



**Tarus & 51 others v Attorney General & 4 others; Kebenei & 15 others (Interested Parties)
(Constitutional Petition 8 of 2020) [2025] KEELC 819 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 819 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
CONSTITUTIONAL PETITION 8 OF 2020
EO OBAGA, J
FEBRUARY 26, 2025
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ARTICLES 3(1), 19(1)(2), 21(1), 28,
29, 40 AND 43 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION
OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE
AND PROCEDURE RULE) RULES 1, 2, 3, 4, 10, 11, 20, 21, 33
AND
IN THE MATTER OF SECTIONS 18, 37, 38 & 43 LIMITATIONS OF ACTIONS ACT
AND
IN THE MATTER OF ORDER 37 RULE 7 CIVIL PROCEDURE RULES
AND
IN THE MATTER OF ABUSE, THREAT TO ABUSE AND INFRINGEMENT OF THE
PETITIONERS' HUMAN AND FUNDAMENTAL CONSTITUTIONAL RIGHTS
AND
IN THE MATTER OF A PORTION OF TITLE NO. KPLOMBE/KIPLOOMBE, BLOCK
II (FORMERLY KNOWN AS LR. NO. 9723 (LR. 15449) SERGIT RIVER FARM

BETWEEN

ERICK KIBIWOTT TARUS 1ST PETITIONER



LUDIA SAMOEI	2 ND PETITIONER
KELMAS INVESTMENT LIMITED	3 RD PETITIONER
JAPHATE KIPKEMBOI MAGUT	4 TH PETITIONER
EZEKIEL RONO	5 TH PETITIONER
SERGOIT RIVER CATTLE DIP	6 TH PETITIONER
REGISTERED TRUSTEES, AIC CHURCH	7 TH PETITIONER
THE BOARD SERGOIT RIVER FARM SCHOOL	8 TH PETITIONER
PAULIMA CHUMA	9 TH PETITIONER
ELIJAH CHEMAIYO	10 TH PETITIONER
LILIAN JERUTO KITUR	11 TH PETITIONER
STANLEY KIPTOO METOO	12 TH PETITIONER
WILFRED KIMALAT	13 TH PETITIONER
QUANDS ACHIM	14 TH PETITIONER
JOSHUA KIPROTICH MAGUT	15 TH PETITIONER
ROSA JERUBET BIWOT	16 TH PETITIONER
JEPLETING MITEI	17 TH PETITIONER
JOAN BERNARD SICARD	18 TH PETITIONER
GRACENTINI SICARD	19 TH PETITIONER
SAMWEL KIPRONO SAMOEI	20 TH PETITIONER
PAUL KIPSANG MENGECH	21 ST PETITIONER
EDWARD KIPLAGAT SOI	22 ND PETITIONER
MARTHA ONYANGORE	23 RD PETITIONER
BERNATE ANYONGO	24 TH PETITIONER
MARY NEKESA SOGHO	25 TH PETITIONER
AUGUSTINE LELIT	26 TH PETITIONER
NORBART MAINGI MUYA	27 TH PETITIONER
MONICA JERUTO RUTO	28 TH PETITIONER
NICHOLUS ROP KIPKEMBOI	29 TH PETITIONER
NELSON KIPRONO ORGUT	30 TH PETITIONER
BENJAMIN KUTO	31 ST PETITIONER
LINUS CHERUIYOT	32 ND PETITIONER
PAUL KIPKORIR SUM	33 RD PETITIONER



KIMUTWAL CHERUIYOT	34 TH PETITIONER
JOSEPH KOMEN	35 TH PETITIONER
SISUMA INVESTMENT	36 TH PETITIONER
BRI ROP	37 TH PETITIONER
DAVID KIMUREI MENGICH	38 TH PETITIONER
JOSEPH KIBET ROTICH	39 TH PETITIONER
PERES JEMELI KOIMUR	40 TH PETITIONER
FRANCIS OSANO OMWENGA	41 ST PETITIONER
DANIEL KOMEN	42 ND PETITIONER
JOSHUA KIPLETING SULAI	43 RD PETITIONER
JOHN KIPKEMBOI KOECH	44 TH PETITIONER
PROF GABRIEL MISANGO ANABWANI	45 TH PETITIONER
DAVID KIPTALAM BETT	46 TH PETITIONER
MARY OLOO SLA	47 TH PETITIONER
DR SILVANO KIPYEGO ROTICH	48 TH PETITIONER
EVERLINE JEPKEMBOI KEINO	49 TH PETITIONER
BARABARA LAGAI	50 TH PETITIONER
PROF MARTIM HENRY KIMUREI	51 ST PETITIONER
WILSON CHUMA	52 ND PETITIONER

AND

THE ATTORNEY GENERAL	1 ST RESPONDENT
NATIONAL LAND COMMISSION	2 ND RESPONDENT
CHIEF LAND REGISTRAR	3 RD RESPONDENT
ESTATE OF ESMAIL NURANI	4 TH RESPONDENT
ESTATE OF NYONGIO KIMITEI	5 TH RESPONDENT

AND

ZADRACK KEBENEI	INTERESTED PARTY
JAPHETH KIPKEMBOI MAGUT	INTERESTED PARTY
WILFRED KIPTUM KIRU	INTERESTED PARTY
GRACE M SICARD	INTERESTED PARTY
NERBERT MAINGI MUYA	INTERESTED PARTY
BENSON KIPCHUMBA CHERONO	INTERESTED PARTY



MARGARET JEMISTO TUITOEK	INTERESTED PARTY
JUDITH CHEBET KEMBOI	INTERESTED PARTY
LILIAN JERUTO KITTUR	INTERESTED PARTY
ELIJAH CHEMAIYO	INTERESTED PARTY
WILFRED KIMALAT KITUR	INTERESTED PARTY
MARTHA ONYANGORE	INTERESTED PARTY
JOAN JEPKORIR KOMEN	INTERESTED PARTY
BENJAMIN KUTO	INTERESTED PARTY
NELSON ORGUT	INTERESTED PARTY
BOARD OF MANAGEMENT AIC ITIGO PRIMARY SCHOOL BOARD OF MANAGEMENT AIC ITIGO SECONDARY SCHOOL	INTERESTED PARTY

JUDGMENT

Introduction

1. By an amended Petition dated 14th November, 2022, the Petitioners sought the following reliefs:
 - a. A declaration that the Petitioners are entitled by effluxion of time to 80 acres to the 1st Petitioner and 5 acres each to the 2nd - 52nd Petitioners to be excised from title No. KIPLOMBE/KIPLOMBE/BLOCK II (Formerly LR. No. 9723 IR 15449).
 - b. Alternatively an order directing the 1st - 3rd Respondents to complete the conveyance they began in 1985 in favour of the Petitioners over title No. KIPLOMBE/KIPLOMBE/BLOCK II (Formerly known as LR No. 9723 IR 15449) so as to be in tandem with the ground.
 - c. A declaratory order that each and every Petitioner named herein has acquired registrable interest over their respective holding or subplot arising from the subdivision of KIPLOMBE/KIPLOMBE/BLOCK II (Formerly known as LR 9723 IR 15449) Sergoit River Farm.
 - d. A declaration that the 4th Respondent or anybody claiming under them have had their rights extinguished by prescription over their share of 477 acres of title No. KIPLOMBE/KIPLOMBE/BLOCK II (Formerly known as LR 9723 IR 15449) Sergoit River Farm and the same now vest in the Petitioners and the public amenities therein.
 - e. A declaration that the Respondents, their personal representatives or anybody claiming under them be stopped and restrained from disposing, evicting and or interfering with your Petitioners' user and or possession of their individual land holdings being subdivision of title No. KIPLOMBE/KIPLOMBE/BLOCK II.
 - f. Costs be provided for.

Background

2. The history of this Petition can be traced from 1st July, 1958 when the Governor and Commander in Chief of the Colony and Protectorate of Kenya on behalf of Her Most Gracious Majesty Queen



- Elizabeth the second issued a grand over LR No. 9723 (Original nuber 897/6) to Donald James Gear measuring 795 acres for a term of 950 years with effect from 1st July, 1958.
3. There is no clear record on how and when the land was transferred to Nyongio Kimitei and Diamondali Nurani. This is because the original title was lost from the Lands Registry. According to the materials filed by the parties in this petition, the petitioners and the Respondents are giving backgrounds which only suit their positions. It is therefore not easy to trace the history between the time the land was transferred from Donald James Gear to the time when the Moiben Divisional Land Control Board at its meeting of 13th March, 1985 approved subdivision of the land. During this meeting, the Board approved a proposal to partition the land into 477 and 377 acres in favour of Bahadurali Nurani and Nyongio Kimitei. The approval was made under minute number 73/85.
 4. Under minute number 74/85 a proposal by Mr. Bahadurali Nurani to sell 377 acres to the Government of Kenya at a consideration of Kshs.1,696,500/= was approved. Under minute 75/85 a proposal by Mr. Bahadurali to sell 80 acres to Eric Tarus at a consideration of Kshs.180,400/= was approved. In the same meeting a proposal by Mr. Bahadurali to transfer 20 acres to the Government of Kenya by way of gift was approved.
 5. On 25th July, 1985, the Provincial State Counsel Rift Valley Province wrote to the District Land Registrar Uasin Gishu District asking him to cause subdivision of the 377 acres and give the same to the landless. The 377 acres were subdivided into blocks of 5 acres each and these are the plots which the Petitioners claim were given to them.

Petitioners' Case

6. It is the Petitioners' case that vide legal notice number 95 of 8th July, 2005 property number 9723 was converted and it became KIPLOMBE/KIPLOMBE/BLOCK II. Green cards were opened in the names of Erick Kibiwott Tarus, Benjamin Kuto and Ezekiel Komen. An area list comprising 73 members was prepared.
7. The widow of Nyongio Kimitei, Anne Kimitei complained to the police over dealings on the land. In 2012, the 1st Petitioner, the 31st Petitioner and Ezekiel Komen together with others were arrested and charged before Milimani Chief Magistrates court for various offences related to the property. They were however acquitted of all the charges in August, 2017.
8. The Petitioners are now apprehensive that powerful forces are out to dispossess them of their land. They state that they have built permanent houses on the property, put up schools where their children and grandchildren go to. They therefore contend that they have been on the property for nearly 40 years and have acquired prescriptive rights over their respective portions and that they require protection.
9. The Petitioners state that in 1990 they filed Originating Summons No. 90 of 2004 at the High Court in Nairobi. They obtained orders that they had acquired the land (Parcel 9723) by adverse possession. A vesting order was issued but the same was vacated to allow Anne Kimitei to be heard. This case was transferred to Eldoret where it was registered as ELC No. 47 of 2017. This case was however withdrawn by the Petitioners.
10. The Petitioners state that the property is a prime one which was valued at Kshs.954,000,000 in 2012 and it is now worth billions of shillings. It is on this basis that the Petitioners are seeking the reliefs in the Petition.



1st and 3rd Respondents' case as well as 16th and 17th Interested parties case

11. The 16th Interested Party is Board of Management AIC Itigo Primary School. The 17th Interested Party is Board of Management AIC Itigo Secondary School. The two interested parties were joined in this Petition on 26th July, 2022. These two interested parties, the Chief Land Registrar and the Attorney General filed a joint response to the amended Petition. They state that what the Petitioners are seeking are civil wrongs which are in the nature of adverse possession and are not Constitutional issues.
12. The Respondents contend that LR. No. 9723 (IR 15449) which was later converted to KIPLOMBE/KIPLOMBE/BLOCK II has always been private property and not public property hence outside the scope of alienation by the 1st and 3rd Respondents. The 1st Respondent had no mandate whatsoever of alienating, disposing, dealing with or in any other manner purporting to allocate private land to private citizens. They state that the responsibility of allocating land was always on the president through the Commissioner of Lands who is now known as the National Land Commission. Private land could only be disposed of by consent of the registered proprietor.
13. The Respondents further state that the allegation by the Petitioners that the 1st Respondent sanctioned the allocation is false and if it ever happened, then it was without foundation in law and any such allocation could not confer any legitimate interest in anyone. They argue that Article 40 of *the Constitution* allows anyone to acquire land in any part of the country and that protection is only afforded to those who have acquired the land lawfully.
14. The argument by the Petitioners that they have acquired their respective portions by effluxion of time is not a Constitutional issue. The Petitioners should have filed a Civil Suit against the 4th and 5th Respondents who own the land and not a Constitutional Petition. The Respondents further argue that the jurisdiction of this court is ousted through the doctrine of exhaustion since there are available mechanisms for resolving the Petitioners' dispute. They state that the Petition does not raise any Constitutional issues to warrant this court to entertain the same.
15. In the alternative, the 16th and 17th interested parties state that they occupy 7.4 hectare out of LR No. 9723 being land they were allocated or purchased. They state that the allocation followed a surrender of part of the LR 9723 to the government.

The 2nd Respondents' case

16. The 2nd Respondent neither entered appearance nor filed any response to the Petition.

The 4th Respondent's case

17. The 4th Respondent entered appearance and later filed a preliminary objection which was dismissed on 20th April, 2023. There was no response filed by the 4th Respondent.

The 5th Respondent's case

18. The 5th Respondent contends that the Petitioners are illegally residing on LR No. 9723 and that the land described as KIPLOMBE/KIPLOMBE/BLOCK II does not exist within the Uasin Gishu County Land Registries. The 5th Respondent states that LR. No. 9723 measuring 795 acres was purchased by Diamondali Nurani and Nyongio Kimitei who were registered as tenants in common in equal shares. Later Diamondali relocated to India. He sold his 50% share to his brother Bahadhurali Nurani. Later Bahadhurali Nuran sold his share to Nyogio Kimitei.



19. Later on, the land was invaded by among others the 1st Petitioner who used his position as paramount chief in concert with powerful individuals to subdivide and allocate the land to themselves. The 4th Respondent contends that conversion of LR. 9723 into KIPLOMBE/KIPLOMBE/BLOCK II was done illegally and that this court cannot protect grabbers who are claiming to have acquired prescriptive rights over the land belonging to the 4th Respondent.
20. The 4th Respondent further contends that the Moiben Divisional Land Control Board was illegally convened for the sole purpose of grabbing the land which was allocated illegally to people including senior government officials. The 4th Respondent states that Nyongio Kimitei complained against the actions of the Petitioners in vain. The Petitioners even obtained a vesting order claiming that they had obtained their respective portions by adverse possession but their order was vacated as an adverse possession claim could not be sustained against the Chief Land Registrar. Despite vacation of the vesting order, the Petitioners went ahead to have illegal registrations and are now claiming to have acquired the land by adverse possession which cannot be maintained in a Constitutional Petition.

The 1st to 15th Interested Parties Case

21. The 1st to 15th Interested parties were joined to this Petition on 26th July, 2022. They entirely support the Petition. What is interesting is that seven of the interested parties are also Petitioners. The 2nd, 4th, 9th, 10th, 11th, 12th, and 14th interested parties are the 4th, 19th, 11th, 10th, 13th, 23rd and 31st Petitioners respectively. Their joinder as interested parties while aware that they were Petitioners is an abuse of the process of the court.
22. Some of the interested parties claim that they purchased their land from those who had been allocated land which the government had acquired. They state that the government had acquired 377 acres from Bahadurali Nurani which was then shared out to various individuals. The interested parties state that the process of registration of their portions was stalled following the vacation of the vesting order which was given in Nairobi High Court Originating Summons No. 90 of 2004. They argue that they have been on the suit property for a period of over 20 years and that they have acquired their respective portions by way of adverse possession which should be protected through this Petition.

Parties Submissions

1st Petitioner's Submissions

23. The 1st Petitioner filed his submissions on 16th January, 2024. He submitted that he entered the suit property in 1964 following award of 80 acres vide a decision of the Rift Valley Land Control Board Appeals Tribunal in 1985. Upon this decision, he proceeded to the Uasin Gishu District Treasury at Eldoret where he paid for his land.
24. The 1st Petitioner submitted that the Petition filed herein meets the Constitutional threshold of a Petition. He relied on the case of Fred Munialo Maclous -vs- Mathew Wamalwa Wafula & 2 others (2020) eKLR where it was stated as follows;

“Each case must be considered on its own peculiar circumstances and it is not a principle of law that a Constitutional petition cannot be filed where there is another remedy which the petitioner could have pursued. A party is also entitled to pursue the remedy that would be most efficacious in addressing the grievance on addressing the grievance which has been pleaded before the court.”



25. The 1st Petitioner also submitted that he had acquired the suit property through adverse possession. He relied on the case of Mombas Teachers Co-operative Savings and Credit Society Limited (infra) and Samuel Kihamba (infra).

2nd to 52nd Petitioners' submissions

26. The Petitioners filed their submissions on 19th January, 2024 and further submissions on 1st February, 2024. The Petitioners submit that the government through the 1st Respondent put in a mechanism of subdividing 377 acres to the Petitioners. The 1st Petitioner had been given 80 acres whereas the other Petitioners were each given parcels measuring 5 acres each. They submit that as the 1st Respondent embarked on the process of subdivision, the government omitted to have the original title surrendered and the land registered in her name in order to properly allocate the land to the Petitioners.
27. The Petitioners had obtained a vesting order on the basis that they had acquired their respective portions by way of adverse possession. This vesting order was however vacated. They submit that this has now left them in a precarious position as they have no titles. They submit that they have been on the land for over 40 years and have therefore acquired prescriptive rights over the same.
28. The Petitioners submit that their rights under Articles 19(1), 19(2) 21(1), 23, 29, 40, and 43 of *the Constitution* have been violated. They further submit that the arraignment of some of them in Nairobi CM Criminal Court No. 1351 of 2012 (Republic -vs- Erick Kibiwott Tarus & 5 others) infringed their rights under the Bill of Rights.
29. The Petitioners relied on the case of Mombasa Teachers Co-operative Savings & Credit Society Limited -vs- Robert Muhambi Katana & 15 others (2018) eKLR where the court stated as follows;

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.”

30. The Petitioners also relied on the case of Samuel Kihamba -vs- Mary Mbaisi (2015) eKLR where it was stated as follows;

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land .”

1st and 3rd Respondents and 16th and 17th Interested Parties Submissions

31. It was submitted that the suit property has always been private property which could not be alienated by the government. Reliance was placed in SCPT No. 32 of 2022 (Consolidated with SCPT No. 35 of 2022 and SCPT No. 36 of 2022 Fanikiwa Limited & Others -vs- Sirikwa Squarters & others where the Supreme Court stated that the purported allocation of private land by the late H. E. Daniel Toroitich Arap Moi to Sirikwa squarters by the Commissioner of Lands was ultra vires the powers of the President and the Commissioner of Lands.



32. They submitted that the purported allocation of private land through the office of the Attorney General was null and void.
33. The 1st and 2nd Respondents as well as the 16th and 17th Interested parties further submitted that the Petition did not meet the threshold set out in the case of Anarita Karimi Njeru -vs- Republic (1979 to 1980) KLR 1272.
34. The principles in the Anarita Karimi Njeru case (Supra) were restated in the case of Northern Nomadic Disabled Person's Organization (Nondo) -vs- Governor County Government of Garissa & another (2013) eKLR which stated s follows;
- “The Court of Appeal in Mumo Matemo case found that the petition did not meet the threshold in Anarita Karimi Njeru case for similar reasons like in this case where there is no evidence to support the allegations of violations of Constitutional provisions. As submitted by the Respondents, there is no evidence that any of the members of the Petitioner presented themselves for appointment and they were rejected. There is no evidence of the number of their members and the distribution of membership in all the counties in Northern Kenya given that their membership covers a region they refer to as Northern Kenya. There is no evidence to show how many of those members belong to Garissa County. There is no evidence to show how many of those members meet the criteria for appointment under Section 35 of the County Government Act.”
35. They further submitted that this Petition does not raise any Constitutional issues and as such this court does not have jurisdiction to deal with it. A constitutional issue was defined in the case of CNM -Vs- WMG (2018) eKLR where it was stated as follows:
- “18. A Constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute.”
- “20. When determining whether an argument raises a Constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.”
36. They submitted that a matter which is wholly dependent on statutory interpretation cannot be brought as a Constitutional issue. The issue being raised requires interpretation of the Government Lands Act (now repealed) Physical Planning Act (now repealed), Registered Land Act and the Office of the Attorney General.
37. The determination of whether a claim for adverse possession has crystalized will require interpretation of application of common law, the Civil Procedure Rules, Land Registration Act and the Limitation of Actions Act. A claim for adverse possession cannot be brought under a Constitutional Petition and cannot be sustainable against the 1st and 3rd Respondents.
38. It is submitted that this Petition is a civil claim laced with Constitutional undertones. Reliance was placed on the case of Trans Nzoia Chingano Grain Farmers Co-operative Society -vs- Hon. Attorney General & 4 Others (2013) eKLR and Parkire Stephen Munkasio & 14 others -vs- Kedong Ranch Limited where it was stated that a party cannot bring a claim of adverse possession in a Constitutional Petition as the Civil Procedure Rules clearly provide the manner in which such a claim ought to be brought to court and prosecuted.



39. In the case of Parkire Stephen Munkasio (Supra) it was stated as follows:

“I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with this argument. Claims for adverse possession are adequately addressed by the *Limitation of Actions Act*, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the Petitioners can assert a claim for adverse possession, a purely private law claim, through a Constitutional Petition. In deed, I doubt if there is a Constitutional violation which one will point at, when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession on behalf of the same parties herein has previously been litigated, the aspect possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.”

40. In *Edarus Salim Hussein & 6 others -vs- Shariffia Binti Salim & 3 others* (2022) eKLR Justice M. A. Odeny in dismissing a Petition seeking adverse possession orders stated that Constitutional Petitions must raise Constitutional issues and violation of rights under the Bill of Rights with specific Articles being quoted.

5th Respondent’s Submissions

41. The 5th Respondent submitted that a claim for adverse possession cannot be brought as a Constitutional Petition. The 5th Respondent also submitted that this Petition is subjudice as there is ELC 40 of 2019 involving the same parties and same property. The 5th Respondent argues that this Petition is an abuse of the process of the court.

The 1st DIVISION - to 15th DIVISION - Interested Parties Submissions

42. The Interested Parties submitted that they had proved that they have acquired their respective portions through adverse possession. They submitted that the court should strive to hear the parties on merits. They relied on the case of *Coast Development Authority -vs- Adam Kazungu Mzamba & 49 others* (2016) eKLR where it was stated as follows:

“Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In *Salat -vs- IEBC & 7 others, Petition No. 23 of 2014*, the Supreme Court reiterated that the above Constitutional provision accords precedence to substances, over form and in *Lamanken Aramat -vs- Harun Maitamei Lempaka, Petition No. 5 of 2014* the same court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The court concluded thus:

“The court’s authority under Article 159 of *the Constitution* remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice.”

43. The interested parties submitted that some of them were lucky to obtain titles and that their titles should be protected. They relied on Section 26 (1) of the *Land Registration Act* which states as follows;

26.



- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Analysis and Determination

44. I have considered the Petition, the response to the Petition, the submissions by the parties as well as the cases cited. The following are the issues for determination:
 - a. Whether the Petition raises issues worth to be considered as a Constitutional Petition.
 - b. Whether the rights of the Petitioners were violated as alleged.
 - c. Whether the court should grant the reliefs sought in the Petition.

Whether the Petition raises issues worth to be considered as a constitutional petition

45. The case of Anarita Karimi Njeru case (Supra) stated that a Constitutional Petition must state with precision the provisions of *the Constitution* which is alleged to have been violated, the manner in which it was violated, the evidence of violation and the loss suffered as a result of the violation.
46. In the instant case, the Petitioners have not stated with precision the provisions of Constitution which is said to have been violated and the manner in which it was violated. The single issue which the Petitioners are raising is the question of adverse possession. A claim of adverse possession requires interpretation of statute of Limitation Act, evidence of occupation and the size occupied has to be considered. This is not a matter which can be brought through a Constitutional Petition. As was held in the case of Trans Nzoia Chingano Grain Farmers Co-operative Society (Supra), a claim of adverse possession cannot be brought as a Constitutional issue.
47. In *Uhuru Muigai Kenyatta -vs- Nairobi Star Publications Limited (2013)*, Justice Lenaola (as he then was) held as follows:

“Where there is a remedy in civil law, a party should pursue the remedy and I say so well aware of the decision in *Haco Industries* where the converse may have been expression as the position. My mind is clear however that not every ill in society should attract a Constitutional sanction and as stated in *A.G -vs- S. K. Dutambala Cr. Appeal No. 37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

48. The issues being raised by the Petitioners should have been raised in a Civil Case where they should have adduced evidence of occupation which then would have given court opportunity to interpret the provisions of the *Limitation of Actions Act* and Civil Procedure Rules. The Petitioners had in fact filed an Originating Summons in Milimani High Court No. 90 of 2004. This case was against the Land Registrar. They obtained orders and a vesting order was issued. The vesting order was however



vacated. This case was transferred to Eldoret where it became ELC No. 47 of 2017. The Petitioners however withdrew this case. This was because they realised the futility of pursuing it as there cannot be an adverse possession claim against the government or its agency.

49. The Petitioners have now brought this Petition for adverse possession which does not raise any Constitutional issues for determination. This is purely a civil claim clothed as a Constitutional Petition. I therefore find that the Petition does not raise any Constitutional issues worth of consideration by this court.

Whether the rights of the Petitioners were violated as alleged

50. The Petitioners allege that their Constitutional rights under Article 40 of *the Constitution* were violated. Article 40 of *the Constitution* states as follows:

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - a. of any description; and 26 Constitution of Kenya [Rev. 2022]
 - b. in any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.
6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

51. In this Petition it has emerged that the Petitioners are alleging that the government through the Attorney General directed that 377 acres be subdivided and given to the landless people. The Petitioners have annexed a letter from the Provincial State Counsel giving directions to the Land Registrar Eldoret to move and survey 377 acres which was to be given to landless people. It is alleged



that the government had purchased the 377 acres from Bahadurali Nurani. There was no evidence adduced of any payment made by the government.

52. Even if there was any instructions to give land to the landless, those instructions were illegal and cannot be a basis of the Petitioners seeking to compel the government to complete an illegal process. The land was and is still private property which can only be alienated through lawful means. The Petitioners allege that the government forgot to register the land in her name before allocating it to the them. What the Provincial State Counsel was doing was an illegal act which was being pushed down his throat by the then powerful Provincial Administration Officials. If the list of the allottees is anything to go by, the same shows that the beneficiaries were senior government officials. They were not landless.
53. Article 40 (6) is clear that there cannot be protection to a property which is found to have been acquired unlawfully. As I have said hereinabove, there is no evidence that the government purchased the 377 acres as alleged. The allocation to the Petitioners was unlawful. The Petitioners cannot therefore seek to be protected under Article 40 of *the Constitution*.
54. The Petitioners are also claiming that their rights under Article 43 of *the Constitution* have been violated. The Petitioners cannot seek to realize their economic and social rights over private property. The Court of Appeal in the case of Kenya Airports Authority -vs- Mitu-Bell Welfare Society & 2 others (2016) eKLR clearly dealt with the issues of social economic rights. The position in this case was adopted by the Supreme Court in its judgement in Mitu-Bell Welfare Society -vs- Kenya Airports Authority & 2 others: Initiative for strategic Litigation in Africa (Amicus Curie) (Petition 3 of 2018) (2021) KES C 34 (KLR) (11 January, 2021) where it was stated as follows:

“We have surveyed the emerging judicial decisions in Kenya in an attempt to discern the emerging principles to address the seeming tension between private property and realization of socio-economic rights. *The Constitution* in the Bill of Rights recognizes and protects the right to private property. Whereas socio-economic rights are recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer proprietary rights in the land of another. In Latin, socio-economic rights cannot confer rights in alieno solo. Under the law as it stands today, enforcement and realization of socio-economic rights does not override the provisions of the *Limitation of Actions Act* (Cap 2 fo the Laws of Kenya). Prescriptive rights to land cannot be acquired in the name of enforcement of socio-economic rights. It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic right, it is not the role or function of courts to re-engineer and redistribute private property rights.”

55. The Petitioners are alleging that their rights under Article 29 of *the Constitution* were violated. They claim that some of the Petitioners were arrested and charged in Nairobi Chief Magistrate court in Criminal Case No. 1351 of 2012. This court does not have jurisdiction to interrogate whether the rights of the 1st and 31st Petitioners were violated as that is a preserve of the High Court. This is the same case with Article 28 of the Constitution. The High Court is the proper court to address any alleged violation of Article 28 and 29.

Whether the court should grant the reliefs sought in the Petition.

56. The Petitioners are seeking a declaration that they have acquired their respective portion by way of adverse possession. Firstly, this cannot be granted as there can be no claim of adverse possession against the government. Secondly, there is no claim against the owners of the suit property. The Estate of Esmail Nurani has no interest in the suit property. In fact Esmail Nurani had been charged in Criminal



Case No. 1362 of 1997 for attempting to lay claim to the suit property through forgery but he died before the case was heard.

57. The Estate of Nyongio Kimiti owns the suit property. There were allegations that Nyangio Kimiti had intention to purchase the share of Bahadurali Nurani but this did not materialize. There is no evidence that this was the case. The title to the entire property got lost. The provisional certificate of title which was issued pursuant to Gazette Notice No. 4024 of 30th April, 2021 is incomplete as it does not show the entry of the name of Nyongio Kimiti and Bahadurali Nurani and their respective shares. It is also not clear whether the shareholding of the two was 50:50 or 60:40%.
58. The Petitioners cannot therefore be granted orders of adverse possession. Equally the government cannot be compelled to complete a process which was illegal in the first place. As matters stand, it is the Estate of Nyangio Kimiti who owns the suit property and they cannot be restrained from dealing with the same including evicting the Petitioners therefrom.

Disposition

59. From the above analysis, it is clear that the Petitioners' Petition is devoid of merit. The same is dismissed with costs to the 1st, 3rd, and 5th Respondents.

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HON. E. O. OBAGA

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF FEBRUARY, 2025.

In the presence of:

Ms. Irura for Mr. Gathara for 2nd to 52nd Petitioners.

Ms. Chesoo for Mr. Mathai for 1st Petitioner

Mr. Ombuto for 5th Respondent.

Mr. Ogongo for Mr. Barasa for 1st to 15th Interested Parties.

