



**Sang & 12 others v Principal Secretary, Ministry of Lands and Physical Planning & 33 others (Environment & Land Petition 12 of 2019 & Environment & Land Case 37 of 2020 (Consolidated)) [2024] KEELC 1261 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1261 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT & LAND PETITION 12 OF 2019 &**  
**ENVIRONMENT & LAND CASE 37 OF 2020 (CONSOLIDATED)**

**EO OBAGA, J**

**MARCH 7, 2024**

**BETWEEN**

**KIPKOECH ARAP SANG ..... 1<sup>ST</sup> PETITIONER**  
**ROSELINE SAMOEI ..... 2<sup>ND</sup> PETITIONER**  
**MESHACK KIMUTAI MORO ..... 3<sup>RD</sup> PETITIONER**  
**STEPHEN KIPKOECH BOR ..... 4<sup>TH</sup> PETITIONER**  
**WILLIAM KIPRUTO CHUMO ..... 5<sup>TH</sup> PETITIONER**  
**DAVID BOR (AS A BENEFICIARY OF THE ESTATE OF JOHN KIPKEMBOI**  
**BIWOTT - DECEASED) ..... 6<sup>TH</sup> PETITIONER**  
**ST. PETERS ANGLICAN CHURCH OF KENYA, CHEBOROR .... 7<sup>TH</sup>**  
**PETITIONER**

**AND**

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL**  
**PLANNING ..... 1<sup>ST</sup> RESPONDENT**  
**DISTRICT REGISTRAR, UASIN GISHU ..... 2<sup>ND</sup> RESPONDENT**  
**NATIONAL LAND COMMISISON ..... 3<sup>RD</sup> RESPONDENT**  
**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**  
**PAUL KARAN & 28 OTHERS ..... 5<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH**  
**ENVIRONMENT & LAND CASE 37 OF 2020**



**BETWEEN**

**KIPKOECH ARAP SANG ..... 1<sup>ST</sup> PLAINTIFF**  
**ROSELINE SAMOEI ..... 2<sup>ND</sup> PLAINTIFF**  
**MESHACK KIMUTAI MORO ..... 3<sup>RD</sup> PLAINTIFF**  
**STEPHEN KIPKOECH BOR ..... 4<sup>TH</sup> PLAINTIFF**  
**WILLIAM KIPRUTO CHUMO ..... 5<sup>TH</sup> PLAINTIFF**  
**DAVID BOR (SUING AS A BENEFICIARY OF THE ESTATE OF JOHN**  
**KIPKEMBOI BIWOTT - DECEASED) ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF UASIN GISHU ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Petition herein was initially filed on 12.4.2017 at the Environment and Land Court at Nakuru as Petition No. 13 OF 2017. The petition was transferred to the Eldoret Environment and Land Court vide a court order given on 7.5.2019.
2. The Petitioners sought the following reliefs:-
  - a. A declaration that the Petitioners are the lawful owners of all those parcels of land known as Cheboror Farm Parcel Nos. 159, 354, 355, 352, 353, 121, 191, 360 and 361 respectively.
  - b. A declaration that the rights of the petitioners guaranteed under Articles 27, 28, 29, 40, 43 and 47 of *the Constitution* are under threat of violation by the Respondents.
  - c. An order directing the Respondents to issue title deeds to the petitioners with respect to all those parcels of land known as Cheboror Farm Parcel Nos. 159, 354, 355, 352, 353, 121, 191, 360 and 361.
  - d. An order prohibiting the Respondents from proceeding with the tilting process without taking into account the interests of the petitioners.
  - e. Costs of this petition.
  - f. Any other relief that this honorable court may deem fit and just to grant in the circumstances.
3. On 20.7.2020 six of the Petitioners filed Eldoret ELC case No. 37 of 2020 against the County Government of Uasin Gishu in which they sought the following reliefs: -
  - a. A declaration that the Plaintiffs are the registered proprietors of all those parcels of land known 159, 354, 355, 352, 353, 121 and 191 and a mandatory injunction compelling the Defendant either by itself, its servants, agent or otherwise howsoever to remove the poles and all materials on the suit properties.



- b. A permanent injunction restraining the Defendant either by itself, its agents, servants, employees, tenants or otherwise howsoever restraining them from further developing, leasing or dealing with all those parcels of land known land <sup>d</sup> parcels number 159, 354, 355, 352 and 353, 121 and 191 in a manner prejudicial to the interest of the Plaintiffs.
  - c. General damages for trespass and unlawful interference with the Plaintiffs property rights pursuant to the provisions of Section 75 of the Land Registration Act, 2012.
  - d. Costs of this suit.
  - e. Interest on c) and d) above.
  - f. Any other or further relief this Honourable Court may deem fit to grant.
4. On 30.9.2020, the petition and ELC No. 37 of 2020 were consolidated and the lead file was Petition No. 12 of 2019. Orders of maintenance of status quo which had been given in ELC 37 of 2020 were to be maintained until hearing and conclusion of the consolidated causes.

**Petitioners' case;**

5. The Petitioners' case is that in the 1980's the Government of Kenya evicted members of the Ogiek/ Dorobo Community (Ogiek) from various forests in Kenya. Later in 2002, the Government through Gazette Notice No. 898 of 31.1.2002 excised part of North Tinderet Forest to create LR. No 24644 (Cheboror Farm) measuring 788. 30 hectares.
6. A Committee of Ogiek elders was established to work closely with government agencies to oversee the distribution of the excised land among its members.
7. In 1995, the Petitioners and other members were allocated about 2 hectares each. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Petitioners were allocated parcel Nos 144, 166, 115 and 121 respectively. John Kipkemboi Biwott (Deceased) was allocated parcel No. 191 and Chepkwony Agui was allocated parcel 245.
8. A huge part of Cheboror Farm was set aside for Public utilities in one area of the farm. Before the petitioners could settle on their allocated parcels, the government realized that public utility plots were concentrated on one part of the farm.
9. The Petitioners' parcels were converted to public use namely Ndungulu Centre, Ndugulu Primary School, Ndugulu secondary school, Cheboror Centre and Cheboror primary school. The 2<sup>nd</sup> Petitioner swapped her parcel No. 168 with Sabomo Samoei's parcel No. 354.
10. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Petitioners were given parcel No. 159, 354, 355 and 353 respectively. John Kipkemboi Biwott (Deceased) was allocated parcel 191 and Chepkwony Agui (Deceased) was allocated 352 as alternative plots in place of those which had been converted to public utility plots. The 7<sup>th</sup> Petitioner was allocated parcel 360.
11. It is the Petitioners' case that the 1<sup>st</sup> and 5<sup>th</sup> Petitioners moved with their original parcel Nos to their new parcels. In 1997 the first Ogiek Committee of elders was ousted by members from Nandi Community who reversed the first Committee's decision and declared that the Petitioners' parcels were public utility plots.
12. When the Government was preparing to issue titles, the Petitioners noticed that their names were not on the list of those who were to be issued with titles. It is their contention that the exclusion of their names was discriminatory and amounts to deprivation of their right to own property. It is their case



that they were issued with allotment letters on 30.3.1995 and this is what informed the filing of the petition.

13. As regards ELC No. 37 of 2020, it is the petitioners case that they had obtained conservatory orders in petition No. 12 of 2019 which prohibited the petitioners from processing titles in respect of Cheboror Farm. They served the orders upon the Defendant but the Defendant's officials argued that they were not bound by the orders as it was not party to petition No. 12 of 2019.
14. On 10.6.2020, the Defendant's agents trespassed into parcel Nos 159, 354, 355, 352, 353, 121 and 191 and dug holes and put up a fence around their properties and thus enclosing the crops which they were cultivating. This is what informed the filing of ELC 37 of 2020.

#### **First, second and fourth Respondents' case;**

15. The Cheboror Farm contained in LR. No. 24644 was established in 1995 for the Ogiek Community through an executive order and alteration of forest boundary through Legal Notice No. 898 of 31.1.2002. LR. No. 24644 which came to be known as Cheboror Farm was subdivided into parcel Nos. 1 to 358 inclusive of public utilities with an approved Registry Index Map sheet one and two published as Lainguse/Lainguse Block 4 (Cheboror).
16. At the time of surrender, conversion and sub-division of LR No. 24644 measuring 788.30 hectares, there were three public utility plots which were reserved. Lainguse/Lainguse Block 4 (Cheboror)/120 measuring 1.96 hectares was reserved for Cheboror Primary school, LR. No. Lainguse/Lainguse Block 4 (Cheboror)/194 measuring 2.03 hectares was reserved for Ndungulu Primary school and LR. No. Lainguse/Lainguse Block 4 (Cheboror)/353 measuring 20.04 hectares was reserved for Cheboror Farm Town Plot.
17. The contested plots were distributed as follows:- Lainguse/Lainguse Block 4 (Cheboror)/159 measuring 2.11. hectares was allocated to Kipkoech Arap Sang, the 1<sup>st</sup> Petitioner, Lainguse/Lainguse Block 4 (Cheboror)/354 measuring 14.44 hectares was allocated to David Kiprugut Korir, Lainguse/Lainguse Block 4 (Cheboror)/355 measuring 15.04 hectares was allocated to Jane Kiptoo Misos, Lainguse/Lainguse Block 4 (Cheboror)/352 measuring 1.65 hectares was allocated to Stanley Agui Biwott, Lainguse/Lainguse Block 4 (Cheboror)/121 measuring 2.11 hectares was allocated to William Kipruto Chumo and Lainguse/Lainguse Block 4 (Cheboror)/191 measuring 2.05 hectares was allocated to John Kipkemboi Biwott.
18. It is the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents' case that as per the approved members register, Cheboror Farm was subdivided into 358 parcels and therefore there is no way Lainguse/Lainguse Block 4 (Cheboror) 360 and 361 could exist and could not therefore have been allocated to any of the Petitioners.
19. The titles for the 358 parcels were prepared and forwarded to the County Land Registrar on 4.10.2018 by the National Titleling Centre and all the concerned parties were issued with their respective titles. It is therefore the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents' case that the titles having been prepared and issued in accordance with the approved members register, the Petitioners' petition has been overtaken by events.
20. Finally, it is the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents' case that as the dispute herein is on ownership an occupation of land, the matter should not have been brought as a Constitutional petition and that in any case, the petition does not meet the threshold set out in the case of Anarita Karimi Njeru –Vs- Republic (1976 – 1980) KLR 1272.



### **Third Respondent's case;**

21. It is the 3<sup>rd</sup> Respondent's case that the petition lacks precision of facts and cause of action and hence it is difficult to make a comprehensive response. The 3<sup>rd</sup> Respondent contends that the petitioners have not shown how the 3<sup>rd</sup> Respondent has breached the petitioners' rights as alleged. The 3<sup>rd</sup> Respondent argues that the petitioners have remotely touched on its mandate but have not constitutionally invoked its mandate and hence the petition is premature and is in breach of the constitutional practice and procedure Rules regarding joinder of parties.

### **Fifth to Thirty Third Respondents' case;**

22. It is the 5<sup>th</sup> to 33<sup>rd</sup> Respondents' case that the Petitioners had filed Eldoret High Court Civil Application No. 71 of 2004 in which they attempted to stop the 1<sup>st</sup> to 4<sup>th</sup> Respondents' from carrying out their mandate. There was a response to the application. The petitioners later withdrew the application on 21.3.2006. The Petitioners have again come back to court after 10 years seeking to stop the process of issuing titles.
23. It is the 5<sup>th</sup> to 33<sup>rd</sup> Respondents' position that upon the petitioners withdrawing Eldoret HC Application No. 71 of 2004, a list of genuine squatters was prepared and titles have since been processed including those of the Petitioners and as such the petitioners claims have been overtaken by events.
24. The petitioners are disgruntled members who were not satisfied with the distribution of the 358 parcels and are out to grab public utility plots as well as plots belonging to individuals. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Petitioners were allocated parcel Nos 159, 115, 121 and 191 respectively. The 5<sup>th</sup> petitioner has since disposed his interest in parcel 121 to the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents.
25. Despite the fact that the each of the members were allocated about 5 acres each or thereabouts, the 5<sup>th</sup> petitioner is laying claim to parcel 353 which has since been subdivided and allocated to members as it was a town plot. They contend that the 2<sup>nd</sup> petitioner is related to a former vice chairman Cheboror Farm and was not allocated any plot but has come to claim plot 354 when her relative was allocated plot 105.
26. The 3<sup>rd</sup> petitioner was not allocated any land as he was not a squatter but he is laying claim to parcel No. 355 which belongs to Jane Jeptoo Misos. The 7<sup>th</sup> Petitioner could not have been allocated parcel No. 360 as that parcel is non existent owing to the fact that there were only 358 parcels at Cheboror Farm.
27. The Respondents contend that the maps which the petitioners presented to court are forgeries and that they have reported the forgeries to Police and the alterations in the maps is evident.

### **The parties' submissions:**

28. The parties agreed to dispose of the consolidated causes by way of written submissions. The petitioners filed their submissions on 10.7.2020. the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents' filed their submissions on 7.11.2023. The 3<sup>rd</sup> Respondent did not file any submissions. The 5<sup>th</sup> to 33<sup>rd</sup> Respondents filed their submissions on 13.7.2020.

### **Petitioners submissions;**

29. The Petitioners submitted that in any pleading which is supported by a sworn affidavit, the same must be rebutted by a replying affidavit which is sworn. Failure to do so, it will be taken that the facts as set out are admitted. The petitioners further submitted that where a pleading is supported by a sworn



affidavit and in rebuttal of the same, only grounds of opposition are filed, that will not be sufficient to rebut the averments in the sworn affidavit.

30. In support of the above propositions, the petitioners relied on the case of Wycliffe Gisebe Nyakina –Vs- Attorney General & another (2014) eKLR where Justice Lenaola (As he then was) stated as follows:-

“The factual background to this matter is uncontested because as shall be seen later, the Respondent filed only Grounds of Opposition in response to the Petition. I therefore proceed on the premise that the facts are unchallenged and I shall apply them as pleaded by the Petitioner. see Prof. J. Oloka Onyango & Others vs Constitutional Petition No. 8 of 2014 per the Constitutional Court of Uganda. [Emphasis ours]”

31. The Petitioners further relied on the case of Peter O. Nyakundi & 68 others –Vs- The Principal Secretary, state Department of Planning Ministry of Devolution and Planning & Another Petition No 24 of 2015 where Justice Odero held as follows:-

“The Respondents have failed to refute specifically the allegations in the Petitioners sworn affidavit in support, Failure to file a replying affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”

32. The Petitioners further submitted that it is not fatal even if a petition does not clearly specify the provisions of *the constitution* which is alleged to have been violated and the manner in which those provisions were violated. In support of this contention, the petitioners cited a number of decisions including the case of Mumo Matemu –Vs- Trusted Society of Human Rights Alliance and others Civil Appeal No. 290 of 2012.

33. In the case of Tom Onyango & 5 others –Vs- Independent Police Oversight Authority & 4 others (2015) eKLR the Court held as follows:-

“The court in Anarita Karimi case, as was stated by this court in Kevin Turunga Ithagi -v- Fred Ochieng & 5 Others [2015] eKLR, never meant absolute precision. In approving and reaffirming the principle set out in Anarita Karimi Njeru's case the Court of Appeal in Mumo Matemu vs Trusted Society for Human Rights Alliance (2013) eKLR also never stretched it to have stood for absolute precision in drafting.

I hold the view as did the court in Kevin Turunga Ithagi —v- Fred Ochieng & 5 Others eKLR that the principle and ratio of Anarita Karimi Njeru -v- Republic (Supra) ought to be applied with abundant caution. Where the pleadings take the trajectory of constitutional interpretation or application then there is no reason why the Petition, and by extension any application filed thereunder, should not be heard on its merits.

In the instant case, I confirm that I have read the Petition. The pleadings have not specifically pinpointed the Articles alleged to have been violated. The Petition however takes the trajectory of a constitutional application when the Petitioners complain that their prosecution is an abuse of the Respondents constitutional powers and the further that their trial itself is an abuse of the process, I am also not convinced that the Petition is beyond repair through amendments.

Even though the Petitioner ought always to demonstrate his case through clear and concise pleadings and not merely through prayers for constitutional remedies, I am satisfied that in



this case the court at this stage is well seized with both the Petition and the application and the constitutional issue(s) raised may be painlessly identified.”

34. As regards joinder or misjoinder of parties in constitutional petitions, the petitioners submitted that a constitutional petition cannot be defeated merely because of joinder or misjoinder. In support of this, they relied on the case of *Judicial Service Commission –Vs- Speaker of the National Assembly & 8 others* (2014) eKLR where it was held as follows:-

“ . . . . . As observed above, however, in reference to the provisions of the Mutunga Rules, a petition shall not be defeated by reason of the joinder-or; misjoinder of parties. We therefore find and hold that the JSC is the proper petitioner in this matter. In any event, even if there had been a misjoinder, which we find is not the case, the Court would not, by virtue of Rule 5(b), be precluded from dealing with the issues in dispute”

#### **First, Second and Fourth Respondents’ Submissions;**

35. The Respondents submitted that the process of issuing titles has been completed. Even the Petitioners have obtained their own titles. They therefore argue that there is nothing remaining to be determined. In support of this contention, they have relied on the case of *Daniel Kaminja & 3 others (Suing as Westlands Environmental Caretaker Group) – Vs- County Government of Nairobi* (2019) eKLR where Justice Mativo (as he then was) stated as follows:-

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

“No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.”

36. The Respondents submitted that the petition herein did not meet the threshold of a constitutional petition for lack of precision in the articles of *the constitution* which were alleged to have violated and the manner in which they were violated as was held in the case of *Anarita Karimi Njeru – Vs- Republic* (Supra). The Respondents further submitted that this petition should have been brought as an ordinary civil suit. They contended that the petitioners were trying to avoid the statute of limitation. In support of the twin arguments, the Respondents relied on the case of *Stephen Ranji & 7 others – Vs- Joseph Kihara Muithukia & 2 others* (2011) eKLR which was cited in the case of *Grays Jepkemoi Kiplagat – Vs- Zakayo Chepkonga Cheruiyot* (2021) eKLR where it was stated as follows:-

“I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as constitutional petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the constitutional court. It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated and/or threatened violation. I do not suppose it is enough to merely cite



constitutional provisions. There has to be some particulars of alleged infringement to enable the respondents to be able to respond to and/or answer to the allegations or complaints.”

37. The Respondents submitted that parcel No. Languise/Languise Block 4 (Cheboror)/ 353 was not available for alienation as it had been reserved as a public utility plot. The Respondents referred to section 2 of the Government Lands Act cap 280 (repealed) which defined “unalienated Government Land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner of Lands has not issued any letter of allotment.”
38. The Respondents also referred to section 3 of the Physical Planning Act cap 286 which defined unalienated land in similar terms as section 2 of the Government Lands Act cap 280 (repealed). The Respondent relied on Eldoret CACA No. 288 of 2010 Kipsirgoi Investments Limited –Vs- Kenya Anti-Corruption Commission and Kenya Anti-Corruption Commission – Vs- Trans Investment Limited & 6 others (2020) eKLR for the proposition that land reserved for public purpose is not available for alienation and that as the purpose for which the land reserved subsists respectively, that land is not available for alienation.
39. The Respondents further submitted that as parcel Nos. Languise/Languise Block 4 (Cheboror)/360 and 361 did not exist, this court is without jurisdiction to make orders on non-existent properties. Reliance was placed on the case of Stephen Mwadoro & 56 others –Vs- Alhad Mohamed Hatimy (2020) eKLR where it was held as follows:-

“It is pointless having this suit proceed on a title that does not exist. There is no need of wasting the court’s time on a case where the order sought is incapable of being granted for the non-existence of the subject matter. I cannot order the plaintiffs to be registered as owners of the title LR No. 8826 (Original 143/2) because that title is non-existent. The plaintiffs are litigating on land that does not exist and that being the position, this case has no legs upon which to stand on, and it is hereby struck out with costs.”

40. The respondents further relied on the case of Julius K. Atunga –Vs- Naumy Jebyegon Kemboi (2014) eKLR where it was held as follows:-

“It seems to me, given the above scenario that there is nothing to go for trial. The suit land Nandi/ Kapsengere/1289 no longer exists and since it does not exist, one cannot continue a case on non-existent land.”

#### **Fifth to Thirty Third Respondents’ submissions;**

41. The Respondents submit that the Petitioners petition has been overtaken by events as the titles which they were seeking to stop have since been issued. They relied on the case of Tanzania Roads Agency –Vs- Kundan Singh Construction Ltd & another (2013) eKLR where the Court of Appeal stated as follows:-

“...we are satisfied that the appeal can be effectively disposed of on the narrow ground of the same having been overtaken by events. In other words, we need not consider the merits of the appeal at all. Both parties have agreed that the subject of this appeal, the Milimani case has run its course exhaustively.

According to the appellant, the Milimani case had progressed to the point where enforcement of the decree was anticipated. However, according to the 1<sup>st</sup> respondent, an application for the dismissal of the said suit had been made, canvassed and ruling thereon was



expected sometimes in October, 2013. Thus whichever way one looks at it, progress has been made in the Milimani case towards its conclusion so that even if this Court was to allow or dismiss the appeal, such an outcome will have no impact or effect at all on the Milimani case. If anything there is a high risk of such eventuality turning into a legal absurdity. For instance, if we were to allow the appeal, effectively, we will be saying that the two cases should proceed to hearing simultaneously but separately. However, as we already know, the Milimani case has been heard and is pending either enforcement of the decree or a ruling on an application for its dismissal presumably for want of prosecution. So that at the end of the day, we would have issued an order in vain and court orders are never issued in vain.

On the other hand, if we were to dismiss the appeal, we would effectively have given a seal of approval of the learned Judge's order staying the proceedings in the Mombasa case pending the hearing and final determination of the Milimani case. Again such an order will be in vain as the Milimani case has been heard and is pending conclusion either way. In the premises there is hardly anything left in the proceedings to stay. We will be doing what one may say closing the stable when the horse has already bolted.

To avoid such an absurdity and since this appeal has to be determined either way, by either dismissing it or allowing it, and since the appeal for all intents and purposes has been overtaken by events, the best result that commends to us in this appeal is to have it dismissed.”

42. The Respondents further submitted that the dispute herein was on ownership and occupation of Land, thus should have been brought as an ordinary civil claim. In support of tis contention, they relied on the case of Nairobi Misc. Application 99 of 2006 Sanghani Investments Limited –Vs- Officer In-charge Nairobi Remand & Allocation Prison (2007) eKLR where the court stated as follows:-

“Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In the case of Rep V Ex Parte Karia Misc Application 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in Judicial Review proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced... So that in this case, even though this Application were properly before this court and the Application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances.

Even if the notice under challenge is quashed, the issue over the ownership of the land still stands. It will still require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.”

43. Finally, the respondents submitted that the petition had not stated with precision the articles of *the constitution* which had been violated and the manner in which they were violated. they relied on the case of Anarita Karimi Njeru (Supra).



### **Defendants' submission in respect of ELC 37 of 2020;**

44. The Defendant submitted that the plaintiffs have failed to specify who owns which parcel and that as such, it is unable to controvert the allegations by the plaintiffs. The Defendant submits that it is only interested in parcel 353 which was set aside for Cheboror Trading Centre. The Defendant relied on the case of World Explorers Safaris Limited –Vs- Cosmopolitan Travel Limited & another (2021) eKLR where it was held as follows:-

“It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.”

45. The Defendant submits that in paragraph 5 of the plaint, the plaintiffs aver that members of Cheboror Farm were to get approximately 2 hectares. It then argues that one wonders why one of the plaintiffs is laying claim to parcel 353 which is 20.04 hectares when the other members were getting a paltr 2 hectares.

46. The defendant submitted that this court cannot give orders touching on other properties as it is only interested in parcel No. 353 which according to the maps available is clearly reserved for Cheboror Trading Centre. The Defendant relied in the case of B –Vs- Attorney General (2004) EKLR which was quoted with approval in Republic –Vs- County government of Kitu Ex-parte Fairplan Systems Ltd (2022) eKLR where it was stated as follows:-

“The court does not, and ought not to be seen to, make orders in vain, otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

### **Analysis and determination;**

47. I have carefully gone through the petition, the opposition to the same by the Respondents, the plaint in ELC 37 of 2020 as well as the defence filed therein. I have also considered the submissions by the parties in this consolidated causes. The issues which emerge for determination are firstly, whether the petition meets the threshold of a Constitutional petition. Secondly, whether the petition has been overtaken by events. Thirdly, whether parcel Nos Languise/Lainguse Block 4 (Cheboror)/360 and 361 exist at Cheboror Farm. Fourthly, whether LR. No. Lainguse/Lainguse Block 4 (Cheboror)/ 353 was available for alienation to any or all the petitioners. Fifthly, are the petitioners and the plaintiffs entitled to the reliefs in the petition and plaint. Lastly, which order should be made on costs.

48. It is not disputed that Cheboror Farm was subdivided and allocated to members of the Ogiek Community in 1995. It is also not contested that when the farm was being distributed, there were officials from the community who were working closely with government agencies to ensure that all the genuine members got land from the farm. The first group of official was led by Kipkeoch Arap Sang, the 1<sup>st</sup> Petitioner who was the chairman. It is also not contested that the first officials were later replaced by officials who were led by Paul Karan as the chairman.

49. It was during the leadership of Paul karan that Cheboror Farm was subdivided and it is the Karan led Committee which prepared the final list of allottees who wree finally issued with titles. The approved members list which was filed with the 2<sup>nd</sup> Respondent contained 358 members.



50. On the first issue, the position before the 2010 constitution was that a petitioner was supposed to state the section of *the constitution* which was violated and the manner in which the alleged violation was done. The petitioner had to cite the sections violated or threatened with violation with a degree of precision. However, post the 2010 constitution, courts have interpreted what had hitherto stood in the Anarita Karimi Case (Supra) and have arrived at a conclusion that though the Anarita Karimi case is good law; its application should not be interpreted to lock out petitioners.
51. This is more so given the requirements of the Mutunga Rules which stipulated that a petitioner can even walk to court and ask the court to put his concerns in writing and that he will be heard. It is in light of the decisions in Tom Onyango & 5 others case (Supra) that courts have adopted a liberal approach which is not strictly in agreement with the Anarita Karimi Njeru case (Supra).
52. It can be discerned from the petition what grievances the petitioners are raising without any pain. Their contention is that they were excluded from the list of those to be issued with titles and as such the Respondents' actions were discriminatory and amounted to deprivation of right town property as enshrined in Articles 27 and 40 of *the constitution*. I therefore find that the petitioners' petition meets the threshold of a constitutional petition as envisaged in the Anarita Karimi Njeru case and the decisions which followed it later on.
53. On the second issue, it is important to look at the prayers in the petition. The prayers emanate from the averments in the petition. What triggered the filing of this petition is the process of issuance of titles. The petitioners contended that their names had been left out from the list of those who were to be issued with titles. This is why conservatory orders were given stopping the process of issuance of title.
54. The petitioners were contending that they were entitled to be given titles in respect of parcel Nos. 159, 354, 355, 25, 353, 121, 191, 360 and 361. The process of processing titles was undertaken by the National Titling Centre which used the approved members list. The list of 358 members including public utility plots was forwarded to the 2<sup>nd</sup> Respondent on 4.10.2018 for registration which was done and all the members including the petitioners got their titles.
55. The 1<sup>st</sup> petitioner got title for LR. No. Lainguse/Lainguse Block 4 (Cheboror)/159. The 4<sup>th</sup> petitioner got title for LR. Langisuse/Lainguse Block 4 (Cheboror)/115. The 5<sup>th</sup> petitioner got title for LR. Lainguse/Lainguse Block 4 (Cheboror)/121. The 6<sup>th</sup> petitioner John Kipkemboi Biwott (Deceased) got title for Lainguse/Lainguse Block 4 (Cheboror)/191.
56. Title No. parcel 353 was reserved for Cheboror Trading Centre. This parcel was reserved as town plot. It was subdivided and shared among members of Cheboror Farm. The 1<sup>st</sup> petitioner even got plot 168 measuring 25x100 out of the plot reserved for Cheboror Trading Centre. The other parcels which are being claimed by the petitioners belong to other members of Cheboror Farm. Parcel 360 and 361 are non-existent. This is clear from the authority to plead given by representatives of the 7<sup>th</sup> Petitioner to their Advocate which clearly says that the church is unable to be shown the plot. The seventh Day Adventist Church which is said to have been allocated parcel 361 is not even a petitioner in the petition and from the letter of authority given to their Advocate to plead their case, the church does not seem to know where the plot they were allocated is situated.
57. This being the case and in keeping with the decisions in the case of Daniel Kaminja & 3 others (Suing as Westlands Environmental Caretaker Group (Supra) and the case of Tanzania Roads Agency (Supra), I find that this petition has been overtaken by events and that there is nothing more remaining to be decided on.



58. On the third issue, it is clear that the approved members register which was forwarded to the 2<sup>nd</sup> Respondent shows that Cheboror Farm was subdivided into 358 parcels. The officials who were in office are the officials led by Paul Karan. These are the officials who prepared the final list of members of Cheboror Farm which was used to generate titles. The list exhibited by the petitioners which purports to indicate that the plots ran into number 362 was signed by the Chief of Leinguse Location and he was not an official of either the first officials of Ogiek Committee or an official with the group led by Paul Karan. This list was not filed at the District Lands office at Uasin Gishu as per the requirement of registration for purpose of issuance of titles.
59. The process of distributing the parcels at Cheboror Farm was done closely in conjunction with local administration and other government agencies such as physical planner and surveyor. The distribution exercise was started and was under close supervision of the District Commissioner of Uasin Gishu District and the one of Nandi District. Nandi District was later split into Nandi North and Nandi South.
60. On 15.9.2000, the District Commissioners of Uasin Gishu and Nandi attended a meeting with members of Cheboror Farm. The issue of occupation of the plots reserved for trading Centre arose. During that meeting, the 1<sup>st</sup> petitioner who was a former chairman was given time to address the members. The 1<sup>st</sup> Petitioner told the District commissioner who was chairing the meeting that he personally had not agreed to the allocation of the town plot but that he was prevailed by the then Nandi District Commissioner to allocate it and had no otherwise.
61. One of the resolutions at the meeting of 15.9.2000 was that the 1<sup>st</sup> petitioner, 4<sup>th</sup> petitioner, 2<sup>nd</sup> petitioner, 3<sup>rd</sup> petitioner, 6<sup>th</sup> petitioner, 5<sup>th</sup> petitioner and Agui Chepkwony who had occupied the town plots had to vacate the same and return to the plots at the farm which had been allocated to them. On 26.5.2004 Nandi North District Commissioner asked the petitioners to immediately move out of the town plots which they were illegally occupying. The District Commissioner reminded the petitioners that the town plots had been allocated on 30.9.2003 in the presence of the District Commissioner of Uasin Gishu, Nandi North and Nandi South.
62. The town plots had been allotted by members picking ballots. During this exercise, 7 individual members deliberately refused to pick their ballots. These were the petitioners. The minutes were signed by the three District Commissioners and the officials of Cheboror Farm.
63. It is therefore clear that LR. No. Lainguse/Leinguse Block 4 (Cheboror)/360 and 361 were non existent.
64. On the fourth issue, the approved members register which was used to generate titles shows that parcel No. 353 which measures 20.04 hectares was reserved for Cheboror town plot. This being the case the plot was not available for allocation to any one or all the petitioners. The petitioners claim that parcel 353 was given to Stephen Kipkoech Bor as compensation for surrendering his parcel which he had ben allocated initially. He claims to have been allocated plot 115. If that be true, then one wonders how one can surrender a 2.02 hectare plot in exchange for a 20.04 hectares. This does not make sense. Plot No. 115 remained in the name of Stephen Kipkoech Bor for which he obtained title in 2018.
65. Parcel No. 353 having been reserved for Cheboror Farm Town plot, it was not available for allocation and any claim to it by the 4<sup>th</sup> Petitioner is misplaced, null and void.
66. I now come to the fifth issue, whether the petitioners who are also the plaintiffs in ELC 37 of 2020 are entitled to the reliefs in the petition and ELC 37 of 2020. The petitioners are seeking for a declaration that they are lawful owners of parcel Nos. 159, 354, 355, 352, 353, 121, 191, 360 and 361 respectively.



Documentary evidence before court has shown that parcel No. 354 belongs to David Kiprugut Korir, parcel 355 belongs to Jane Kiptoo Misos, parcel 352 belongs to Stanley Agui Biwott, parcel 353 belongs to Cheboror Farm Town plot which is a public utility plot, parcel 360 and 361 are non existent plots as the court has demonstrated hereinabove.

67. Parcel Nos. 121, 159 and 191 belong to the 5<sup>th</sup>, 1<sup>st</sup> and 6<sup>th</sup> Petitioners respectively. The petitioners tried to bring up an argument that they moved to the town plots with their original parcel numbers. This does not make sense. The town plots were allocated on 30.9.2003 and were given their own numbers and were mostly 25x100. The three petitioners have obtained titles in respect of their parcels which were farm plots and not town plots as they allege.
68. The petitioners are also seeking for an order that the Respondents do issue them with title deeds in respect of all parcels of land known as parcel Nos. 159, 354, 355, 352, 353, 121, 191, 360 and 361. Already titles have been issued to the true owners and no such an order can be given as courts do not give orders in vain.
69. The order prohibiting the Respondents from proceeding with titling process without taking into account of their interest has been overtaken by events as titles have already been processed including those lawfully belonging to the petitioners.
70. The petitioners contend that their constitutional rights under Article 27 of *the constitution* were violated. They contend that when the Respondents were preparing to issue titles to members of Cheboror Farm, they noticed that their names were not on the lists. They therefore contended that this was discriminatory and it amounted to deprivation of their right to own property.
71. Article 27 of *the constitution* provides as follows:-
  1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
  2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
  3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
  4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
  5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
72. Black's Law Dictionary 10<sup>th</sup> Edition defines Discrimination as follows:-

“Differential treatment; especially, failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”
73. There was no evidence tabled by the Petitioners to show that their names had been omitted from the list of those who were to get titles. Infact, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Petitioners got titles in respect of parcels which were lawfully due to them. The 2<sup>nd</sup> petitioner had no parcel allocated to her. She claimed that she had swapped plot 168 with plot 354. Plot 168 belonged to Kibomo Samoei. Plot 354 belonged to David Kiprugut Korir. She could not swap a non existent plot or a plot belonging to another person. The documents annexed in support of her case are contradictory. No evidence of any swapping was adduced.



74. The 3<sup>rd</sup> petitioner was not a squatter. He was a son of a former chief of the area and was not allocated any plot. Plot 355 which he purported to be allocated belonged to Jane Kiptoo Misos. He cannot therefore claim to have been discriminated when he had attempted to take over someone's land. As to the 7<sup>th</sup> Petitioner, I have demonstrated hereinabove that plot 360 was non-existent. One cannot expect to be on a list for issuance of title over a plot which does not exist.
75. Article 40 of [the constitution](#) provides as follows:-
1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
    - a. of any description; and
    - b. in any part of Kenya.
  2. Parliament shall not enact a law that permits the State or any person—
    - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
    - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
  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— 30 [Constitution of Kenya, 2010](#)
      - 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.
  4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
  5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.
  6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
76. Article 40(6) does not protect any property which is found to have been unlawfully acquired. The petitioners were found to have laid claim to land which had been reserved for Cheboror Farm Town plot. This was an illegal acquisition as that land was not available for allocation to any of the petitioners. They cannot therefore allege that their rights to property was violated.
77. Article 28 of [the constitution](#) provides as follows: -
- “Every person has inherent dignity and the right to have that dignity respected and protected.



The Petitioners have not stated in which manner their dignity was violated and considering what informed the filing of this petition, the Petitioners rights were not violated.”

78. Article 29 of [the constitution](#) states as follows: -

“Every person has the right to freedom and security of the person, which includes the right not to be— (a) deprived of freedom arbitrarily or without just cause; (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman or degrading manner.”

79. The petitioners did not state in which manner their constitutional rights under Article 29 were violated. The petitioners were not subjected to any torture or violence. They were never treated or punished in any cruel or inhumane or degrading manner.

80. The petitioners are alleging that their rights under Article 43 of [the constitution](#) were violated. They have not stated in what manner these rights were violated. In ELC 37 of 2020, the petitioners who are the plaintiffs claimed that the County Government of Uasin Gishu had put up a fence around their properties where they were growing maize. The County Government was only interested in parcel 353 which was a public plot. The petitioners had their own plots and they cannot claim that they were exposed to hunger and from accessing adequate food. In any case they obtained conservatory orders protecting them until the determination of this petition in ELC 37 of 2020.

81. Article 47 of [the Constitution](#) provides as follows: -

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

(2) If a right or fundamental freedom of a person has been or is [Constitution of Kenya, 2010](#) 33 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

82. There were meetings held to resolve the dispute surrounding parcel No. 353. Those who had illegally settled on the town plots were asked to vacate. This is after they were given opportunity to be heard. In particular, the 1<sup>st</sup> Petitioner was given opportunity to comment on the allocation of the town plots. He told the presiding District Commissioner that he was prevailed upon by the then Nandi District Commissioner to allocate the land and he had no otherwise. He and the other petitioners who were on the town plot land were asked to vacate and the reasons for being asked to do so were recorded in the minutes which were signed by all the District Commissioners present and the officials of Cheboror Farm.

83. When the town plots were being allocated on 30.9.2003, the petitioners were given an opportunity to pick up the ballots but they declined. Infact, the 1<sup>st</sup> petitioner was later allocated plot No. 168 on 7.7.2004. This plot measured 25x100. The petitioners cannot therefore claim that their rights to fair hearing were violated.

84. As regards the reliefs in ELC 37 of 2020 none of the reliefs can be granted and the reasons for declining the same have been adequately addressed hereinabove. The County Government cannot pay damages for trespass on a property which is a public utility. It is within the mandate of the county Government



of Uasin Gishu to put up markets for residents on public utility plots. This is what the County Government of Uasin Gishu did in fencing plot 353 and starting to put up Cherus Market.

**Disposition;**

85. It is clear from the above analysis that the petitioners' petition as well as ELC 37 of 2020 are devoid of merit. The petition is dismissed with costs to the Respondents. ELC No. 37 of 2020 is also dismissed with costs to the Defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Mogire for Mr. Konosi for Petitioners and for plaintiffs in ELC 37 of 2020.

Mr. Kibii for the 5<sup>th</sup> to 33<sup>rd</sup> Respondents.

Mr. Ogongo for the Defendant in ELC 37 of 2020.

Court Assistant -Akidor

