



Murusi & 17 others v County Government of Marsabit & 3 others; National Land Commission & another (Interested Parties) (Environment & Land Petition 007 of 2021) [2024] KEELC 5541 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5541 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISILO
ENVIRONMENT & LAND PETITION 007 OF 2021
PM NJOROGE, CK YANO & CK NZILI, JJ
JULY 19, 2024

BETWEEN

- LERUK MURUSI 1ST PETITIONER**
- LECHEKU ARIGELE 2ND PETITIONER**
- LEADO STEPHEN LTERIOS 3RD PETITIONER**
- L'TETIAN LERUPES 4TH PETITIONER**
- JIMMY LENEPE 5TH PETITIONER**
- JAMES MARLENI 6TH PETITIONER**
- LPIRIKON NEEPE 7TH PETITIONER**
- PATRICK KURAKI 8TH PETITIONER**
- SAMUEL LOIBARBAN 9TH PETITIONER**
- FRANCIS LEADUMA 10TH PETITIONER**
- HON DANIEL BURCHA 11TH PETITIONER**
- HON ASUNTA 12TH PETITIONER**
- LENJODO DO MAIDAT LOLBALANGA 13TH PETITIONER**
- L'ETEYON NURE 14TH PETITIONER**
- IMARIATON LOIBALANGA 15TH PETITIONER**
- STEPHEN LESOROH GAMBARE 16TH PETITIONER**
- STEVEN TIMBOR 17TH PETITIONER**
- RENDILLE PROFESSIONAL ASSOCIATION 18TH PETITIONER**



AND

COUNTY GOVERNMENT OF MARSABIT 1ST RESPONDENT
CHIEF OF THE KENYA DEFENCE FORCES 2ND RESPONDENT
CABINET SEC MINISTRY OF DEFENCE 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY
THE KENYA WILDLIFE SERVICE INTERESTED PARTY

RULING

1. What is before the court is a further Amended Petition dated 4/11/2020. The Petitioners describe themselves as elders, members, and professionals of the Rendille Community of Karare-Songa Ward within Marsabit County. They bring this suit on their behalf and on behalf of the Rendille and Samburu communities. The petitioners aver that the whole of Rendille and Samburu Communities are and have been in occupation of all that land within Karare-Songa Ward, measuring approximately 877 square kilometers since time immemorial.
2. It is averred that the Rendille and Samburu communities are minority and Indigenous peoples in Kenya who operate and live in an environment where their benign culture, customs, and traditions are endangered. The petitioners aver that their communities occupy the said area, which is mainly arid, have limited political representation owing to their population numbers, and are 90% nomadic pastoralists, relying mainly on livestock, composed of cows and, to a lesser extent, sheep, goats, camels and donkeys for their nutrition and economic activities. The petitioners aver that their area has few state investments, as a result of which they are marginalized, there is approximately 90% illiteracy, and over 95% living below the poverty line.
3. In addition, the Petitioners aver that their communities border the Borana, not the Gabbra communities, whose relationship has been hostile with occasional fighting and cultural feuds over cattle raids, cattle grazing areas, cow herds, watering points, and boundaries. It is averred that efforts have been made and continue to be made to have a peaceful co-existence. Specifically, the petitioners aver that out of their population numbers, the area Governor of Marsabit County, the members of the County Assembly and the National Assembly are persons from the Borana community, whose leadership has never acted in the Rendille and Samburu communities' best interests in respect to the land parcels in issue in this petition.
4. The Petitioners aver that the suit land is unregistered community land held in trust by the 1st Respondent on their behalf for purposes of Wildlife, culture and tourism, land use, and promotion. The complaint by the petitioners is that by a letter dated 2/7/2019, the 1st Respondent allegedly allocated part of the Petitioner's land measuring 5242.8 hectares to the 2nd and 3rd Respondents, who had made a similar request in 2012 and after a series of meetings, community leaders and elders had agreed on land within Mata Hama area. However, it appears they declined the offer and were demanding 10000 Ha in 2020.



5. Similarly, the Petitioners averred that through a contested purported public participation under a report dated 25/1/2020, some land measuring 2500 hectares was allegedly acquired by the 2nd and 3rd Respondents without involving the 1st Interested Party, the organ constitutionally responsible and accountable for acquiring land for public use on behalf of the National and County Government.
6. The Petitioners aver that in parts of the land in issue there is Wildlife, which falls under the jurisdiction of the 2nd Interested party and which was also not involved in the alleged land acquisition. The Petitioners aver that on 20/1/2020, the 2nd and 3rd Respondents purported to hold a public participation meeting led by the county government. However, the community elders present rejected the request by the 2nd and 3rd Respondents to change the locality of the land for reasons that the proposed new site, was a cultural and biologically diverse critical area of importance and a sensitive conservation and pastoral grazing land.
7. The Petitioners aver that in a bid to acquire the suit land forcefully and in total disregard of community objections during the consultative and purported public participation, the 2nd and 3rd Respondents resorted to the use of government administration chiefs and the county government hand-picked 36 elders from Karare Location and forced them to show them the suit land claiming that the suit land was public land which they intended to use for public purposes.
8. As a consequence, the Petitioners aver that the 2nd and 3rd respondents have not procedurally taken over their land, and the way it was taken was not in the public interest; there was no proper public participation, and it was done in breach of *the Constitution* and the Law. Further, the petitioners aver that the 2nd interested party, and the Cabinet Secretary responsible for Wildlife, were not involved; that their local political leadership acted against the best interests of the communities; they abused their privileged position to take away their land and change the community's boundaries as well as electoral areas between them and the Borana community.
9. The Petitioners aver that the County Leaders have used their privileged offices to usurp Rendille and Samburu communities' land by using unsuspecting national entities to allocate 877.30 square kilometres of their land without involving the county Assembly, the national assembly, and the communities themselves. By targeting this land, the Petitioners averred that the Governor and the area Member of Parliament will achieve for the Borana community what they have been unable to achieve through feuds, violence, loss of lives, and attempted extermination of the community since 1994.
10. The Petitioners aver that the process, procedure, and approach to dispossess them of their grazing and watering points is contrary to the Law by making the primary source of the conflict to be taken by the 2nd Respondent, the Saku Sub County community being the only area of the County with high economic, agricultural and cultural potential. The Petitioners aver that despite the Member of Parliament for Saku having attempted to settle Gabbra households in community land. Eventually their land was given to the 2nd Respondent by the Governor, and his accomplices regardless of the consequences to the Rendille and Samburu communities.
11. The Petitioners aver that in their bid to acquire the land, the 2nd and 3rd Respondents visited the suit land accompanied by the Survey of Kenya to demarcate the land, having failed to persuade the community to allocate their culturally and religious sensitive areas to them. The Petitioners aver that on 29/5/2020, the 2nd and 3rd Respondents actualized their intention by forcefully acquiring the suit land, illegally and unlawfully entering it with trucks, and bulldozers and began digging a road of access and proceeded to erect a fence round the suit land, using military force hence sparking tension and violence in the area. The petitioners aver that 150,000 acres of their land have been confiscated and been given to the Lake Turkana Wind Power Project and that there is continued forceful Acquisition



- of more of their community land, likely to render them landless and destitute in the near future and to render them extinct.
12. The Petitioners aver that the 1st Respondent, as a trustee of unregistered community land, has acted against Article 63 (3) 4 (c) of *the Constitution* as read together with Section 6 (6) of the *Community Land Act* 2016, hence breaching the trust bestowed upon it.
 13. The Petitioners aver that the activities of the respondents have caused them loss, injury, damages, and prejudice due to displacement, rendering them homeless, causing tensions to escalate, loss of four lives, loss of environmental goods and services, lack of grazing and human water points, wildlife animals/human corridor and co-existence in the ecosystem, lack of access to the cultural, water/economic sites, biodiversity's loss, conservation and the cultural site used for education, ecotourism, recreational, health, and research purposes; traditional, and circumcision rites known as "hallow" and interference with migration of Wildlife that access the area as a critical habitat of the endangered, rare and related species.
 14. Further, the Petitioners aver that the affected areas were the only fertile land, a water catchment area during the dry seasons for use by the pastoralist communities from not only Karare but as far as Songa, Logologo, Kamboga and Laisamis hence shall affect food production in the area, due to loss of pasture and water to over 150,000 camels, 21500 sheep, 4000 goats, 85000 cattle, and approximately 35% shall be lost due to drought-related complications.
 15. The Petitioners aver that the Respondents' actions have not only disregarded the rule of Law, violated the legitimate expectations of the Rendille and Samburu communities, but also compromised their environmental rights and interests contrary to the best approach in a proposed project of this magnitude, where there must be an environmental and social economic impact assessment as a condition precedent.
 16. The Petitioners aver that the Rendille and Samburu communities were a disgruntled lot since there was non-observance of the Law, they were not given an opportunity to be heard, and the decision did not take into account their objections, reservations, concerns, and fears, over their cultural, economic, environment, pastoralist, water, pasture, and wildlife interests. The petitioners aver that the Rendille and Samburu communities have been denied the protection of the Law, have been discriminated against in the use and involvement in any action directly related to the subject land and its use, and above all, the failure by the respondents to offer, and pay fair compensation for the Acquisition of their land as provided for in *the Constitution*, the *National Land Commission Act*, the *Land Act*, the *Community Land Act* and its Community Land Regulations 2017, and the U.N. Declaration of the rights of Indigenous people requiring a free, prior and informed consent in all legislation concerning their land. The petitioners aver that they shall continue to suffer unless the 2nd Respondent vacates the land and is restricted from further development or expending budgetary expenses and allocation in their land and they seek general, exemplary, and aggravated damages for the violations of their rights.
 17. The petitioners' prayers before this court are; -
 1. A Declaration that the land situated within Karare -Songa Ward, Saku Constituency measuring approximately 877.30 square kilometers, which is unregistered community land be dealt with in accordance with Article 63 of *the Constitution*, the Wildlife Management and Conservation Act, the *Community Land Act* and the *Land Act*.
 2. A declaration that the actions of the 1st and the 2nd Respondents in trying to acquire the said land or any part of it forcefully violates Article 63 of *the Constitution*, the *Community Land*



Act, the Regulations 2017, the Land Act, and the rights of the members of the Rendille and Samburu Communities.

3. A declaration that the actions of the 2nd and 3rd Respondents in forcefully and illegally entering upon the said land, erection of fences, and constructing temporary structures is unconstitutional.
 4. A declaration that the failure by the 1st, 2nd and 3rd Respondents to abide by public participation norms, substantive and procedural justice, including the purported minutes for the meeting dated 28/1/2021, allocating 2500 hectares was unlawful, illegal, null, and void.
 5. A declaration that the 1st Respondent Governor's unilateral and non-consultative decision on the allocation of 5000 hectares through a letter dated 2/7/2019 is null and void.
 6. A Conservatory order barring and restraining the respondents from acquiring, maintaining the possession, use, occupation of the land, alienating, disposing of, and or in any way dealing with the land except in accordance with the Constitution and the relevant statutes.
 7. Prohibitory orders to stop the respondents from forcefully acquiring, alienating, maintaining possessing, using, occupying, disposing of, or in any way whatsoever dealing with the suit land except in accordance with the Constitution and the relevant statutes.
 8. An order of Mandamus compelling the 2nd and 3rd Respondents to exit and move out of the suit land measuring about 5000 hectares as indicated in the Governor's letter and or based on the minutes in the Report dated 25/1/2020, and for the demolition of any structures that they have erected thereon.
 9. A declaration that the process and procedure and manner employed by the 2nd Respondent and Governor of the 1st Respondent to alienate the petitioners' land is alien to Law, discriminatory, on account of the Petitioners' ethnicity, literacy levels, poverty levels, economic capacity, political clout, and privileges and advantages as compared to other Kenyans and therefore is founded on no reasonable or lawful basis.
 10. Restraining orders against the 2nd and 3rd Respondents from undertaking any other and or further developments, construction, excavations, vegetation, clearance, and or drilling on the land occupied by the 2nd Respondent.
 11. Orders against the 2nd to 4th Respondents from spending any public monies and or budgetary allocation or expenses on the whole of the land occupied by the 2nd Respondent.
 12. General, exemplary, and aggravated damages for the breaches, violations, and injuries occasioned.
18. The amended petition was accompanied by supporting affidavits by Leruk Murusi, sworn on 11/11/2020, Hon. Daniel Burcha, Hon. Asunta Gambale, and Hon. Bernard Leokono, sworn on 11/11/2021. The 1st Petitioner averred that the petitioners have been born and brought up in Karare ward where they have their permanent houses and live therein with their families. He confirmed that there was an agreement between the 2nd and 3rd Respondents, and elders of the community in 2012 to give the 2nd Respondent some land in the Mata Hama area, who unfortunately changed its mind and later approached the 1st Respondent for an alternative land in January 2020 within Karare ward measuring 10,000 Hectares.
19. The 1st Petitioner confirmed that the meeting took place on 20/1/2020, but the petitioners opposed the site proposed for its cultural biodiversity, conservation, and pastoral grazing land.



20. The 1st Petitioner averred that there was no public participation, and instead, the 2nd and 3rd Respondents resorted to a divide and rule strategy and arrogantly alleged that the land was public. The 1st Petitioner reiterated that the 2nd and 3rd Respondents forcefully acquired the land on 12/3/2020 and started a survey exercise. The 1st Petitioner averred that the acts of the 1st and 3rd Respondents were illegal, unlawful, contrary to the Law and *the Constitution* and have caused them loss, damage, distress, and amount to a breach of their constitutional rights and freedoms.
21. Hon. Daniel Burcha, the 13th Petitioner, is a member of the county assembly, representing the Laisamis ward. He averred that his constituents, the Rendille and Samburu, were on the land that Kenya Defence Forces was trying to forcefully acquire and used it as a dry grazing area and for cultural purposes and activities.
22. The Petitioners averred that the issue of allocating land to the 2nd Respondent in terms of whether to allocate or not, its acreage, and the location was never brought to the County Assembly or ever discussed in any County Assembly event, let alone the tabling of the letter by the Governor for the allocation, for discussion on approval by way of resolution. The Petitioners averred that the land was forcefully taken, yet it was community land belonging to the Rendille and Samburu peoples. The deponent averred that no public consultation or discussion allowing the 2nd and 3rd Respondents to occupy the land was undertaken and that the community was opposed to taking over their grazing area and a culturally sensitive area, more so when they have been offered no alternative parcel of land.
23. The 13th Petitioner averred that the 2nd Respondent forcefully entered the land, prepared a road, and set up a camp, which is now occupied by its staff, covering approximately ten acres. While associating himself with the affidavit sworn by the 1st Petitioner and filed on 5/10/2020, he denied that the suit land was part of the Marsabit National Reserve. Further, he said that the letter by the Governor and the minutes for the 25/1/2020 meeting were evidence that the land belonged to the community and was not public land. The Petitioners averred that even if the land was a National Reserve, which is denied still, there was a need to issue a notice to acquire it, and under Section 37 of WCMA, the cabinet secretary responsible for the Wildlife had to approve any alteration of the boundaries, change of use and or relocation of the gazetted area.
24. The Petitioners averred that the proposal to take the land posed a danger not only to them but also to the ecosystem, biodiversity, culture, grazing fields, and the endangered species on the site.
25. The Petitioners deponed that the project had to be subjected to an E.I.A. report, but none was done, and the locals were not invited to give their views. The Petitioners deponed that the 1st Respondent allocated or alienated the suit property land without involving the 1st Interested Party, carrying out public participation, engaging the county Assembly, and procuring compensation for the petitioners. The 1st Petitioner averred that the purported public participation on 21/1/2020 fell below the threshold for public participation under the Law.
26. The 1st Petitioner deponed that the Act of the Governor and Area MP was discriminatory to the Petitioners by treating their land differently on account of illiteracy, ethnicity, lifestyle, poverty, economic impoverishment, limited political clout, and as lesser human beings in Kenya. Further, the 1st Petitioner deponed that the petitioners were treated as though the Rule of Law does not exist in Kenya and as if they have no economic, social, cultural, or environmental inherent rights, interests, privileges, and advantages, in law contrary to what is enjoyed by the other Kenyan populace.
27. The 1st Petitioner averred that whereas the respondents are fully aware of the procedure for change of user of a national reserve and gazettelement going by the Report dated 20/1/2020, they cannot approbate and reprobate as to and especially on whether or not the land was public or community



and on what procedure to follow to acquire land lawfully, access, possess and use it under the relevant statutes.

28. The 1st Petitioner averred that the contents of the alleged public participation report were clear that the 1st and 3rd Respondents acted with impunity and in complete disregard of the community interests and reservation, and total disregard of the process and equity, and their actions are unjust, unfair, inequitable, unlawful, illegal and unconstitutional. The 1st Petitioner deponed that the petitioners maintain that a declaration of community land in the Report as a national reserve could not convert the land into public land. In any event, the 1st Respondent is mandated to manage areas declared as national reserves in trust for the community and cannot make unilateral decisions without involving the people in a consultative manner.
29. The 1st Petitioner swore on oath that whereas the petitioners were supportive of any presence of the 2nd and 3rd Respondents in the area, the manner and process of the Acquisition of the land was incomplete, a different land parcel had been offered whereas the site is culturally, economically and environmentally sensitive and valuable to them.
30. The 1st Petitioner deponed that despite their proposal in 2012, there was a collusion to forcefully take away their land and begin utilizing it in disregard of the Law and *the Constitution* by the 2nd and 3rd Respondents, who are duty bound and expected to follow the Law. The 1st Petitioner deponed that the respondents should not hide behind the guise of an alleged national and public interest as outweighing the interest of the petitioners by violating the rule of Law, discriminating against them, and violating the Law as regards that Acquisition, use, and occupation of community land belonging to Rendille and Samburu communities.
31. The 1st Petitioner deponed that there was no crisis or urgency in the circumstances warranting the unlawful, forceful, and trampling of all laws, the rule of Law, legitimate expectation, fair administrative action, constitutional process, and democratic governance of people by the Respondents concerning the suit land, other than a posture of arrogance and a presumption of them being above the Law.
32. The 1st Petitioner deponed that the Act of the respondents have endangered the Rendille and Samburu communities by killing their culture, altering land boundaries, condemning their livestock to extinction by depriving their grazing land and thus aggravating marginalization and eventually rendering them destitute and landless, without public participation in a manner favouring the Borana community, who have been pushing for extension of its boundary and enlarging their grazing fields.
33. The amended petition was equally supported by an affidavit sworn by Len Joloba Maitoti Lolbalanga, the 4th Petitioner, dated 29/4/2021. The 9th to 18th Petitioners supported the further amended petition by an affidavit of Stephen Gambare, a member of the Rendille Professionals Association, sworn on 2/11/2023. It was averred that the suit land was never subjected to E.I.A. involving the members of the public as admitted in the senate parliamentary report dated 10/6/2023 attached, yet the EMCA does not envisage the 2nd and 3rd respondents to carry out such a project without undertaking an E.I.A. Report.
34. The 9th -18th Petitioners deponed that the Acquisition of the land by the 2nd and 3rd respondents was not in accordance with Articles 40 (3) 42 and 43 of *the Constitution*, Section 5 (4) of the *Community Land Act* and Section 35 WCMA 2013. Further, it was deponed that the 2nd and 3rd Respondents failed to involve the National Land Commission and were in total disregard of Sections 57 A, 58(1), and 59 of EMCA as read together with Sections (4) (a) and (5b) of the Physical Land Use Planning Act 2019.
35. The 9th to 18th Petitioners deponed that the dispute herein has ripened and represented an actual controversy ready for resolution by this court since 2500 hectares of their land had been taken away,



causing loss, harm, and damage which this court under Article 162 (2) (b) of *the Constitution* and Section 4 and 13 (1) of the ELCA Act should adjudicate. The 9th to 18th petitioners deponed that the dispute was not between two levels of government, for the petitioners are neither a state organ nor state officers, but their land was taken away without involving the only constitution-mandated organ, the National Land Commission in acquiring land for public use; hence rendering the process unconstitutional, null and void.

36. The 9th to 18th Petitioners deponed that the Respondents and the interested bodies abdicated duties so far as the Acquisition was concerned and allowed it to proceed in utter dissonance with the Law, hence the prayer for mandamus. The 9th to 18th Petitioners averred that out of the senate parliamentary committee report, it became evident that the respondents failed to adhere to the Law on public participation, mitigation measures, compulsory Acquisition of land, change of user and conversion of land for private, public, or community.
37. The 2nd, 3rd and 4th Respondents opposed the petition by a preliminary objection by the Hon. Attorney General dated 26/7/2022 thus:
- i. The petition was an intergovernmental land dispute between the K.W.S., D.O.D., National Land Commission, and the County Government of Marsabit; hence falls under Articles 6, 189 (4), and 189 of *the Constitution* as read together with the *Intergovernmental Relations Act*, hence the non-exhaustion doctrine applies.
 - ii. That the dispute was not ripe for the court's determination.

This court found that the apposite dispute was not an intergovernmental dispute as the Petitioners were individual Kenyan Citizens.

38. Further, the 2nd and 3rd Respondents relied on a replying affidavit by Captain Julius Messo sworn on 15/11/2021 to oppose the petition for failing to reach the constitutional threshold of a petition and for not filing a substantive suit for proposed arbitration in the interest of justice.
39. The 2nd and 3rd Respondents averred that based on national security concerns, the Ministry of Defence made an application and ultimately identified land in Karare Ward to set up a base for its operation and defense posturing. Due to the urgency of security, the Ministry took possession of the identified land and started setting up its base temporarily, and all the above was done in an inclusive process that involved members of the local community, local leadership, and government agencies.
40. The 2nd and 3rd Respondents averred that the interest in the land by the Ministry of Defence in Marsabit County was in the national interest, in the execution of its constitutional mandate under Article 241 of *the Constitution*. Therefore, it was averred by Captain Messo that it was not true that the Ministry intended to displace the petitioners for the benefit of the Borana community, given that the Military is a national organ that has the best interest of every community at heart and has the collective and all-inclusive duty to all communities in the country. More so, the land is critical to the Borana and Gabbra communities as it is to the Rendille and Samburu. To execute its mandate efficiently, Captain Messo averred that the Military maintains its presence and posture in selected places in the country based on security analysis in order to detect moves by an aggressor and to respond quickly in the event of an act of aggression. It was averred that there has been no substantial military presence in Marsabit County since independence. However, given the security dynamics regionally, it has been imperative to have such presence as a matter of urgency, given that the County shares an international border spanning thousands of kilometres with Ethiopia; the County has an array of challenges ranging from the proliferation of arms, cattle rustling, clans rivalries which disrupt economic activities and people's



way of life; and lastly, since the County had a strategic national project under the *Physical and Land Use Planning Act*.

41. The 2nd and 3rd Respondents averred that due to the hostile relationship between the Rendille, Samburu, Gabbra, and Borana communities as presented by the petitioners, and for the security within the County, there is now a need to set up the base. The 2nd and 3rd Respondents averred that the land in dispute historically was gazetted as a National Reserve in 1948 vide gazette No. 936 of 1948, and by Gazette No. 3962 of 1983, some portions were excised for the reserve as defined in Boundary plan 216/48 attached as J.M. "2" now constituted as community land.
42. The 2nd and 3rd Respondents averred that the land the Ministry of Defence identified within Marsabit County is not within the county land that was excised in Gazette No. 3962 of 1983 as per the Boundary plan annexed as J.M. "3" and by virtue of Article 62 (1) (g) of *the Constitution*, government forests, game reserves, water catchment areas, national parks, animal sanctuaries and specifically protected areas are classified as public land, and so are all unalienated government lands as at the effective date.
43. The 2nd and 3rd Respondents averred that the land in dispute was a gazetted national reserve and not an unregistered community land, as alleged in the petition. The 2nd and 3rd Respondents averred that if the petitioners were aggrieved by the letter dated 2/7/2019, the only recourse was to seek orders of certiorari to quash the decision by the 1st Respondent for being ultra vires, and even if it was ultra vires, the same could not affect the interest by the 2nd and 3rd Respondents as their interest flows from neither the letter nor do they flow from the public participation exercise.
44. The 2nd and 3rd Respondents deny that it was the 1st Respondent who alienated the land to it as it was already reserved and gazetted as a national reserve by the time the 2nd and 3rd Respondents started engaging the defunct County Council of Marsabit and its successors. It was averred that the establishment of a military base itself does not change the legal status of the land since there would be no conversion of land from one legal regime to another, and further that the circumstances herein do not amount to alienation of land to involve any provisions of the Law that relate to alienation of land, given that the land shall remain public land as gazetted in 1948 and as per Section 35 of WCMA 2013, where it was only the Cabinet Secretary who can degazette the land which has not happened.
45. The 2nd and 3rd Respondents averred that a national park was different from a national reserve; hence, Section 34 of WCMA was inapplicable. It was averred that under Article 62 (3) of *the Constitution*, the public land interest vested with the national government, and therefore, the leasing, transfers, and sharing or conveyance of interest among public entities should not be a concern of the petitioners, more so when the Kenya Wildlife Service, which manages national reserves has not complained against the Ministry of Defence.
46. The 2nd and 3rd Respondents denied that the Military took possession of the disputed land by use of military might. On the contrary, it was averred that the Ministry of Defence is mindful of the guiding principles of Article 232 (1) (a) and 232 (d) of *the Constitution* and has positively engaged the local leadership, local population, and the relevant government agencies since 2012, and in particular the defunct County Council of Marsabit who passed a resolution to allocate the land in Kubi Kalo. However, with the advent of County Governments after the 2013 general elections, the allocation was discarded, forcing them to start a fresh engagement in 2018.
47. The 2nd and 3rd Respondents averred that the reaction concerning the present allocation of land delayed the setting up of the base to the detriment of National Security. Despite the land being a national reserve, out of courtesy and abundance of caution, the Ministry of Defence engaged the local leadership and population on the most viable site to avoid disrupting their activities for the sake of



good neighbourliness. It was averred that even on the assumption that the land was community land, the *Community Land Act*, was yet to be operational for there to be management committees to be engaged. So, the Ministry of Defence engaged the most viable equivalent through county leadership, local political leadership, and the National Land Commission, whose engagements were elaborate, consultative, jointly done, and that there was sufficient public participation as evidenced by a report attached as J.M. "4".

48. The 2nd and 3rd Respondents averred that they relied on the local area leadership and the County Government representatives to identify and select the area suitable for establishing a military base with minimal or no interruption of daily economic, religious, and cultural routines of the people. It was averred that some of the findings and recommendations of the public participation indicated that the locals were very supportive of the project; they depended mainly on livestock and were keen to protect grazing areas and water points. It was averred that the land would be used for training and would be used jointly with the Community and subject to proper coordination and liaison and that the land was reduced to 2500 Hectares from 5000 Hectares and that all issues of concern including those raised by the petitioners were duly considered with no intention of the Ministry of Defence to stop the locals from grazing on the training grounds when there was no training taking place.
49. The 2nd and 3rd Respondents averred that the process was transparent with full support of the host community, and there was no undue influence by the 2nd and 3rd Respondents during the public participation exercise. It was averred that it was not practically possible to engage every member of the community in public participation and that the petitioners were likely to be either those who wilfully failed to turn up for the exercise or otherwise failed to submit their views but were now out to jeopardize a national and public interest process. It was averred that the respondents should not be vilified for engaging the local community and the county government of Marsabit when they were duty-bound to do so and when they did so in utmost good faith in the process and that the process was above board and all-inclusive.
50. As to the actual status of the land, the 2nd and 3rd Respondents averred that whereas the petition talks of the land being a critical area for wildlife migration and home for rare and endangered species, the supporting affidavit of Lenjolodi Lolbalang confirms the existence of public utilities and settlement on the land such as public schools, hospitals, and administrative offices, which coupled with the land being a gazetted National Reserve are all clear pointers that the land was public.
51. The 2nd and 3rd Respondents averred that the Military was an environmentally and culturally conscious organ as constitutionally required of all public institutions and therefore strives to comply with all legal and policy requirements as it executes its mandate, including obtaining a NEMA report annexed as J.K. "5" for the Karare Military Camp Site. It was averred that the state, under Article 66 of *the Constitution*, could change the use of land or any interest in or rights over any land in the interest of public safety or land planning. In this case, the Ministry of Defence engaged the Locals' and took up possession of the public land. Hence any recourse to the petitioners' case, if any, did not lie in the issuance of conservatory orders since public /national interest far outweighs the partisan interests claimed by the petitioners, who in any event have furthered no evidence to proof any of the many issues alleged in this further amended petition.
52. The 1st Interested Party opposed the petition through a replying affidavit sworn by Brian A. Ikol on 28/7/2023. The 1st Interested Party confirmed that the suit land was indeed an unregistered community land in accordance with Article 63 2(c) of *the Constitution* as read together with the preamble of WCMA, which defines a national reserve as an area of community land declared to be a National Reserve.



53. The 1st Interested Party denied the allegations that the land was irregularly acquired or allocated by the 1st Respondent. It postulated that the said land was excised from the national reserve and allocated to the Ministry of Defence for public purposes in line with Article 40 (3) of *the Constitution*, read together with Section 5 (a) of the *Community Land Act*, and that under Section 6 (3) of the *community land act*, the 1st Interested Party is not accountable to the Samburu and Rendille communities as it executes its duties and powers in accordance with the Law.
54. Therefore, the 1st Interested Party, admitting the contents of paragraph 8 (2) (a) 4 (b) of the petition, denied the contents of paragraphs 9B 10, 11, 12, 13A, 13C, 13E and 4 of the amended petitions, terming the contents as untrue, unfounded, lacking factual basis and fraught with apparent contradictions. Further, the interested party declared the court as lacking jurisdiction to hear and determine a prematurely filed petition since the petitioners ought to have exhausted the existing remedies under Articles 6 (2) and 189 of *the Constitution* as read together with the *Intergovernmental Relations Act* 2012. Lastly, the 1st Interested Party averred that the petitioners have failed to demonstrate through evidence or otherwise that the respondents have abdicated their duties in whichever way to warrant the reliefs sought.
55. The 2nd Interested Party opposed the petition by a replying affidavit sworn by Doreen Mutunga and Judy Adipo on 12th March, 2021 and 17th November, 2023 respectively. The 2nd Interested Party averred that Marsabit National Reserve was established vide Government Notice No. 938 of 24th September 1948, with boundaries showing boundary plan No. 216/11. It was further averred that the area identified by the Ministry of Defence for purposes of setting up a base for its operations was part of Marsabit National Reserve, which is public land that was separate from the community land excised from the Marsabit National Reserve in 1983. Further, the 2nd interested party averred that the disputed land was within Karare – Songa ward. It attached a copy of the boundary plan and the legal Notice as annexures marked as JA "1". The 2nd Interested Party averred that the disputed land was, therefore, public land by virtue of the boundaries plan and the Legal Notice; hence was not an unregistered community land as alleged by the petitioners.
56. Following directions that the petition shall be determined through affidavit evidence and written submissions, by consent of parties, a scene visit was conducted, and a scene visit report was prepared by the Deputy Registrar of the court. Further parties were directed to, file and exchange written submissions covering not only the main petition but also the Preliminary Objection brought by the 1st and 4th Respondents.

Submissions

57. All the Petitioners relied on written submissions dated 15/11/2023 filed by Katwa and Kemboy Advocates on record for the 9th – 18th Petitioners. The Petitioners submitted that the basis of the petition was to challenge the acquisition, utilization and the legality of the process employed to acquire land belonging to the Rendille and Samburu communities, which was community land by the Military which was contrary to the statutes, *the Constitution* and all relevant international legal instruments over land and environment especially regarding indigenous people, to which Kenya is a signatory.
58. The Petitioners submitted that the suit land was community land since time immemorial used for livestock, watering, and cultural events and was lawfully held, managed, and used as forest, grazing, and shrine land by virtue of Article 63 of *the Constitution*. The petitioners submitted that under Sections 34 and 35 of WCMA and the *Land Act*, a gazetted National Reserve could simultaneously be community land, the same way Masai Mara is community land and is managed by the County government of



- Narok, as admitted in the replying affidavit of 1st interested party in paragraph 8, it was the only entity mandated to make such a decision.
59. The Petitioners submitted that the 2nd Respondent unlawfully seized the land and also failed to conduct an E.I.A while excluding the 1st interested party in the process and also by not conducting substantive, explicit, understandable, and sensible public participation. It was submitted that during the faulted exercise, there could have been defined whether the land belongs to the public or community and to decide if the land was suitable; determine compulsory Acquisition, agree on the amount and the fair compensation, determine accountability of conversion of the land from Wildlife to Military user under Section 34 and 37 of WCMA. It was submitted that the respondents failed to table and obtain approval from parliament to terminate the use of the land. Further, it was submitted that out of a hollow, unclear, void purported public participation that had no straightforward questions upon which to follow, including a sample representation, demographic audience, and or data the 2nd and 3rd Respondents purported to acquire the suit land.
 60. The Petitioners attacked the Respondents' responses for not exhibiting an E.I.A report or, any environmental impact proceedings or any evidence of involving the 1st Interested Party or parliament or compliance with Sections 34 and 37 of WCMA on the change of use of the land from a Reserve for Wildlife to military use. The Petitioners submitted, regardless of the 1st and 2nd Interested Parties' allegations in the replying affidavits, it was apparent it was contradictory to what they said that the land was public in their previous appearances before the Parliament/Senate as captured in the Report dated 10th June 2023.
 61. As for whether the suit land is community land, the petitioners, relying on Article 63 of *the Constitution*, submitted that any unregistered community land should be held in trust by the county government on behalf of the communities for which it is held;- Relying on Section 2 of the *Community Land Act* (C.L.A), the petitioners submitted that community land refers to land declared so under Article 63 (2) of *the Constitution* of Kenya or land converted into community under the Law.
 62. Following this, the Petitioners submitted that community land refers to land that is traditionally owned, managed, and used by indigenous communities or specific groups of people. Going by the definition of a community under (C.L.A.) the petitioners submitted that the suit land has been the indigenous land of the Rendille and Samburu communities, who share a common ancestry, similar culture, or unique mode of livelihood, a social economic or other similar common interest; geographical or ecological space and ethnicity;
 63. In particular, the Petitioners submitted that the Rendille and Samburu communities had an infinite history of the same ancestry in relation to the suit land and geographical area, whose land is held in trust for them by the 1st Respondent as provided under Article 63 (2) (c) (d) (1) of *the Constitution* of Kenya. The Petitioners reiterated that the suit land falls under community land, has shared ownership by the pastoralist communities, is collectively managed as a whole and has customary tenure for it is governed by customary laws and practices that have been developed and upheld by the two communities. The petitioners aver that the customary tenure system defines its use, access and transfers and that the land has cultural and historical significance in terms of culture, spirituality and history as it forms part of their identity, heritage and traditional way of life. The petitioners submitted that the land is used for various purposes, including grazing livestock, gathering, natural resources, and for cultural ceremonies including prayers and circumcision.
 64. The Petitioners submitted that as Indigenous communities, the Rendille and Samburu have traditionally practiced sustainable land-management techniques on their community land based on their traditional knowledge and ensure the long-term ecological health and productivity of the land



such as through rotational grazing, natural resource conservation, and protection of biodiversity. Simultaneously, the petitioners submitted that the land plays a vital role in their livelihood and subsistence activities as Indigenous communities. The Petitioners submitted that the land acts as the source of food, water, shelter, and economic activities such as pastoralism, agriculture, and other traditional occupations. Additionally, the petitioners submitted that they exercise decision making in the management of the land through communal governance structures.

65. The Petitioners submitted that contrary to the assertions by the 2nd to 4th Respondents and the 2nd Interested Party that the suit land was a National Wildlife Reserve, the designation itself does not make the land public land because under Section 35 of WCMA, private and community land may also be declared a National Wildlife Reserve. The Petitioners submitted that the gazettment of the land in 1948 did not make or convert the suit land into public land to the exclusion of it being community land. The petitioners submitted that a reserve was like a caveat, a wayleave, or a right of way that could be placed on a land parcel belonging to someone else. Therefore, the petitioners submitted that designating the land as a "reserve" did not damage the ownership status of the land.
66. Further, the Petitioners submitted that the court should take cognizance of the fact that under Section 35 of WCMA a Reserve is created upon consultation and approval over land under the participation of a county government to be a national reserve. Since all unregistered community land was invariably in the trust of the County Government, the Petitioners submitted that the essence of section 35 of WCMA was consistent with Article 63 of *the Constitution* of Kenya.
67. According to the Petitioners, this logic, ratio, and analysis above explain why the world's most popular conservancy, the Masai Mara in Narok, was community land managed by the Narok County Government on behalf of the Masai. The Petitioners relied on Mohammed Hussein Yakuba & Others and County Government of Marsabit & Others (2020) eKLR, where the court found that a land parcel is community land if it has an ancestry of being used by the community as a shrine or for grazing purposes.

The Petitioners submitted that the suit land has all the hallmarks of a common ancestry in the hands and use of the Rendille and Samburu communities; hence, the land is community land. Further relying on the County Government of Tana River vs. Binesa Wako Danko & Others (2020) eKLR, the petitioners submitted that the Rendille and Samburu communities meet the criteria set by the court, owing to them being on the land since time immemorial and they had used, occupied, managed and utilized it as a grazing, circumcision, worship, watering area and as a traditional source of salted soil. They had also used it for hunting and gathering. The land had all their holy shrines.

The Petitioners submitted that the Rendille and Samburu communities have ancestrally been on the said Karare Land.

68. The Petitioners submitted that any application and test using criteria of Article 63 of *the Constitution* shows clearly and inevitably that the apposite land was community land. On whether the land was acquired lawfully and procedurally, the petitioners submitted that it was an absolute fact that there was no E.I.A. no public participation was undertaken by the respondents before taking over the suit land, hence denying the public an opportunity to be involved by way of public participation in any environmental evaluation, going by the Senate Report dated 10/6/2023.
69. The Petitioners submitted that the steps required to be fulfilled by a proponent of a project under Sections 2, 57, 58, 59, and 63 of EMCA and the E.I.A. Regulations 2003 were not complied with. The petitioners submitted that pursuant to Principle 10 of the Rio Declaration, the state and its organs must ensure the protection of the environment as a critical element of all development agencies in all



- decisions affecting the environment, for under Article 42 of Constitution of Kenya every person has a right to a clean and healthy environment.
70. The Petitioners submitted that public participation was an accepted phenomenon post-2010 Constitution. Whereas under Article 69(1) (2) of *the Constitution* of Kenya, the state is obligated to encourage public participation, citizens are equally encouraged to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
 71. Consequently, the Petitioners submitted that public participation is at the center of any E.I.A. and, therefore, a proponent of a project in consultation with NEMA, seeks the views of persons who may be affected by the project in accordance with Section 58(1) (2) (5), 59, 63, and 65 of EMCA, and the regulations by publicizing, publishing, making announcements, holding at least three public meetings, notifying and consulting with its authority to receive and record both oral and written comments during all public meetings for onward transmission to the authority.
 72. Reliance was placed on Ken Kasinga Vs Daniel Kiplagat & Others (2015) eKLR, John Kubukuru Kibicho & Anor Vs County Government of Nakuru & Others (2016) eKLR, Moffat Kamau & Others Vs Aelucus (K) (2016) eKLR, Abdalla Rhova Hiribare Vs Attorney General (2013) eKLR, Rep Vs. The County Government of Kiambu exparte, Robert Gakuru (2016) eKLR, Save Lamu versus NEMA (2019) eKLR. The court was urged to find that the principle of free, prior, and informed consent (FPIC) applied to all Kenyan communities and was embedded in Article 10 of *the Constitution* of Kenya as read together with Section 58 (2) of EMCA.
 73. Relying on Mohammed Ali Baubi vs. Attorney General (2018) eKLR, where the court concluded that the standard of determining whether there is adequate public participation in environmental matters is the standard of reasonableness, the petitioners urged the court to find that the action of the Respondents did not in any way equate to public participation as anticipated by *the Constitution* and espoused by courts. The Petitioners submitted that Section 36 of the C.L.A. 2016 addresses the need for a free, consultative process when dealing with Investments related to community land, and the process must include conducting an environmental, social, cultural, and economic impact assessment, stakeholder consultation, and the involvement of the community. Further, the Petitioners submitted that Section 38 (2) (c) of the C.L.A. decrees the observance of environmental Law whenever conversion was being undertaken. Unfortunately, this was contravened by the Respondents See Mohamed Hussein Yakub & Others (Supra).
 74. The Petitioners submitted that under Article 42 of *the Constitution* of Kenya, every citizen has a right to have the environment protected, and therefore, in the absence of compliance, the project by the 2nd Respondent should be nullified and halted. The petitioners submitted that Indigenous communities like Rendille and Samburu have deep cultural and spiritual connections to their ancestral land, which has both cultural and environmental significance for it is a foundation for the communities' identity, traditional religious practices, access to resources such as minerals, Wildlife, forest, and water.
 75. The Petitioners submitted that the Acquisition of the community land and disruption of the livelihoods of the inhabitants was a pointer to a government's failure to balance the need for national security with an obligation to safeguard the social, economic, and cultural well-being of its citizens as well as its duty to maintain ecological integrity.
 76. Going by an annexure marked Karare 2 in the 9th -18th Petitioners' supplementary affidavit, the petitioners submitted that the adverse effect of the project on the community is apparent, including loss of permeable grazing space, loss of water points, loss of biodiversity, destruction and closure of



- wildlife corridors, increase in human wildlife conflicts, destruction of crop cultivation, water and degradation, noise and air pollution and the disruption of traditional land uses.
77. The Petitioners submitted that injury and prejudice were evident, given that the respondents did not aim at protecting or preserving the dignity of the individuals or communities in the promotion of social justice and the realization of the potential of all human beings as espoused in Article 19 (1) & (2) of *the Constitution* of Kenya, for both men and women, including the right to equal opportunities in political, economic, cultural and social spheres without discrimination as provided under Article 27 (1) & (7) of Constitution of Kenya.
 78. The 9th to 18th Petitioners submitted that there was differential treatment in the process, which was wholly attributable to their ethnicity, their land, their levels of literacy, poverty levels, economic capacity, and political clout. The Petitioners submitted that under Articles 40, 42, 43, 44, 47 & 70 of *the Constitution* of Kenya, their rights to public participation, environmental preservation, option for compensation and due process, and individual and collective ownership of property by the respondents were breached, Intergenerational Equity, E.I.A., and economic and social rights to be free from hunger and adequate food and water were violated by the Respondents.
 79. The Petitioners submitted that under Article 44 of *the Constitution* of Kenya, culture was the social economic anchor as a critical aspect of individual and collective identity, and which is intertwined with other rights and freedoms, contributing to the rich cultural diversity and heritage of a country. The Petitioners submitted that their right to culture had been unlawfully infringed upon by the 1st Respondent's illegal Acquisition of their land and, in the process, displacing them.
 80. For breach of Article 10 & 63 (2) (h) of *the Constitution*, the Petitioners submitted that their right as a community to be involved in decisions regarding the use and management of community land was not adhered to. As regards Section 33 of C.L.A., the Petitioners submitted that there was no public participation in the conversion of their land from community to public land by seeking their views, interests, voices, concerns, and rights.
 81. The Petitioners submitted that the 1st Interested Party was a vital organ and player in the Acquisition for it to be lawful, and in the absence of its involvement, the whole process and outcomes were null and void. The petitioners submitted that the 1st Interested Party was a constitutionally independent office playing a crucial role in the compulsory Acquisition of community land. To this end, the National Land Commission oversees and manages the process of acquiring land for public purposes, including infrastructure development, public utilities, and other government projects.
 82. The Petitioners submitted that the 1st Interested Party was supposed to get involved in the various stages of the process under Sections 107, 108, 110, 111, and 112 of the *Land Act* by way of notification, consultation, valuation, compensation, grievances process, public interest assessment, approval and monitoring and propriety of changing the land from a wildlife reserve to military use under Section 34 & 37 of WCMA. The Petitioners submitted that BY NOT roping in the 1st Interested Party as required by the Law and also excluding it, the 2nd and 3rd Respondents went in directly and took over the land without due process, compensation, and public participation.
 83. Due to this, the Petitioners submitted that in the absence of public participation on the critical steps required by Law, namely valuation, compensation, change of user E.I.A., NEMA License, and parliamentary approval, the purported public participation by the 2nd to 4th Respondents was null and void, since it falls short of the criteria of transparency & information sharing, adequate timelines, consultation and engagement, environmental impact assessment, social, economic impacts, legal and regulatory compliance, compensation and benefit sharing; land tenure and rights,



- cultural and historical significance, public infrastructure and services, monitoring and enforcement, dispute resolution, long-term sustainability, public access and use, records of community rallies and environmental impact as required under [Land Act](#), EMCA and Section 41 (3) & 52 of the Physical Land Use and Planning Act.
84. Reliance regarding poor compliance was placed on John Kahukuru Kibicho & Anor Vs County Government of Nakuru & Others (Supra), Principle 10 of Rio declaration on environmental and Bali Guidelines for the Development of National Legislation on Access to Information; Public participation and Access to Justice, Article 174 (c), (2) of Constitution of Kenya, F.A.O. Report on Governance & Tenure Technical Guidelines Rome 2014, Kichwa Judgment, People of Sarayaku US: Ecuador Inter American Court of Human Rights, Judgment of 27th June, 2012, Endorois ACMHPR com 276/2003, Saramaka People Suriname Inter-American Court of Human Rights Judgment of November, 28/2007, Global Assembly, Declaration on Security and Access for people with low incomes in times of Intensified Natural Resources Competition (Tirana) Declaration, International Land Coalition 2011.
85. The Petitioners also proffered the following authorities;
- David Kiptum Yator & Others Vs. Attorney General & 14 (2021) (2021) eKLR, Tana River Delta, Abdalla Rhova Hirbae & Others Vs. Attorney General & Others (Supra), Mui Coal Bajin Local Community Vs. Permanent Secretary Ministry of Energy (2015) eKLR, Mugo & 14 Others Vs. Matiangi & Anor IEBC (Interest Party) (2022) KEHC (158) International Vs Speaker of the National Assembly & Others CC/12/05 (2006) 2ACC 11: (2006) 12 (B C.L.R.) 1399 (CC): (2008) (6) S.A. 46(CC) Doctors for Life International Vs Speaker of the National Assembly & Others (Supra). Mataila Municipality & Others Vs President of South Africa & Others (2) CCT73 (05A (2006) 2ACC 12: 2007 1 BCLR 47 (CC), Robert N. Gakuru & Others Vs Government of Kiambu County (Supra), Richard Dickson Ongembo & Others Vs Attorney General & Others (2019) eKLR, Samuel Thinguri Waruath & Others (2015) eKLR, Section 21 of the Environmental Impact Assessment & Audit Regulation 2003. The Petitioners, therefore, urged the court to recall and quash the Acquisition for failing to meet the public participation thresholds.
86. On the Legal Regime governing the impugned land acquisition, the Petitioners submitted that the status, possession, and use of community land must adhere to the [Community Land Act](#), the [National Land Commission Act](#), the [Land Act](#), and [the Constitution](#), which provide the framework for the administration, management, and protection of community land. Reliance was placed on Patrick Musimba Vs. National Land Commission & Others (2016) eKLR,
87. On the power of the 1st Respondent to give away community land and public land unilaterally or at all, the petitioners submitted that under the C.L.A. and the County Government Act, the 1st Respondent holds the land in trust as per Section 6 thereof and can only deal with the land as per the Law. Reliance was placed on the County Government of Tana River Vs. Mohamed Amin Mohamed & 3 Others (2021) (2021) eKLR.
88. On whether the Petitioners are entitled to compensation and the reliefs sought, it was submitted that since the land is ancestral and due process was not followed to acquire it, including compulsory compensation, their land rights are protected under Article 40 of [the Constitution](#) of Kenya, as habitually and collectively and widely used, the only way to alienate it was in line with Article 67 of [the Constitution](#) of Kenya, through the 1st Interested Party, who under Section 111 (1) of the [Land Act](#) 2012, had the mandate to assess just compensation, prepare and award and subsequently compensate



- them promptly under Article 40 (3) (b) of Constitution of Kenya as read together with Section 115 of the Land Act.
89. The Petitioners submitted that contrary to the rules of natural justice and the Fair Administrative Action Act, the people of Rendille and Samburu were not given prior Notice of the decision to acquire their land, which is itself a denial of their constitutional rights. Reliance was placed on Patrick Musimba Vs. National Land Commission & Others (Supra). The Petitioners submitted that the respondents acted with impunity and in utter dissonance with the Constitution and deprived them of their land. Reliance was placed on Endorois (Supra), and Communication 155/96 SERAC & Anor Vs Nigeria.
90. In conclusion, the petitioners urged the court to find that the Acquisition of the land for military purposes without regard to due process and without regard to their constitutional rights was illegal, irregular, and in violation of their political, social, cultural, religious, and economic rights, invalid and unconstitutional. The petitioners urged the court to seize the opportunity and reaffirm the Constitution on the protection and promotion of community rights, equitable access to land, and its sustainability.
91. The 2nd and 3rd Respondents relied on written submissions dated 13/5/2024. It was submitted that the pleadings in support of the petition fail the test of specificity as held in Anarita Karimi Njeru Vs. Attorney General (1979) eKLR, Mumo Matemu Vs. Trusted Society for Human Rights Alliance & Others (2013) eKLR, for merely listing out the facts and lamentations without disclosing the constitutional provisions alleged to have been violated.
92. Further, the 2nd - 4th Respondents submitted that the issues raised had mutated the pleaded case from a constitutional suit to a normal suit that would be better adjudicated through critical discovery of evidence and testing of the veracity through viva voce evidence. In particular, the 2nd and 3rd Respondents submitted that the affidavits of Stephen Gambare, sworn on 2/11/2023, addressed an unpleaded issue and introduced disputed facts and several expert reports in an alleged environmental impact assessment audit report. Regarding the ecological assessment report, the respondents submitted that the Environmental Impact License was issued to them, according to the Senate Report.
93. On whether the disputed land was a National Reserve, the 2nd and 3rd Respondent submitted that the replying affidavit by Captain Messo gave the historical perspective of the land in dispute, now complimented by the Senate Report and the Kenya Wildlife Service scene visit report dated 4/12/2023. Further, the 2nd & 3rd Respondents submitted that Section 114 of the retired Constitution allowed the land to be gazetted as a National Reserve in 1948 and, therefore it ceased being trust land as defined in the 4th, 5th, 6th, and 7th Schedules of the Government Lands Act 1963.
94. As to the de-gazettement from the National Reserve, the 2nd & 3rd Respondents submitted that under Section 115 of the defunct Constitution, a County Council was at liberty to alienate degazetted land to individuals and allocate the land that ceased being trust land under Section 116 thereof. The 2nd - 3rd Respondents submitted that after the 2010 Constitution, all trust land transitioned to community land under Article 63.
95. The 2nd & 3rd Respondents submitted that the premise by the petitioners that the land was customary land by virtue of use by the community as forest, grazing areas, and shrines was wrong and, if true, was unlawful or could not make the land community land as defined by Article 63 of Constitution of Kenya. Similarly, it was submitted that even if the government acquiesced to the use of the land by the petitioners for grazing, the 2nd and 3rd Respondents submitted that it did not give rise to the purported interest in the land.
96. The 2nd & 3rd Respondents submitted that public land is land lawfully held, used, or occupied by any state organ, including game reserves, water ice/land areas, national parks, government animal



- sanctuaries, and specified protected areas. Therefore, since the land was gazetted as a National Reserve in 1948, it was effectively placed under the use and occupation of the relevant government ministry and agencies in this case, the 2nd Interested Party, being the contemplated agency under Article 62 (1) (b) of Constitution of Kenya on the effective date.
97. The 2nd & 3rd Respondents submitted that by virtue of *the Constitution* of Kenya 2010 and WCMA, communal rights in land were extinguished upon the gazettelement of the suit land as a national land under WCMA and since this had not been disputed, the same won't be understood in the context of C.L.A. & Article 63 (2) Constitution of Kenya. The 2nd & 3rd Respondents submitted that whereas a National Reserve under WCMA is defined as an area of community land declared to be a National Reserve, and community means a group of individuals who share a common heritage and interest for the sake of identifiable land-based resources or benefits, the use of community land does not mean to give same meaning as community land under Article 63 (2) of Constitution of Kenya.
98. On whether a National Reserve can be declared over private or community land, the 2nd and 3rd Respondents submitted that the assertion by the Petitioners' that National Reserves could fall under private or community land under Section 35 of WCMA was a wrong reference as public land cannot be Community Land.
99. The 2nd - 3rd Respondents submitted that the only window for conversion of community land to a national reserve was under Section 13 (3), 22, 23, and 29 of C.L.A. so as to assist communities in managing their land to the best of their communal interest, which in the circumstances is distinguishable.
100. The 2nd & 3rd Respondents submitted that WCMA was post-2010, despite the gazettelement being 1948, and therefore, the Law could not operate retrospectively, meaning that Section 35 of WCMA was inapplicable to the petitioners who submitted that the National Reserve was declared over community land. The 2nd and 3rd Respondents submitted that the gazettelement implied that any ancestral communal and customary rights over the suit land became extinguished. The court was urged to take Judicial Notice that all land was at some point ancestral land associated with a particular Indigenous community, and the categorization of land was a creation of the Law as it evolved. In this instance, it was submitted that pre-2010, it was not possible to have a national reserve over community land, for the land was either trust land or community land or if it was a national reserve and not trust land, communal or ancestral rights ceased to exist.
101. The 2nd and 3rd Respondents relied on the case law of *Peter Kitelo Chengeywo & Others vs Attorney General* (2022) KEELC 13783 (K.L.R.), where it was held that a gazetted national reserve was a public land and should be handled in accordance with the Wildlife Conservation Management Act and the *Forest Conservation and Management Act*. As for the Masai Mara Conservancy, the 2nd and 3rd Respondents submitted that what was applicable in Narok County was the repealed Land (Group Representatives Act Cap (287), where groups could register their common interests and manage their land. In this case, the 2nd and 3rd Respondents submitted that Marsabit County was not known for applying or implementing Cap 287.
102. On the alleged breach of statutory and constitutional rights, the 2nd and 3rd Respondents submitted that since after the gazettelement in 1948, the land ceased to be trust land, it could not transition to community land after the 2010 constitution or the enactment of the C.L.A or WCMA without prejudice to its earlier status; the 2nd and 3rd Respondents submitted that in the event the Court finds that the land was community land, the petitioners are not members of any community assembly or community land management committee as contemplated under Section 15 of the C.L.A. therefore, for they lack the mandate to act on behalf of the community. They have failed to prove any authority



to act as such; the Rendille and Samburu communities were not only residing in the Karare ward but are also in other areas; the suit was premature for non – exhaustion of internal dispute mechanisms under Sections 39,40 & 42 of the C.L.A. and Article 159 (2) of *the Constitution* of Kenya and that no attempts were made to engage in A.D.R. with them before filing the suit.

103. The 2nd & 3rd Respondents submitted that the petitioners lack locus standi and should not enjoy the court's audience, for they have been aprobating and reprobating in light of the provision of part VIII of the C.L.A. Further, the 2nd & 3rd Respondents submitted that Sections 34 & 35 of WCMA are inapplicable for the dispute is over a national reserve and a national park, there is no variation of a boundary or revocation thereof, and the procedures thereof are inapplicable.
104. As to EMCA, the 2nd and 3rd Respondents submitted that a project report was submitted to NEMA, was duly considered, and culminated into a NEMA Licence as attached to the replying affidavit in compliance with Section 58 thereof, which NEMA did not dispute under Sections 63 & 64 of EMCA and the petitioners had failed to exhaust the internal mechanisms under EMCA, if they were aggrieved by the license through the Nema Tribunal under Section 129 (2) EMCA.
105. The 2nd and 3rd Respondents submitted that since there was no land conversion of one regime to another as envisaged by Section 9 of the *Land Act*, 2012, the 1st Interested Party could not step in for the use of a national reserve since the land retains public use, and any changes that ought to be done should be done administratively by the Executive.

In this instance, the 2nd and 3rd Respondents submitted that the Senate report was clear that the engagement of the relevant ministries or agency was undertaken, leading to an environmental and social impact report and an E.I.A. on specific conditions to occupy the land as a lease.

106. On public participation, the 2nd and 3rd respondents submitted that the disputed land was public and, therefore, the provision of Section 34 of WCMA was inapplicable since there was no variation of boundaries, and the public participation undertaken was broad and effective before taking possession. Reliance was placed on Commissioner General of KRA Vs Okiya Omtata & Others (KECA) 127g (K.L.R.), Mui Coal Basin (Supra) that there was no litmus test or a particular formula for public participation so long as the same was effective.
107. On whether public interest outweighs private interest concerns, the 2nd and 3rd Respondents submitted that the petitioners had failed to demonstrate any individual or communal right over the land which was violated, threatened, or infringed, unlike those whose interest on the land was purely for public interest or purpose under Article 24 of *the Constitution*. The Montevideo convention on the right & duties of states, Article 5 & 60 read together with chapter I and II of *the Constitution* of Kenya allowed the state to sustain the Republic and the State.
108. The 2nd and 3rd Respondents urged the court to take Judicial Notice that they only require a part of the national reserve, and as per the scene visit report dated 4/12/2023, public resources have been expended in setting up the camp to its current form, and the court should not issue such orders as may put public resources into waste. Given that the 2nd Interested Party has legitimate ownership over the land, acquiescence, if any does not amount or translate to a right. The National/Public interest of security concerns outweighs alleged private/individual/ancestral or communal interests and the issuance of the letter by the 1st Respondent prejudiced no body. Without having exhausted the available administrative remedies and quasi-judicial avenues, the 2nd and 3rd Respondents urged the court to find the petition premature, undeserving, lacking merit and unproven.



Analysis

109. Having read and considered the petition, affidavits, rival submissions, and all the material placed before us by the parties, the following issues commend themselves for our determination; -
- a. Whether the petitioners have locus standi to institute this petition on their behalf and on behalf of the Rendille and Samburu communities.
 - b. Whether the petitioners exhausted all the available internal dispute mechanisms.
 - c. Whether the petition meets the constitutional threshold.
 - d. Whether the petitioners have pleaded and proved breach of any of their constitutional rights and freedoms to be entitled to the reliefs sought.
 - e. What is the order as to costs?
110. The Petitioners' case is that they have occupied, used, and lived in the suit land since time immemorial, and therefore the land is ancestral or customary land. Further the petitioners averred that the land has never been public at all. Acquisition of land for public use was governed by Section 75 (1) of the retired Constitution and the Land Acquisition Act Cap 295 (repealed).
111. Section 75 (1) thereof states;
- “No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the taking was necessary in the interest of defense, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefit and provision is made by a law applicable to that taking of possession or Acquisition for the prompt payment of total compensation”. This section of the Law has been sustained in Article 40 (2) (3) (4) & (6) of *the Constitution* of Kenya.
112. Sections 17, 18, 19, and 20 of the repealed Land Acquisition Act spell out ingredients preceded to acquisition of land, including the surety, appropriate Notice to be issued to all persons to be affected, and the vesting of the land in the government. In *Commissioner of Land Vs. Coastal Aquaculture (1997) eKLR*, the court held that the government as the custodian of all land documents, must provide the gazette notice showing that the government took possession of the land and that the property had vested in it and nothing would have been easier than to furnish them to the court.
113. In *Eunice Grace Njambi, Kamau & Another Vs. Attorney General & 5 Others (2013) eKLR*, the court said that under the repealed land acquisition act, the government had an obligation to execute the process of land acquisition to finality to effectuate title acquisition with proper documentation. In *Direnda Ranji Gudka & Others Vs. Attorney General (2014) eKLR*, the court stated that a specific provision of the Law conferred the rights of compulsory Acquisition. The applicable Law is Article 40 of the Constitution and Sections 107 and 133 of the *Land Act*, which replaced the Land Acquisition Act and which must be complied with for the rights of Acquisition to crystallize.
114. Article 40 (3) of *the Constitution* provides that the state shall not deprive a person of property of any description or of any interest in, or right if the deprivation 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 5 or is for a public purpose, or in public interest and is carried out in accordance with *the Constitution* and



- any Act of parliament which requires prompt payment in full, or just compensation to the person and allow, any person who has an interest in or right over, that property a right of access to a court of Law.
115. The Petition before the court has been attacked on locus standi and on account of not meeting a constitutional test, for lack of specificity in its pleadings and not disclosing any constitutional questions or issues. The 2nd - 4th Respondents have admitted that they took over land in Karare Ward for a public purpose, namely the advancement of their mandate and national security and the safeguarding of the sovereignty of Kenya and its state as set out under Article 241 of [the Constitution](#).
 116. The Petitioners claim that the land that has been taken has ancestral, cultural, religious, social, ecological, and economic interests and that the land is where their identity, integrity, ancestry, and livelihood are derived from. The petitioners have faulted the whole process, manner, and rationale of the land acquisition that falls short of [the Constitution](#) and statutory test, as well as undermining their constitutional rights to land ownership, equality before the Law, freedom from discrimination of whatever kind, right to a fair hearing, and social and economic rights.
 117. In *Anarita Karimi Njeru Vs. Attorney General (Supra)*, as read together with *Mumo Matemu Vs. Trusted Society of Human Rights Alliance (Supra)*, the court held that a party bringing a constitutional petition must specify the constitutional right threatened or violated, the manner, nature, and participation of the violation and must support the same with precise particulars and evidential materials. In *C.C.K. vs. Royal Media Services*, the court said that the purpose of pleadings in a constitutional Petition is to clarify the issue before the court and for the parties to know what they stand blamed for.
 118. In this petition, the respondents were able to respond in detail to the issues raised by the petitioners. The issues raised speak to the Constitutional Standard of Acquisition of land for public purposes by state agencies. Issues raised by the Petitioners directly invite considerations of Article 40 and Chapter (V) of [the Constitution](#). The questions called for and to be answered by the petitioners from the constitutional framework are the alleged land acquisition, manner and nature of the rights, interests, and concerns. The Petitioners argue that the process employed by the respondents failed the constitutional test and amounted to an infringement, violation, and breach of their constitutional rights and freedoms.
 119. In *Patrick Musimba Vs. National Land Commission & Others (2018) eKLR*, the court observed that national endeavours geared towards development would naturally touch on the public as well as private property and, with it, an obligation to protect any proprietary rights. The court, like in the instant petition, was dealing with whether the compulsory land acquisition process of land for S.G.R. had been conducted properly against the Petitioner's will, was a serious invasion of his proprietary rights, and required the application of constitutional and statutory authority and scrutiny as provided by part VIII of the [Land Act](#) 2012.
 120. The next question is whether the petitioners have made a case that the whole process, manner, and nature and of the 2nd and 3rd Respondents entry into, Acquisition, and occupation of Karare Land, failed the constitutional test, process, nature and purpose. Giving out of land for public purpose is governed by Article 40 of [the Constitution](#). The Article refers to rights and interests of, or over, or on any property of any description or a conversion of an interest in land or title to land in accordance with Chapter (V) of [the Constitution](#) and must be carried out as per [the Constitution](#) and a statute. The Article covers both public, private, and community land which is being acquired for public purposes.
 121. In this petition, the petitioners have expressed and defined their individual and collective interests or rights to the suit land. [The Constitution](#) has given parties aggrieved by or who are threatened with



- any breach of their constitutional rights and freedoms to approach the court for constitutional relief. Article 40 (3) defines who has the right to access courts where there is a threatened acquisition of land.
122. The Petitioners fit that description, and we have no hesitation in finding that they have locus standi and that the issues raised call for constitutional answers from this court. Similarly, the reliefs sought could not be raised in any other forum apart from this court. To this end, this court finds that the objections that the petitioners have no demonstrable interest or stake in the land or the Acquisition lacks merits.
 123. In *C Priscilla Jesang Koech Vs. Rebecca Koech & Others* (2018) eKLR, the court observed that under the [Land Act](#) it provides that the National Land Commission was the constitutionally mandated organ to oversee and undertake the Acquisition of land for public purposes on behalf of the national and County governments. The National Land Commission must establish the constitutional threshold that the land to be acquired is for public purposes and or in the public interest. The petitioners have attacked the jurisdiction of the 1st Respondent in purporting to alienate their land through a letter dated 2.7.2019 to the 2nd and 3rd Respondents. Further, the petitioners have termed the minutes and a subsequent Report alleged to have been as an outcome of public participation incapable of meeting the constitutional standards under Article 40(3) of [the Constitution](#), Kenya's international commitments to the environment and the rights of Indigenous peoples, and the enabling legislations.
 124. In *Law Society of Kenya v Kinyua, Head of Public Service and five others: Migot Adhola & Another* IP ELC PET No E029 of 2022 KEELC 3962)12th August (2022) (Ruling), the court observed that sections 12 and 14 of the [Land Act](#) provide the mechanism under which public land may be allocated and the National Land Commission as the constitutionally mandated body should do it on behalf of the national and County governments.
 125. Flowing from [the Constitution](#), even if the land was public, the National Land Commission has to be involved in the Acquisition. The 1st - 4th Respondents actions must be looked at from the spectrum of Article 40(3) of [the Constitution](#). The 1st - 4th Respondents have not challenged the petition with documentary evidence showing strict adherence to Article 40(3) of [the Constitution](#) and the provisions of the [National Land Commission Act](#), [Land Act](#), and the [Land Registration Act](#). Under the cited laws, the 1st Respondent's Governor has no constitutional and statutory rights to unilaterally or otherwise alienate the suit land through a letter, fiat, or decree. Similarly, the 2nd and 3rd Respondents cannot ignore adherence with the constitutional and statutory framework alluded to above by purporting to rely on the two documents which have no imprimatur of the 1st Interested Party.
 126. The National Land Commission, in undertaking the process of Acquisition of land on behalf of the 2nd and 3rd Respondents, has to fully comply with Sections 12-19 and 110-119 of the [Land Act](#). It is only after that, and with a vesting order that the 2nd and 3rd Respondents could be justified in moving into, entering, acquiring, using, or developing the suit land. The suit land has never legally and constitutionally vested in the 2nd and 3rd Respondents.
 127. At this juncture, we find it necessary to allude to Government Gazette Notice No. 536 of 24th September, 1948 that the Respondents and the Interested Parties claim gave the suit land to the predecessor of the 2nd Interested Party. A purposeful reading of the said Gazette Notice shows that it merely gave the defunct Kenya National Parks Trustees rights to protect and conserve Wildlife in the Gazetted area. It did not confer title to them. As a result, the Rendille and Samburu Communities continued to occupy the land.
 128. The 2nd - 4th Respondents have pleaded that there was urgency due to the national security threats and hence the reason that they moved with speed to enter into the suit land. The 2-4th Respondents urged this court to find that the constitutional rights and freedoms of the petitioners are subject to national



security and public interest. The answer to any urgency in the Acquisition of land for public purposes is Section 120 of the *Land Act*. It provides:

- (1) After an award has been made, the Commission may take possession of the respective land by serving every person interested in the land a notice that on a specified day, possession of the land and the title to the land will vest in the national or County government as the case may be, provided that such taking of possession will not result in persons being rendered homeless.
- (2) In cases where there is an urgent necessity for the Acquisition of land, and it would be contrary to the public interest for the Acquisition to be delayed by following the normal procedures of compulsory Acquisition under this Act, the Commission may take possession of the land upon the expiration of fifteen days from the date of publication of the Notice of intention to acquire, and on the expiration of that time the Commission shall, notwithstanding that no award has been made, take possession of that land in the manner prescribed by subsection (1).
- (3) Upon taking possession of land under subsection (1) or subsection (2), the Commission shall also serve upon—
 - (a) The registered proprietor of the land, and
 - (b) The Registrar, a notice that possession of the land has been taken and that the land has vested in the national or County governments, as the case may be.
- (4) Upon taking possession and payment of just compensation in full, the land shall vest in the national or County governments absolutely free from encumbrances.

Further, Section 124 of the Act provides that:

Power to obtain temporary occupation of land.

- (1) If the Commission is satisfied that the possession of any land is required by a public body for a particular period not exceeding five years and that—
 - (a) The possession of the land is necessary for public purpose or public interest;
 - (b) The possession of the land is necessary in the interests of defense, public safety, public order, public morality, public health, urban and planning, or the development or utilization of any property in such manner as to promote the public benefit; and
 - (c) The necessity, therefore, is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property, and so certifies in writing that possession of such land may be taken for that period under this section.
- (2) The Commission shall then serve on every person interested or who claims to be interested in the land to be taken possession of under subsection (1), or on such of them as after reasonable inquiry is known to the Commission, a notice that the Commission is to take possession of the land for the period in question.



- (3) At the end of seven days after the service of notices has been completed under subsection (2), the Commission may take possession of the land by entering, personally or by agents, on the land and posting on the land a notice in the prescribed form that possession has been taken of the land, and shall serve a copy of the Notice on the occupier.
- (4) This section shall not apply where the use of land is likely to cause permanent damage to land.

129. Even assuming there was some urgency or national security threats, the 2nd - 4th Respondents ought to have invoked and complied with these sections. On the contrary, the 2nd and 3rd Respondents ignored the path of Law and order and took the path of impunity and dis-order. A party who takes such a path cannot invoke the jurisdiction of the court to sanitize an illegality.
130. In Commissioner of Lands vs. Essaji Jiwaji & Public Trustee (1978) eKLR, the court observed that section 8 of the Land Acquisition Act on full and prompt compensation was in accordance with section 75 1(c) of the retired Constitution granting protection from deprivation of property unless certain conditions are satisfied. In Chief Land Registrar & Another and Nathan Tirop Koech (2008) eKLR, the court observed that a right to hold property was a constitutional right as well as a human right which can only be denied or deprived of in accordance with the Constitution and the statute, and the condition precedent is that the authority taking the land acquisition must ensure compliance with the two. Article 40(3) of the Constitution has no exception on account of national security. Due process has to be followed by not only the state organs but also state officers. Articles 19,20,21 and 22 of the Constitution bind all state officers and state organs.
131. The Respondents urged this court to hold that the Petitioners' legal and constitutional rights or interests to the land were extinguished upon gazettelement of the suit land and its declaration as land belonging to the 2nd Interested Party. The footprints of the 2nd Interested Party are lacking in this petition. Assertion of a right of ownership is one thing, while proof of the same is another. The burden of proof was on the 2nd - 4th Respondents and the 2nd Interested Party to show that the 2nd Interested Party has been in exclusive ownership and not the petitioners with effect from 1948.
132. The 2nd Interested Party did not indicate how it has been utilizing the parcels of land. There was no evidence tendered that the game rangers of the 2nd Interested Party have been deployed to the area to oversee the use of the land. There is evidence that the petitioners have homesteads and there are public facilities in the suit land. The 2nd Interested Party does not claim ownership of those facilities. It is the petitioners who utilize those developments. Therefore, the argument that since there are government facilities on the suit land, this land is public cannot be accurate in the absence of any gazettelement of the land as belonging to the 2nd Interested Party under the WCMA. The purported gazette notice of 1948 has not been authenticated as valid through the Kenya National Archives if the respondents wanted this court to draw any legality out of it. We say so because a lot happened after independence; the National Land Policy 2009, the Constitution of Kenya 2010, and the alignment of our laws with the new constitution.
133. The 2nd - 4th Respondents urged the court to find that even if the government acquiesced and allowed the petitioners to occupy the land, the prolonged occupation did not amount to accrual of any superior rights to the petitioners. There is no evidence that the 2nd Interested Party asserted any superior rights over the land against the petitioners, that failure or neglect for an unreasonable length of time to assert its right by exercising diligence, warrants a presumption that the party entitled to assert it either abandoned it or declined to assert it.



134. In Chief Land Registrar & Others Vs. Nathan Koech (Supra), the court observed that there are no time limits set by *the Constitution* or statute within which a party can file a constitutional petition. In this petition, the petitioners are properly before this court to assert their constitutional rights over the land under their occupation and or use. The 2nd Interested Party has not filed a cross-petition asserting superior rights over the suit land.
135. In Francis Muruatetu & Others Vs. Attorney General, the court defined who the interested party is. The 2nd – 4th Respondents cannot, therefore, advance the interest of the 2nd Interested Party as if it is the primary party in this petition. In Chief Land Registrar Vs. Tirop (Supra), the court observed that there can be no estoppel against *the Constitution*, which is the paramount Law of the land and subject to Article 24 of *the Constitution* of Kenya; no individual can barter away constitutional rights and freedoms or acquiesce or waive them. Further, the court held that constitutional rights are there as a written public policy, not simply for individual benefit only.
136. Additionally, the court held that subject to the express constitutional provision under Article 24 of *the Constitution* of Kenya, neither the state nor an individual can arrogate to itself or himself a right or justification to commit a breach of fundamental rights of any citizen and resort to the doctrine of waiver, acquiescence, Individual Delay estoppel or other similar principles as absolute defense or excuse. The court cited the case Indian Case of the state of B.hav & others Vs. Project Uchdia Vidya, Si Kshak Saugh and others MANU/SC/0054/2006, (2006) 2 SCC S45 and Olga Tellis Vs. Bombay Municipal Corporation (1985) K85.0710 (1986) A.I.R.
137. The 2nd -4th Respondents have attacked the petition for non-exhaustion of the available internal dispute mechanisms. Given that the 2nd – 4th Respondents failed to follow Article 40 of *the Constitution*, the *Land Act* 2012, and the *National Land Commission Act*, there was no other appropriate forum for the petitioners to fall upon save for coming to this court. The respondents allocated themselves the land unilaterally without involving the National Land Commission and following the laid down procedures for the Acquisition of land for public purposes.
138. It is the respondents who want the court to believe that they complied with *the Constitution* and the cited statutes. The onus fell on the respondents to prove the existence of facts on constitutional and statutory compliance in the acquisition of the suit land. The only evidence of compliance tendered by the respondents is a letter and a public participation report. This evidence falls short of showing that Section 114 -119 of the *Land Act* were complied with. See Wareharm t/a A.F. Wareharm & Others Vs. Kenya Post Office Savings Bank (2004) 2KLR 91.
139. In *Joseph Ibago Mwaura & Others Vs. the Attorney General & Others N.R.B. Petition No. 498 of 2009*, the court observed that Section 75 of the retired Constitution did not create proprietary interest but protected proprietary interest through the existing legal framework. The petitioners have pleaded that they had legitimate expectations that the 2nd -4th Respondents would consider their rights, interests, and concerns under the Law. The petitioners also pleaded for their rights to fair administrative action.
132. The Respondents have been unable to show what constitutional or statutory provisions they relied upon. Other than relying on the letter written by the Governor, the public participation report, and the map, the 2nd and 3rd Respondents have failed to establish before this court constitutional and statutory compliance with the legal framework set for the Acquisition of land for public use. Given the preceding, the irresistible conclusion is that the petitioners have discharged the burden of proof and established that the process, manner, and nature of acquiring land by the 2nd and 3rd Respondents and entry therein did not meet the constitutional and statutory test. As a consequence, the rights and interests of the petitioners were violated, infringed, and breached.



133. The alleged negotiations, consultations, and meetings between the 1st Respondent and the 2nd and 3rd Respondents and some of the locals in the area, however well-intentioned, failed to meet the requirements of *the Constitution* and the statutes. In any case, they constituted a belated attempt to sanitize an illegality.
134. The Petitioners' case is that they have occupied, used, and lived in the suit land since time immemorial, and therefore, the land is ancestral or customary. Further the petitioners averred that the land has never been public at all. In *Commissioner of Lands Vs. Coastal Aquaculture (1997) eKLR*, the court held that the government as the custodian of all land documents, must provide the gazette notice showing that the government took possession of the land and that the property had vested in it and nothing would have been easier than to furnish them to the court.
135. In *Eunice Grace Njambi, Kamau & Another Vs. Attorney General & 5 Others (2013) eKLR*, the court said that under the Repealed Land Acquisition Act, the government had an obligation to execute the process of land acquisition to finality to effectuate title acquisition with proper documentation. In *Direnda Ranji Gudka & Other Vs. Attorney General (2014) eKLR*, the court stated that a specific provision of the Law conferred the rights of compulsory Acquisition.
136. Article 40(3) of *the Constitution* and Sections 107 and 133 of the *Land Act*, which replaced the Land Acquisition Act, must be complied with for the rights of Acquisition to crystallize.
137. Article 40 (3) of *the Constitution* provides that the state shall NOT deprive a person of property of any description or of any interest in, or right if the deprivation 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 5 or is for a public purpose, or in the public interest and is carried out in accordance with *the Constitution* and any Act of parliament which requires prompt payment in full, or just compensation to the person and allow, any person who has an interest in or right over that property a right of access to a court of Law. From the evidence tendered, the respondents have admitted entry into, occupation and that they have undertaken developments on the suit land. The justification for taking such actions without following *the Constitution* have no justification and cannot find cover under the banner of urgency, national security, and public interest. The situation was made worse when the respondents failed to involve the National Land Commission, a body mandated constitutionally to oversee and manage the process, including establishing the appropriateness of the site for the intended purpose, the affected persons, their social, economic, cultural, and environmental concerns, interests, and rights and coming up with appropriate fair and just compensation. The framers of *the Constitution* saw it fit for a neutral party to midwife the process of land acquisition for public purposes. The 2nd and 3rd Respondents, as Interested Parties, were incompetent to handle the process and be expected to be fair to the petitioners.

Appropriate Reliefs, Final Orders and Disposition

132. Article 23 (3) of *the Constitution* mandates this court to grant appropriate reliefs, including a declaration of rights and injunctions, and conservatory and prerogative writs. What amounts to an appropriate relief depends on the nature of circumstances of each particular case; See *Rincy Makhohh B and 3 Vs. JSCA & Other (2012) eKLR* *B.2CO Oil Refineries Limited Vs. Attorney General (2012) eKLR*.
132. The Petitioners have urged the court to find that since the whole process of Acquisition was flawed, the entry into the land cannot be justified. Further, the Petitioners urged the court to halt the whole process and declare the same invalid, null, and void ab initio.



133. On the other hand, the respondents urged the court to find that the nullification of the whole process would result in the loss of colossal public resources. There is no evidence that public interest or state security outweighs interests of the petitioners.
134. The Petitioners approached this court before the 2nd - 4th Respondents undertook any development on the suit land. This court issued a status quo order. The Respondents since 2020 have maintained that whatever action they undertake is lawful, legal and constitutional. The 4th Respondent as the Chief Legal Advisor to the Executive have taken a partisan position in this petition yet the constitutional and legal framework governing the Acquisition of land for public purpose was not followed. Nothing was stopping the 2nd and 3rd Respondents from reviewing their position and rethinking the same after the petitioners moved to court. By relying solely on the Governor's letter of allocation and the purported public participation report, the respondents want the court to sanitize an already flawed process in the name of national security and public interest.
135. The court takes Judicial Notice of the Twelfth Parliament's Departmental Committee of Defence and Foreign Relations Report on the inquiry into land acquisition by the Kenya Defence Forces for the establishment of a forward operating base in Narok county dated 2.4.2019 accessed from <http://www.parliament.go.ke>.
136. In the said report the land earmarked for the acquisition was within the Masai Game Reserve Ecosystem and was along the migratory corridor of the animals within the park. The complaint to the committee was lack of public participation, and non-compliance with Articles 10 (2) (a) & (b), 61 & 69 (1) (2) of [*the Constitution*](#), Public Procurement and Assets Disposal Act and Section 58 of the EMCA.
137. In compliance with [*the constitution*](#), the 2nd and 3rd respondents had involved the National Land Commission who published gazette Notice No.5692 dated 8.6.2018 on page 1791 under the [*Land Act*](#) for the proposed Narok Military Land.
138. The 2nd and 3rd Respondents in the land acquisition for security purposes complied with Sections 17 – 126 of the [*Land Act*](#).
139. The role of the courts under compulsory acquisition is set out under Sections 127 & 128 of the [*Land Act*](#). It includes determining the construction, validity and effect of any instrument of acquisition, the persons interested in the land concerned, the nature and extent of their interest and the persons to whom compensation is payable and the shares in which compensation is to be paid to tenants in common.
140. Additionally, Section 133A of the [*Land Act*](#) establishes the land acquisition tribunal to hear and determine appeals from the decision of the National Land Commission in matters relating to the process of compulsory acquisition of land whose decisions are appealable to the court under Section 133D of the Act.
141. The 1st – 4th Respondents ignored the constitutional and legal framework governing the acquisition of land for public purposes. Therefore, the Respondents and the 1st & 2nd Interested Parties as creatures of the law have no justification to fight the law and breach the fundamental rights and freedoms of the petitioners. It was discriminatory on the part of the 2nd – 4th Respondents to ignore the law on the suit land yet and when almost at the same time for defence purposes they follow the law in another part of Kenya in particular Narok County, in similar circumstances. See [*Town Council of Awendo vs Nelson Onyango A.G \(Petition 37 of 2014\)*](#) (2019) KESC 38 (KLR) (Civ) (30th April 2019) (Judgment), [*Muambi Properties Ltd vs Kenya Urban Road Authority & Others*](#) (2024) KEELC 4307 (KLR) (23rd May 2024) (Judgment), [*Registered Trustees of Premier Club & Others vs Commissioner of Land \(Civil*](#)



Appeal 85 of 2018) (2024) KECA 281 (KLR) (8th March 2024) (Judgment), Bomбу Welfare Group vs National Land Commission and Another (Tribunal Case E003 of 2023 (2021) KCLAT 509 (KLR) (5th February 2024) (judgment), *Mabavu & 6 others vs Babati Properties Ltd (Application E052 of 2023)* (2024) KESC 8 (KLR) (12th April 2024) (Ruling).

142. This court opines that one of the cardinal responsibilities of a government is to ensure untrammelled obeisance to the law of the land. In this regard, the government should exemplify the highest integrity to the law of the land. We are hereby constrained to agree with the view of United States of America Supreme Court Justice Louis Brandeis in the Classic Case of *Olmsted Versus United States* 277 US 438 (1927) who opined as follows:

“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. If the government becomes lawbreaker, it breeds contempt for law; it invites everyone to become a law unto himself; it invites anarchy.”

160. The action of the Governor of the 1st Respondent to purport to allocate land to the Ministry of Defence had no basis in law whatsoever. Article 62 of *the Constitution* of Kenya is pellucidly unequivocal that public land whether vested in the County Government or vested in the National Government shall be administered by the National Land Commission. The action of the Governor of the 1st Respondent to allocate land to the Ministry of Defence and the attempt by the 2nd, 3rd and 4th Respondents and also by the 1st and 2nd Interested Parties to embrace and sanitize the illegal action of the Governor of the County Government of Marsabit demonstrates impunity by the Government and its named agencies. This Court deprecates this blatant attempt to circumvent the law of the land, including *the Constitution* of Kenya which is the Supreme law of the land.

161. This Court's unequivocal and unanimous position is that any actions taken consequent to the flawed decision of the Governor of the County Government of Marsabit are veritably void ab initio. The Governor unorthodoxically contrived to be an approbator devoid of any veneer of legal authority. Indeed, his action sought to effectively deracinate the Rendille and Samburu Communities from the suit land.

162. Having found that the process of allocating land to the Ministry of Defence is illegal statutorily and constitutionally, this Court unequivocally finds that this petition has merit and should be allowed. We however, find it difficult to grant the order of mandamus in accordance with the prayer crafted by the petitioners. At the time this petition was filed, the 1st, 2nd and 3rd Respondents did not have a duty to move out of the suit land. The status of the suit land had not been established at all. In Lieu thereof, this Court will order that the 2nd and 3rd Respondents do move out of the suit land measuring 5000 Hectares as indicated in the Governor's letter and or based on the Minutes of the Report dated 28/1/2020 as measuring 2500 Hectares and do also remove any structures they have erected thereon within a period of one year from the date of delivery of this judgement.

163. This Court has carefully considered the issue of damages. This petition was filed by a handful of petitioners. However, the citizens affected by the illegal process number in thousands, perhaps hundreds of thousands. It appears to us that a handful of citizens ought not to be awarded damages exclusive to themselves whereas the damage done is to the whole affected communities. This factual situation notwithstanding, this Court is alive to the centuries old maxim “Ubi jus ibi Remedium” as enunciated in the case of *Ashby versus White* (1703) 92 ER 126 that indeed “where there is a right there is a remedy.” There is no dispute that the petitioners and the affected communities have suffered



damages. We have decided to grant damages to the community in the sum of Kshs 30,000,000/= to be expended in a project or projects that benefit the affected communities. This award will be in the hands of a trust to be constituted by the following persons:

- a. The area Member of the County Assembly.
- b. A representative of the County Commissioner.
- c. Two representatives of the Petitioners; and
- d. A representative of the County Government of Marsabit

The damages awarded in this judgement will be paid by the 1st, 2nd and 3rd Respondents jointly and severally.

164. The prayers sought by the Petitioners are shown at Paragraph 17 of this Judgment.

165. In the circumstances, we make the following orders:

- a. Prayers 1, 2, 3, 4, 5, 6, 7, 9, 10 and 11 are hereby granted
- b. In lieu of the prayer of mandamus as sought by the petitioners in their prayer No. 8, the 2nd and 3rd Respondents are ordered to leave the suit land and remove any structures they have built on the suit land within one year of delivery of this judgement.
- c. The Petitioners did not canvass exemplary and aggravated damages and therefore, no such damages are awarded.
- d. General damages to the tune of Kshs 30,000,000/= are awarded to the petitioners BUT to be used for the benefit of the community affected by the illegal process of allocation of the suit land and that use is to be determined by a Trust to be comprised of:
 - i. The area Member of the County Assembly.
 - ii. A representative of the County Commissioner.
 - iii. Two representatives of the Petitioners.
 - iv. A representative of the County Government of Marsabit.
- e. Costs shall follow the event and are awarded to the Petitioners.

DELIVERED IN OPEN COURT AT ISIOLO THIS 19TH DAY OF JULY, 2024 IN THE PRESENCE OF:

Court assistant: Balozi/Tupet/Kananu

Katwa Kigen for 8th to 18th Petitioners together with Miss Makena Mbogo (present virtually).

Nelima absent for 1st to 7th Petitioners.

Birik absent for 1st Respondent

Yusuf holding brief for Mugira for the 2nd and 3rd Respondent (Virtually).

Yusuf holding brief for Kimathi for the 4th Respondent.

Haji absent for 1st Interested Party.

Petitioners represented by Christine Dokhole, Leruk Murusi and Joseph Leruk (MCA) member of the 17 Petitioners.



HON. JUSTICE PETER MUCHOKI NJOROGE - PRESIDING JUDGE

HON. JUSTICE CHARLES KIMUTAI YANO - JUDGE

HON. JUSTICE CHRISTOPHER KYANIA NZILI - JUDGE

