



**Tana and Athi Development Authority v National Land Commission & another  
(Civil Appeal 93 of 2016) [2023] KECA 1207 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1207 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL 93 OF 2016  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**TANA AND ATHI DEVELOPMENT AUTHORITY ..... APPELLANT**

**AND**

**COUNTY GOVERNMENT OF TANA RIVER ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement of the Hon Justice Oscar  
Angote dated 14th September, 2016 in ELC Const. Pet No 2 of 2015)*

**JUDGMENT**

1. The proceedings giving rise to this appeal were commenced by way of a petition dated March 4, 2015 by the County Government of Tana River, the 1<sup>st</sup> Respondent, herein against the Appellant and the 2<sup>nd</sup> Respondent.
2. The gist of the petition was that on January 17, 1995, the Commissioner of Lands, the predecessor to the 2<sup>nd</sup> Respondent, offered a grant to the Appellant vide a letter of allotment on un-surveyed community land on Plan No 106798/33A for a term of 45 years; that the said land harbours Tana River Delta, a unique ecological system with rare species of plants and animals and is the only source of water and pasture for the majority of county residents; that the Appellant encroached upon villages displacing thousands of people and their livestock leaving them exposed and at the mercy of the vagaries of nature; and that the Appellant frustrated and continued to frustrate the efforts from the elders of the affected settlements aimed at restoring the land back to the affected communities.
3. The 1<sup>st</sup> Respondent's case was that the purported grant of the Certificate of Lease by the 2<sup>nd</sup> Respondent to the Appellant in respect of the disputed land on 10<sup>th</sup> November, 2013 was contrary to the laid down procedures and laws governing community land under sections 10 and 11 of the [Land](#)



- Act; that pursuant thereto the Appellant commenced farming and doing irrigation on the said land measuring 25,875 hectares; that the Appellant proceeded to clear, survey and map out large portions of the said land into blocks and engaged third parties in the use and management of the same without involving the 1<sup>st</sup> Respondent or inviting public participation; and that the said actions were an affront to national values set out in Articles 10, 40, 42, 56, 60, 63, 69 and 174 of the Constitution.
4. It was therefore sought that the Court declares that the said actions by the Appellant and the 2<sup>nd</sup> Respondent violated the aforesaid Articles of the Constitution; that the Certificate of Lease issued to the Appellant in respect of LR No 28026 be revoked and that the said land be vested in the 1<sup>st</sup> Respondent to hold in trust for the people of Tana River County; that the Appellant be permanently enjoined from the dealing with the said land in any manner adverse to the rights of the indigenous people of Tana River County; that a provision be made as regards the costs of the petition; and that the court be pleased to grant any relief it may deem just to grant.
  5. In the supporting affidavit that was sworn by Omar Buketa, a member of the County Executive Committee in charge of Lands, Agriculture and Fisheries of the 1<sup>st</sup> Respondent, the said averments were reiterated and the existence of a previous matter, namely Abdalla Rhora Hibirae & 3 Others v Attorney General & 6 Others, High Court Petition No 14 of 2010 was disclosed. According to the deponent, in that case the Appellant was directed to re-evaluate its short-term, medium term and long range plans in consultation and with the participation of the communities in the area and all state entities involved in the Tana Delta, ensure compliance with Articles 60 and 69 of the Constitution, a directive which the Appellant did not comply with. Instead the Appellant issued a tender to a third party to carry out certain activities on the subject land without consulting the 1<sup>st</sup> Respondent or the communities concerned. That tender, it was averred, gave rise to a court case which was however withdrawn before being heard on its merits.
  6. The deponent further averred that the subject land is not being properly managed and conserved to ensure equitable sharing of the accruing benefits to the communities concerned as envisaged under Article 69 of the Constitution; that some three communities who are minorities in the County, Salama, Ngatana and Orma Communities, were adversely affected by the massive irrigation and large scale farming schemes which use fertilizers and pesticides in violation of their rights to a clean and healthy environment; that the alienation of the Tana Delta has denied them an environment in which to practice their culture and develop their cultural values; and that the agricultural activities have adversely affected the flora and fauna in the area as a result of the change of the Tana River course and threat to the existence of rare species.
  7. According to the deponent, the suit land was and remains community land that was held in trust by the County Council of Tana River District for the people residing in the area and could not therefore be available for allotment. In the alternative it was averred that it was unlawful for the 2<sup>nd</sup> Respondent to issue title to the Appellant without seeking the opinion and/or participation of the 1<sup>st</sup> Respondent or the local communities. It was therefore averred that the actions of the 2<sup>nd</sup> Respondent were ultra vires.
  8. In response to the petition, the Appellant relied on the affidavit sworn by Sylvia Ndegwa, the Appellant's Legal Services Manager who deposed that all the requisite legal, environmental and public processes and mechanisms were followed in the run up to the various projects that the Appellant initiated and that some of the rights the 1<sup>st</sup> Respondent invoked had already been litigated on and were either *res judicata* or subjudice. These suits were identified as Abdalla Rhora Hibirae & Others v AG & 6 Others High Court Petition No 14 of 2010; Lawrence Chalalu & 5 Others v TARDA & 2 Others Mombasa HCCC No 660 of 1994; and Malindi Miscellaneous Application No 20 of 2008 – Republic v NEMA & Others.



9. According to the deponent, the Appellant is a creature of the statute formed to enhance strategic planning and utilisation of water and other resources in the Tana and Athi River Basin and that it has engaged in various projects including irrigation of crops within the Tana Delta and Athi area; that the Tana Delta Irrigation Project (TDIP) was formulated to open 12000 Ha of flood plains to produce 65,000 tons of milled rice a year; that the project area is to be divided into three sub areas surrounded by flood protection dykes and that the Appellant embarked on the construction of dykes in the area from 1987 to 1989; and that an Environmental Impact Assessment was conducted at the project planning stage; and that there is also a project environmental monitoring unit in place to monitor adverse environmental effects.
10. According to the deponent, there is also a proposed Tana Delta Irrigation Sugar Project in respect of 20,000 Ha and that over 2,600 stakeholders were individually consulted; that the land covered by Plan No106798/33A is public land belonging to the National Government; that the Title Deed Grant No IR 152049 that was issued to the Appellant is valid and legitimate and that the process of acquisition of the land by the Appellant was above board. Further, that pursuant to Article 62(2)(b) of the Constitution, land held, used or occupied by any state organ cannot be claimed by the County Government and that the Petition has been filed in bad faith.
11. Contrary to the averments of the 1<sup>st</sup> Respondent, it was deposed that the Appellant had continually supported the local communities in order to improve their food production by supplying the required amenities as well as technical support. While appreciating that there may be possibilities of water pollution as a result of the use of agrochemicals in the farm, it was averred that the project advocates selective use of agrochemicals with minimum environmental damage in order to reduce the levels of pollution. It was disclosed that as regards the water borne diseases resulting from stagnant water, the project undertakes public health awareness campaigns in collaboration with the Government of Kenya and Non- Governmental Organisations and also supports the provision of affordable drugs at project dispensary. It was further disclosed that the project designed and allowed for the necessary livestock corridors to the Tana River and made provision for supply of water to the wildlife along the eastern dyke of the project.
12. It was averred that the Appellant has been conserving important areas of flora and fauna within the project areas; that the Appellant was engaging in flood control by constructing dykes around villages; that the Appellant was regulating the river by repairing all brooks along the river; and that the Appellant had a fully-fledged department of environmental control which deals with environmental matters.
13. According to the deponent, the Appellant was also engaged in other flagship projects such as the High Grand Falls Multi-Purpose Reservoir Project, the Tana Integrate Sugar Project and Water Catchment Conservation all of which are meant to alleviate poverty in the area and for the purposes of national development. According to the deponent, the Appellant engaged in extensive consultations and public discussions in carrying out various projects and commissioned experts to undertake and carry out an Environmental Impact Assessment and was issued with Environmental Impact Assessment License Registration.
14. In the deponent's view, the projects in question are likely to have far more positive effects than negative impacts as they will act as tourist attraction, enhance food security and create wealth for the local people and improve their lives and livelihoods. According to the Appellant, should the project be stopped there would be very serious regional and national ramifications such as the threat to national food security; adverse effects on the livelihoods of many members of the communities residing in the Tana Delta; reduction in the economic independence and viability of the Tana Delta; and loss of income nationally through importation of rice and possibly maize. According to the deponent, it is not possible



- to trample on the constitutional rights of the communities while improving on their livelihood and fundamental rights at the same time.
15. Regarding the ownership of the land, it was averred that the Appellant was the valid and legitimate owner of the land covered by plan No 106798/33A which is public land belonging to the National Government. According to the deponent, the process of acquisition of the land by the Appellant was above board, transparent and pursuant to the Constitution and Land Laws governing such a process; that pursuant to Article 62(1)(b) of the Constitution, any state organ can lawfully hold, use or occupy public land except any such land that is occupied by the State organ as a lessee under private lease; that pursuant to Article 62(2)(b) land held, used or occupied by any State organ cannot be claimed or held by the County Government in trust for the people resident in the county; that TARDA being a body established pursuant to Article 96 of the Constitution, is a State organ as defined in Article 260 of the Constitution and pursuant to Article 3 of the Constitution, is empowered to own land.
  16. It was therefore urged that the petition be dismissed with costs.
  17. In his judgement, the learned Judge found that although most of the issues in the current petition were raised in Abdalla Rhora Hibirae & Others v AG & 6 Others High Court Petition No 14 of 2010, the Petitioner herein was not a party to that suit and that there was no evidence that the parties in both suits were litigating under the same title. As for Malindi JR Miscellaneous Civil Application No 20 of 2008, the Court found that the same was struck out before it could be heard and determined on its merits. In the circumstances, the learned Judge found that the Petition was neither *res judicata* nor *sub judice*.
  18. The learned Judge found that the 1<sup>st</sup> Respondent did not provide the court with evidence to show that the Appellant had not complied with the conditions in the licence issued by NEMA to enable the court to determine whether the Appellant's actions were harmful to the environment. It was further noted that the Petitioner had not lodged any complain with NEMA viz-a viz the licence that was issued to the Appellant with respect to those allegations. The learned Judge therefore found that the 1<sup>st</sup> Respondent had not placed before him any material to enable him stop the 1<sup>st</sup> Respondent from conducting its activities on the suit property on the premise that the said activities infringes on its rights to a clean and healthy environment.
  19. Regarding the legality of the grant in respect to LR No 28026, the learned Judge made reference to his decision in the case of *Babola Mkalindi Rbingo v Michael Seth Kaseme & Others*, Malindi ELC No 168 of 2012 as regards the law relating to setting apart of Trust land under the repealed Constitution and the Trust Land Act. He found that the Appellant and the 2<sup>nd</sup> Respondent did not annex any minutes to show that indeed the then Tana River County Council approved the setting apart of the suit property and how the residents of the area were compensated by the 1<sup>st</sup> Respondent, if at all; that while the 1<sup>st</sup> Respondent addressed the Ministry of Lands on the complaints by the members of the communities regarding the allocation, the then Minister of Lands promised to address their concerns but did not do so; that instead, the Minister went ahead and issued the Appellant with a letter of allotment for LR No 28026 and a grant on 5<sup>th</sup> May, 2010 and 20<sup>th</sup> November, 2013 respectively; that the participation of the people of Salama Location and due process in the setting apart of the suit property, as provided for under the repealed Constitution, the current Constitution and the Trust Land Act, was never followed by the Appellant and the 2<sup>nd</sup> Respondent; that since it is the Petitioner who is mandated under the Constitution to hold community land/Trust land in trust for the people resident in the County of Tana River, the right of the Petitioner to hold such land in trust for its people was infringed upon by the Appellant and the 2<sup>nd</sup> Respondent; and that the grant in respect of L.R. No28026 for land measuring 25,875 hectares could not stand.
  20. The learned Judge proceeded to allow the Petition dated March 4, 2015 in the following terms:-



- a. A declaration be and is hereby issued that the actions of the Appellant and the 2<sup>nd</sup> Respondent described in the Petition are in contravention of Articles 10, 40 and 56 of the Constitution.
  - b. The grant in respect to land registered as I.R. 152049 being L.R.No28026 and issued to the Appellant be and is hereby revoked.
  - c. A permanent injunction be and is hereby issued restraining the Appellant, its servants, employees, agents or contractors from dealing with the suit land in any manner whatsoever.
  - d. The Appellant and the 2<sup>nd</sup> Respondent to pay the costs of the Petition.
21. It was that decision that aggrieved the Appellant and provoked it into lodging the instant appeal in which 19 grounds of appeal were raised. However, the Appellant condensed into 5 grounds which were whether the petition was *res judicata* and *sub judice*; whether the County Government has Locus to institute proceedings to enforce fundamental rights and freedoms; whether the court made determination on issues that had not been pleaded with particularity and or pleaded at all; and whether the whole of the suit land (I.R 152049 being L.R No 28026) in question was trust land; and whether if any setting apart was done, what was the acreage and was the correct process followed.
  22. We heard this appeal on 5<sup>th</sup> June, 2023 via the Court's virtual platform when Learned Counsel, Mr Munyalo appeared for the Appellant, Mr Maurice Odunga, appeared for the 1<sup>st</sup> Respondent and there was no appearance for the 2<sup>nd</sup> Respondent notwithstanding that its advocates on record were duly notified of the hearing date. Learned Counsel informed us that they had filed their written submissions which they briefly highlighted.
  23. On whether the petition was *res judicata* and *sub judice*, it was submitted that the learned Judge did not deal with the said issues yet the 1<sup>st</sup> Respondent was a party to both High Court Civil Case No 14 of 2010 - Abdalla Rhova 3 Others v The Hon Attorney General 7 Others and HCCC No 660 of 1194 - Lawrence Chhalalu & 5 Others vs TARDÁ & 2 others the latter which was still pending. According to the Appellant, the latter case was filed by communities of Salama Location and was questioning the legality of the setting apart/acquisition of their land Since the County Government of Tana River were successors in title of the various local government authorities that fell within their jurisdiction after the Constitution of Kenya, 2010, it was submitted that the principles of *res judicata* would properly apply to the 1<sup>st</sup> Respondent based on the decisions in Governors Ballon Safaris Ltd v Skyskip Company Ltd & another [2015] eKLR and Republic v Town Clerk Webuye County Council and Another [2014] eKLR. On the failure by the learned Judge to deal with the said issues, the Appellant cited the case of Mohammed Eltaff & 3 others v Dream Camp Kenya Limited [20051 eKLR.
  24. On behalf of the 1<sup>st</sup> Respondent, it was submitted that the case of Abdalla Rhova Hibirae & Others v AG & 6 Others High Court Petition No 14 of 2010 was instituted by some members of the community and that the 1<sup>st</sup> Respondent was sued as the 4<sup>th</sup> Respondent therein; that in that case the petitioners were not challenging the Appellant's title but were aggrieved by the failure to develop what they referred to as a multiple and comprehensive master plan to guide proposed developments within Tana Delta in a way that helps to safeguard the environment and the rights of the local people; that the prayers sought in the case and the subject petition were significantly different; that the 1<sup>st</sup> Respondent herein who was the 4<sup>th</sup> Respondent in the said suit cannot be said to have been litigating under the same title with Abdalla Rhova and his co-petitioners or the County Council of Tana River; and that the subject matter in this petition cannot be said to have been directly and substantially in issue in the earlier suit.



25. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

26. This Court dealt with the question of *res judicata* in Civil Appeal No 105 of 2017 - *Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others* [2017] eKLR where it found:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court’s decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR they rendered the elements as;

- a. the former judgment or order must be final;
- b. the judgment or order must be on merits;
- c. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- d. there must be between the first and the second action identity of parties, of subject matter and cause of action.”

27. In this appeal it is submitted that the suit in *Abdalla Rhova Hibirae & Others v AG & 6 Others* High Court Petition No 14 of 2010 the suit was instituted by some members of the community and that the 1<sup>st</sup> Respondent was sued as the 4<sup>th</sup> Respondent therein. It would follow that though the 1<sup>st</sup> Respondent was a party to those proceedings, it did not participate therein in the same capacity as in the instant proceedings where it was the one who instituted the proceedings. While it may be argued that the 1<sup>st</sup> Respondent instituted these proceedings on behalf of the people of Tana River County, it was not argued before us that the earlier proceedings were similarly instituted by or on behalf of the people of Tana River County. The mere fact that they may have been instituted by some of the communities in Tana River County does not thereby render them proceedings instituted by or on behalf of Tana River County. Accordingly, that test fails.

28. It is further submitted that in *Abdalla Rhova Hibirae & Others v AG & 6 Others* High Court Petition No 14 of 2010, the petitioners were not challenging the Appellant’s title but were aggrieved by the



failure to develop what they referred to as a multiple and comprehensive master plan to guide proposed developments within Tana Delta in a way that helps to safeguard the environment and the rights of the local people. The Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) dealt with this element by expressing itself as hereunder:

“Whereas the two suits concern the suit property, the main issue for determination in ELC Petition was whether the suit property is a public utility and it challenged the manner in which the suit property was alienated and subsequently allocated to the 1<sup>st</sup> registered owner and the conversion to freehold property. On the other hand, the main issue in HCCC No 131 of 2011 was whether the suit property was a beach plot and on a riparian reserve and whether blocking the Plaintiff’s view to the ocean and sea breeze by the appellant was actionable. The issues for determination in ELC Petition 12 of 2017 were therefore not substantially in issue in HCCC No 131 of 2011. Further, the 2<sup>nd</sup> to 6<sup>th</sup> respondents were not parties in HCCC No 131 of 2011 and the court’s findings were inconclusive due to the absence of the state organs, specifically, the Registrar of Titles to enable the court make a determination. The parties in ELC Petition 12 of 2017 are different from those in HCCC No 131 of 2011 save for the appellant.”

29. We are similarly not satisfied that this element was satisfied. We therefor find that the learned Judge rightly held that the suit was not *res judicata*.
30. Based on the same reasoning we would also dismiss the ground challenging the learned Judge’s finding on *sub judice*.
31. Regarding the issue whether the County Government has locus to institute proceedings to enforce fundamental rights and freedoms, it was submitted that whereas the issues framed by the trial Court included whether the Respondents violated the Petitioner’s constitutional rights to a clean and health environment and whether the Respondents violated the Petitioner’s constitutional right to own property, the 1<sup>st</sup> Respondent has no rights capable of being violated. This submission was based on the case of Meru County Government v Ethics and Anti-Corruption Commission Civil Appeal No 193 of 2014.
32. The 1<sup>st</sup> Respondent, on the other hand took the view that state organs including the 1<sup>st</sup> Respondent can file a suit to protect various rights, capabilities, competencies and privileges accorded to them by the *Constitution*; that the court was called upon to interpret whether the Appellant and the 2<sup>nd</sup> Respondent violated the *Trust Land Act* and the *Constitution* while allocating the suit property to the Appellant; that being a trustee of the public and community land on behalf of its people, the 1<sup>st</sup> Respondent has all the rights, privileges and competencies to file a constitutional petition challenging any action of any person that deprives or attempt to deprive the community of their property rights as guaranteed under Article 40 of the *Constitution*; that the 1<sup>st</sup> Respondent had the rights to move the court in the manner it did pursuant to Section 12 of the repealed *Trust Land Act* in order to seek a determination of the legality of the setting apart and for the purposes of obtaining prompt compensation.
33. We agree and associate ourselves with this Court’s decision in *Meru County Government v Ethics and Anti-Corruption Commission* Civil Appeal No 193 of 2014;

“State organs can indubitably file suit inter se to protect various rights, capabilities, competencies and privileges accorded to them by the *Constitution*. What they cannot in and of themselves do, is to purport to claim for themselves and enforce for themselves qua State



organs, the rights enumerated in the Bill of Rights. Such rights as we have stated, and the Kisumu Bench as well belong only to individuals as natural persons who only can enforce or protect them in person or through any other persons be they natural or juristic. Now, had the various officers of the appellant or any one of them, on behalf of whom the appellant went to court, been co-petitioners claiming that their rights as individual natural persons had been or were in danger of being violated or infringed, the petition before the learned Judge would have been competent. They were not joined, however, and the claim as it stood was to the effect that the appellant, a juristic person and a State Government at that, had been a victim of violation of various postulates of the Bill of Rights. We think that in principle the petition as presented was making impossible claims and was factually contradictory and so incompetent. This finding is on all fours with the pronouncement of this Court in the Cholmondley (*supra*) case which we have referred to earlier in this judgment and with which we are in full concurrence: The Bill of Rights affords protections and guarantees for natural persons as individuals and that protection does not extend to the State or its organs such as national and county governments.

34. It is clear from the foregoing that State organs can properly file suits inter se to protect various rights, capabilities, competencies and privileges accorded to them by the *Constitution*. In this case the law recognises the County Governments as the custodians of community land on behalf of the communities within the county. As custodians, the County Governments, in our view, have the right to move the Court in order to obtain an interpretation of the *Constitution* as regards the community land. We therefore find that the 1<sup>st</sup> Respondent properly moved the trial court for the reliefs it sought.
35. On whether the court made determination on issues that had not been pleaded with particularity and or pleaded at all, it was submitted that though a finding was made regarding the process used in setting apart trust land, the petition did not allege any violation of any section of *Trust Land Act* and the repealed Constitution particularly section 118 of the *Constitution*; that though the Court made a finding of lack of evidence showing that the then Tana River County Council approved the setting a part of the suit property, in the petition, there was no allegation that the then Tana River County Council did not approve the setting apart; and that there were no particulars given with regard to some alleged violations of the *Constitution*. The Appellant relied on *Caltex Oil (k) Ltd v Rono Ltd* [2016] eKLR, *Nairobi City Council v Thabiti Enterprises Ltd* [1995-98] 2 EA 251 (CAK), for the position the court has no jurisdiction to make a finding on issues that had not been pleaded; and the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
36. According to the Appellant, the affidavit in support of the petition did not have any evidence to support noncompliance with the *Constitution* with regard the manner in which the Appellant was allotted land, particularly as regards the issue of compensation, hence there was therefore no evidence to support the averments in the petition. In this regard, the Appellant cited the case of *Dimension Outdoor Limited v County Government of Isiolo* [2017] eKLR.
37. On behalf of the 1<sup>st</sup> Respondent, it was submitted that Rule 10(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (the Mutunga Rules) only envisages the stating of the specific article of the *Constitution* which has been violated or threatened with violation and not the itemisation of any violation of a statute or subsidiary legislation which can be presented by way of submissions. It was nevertheless submitted that the 1<sup>st</sup> Respondent pleaded in paragraph 36 of the petition the legality of the title to which the Appellant responded in paragraph 45 of the replying affidavit. It was therefore submitted that the learned Judge was justified in conducting research on laws governing setting apart and make a determination as to whether there was compliance.



38. This Court in of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR pronounced itself as follows:

“The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.... We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra).

39. It, therefore, follows that it is not sufficient for a petitioner to simply refer to various Articles of the *Constitution* without linking the said Articles to the issues for determination. A petition, must therefore set out the Articles complained to have been violated or threatened with violation and state the relevance of these Articles to the issues for determination. Of relevance to this appeal, arising from the findings of the learned trial Judge and the grounds of appeal raised before us, are the 1<sup>st</sup> Respondent’s complaint that the grant of the Certificate of Lease by the 2<sup>nd</sup> Respondent to the Appellant was contrary to the laid down procedures and laws governing community land under sections 10 and 11 of the *Land Act*; that pursuant thereto the Appellant commenced farming and doing irrigation on the said land measuring 25,875 hectares; that the Appellant proceeded to clear, survey and map out large portions of the said land into blocks and engaged third parties in the use and management of the same without involving the 1<sup>st</sup> Respondent or inviting public participation; and that the said actions were an affront to national values set out in Articles 10, 40 42, 56, 60, 63, 69 and 174 of the *Constitution*.

40. In his judgement, the learned Judge found that the Appellant and the 2<sup>nd</sup> Respondent did not annex any minutes to show that indeed the then Tana River County Council approved the setting apart of the suit property and how the residents of the area were compensated by the 1<sup>st</sup> Respondent, if at all. Clearly the issue of compensation was never raised in the petition. Even had it been raised, there was no evidence by any of the members of the community that they were never compensated. Accordingly, based on the pleadings as well as the evidence, the learned Judge erred in finding that the residents of the area were never compensated.

41. Regarding whether there was public participation, the minutes of the 1<sup>st</sup> Respondent’s predecessor, County Council of Tana River, of 13<sup>th</sup> November, 1986 clearly revealed that the 1<sup>st</sup> Respondent was made aware of the Appellant’s project. In the said minutes, the Clerk to the Council:

“...read letters from TARDÁ and asked members to contribute constructively on the issue. He pointed to the councilors not to oppose the move as there were clear benefits that the residents were likely to realize. He further noted to them that very little of the land in question was under the control of the council. Only a few patches were he said, as otherwise it was state owned.”

42. That there were consultations between the Appellant and the 1<sup>st</sup> Respondent was confirmed by the contents of the letter dated 26<sup>th</sup> November, 1986, in which the County Council of Tana River referred to the said minutes and confirmed that there was a follow-up physical visit to the area and that a consent to commence the work had been granted. There was no other evidence that the members of the public were not made aware of the same since the petition was brought by the 1<sup>st</sup> Respondent on behalf of the area residents. The learned Judge seemed to have shifted the burden of proof to the Appellant when he held that there was no evidence that public participation was conducted. We therefore find that the 1<sup>st</sup> Respondent failed to prove its allegation that there was no public participation.



43. On the issue whether it was proper for the learned Judge to find that the whole of LR No 28026 was trust land, from the minutes of the 1<sup>st</sup> Respondent's predecessor, County Council of Tana River, of 13<sup>th</sup> November, 1986 read together with the letter by the County Council of Tana River dated 3<sup>rd</sup> February, 19915 appointing the Attorney General to act for it in *Abdalla Rhova Hibirae & Others v AG & 6 Others* High Court Petition No 14 of 2010, it was acknowledged that only 350 ha formed the trust land. In those circumstances, we agree that the learned trial Judge erred in nullifying the allocation of the whole land when there was no evidence that it was trust land. In the said letter, the clerk to the County Council noted that:

“The Tana and Athi River Development Authority (TARDA) has been commissioned by the Kenya Government to carry out a giant rice irrigation scheme in Garsen area. Upon completion, this project is estimated to cover a total of area of approximately 28,000 Hectares. Presently, phase 1 of the project covers areas around Kulesa, Werna and Hewani Villages which all fall in Salama location. The Land status through which the project area traverses is majorly government land with isolated pockets of Trust land. The Trust Land pockets named Chunoni and Kulesa covers a total area of approximately 350 Hectares... In 1986, TARDA requested the Council to grant a wayleaves licence for construction of flood protection dykes that passed through the Chunoni and Kulesa Trust land areas amongst other areas. The Council granted the same and they have since been accomplished by TARDA. Unless stated otherwise, the Council believes that where appropriate Tarda has duly paid the requisite compensation. The project is now at a fairly advanced stage of implementation. In fact more recently Tarda has undertaken major earthworks involving clearance of huge chunks of land in a bid to lay out the Rice Scheme Project. It is these works in progress that have brought about this case now in Court. The community feels aggrieved and they have taken both Tarda and the Council to Court. Even though the Government has not been enjoined as a party to this case, its interests are massive. Ninety percent of the land in the project area is state owned. Its exclusion from the proceedings must be an oversight on the part of the plaintiffs.”

44. The learned Judge ought to have made a finding as to what portion of the land constituted government land and what portion was trust land since, as the learned Judge appreciated in the case of *Babola Mkalindi Rhiqho & 9 others v Michael Seth Kaseme & 3 others* [20161 eKLR:

“The Government Lands Act was enacted to make further and better provisions for regulating the leasing and other depositions of Government Land. Under this Act, it is only the President who could sign documents granting title although he would delegate these powers to the Commissioner of Lands. Unalienated Government land was not Trust land in that it was not vested in local communities and it was not held in trust for them by a County Council. Under section 3 of the Government *Land Act*, it is only the President who was allowed to make grants or disposition over unalienated Government land. It is the Commissioner of Lands, on behalf of the President, who used to allocate unalienated Government land to the person whose application for the allocation of such land would have been approved by the President. Unlike Trust land, the County Councils had no role to play at all in the allocation of unalienated Government land. They could not even purport to administer such land on behalf of the Government.”

45. Even if there was evidence that the setting apart was not procedural, and we are not satisfied that that was the case, it is our respectful view that the trial court, in arriving at its decision ought to have taken into account public interest. The doctrine of proportionality is a constitutional factor that ought to be



taken into account by the Court in arriving at its decision in such matters. However, we must state that a consideration of public interest does not justify a violation of a person's constitutionally guaranteed rights. A court of law cannot decline to make a finding that a right has been violated or is threatened by violation on the basis that to do so is not in public interest. Public interest only comes into play when the Court considers the nature of the relief, if any, to be granted. That the Court must always pronounce itself on violations of human rights notwithstanding public interest was affirmed by this Court in In the case of *Commission for the Implementation of the Constitution v The Attorney General and Another*, Nairobi Civil Appeal No 351 of 2012, where this Court reaffirmed this position by stating that:-

“The constitutional interpretation jurisdiction that resides in the High Court, and which we must exercise when sitting on appeals from its determinations, is a critical and vital one. This is especially so when it comes to testing the constitutionality of legislative actions that touch on the special safeguards and protections that have progressively been adopted to protect persons and groups that are vulnerable or disadvantaged. In such instances, it is for the court to robustly and firmly affirm those protections that from their very nature may seem a counter-majoritarian irritation to those that have the weight or the numbers on their side.”

46. In arriving at its decision the Court cited the decision of Justice Chalkalson, in *The State v T. Makwanyane & Anor* 1995 (3) S.A. 391 (C.C) in which the Constitutional Court of South Africa expressed itself as follows;

“Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the courts to interpret the *Constitution* and to uphold its provisions without fear or favour. If public opinion were to be the decision there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution.”

47. Francis Bennion in *Statutory Interpretation*, 3<sup>rd</sup> Edition at page 606 defined public interest as:

“...the basic principle of legal policy that law should serve the public interest. The court... should therefore strive to avoid adopting a construction which is in any way adverse to the public interest.”

48. According to *Black's Law Dictionary*, 9<sup>th</sup> Edn. “public interest” is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

49. Article 1(1) of the *Constitution* provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the *Constitution* while under Article 1(3)(c) sovereign power under the *Constitution* is delegated inter alia to the Judiciary and independent tribunals. In our view, and as was held in *Konway vs. Limmer* [1968] 1 All ER 874, there is the public interest that harm shall not be to the nation or public and there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

50. It is therefore our view and we so hold that in appropriate circumstances, when it comes to what reliefs to grant, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the



Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. That, we believe, was what informed this Court’s decision in the case of East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR where the Court opined that:

“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most good. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable”

51. In this case, both on the merits and the reliefs granted by the trial court, we find that the decision arrived at by the learned Judge cannot be upheld. We allow the appeal, set aside the judgement delivered in Malindi ELC Constitutional Petition No 2 of 2015 on September 14, 2016 and substitute therefor an order dismissing the petition.
52. As the dispute pitted two levels of the executive, we make no order as to the costs, both here and in the court below.
53. Judgement accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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*I certify that this is the true copy of the original*

**DEPUTY REGISTRAR**

