



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT CHUKA**  
**CHUKA ELC PETITION CASE NO 01 OF 2017**  
**FORMERLY MERU ELC PETITION CASE NO. 05 OF 2010**  
**IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**  
**RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER SECTION 70 (A)**  
**AND (C), 75 (1) AND (2) OF THE CONSTITUTION OF KENYA**  
**BETWEEN**  
**ANGELO MUCEE KITHIRA.....1<sup>ST</sup> PETITIONER**  
**PAUL MUTEGI KATHENYA.....2<sup>ND</sup> PETITIONER**  
**AUGOSTO NJERU MUCEE.....3<sup>RD</sup> PETITIONER**  
**VERSUS**  
**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**COUNTY COUNCIL OF THARAKA.....2<sup>ND</sup> RESPONDENT**  
**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> RESPONDENT**  
**THE DIRECTOR OF LANDS ADJUDICATION AND**  
**SETTLEMENT.....4<sup>TH</sup> RESPONDENT**  
**THE DISTRICT LAND ADJUDICATION &**  
**SETTLEMENT OFFICER THARAKA.....5<sup>TH</sup> RESPONDENT**  
**THE DEMARCATION OFFICER GATUNGA**

**JUDGMENT**

1. This petition reads as follows:

TO:

THE HIGH COURT OF KENYA

**PETITION**

The humble petition of ANGELO MUCEE KITHIRA, PAUL MUTEGI KATHENYA and AUGOSTO NJERU MUCEE C/O MITHEGA & CO. ADVOCATES, ELECTRICAL HOUSE, OPPOSITE UCHUMI SUPER MARKET, NEXT TO KENSILVER BOOKING OFFICE, P. O. BOX 612-60200, NAIROBI in the republic of Kenya is as follows:-

1. That the Petitioners are adult males of sound mind with the 1<sup>st</sup> Petitioner being the father of the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners and they are the beneficial owners of 20 acres or thereabout of unregistered land No. 1249 in Gatunga adjudication section (hereinafter called the suit land).
2. That the 1<sup>st</sup> respondent is the chief legal advisor of the government of Kenya on whose behalf he is being sued.
3. That the 2<sup>nd</sup> Respondent is a local authority duly established under the local authorities Act.
4. That the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents are government of Kenya land officers who have dealt with the suit land by virtue of their office.
5. That the suit land is within the trust land under the county council of Tharaka.
6. That the suit land is ancestral land belonging to the family of the petitioners who have been occupying and using the same since time immemorial.
7. That the petitioners aver that they have extensively developed the suit land where on the 1<sup>st</sup> petitioner has lived and used with his family including the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners since inheriting the same from his father in 1940's. The nature of developments included among others;
  - i. Four (4) semi-permanent houses which are fully cemented including the walls.
  - ii. Building materials deposited since 2005 which are;
    - a. Quarry stones/blocks – 12 lorries, 7 tonnes capacity bought at Kshs.12,000/= per lorry of 400 fts totaling to Kshs.144,000/=.
    - b. Five (5) lorries of sand – 7 tonnes capacity bought at Kshs.5,000/= per lorry totaling to Kshs.25,000/=.
    - c. Two (2) lorries of ballast – 7 tonnes capacity bought at 11,000/= each totaling to Kshs.22,000/=.
    - d. There is also hardcore filling 1 lorry bought at 6,500/=.
  - iii. Mango, banana and neem plants
  - iv. The land is also fully cultivated for subsistent (sic) crops.

v. Soil conservation is well done

vi. Land is fully fenced (life plant fence)

8. That petitioners contend that the suit land is their rightfully acquired property within the meaning of action 70 (a) and (b) of the constitution of Kenya which guarantee the petitioners the right to protection of the law and, protection for the privacy of and from deprivation of the suit land without compensation, subject only to such limitations to that protection as are enshrined in the relevant statutes.

9. That in the year 2005 during land adjudication process the 6<sup>th</sup> respondent inspite of finding the petitioners in possession, user and occupation of the suit land purported to declare that the suit land was a public land under the trusteeship of the 2<sup>nd</sup> respondent reserved for Gatue Secondary School.

10. That further the 5<sup>th</sup> respondent in 2008 purported to direct that the suit land was set apart in the year 1990 for public use, that is for Gatue Secondary School, by the 2<sup>nd</sup> respondent which was not even in existence then since it was established in 1999.

11. That the petitioners aver that the suit land being within Trust Land area is under provision (sic) of Trust Land Act (Cap 288) whose express provision (sic) and in particular section 13 thereof were never complied with in the purported setting apart.

12. That the Petitioners further aver that the purported setting apart did not also comply with provisions of section 117 of the Constitution of Kenya.

13. That the petitioners therefore aver that the law was not followed in setting apart the suit land for the benefit of Gatue Secondary School in that:

a) The 2<sup>nd</sup> respondent never notified the chairman of the Divisional Board of its intention to set apart the suit land.

b) The 2<sup>nd</sup> respondent never brought its proposal to set apart the suit land to the local people and in particular the petitioners.

c) The divisional board never sat to hear and record in writing the representation of the local people and in particular the petitioners.

d) The divisional board never forwarded any recommendations to the 2<sup>nd</sup> respondent.

e) The 2<sup>nd</sup> respondent never considered any recommendations from the divisional board.

f) The 2<sup>nd</sup> respondent never passed any resolution by its three-quarters of all its members to set-apart the suit land.

g) No notice of setting apart was published in the gazette.

h) No compensation was ever offered to the petitioners.

14. That the petitioners aver that their land was therefore purportedly set apart without being heard and without being compensated as required in law.

15. That the petitioners contend that the suit land is their property and that their constitutional right to protection from deprivation of property without hearing and compensation has been violated by the respondents.

16. That the petitioners shall seek an interim conservatory order to preserve the status quo of the suit land pending the hearing and determination of this petition.

Your petitioners therefore humbly pray for:

- a. A declaration that the respondents are in breach of the mandatory Constitutional and statutory provisions relating to setting apart the suit land and as such the suit land has never been set apart at all.
- b. A declaration that the suit land belongs to the petitioners.
- c. A permanent injunction restraining the respondents and/or any other person or body claiming through them from trespassing into the suit land or any other way interfering with the petitioners quiet and peaceful possession, user and occupation of the suit land.
- d. Costs of this petition be paid by the respondents jointly and severally.

**DATED AT MERU THIS 20<sup>TH</sup> DAY OF JULY, 2010**

**FOR MITHEGA & CO**

**ADVOCATES FOR THE PETITIONERS.**

2. The Petition is supported by the affidavit of the 2<sup>nd</sup> Petitioner, Paul Mutegei Kathenya sworn on 20.7.2010 which states as follows:

I, **PAUL MUTEGEI KATHENYA of P. O. Box 20895-00200, Nairobi** do make oath and state as follows:

1. That I am the 2<sup>nd</sup> petitioner herein and I make this affidavit on my own behalf and on behalf of my co-petitioners who have fully authorized me to do so in support of this application.
2. That the 1<sup>st</sup> petitioner is my father and the 2<sup>nd</sup> respondent is my brother.
3. That my co-petitioners and I are the beneficial owners of 20 acres or thereabout of the unregistered land No. 1249 in Gatunga Adjudication Section hereinafter called the suit land.
4. That the suit land is within the Trust Land under the jurisdiction of the 2<sup>nd</sup> respondent.
5. That the suit land is ancestral land which my father inherited from my grandfather in 1940's and he thereafter shared the same with me and my brother.
6. That my family and I live on this land and we have extensively developed the same.
7. That in the year 2005 the 6<sup>th</sup> respondent visited the suit land for purposes of adjudication and demarcation and in spite of finding us in possession, user and occupation thereof purported to declare that the land was a public land reserved for Gatue Secondary School.
8. That in 2008 the 5<sup>th</sup> respondent also purported to direct that the suit land was set apart in the year 1990 for Gatue Secondary School.
9. That as pleaded in the petition the procedure for setting apart land for public use was never followed in total breach of the Constitution of Kenya and Trust Land Act.
10. That the respondents now want to evict us from the suit land without any compensation which

would render us landless.

11. That it is only fair and just that (sic) interim conservatory order be issued to maintain the status quo pending final hearing and determination of the petition.

12. That all the facts deponed to herein are true to the best of my knowledge and belief.

3. The 2<sup>nd</sup> respondent, opposed the application through a replying affidavit sworn by one WANYUNDI OMUKAMANI HENRY of post office box number 3-60408, Marimanti which states as follows:

1. That I am the Clerk to the County Council of Tharaka and therefore competent to make and swear this affidavit.

2. That I have read and understood the petition dated 20<sup>th</sup> July, 2010 and it is in reply thereto that I make and swear this affidavit.

3. That firstly, I wish to state that the petitioners have concealed very material facts in their joint petition to wit that they have filed a land committee case and an arbitration board case, which they both lost.

4. That paragraphs 1, 2, 3 and 4 of the petition are admitted, same merely (sic) descriptive of the respondents herein.

5. That the suit land is not within the trust land area under the 2<sup>nd</sup> respondent. The truth of the matter is that the area within which the suit land is situated is currently under the adjudication process.

6. That I am sure that the suit land is not the petitioner's ancestral land and further, I deny that they have been using the same since time immemorial.

7. That I am aware that the petitioners hurriedly put up some structures in the year 2005, on the suit land which action was illegal and improper since the community had reserved the suit land for the construction of a public secondary school known as Gatue Secondary. I therefore categorically deny and dispute the fact that is being alleged by the petitioners that the suit land has been in their possession since 1940's.

8. That I vehemently deny that the suit property was ever acquired by the petitioners as alleged and I believe that the petitioners cannot seek protection of law over an illegal act of occupying a public land meant for a public institution.

9. That in actual act, I am aware that as early as 1990, there commenced plans of building the school on the suit land, which had been earmarked for the same. The 2<sup>nd</sup> respondent therefore did not set apart the land under Trust Land Act (Cap 288) and the allegations by the petitioners of non compliance with the provisions of section 117 of the now old constitution is a misconception and misinterpretation of the law since;

a) The land was not Trust Land

b) The land was not subject to the Trust Land Act.

c) The petitioners and the 2<sup>nd</sup> respondent were engaged in disputes as per CAP 283 and 284.

10. That I further reiterate that no land belonging to the petitioners was ever set apart and as such, no compensation was due or is due to the petitioners at all.

11. That I wonder why the petitioners insist that they were deprived of their property without being heard, whereas the petitioners filed a land committee case No. 258 of 2005 which was heard on 26<sup>th</sup> July, 2007 and in which the petitioners fully participated. The suit land was declared the property of the 2<sup>nd</sup> respondent. Annexed and marked HW1 is a copy of the proceedings and the award.

12. That I am also aware that the petitioners were dissatisfied with the decision of the land committee and they filed an arbitration board case No. 143 of 2008 which was heard and vide a decision made on 25<sup>th</sup> November, 2009, the claim against the 2<sup>nd</sup> respondent was also dismissed.

13. That I have documentary proof of the meetings that were held as early as 1990 for the purposes of establishing Gatue Secondary School on the suit land. Annexed and marked HW2, 3, 4, & 5 are copies of the minutes of the steering committee held on 15<sup>th</sup> June, 1990, 24<sup>th</sup> August 1990 and 28<sup>th</sup> September, 1990.

14. That I am also aware there was a meeting held for Gatue Land Committee on 7<sup>th</sup> September, 1999 whereby public lands were taken down and their locations. Annexed and marked HW6 is a copy of the minutes.

15. That further on 17<sup>th</sup> April, 2000, the government and public properties in Gatue/Gatunga location were identified and their list was forwarded to the then District Officer, Tharaka North Division. Annexed and marked HW7 is a copy of the list.

16. That I believe that this petition is an abuse of the court process, since the petitioners cannot exhaust the adjudication process and then file the present petition. This petition is misconceived and bad in law and the prayers sought are unavailable to the petitioners.

17. That I therefore pray that the petition be dismissed with costs to the 2<sup>nd</sup> respondent.

18. That all what is deponed to hereinabove is true to the best of my knowledge, information and belief.

4. I note that there were some interlocutory applications handled by the court. I do not see the need to delve into them in this judgment.

5. This Petition was filed before the Constitution of Kenya, 2010 was promulgated. The principal complaint by the petitioners is that the 2<sup>nd</sup> respondent set apart land which they occupied without following the applicable law at that time which was encapsulated, inter alia, in section 13 of the now defunct Trust Land Act, (Cap 288) and by Section 117 of the Repealed Constitution of Kenya. To support their assertion that the proper procedure was not followed in the alleged setting apart of the suit land, the petitioners proffered sections 114, 115, 116 and 117 of the defunct Constitution. They also proffered sections 13 and 69 of the Trust Land Act (supra).

6. By and large, the petitioners' written submissions reflect what is contained in their pleadings and especially in their affidavits which also embrace the assertions made in the petition itself.

7. The 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> respondents' submissions have opposed the Petition. They laconically deny that the suit land had ever been set apart. They assert that the suit land was land under adjudication. They, therefore, deny the appellants' claim that the land was set apart without their being heard and compensated as required by the defunct Constitution and by the repealed Trust Land Act.

8. The 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> respondents argue that as the suit land was properly under adjudication, the petitioners were merely attempting to dislodge statutory procedures apposite to the adjudication process through the back door. They assert that since the appellants in paragraph 6 of their petition had conceded

that the suit land was ancestral land belonging to their families which had occupied it since time immemorial, they should have exhausted the process established for ascertainment of ancestral rights which are contained in the Land Adjudication Act and in the Land Consolidation Act.

9. The 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> respondents further submitted that the petitioners had jumped the gun as they do not enjoy exclusive rights over the area they reside and since the area is under adjudication, if declaratory orders were issued in their favour, this would deny other interested parties their right to have their ownership rights ascertained. They further state that since the petitioners had not shown evidence that they had exhausted apposite statutory procedures, it should be presumed that the suit land is under customary tenure. They opine that any grievances the petitioners could have been entitled to articulate could have been adequately resolved under the provisions of the Land Adjudication Act and the Land Consolidation Act. They further assert that as the petitioners do not deny that there were other parties interested in the suit land, including Gatue Secondary School, which they say is the intended beneficiary of the suit land, they lack locus to represent the other parties and merely seek to steal a match from other parties, who are also interested in the suit land.

10. The 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> respondents submit that the Constitution is the guardian of all other laws. They say that it should be interpreted in a way that preserves statutes and ensures compliance with all existing laws. They further state that the petition and the orders it seeks are premature and an abuse of the court process. They opine that the declaratory orders sought should be denied given their drastic nature in scope which do not embrace the rights of other interested parties.

11. The 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents urge the court to dismiss the petition with costs for being immature in the light of the non-exhaustion of the statutory processes available for ventilation of the issues in dispute.

12. By and large, the written submissions filed by the 2<sup>nd</sup> Respondent reflect the assertions contained in the 2<sup>nd</sup> Respondent's Replying Affidavit sworn on 18<sup>th</sup> August, 2010.

13. The 2<sup>nd</sup> Respondent denies that it set apart land at all. It denies that the appellants and their ancestors had been in occupation of the suit land since the 1940's. They say that the Petitioners hurriedly put up structures in the suit land in 2005 to stake a claim on it. They assert that the suit land is subject to the Land Consolidation and the Land Adjudication Acts.

14. The 2<sup>nd</sup> Respondent posits that Constitutional Petitions should be reserved for serious Constitutional disputes particularly in protection of fundamental rights and freedoms and not simple commercial or contractual disputes or land disputes. I doubt that any court of law could take issue with this proposition.

15. The petitioners proffered the following authority to buttress their assertions:

(a) Funzi Island Development Limited & 2 others AND County Council of Kwale & 2 others, Court of Appeal, CA No. 252 of 2005 at Mombasa. This suit examined in detail the integrity of the process apposite to the claimed setting apart of the land in dispute.

16. The 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents did not proffer any authority to support their propositions. They, however, filed concise but eruditely persuasive written submissions.

17. The 2<sup>nd</sup> Respondent proffered the following authority in support of its assertions:

a) Jeremiah Muku versus Methodist Church of Kenya & Another, Meru HCCC No. 80 of 2005.

18. I consider that the main issues to be determined in this matter are:

a) Did the 2<sup>nd</sup> Respondent set apart land that affects the suit land?

b) If there was setting apart of land, were the statutory and constitutionally mandated processes followed?

19. I have considered the pleadings, the submissions and the authorities proffered by the parties.

20. I opine that the authorities proffered by the parties are good authorities in their circumstances. I, however, add that no facts and circumstances of a case can, in a situation similar in mathematical certitude, be congruent to the facts and circumstances of another. The authority cited by the petitioners can only be relevant if the court finds that the 2<sup>nd</sup> Respondent had set apart land that affected the suit land. The authority proffered by the 2<sup>nd</sup> Respondent, in that it restates correctly the position that constitutional petitions cannot be a panacea to resolution of all types of legal disputes and should only be reserved for serious breaches of the Constitution and not for mere infractions of statutory provisions and procedures, postulates an assertion which is incontrovertible.

21. Section 61(2) of the Constitution of Kenya decrees that land in Kenya is classified as public, community or private. In the case of the suit land it is not controverted that when the petitioners filed this suit, the area where the suit land is located was undergoing an adjudication process. In terms of the preamble to the Land Adjudication Act, the suit land is presumed to be community land. The petitioners have not debunked this presumption. If the suit land was situated in a special area, then it is not controverted that it was undergoing a consolidation process in terms of the provisions of the Land Consolidation Act. Ascertainment of rights to land for community land and land in special areas must be subjected to the processes encapsulated in the Land Adjudication and the Land Consolidation Acts. One cannot escape these processes.

22. Section 116 of the defunct Constitution allows for the subjection of Trust Land to the Land Consolidation Act and the Land Adjudication Act. It states:

116 (1) A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land.

(2) The laws to which subsection (1) applies are -

(a) the Land Consolidation Act and the Land Adjudication Act; and

(b) any other law permitting the registration of individual titles to estates, interests or rights in or over land that, immediately before registration, is Trust land (except so far as the law permits the registration of estates, interests or rights vested in persons or authorities for whose use and occupation the land has been set apart under this Chapter).

23. Subjection of Trust Land to the Land Consolidation Act and the Land Adjudication Act is quite different from setting apart of Trust Land.

24. I find that there is no iota of evidence from the pleadings tendered by the petitioners that there was any setting apart of land by the predecessor of the 2<sup>nd</sup> Respondent. Having so found, it is not necessary to examine the processes followed in the alleged setting apart of the land in order to establish if or not the apposite process was in consonance with the applicable constitutional and statutory provisions. In other words there is no need to ascertain the integrity of the alleged setting apart process.

25. In the circumstances, this Petition is dismissed.

26. Any interlocutory orders granted in this petition are vacated forthwith.

27. Costs are awarded to the Respondents.

28. It is so ordered.

Delivered in open court at Chuka this **13<sup>th</sup> day of December, 2017**

in the presence of:

CA: Ndegwa

I.C Mugo h/b Manasses Kariuki for Petitioners

Other parties absent.

**P.M. NJOROGE**

**JUDGE**