REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 74 OF 2014

(Formerly NYERI HCCC NO.154 OF 2009 (O.S)

IN THE MATTER OF: APPLICATION UNDER SECTION 38(1) OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA FOR AND ORDER THAT THE PLAINTIFFS BE REGISTERED AS PROPRIETORS OF LR NO.10068 LAIKIPIA ON ACCOUNT OF ADVERSE POSSESSION

AND

IN THE MATTER OF: AN APPLICATION UNDER SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA FOR AN ORDER VESTING ON THE PLAINTIFFS/APPLICANTS THE EASEMENTS ENJOYED AND ACQUIRED ON LR NO.10068 LAIKIPIA

BETWEEN

JOSEPH LEKAMARIO & 248 OTHERS.....PLAINTIFFS/APPLICANTS

AND

AFRICAN WILDLIFE FOUNDATION ……..……1ST DEFENDANT/RESPONDENT

H.E DANIEL TOROITICH ARAP MOI …… 2NDDEFENDANT/RESPONDENT

KENYA WILDLIFE SERVICE.....…….. 3RD DEFENDANT/RESPONDENT

KITUO CHA SHERIA ……..…1ST INTERESTED PARTY

YASH PAL GHAI ……..……2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The plaintiffs took up the summons dated 18th October, 2009 and amended on various occasions for determination of various questions concerning their alleged rights and entitlements to the parcel of land

known as **LR No.10068 Laikipia** (hereinafter referred to as "the suit property").

2. From the pleadings filed in this matter, the plaintiffs' case can be summarized as follows:

(a) That they have been in open, continuous, uninterrupted and peaceful possession and occupation of the suit property for more than twelve years;

(b) That their occupation and possession of the suit property has been without force, none secretive and without the permission of the registered proprietor;

(c) That they have relied on the suit property for their lives, livelihoods, sustenance and survival;

(d) That in addition to living in the suit property, they have used the resources and facilities therein;

(e) that the respondents began interfering with their occupation and possession of the suit property sometime in 2009, way after their rights had become extinguished by their adverse possession of the suit property;

(f) that they have peaceably, openly, an interruptedly and as of right enjoyed facilities like boreholes, dams, water courses, rivers and stock routes in the suit property for more than 20 years;

(g) That they have peaceably used the suit property to gain access to markets and grazing areas beyond the suit property.

3. Through the amendments effected to the suit on 31st January, 2012 the plaintiffs' introduced an element of historical injustices in their claim by averring as follows:

"i. That after the Anglo-Maasai Agreements of 1904 and 1911, their ancestors were pushed by the European settlers northwards and southwards to create room for settlement;

ii. That their descendants and forefathers remained in Laikipia and in particular the suit land from time immemorial and practiced their culture and their socio-economic lifestyle for years uninterrupted;

iii. That they have never been aware of the alienation of the suit land to any other party including the defendant/respondents.

iv. That it's their contention and prayer, that they are entitled to adverse possession to the suit land and also they hold native title to the suit land through their ancestral inheritance."

4. For the foregoing reasons, the plaintiffs seek the following orders against the 2nd respondent (as per the amended-amended originating summons (O.S) dated 31st January, 2012).

(i) registration as proprietors in common of the suit property in place and instead of the 3rd respondent who is presently the registered proprietor;

(ii) vesting of the easement they have acquired and enjoyed in the suit property (viz. the rights of way and stock routes through the suit property and the use of the boreholes, dams, watercourses and rivers and of the water found on the suit property) in them;

(iii) The respondent be ordered to vacate and/or be evicted from the suit property;

(iv) The respondent be permanently restrained from entering, being or remaining on the suit property and from in any way interfering with their title to and ownership of the suit property and from otherwise disturbing or meddling with their quiet and peaceful enjoyment and possession/ occupation of the suit property;

(v) The respondent be permanently restrained from denying, frustrating, blocking or impeding or otherwise interfering with their use and enjoyment of the easements and from erecting or maintaining a perimeter fence/wall around the suit property and from fencing the applicants in or out of the suit property;

(vi) The costs of the suit be borne by the respondents;

(vii) Any other or further orders/reliefs as the court may deem just, expedient, convenient, conducive or necessary.

5. The application is opposed on the grounds that the 1st respondent has never been the registered owner of the suit property; that the 2nd respondent as the registered proprietor of the suit property was within his rights to remove the plaintiffs from the suit property and operate or undertake such activities as he deemed fit and that the plaintiffs have come to court with dirty hands.

6. The plaintiffs are accused of having failed to disclose to the court about the suit they preferred before Nanyuki Law Courts over their interest in the suit property wherein they *inter alia* described themselves as neighbors to the suit property as opposed to owners.

7. In support of their case, the plaintiffs availed ten (10) witnesses namely Peter Letotin Lemosa (P.W.1); Tiyon Lekolwa (P.W.2); Nakuro Lemironi (P.W.3); Parasian Lekolu (P.W.4); Makena Lemoroko (P.W.5); Joseph Lekamario (P.W.6); Moses Lolmewiti (P.W.7); Solkan Lesuda (P.W.8); Peter Mukutar Lenamaita (P.W.9) and Rebecca Wangare Wangui (P.W.10) whose testimonies are to the effect that:

(i) They entered the suit property at different times as from 1984;

(ii) That at the time they entered the suit property, the suit property was occupied by some people who kept animals therein and burnt charcoal;

(iii) That there was a polling station and a farm house in the suit property;

(iv) That they lived peacefully with the people they found in the suit property until sometime in 2009 when differences arose between the representatives of their community and the representative of the 1st respondent over the projects that the 1st respondent wanted to initiate in the suit property;

(v) That the differences between them and the 1st respondent touched on their representation and involvement of other communities (the plaintiffs did not want other communities to benefit from the projects the 1st respondent was going to implement in the suit property);

(vi) That following the differences, they filed a suit at Nanyuki law courts to *inter alia* restrain the 1st respondent from initiating the projects it wanted to initiate without involving them and/or without their approval;

(vii That owing to the said differences they were forcefully evicted from the suit property;

(viii) That the suit the plaintiffs filed in Nanyuki Law Courts was dismissed because the court had no jurisdiction to hear and determine it;

(ix) After the suit was dismissed, they filed the current suit for determination of their rights to the suit property;

(x) That by the time the plaintiffs entered the suit property, they did not know that it was a private property;

(xi) That they got to know about the 2nd respondent's ownership of the land in 2009, when they were evicted;

(xii) That they occasionally moved out of the suit property to graze their animals in neighboring areas but left their families in the suit property;

(xiii) That some members of their community were arrested and charged for malicious damage to the property fence;

(xiv) That their claim is for the entire suit property;

(xv) That their community is not the only community that lived in the suit property;

(xvi)That the suit property has been theirs since time immemorial (is ancestral land);

(xvii) That they have co-existed with wildlife since time immemorial;

(xviii) That they did not get the help they were promised by the 1st respondent;

(xix) That they knew the land in dispute as Kisangei but their advocates told them it is called Elands down or Kabarak farm;

(xx) That they grazed their animals, got firewood, herbs and construction materials from the suit property without seeking the permission of anybody.

(xxi) That the plaintiffs are a marginalized community who because of lack of security of tenure have been prejudiced by the existing land laws;

(xxii) That the plaintiffs' claim is premised on the Limitation of Actions Act, Cap 22 Laws of Kenya.

8. On their part, the respondents availed 8 witnesses namely, Jonah Kariuki (D.W.1), an executive officer of this court (Nyeri registry), who produced the file in respect of the Nanyuki case as **Dexbt-4**.

9. Festus Baithibua (D.W.2) a senior fencer with Ol Pejeta conservancy since 1978 informed the court that the conservancy had approximately 3000 herds of cattle in the suit land. He denied the plaintiffs' allegations that they lived in the suit property but admitted that there were occasional cases of trespass into the suit property.

10. Giles Pretty Jones (D.W.3), the livestock manager of Ol Pejeta conservancy since 1998, told the court that he had not witnessed any human settlement in the ranch. Like D.W.2, he informed the court that the suit property was used for cattle keeping both by the 1st registered proprietor and the 2nd respondent.

11. Charles Tanui (D.W.4) stated that he was the farm manager of Kabarak farm between 2004 and 2008. He confirmed the testimony of D.W.1 and D.W.2 that the suit property was used by the 2nd respondent for cattle keeping and that there were no squatters living in the suit property. He further informed the court that the suit property was invaded after the 1st respondent bought it from the 2nd respondent. The invaders were, however, evicted. He produced the records of livestock covering the years 2004 to 2008 as **Dexbt 10**; Master Roll of employees as **Dexbt 11 (a)** and **(b)**; notebooks reflecting daily counting of cattle as **Dexbt 12 (a)** and **(b).**

12. Peter Mwangi Wangare (D.W.5), the Assistant chief Segera sub-location, told the court that the suit

property falls in his sub-location. After he was appointed to the position of area assistant chief in 2003, he went round the suit property but did not see any squatters therein. He saw workers only. He further informed the court that Kisangei village is outside the suit property. Like D.W.4, he stated that he is aware of invasion of the suit property by the Samburu community in about the year 2010.

13. D.W.6 Richard Highnoor, testified that he had been the Chief Executive Officer Ol Pejeta conservancy since 2005. He was the General Manager from 1996 to 2005. He stated that the suit property was sold to the 2nd respondent in 1997 and a transfer effected in his favour on 21st September,1997. He informed the court that the Ol Pejeta conservancy kept livestock in the suit which they handed over to the 2nd respondent upon sale of the suit land. He further informed the court that at that time the entire land was fenced and paddocked. Like the other defence witnesses, he admitted that there were occasional illegal grazing and that they engaged the local community to discuss social benefits due to the community to sustain wildlife conservancy. He acknowledged that disputes arose between them and the Pois and Suguroi communities because they were creating division between the communities (did not want other communities to benefit from the projects the 1st respondent was going to implement).

14. Like D.W.5, D.W.6 informed the court that the plaintiffs are neighbours of the suit property and that they did not occupy the land in 1981/1984.

15. In cross-examination, D.W.6 informed the court that the gist of the project the 1st respondent was going to implement was to integrate wildlife conservation with use of the land by the local communities. They were to allow the local communities to use the land and rehabilitate the management center by fencing the suit property to manage human-wildlife conflict, improve water provision, internal fencing, roads and employ a manager for wildlife.

16. D.W.6 further informed the court that there was good relationship between Ol Pejeta ranch and the community. They wanted the community to determine how it could be involved in management of the conservancy.

17. He pointed out that they failed to agree with the Suguroi community. As a result, some members of the Suguroi community forcibly entered the suit land and started threatening their employees and destroying the properties and developments therein. Consequently, the government moved in and evicted them. He regretted that the selfish interests of one community derailed the benefits due to the neighboring communities.

18. In further cross-examination, he admitted that the plaintiffs traversed through the property but with consent of the management of the conservancy. He further stated that illegal occupants occupied the land after it was purchased by the 1st respondent in 2008.

19. D.W.7 Kathleen fitzgerd, stated he is the director of habitat conservation of the 1st respondent. He pointed out that the suit property is a critical wildlife migratory corridor. He opined that subdivision and allocation of the suit property will lead to suffering of wildlife. He produced a document prepared by the 1st respondent on conservancy projects as **Dexbt-6**. He informed the court that before the 1st respondent bought the suit property from the 2nd respondent, it did due diligence through which it established that the suit property was not encumbered. He also informed the court that he visited the suit property in 2008 and apart from the employees of the 2nd respondent, there were no other people occupying the suit property. He produced a valuation report in respect of the suit property which confirms as much as **Dexbt 7**. He took photographs of the developments on the suit property which he produced as **Dexbt 8 (a)** and **(b)**.

20. It is the testimony of D.W. 7 that from the due diligence they conducted, he established that the suit property had been privately owned since 1962 and that there was no claim on the land by anybody. Consequently, they paid the purchase price in full to the 2nd respondent who was supposed to hand over vacant possession of the suit property to it.

21. He explained that because the 2nd respondent was a foreign body corporate, they had challenges in getting the property registered in their favour. The foregoing notwithstanding, in 2008, they took beneficial possession and use of the suit property. He informed the court that the land was vacant when they took over.

22. He explained that they purchased the livestock the 2nd respondent kept in the suit property and handed them to Ol Pejeta farm for management. D.W.7 further informed the court that the 1st respondent did not receive any demand letter from the Pois and Suguroi communities claiming the suit property. Instead they received a letter congratulating them from Joseph Lekamario (P.W.6). The court further heard that P.W.6 encouraged the 1st respondent to buy more land for conservation.

23. D.W.7 further informed the court that they entered into a management agreement with Ol Pejeta conservancy and started having meetings with community representatives over the projects the 1st respondent was going to implement.

24. Arguing that they had no obligation to discuss the project with the communities, he informed the court that they just wanted to involve the community in running and managing the conservancy.

25. The court further heard that each community was required to nominate two representatives. However, a dispute arose between the communities. The Sugurui community complained about the representatives elected to represent them. Later the Pois and Suguroi community did not want other communities to benefit from the project.

26. He pointed out that vide letters written to the 1st respondent, the Pois and Suguroi communities identified themselves as neighbours to the suit property. He produced a letter dated 13th February, 2009 to that effect as **Dexbt-5**.

27. The court heard that the Pois community later filed a case at Nanyuki Law Courts contending that the 1st respondent

28. D.W.7 further informed the court that they made inquiries and identified 19 group ranches and additional trust lands where the Suguroi communities actually come from. They also identified three joint ranches' lists of registered members and established that the plaintiffs are registered members of some of the group ranches they identified. She produced the lists as **Dexbt 9 (a) (b)** and **(c)** for Suguta Marmar Group Ranch; Lokorata Group Ranch and Ilmisigiyo Group Ranch respectively.

29. She pointed out that the 1st plaintiff herein is registered as member No. 124 of Ilmisigiyo Group Ranch; Lomarimai Lengerdet (the 12th plaintiff in this matter) as member number 465 of Lokorate Group Ranch among other plaintiffs. Based on the registers of the said group ranches, she contended that the plaintiffs were not in occupation of the suit property in 1981 as claimed.

30. Because the current suit was filed barely three months after the Nanyuki matter was dismissed, D.W.7 suspects that the plaintiffs were instigated by Richard Lekiyangu and Joseph Lekamario (P.W.6) to bring it.

31. Concerning the impugned evictions, she stated that the 1st respondent was not involved.

32. D.W.7 explained that the 1st respondent had identified the suit property as suitable land for its conservation mission and after it experienced challenges in effectuating the mission, it engaged the 3rd respondent (KWS) to carry out the mission on its behalf.

33. According to D.W.7, it is not possible for the plaintiffs to have been in occupation of the suit property for over12 years because the evidence on record shows that the suit property was at all times material to the suit, being used by the registered proprietors.

34. On the legality or otherwise of the transfer of the suit property to the 3rd respondent during the pendency of this suit, she pointed out that there were no court orders barring the transfer or gifting of the property to the 3rd respondent.

35. D.W.7 maintained that they had no intention of circumventing or disinheriting the plaintiffs.

36. Raphael Meli (D.W.8), a land officer with the 3rd respondent, informed the court that the 1st respondent is a partner of the 3rd respondent in conservation matters.

37. D.W.8 further informed the court that the 3rd respondent received the suit property from the 1st respondent as a gift. The court heard that transfer documents were prepared on 5th July, 2011 and transfer duly executed on 4th November, 2011.

38. According to D.W.8, the 1st respondent authorized the 2nd respondent to transfer the suit property to the 3rd respondent. D.W.8 produced the transfer and title in respect of the suit property respectively as **Dexbt 13 (a)** and **(b)**. He pointed out that the 3rd respondent was exempted from payment of stamp duty by the minister of finance. He produced the exemption notice as **Dexbt 14**.

39. He informed the court that the title in respect of the suit property shows that there have been 18 entries since 1962 most of which relate to pledging of the property as security.

40. The court also heard that as at the time the 3rd respondent took possession of the suit property, there were no human settlement. They, however, found people grazing thereon.

41. Like D.W.7 he stated that at the time the suit property was transferred to the 3rd respondent there was no order barring the registered proprietor from transferring the suit property to third parties.

42. Fred Kapondi Chesebe (D.W.9), the chairman of the Parliamentary Committee on Administration and National Security at the material time, informed the court that the Member of Parliament for Samburu East at that time, Hon. Raphael Letimalo, raised in parliament matters touching on the subject matter of this case.

43. His committee visited the suit property and prepared a report which he produced as **Dexbt-15**.

44. D.W.9 further informed the court that there was a report by the manager of security of threats by certain individuals to invade the farm. The court heard that Col Leyiangu (the 16th plaintiff in this matter) whom the committee interviewed stated <u>he is a neighbour to the suit property</u> and that he has a farm in the area.

45. The committee concluded that some individuals had incited the community to invade the farm. Col leyiangu was mentioned as one of the persons who incited the community.

46. The committee established that the community was allowed by the 1st respondent to graze on the land on humanitarian grounds. He tabled the report before parliament but could not tell whether it was discussed.

47. He stated that Parliament debated issues regarding the suit property and produced the Hansard report as in respect thereof as **Dexbt-16**.

48. Concerning the allegation that the 1st respondent allowed neighboring communities to graze on the land on humanitarian grounds, he stated that the committee did not get any documentary evidence to support that. The committee found no signs of eviction on the ground.

49. The committee observed that there was an attempt to invade the suit property to hoodwink the

committee that there were evictions. In this regard, he stated that the committee was shown relatively new structures.

50. At close of hearing, counsels for respective parties filed submissions.

Plaintiffs' submissions

51. On behalf of the plaintiffs (applicants), an overview of the plaintiffs' case is given and submitted as follows:

(a)The evidence of the plaintiffs establishes adverse possession. In that regard, it is contended that the evidence of P.W.1 satisfies the basic elements of adverse possession. It is further contended that the evidence of the plaintiffs shows that, although, they left the suit property in search of pasture they left their families behind.

(b) On the law, reference is made to the principles espoused in the cases of **Mtana Lewa v. Kahindi Ngara Mwagandi (2015) eKLR; Harrison Ngige Kaara vs Gichobi Kaara & Another (1997)eKLR** and submitted that the testimonies of the plaintiffs fulfill the requirements set out by the Court of Appeal.

(c) The case of the plaintiffs is said to have not been controverted as the respondents' case amounted to general denials that there was no occupation on the suit property but the neighbouring land.

(d) According to the plaintiffs, their alleged long and uninterrupted stay on the suit property, encompassing the birth, traditional rights and marriage of generations, should be protected by law.

(e) The 2nd respondent (His Excellency Daniel Toroitich Arap Moi) is said to have sat on his rights since 1981 and latest since 1999.

(f) It is acknowledged that the plaintiffs occasionally left the suit property in search of pastures but on the authority of the case of **Alfan Said & 8 Others v. Najib Islam Omar & Another** (2010) eKLR, submitted that the occasional movement of the members of the plaintiffs out of the suit property did not vitiate their continuous uninterrupted occupation as contended by the respondents.

(g) Maintaining that the plaintiffs have gained rights over the suit property, counsel for the plaintiffs urges the court to uphold the plaintiffs' rights to the suit property and rescue them from the Damocles that have been over their heads.

(h) The plaintiffs who are said to have occupied the land and prevented it from falling into disuse by rearing cattle, are said to have not affected other animals living on the suit property but instead made it productive. The plaintiffs are also said to have demonstrated their enthusiasm in utilizing the land that had been lying idle for 35 years.

(i) It is reiterated that the plaintiffs have been in occupation of the suit property for over 35 years peacefully, openly and continuously until 2009 when the 2nd respondent burnt their dwellings.

(j) The 2nd respondent is accused of having sought the influence of Parliament to make adverse findings in a Parliamentary report.

1st respondent's submissions

52. On behalf of the 1st respondent, an overview of the historical background of the suit property, the cases of the plaintiffs parties to the dispute herein and the law applicable to the case is given and the following identified as the issues for the court's determination:

(i) Who are the claimants/plaintiffs in this case and what is the nature and legality of their claim?

(ii) Whether the plaintiffs have been in adverse possession of the suit property for a period of or more than 12 years?

(iii) Whether the plaintiffs have been in adverse use and enjoyment of easements on the suit property for a period of or more than 20 years?

(iv) Whether the plaintiffs are entitled to the orders sought in the originating summons?

53. With regard to the first issue, it is submitted that a claim for adverse possession cannot be brought by an amorphous group because identification of the adverse possessor (s) is an integral part of the process of proving adverse possession. From the plaintiffs' documents and the evidence on record, it is submitted that it is not possible to tell who is claiming for whom, through whom and for what portion because the plaintiffs are an amorphous group. In this regard, it is contended that the plaintiff's witnesses stated that they entered the suit property at different times. Some in 1981, others 1984 and others in 1988.

54. It is pointed out that some of the witnesses of the plaintiffs referred to the plaintiffs as members of the Kisagei community while others referred themselves as members of the Suguroi Community. Some others referred themselves as members of Pois communities while others referred themselves as members of the Samburu community.

55. It is pointed out that the plaintiffs had opportunity to clearly identify who they are and who is claiming what and for whom but failed to do so.

56. Maintaining that the plaintiffs are an amorphous entity and confusing group to whom no orders in the nature sought can issue, based on the decision in the case of **Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakshwein & Another** (2015) eKLR, counsel for the 1st respondent asserts that the orders sought cannot issue in favour of the plaintiffs because they are an amorphous entity.

57. The plaintiffs claim is also said to be tainted with illegality because some of the plaintiff's witnesses, in particular P.W.3, P.W.5., P.W.7 and P.W.8 denied having signed the documents filed in court. Terming the pleadings and documents forgeries, counsel for the 1st respondent submits that no benefit can be derived from such acts as they are criminal. For that reason, the 1st respondent urges the court to strike out the pleadings on that ground alone.

58. It is also contended that there are irreconcilable contradictions in the plaintiff's claims set out in the amended- amended originating summons filed on 9th February,2012. Terming the prayers mutually exclusive, counsel for the 1st respondent points out that vide prayer 1, the plaintiffs seek to be registered as proprietors in common of the suit property on account of their adverse possession thereof vide the amendments introduced to the originating summons on 31st January, 2012 wherein the plaintiffs are claiming ownership of the suit property under ancestral rights and alleged Anglo-Maasai agreements of 1904 and 2011.

59. From the foregoing, the 1st respondent wonders what the nature and basis of the plaintiffs' claim is.

60. The claim, in as far as is based on ancestral rights or the Anglo-Maasai agreements of 1904 and 1911, according to the 1st respondent must fail for the reasons that it is not a claim based on adverse possession or use of land but legal, proprietary and constitutional rights which can only be brought against the government of Kenya as the successor of the British colonial government and not the land owner.

61. It is pointed out that no evidence of any kind was adduced or produced by the plaintiffs of the alleged Anglo-Maasai agreements of 1904 and 1911 and/or any evidence giving rise to the alleged ancestral rights.

62. The claim, as far as it relates to the alleged easements on the part of the suit property, it is submitted that such a claim cannot be for the entire suit property. Further, based on the decision in the case of **Benina Ndugwa Kunyumu and 4 others v. National Land Commission** (2015) eKLR, it is submitted that there is a difference between a claim for easement and that of title under adverse possession.

63. On the 2nd issue, it is submitted that there is overwhelming evidence that the plaintiffs were never in possession of the suit property from 1981, 1984 or 1988 as alleged. The plaintiffs are said to have only forcefully entered the suit property in 2008 and 2009 when discussions with the 1st respondent on representation of communities in the intended project committee fell through. The fact that the plaintiffs have never been in adverse possession of the suit property is said to be borne out by the following:

(i) Evidence of the plaintiffs' witnesses on when they took possession of the suit property is contradictory. In this regard it is pointed out that some of the witnesses stated that they found the property vacant, others stated that it was occupied; some accused others of lying. Others confirmed that they were living outside the suit property while others confirmed that they never had quiet enjoyment of the suit property. Others are said to have been categorical that what was stated by Joseph Lekamario (P.W.6) in the Nanyuki case was true while other denied it.

(ii) All the plaintiff's witnesses are said to have confirmed that they fell out with the 1st respondent when they could not agree on the proposed project committee. For instance, P.W.8 is said to have confirmed that they had a cordial relationship with the 2nd respondent and that they were not living in the suit property.

(iii) The plaintiffs are further said to have unequivocally stated on oath that they were neighboring communities to the suit property in the Nanyuki case. It is also pointed out that in the Nanyuki case, the plaintiffs referred to themselves as members of Suguroi and Pois communities but tried to distance themselves from those communities in the current suit.

(iv) It is pointed out that the plaintiffs in the Nanyuki case had deposed that they had enjoyed a peaceful relationship with the 2nd respondent as neighbors and had accused the 1st respondent as the one who had come to cause conflicts between the communities surrounding the property.

(v) Further, it is pointed that the plaintiffs had referred to the suit property by the same name in the Nanyuki case as well as in the current suit.

(vi) Based on the decision in the case of **Central Kenya Limited v. Trust Bank Limited and Others** (1995-98) 2 EA 52 where the Court of Appeal held that evidence given by a witness in a judicial proceeding between the same parties is admissible in subsequent judicial proceedings for purposes of proving the fact which it states, it is submitted what the plaintiffs stated in the Nanyuki case is admissible in this case.

(vii) The exhibits produced by respondents are said to be in support of the respondents' case to the effect that the plaintiffs were not in possession of the suit property as alleged. These include the 2nd respondent's records for cattle produced as **Dexbt 10**; master roll of employees produced as **Dexbt 11 (a)** and **(b)**; daily counting notebook, **Dexbt 12 (a)** and **(b)**; valuation report; record of persons arrested and charged with trespass, agreement for sale of the suit property and the cattle therein, photographs of remnants of fencing posts and wire clearly show that the property was being used as a cattle ranch.

(viii) It is pointed out that no human settlements by the plaintiffs or any other persons were reported. The numerous letters exchanged between the plaintiffs and the 1st respondent's advocate also attest to the fact that the plaintiffs were not in occupation.

(ix) According to the 1st respondent, the registers produced showing that the plaintiffs were members of group ranches away from the suit property also go to attest that the plaintiffs were not in

occupation of the suit property. The report of the Parliamentary Committee on administration and security also goes to attest to that fact.

64. From the totality of the evidence adduced in this matter, it is submitted that the plaintiffs have failed to discharge the burden placed on them of proving actual, exclusive, peaceful, continuous and uninterrupted possession of the suit property for the requisite statutory period.

65. It pointed out that no evidence whatsoever was adduced to show that the predecessor in entitlement of the suit property, Ol Pejeta Ranching Limited or the 2nd respondent were dispossessed of the suit property by the plaintiffs as contemplated by law and in particular the cases of **Wambugu v. Njuguna** (1983) KLR 172**; Public Trustee v. Wanduru** (1984) KLR 314**; Kimani Ruchine & Another v. Swift, Rutherfor Co. Ltd & Another** (1976-80) 1 KLR**; Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakshweni & Another supra; Githu v. Ndeete** (1984) KLR 776.

66. The occasional breaking of the fence by the Samburu herdsmen, trespassing on the land for grazing and cattle rustling or theft according to the 1st respondent was not inconsistent with the enjoyment of the land by Ol Pejeta and 2nd respondent as proprietors because they were rearing cattle thereon.

67. The evidence on record is said to be of effect that the respondents did not lose the suit property either by being disposed or having discontinued possession for the period provided in law.

2nd respondent's submissions

68. On behalf of the 2nd respondent, it is contended that the suit property was bought by the 2nd respondent on or about 1998 from its previous owner Ol Pejeta Ranching Limited unencumbered and free of any squatters.

69. It is pointed out that after taking possession of the suit property, the 2nd respondent began keeping cattle thereon.

70. It is acknowledged that there were occasional illegal trespasses to the suit property by neighboring communities and pointed out that some of the trespassers were arrested and charged in Nanyuki Law Courts.

71. It is explained that the 2nd respondent was approached by the 1st respondent to sell the land to it for purpose of conservation of the suit property which is a crucial wildlife migratory corridor.

72. It is further pointed that the 2nd respondent agreed to sell the suit property to the 1st respondent, who with the consent of the 2nd respondent later on transferred it to the 3rd respondent to carry out the intended conservation.

73. It is also pointed out that after the 1st respondent bought the suit property from the 2nd respondent, it engaged the neighboring communities concerning its intended projects in the suit property.

74. It is submitted that the plaintiffs' community (the Samburu) who were not opposed to the project but were opposed to involvement of other communities in the projects the 1st respondent was going to roll out and implement, filed a case at Nanyuki Law Courts to *inter alia* restrain the 1st defendant from involving other communities from the project. It is pointed out that the suit was dismissed.

75. After the suit was dismissed, the plaintiffs in the former suit together with other persons filed the current suit.

76. The 2nd respondent faults the plaintiffs for failing to disclose to this court that it had filed a suit in the lower court seeking to restrain the activities of the 1st respondent on the suit property.

77. Based on a valuation report conducted by the 2nd respondent before the property was sold to the 1st respondent, the parliamentary report concerning the plaintiffs' claim to the suit property which shows that there were no squatters in the suit property, the 2nd respondent argues that there is no evidence capable of proving that the plaintiffs were at any point in time squatters on the suit property for a continuous period of at least 12 years.

78. The plaintiffs' evidence is said to have shown that they were pastoralists who required government help so that they do not invade private properties.

79. On the other hand, the 2nd defendant is said to have demonstrated that he has a title protected by the constitution and the law.

80. Wondering why the plaintiffs did not claim the suit property since 1962 when it was registered in the name of the 2nd respondent's predecessor in title, the 2nd respondent submits that the evidence adduced by the plaintiffs is insufficient to prove or support their claim for adverse possession or their claim for entitlement to the suit property on account of the alleged ancestral rights.

81. Arguing that the plaintiffs' claim is purely statutory; that is to say, premised on the cited provisions of the law to wit **Sections 3A, 63 (c)** and **(d); Order 36 Rules 3D, 7, 8, 8B, 10(1)** of the Civil Procedure Act and Rules respectively; **Sections 7, 13(1), 15, 17, 37 and 38** of the Limitation of Actions Act, Cap 22 Laws of Kenya, the 2nd respondent asserts that the plaintiffs' claim not being a constitutional petition, does not turn on the provisions of the constitution.

82. Based on the decisions in the cases of **Haro Yonda Juaje v. Sadaka Dzengo Mbauro & Another** (2014) eKLR**; Wambugu v. Njuguna** (1983) KLR 173**; Parkire Stephen Munkasio & 14 others v. Kedong Ranch Ltd & 8 Others** (2015) eKLR, the 2nd respondent maintains that the plaintiffs have not made up a case for being granted any of the orders sought.

83. In the case of **Haro Yonda Juaje** *supra* it was held that if one claims that the land he is occupying is his ancestral land and that he only learnt of the true owner a few years ago (less than 12 years), such a person cannot claim to have acquired land by adverse possession as he would be unable to prove the element of *animus possidendi*.

84. In the case of **Parkire Stephen Munkasio & 4 others** *supra*, it was held that the belief by the petitioners that the land was ancestral land, was immaterial as the same formed private land recognized and protected under our constitution which is the supreme law of the law.

3rd respondent's submissions

85. On behalf of the 3rd respondent, reference is made to the pleadings filed in this case and submitted that the suit is neither representative nor a public interest suit because it relates to the 249 persons named in the pleadings. It is further submitted that the suit does not raise constitutional questions as it is specifically about purported acquisition of land and/or easements through adverse possession and/or prescriptive rights.

86. Further reference is made to the amendments effected to the pleadings and submitted that the plaintiffs erred by failing to file amended affidavits or further affidavits to reflect the changed circumstances of the case.

87. Arguing that the evidence adduced in this case does not support the case pleaded by the plaintiffs, counsel for the 3rd respondent submits that the prayers sought by the plaintiffs cannot issue against the 3rd respondent as they are not specifically addressed to it.

88. On whether the respondents were dispossessed or discontinued their possession to the suit property, reference is made to the title in respect of the suit property which shows that there have been numerous

transactions over the suit property and submitted that the respondents were never dispossessed of their entitlement to the suit property or discontinued their possession to warrant grant of an order of adverse possession in favour of the plaintiffs.

89. It is pointed out that registration of the suit property changed in favour of the 3rd respondent during the pendency of the suit without any change of pleadings to reflect the changed factual situation of the plaintiffs' case and submitted that the plaintiffs' prayer for registration as the registered proprietors of the suit property in place of the 2nd respondent has been overtaken by events.

90. It is further pointed out that through the amendments made by the plaintiffs to their pleadings, the plaintiffs introduced a new cause of action to ancestral rights and submitted that it is not clear whether the plaintiffs' claim is premised on adverse possession as per the original claim or on ancestral ownership rights as per the amended O.S and the amended-amended O.S.

91. On whether the plaintiffs proved their case, an overview of the oral testimonies given in this suit is given and submitted that the plaintiffs failed to prove either of the pleaded causes of action.

92. Terming the oral testimonies of the plaintiffs' witnesses shallow, inconsistent and contradictory and those of the respondents' witnesses consistent and watertight, counsel for the 3rd respondent maintains that the plaintiffs' have not made a case for being granted the orders sought or any of them.

93. Arguing that the evidence on record shows that the suit property is a wildlife migratory corridor, the 3rd respondent contends that issuance of the orders sought in favour of the plaintiffs would be an environmental catastrophe as the plaintiffs' upon being issued with individual titles to the suit property may subdivide it and sell it thus making it unavailable for the intended use, wildlife conservation.

94. In support of the 3rd respondent's case, reference is made to the following cases:

(i) Kisumu Court of Appeal Civil Appeal No. 19 of 1996-Mt. Elgon Hardware v. United Millers Ltd;

(ii) Mombasa Court of Appeal Civil Appeal No. 125 of 1997-Mwinyi Hamisi Ali v. The Attorney General & Another;

(iii) Nairobi Court of Appeal Civil Appeal No.49 of 1996-William Gatuhi vs. Gakuru Gathimbi;

(iv) Nyeri Court of Appeal Civil Appeal No.22 of 2013-Peter Mbiri Michuki v. Samuel Mugo Michuki;

(v) Malindi Court of Appeal Civil Appeal No. 11 of 2014-Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakshwein & Another

(vi) Nyeri Court of Appeal Civil Appeal No.28 of 2014-Titus Kigoro Munyi v. Peter Mburu Kimani.

2nd interested party's submissions

95. The 2nd interested party points out that the case of the plaintiffs' hinges on historical injustices and admits that the case is premised on the technical area of the law on adverse possession. That notwithstanding, he submits that in addressing the issues raised in the suit, the court must be guided by the values, principles and objects of the constitution of Kenya 2010.

96. Terming the suit property as community land as contemplated by **Article 63(1)** of the Constitution, the 2nd interested party submits that the plaintiffs are entitled to recognition and protection as a community.

97. According to the 2nd interested party, addressing the needs of the plaintiffs includes understanding the realities of their position, the challenges they face in using the court system, their lack of familiarity with court procedures, the imbalance between the parties, differences in lifestyles between the parties and the significance of dates and times which partly impacted on the plaintiffs' case.

98. Arguing that great injustices were committed during colonization through seizure of huge tracks of land belonging to communities, the 2nd interested party points out that the National Land Commission (NLC) was established to *inter alia* redress the historical injustices, counsel for the 2nd interested party faults the National Land Commission for failing to discharge its mandate of investigating and redressing historical injustices.

99. Urging the court not to shut its eyes on the injustices meted on the plaintiffs, counsel for the 2nd interested party acknowledges that the plaintiffs have not demonstrated that they entered into the suit property with the intention of dispossessing its registered owner as espoused in the case of **Mtana Lewa v. Kahindi Njula Mwagandi** *supra* but urges this court not to be guided by that authority but instead to be guided by the modern law as espoused in **Jourdan & Gadner Adverse Possession, (2nd edition) Bloomsbury Professional, 2011) P.186** to the effect that one does not need to prove *animus possidendi* in order to acquire title to land owned by another person by adverse possession.

100. Counsel for the 2nd interested party urged this court to be guided by the constitution in determining the issues raised in this suit and in so doing to give purposive interpretation to the constitution and the other laws in order to achieve the objectives of the constitution; particularly **Article 20** thereof which requires the court in applying a position of the Bill of Rights to develop the law to the extent that it does not give effect to a right or fundamental freedom.

Analysis and determination

101. According to the evidence adduced in this matter, the suit property was allocated to Ol Pajeta Ranching Limited ("herein Ol Pejeta") by the colonial Government sometime in 1962. Registration in favour of Ol Pejeta was effected on 14th June,1962. In this regard, see the title issued in respect of the suit property which was produced by D.W.8 as **Dexbt 13 (a) and (b)**.

102. The evidence adduced in this matter to wit the aforementioned indenture of title, shows that from the time the property was registered in favour of Ol Pejeta there have been various registered dealings /transactions in respect thereof. These dealings/ transactions include charges in favour of financial institutions, discharge of the charges, caveats and transfers. In total a number of 19 transactions/ dealings concerning the suit property are indicated as having taken place in respect of the suit property between 1962 and 2011.

103. Concerning the transfers, the evidence on record shows that the Ol Pejeta transferred the suit property to the 2nd respondent on 21st November, 1997. The 2nd respondent, later on, transferred it to the 3rd respondent herein.

104. Transfer in favour of the 3rd respondent was effected on 4th November, 2011, during the pendency of this suit.

105. It is noteworthy that the plaintiffs' who claim to have entered the suit property at the time the property was owned by Ol Pejeta, did not make Ol Pejeta a party to the suit, yet it was the party against which their claim for adverse possession if at all it accrued at that time, accrued. For that reason, a question a rises as to whether the plaintiffs can urge a claim for adverse possession in respect of that time in the absence of Ol Pejeta.

106. In answering that question, I will not re-invent the wheel but adopt the decision in the case of **Mwinyi Hamisi Ali v. Attorney General & Another; Mombasa Court of Appeal** Civil Appeal No. 125 of 1997 where the Court of Appeal observed:

"In Order that Mr. Hamisi Ali could claim successfully, title by adverse possession, he had to show that the title of the said four persons stood extinguished. That can only be done if the title holders were parties to the suit. In our view, the learned judge erred when he proceeded to decree title by virtue of adverse possession where the registered proprietors were not parties to the suit."

107. The logic behind holding that the plaintiffs' cannot urge a case against Ol Pejeta is premised on the rule of natural justice which requires that before a decision that is likely to adversely affect the rights or interests of another person can be made, that person ought to be given an opportunity to defend that which is urged against him. In that regard, see **Pashito Holdings Limited & Another v. Paul Nderitu Ndungu & 2 Others** (1197) eKLR, where the Court of Appeal stated:

"The learned Judge without having the Commissioner before him and without hearing him in his defence has finally condemned him on an interlocutory application for injunction in the following terms: - "It was not open to the Commissioner of lands to re-alienate the same".

He could have made only a *prima facie* finding and that too if the Commissioner had been sued and served with the application. Not only that, the learned Judge appears to have finally sealed the fate of this suit which is yet to be heard on merits by holding: " So the alienation was void *ab initio*"

No such finding *prima facie* or final can be made without the Commissioner's participation in the proceedings.

The gravamen of the respondent's suit is that the Commissioner had no right to alienate a public land to any person for any use other than that for which it has been reserved. The respondents could not have established a *prima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

> **"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".**

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

> **" However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings".**

With respect, he should have seen that it was not upto the appellants to fill up the gaping holes in the respondents case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief."

108. Because the plaintiffs did not make Ol Pejeta a party to this suit, I am of the view that their claim for adverse possession can only be restricted to the title held by the 2nd respondent.

109. Time for purposes of adverse possession, if it ever began to run against the title held by the 2nd

respondent, began running as from the time the 2nd respondent became the registered proprietor in respect thereof, that is to say, on 21st November,1997. In this regard see the case of **Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakswein & Another (2015) eKLR** where the Court of Appeal observed:

> **"As correctly observed by the trial court, beyond prescribing the limitation period, the Act does not expressly define "adverse possession" as a term. Section 13(1) however, provides that a right of action in recovery of land does not accrue unless the land in the possession of some person in whose favour the period of limitation can run (which possession in this Act is referred to as adverse possession. Tied to this, is section 7 of the Limitation Act which bars an owner of a parcel of land from an action to recover it at the expiry of twelve years. From these provisions, what amounts to "adverse possession"? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in adverse manner to the title owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this court. Suffice to mention but two, Kasuve v. Mwaani Investment Ltd & 4 others (2004) 1KLR 184 and Wanje v. Saikwa (No.2) (1984) KLR 284."**

110. Whereas the initial claim was against the 1st respondent herein, the evidence on record shows that the 1st respondent has never been the registered proprietor of the suit property.

111. Apparently based on the realization that the 1st respondent was not the registered proprietor of the suit property at the material time and at all, the plaintiffs amended their pleadings to restrict their claim to the 2nd respondent who at the material time was the registered proprietor of the suit property.

112. After the ownership of the suit property changed to the 3rd respondent, the plaintiffs partially amended their pleadings to accord with the changed circumstances of the case.

113. I say partially amended their pleadings because the evidence on record shows that they merely amended the pleading to include the 3rd respondent and to claim registration in their favour instead of the 3rd respondent.

114. It is noteworthy that the plaintiffs did not amend their supporting affidavit to reflect the changed circumstances of the case.

115. Owing to failure by the plaintiffs to amend their entire pleadings to reflect the changed circumstances of their case, it is submitted on behalf of the 3rd respondent, that the orders sought cannot issue against it.

116. On whether the orders sought in the amended O.S can issue against the 3rd respondent, I start by pointing out that I am conscious of the fact that parties are not allowed to depart from their pleadings unless by way of amendment.

117. The foregoing notwithstanding, under **Article 159** of the Constitution of Kenya as read with **Section 3A** of the Civil Procedure Act, this court is enjoined to dispense justice without undue regard to procedural technicalities. As the case urged by the respective parties is clear and there being no evidence that the 3rd respondent stands to suffer any prejudice on account of the failure by the plaintiffs to amend their pleadings to accord with the changed circumstances of the case, in the circumstances of this case, nothing can prevent this court from issuing such orders as the justice of the case may require.

118. I hasten to point out that the title passed on to the 3rd respondent can only be good if and only if the 2nd respondent had a good title to pass to it. Therefore, should this court find that the title held by the 2nd respondent had become extinguished by the plaintiffs' adverse possession of the suit property at the time

the property was transferred to it, this court would not hesitate to make such a finding, which finding would definitely have a bearing on the title held by the 3rd respondent.

119. On whether the title held by the 2nd respondent had become extinguished by the plaintiffs' alleged occupation, the evidence on record and the pleadings filed in this matter show that, if the plaintiffs ever lived in the suit property, they were evicted there from in 2009. In this regard see the following excerpts from the oral testimonies of some of the plaintiffs' witnesses:

(i) **"Our occupation has not been interrupted until 2009 when the government security forces came to interrupt our peaceful occupation…. we were forcefully evicted in 2009…"** (per the oral testimony of P.W.1 at pages 27 and 28 of the typed proceedings);

(ii)**"I and the other Samburu residents lived in peace for many years until 2009 when we were evicted…** (per the oral testimony of P.W.6 at page 55 of the typed proceedings).

120. In the affidavit sworn in support of the original motion, the plaintiffs intimated that the respondents began meddling with their alleged quiet and peaceful occupation of the suit property in or about March 2009.

121. From the foregoing factual situation of this case, even assuming that the plaintiffs were actually in adverse possession of the suit property, which as will be demonstrated hereunder is not the case, the question to answer is whether the title then held by the 2nd respondent had become extinguished by their adverse possession as at March 2009, when they were evicted there from.

122. As pointed out hereinabove, time for purposes of adverse possession against the title held by the 2nd respondent, if at all, began to run in favour of the plaintiffs, on 21st November, 1997. By simple calculation, the plaintiffs' right to move the High Court for declaration that they had become entitled to be registered as proprietors of the suit property in place of the 2nd respondent accrued on 21st November, 2010 and not before that time, as that is when the time stipulated in law for lodging a claim for adverse possession accrued in their favour.

123. As pointed out above, the evidence on record including the plaintiffs' own pleadings show that the plaintiffs had been evicted from the suit property as at March, 2009, way before the time within which they could raise a claim against the 2nd respondent's ownership of the land had lapsed.

124. On the authority of **Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakswein & Another** *supra*, to acquire title to land by adverse possession, the plaintiffs must *inter alia* proof that they had been **in open and exclusive possession of the suit in adverse manner to the title owner for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner**.

125. Having determined that, if the plaintiffs were at all in adverse possession of the suit property that possession was terminated before the time stipulated in law to acquire title to land by adverse possession accrued in their favour, I need not say more to demonstrate that the plaintiffs' claim for been declared the owners of the suit property by adverse possession is unsustainable.

126. On whether the plaintiffs dispossessed the registered proprietors or the registered proprietors voluntarily discontinued their possession of the suit property for the period stipulated in law, upon review of the evidence adduced in this matter, I find that it does not show that the plaintiffs at any time material to the suit, dispossessed the registered proprietors of their interest in the suit property or that the registered proprietors at any time material to the suit discontinued their possession of the property. In this regard see the testimony of the respondents' witnesses which shows that at all times material to this suit, it is the respondents who were in control of the suit property.

127. The plaintiffs' witnesses also acknowledge that by the time they allegedly entered the suit property,

there were people in use and occupation of the suit property. For instance, the evidence on record shows that the respondents used the suit property to secure their financial obligations to financial institutions besides carrying out various development projects thereon

128. In the case of **Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakswein & Another** *supra*, it was held:

> **"In the first decision (read Kasuve v. Mwaani Investment Ltd & 4 others (2004) 1KLR 1), the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition."**

129. In the Wanje case, the court took the view that in order to acquire by statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it and what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

130. The evidence adduced in this case shows that at no time did the plaintiffs' dispossess the registered proprietors of their interest in the suit property or the registered proprietor(s) discontinued their possession of the suit property to warrant a declaration that the plaintiffs' alleged possession of the suit property was adverse to that of the registered proprietor(s).

131. The nearest situation the evidence in record brings us to is that contemplated in the case of **Wambugu v. Njuguna** *supra* where it was held:

> **"If the owner has little present use of the land, much may be done on it by others without demonstrating possession inconsistent with the owner's title."**

132. Counsel for the 2nd interested party, Yash Pal Ghai, in his submissions, agrees that in the circumstances of this case, the plaintiffs' occupation does not meet the threshold set in our statutes and decided authorities, especially with regard to the element of *animus possidendi* espoused in the case of **Mtana Lewa v. Kahindi Njula Mwagandi.** That notwithstanding, he urges this court to be guided by the objectives, values and principles set in our constitution in considering the plaintiffs' claims which according to him hinges on historical injustices as opposed to the technical area of adverse possession.

133. Whilst the sentiments expressed by counsel for the 2nd interested party concerning the plight of the plaintiffs' are germane, especially on account of the alleged historical injustices in land, this not being a constitutional petition for redressing the alleged historical land injustices, I agree with the submissions by counsel for the 3rd respondent that this court must restrict itself to the applicable statutory framework and the facts of the case.

134. On whether the applicable statutes relied on by the plaintiffs do not give a right to a fundamental freedom donated by the constitution to warrant reading in the provisions of **Article 20 (3)(a),** it is noteworthy that the 2nd interested party did not demonstrate to the court the manner in which the laws relied on by the plaintiffs have failed to give effect to the plaintiffs' fundamental rights and freedoms.

135. Being of the view that the plaintiffs who were ably represented by counsel had a choice to file a constitutional petition and urge their case based on the alleged breaches of their constitutional rights, I reject the invitation to elevate a purely civil matter to a constitutional petition. I hasten to point out that this court is not the right forum to litigate issues concerning the alleged historical injustices in the first instant. In this regard see the case of **Ledidi Ole Tauta & Others v. Attorney General & 2 others (2015)e KLR** it was held:

"We also note that the petitioners claim to the land is predicated on what the petitioners claim historical injustices were visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. <u>We do not think the court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices</u>."

136. The court further observed:

"The constitution acknowledged there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67(1) of the Constitution is to investigate historical injustices and to make recommendations for redress.

Article 67(2) (e) provides that among the functions of the National Land Commission is to:-

"(e) Initiate investigations, on its own initiative or on a complaint, into present or historical land injustices recommend appropriate redress".

In our view it's the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. <u>The court is not the appropriate organ to carry out the investigation and/or inquiry</u> and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to court without either exhausting the process of obtaining a degazettement of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67(2) (e) of the Constitution…"

137. As the plaintiffs' claim for easements is tied to their claim for adverse possession, which they have failed to prove, I similarly find it to be unsustainable for the aforementioned reasons.

138. The upshot of the foregoing is that the plaintiffs' case is found to be lacking in merits and dismissed with costs to the respondents.

139. Orders accordingly.

Dated and signed at Nyeri this 15th day of June, 2017.

L N WAITHAKA

JUDGE

Dated, signed and Delivered at Nyeri this 27th day of June, 2017.

NGAAH JAIRUS

JUDGE