties or parties under whom they claim and that the matters directly and substantially in issue in both suits is the same. It is evident from the court record that none of the Respondents or interested parties exhibited copies of the pleadings in the previous petitions referred to in their affidavits and submissions. In those circumstances, there is no sufficient material upon which the court may hold that the *sub-judice* rule applies to the instant petition.

39. The second limb relates to the doctrine of *res judicata*. This is a Latin phrase which literally means “a thing adjudicated”. It is catered for by **section 7 of the Civil Procedure Act** which provides that;

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

40. In order for the doctrine to apply it must be demonstrated that the matters or issues in controversy were conclusively determined by a decree or order issued in the previous proceedings. The proceedings must be between the same parties or parties through whom they claim. It is evident from the record, once again, that neither the Respondents nor the interested parties exhibited copies of the pleadings in the previous proceedings. A copy of a consent order in **Petition No. 1 of 2014** cannot be sufficient. It does not give a full picture of the issues which were directly and substantially in issue. The court is, therefore, unable to hold that the instant petition is *res judicata*. See **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 Others [1996] eKLR**.

41. The 2<sup>nd</sup> issue is whether the Scheme land was public land or community land. The provisions of **Article 63 (2) of the Constitution** defines community land as follows;

**(2) Community land consists of**

- a) land lawfully registered in the name of group representatives under the provisions of any law;**
- b) land lawfully transferred to a specific community by any process of law;**
- c) any other land declared to be community land by an Act of Parliament; and**

**land that is –**

- i. lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;**
- ii. ancestral lands and lands traditionally occupied by hunter-gatherer communities or**
- iii. lawfully held as trust land by the county governments,**

**but not including any public land held in trust by the county government under Article 62(2).**

42. Whereas the 3<sup>rd</sup> Respondent contended that the Scheme land was public land, the court is reasonably satisfied that the land is community

land within the meaning of **Article 63 (2) (d) (iii) of the Constitution**. The said land was declared as trust land vide *L.N. No 169 of 1970* hence it constituted trust land under the repealed Constitution of Kenya. It must be in this regard that the 3<sup>rd</sup> Respondent became involved as a trustee for the residents of Embu County. The court is unable to agree that the Scheme land was unalienated government land within the meaning of **Article 62 (1) (a) of the Constitution**.

43. The 3<sup>rd</sup> issue is whether or not the demarcation, allocation and alienation of the Scheme land was done in violation of the Constitution. The Petitioners' contention was that under **Article 63 (4) of the Constitution**, community land could only be disposed of in terms of an Act of Parliament which was to be enacted pursuant to **Article 63 (5) of the Constitution**. It was not disputed that the legislation envisaged under **Article 63(5)** was the **Community Land Act, 2016** which came into force on 21<sup>st</sup> September 2016.

44. The Petitioners' view was that all actions by the Respondents including those undertaken before the Act came into force were unconstitutional. The 3<sup>rd</sup> Respondent, on the other hand, contended that all processes in relation to the Scheme were undertaken and conducted before the **CLA** came into force. It was further contended that the said Act could not apply retrospectively to a process which had been concluded before its enactment.

45. The court has perused the **Community Land Act, 2016**. It was assented to on 31<sup>st</sup> August 2016. It was gazetted on 7<sup>th</sup> September 2016 with a commencement date of 21<sup>st</sup> September 2016. In my view, the said Act could not have come into force prior to its gazettment in the Kenya Gazette. See **section 9** of the **Interpretation and General Provisions Act (Cap 2)**. The text of the Act does not declare that it shall apply retrospectively. One of the rules of statutory interpretation is that an Act of parliament shall be deemed to apply prospectively unless there is clear language to the contrary or unless the purpose or object of such legislation supports such application. See **Ruturi & Kenya Bankers Association Vs Minister for Finance [2001] EA 253**.

46. The court is, therefore, of the opinion that the Respondents could not be expected to apply the legislation contemplated by **Article 63 (5)** when the same was not in existence. There is adequate evidence on record to demonstrate that as far back as 6<sup>th</sup> May 2016, some of the beneficiaries of the Scheme had already collected their title deeds. That could only mean that the process of demarcation, allocation and alienation had been concluded prior to that date. The Respondents could not be reasonably expected to recall the titles, cancel the entire process and re-start it all over again upon the enactment of the **CLA**. The court has noted that there was considerable delay between the time the Constitution was promulgated on 27<sup>th</sup> August 2010 and September 2016 when the said Act was enacted. However, that delay could not be attributed to any of the Respondents. It was the duty of parliament to legislate.

47. The court, therefore, finds that the provisions of **Article 63 (4) of the Constitution** were not violated by the Respondents in the demarcation, allocation and alienation of the Scheme land. The Respondents were, therefore, entitled to invoke the transitional provisions of the **6<sup>th</sup> schedule** to the Constitution and apply existing legislation to the Scheme. The Respondents were not expected to suspend the performance of their duties for a period of six (6) years awaiting enactment of the legislation contemplated under **Article 63(5) of the Constitution**. **Section 7** of the **6<sup>th</sup> schedule** provides *inter alia*,

**“1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”**

48. The 4<sup>th</sup> issue was whether the process was undertaken secretly and without the knowledge of the Petitioners. The court has considered the evidence on record relating to the demarcation and allocation of land in the Scheme. It is evident that the process has been lengthy and troublesome. There were so many stakeholders, interest groups, and individuals who had an interest in the Scheme. There were claimants from within and without the county of Embu. Some individuals even presented a petition to the senate over the matter. There have been several suits and other judicial proceedings spanning several years over the Scheme. Some of the proceedings are concluded whilst others are pending. In my opinion, the process has been torturous to say the least.

49. In those circumstances, could it be said that the Respondents undertook the demarcation and allocation secretly and without the knowledge of the ten (10) Petitioners? The court has perused the minutes of the various stakeholder meetings held within Embu County over the Scheme. The local administrators within the county were very much aware of the process. The court is unable to agree with the Petitioners that they were totally unaware of the process. The process was not undertaken covertly or secretly. It is apparent that a broad section of the general public was aware. If the Petitioners were totally in the dark, then they must have shut their eyes and blocked their ears to the obvious. They can only have themselves to blame.

50. The 5<sup>th</sup> issue is whether public participation was undertaken during the process of demarcation, allocation and alienation. There is no doubt that the national values and principles of governance stipulated in Article 10 of the Constitution bind all state organs and public officers whenever they apply any law, make or implement public policy decisions. Public participation is one of the national values and principles of governance.

51. The 3<sup>rd</sup> Respondent contended that there was adequate public participation and consultations with various stakeholders and interested persons and groups spanning over three (3) years. Several copies of minutes and records of proceedings or various meetings were annexed to the replying affidavit of Josphat Kithumu who swore the affidavit on behalf of the 3<sup>rd</sup> Respondent. The Petitioners contended that although the 1<sup>st</sup> interested party attended most of the meetings, the representatives of the other communities other than Mbeere only attended a few of such meetings. It was also contended that it was not clear how the participants were selected and vetted and that it was hard to tell how many participants attended each meeting and how those meetings were convened.

52. The court has considered the material on record on this issue. The court is satisfied that some form of public participation was undertaken. The interested parties seem to agree that public participation was undertaken. The Petitioners, however, appear to have been passed by the stakeholder consultations. In their submissions, they appeared to be challenging the qualitative and quantitative aspects of public participation. They did not firmly assert that the copies of minutes exhibited were just made up or outright forgeries. They appeared

to be contending that it was not just good enough. The court does not take the view that the Respondents should have moved from door to door and house to house. There was no constitutional obligation to engage with every individual within Embu County or elsewhere who may have had an interest in the Scheme. Such a course may be too taxing and impracticable.

53. As was held in **Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (as consolidated) in the matter of Mui Coal Basin Local Community [2015] eKLR**, it is sufficient if there is a meaningful engagement with the concerned stakeholders and other persons having an interest in the matter. The public authority has a discretion to design a programme of public participation which is feasible, practicable and affordable. It was not unreasonable for the Respondents to adopt consultative meetings as a means of achieving public participation. The court is reasonably satisfied that public participation was undertaken during the process impugned by the Petitioners.

54. Similarly, in the case of **Patrick Musimba Vs National Land Commission & 4 Others [2016] eKLR** it was held, *inter alia* that;

**“The law with regard to public participation as has been laid out in a series of cases is relatively clear. When an entity is enjoined to involve the public in governance or any decision making or legislative process the person so enjoined has a duty to ensure that adequate facilitation for such public participation is made. The public need not only be invited but must also be given adequate opportunity to participate. As to whether the public participates and their views taken, is truly another sphere. It is, however, not intended to be a mere cosmetic exercise as the spirit behind the constitutional requirement that the public be involved in governance and decision making as well as legislative exercise is that the end product be deemed owned by the public.”**

55. The 6<sup>th</sup> issue is whether the said process was transparent and inclusive. Although the Petitioners contended that the process was not transparent and inclusive, the 3<sup>rd</sup> Respondent and the interested party contended otherwise. The Petitioners contended that it was a secretive process. They were of the view that there was no public participation and that some communities were deliberately excluded.

56. The court has already held hereinbefore that the process was not secretive. The court has also held that there was public participation. There is no material which was placed on record by the Petitioners to demonstrate that the process was not transparent. There was no material placed on record to demonstrate that the process was not inclusive. There was no material on record to show, as alleged by the Petitioners, that members of the Akamba Community were excluded from the allocation. There was no material on record from which it could be inferred that the Respondents harboured a sinister motive during the process. The court, therefore, holds that the process was transparent and inclusive.

57. The 7<sup>th</sup> issue was whether the Petitioners’ rights to fair administrative action under **Article 47 of the Constitution** was violated. The material provisions of **Article 47** provide as follows;

- a) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- b) 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.
- c) Parliament shall enact legislation to give effect to the rights in clause (1) and the legislation shall –
- d) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- e) Promote efficient administration.

58. Pursuant to **Article 47 (3)** parliament enacted the **Fair Administrative Action Act, 2015 (FAAA)**. The said Act was enacted to give effect to the provisions of **Article 47**. The provisions of **section 4 of FAAA** provide as follows;

- 1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- 2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- 3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
  - a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - b) an opportunity to be heard and to make representations in that regard;
  - c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - d) a statement of reasons pursuant to section 6;
  - e) notice of the right to legal representation, where applicable;

**f) notice of the right to cross-examine or where applicable; or**

**g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

(Emphasis added).

59. It would appear to me that the provisions of **section 4 of the FAAA** were primarily designed to afford fair administrative action to persons against whom adverse action was intended to be taken. That is clear from the language of **section 4(2)** thereof hence the reason why **section 4(3)** provides for a mechanism for notice of the nature and reasons for adverse action, a hearing prior to the action, the right to legal representation, the right to cross-examine witnesses, the right to internal review or appeal e.t.c.

60. In the circumstances of this petition, it has not been shown what adverse administrative action was undertaken, or proposed to be undertaken by the Respondents. In my opinion, it was not demonstrated by the Petitioners in what manner **Article 47 (2) and the FAAA** were violated or likely to be violated in relation to them. The legal regime under which the demarcation, allocation and alienation of the scheme provided mechanisms for taking various administrative actions and for resolution of grievances which may arise during the process. It was not demonstrated that they were denied access to any legal mechanisms for redressing any grievances they may have had.

61. The 8<sup>th</sup> issue is whether the Petitioners' right of access to information under **Article 35 of the Constitution** was violated. It was the Petitioners' case that their advocate, Mark Ndung'u had requested the 1<sup>st</sup> respondent to furnish him with copies of all the survey plans and list of all beneficiaries of the Scheme. It was their case that the request was not honoured hence they contended that their right of access to information was violated.

62. **Article 35 of the Constitution** guarantees the citizens access to information held by the state. In order to give full effect to Article 35 Parliament enacted the **Access to Information Act 2016** (hereinafter AIA). The said Act became operational on 21<sup>st</sup> September 2016. The Act provides an elaborate framework for citizens to access information held by both the public and private entities, review of the decision by such entities to deny, defer or grant access to information sought, and mechanisms for enforcement of the provisions of the Act by the Commission on Administrative Justice.

63. The provisions of **section 8 of the AIA** provide that the application shall be in **writing** whereas the provisions of **section 14** thereof provide for a review of the decision by a public or private entity to grant, refuse or defer an application for access to information. There is no material on record to show that a formal application for access to information was made to the 1<sup>st</sup> Respondent. Even if there was no legal requirement at the time to place a request in writing, that is the only logical way an advocate could present a request to a public authority. It could not be made orally.

64. The 9<sup>th</sup> issue is whether or not the Petitioners are entitled to the reliefs sought in the petition. In view of the findings and holdings of the court on the preceding issues, the court holds that the Petitioners have not proved the allegations in the petition to the required standard. The Petitioners are, therefore, not entitled to the reliefs sought in the petition or any one of them.

65. The 10<sup>th</sup> and final issue is on costs. Under **section 27 of the Civil Procedure Act (Cap 21)** costs of an action are generally at the discretion of the court subject to the proviso that costs shall follow the event. So, a successful party should be awarded costs unless, for good reason, the court directs otherwise. The court has noted that the Petitioners filed the petition in a bid to vindicate the perceived violation of their constitutional rights and those of the residents of Mwea Settlement Scheme. In my view, this petition was filed for the enforcement of public rights and not purely for personal benefit. The appropriate order on costs is for each party to bear own costs.

66. The summary of the court's findings on the issues for determination is as follows;

- a) There is no evidence on record to show that the instant petition is either *sub judice* nor *res judicata*.
- b) The land comprised in Mwea Settlement Scheme is community land within the meaning of Article 63 of the Constitution.
- c) The demarcation, allocation and alienation of the scheme land was not done in violation of the Constitution.
- d) The said process was not undertaken secretly without the knowledge of the Petitioners.
- e) Public participation was undertaken by the Respondents during the said process.
- f) The said process of demarcation, allocation and alienation of the Scheme land was transparent and inclusive.
- g) There was no evidence to demonstrate that the Petitioners' right to fair administrative action under **Article 47 of the Constitution** was violated by the Respondents.
- h) There was no evidence to demonstrate that the Petitioners' rights of access to information under **Article 35 of the Constitution** was violated.
- i) The Petitioners are not entitled to the reliefs sought in the petition or any one of them.
- j) Each party and the interested parties to bear own costs.

67. The upshot of the foregoing is that the court finds no merit in the petition dated 14<sup>th</sup> April 2016 and the same is hereby dismissed. Each party to bear its own costs.

68. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 12<sup>th</sup> day of JULY, 2018.**

In the presence of Mrs Njoroge holding brief for Mr Githinji for the 2<sup>nd</sup> Respondent, Ms Muthama holding brief for Mr Guantai for the 3<sup>rd</sup> interested party and in the absence of all the other parties.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**12.07.18**