



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 3 OF 2016

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1), 1(3), 2(2), 2(4), 3(1), 10, 35(1), 47, 62 (2), 63(1), (2), (3) AND (4), 67, 232(1), 258 AND 259(1) OF THE CONSTITUTION OF KENYA

AND

THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

BETWEEN

THE COUNTY GOVERNMENT OF KIRINYAGA.....PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE COUNTY GOVERNMENT OF EMBU.....1ST INTERESTED PARTY

APOLO NJERU MAGANJO & 8 OTHERS.....2ND INTERESTED PARTIES

MBEERE ELDERS ADVISORY WELFARE GROUP

& 13 OTHERS.....3RD INTERESTED PARTIES

JOSPHAT NGIRIGACHA MUGWANJA & OTHERS.....4th INTERESTED PARTIES

PHILIP MUTUKU MUSYOKA & OTHERS.....5TH INTERESTED PARTIES

ESTHER GATARI MATUVO & OTHERS.....6TH INTERESTED PARTIES

JOSEPH MIANO MIIGWA & OTEHRS.....7TH INTERESTED PARTIES

PETER MUCHAI & OTHERS.....8TH INTERESTED PARTIES

EMBU/MWEA RANCHING CO-OPERATIVE

SOCIETY LIMITED & 7 OTHERS.....9TH INTERESTED PARTIES

JUDGEMENT

1. By a petition dated 12th August 2016 brought under **Articles 1, 2, 3, 6, 10, 35, 62, 63, 67, 232, 258 and 259 of the Constitution of Kenya**, the Petitioner sought the following 12 reliefs against the Respondents;

a. A declaration that within the intendment of Article 10 of the Constitution the Respondents are bound by the key national values and principles, to carry out meaningful and qualitative public participation.

b. A declaration that within the intendment of Article 27(4) of the Constitution the Respondents cannot discriminate directly or indirectly against any person on any ground, including ethnic origin.

c. A declaration that within the intendment of Article 28 of the Constitution the Respondents are bound to respect and protect the inherent dignity of all persons occupying the Mwea Scheme land and those with valid historical claims to it.

d. A declaration that within the intendment of Article 35(1) of the Constitution the Respondents are bound to release all documents pertaining to the demarcation, alienation and allocation of titles to all the land comprising the Mwea Settlement Scheme.

e. A declaration that within the intendment of Article 40(3) of the Constitution the Respondents cannot exclude thousands of Kenyans who have current or historical land claims in their demarcation, alienation and allocation of titles to all the land comprising the Mwea Settlement Scheme.

f. A declaration that within the intendment of Article 47(1) of the Constitution, the Respondents are bound to provide administrative action that is lawful, reasonable and procedurally fair.

g. A declaration that within the intendment of Article 47(2) of the Constitution, the Respondents are bound to provide reasons for failure to include names of thousands of Kenyans with current and historical land rights in its allocation of titles to all the land comprising the Mwea Settlement Scheme.

h. A declaration that within the intendment of Article 63(4) & (5) of the Constitution, the Respondents cannot demarcate, alienate and allocate titles to community land before the enactment of legislation on community land.

i. A declaration that within the intendment of Article 67(2) (f) of the Constitution, the Respondents are bound to investigate all complaints relating to historical land injustices referred to it.

j. A declaration that the demarcation, alienation and allocation of titles to all the land comprising the Mwea Settlement Scheme, is inconsistent with the provisions of Articles 10, 27(4), 28, 35(1), 47, 63(4) & (5) and 67(2) (f) of the Constitution, and is null and void.

k. An order of certiorari quashing any and all the titles to the land in question comprising the Mwea Settlement scheme.

l. There be an order as to costs.

2. The basis of the said reliefs was that the Petitioner was aggrieved by the manner in which the alienation, allocation and demarcation of Mwea Settlement Scheme (hereinafter referred to as the *Scheme*) was being undertaken. It was pleaded that the said process was not only irregular and unlawful but also unconstitutional. It was alleged that the Respondents had wrongfully excluded thousands of members of some communities or clans from Kirinyaga County who had either current or historical claims to the scheme.

3. The Petitioners raised several alleged violations of the Constitution by the Respondents. First, it was contended that the Respondents had failed to undertake meaningful public participation in violation of **Article 10 of the Constitution**. As a consequence, it was contended that a flawed and incomplete list of beneficiaries of the scheme land was prepared.

4. Second, it was contended that the process was discriminatory and unfair because the list of beneficiaries was tipped in favour of members of the Mbeere community. It was claimed that the said list was prepared by the Mbeere Elders Advisory Welfare Group. It was further claimed that although the scheme was occupied by members of various communities, the Respondents had unfairly discriminated against members of the Kamba, Kikuyu and Embu communities contrary to **Article 27 of the Constitution**.

5. Third, it was contended that the Respondents were in violation of **Article 28 of the Constitution** by failing to protect the dignity inherent in every human being. It was alleged that most of the residents having current or historical claims to the scheme were unfairly excluded from allocation in favour of the rich, the powerful and the elite of society. It was asserted that the 9 clans of Kirinyaga, the "Mihiriga kenda", had a historical claim to the scheme land which currently falls within Embu County.

6. Fourth, it was contended that the Respondents had acted in violation of **Article 35 (1) of the Constitution** by failing to avail information on the alienation, demarcation and allocation of the scheme land. It was claimed that the Respondents had stated that such information could only be available upon completion of the exercise and issuance of title deeds.

7. Fifth, it was contended that as a result of the aforesaid historical injustices and deprivation of land of thousands of claimants, the Respondents were in violation of **Article 40 (3) of the Constitution** which prohibits such deprivation without due process or just compensation.

8. Sixth, it was contended that the Respondents had violated **Article 47 of the Constitution** by failing to provide written reasons for the

adverse actions which had deprived or threatened to deprive genuine claimants their rightful share of the scheme land. It was also contended that the Respondents had failed in their duty to provide administrative action which was lawful, reasonable and procedurally fair.

9. Seventh, it was contended that in the absence of the legislation on community land contemplated under **Article 63 (5) of the Constitution**, the Respondents could not lawfully undertake any demarcation, allocation or alienation of the scheme land.

10. For those reasons, the Petitioner sought a declaration that the entire process of demarcation, allocation and alienation of the scheme was unconstitutional, null and void. The Petitioner also sought an order of *certiorari* to quash all titles which may have been issued in the scheme.

11. The said petition was supported by an affidavit sworn by Harry Mugo on 12th August 2016. Mr Mugo described himself as a member of the County Executive Committee in charge of Land, Housing and Urban Development in the County Government of Kirinyaga.

12. The 1st and 3rd Respondents filed a replying affidavit sworn by Edwin Munoko Wafula on 5th September 2016 in opposition to the petition. He described himself as a Land Registrar in the then Ministry of Lands and Physical Planning who was authorized and competent to swear the replying affidavit.

13. It was contended in the said replying affidavit that there were several consultative meetings attended by representatives of the various ethnic groups and clans resident within Embu County which were held prior to the commencement of the process of demarcation, allocation and alienation of the scheme. There were at least ten (10) copies of minutes and reports of the various meetings which were annexed to the affidavit.

14. It was further contended that as a result of the extensive public consultations the parties to the dispute in *Embu ELC Petition No. 1 of 2014* recorded a consent order for the resolution of the dispute which involved allocation of part of the land in the scheme. The land in dispute was said to be L.R. No. 26461 F/R 317/30 (Mwea Settlement Scheme) measuring approximately 17,830.6 ha.

15. It was further stated that it was pursuant to the said court order that the demarcation, allocation and alienation of the scheme was to proceed on the basis of the spatial and survey plans and the list of beneficiaries agreed upon by the community and which list was handed over to the 2nd Respondent. The Chief Land Registrar and the 2nd Respondent consequently concluded the process and processed title deeds for the individual beneficiaries way back in May 2016.

16. It was denied that the list of beneficiaries was dominated by one ethnic community. The 1st and 3rd Respondents contended that the list of beneficiaries was all inclusive and that the list was generated and agreed upon by the various communities ordinarily resident within Embu County.

17. It was further contended that the Petitioner was in violation of **Article 6 of the Constitution** in intermeddling in matters falling squarely within the sole jurisdiction of the County Government of Embu under the Constitution. It was contended that the scheme land was held in trust for the people ordinarily resident within Embu County and that the County Government of Kirinyaga had no business intermeddling in the scheme.

18. The 1st and 3rd Respondents also contended that since the impugned process was undertaken pursuant the court order in *Embu ELC Petition No. 1 of 2014*, it was an abuse of the court process for the Petitioner to institute fresh proceedings instead of seeking a review or setting aside of the consent order in the earlier proceedings. They, therefore, urged the court to dismiss the petition in its entirety.

19. The 2nd Respondent filed a replying affidavit sworn by Brian Ikoi on 21st May 2018 in opposition to the petition. He described himself as the Acting Director Legal Affairs and Enforcement at the National Land Commission. It was contended that the scheme was declared trust land vide Legal Notice No. 169 of 1970 and later on brought under the regime of the Land Adjudication Act (Cap 283) in 1977. The land adjudication process was completed about 2011 before the 2nd Respondent was established. It was, therefore, denied that the 2nd Respondent was involved in any constitutional violations.

20. The 2nd Respondent further stated that due to the numerous court cases involving the scheme land, it was involved in attempting to resolve the dispute through alternative dispute resolution in accordance with the provisions of **Article 252 (1) (b) of the Constitution**. It was stated that a sub-county committee was set up comprising of representatives of the national government, county government, the NLC, the youth, women and persons with special needs. It was emphasized that the role of the 2nd Respondent was merely facilitative and that the identification of beneficiaries and actual demarcation was undertaken by representatives of the various stakeholders.

21. It was contended that after extensive consultations and meetings the said committee reached a consensus on fair allocation of the scheme as follows;

a. Mbeere (39 clans)	40%
b. Mwea (Kamba)	30%
c. Embu (Manyatta & Runyenjes)	20%
d. Kikuyu	5%

22. The 2nd Respondent contended that it was upon such consensus that a consent order was recorded in *Embu ELC Petition No. 1 of 2014* on 22nd October 2015 to facilitate the process of demarcation, allocation and alienation of the scheme land. It was further contended that the said consent order had never been challenged, vacated or appealed against. It was, therefore, contended that the instant petition was an abuse of the court process.

23. The 1st interested party filed a replying affidavit sworn by Josphat Kithimu on 8th March 2018 in opposition to the said petition. He described himself as a County Executive Member in the County Government of Embu. The 1st interested party asserted that extensive public participation was undertaken prior to the process of demarcation, allocation and alienation of the scheme land. Like the 1st and 3rd Respondents, the 1st interested party annexed copies of minutes of ten (10) meetings on public participation relating to the scheme.

24. It was contended that public consultations were held with representatives of various ethnic groups resident in Embu County such the Mbeere, Akamba, and Kikuyu. The said consultations spanned about 3 years and that the quality of public participation was not compromised.

25. It was further contended that the process of generating the list of beneficiaries was all inclusive and that the list was proposed by representatives of the various communities and sections resident in Embu County. It was denied that the list was dominated by the Mbeere ethnic group.

26. The 1st interested party also objected to the petition for having been filed in violation of **Article 189** of the **Constitution of Kenya** and the **Inter-Governmental Relations Act, 2012**. It was also contended that the scheme was public land which was vested solely in the County Government of Embu to hold in trust for the people resident in the county only. It was denied that it was community land as contemplated under **Article 63 of the Constitution**.

27. The 1st interested party echoed the responses of the Respondents on the consent order recorded in *Embu ELC Petition No. 1 of 2014*. It was contended that the impugned process was conducted pursuant to a court order which had not been vacated or set aside to date. The court was, therefore, urged to dismiss the petition and bring the dispute to a close.

28. The 3rd interested party filed a replying affidavit in opposition to the petition. The 6th and 7th interested parties did not file any affidavits in response to the petition but Mr Kamunda who was holding brief for their respective advocates informed the court that they were both in opposition to the petition. The court record has no indication of any submissions having been filed by the 6th and 7th interested parties either.

29. On the other hand, the 4th, 5th and 9th Respondents filed affidavits in support of the petition for various reasons advanced in their respective affidavits. The 4th Respondent claimed to represent the *Kirinyaga Mihiriga Kenda* who claimed the scheme as their ancestral land. On the other hand, the 9th interested party, Embu/Mwea Ranching Co-operative Society claimed to be the true owner of the scheme.

30. There is no indication on record of the 2nd and 8th interested parties having filed any response to the petition. Their advocates hardly participated in the proceedings and they were absent when directions were given on the hearing and disposal of the petition. They did not file any submissions either hence it is not possible to know whether they were in support of or opposition to the petition.

31. The court has considered the petition, the various affidavits both in support and in opposition thereof and the submissions on record. In the court's opinion, the following issues arise for determination;

- a. Whether the instant petition is *sub judice* or *res judicata*.
- b. Whether the petition is an abuse of the process of court.
- c. Whether the process of demarcation, allocation and alienation of the scheme (hereinafter the "said process") was undertaken without meaningful public participation contrary to **Article 10 of the Constitution**.
- d. Whether the said process was undertaken in a discriminatory manner contrary to **Article 27 (4) of the Constitution**.
- e. Whether the said process was undertaken in violation or **Article 40 of the Constitution**.
- f. Whether the Respondents violated the provisions of **Article 28 of the Constitution** in undertaking the said process.
- g. Whether the Respondents acted in violation of **Article 35 (1) of the Constitution** by refusing to avail information relating to the said process.
- h. Whether the Respondents acted in violation of **Article 47** of the Constitution in undertaking the said process.
- i. Whether the Respondents acted unlawfully and unconstitutionally in undertaking the said process in the absence of legislation on community land contemplated under **Article 63 (5) of the Constitution**.
- j. Whether the petition was instituted in violation of **Article 189 of the Constitution and section 35 of the Inter-Governmental**

Relations Act.

k. Whether the Petitioner is entitled to the reliefs sought in the petition.

l. Who shall bear the costs of the petition.

32. The 1st issue is whether the instant petition is *sub judice* or *res judicata*. The phrase *sub-judice* simply means that the same matter is pending before a judge for adjudication. This doctrine is recognized under **section 6 of the Civil Procedure Act (Cap 21)** 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.”

33. It is evident that before a legal proceeding can be barred on account of the doctrine, it must be demonstrated that there is 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 are the same. It is not sufficient to establish merely that the subject matter in dispute in *Embu ELC petition No. 1 of 2014* is the same as the subject matter in this petition. The requirements on the parties to the suit and the issues to be decided must be met.

34. It is evident that the Petitioner was not party to the earlier petition and it has not been demonstrated that the Petitioners in the earlier petition were claiming any relief under or through the current Petitioner. In the circumstances, the court is not satisfied that the doctrine of *sub judice* would apply to the instant petition.

35. The doctrine of *res judicata*, on the other hand, is provided for under **section 7 of the Civil Procedure Act (Cap 21)**. *Res judicata* is a Latin phrase which literally means “a thing adjudicated.” The material provisions of **section 7** provide 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 former suit between the parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been heard and finally decided by such court.”

36. In order for the doctrine to apply, it must be demonstrated that the matters 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. As indicated in the preceding paragraph, the instant Petitioner was not party to *Embu ELC Petition No. 1 of 2014* and there is no evidence on record to demonstrate that the Petitioners in the earlier petition were claiming any relief through or account of the current Petitioner. Moreover, the consent which was recorded in the previous petition was only a partial consent. It has not been demonstrated that the issues raised in the instant petition were conclusively determined by the partial consent. The court is, therefore, unable to hold that the doctrine of *res judicata* applies to the instant petition.

37. The 2nd issue is whether the instant petition is an abuse of the process of court. It was submitted by the Respondents and some of the interested parties that the process of demarcation, allocation and alienation of the scheme was undertaken pursuant to a court order made in *Embu ELC petition No. 1 of 2014*. It was further submitted that the said order had not been set aside, vacated or reviewed. It had also not been appealed against hence it was an abuse of the court process for the Petitioner to file the instant petition.

38. The court has considered the material on record and the circumstances relating to the making of the consent order in the earlier petition. It must be borne in mind that the instant Petitioner was not party to the earlier petition. The court is of the view that even if the Petitioner had applied for joinder and setting aside of the consent order, that would not have resolved the issues which have been raised in the instant petition. In those circumstances, it could not be said that the Petitioner is simply misusing the machinery of the court. The court finds that it has not been demonstrated that the instant petition is an abuse of the court process.

39. The 3rd issue is whether the said process was undertaken without meaningful public participation. The Petitioner and the interested parties supporting the petition contend that there was no or no meaningful public participation in the process whereas the Respondents and the interested parties in opposition to the petition contended otherwise. The court has considered the material on record and the submissions of the various parties on this issue. The court is reasonably satisfied that the Respondents undertook some form of public participation. There is evidence in the form of affidavits and copies of minutes to demonstrate that at least ten (10) consultative meetings were held spanning a period of 3 years.

40. As was held in the case of **Patrick Musimba Vs National Land Commission & 4 Others [2016] eKLR** public participation ought to be meaningful and not merely cosmetic. The court stated, *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.”

41. Similarly, in **Nairobi Metropolitan PSV Sacco Union Ltd & 25 Others Vs County Government of Nairobi & 3 Others [2013] eKLR**, the Hon. Justice Lenaola J (as he then was) held as follows;

“... it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health Vs New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

42. In **Embu ELC Petition No. 2 of 2016 Nickson Mutinda Musyoki & 9 Others Vs National Land Commission & Others** this court made the following observations on public participation;

“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.”

43. The 4th issue is whether the said process was undertaken in a discriminatory manner contrary to **Article 27 (4) of the Constitution**. The said provision prohibits the state from either directly or indirectly discriminating against any person on any ground such as race, sex, marital status, health status, ethnic or social origin, colour, age, religion and others.

44. It was contended by the Petitioner that the said process was unfair and discriminatory because the list of beneficiaries was dominated by members of the Mbeere Community hence there was discrimination against members of the Kikuyu, Kamba and Embu Communities. The court has considered the material on record on the issue. The 2nd Respondent contended that the percentages of allocation within the scheme was agreed amongst the concerned stakeholders as follows;

a. Mbeere (39 clans)	40%
b. Mwea (Kamba)	30%
c. Embu (Manyatta & Runyenjes)	20%
d. Kikuyu	5%
e. Disabled	5%

45. There is no doubt from the above that members of the Mbeere Community got the largest allocation amongst all the communities in the scheme. The court is aware that there are factors which the authorities and the stakeholders may have taken into account in arriving at such percentages. It was not contended by the Petitioners that the population of the various communities in the scheme was *equal* hence the sharing should have been on an *equal* basis. In my view, it has not been demonstrated that those allocations were arrived at on the basis of discrimination on account of ethnicity or any of the other aspects specified in **Article 27 (4) of the Constitution**.

46. The mere fact that the Mbeere community got a larger allocation than the other communities cannot, without more, constitute discrimination within the meaning of **Article 27 (4)**. It may well be the case that the relative population of the 39 Mbeere clans is bigger than that of the other communities resident within the scheme. The court is, therefore, not satisfied that the Petitioner has demonstrated unlawful discrimination as pleaded in the petition.

47. The 5th issue relates to alleged violation of **Article 40 (3) of the Constitution**. The said Article provides that;

“(3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –

(a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –

i. Requires prompt payment in full, of just compensation to the person; and

ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.

48. The court's understanding of the Petitioner's complaint as appears from its pleadings and submissions is that the Respondents unjustifiably excluded very many Kenyans who had a legitimate current or historical claim to the scheme. The court's understanding of the said Article is that it affords protection to private property right or interests which have already crystallized. In the court's opinion, where a person has an expectation or even a legitimate expectation that the state shall allocate him a portion of community land he cannot contend that the said Article has been violated where the land is not ultimately allocated to him. The property rights and interests which are protected are those which are already vested. That is why the Constitution provides for payment of just compensation in case of deprivation.

49. In the circumstances of this petition, the Petitioner and the parties on whose behalf the petition was filed had no vested property rights in the scheme. If they were not allocated any land it could not be said that the Respondents had acted unconstitutionally by *depriving* them of their property contrary to **Article 40 (3) of the Constitution**. The court, therefore, finds that the alleged constitutional violation has not been demonstrated.

50. The 6th issue is whether the Respondents violated the provisions of **Article 28 of the Constitution** in undertaking the said process. This issue is related to the immediately preceding one. It was contended that as a result of the alleged deprivation of property by the Respondents, very many legitimate claimants were deprived of their human dignity which is inherent in every human being.

51. Whereas the court agrees that the constitutional right guaranteed by **Article 28** applies to the citizens on whose behalf the petition was filed, the court does not agree that the mere fact that those citizens missed out on the allocation, without more, demonstrates a violation of that right. It must be demonstrated, through evidence, that the Respondents through some deliberate acts or omissions violated that human dignity. The evidence on record does not demonstrate any such violation on the part of the Respondents.

52. The 7th issue relates to the alleged violation of **Article 35 (1) of the Constitution** by the Respondents. It was contended that they had refused to avail or disclose information relating to the said process. The court has considered the material on record on this aspect. There is absolutely no evidence that the Petitioner made a request for such information and that such request was declined. There was no letter of request which was exhibited by the Petitioner hence there is no basis upon which the court may find and hold that the Respondents were in violation of the provisions of **Article 35 (1) of the Constitution**.

53. It is interesting to note that the Petitioner relied on the case of **Famy Care Ltd Vs Public Procurement Administrative Review Board & Another, High Court Petition No. 43 of 2012 [2012] eKLR** and the case of **Nairobi Law Monthly Company Ltd Vs Kenya Electricity Generating Co. & 2 Others [2013] eKLR** whereby the court held that the right of access to information under **Article 35 (1)** was limited to natural persons as opposed to legal persons. The court in both cases held that the term "citizen" as employed in the said article excluded juristic persons such as corporations. It is, therefore, doubtful if the right could be available to the Petitioner who is not a natural person.

54. The 8th issue is whether the Respondents acted in violation of **Article 47 of the Constitution** in undertaking the said process. The Petitioner submitted on two issues regarding the alleged violation. First, it was submitted that the Petitioner's right to be heard was violated. The Petitioner cited the case of **Ridge Vs Baldwin [1964] AC 40** and **David Onyango Oloo Vs The Attorney General** in support of that submission. Second, it was submitted that the right of a legitimate expectation was violated in terms of the case of **Council of Civil Service Unions Vs Minister for the Civil Service [1983] UKHL 6**. It was submitted that an expectation arose from the longevity of occupation of the residents of the scheme that they would be allocated some land.

55. In handling a similar petition relating to Mwea Settlement Scheme in **Embu ELC Petition No. 2 of 2016**, the court made the following observations;

"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."

56. The court further made the following observations on the application of **Article 47 of the Constitution**;

"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..."

57. Those two passages in my view reflect the position obtaining in this petition as well. The FAAA quoted in the preceding paragraphs refers to the Fair Administrative Action Act, 2015. The two cases of **Ridge Vs Baldwin (supra)** and **David Onyango Oloo Vs The Attorney General (supra)** precisely related to situations where adverse administrative action was undertaken against the Appellants without being accorded an opportunity of being heard on the charges against them. When the Respondents embarked on the process of demarcating and allocating the scheme land, it could not be said that they were undertaking *adverse* administrative action against the Petitioner or the persons whose interests it is representing. In the opinion of the court, it was sufficient for the Respondents to undertake public participation as opposed to serving adverse notices on all the residents of Embu County and Kirinyaga County.

58. The court is also not satisfied that the Petitioner has demonstrated a violation of the legitimate expectation of the persons it is representing. It is a matter of judicial notice that land is a scarce resource. It is to be managed and administered in the manner stipulated in **Article 60 of the Constitution**. In the court's opinion, that does not mean that every person in the county of Embu or Kirinyaga must be allocated some land in the scheme. It does not even mean that every person who has either a current or historical claim to the scheme land must get a share thereof. In most instances, the claimants would be more than the available land could cover. In those circumstances, it could not be said that there is a violation of the constitution whenever some claimants miss out on the allocation. The court finds no

evidence of violation of the provisions of **Article 47 of the Constitution**.

59. The 9th issue is whether the Respondents acted lawfully and unconstitutional in undertaking the said process in the absence of the legislation on community land. The Petitioner contended that the Respondents violated the provisions of **Article 63 (4) of the Constitution** which provides that;

“(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.”

60. In terms of **Article 63 (5)** parliament was obligated to enact the legislation contemplated under **Article 63 (4)**. There is no dispute that the said legislation, the **Community Land Act, 2016** was asserted to on 31st August 2016 and came into force on 21st September 2016. The impugned process was therefore undertaken by the Respondents before that legislation came into existence.

61. The court shall adopt and apply its holding in the earlier case of **Nickson Mutinda Musyoki & 9 others Vs NLC & Others** (*supra*) in that regard. This court held as follows:

“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 6th 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 6th 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.”

62. The 9th issue is whether the Petitioner by filing the instant petition, violated the provisions of **Article 189 of the Constitution and section 35 of the Intergovernmental Relations Act**. This issue was raised as a preliminary objection by the 1st and 3rd interested parties in their notices of preliminary objection dated 8th September 2016 and 5th December 2016 respectively. In its ruling dated 18th January 2018, the court dismissed the preliminary objections and held that the Petitioner had made some reasonable efforts to invoke the ADR mechanisms provided for under the Inter-Governmental Relations Act without success. The court, therefore, maintains its earlier decision on the issue and finds no violation of either **Article 189 of the Constitution or section 35 of the Inter-Governmental Relations Act**.

63. The final issue relates to costs. The general rule is that costs of an action shall follow the event unless, for good reason, the court directs otherwise. The court has considered the nature of the petition and the persons on whose behalf it was filed. The court has also considered that the Petitioner was seeking to enforce the perceived violation of the constitutional rights of a section of the public. The court is of the view that each party to the petition should bear its own costs.

64. The upshot of the foregoing is that the court finds no merit in the petition dated 12th August 2016 and the same is hereby dismissed. Each party shall bear its own costs.

65. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 27th day of SEPTEMBER, 2018.

In the presence of Mrs Njoroge holding brief for Mr. Githinji for the 1st and 3rd Respondent and holding brief for Ms Njuguna for the 2nd Respondent, Mr Ndegwa for the 1st Interested party, Mr. Kamunda for the 3rd interested parties and holding brief for Mr. Kibe for the 6th interested parties, and also holding brief for Mr Kagio for the 7th interested parties and Mr Guantai for the 9th interested parties and in the absence of the 2nd, 4th, 5th and 8th interested parties.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

27.09.18