



**Maiyo & 4 others v Land Adjudication & Settlement Officer, Nandi County & 8 others
(Environment & Land Petition 7 of 2021) [2024] KEELC 4003 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4003 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION 7 OF 2021
MN MWANYALE, J
APRIL 30, 2024**

BETWEEN

**JOEL KIPYEGO MAIYO 1ST PETITIONER
DAVID KIRWA KEMBOI 2ND PETITIONER
JONATHAN KIPSAINA KEMEI 3RD PETITIONER
DAVID KIPCHIRCHIR LELEI 4TH PETITIONER
JOHN KIPTARUS LELEI 5TH PETITIONER**

AND

**AND ADJUDICATION & SETTLEMENT OFFICER, NANDI
COUNTY 1ST RESPONDENT
DIRECTOR OF ADJUDICATION & SETTLEMENT MINISTRY OF LANDS,
HOUSING & URBAN DEVELOPMENT 2ND RESPONDENT
DIRECTOR OF SURVEYS MINISTRY OF LANDS URBAN
DEVELOPMENT 3RD RESPONDENT
LAND SECRETARY MINISTRY OF LANDS HOUSING & URBAN
DEVELOPMENT 4TH RESPONDENT
DIRECTOR OF KENYA FOREST SERVICE 5TH RESPONDENT
COUNTY CONSERVATOR OF FOREST NANDI COUNTY . 6TH RESPONDENT
MINSITRY OF LAND & ENVIRONMENT NANDI COUNTY 7TH
RESPONDENT
NATIONAL LAND COMMISSION 8TH RESPONDENT
ATTORNEY GENERAL 9TH RESPONDENT**



JUDGMENT

1. In their Petition before this court dated 25th July, 2016 and filed on their behalf by Messrs Bungei and Murgor Advocates the Five petitioners pray for the following a declaratory order, to wit;
 - i. the acts of the 1st to 6th Respondents illegal unconstitutional and null and void.
 - ii. the subdivision of Kamwega Land Adjudication section into two and the re-establishment of the declared boundary violates their proprietary rights under the independence constitution, Article 40,63(d) (iii), Article 27, Article 47, Article 50, the Land Act 2012, the Land Registration Act 2012, the National Land Commission Act 2012 and the Trust Land Act Cap 288 and are therefore null and void.
 - iii. the 1st, to 6th Respondent's re-establishment of the declared boundary is in contempt of the order of mandamus issued by the High Court in Kisumu via Misc. Civil Application No.13 of 2002 now Eldoret High Court Misc. Civil Application No.46 of 2007.
 - iv. the Land comprising of the entire Nandi North Forest is Trust Land as per the provisions of the Independence Constitution and now embodied in Article 63 (e) as Community land and can only be dealt with as per the provisions of the Old constitution and the New Constitution and the National Land Commission Act 2012.
 - v. any legislations and or amendments or repeal that may have been made to the Trust Land Act Cap 288 that were in consistent with the proprietary rights of the Petitioners under the Independence constitution as null and void to the extent of the inconsistency.
 - vi. the 1st, to 6th Respondent's jointly and severally be prohibited from interfering with the Kamwega Land Adjudication Register as compiled and published on 14th August 2000.
 - vii. an order of mandamus to compel 1st, 2nd, 3rd, 4th, 5th and 8th Respondents to issue titles to all Kamwega Land Adjudication section land owners as per the register that was compiled and published on 14th August 2000.
 - viii. an order of mandamus directing the 5th and 6th Respondents to proceed and remove the parallel beacons put in the adjudication section and to respect and comply with the orders issued and served on them by the Court in Kisumu via Misc. Civil Application No.13 of 2002 and to proceed to issue titles forthwith.
 - ix. A conservatory order issued restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th from reopening the adjudication process on Kamwega Land Adjudication section, alienating any part of the adjudication section, claiming any part thereof to belong to the forest or dealing in any manner with the section contrary to what was compiled and published on 14th August 2000 by the then Land Adjudication and Settlement Officer.
2. The above prayers were sought against the Land Adjudication and Settlement Officer Nandi County as the 1st Respondent, the Director of Adjudication and Settlement Ministry of Lands, Housing and Urban Development as the 2nd Respondent, the Director of surveys, Ministry of Lands, Housing and Urban Development as the 3rd Respondent, The Lands Secretary Ministry of Lands, Housing and Urban Development as the 4th Respondent, the Director of Kenya Forest Service as 5th Respondent. the County Conservator of Forests Nandi County as 6th Respondent, the Minister Land and Environment



Nandi County as 7th respondent, the National Land Commission 8th Respondent and the Honourable Attorney General as the 9th Respondent.

3. The State Law Office entered appearance for the 1st, 2nd, 3rd, 4th and 9th Respondents while Messrs Gicheru and Company entered appearance for the 5th and 6th Respondents. A memorandum of appearance was also filed by the Director Legal Affairs of the 8th Respondent who neither filed a Replying affidavit nor took part in the proceedings but filed grounds of opposition while the County Government of Nandi the 7th Respondent, did not enter appearance file any response and did not take part in the proceedings.
4. On 28.2.2018 the parties took directions that the petition proceeds by way of viva voce evidence and on 26/6/2018 PW1 Jonathan Kipsaina Kemei testified. On 20.9.2018 an application under certificate of urgency was filed and dealt with by Lady Justice M. Odeny who issued orders of status quo and slated the application for hearing on 8/10/2018.
5. On 8/10/2018 by consent of the counsels present the status quo orders that had been issued on 20.9.2018 were confirmed, PW2 David Kirwa Kemboi and PW3 Joel Kipyego Maiyo testified and the Petitioner's case was closed.
6. The 5th and 6th Respondents called their witness DWI who testified on 2/3 2020 and their case was closed on the said date while the 1st, 2nd and 3rd, 4th, 7th, 8th and 9th Respondents did not call any oral evidence but relied on the affidavit of Grace Ondiga which they converted as a witness statement and relied on it entirely.

Petitioners' Case: -

7. The Original 1st Petitioner herein Mr. Joel Kipyego Maiyo (now deceased) avers that he is the registered owner of Land Parcel L.R. Nandi/Kamwega/827; while the 2nd petitioner David Kirwa Kemboi was the owner of Nandi/ Kamwega /1584; the 3rd petitioner Jonathan Kipsaina Kemei the owner of Nandi Kamwega 1538 and 1579; L.R No. Nandi/Kamwega/1578 being owned by the 4th Respondent David Kipchirchir Lelei; Nandi/Kamwega 1083 was owned by the 5th petitioner John Kiptarus Lelei.
8. That all the 5 Petitioners are residents/descendants of Kamungei, Chesombe, Sangalo, Tabolwa, Chepnego, Oromo, Chepnyogason and Chepng'abai areas which fall under Kamwega land adjudication section hereinafter referred to as the "adjudication section".
9. That Kamwega Land Adjudication section is also home to several public utilities to wit Chesombe Primary School, Chepng'abai Primary School, Chepnego Primary School, Kamwega Dispensary, Oromo Primary School, Kamwega Secondary School, Tabolwa Secondary School, Tabolwa Primary School, Chepnyogason Primary. School, Tabolwa Dispensary, Chepnyogason Dispensary, Chepnyogason Cattle Dip, Tabolwa Cattle Dip, Kamwega Cattle Dip and Ngoromosho Primary School.
10. The factual basis of the petition is that;
 - a) the petitioners are descendants of the inhabitants who occupied the areas in the 18 and 19 century and at independence in 1963 the land comprised in the areas were declared as Trust Land as per section 115 of the repealed constitution and the same were vested in the county councils to hold in trust for the people who were ordinary residents of the area.
 - b) the land comprised in this area is now classified under *the constitution* of Kenya 2010 as community land under Article 63(d)(iii) and was vested in the county of Nandi having initially



been held by Mosop Area council at independence and by Nandi county council and now the County Government of Nandi as aforementioned.

- c) that the councils had the powers under the repealed constitution to ascertain the rights of individuals and communities with an aim of issuing them with titles and the council had acceded to a petition and on 16.8.1988 the District Land Adjudication and settlement officer Nandi county exercising mandate under section 5 of the *Land adjudication Act* cap 284 declared an adjudication section which comprised of the land falling between Kamungei, Sangalo Tabolwa, Chepngeno and Chepngabei as per the legal notice whose boundary was to commence at Chepngaboi -Chepngeno northwards to the western rift valley provincial boundary for about kilometers along Kaptich/Kamwege sublocation boundary to the intersection of the land Kamwega/North Nandi forest in zig zag manner to its point of commencement.
 - c) the exercise was to proceed and all claims were to be lodged not later than 2nd February 1989. And a committee was formed for purposes of adjudication. The adjudication section thus covered 3048 hectares and the process commenced on 2/8/1988 and was completed on 14/8/2000.
11. At time of completion of the register a total of 1632 parcels were identified, 520 objections registered, heard and determined and the register was finalized and sent to the 2nd respondent, the 6th respondent did not file any objections, 13 appeals against the decisions of the land adjudication officers were sent to the minister none had emanated from the 6th respondent;
 12. After finalization of the register the 6th Respondent thus claimed that the adjudication had encroached Gazetted Forest Land and the 1st Respondent started altering the declared boundary which culminated to the filing of High Court Misc. Civil Application 13 of 2002 before the High Court at Kisumu which issued mandamus orders directing the 1st Respondent to forward the register to the 2nd Respondent for titling.
 13. That in spite of the orders of mandamus issued by the High Court in Kisumu the 1st respondent allowed the 5th and 6th respondents to reopen the closed adjudication register by subdividing the closed adjudication section into two and declaring part of belonging to the 5th and 6th Respondents with the results that the residents in the part of the section declared to belong to the 5th and 6th respondents as apart of Nandi North Forests were in eminent danger of eviction.
 14. The petitioners aver that the move by the 5th and 6th Respondents takes away their ancestral land which was Trust Land under the Trust *Land Act* yet the only declared boundary was done by the Respondents surveyors and the 5th and 6th respondents did not file any objections under section 26(1)(2) and section 29 (1)(a), (2) and (3) of the *Land Adjudication Act*.
2. The constitutional and legal foundation of the petition is that;
 - i. Under Article 27 of *the constitution* the petitioners have
 15. A right to equality and freedom from discrimination and their rights to equal protection and equal benefits of law will avail to secure their rights for the protection of all rights and privileges and prerogatives enshrined in *the constitution*.
 16. The Government, public officials and all persons will respect their constitutional and statutory rights and refrain from violating the same in due disregard of the due process of the law.



17. The Petitioners as land owners, have a right to the same protection and equal benefit of law that other title holders are entitled to under *the constitution* and other statutes.
18. The Government does not have powers to enact legislation and/or repeal laws and/or use state power to dispose of the petitioners of their ancestral land without regard to the due process of the law.
19. that the reestablishment of the sectional boundary and the interference of the published Adjudication register contravenes the petitioners right to property and offends Article 40 of *the constitution* in that;
 - i. Article 40(i)(a) of *the Constitution* protects their right to acquire property individually or in association with others of any description in any part of Kenya.
 - ii. The right to protection of the right to property under Article 40 relates to existing parcels of land to which a person holds title or any form of ownership and cannot be defeated or compromised by past dealings of the land by the Government and its officials.
 - iii. Under article 40 the only property without constitutional protection is that which the high court and/or any other tribunal established by the law has found to have been unlawfully acquired.
20. That the high court in Kisumu had found that the petitioners are entitled to be issued with title deeds pursuant to completion of the adjudication process of Kamwega land adjudication section.
18. The proposed interference with the adjudication register is arbitrarily and unlawful within the meaning of Article 40(2) of *the constitution*.
19. The petitioner further avers that the petition is founded on article 22(i) of *the constitution* giving them locus to file the instant petition and article 23(2) giving the High court jurisdiction in accordance with Article 165 to hear and determine applications for redress of denial, violation or infringement of for a threat or fundamental freedom in the Bill of Rights.
20. The petitioners contend that under Articles 1,2,3,23,50,159 and 165 of *the Constitution* the Court is obligated to exercise its judicial authority without undue regard to procedural technicalities, to protect and promote the purpose and principles of *the Constitution* and ensure that natural justice and fairness are observed and that under Article 47 the petitioners have a right to Fair Administrative Justice and are thus entitled to detailed explanation as to why their ancestral land is annexed or alienated from them
21. On the strength of the above averments the petitioners sought for the orders set out at paragraph 1 of this judgment. the petition is supported by the supporting affidavits of Joel Kipyego Maiyo the original 1st petitioner (now deceased) who reiterates the averments in the petition and has annexed the legal notice declaring the Kamwega adjudication section JKM 3, a letter from director of surveys to the District adjudication and settlement office Kapsabet dated 21.10.1998 requesting for tracing of the boundaries area JKM 4., the list of the Committee members JKM5, and the letters from the chief dated 19th July 1988 forwarding the committee members list JKM6, a notice to the residents inviting objections JKM7, Two letters from the 6th respondents claiming that the Kamwega adjudication section as declared encroached their Perimeter boundary JKM 8 and 9, a consent from the Land Adjudication Officer for institution of High court Misc. Civil Application no.13 of 2022 Kisumu JKM 10, an order issued in High court Misc. Civil Application no.13 of 2022 Kisumu JKM 11, letter dated 29.6.2004 by the petitioners as JKM 12, response to the letter dated 29.6.2004 as JKM 13, a photograph of a beacon as JKM14, a copy of a parliamentary question, the answer and supplementary information as JKM15, Letter dated 26.7.2006 by the Lands P.S as JKM 16.



Petitioners Evidence: -

22. As noted at paragraph 4 above the parties herein took direction for the matter to proceed vide viva voce evidence. It was the petitioner evidence vide the testimony of PW1 Jonathan Kipsaina Kemei that: he was born on the adjudication section and owned NANDI/KAMWAGA/1538 which he got as a result of the adjudication process which had resulted into 1632 parcels and the adjudication had been finalized in 2000. There had been objections and determination and they had been a representative of the forest department during the objections known as Phyllis Koskei and a first boundary was established and he was told to await for the titles to be issued as the adjudication process was complete. When the other persons in the area were issued with titles they noticed an anomaly in the acreage and he produced as exhibits some photographs as exhibits 1a to j, the notice declaring the adjudication section as p exhibit 2, letter from director of surveys as P exhibit 3, the committee list s p exhibit 4, letter from director of surveys as p exhibit 5 and the High Court order in Misc. civil application 13 of 2002 Kisumu as p exhibit 6. He prayed for the petition to be allowed and for the parties to be issued with their titles.
23. On Cross examination by Mr. Odongo Learned Senior State Counsel for the 1st, 2nd, 3rd, 4th and 9th Respondents the witness stated that his petition was for the issuance of titles and that Kamwega Adjudication scheme was not divided into two sections, it should remain as was declared on 16/8/1988. The witness stated that he was not aware that the area had been declared as a forest in 1936 and that the boundaries had been demarcated by the legal notice. He was not aware that the land thus belonged to the Government and that there had been no gazette ment changing the boundaries of Nandi North Forest, he further said that it was not true that the establishment of the scheme encroached on the forest, since they were not living on the Forest. The witness further stated that they were still cultivating on the property and all objections were heard and determined by the adjudication officer and he was not aware why the titles had not been issued to him.
24. On further cross examination by Mr. Aseso for the 5th and 6th Respondents the witness stated that he did not have any documentation to show that his parents stayed on the forest land. He stated that he had only a plot number, the witness stated that the forest officers participated in the Adjudication process and in relation to Kisumu High court Civil Misc. civil application number 13 of 2002, they had wanted the court to stop the forest department from interfering with the boundaries and the beneficiaries to be issued with titles
25. On re- examination he settled that he owned land in Kamwega adjudication section since he had been shown the register and seen his name there in and the forest department had put beacons on the land. The scheme had been divided into two. He prayed for the petition to be allowed.
26. PW2 David Kirwa Kemboi testified too that he was born in Nandi county and his property was NANDI/KAMWEGA/914 and he produced a copy of his title as p exhibit 7 he stated title had been issued on 18/3/2015 but he had been on the suit land since 1982, his late father born in 1908 has lived on the suit land although he had not been issued with a title deed. The Area had been declared an adjudication section in 1988 and the adjudication process had been completed in 2000. he had been shown his property during the adjudication and which was 12 acres but the title showed the area to be only 4 Acres and he had filed the petition because his title reflected only 4 acres while he was entitled to 12 Acres as the forest officers had excised part of his property and put parallel beacons yet he stayed on the whole 12 acres.
27. The witness further stated that the forest officers had been present during the adjudication process and an objection was filed and heard by the Land Registrar and they did not file an appeal since the



- Adjudication officer had not encroached on the forest land. That the Kioban area was a forest that had been given to people in 1969 and the area was is known as kaptich measuring about 1616 Hectares about 4040 acres.
28. It was the witness's further testimony that Nandi North forest was gazetted in 1n 1936 and measured 29270 acres, that the defendants have stated in their affidavit that they had been encroachment leaving a balance of 26261 acres and if the kaptich area is added then the forest area would be 30291cres which is more than the acreage that they are claiming.
 29. That the kamwega adjudication section existed before the forest since they are public utilities in the area and that in response to a parliamentary question the then P.S had indicated that the issue making the issuance of titles in the Kamwega area was the Forest Shamba system and the re- establishment of the boundaries. The forest department had in 2017 pulled down electric poles within the areas and that the maps the defendants were relying on were issued in 2015. The Kamwega Adjudication section has 1633 parcels of land per exhibit 8 a letter dated 26/9/2012 and the witness prayed for the petition to be allowed.
 30. On cross examination by Mr. Odongo senior state counsel, the witness stated that his tile was for plot number 194, but he did not know how many titles had been issued though he conceded that titles were issued numerically. He was not aware whether other people had sued, his title ought to have been for 12 acres yet it had issued for only 4 Acres.
 31. On further cross examination the witness stated that his late father had been given 12acres although he did not have the area list he had seen the same in 2000 and there was no issue with the forests. The 1st petitioner had represented them in 2001 and they had been an agreement with the forest department but they had not agreed for the surveyors to go to the ground to re-establish the boundaries. The witness stated that he was aware of objections and appeals which culminated to the filing of Kisumu High Court case in 2002 to compel the registrar to forward the documents to Nairobi. The documents were forwarded to the registries on 26/9/2012. He stated that the verdicts or resolutions could have reduced or increased the acreage.
 32. The witness did not agree with the acreage given to him since it was less but he never protested the issuance of the less acreage to the land's office. The witness stated that the shamba system never changed the boundaries. When the adjudication section was declared in 1988 the witness was 21 years old he did not remember the boundaries changing into the forest and that this case did not stop the titling Process.
 33. The witness was further cross examined by Mr. Aseso for the 5th and 6th Respondent where he stated that he was born in 1969 and was the 2nd last born in a family of 9 siblings his father had about 50 acres. From JKM 8 he attested that he had been in kamwega in 2002 and that there was committee during the adjudication process and among the members he remembered were kipkoech Busienei and Patrick Rutto who were now deceased. The witness stated that he would have a problem with the Government surveyor resurveying the parcels. The surveyors had placed the beacons in 2015 while the High court in Kisumu had ordered that the land registrar to forward the documents to Nairobi in respect of the Kamwega Adjudication section.
 34. In Re-examination the witness stated that they were only proceedings and objection once the Kenya forest service had no pending appeal. He had filed the case for his own benefit and the benefit of other residents of kamwega adjudication scheme since the property was under Trust Land.
 35. PW3 was the 1st petitioner Joel Kipyego Maiyo it was his evidence that he had lived on his farm since birth in 1956and had brought the petition on his behalf and behalf of other petitioners. It was his



testimony that in 1988 there was a gazette notice that survey would be conducted in Kamwenga and the surveyors came and he went to check his parcel and the same was 20 acres documents were taken to Nairobi but the forest officers put beacons on his parcels. It was his further testimony that his father had been born in 1909 on the same parcel of land and that when the survey was done the forest officers were present and they had no objection as they signed after the objections. this case was filed so as the titles could be issued and the beacons placed by the forest officers to be removed. the witness stated that he had 20 acres but due to the beacons he now had 14 acres and he did not pick the title since the acreage was less than what he was entitled to. The witness adapted his supporting affidavit as part of his evidence in chief.

36. On cross examination by Mr. Odongo learned senior state counsel for the 1st, 2nd, 3rd, 4th, 7th and 9th Respondents the witness stated that the adjudication register was closed in 2000 and when he checked the register in 2001 and it was sent to Nairobi. So, it was not true that the register had been completed in 2012. In 2002 the forest officers encroached their land and the Kisumu case were meant for the forest officers to stop their encroachment of their land. The witness thought that the documents had been sent to Nairobi in 2002. He was adamant that it is the forest that encroached their land. The witness stated that he knew Jonson Kemei but did not know any committee member and whether Jonathan Kemei represented the Kamwega community in a meeting between the DC, the forest and the lands. He was not aware that the meeting took place before the register was taken to Nairobi.
37. The objections filed related to the forest department had encroached their land. The objections were filed before the register was taken to Nairobi. The shamba system started in 1979 and the witness was not a beneficiary of the shamba system although his property was next to the forest. The witness denied changing the boundaries of the forest which were placed in 1999 but confirmed in 2002. his was the owner of NANDI /KAMWEGA 827. His issue was that his property after the beaconing was now 14 acres and not the initial 20 acres he did not have the register for the 20 acres in court.
38. In further cross examination by Mr. Aseo the witness stated that he was not aware that Nandi North Forest had been gazetted, he was born in 1956 and the shamba system had been started in 1979., the adjudication of Kamwega section was declared in 1988 and was completed in 2001 and he was not sure whether the register had been forwarded to Nairobi in 2000 or 2001. The Kamwega scheme had been one and they placed beacons so as to suggest that the scheme had been divided into two. The witness did not have a copy of the register and the Kisumu case was to compel the registrar to forward the register and documents to Nairobi.
39. The witness was not re-examined and with the testimony of the 3 witnesses the Petitioners case was closed.

The 1st, 2nd, 3rd, 4th and 9th Respondents Case and Evidence: -

40. These Respondents were represented by the State Law Office and Mr. Odongo Senior Counsel appeared for them. The then 1st Respondent, Grace K. Ondiga swore a Replying Affidavit on 22/11/2017 on their behalf. The said Replying Affidavit was also converted to her witness statement as it became apparent that she was not available to testify the matter having being adjourned severally to accommodate.
41. It is their case that;
 - a) That the petition is incurably defective, incompetent, frivolous and scandalous and derived of any substance in law and the affidavit in support was full of falsehoods and misrepresentations.



- b) That Kamwega Adjudication Section covering approximately 3,048 Hectares and situate in Salango Location within Nandi County was declared as such vide Notice of establishment dated 16/8/1988, the said notice is exhibited as annexure GKO 1. The Notice of completion of adjudication section was issued 14/8/2000, paving way for inspection of the register and filing of objections. The completion notice is annexure GKO 2.
- c) A total of 561 objections were filed out of which 92 objections related to Nandi North Forest against the district forest officer, copy of the objection register GKO 3.
- d) The objections were heard and determined and 21 appeals to the minister arose which appeals have not been determined thus forestating any further action in the section including forwarding the adjudication register to the director of land and adjudication and settlement for action. Copy of the appeal register was exhibited as GKO4.
- e) A Section of plot owners filed Kisumu High Court Misc. Civil application No. 13/2002 (now Eldoret High Court Misc. Civil application No. 46/2007 obtaining an order of mandamus compelling the Nandi District Land Adjudication Officer to forward the adjudication register to the Director of Land Adjudication together with particulars of objections for purposes of registration subject to outstanding appeal. The Order was exhibited as GKO 5.
- f) There was a delay in compiling with order as the adjudication register needed to be error and fault proof, and need to provide for missing access roads on the maps, insertion of missing numbers, correction of duplication number, ensuring that plot owners sign their records and ensuring that all objections were implemented, hence the delay was in excusable.
- g) There was a lot of difficulties in delineating actual common boundary between the Forest and the Adjudication section due to the shamba system compounded with obsolete photo identification diagrams and unavailable viable maps covering the forest which could be used conclusively to establish the commons boundary in question.
- h) That a common permanent boundary between the forest and the plot owners was established by a committee and proceedings thereon were undertaken and the 3rd Petitioner Mr. Jonathan Kemei was part of the said committee.
- i) The issue of the common permanent boundary was on the objections that needed to be handled by the Nandi District Adjudication officer before forwarding the adjudication register in compliance with the mandamus order.
- j) The committee had recommended a survey to be done so as to mark out and fix the permanent boundary between the plot owners and the forest department and the decision was marked as GKO7.
- k) That the Nandi Land Adjudication Officer did not split the did not split the Kamwega Adjudication Section into two as the [Land Adjudication Act](#) did not envisage spitting an adjudication Section into two neither did the Nandi District Land Adjudication officer have such powers to order a subdivision since the same would be creating a new adjudication section with a separate notice of establishment.
- l) The adjudication register was thereafter forwarded to the Director of Land Adjudication after ensuring that the same was fault proof, as per to forwarding letter GK08.
- m) It was the Respondents further deposition that since the issue of the boundary had formed part of the objection and the same having been resolved the committee and a general agreement



to fix a permanent boundary separating the forest land from the adjudication section the department of forest was not obliged to file an appeal to the minister. The deponent further denied the Kamwega Adjudication Area fell under the Trust Land Act so as to have been vested in the County Government of Nandi but the same was an adjudication area under the Director of Land Adjudication and Settlement on behalf of the Government of Kenya.

- n) That the delay in forwarding the adjudication records was so as to align the boundary of the forest and the adjacent plots which preceded the process of Land Adjudication.
 - o) That the mandamus orders were complied with after the adjudication records were forwarded to the Director of Settlement and Adjudication.
 - p) That due to the shamba system the boundary stated during the establishment and declaration of the adjudication area did not conform to the actual boundary of the ground.
42. The replying affidavit of Grace Ondiga was adopted as evidence in chief and she was not cross – examined on her depositions.

5th and 6th Respondent's Case: -

43. The 5th and 6th Respondents were represented by the firm of Gacheru and Company Advocates and a replying affidavit deponed by Mr. Anthony K. Musyoka was filed in response to the petition.
44. It is the 5th and 6th Respondents case that;
- i) Nandi North forest was gazetted vide the proclamation No. 76 of 1936 and declared a Central Government forest vide Legal Notice No. 174 of 20th May 1964.
 - ii) At gazettelement the Forest which borders Kakamega County Boundary measures 11,845.41 Hectares and that after some alteration the currently acreage is 10,500.71 hectares
 - iii) that under Section 114 of the Repealed Constitution Trust Land meant; -
 - a) land which is in the specific area (meaning the area of land the boundaries of which were specified in the first schedule to the Trust Land Act in force on 31st May 1963) and which on 31st May 1963 vested in the Trust Land Board by virtue of any law or registered in the name of the Trust Land Board.
 - b) The areas of land known before 1st June 1963 as special reserves temporary special reserves, special leasehold area and special settlement area and the boundaries of which were described respectively in the 4th, 5th, 6th and 7th schedules to the crown land ordinance as in force on 31st May 1963 and areas by which were on 31st May commercial reserves by virtue of a declaration under section 58 of that ordinance, the area of land referred to in section 59 of that ordinance as in force on 31st May 1963 and the areas of land in respect of which a permit to occupy was in force on 31st May 1963 under Section 62 of that ordinance.
 - c) Land situated outside the Nairobi Area (as it was on 12th December 1964) the freehold title to which is registered in the name of a county council or the free hold to which is vested in a county council by virtue of an escheat.
 - d) That the definition of Trust land does not cover the area where the Nandi North forest lies since under section 114 (2) of the independence constitution of 1963, Mosop Area Council was not covered at Section 114 (2).



- e) That the suit property equally did not fall under section 115 of the independence constitution as trust land.
- f) That there is no nexus between the Petitioners, their descendants and the suit property and any utilization of the parcels was done with the permission of the Forest Department and now Kenya Forest Service since the gazettement of North Nandi Forest.
- g) That the Land Adjudication Act (Nandi District) Order came into force through L. N. 136/1970.
- h) That after the LN 184/1960 the land in questions was already falling within the land consolidation act, and was not available for adjudication to any other person and hence the petition offends Sections 8 of Land Consolation Act for lack of a consent in writing of the adjudication officer, to the institution or continuance of such proceedings has been given.
- i) That the District Land Adjudication and Settlement Officer Nandi County could not declare land falling in Kamungei, Kamwega, Samgal, Tabolwa, Chepnego and Chepngabel as adjudication sections since the areas were not available for adjudication pursuant to Legal Notice No. 136/1970 and Legal Notice No. 174/1964.
- j) That the adjudication register had not been completed and therefore nothing to forward to the Director of Settlement, thus the petition lacks merit and it is vague.
- k) That the Forest Service mandated to survey and re-establish the Gazetted forest boundary had discovered that;
 - i. Some beacons placed during gazettement were found to be in their correct and stable position.
 - ii. There was massive encroachment mainly cultivation of forest land and settlement totaling to 482.05 Hectares.
- l) That the community land under Article 63 of the Constitution of Kenya 2010 is not one and the same thing with the Trust Land Under Section 114.115.116 and 117 of the independence Constitution.

45. The 5th and 6th Respondents called Mr. Antony Musyoka the deponent of their replying affidavit, who testified as DW1 it was his testimony that he previously the ecosystem conservator of Nandi County and his work entailed Maintenance of the boundaries in the county. He adopted his replying affidavit as part of his evidence in chief and it was his further evidence that the Nandi Forest was Gazetted in 1936 through proclamation Order No. 76/1936 and declared as a Central Forest through proclamation No. 174 of 1964; and he produced the two documents as D Exhibit 1 and 2.

46. The witness further stated that upon gazettement a boundary plan was produced showing the extent of the forest which original acreage was 11,845.41 hectares, but the exercise report to 10,500.7 hectares. The boundary plan was produced as D Exhibit No. 3, which showed the beacons of Nandi North Forest.

47. After the beacons had been done it was found that 480.25 Hectares had been encroached as can be seen in the report (d Exhibit 3) where the dark shaded part in the map was the forest and further shaded was the invaded part.



48. The degazettement acceded to by the Kenya forest Service was one that was done in 1968 where the forest property reduced from 11,845.41 to 10,500.7 hectares which resulted to Kamungui Kipsoi Scheme, Kombe Ngatitia which amounted to 1343 hectares.
49. That D Exhibit 3 was the true boundary position. That people from Kamugui Section invaded the forest in the further side clearing that it was their ancestral land. That survey and mapping section in 2002 went the ground to work at the boundaries.
50. On cross – examination by Mr. Murgor for the Petitioner, the witness stated that he was aware that Kamwega Land Adjudication Section bordered the forest. That paragraph 4 of his replying affidavit the forest bordered. It was his further answer that Kamwega Adjudication Scheme borders the forest as Gazetted in 1936. There was a degazettment of 1343 hectares in the Kaptich the witness stated that he was not aware of the Kaptich excision, and there was encroachment on 482.05 Ha, and that the witness stated that at the time of reestablishing the boundaries he was not aware of the order dated 13/8/2002. Once a boundary plank had been drawn, the forest land was not available for adjudication. The adjudication was thus outside the forest area.
51. The map used in 2015 was not a new map, and the report that the Kenya forest Service was interfering with the boundary was made in parliament.
52. The forest boundaries never changed. The gazette Notice did not declare inhabited areas as forests lands and committee had a realignment of the boundaries.
53. Kamwega adjudication area could not extent to the forest, and no titles were issued in the disputed areas. When an area is degazetted then the same is available for alienation for other uses and adjudication.
54. On re-examination by Mr. Adhiambo the witness stated that the gazette notice No. 76/1936 and legal notice No. 174/1964 have never been challenged. The maps produced showed boundaries as per the gazettement. There was a process of establishing the boundary of Kamwega Adjudication Section. The order of 23/8/2002 directed the District Land Adjudication and Settlement Officer to forward the adjudication register. The order did not mention the forest boundary. There were temporary structures on the encroached section.
55. The 5th and 6th Respondent's case closed with the testimony of Mr. Muyoska their sole witness. On 2/3/2022, the Court (Odeny L. J) ordered for a survey report to be conducted by the Director of Surveys and a representative of Kenya Forest Service Mapping and Survey Section to confirm boundaries. The report was to be filed within 30 days of the said order.
56. A survey report was filed on 5/6/2020 and the Petitioners/Applicant filed Notice of motion application dated 30/5/2023 seeking that the said survey report be struck out.
57. The application was responded to and argued and it was decided vide the ruling dated 19th October 2023.
58. Hitherto the Petitioners had filed an application dated 25/11/2020 seeking various reliefs, which application was equally opposed and argued and ruling dated 28th March 2022 was delivered in respect of the said application was delivered.
59. As noted elsewhere in this judgment the 1st, 2nd, 3rd, 4th and 9th Respondents relied on the replying affidavit of Grace Ondiga who was not available to testify and give viva voce evidence. While the 8th Respondent National Land Committee filed grounds of opositio0n to the petition dated 22nd



December 2016 under the hand of C. Masaka, while the County Government of Nandi sued as 7th Respondent, did not enter appearance filed no response and did not take part in the proceedings.

60. The parties that took part in the proceedings were directed to file written submissions and they all compiled.

Petitioners Submissions: -

61. The Petition framed and submitted on 7 issues for determination. The said issues are as follows and the Court shall summaries submissions by the Petitioners in respect of each issue.
- i. Whether the declaration of Kamwega Land Adjudication Section and its boundaries was done in conformity with the law.
 - ii. Whether the actions by the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents of re-establishing the declared boundary of Kamwega Land Adjudication Section are illegal, unconstitutional, null and void.
 - iii. Whether the re-establishment of the boundaries of Kamwega Land Adjudication Section violates proprietary and constitutional rights of the Petitioner.
 - iv. Whether the re-establishment of the declared boundary is in contempt of the order of Mandamus issued by the High Court in Kisumu High Court Misc. Civil Application No. 13/2002 now Eldoret High Court Misc. Civil Application No. 46/2007.
 - v. What orders ought to issue?
 - vi. Who should bear the costs of the petition?
 - vii. Whether the process of land adjudication registration and declaration in Kamwega Land Adjudication section was done as per the law.
62. On issue number 1, the Petitioner submit that under Section 3 (i) of CAP 284 (now repealed) provides for application of the *Land Adjudication Act* in areas of trust land upon request by the county councils; whether the minister considers that the rights and interest of persons in the land should be ascertained and registered. (c) where land consideration act (cap 283) does not apply, to the area. Section 5 (i) provides for establishment of an adjudication area by an adjudication officer. The petitioner submits that under Section 114 (2) of the Retired Constitution the Kamwega Adjudication Area fell under the Mosop Area Council; and thus, it was properly done in conformity with the law so submits the Petitioners.
63. On issue number 2, it is the Petitioner's submissions that the process was well followed save for the attempt to change boundaries, and that all the 1632 parcels should be issued with titles.
64. On issue number 3, the Petitioner citing Section 10 (1) of Cap 284 submits that the adjudication officer was the only one mandated to resolve any boundary dispute that may have arisen and that the Kenya forest Service having not appealed the Land Adjudication officer's decision that was made in 2001 but waited till 2006 – 2007 where they attempted to re-establish the boundary.
65. The Petitioner submits that under Section 25 and 26 of Cap 284, the adjudication record was compromised of the adjudication register and the maps and any objection were to be handled within 60 days from the publication of the completion notice, and the chief land registrar is required under section 27 of the act to cause registration in accordance with adjudication register, thus the chief land register should issue title for the 1632 parcel as per the documents submitted to his office by the Director of Land Adjudication and settlement.



66. The Petitioners while placing reliance on the decision in Wilfred Juma Wasike & 11 others vs Ministry of Interior and Coordination and the Attorney General, as well as the case of Mitubell Welfare Society vs Kenya Airports Authority and 2 others; that their proprietary interests to their adjudicated process.
67. The Petitioners equally place reliance on the decision in the case of Law Society of Kenya and Joseph Kinyua vs Shem Migot.
68. The Petitioners submit that there was disobedience of Court Orders and direction of Parliament Contrary to Article 10 of *the Constitution*. The disobedience in respect of the Court orders was in relation to Kisumu High Court Misc. Civil Application No. 13/2002. 69. That parliament had found that the problem with the scheme was twofold so submits the Petitioner.
70. It is the Petitioners further submission that the area under encroachment was 956.95 hectares and the degazetted for settlement measured 2,108.95 hectares hence the forest land ought to be 9,736.46 Hectares and not 10,500/71.
71. The Petitioner submits that the area degazetted that resulted into Kaptich (Koiban) registration scheme was 1616 hectares and not 943 hectares and that more land was allocated than what was Gazetted by 673 hectares; hence it is discriminatory not to degazette 482 hectares for Kamwega Adjudication Scheme and contrary to their legitimate expectation as they are entitled under Article 27 of *the constitution* to equal protection of the law and equal benefit of law.....
72. On reliefs the Petitioners submit that the ownership comprised in the 1632 parcels in Kamwega Land adjudication Section passed to the owners after the adjudication process and that the Petitioners rights ere protected by the 2010 constitution, the repealed constitution as well as the *land adjudication act* and the Respondents were in breach of Article 40 of the Constitutions and the finality sections of cap 284.
73. The Petitioners pray for the orders sought in the Petition or alternatively for compensation at a fair market value in lieu of them moving out of the land as was held in Mitubell Welfare Society vs Kenya Airports Authority & 2 others.

The 1st, 2nd, 3rd, 4th and 9th Respondent's Submissions: -

74. In their submissions, the above stated Respondents framed and submitted on 6 issues for determinations, to wit,
 - i. Whether the petition raises constitutional issues worth consideration
 - ii. Whether re-establishing of the boundary between Kamwega Adjudication and North Forest was lawful, justifiable and legal.
 - iii. Status of Nandi, North Forest
 - iv. Whether encroachers have legitimate interest
 - v. Whether the re-establishment of the boundaries violated the Petitioner's rights and freedoms
 - vi. What reliefs should the Court grant?
75. It is the Respondents submissions that Nandi North Forest and Kamwega Adjudication Section are different areas, and that Nandi North Forest was Gazetted vide Proclamation Notice No. 76/1936 and declared as a Central Forest though legal Notice number 174/20/5//1964, meaning that the same was



a state forest initially measuring 11,845.41 hectares which was altered to 10,500.71 hectares and the same was public land since 20/5/1964.

76. The Respondents, submit that Nandi North Forest has been alienated Government land since 1964 hence not available from further alienation through any process including adjudication. Under Article 62 (g) of *the Constitution* of Kenya 2010, all government Land including forest land and Nandi North Forest is public land.
77. The Respondent submits that Kamwega Adjudication Scheme comprising of 3,048 Ha was declared as such through Notice dated 16/8/1988. Thus, at the point of establishing Kamwega Adjudication Scheme, Nandi North Forest was already in existence having been Gazetted; thus, any suggestion that the Nandi North Forest encroaches Kamwega Adjudication Section is not possible since the forest was alienated first in 1964.
78. On issue number 1, the Respondents placing reliance on the decision in the case of CNM VS WMA 2018 eKLR determined what amounts to a constitutional issue as follows; -

“A Constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.....”
79. The Respondent submits that the Court would be bereft of jurisdiction to entertain a matter in nature of a constitutional petition if the same does not disclose arguable constitutional questions and/or if the resolution of the dispute is not entirely or substantially matter of constitutional interpretation; thus, matter in so far as it related to dispute of boundary between Kamwega Adjudication Section.
80. The Respondent thus submits that the dispute is purely a boundary dispute laced with traces of constitutional language and not a constitutional issue thus recourse to the issues raised in the Petition under the provisions of *Land Registration Act*, Cp 2012 and Land Adjudication, and that vide section 18 (2) of the *Land Registration Act*, this Courts jurisdiction has been excessively ousted in matters of boundaries as such disputes are vested on the Land Registrar and in support of this limb of submissions to Respondents have cited the decisions in the case of Ali Farah vs Moses Ole Nasisit & 9 others 2016 (eKLR) as well as the decision in Lucy Agape Wayodi vs Kenya National Highway Authority & 2 others (2019) eKLR.
82. On the status of Nandi North Forest, the Respondents submit that the forest Land was neither Ancestral land, trust land nor communal land as it was public land under Article 62 (i) (g) of *the constitution*. That the disputed area having not been degazetted remains part of the forest. The Respondent relying on the decision in the case of David Kiptum Yator & 23 others vs Attorney General & 15 others (2020) eKLR. where the Court held that Embobut Forest was public land and not community land.
83. The Respondent further cite the Supreme Court decision of Pati Limited vs Funzi island Development Limited (Petition No. 37/2019) KESC. 29 KLR.
84. With respect to Issue 2, whether encroachers have legitimate interests. It is the Respondents submissions, placing reliance on the decision in Simon Kiprotich and 2 others vs Principal Secretary, Ministry of Devolution and Planning and 4 others that..... As the occupation in a forest is illegal there can be no order for compensation as well as in the case of James Rotich & 4 others vs David Kangogo vs 5 others.... And the case of Ledid Ole Tuta vs Attorney General & 2 others.
85. With regard to the issue as to whether the reestablishment of boundaries violated Petitioners rights and freedoms, it is the Respondents submissions that the reestablishment of the boundary was done procedurally in accordance with the *Land Adjudication Act* where one of the Petitioners participated



in the boundary re-establishment. Upon the re-establishment the contested areas fell within Nandi North Forest, making the occupiers of the areas encroachers of public land who cannot claim legitimate interests as it is public land; and no proprietary nor constitutional rights were violated by the Respondents.

86. In this regard the Respondent have cited the David Kiptum Yator decision as well as Joseph Lutuya & 21 others versus Attorney General & 5 others.
87. That no evidence of discrimination under Article 27, infringement of property rights under 40 of Fair Administrative action under Article 47 have been proven, so submits the Respondents.
88. On reliefs, the Respondents submit that the petition is devoid of merits and the same should be dismissed with costs.

The 5th and 6th Respondents Submissions: -

89. The 5th and 6th Respondents through their Counsel equally framed and submitted on 6 issues for determination, to wit,
 - i. Whether the jurisdiction of this Court has been aptly invoked
 - ii. Whether North Nandi Forest and Kamwega Adjudication Section exist independently and which one of the two was first in time.
 - iii. Whether Kamwega Adjudication Section could be established to superimpose Nandi North Forest
 - iv. Whether re-establishment of the boundary of Nandi North Forest and Kamwega Adjudication Section was justifiable and legal.
 - v. Whether members of Kamwega Adjudication Section have any viable claim over Nandi North Forest.
 - vi. What reliefs should this Court grant?
90. On issue number 1, the 5th and 6th Respondents submit that this Court lacks jurisdiction to determine on boundary disputes. In support of this they have cited Sections 18 and 19 of the [Land Registration Act](#) as the jurisdiction is bestowed by the said Section upon the Land Registrars and have cited the Court of Appeal decision in *Azzuri Limited vs Pink properties Limited 2018* (eKLR).
91. The 5th and 6th Respondents also submit while placing reliance on the decision in *John Harun Mwau vs Peter Gastrow & 3 others* that since the Petition could be litigated without recourse to [the constitution](#) then there is no constitutional issues and the Court should not admit the same as a constitutional issue and thus not pronouns itself on the same.
92. The 5th and 6th Respondent submit that the petition having not met the threshold of a constitutional petition and having not secured the consent of the Land Adjudication Officer under Section 30 (i) of the Adjudication Act, the petition is improperly before Court.
93. That the letter of consent dated 22/01/2002 exhibited by the Petitioners related to the filing of the Judicial Review filed before the High Court at Kisumu; and the same having ben valid for 60 days from its date, the same could not be used in these proceedings.
94. On issue number 2, the 5th and 6th Respondents submit that at the time Kamwega Adjudication Section was declared on 16/8/1988, Nandi North Forest and its boundaries had already been established



having been gazette via legal Notice No. 174/1964 which legal Notice applied retro respectively and come into operation on 1st June 1963.

95. On issue number 3, the 5th & 6th Respondents submit that under Article 62 (i) (g) the forest land is public land other than forests under which Article 63 (2) (d) (i) applies; and hence the same could not be super imposed and adjudicated upon under the [Land Adjudication Act](#).
96. That the provisions of [land Adjudication Act](#) could not therefore apply to the Forest Land.
97. On issue number 4, the 5th and 6th Respondent submit that it was lawful for the beacon boundary committee to identify and fix a permanent boundary and hence allow the Adjudication Officers to perfect the register so as to enable issuance of titles.
98. On issue number 5, the 5th and 6th Respondent submit that the Petitioners had no identifiable proprietary rights capable of protection within the Forest Land, and the 5th and 6th Respondents place reliance on the decision in the case of David Kiptum Yator & 23 others vs Attorney General & 15 others (2020) eKLR.
99. On reliefs, the Court was urged by the 5th and 6th Respondents to dismiss the Petition for being a non-starter and in submitting so, the 5th and 6th Respondents place reliance on the decision in the case of Yusuf Gitau Abdalla vs Building Centre (k) LTD. & 2 Others.
100. On costs the 5th and 6th Petitioners submit that costs follow the event and hence the petition is to be dismissed with costs.
101. The 7th and 8th Respondents did not file submissions as they did not take part in the proceedings as earlier observed in this judgment.
102. Before framing issues for determination, the petition and the respective response settled a few non-contested facts which the Court notes as follows; -
 - i. By proclamation No. 76/1936, Nandi North Forest was declared to be part of Nandi Nature Reserve with its boundaries stated in the proclamation.
 - ii. That vide legal notice No. 174/1964 Nandi North Forest was declared as Central Forest.
 - iii. That Kamwega Land Adjudication Section was declared as an Adjudication Section vide the Notice dated 16/8/1988.
 - iv. The acreage of Nandi North Forest vide the legal Notice No. 174/1964 was 10,500.71. Ha while the Kamwega Adjudication Section measured 3,048 Ha.
103. Upon perusal of the petition and the supporting affidavit perusal of the replying affidavits filed, consideration of the evidence produced before Court as well as the elaborate rival submissions filed by the parties, the Court frames the following as issues for determination.
104. The first and second issues are issues of law and shall be preliminary in nature with the possibility of disposing the petition.
 - i. Whether the Courts jurisdiction has properly been invoked in view of Section 18 and 19 of the [Land Registration Act](#).
 - ii. Whether the Petitioner's obtained the requisite consent under Sections 30 of the [Land Adjudication Act](#) prior to filing of the petition.



- iii. Whether Kamwega Adjudication Section comprised portions of Nandi North Forest and if so were the portions degazetted?
- iv. Whether the Petitioner's proprietary rights were infringed
- v. What reliefs ought to issue
- vi. Who bears the costs of the suit?

Analysis and Determination: -

105. This petition presents the possible conflict between proprietary rights on the one hand and environmental conservation on the other hand.
105. In their submissions before Court the Petitioner and the Respondents both allude to the same, and the Petitioner submits that in consideration of public policy and issues of global warming the Government through the respective cabinet secretaries be at liberty to negotiate with them on appropriate compensation; while the 1st, 2nd, 3rd, 4th and 9th Respondents at paragraph 75 of their submissions submit that the Court has a role to ensure that forests are preserved as they aid in carbon sinking thereby alienating harmful climatic changes, and they cite Article 69 of *the Constitution* the obligation to take appropriate measures in protection and safeguarding of the environment.
107. The 5th and 6th Respondents vide paragraph 60 of their submissions also allude to the environmental issues as they submit that a public forest ought to be preserved for the benefit of all the citizen of the Republic of Kenya, and that members of Kamwega Adjudication scheme cannot legally seek to individual benefit from the forest in their personal capabilities by having plots within the forest.
108. In light of the above submissions by the parties which recognize the possibility of a conflict between proprietary rights and environment and conservation, the Court shall now proceed to examine and analyze the issues for determination that have been framed above.
109. On issue number 1, as to the Court lacking jurisdiction as the claim is a boundary dispute, the Respondents submit that under Section 18 and 19 of the Land Registration Acts, the first part of call for determination of a boundary dispute is the Office of the Land Registrar and the Court lacks jurisdiction to determine the dispute. The Respondents have cited a number of decisions in support of this limb of submissions. The Petitioner did not submit on the issue of jurisdiction of the Court in light of Section 18 and 19 of the *Land Registration Act*.
110. The Court agrees that the Respondent's have highlighted the correct proposition of the law in respect of boundary disputes that the Court lacks jurisdiction, however in this instant petition as observed in the foregoing paragraphs involves multifaceted issues, including the issues of boundaries, issues of proprietary rights under Article 40 and issues of Environmental conservation and protection under Article 69 of *the Constitution*. When faced with such a multifaceted issues, then the land Registrar would not have the jurisdiction to determine the same and this Court is thus clothed with the requisite jurisdiction. In arriving at the above finding and conclusion, the Court is guided by the Supreme Court decision in *Petition No. 7/2023 Abidha Nicholus vs Attorney General & 7 others 2023 (KESC) 113 KLR* delivered on 28th December 2023.
111. Whereat paragraph 120 the supreme Court observed.

“in addition to the above findings since the Appellants claim is multifaceted by his own choice, the most appropriate forum for the determination of his petition was the ELC which



would then interrogate and determine them based on such facts and law as shall be placed before it....”

112. The above decision being a later decision that the Kiboss Distillers Case whose appeal had been upheld by the Supreme Court with regard to multifaceted claims and which was cited by the Respondents, spells the latest legal position in respect to multifaceted claims as the ones before Court and the objection on the Court’s jurisdictions on this ground thus fails.
113. Issue number 2 is closely related to issue number 1. The Respondents submit that due to lack of consent by the Land Adjudication Officer as required under Section 30 of the Land Adjudication Act, the instant matter should not have been filed. In support of this submissions the 5th and 6th Respondents place reliance on the decision in the case of Benjamin Okwaro Estika vs Christopher Anthony Ouko & another 2013. The Petitioners submissions are silent on this although I note from the petition and supporting affidavit thereto annexure JKM10, is a letter under the hand of E. A. Ochanda dated 22/1/2001 titled to consent of adjudication officer for hearing of cases.
114. Indeed Section 30 (i) of Cap 284 bars the institution of any civil proceedings concerning an interest in Land in an adjudication section until the adjudication register for that section has become final in all respect under section 29 (3) of this Act.
115. The Consent exhibited by the Petitioners was dated 22/01/2022 and it was to be valid for 60 days only from the recording of the said letter. That consent must thus be deemed to have been issued for purposes of the Judicial Review matter filed at Kisumu and it was not issued for the purposes of this petition. Which brings us to the question as to whether a consent was necessary for purposes of this petition. The petition before Court is a petition to enforce fundamental freedoms in the Bill of Rights the rights are said to have been violated, infringed or threatened and therefore it is a petition under Article 22 of the constitution. Constitutional petitions under Article 22 may under Article 23 (3) (f) seek orders of judicial review, such petitions do not seek leave before commencement unlike a litigant seeking judicial review under Order 53, who must before commencement of the Judicial Review seek leave of the Court.
116. By parity of reasoning this being a petition seeking determination under Article 22 and Article 23, then the issue of the consent under Section 30 would also not be necessary, as leave is not sought to commence reliefs for Judicial Review under Article 23 (3) (g). It would be a limitation to litigants seeking enforcement of fundamental rights under Article 22 and 23 of the constitution to first seek to consent of the land Adjudication Officer, although such consent would be required in a normal civil suit or civil proceedings but not in constitutional petition.
117. This being a constitutional petition it is my humble view that the consent required under Section 30 of Cap 284 is not required. This is answer to issue number 2, the Petitioners could institute the present petition without the need of obtaining the consent under Section 30 of cap 284.
118. The Court shall now analyze and determine issue no. 3 whether Kamwega Adjudication Section comprised sections of Nandi North forest Reserve.
119. As has been observed earlier in the judgment, Nandi North Forest Reserve was first proclaimed by Legal Notice No. 76/1936, and declared a central Government Forest vide legal Notice No. 174 dated 20/5/1964.
120. The Minister for Natural Resources declared the same to be a central forest vide powers conferred to him under paragraph 22 (2) of schedule 2 of the constitution. The said legal notice was to operate



retrospectively from 1st June 1963. Section 114 (2) of the Independence constitution equally provided and declared certain areas including Mosop to be Trust Land.

121. It is the Petitioners case and submissions that by virtue of Section 114 (2) of the independence Constitution and since the forest was in the Mosop Area, then the same ought to have been part of Trust Land to be administered by the Mosop Area Council for the benefits of its inhabitants and that the local inhabitants had proprietary rights that were ascertainable by Adjudication hence the contested Area formed part of Kamwega Land Adjudication Areas.
122. The Respondents on their part submit that upon gazettelement of the Nandi North Forest in 1936 and eventually gazettelement as a central reserve in 1964, the same become a national forest, and public land is it was alienated for that purpose and it was not available for further alienization through allocation or adjudication.
123. A joint survey between the Director of Survey and the Head of Mapping and Resources at Kenya Forest Service was ordered and was reported was filed and produced in evidence. The report stated that at time of gazettelement the Nandi North Forest was 11,845.41 Ha, but at time of survey the same was 10,500.71 Ha, and the findings were that 956.95Ha had been encroached.
124. The gazettelement notice No. 96/1964thus converted Nandi North Forest as public land within the meaning of Article 62 (1) (g) of *the Constitution*.
125. The Kamwega Adjudication Section was declared by a Notice dated 2/8/1988. It was to cover an acreage of 3048 hectares.
126. As the Nandi North forest was declared a central forest it did not form part of the trust land under Section 114 (2) of the retired constitution. This public land could only be available for further alienation upon it being degazetted.
127. Whereas the Petitioners submits and argue that the portion in the Nandi North Forest, they occupy was theirs, they did not produce a Gazette Notice that declared that the portion had been degazetted hence it was available for further alienation as it become unalienated Government Land in accordance with Section 4 of the Forest Act. In fact, in their submissions their submissions the Petitioner have submitted that there was discrimination since some portion of the Nandi North Forest in Koiban Area had been degazzetted.
128. In arriving at the said finding, I am persuaded and guided by the ELC decision in George Matua Ndoto vs Kenya Forest Service, Chief Land Registrar & the Hon. Attorney General where at paragraph 110 the Court quoted the process of degazetting forest land as was articulated in the case of Clement Kipchirchir & 38 others Vs The Principal Secretary, Ministry of Lands, Housing & Urban Development & 3 others where the Court stated as follows;

“ 4(1). The other questions to determine assuming that the 34 titles are actual land titles, is whether these titles were properly acquired. It is not denied.....

- 4 that is indeed what was provided for by the Forest Act (cap 285) now repealed
- (2) by the Forests Act No. 7/2005) which was then in operation at the time that the forest herein was purportedly allocated Section 4 of the said statute provided as follows;-

Section 4. (i) The Minister may from time to time, by notice in the Gazette.



- a) declare any unalienated government land to be a forest area
 - b) declare the boundaries of a forest and from time to time alter those boundaries
 - c) declare a forest area shall cease to be a forest area
- 2) Before a declaration is made under paragraph (b) or paragraphs 6, twenty – eight days’ notice of intention to make the declaration shall be published by the Minister in the Gazette.

129. The onus was on the Petitioners to prove that the portion they claim to have formed part of the Kamwega Land Adjudication Section within Nandi North Forest had been degazetted under the provisions of section 4 of the Forest Act (cap 385) which was then in force.
130. Thus, in answer to issue number 3, the Court finds that no portion of Nandi North Forest being forest Land could have formed part of Kamwega Adjudication Section.
131. Did the Petitioners thus have proprietary interests and legitimate expectation? The Petitioners acquired proprietary interests in Kamwega Adjudication Section upon their interests being noted in the adjudication process, and as has been earlier found the Nandi North Forest area did not form part of Kamwega Land Adjudication Section, hence no proprietary interests could accrue on the contested area in the survey report.
132. Having found that Nandi North Forest was public land, and that no portion was degazetted so as to form part of Kamwega Land Adjudication Section, and noting further that having been alienated on 1st June 1963, as a central forest, the same was not part of community trust land under section 114(2) of the repealed constitution and there is no legitimate expectation on the Petitioners to ascertain proprietary rights through adjudication on public land.
133. Since the public forests played an important role in reduction of carbon foot print as rightly submitted by the Respondents, and noting the role of conserve environment and natural resources, there can be no proprietary rights that an individual may claim over in public forest area, and the Petitioners claim over in portion of Nandi North Forest is thus unconceivable and there is no proprietary rights over a public forest and no legitimate expectation can arise therefrom and the Petitioners has thus no established any infringement or violation or thread to infringement of the Petitioners rights to property under Article 40 or the Fair Administrative Action.
134. The Petitioners having failed to prove the proprietary interest in a public forest the petition thus fails in its entirety.

Disposition: -

135. The petition hereby fails and it is dismissed with costs as it was a self-aggravement petition and not a public interest litigation.
136. As the occupation of the Petitioner on parts of the Nandi North Forest was illegal there shall be no orders of compensation.
137. The 5th and 6th Respondents shall in liaison with the National Land Commissions issue a Notice under section 152 to the occupiers of the portions forming Nandi North Forest.



138. The issuance of the titles in respect of Kamwega Land Adjudication Section which was halted by virtue of this petition shall proceed, but such titles shall not to comprise of any land within Nandi North Forest.
139. Having dismissed the petitions, any interim orders that had been issued pending determination of this petition are hereby discharged.
140. The costs are awarded to the 1st, 2nd, 3rd, 4th, 5th, 6th and 9th Respondents.
141. Judgment accordingly

JUDGMENT DATED AND DELIVERED AT KAPSABET THIS 30TH DAY OF APRIL 2024.

HON. M. N. MWANYALE

JUDGE

In the presence of: -

1. Mr. Murgor for the Petitioners
2. Mr. Ogongo for the 5th & 6th Respondents
3. Mr. Odongo for 1st, 2nd, 3rd, 4th & 9th Respondents

