



Mutyo & 153 others v County Commissioner Bungoma & 6 others (Environment & Land Petition E003 of 2021) [2024] KEELC 7439 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND PETITION E003 OF 2021**

EC CHERONO, J

OCTOBER 24, 2024

**IN THE MATTER OF ARTICLES 19,20,21,22,23,25,27,29
& 39 OF THE CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTALS
RIGHTS AND FREEDOMS OF ARTICLES 40,47,48,60,61,63,64,66,67
&68 OF THE CONSTITUTION OF KENYA, 2010.**

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CHAPTER 284 LAWS OF KENYA

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

AND

**IN THE MATTER OF RULE 10 AND 11 OF THE CONSTITUTION OF KENYA
(PROTECTION AND FUNDAMENTAL RIGHTS AND FREEDOMS OF
INDIVIDUAL) PRACTICE AND PROCEDURE RULES 2006 READ TOGETHER
WITH RULE 19 OF THE SIXTH OF THE CONSTITUTION OF KENYA, 2010.**

BETWEEN

WANDIEMA MUTYO & 153 OTHERS & 153 OTHERS PETITIONER

AND

THE COUNTY COMMISSIONER BUNGOMA 1ST RESPONDENT

**THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT 2ND RESPONDENT**

THE LAND REGISTRAR - BUNGOMA COUNTY 3RD RESPONDENT

THE SUVEYOR - BUNGOMA COUNTY 4TH RESPONDENT



THE NATIONAL LAND COMMISSION 5TH RESPONDENT
THE PRINCIPAL SECRETARY MINISTRY OD LANDS AND PHYSICAL
PLANNING 6TH RESPONDENT
THE KENYA FOREST SERVICE 7TH RESPONDENT

JUDGMENT

Introduction

1. The 1st Petitioner herein in his own capacity and on behalf of 153 other persons who have been enumerated in the List Attached (hereinafter referred to as “the Petitioners”) filed a Petition dated 8/5/2021 (hereinafter referred to as “the Petition”) seeking the following Orders; -
 - a. An order of permanent injunction do issue restraining the Respondents by themselves, their agents and whomsoever claiming under them from evicting, harassing, destroying crops, livestock’s and homes, and from interfering in any manner whatsoever with the petitioners and other Chebombai community members occupation and use of private land outside the cutline separating the boundary of Cheptais forest and Chebombai area.
 - b. A declaration that the right to life, protection of the petitioners and other residents of Chebobai area has been contravened by the threats of forcible evictions from their parcels/ portions of land outside the cutline separating Cheptais forest and Chebombai area within Mt.Elgon sub-county.
 - c. A declaration that the threats to evict the petitioners and other members of the Chebombai community area from their parcels of land outside the cutline separating Cheptais forest and Chebombai area within Mt. Elgon sub-county is a contravention of the petitioners right to protection of the law and their right not to be discriminated against their right to reside in any part of Kenya.
 - d. That the National Land Commission to investigate past, present and or historical injustices melted out to the petitioners and the communities of Chebombai area who occupy land outside the cutline that separates Cheptais forest and Chebombai area.
 - e. That the petitioners and other Chebombai community members occupying portions/parcels outside the cutline that separates Cheptais and Chebombai area be issued with title deeds over the respective parcels that they occupy and or;
 - f. Registration and transfer of all the un-surveyed lands outside the cutline separating Cheptais and Chebombai area to the petitioners and other Chebombai community members.
 - g. That the respondents be ordered to respect the cutline (boundary) fixed in the year During demarcation of the boundary between Cheptais and Chebombai area within Mt.Elgon sub-county.
 - h. That the honourable court do issue declarations, writs, orders and directions as may be necessary to safeguard and prevent violation of article of *the Constitution* of Kenya, 2010.
 - i. That the title deeds being NORTH ALAKASI/NORTH WAMONO/595,565,566 AND 451 be protected having lawfully been issued by the 3rd, 4th and 6th Respondents.



- j. The respondents be condemned to pay damages and costs of the petition to the petitioners.
 - k. That all such other orders this honourable court shall deem fit to grant.
2. The Petition is supported by the affidavit of Titus Wandiemu Mutio, the 5th Petitioner sworn on 8/5/2022. From the said. the Petitioners averred that they are residents of Chebombai village within Mt. Elgon sub-county having lived there all their lives. They further averred that in the year 2001, the 3rd, 4th, 5th, 6th, 7th and 8th Respondents fixed a cutline that separates the boundary between Cheptais forest and Chebombai area and that they have for many years' lived outside that cutline. They contend that after this exercise, adjudication and registration was done and title deeds issued to three families i.e. Rasta Ndege Matia, Wandiemu Mutio and Wanakawa Kirui being titles to L.R NO. North Malakasi/South Wamono/595, L.R NO. North Malakasi/South Wamono 565 and L.R NO. North Malakasi/South Wamono 566 respectively. They averred that one Wandiemu Cheptot Chemokomet was also allocated L.R NO. North Malakasi/South Wamono/451 but registration and adjudication was halted due to insecurity in the area.
 3. It was further averred that sometime in March, 2001, security officers from the 1st, 2nd and 3rd Respondents invaded the area and issued threats of eviction to the petitioners who had been peacefully occupying their respective portions. The Petitioners allege they were asked to vacate their land without any lawful justification and thereafter approached this honourable court for the orders sought in the current Petition.
 4. The Petitioners attached the following documents in support of their claim;
 - i. Map for 1960
 - ii. Map for 1999
 - iii. Letter by Chepkube Chief dated 6/6/2005
 - iv. Photos of the cutline
 - v. Photos showing the homestead
 - vi. Photos showing the crops
 - vii. Gazette Notice No.113
 5. A list of the persons affected and who have consented to the Petitioners listed herein to file this Petition on their behalf against the respondents and Interested Party thereof.
 6. The Petition is said to have been duly served on all the Respondents herein.
 7. The Petition is opposed by the 7th Respondent through a replying affidavit sworn by Evans Kegode, head of Survey and mapping at Kenya Forest Service on 26/8/2021. The said deponent deposed that Mt. Elgon which covers approximately 91,997.16ha was Gazetted as a forest reserve vide [*Proclamation No. 44 of 1932*](#) and declared to be a central forest vide Legal Notice No, 174 of 1964. He stated that its location was placed at 80 Kms west of Kitale town and for ease of management was divided into various fort stations i.e Saum, Kimothon, Saboti, Kiptogot, Keburua and Cheptais. He deposed that Mt. Elgon is an important water catchment and is the source of various rivers i.e Kaibei, Kimothon, Mubere, Kaptagat, Saum, Kaptaka, Kamakuywa, Kimilili, Kikuk etc.
 8. It was further deposed that the 7th Respondent is not aware of any demarcation done in the year 2001 and that the gazetted boundaries are clearly known and described in [*Proclamation No. 44 of 1932*](#) and



the same is said to be clear and visible on the ground as the same are natural boundaries. The deponent averred that the 7th respondent is aware that the gazette Notice declaring Mt. Elgon Forest Reserve boarders private land i.e. L.R NO. North Malakasi/South Wamono 595,565,566 and 451 which are not within Cheptais Forest Block. It was argued that the Petitioners have not shown that they reside outside the Cheptais cutline and that there was a demarcation done in the year 2001.

9. The 7th and 8th Respondents attached the following documents to their Replying Affidavit;
 - i. A copy of the *Proclamation No. 44 of 1932*
 - ii. Legal Notice No, 174 of 1964
 - iii. Map No. ELG001DA
 - iv. A boundary plan showing the gazetted Mt. Elgon Forest Reserve Boundary for Cheptais Forest Station.
10. The 1st, 2nd, 3rd, 4th, 6th and 8th Respondents in opposition to this Petition filed Grounds of Opposition dated 8/9/2021 in which they averred that the Petitioners have not precisely demonstrated any cause of action against them and that the Petition has no substance as it is based on hearsay and is aimed at destabilizing the operations of the Respondents in the exercise of their statutory and constitutional duties to protect gazetted public forests as provided for under Article 69 and 42 of *the Constitution*. It was averred that the alleged violation of their rights to land had not accrued to the Petitioners hence incapable of being protected by this Court since the purported rights have not yet crystalized upon the Petitioners.

Parties Evidence

11. The Petition proceeded by way of viva voce evidence. The Petitioner called two(2) witnesses while the Respondents also called two (2) witnesses.
12. PW1 Titus Wandiemu Mutiyo testified that he is a resident of Chebembai in Cheptais Sub-County. He adopted the statements in the supporting affidavit and supplementary affidavit sworn on 8/5/2021 and 18/6/2021 as his evidence. He produced a list of documents as documentary evidence PExhibit No. 1(a),(b),(c) , PExhibit2 (a),(b),(c),(d) and (e), PExhibit 3 (a) & (b), PExhibit 4(a), (b) & (c), PExhibit 5, PExhibit 6, PExhibit 7 (a) (b) & (c). He stated that this Petition was necessitated by the harassment of the government through the Ministry of forestry which is chasing people from their ancestral land. He stated that the County commissioner placed beacons on the various parcels of land in 2001 and the Petitioners herein have never encroached or in any way invaded the forest and have settled outside the cutline. It was his evidence that he lived in L.R. No. N.Malakasi/S. Wamono/565 which is registered in his name with a title having been issued in 1979.He testified that their houses and crops were burnt and cut down.
13. During cross-examination the witness testified that he holds the certificate of title to L.R. No. N.Malakasi/S. Wamono/565. He confirmed that the maps produced did not bear the stamp from the lands office and that his land is not identifiable from the map. The witness confirmed that he did not tender any minutes for the demarcation meeting or any adjudication records. It was his evidence that he has a title deed and a beacon certificate for his parcel of land. In re-examination he testified that the Petitioners are not asking for land from the forest. He further stated that during the demarcation process the officials present were the area chief and the forest survey office,
14. PW2 Nahashon Ndiema Soet adopted his witness statements dated 20/8/2021 and 6/9/2021. He testified that there is a border between the forest and private land put in place by the Bungoma Land



- Surveyor. It was his statement that the Petitioners reside outside the cutline away from the forest. In cross examination the witness testified that he has not yet been issued with a title deed for the property he is occupying though he was in the process of acquiring one when the government stopped the adjudication and registration process due to skirmishes that erupted in Uganda. He reiterated that the area chief and Bungoma survey office placed boundaries in the year 2001.
15. RW1 Harrison Ouma Agwata testified that he was a retired Kenya Forest Officer but in the year 2001 he was in active service stationed at the regional headquarters in Kakamega. He adopted the contents of his affidavit dated 15/6/2021 as his evidence in chief. He denied the Petitioners claim. He testified that between 19/6/2000 and 22/6/2000 a multi-agency operation was done to remove the communities that had encroached into the gazetted Cheptais forest within Mt. Elgon. He testified that the above-mentioned exercise was peaceful, the chiefs were informed a month in advance and the involved departments co-ordinated well with the community being moved from the forest area into their private land. He testified that the boundaries are well established and known as there are beacons and boundaries. In re-examination RW1 testified that their jurisdiction is only in the forest area and they only moved the community from the said protected area.
 16. RW2 Evans Kegode adopted the contents of the replying affidavit sworn on 26/8/2021. He testified that there was no survey process done in Chebombai area in 2001 as alleged by the Petitioners and that the Mt. Elgon forest was gazetted in 1932. It was his evidence that the boundary of Mt. Elgon runs from Trans Nzoia County from a river marking the boundary between Kenya and Uganda. That on the western direction is Bungoma County where there is a cliff which is visible from Cheptais area all the way to Lwakhakha river which flows towards the North direction along the border of Uganda and Kenya bypassing the peak of Mt. Elgon and running back to Trans-Nzoia. This is the general boundary as per the 1932 gazette. He testified that there are both beacons and natural boundaries that encompass the Mt. Elgon area. It was his evidence that the area complained of by the Petitioners is marked by the natural feature which is the abovementioned cliff and is well shown in the boundary plan that gazetted the forest in 1932.
 17. In cross-examination the witness testified that there are boundaries features identifiable in Mt. Elgon forest such as natural features such as rivers and a cliff and beacons. He testified that he has been in the area since the year 2022 and he knows about the existing dispute between the community and the forest area. It was his evidence that when a boundary issue arises, the County Conservation of Forest sends officers i.e. survey and mapping officers to the ground to help in identifying the boundaries. The witness stated that he is the head of survey and mapping in the Kenya Forest Service's thus he holds all the records of the boundaries and legal notices. In re-examination he refuted the claim that the Forest officers injured people and destroyed property. He testified that cutline are not endorsed under the law and only boundaries in this case are recognised. He confirmed that the boundary between Chebombai area and Mt. Elgon is a cliff which is visible and clearly described. He stated that the gazetted boundaries have only been altered at Chepyuk area only.

Parties Submissions

18. Directions were taken for parties to file submissions. The Petitioner filed submissions dated 21/5/2024 while the Respondent filed submissions dated 16/7/2024.
19. The Petitioners submitted on two issues. On the first issue it was submitted that the map produced by the Respondents was prepared by the Kenya Forest Service Survey and Mapping section and is not a record of the Kenya Survey Department and is simply for internal use by the 7th Respondent. They quoted the case of Rangal Lemeiguran & Others vs. Attorney General & Others (2006) eKLR, Joseph



Letuya 7 21 Others vs. Attorney General and 5 Others (2014) eKLR amongst others. On the issue of costs, the Petitioners urged the court to award them costs.

20. The Respondents on their part submitted on six issues. On the first issue, it was submitted that there exists a clear boundary between Chebombai area and Mt.Elgon which was described in the year 1932 and not in 2001 as alleged by the Petitioners. Secondly, the Respondents submitted that they acknowledge the existence of the private land claimed by the petitioners and that the same has not been interfered with and no evidence has been table in support of the said allegation. Thirdly, they submitted that the Petitioners have not shown that the Respondents infringed on any of their rights and further that the Petitioners do not have any proprietary rights to be protected under Article 40 of *the Constitution*. Reliance was place in the case of Joseph Letuya & 21 Others vs. Attorney General and 5 Others (2014) eKLR. Further, it was submitted that the Petitioners have not proved that they reported the alleged forceful eviction to the relevant authorities. They relied in the case of; Chongeywo & 10 Others (Suing as representatives of the Ndorobo/Ogiek Community of Chepkitale, Mt.Elgon) vs. *Attorney General & 4Others: Kenya National Commission on Human Rights (Amicus Curiae) Enviroment & Land Petition 1 of 2017*[2021] KEELC 13783 (KLR), David Kiptum Yator & 23 Others vs. Attorney General & 15 Others (2020) eKLR.
21. The Respondents also contend that the Petitioners cannot be issued with the orders sought for ownership rights since such rights do not exist. On the order to have the National Land Commission investigate the alleged injustices, the Respondents submitted that the Petitioners ought to have approached the said commission under Article 67 (2) (e) of *the Constitution* of Kenya, 2010 before filing this Petition as provided under section 14 of the *National Land Commission Act*. They relied on the case of; David Kiptum Ytor & 23 Others vs. Attorney General & 15 Others (Supra). They contend that the Appellants are not entitled to the reliefs sought since the alleged right of ownership of the suit land has not been proved by way of certificates of titles. They urged this court to dismiss the petition with costs alleging that this is not a public interest claim.

Analysis And Determination

22. I have had the opportunity to read and analyze the respective pleadings of the parties and their submissions together with the case law cited in support thereto. The issues that distil for determination in this Petition as read with the responses filed by the Respondents are as follows;
 - i. whether the petitioner’s constitutional rights and freedoms were violated by the Respondents and
 - ii. what remedies, if any, are available to the petitioners.
23. Having identified the above issues for determination, I now proceed to evaluate the evidence placed before me and make the appropriate conclusions thereof.
24. The crux of the petition is that the Petitioners as well as other members of Chebombai Community allege that they reside and occupy parcels of land outside the cutline that separate Cheptais Forest and Chebombai area where they have lived since time immemorial, having inherited those parcels from their forefathers. They contend that the said cutline was established in the year 2001 by the 3rd, 4th, 6th, 7th and 8th Respondents where a boundary was demarcated between Cheptais Forest and Chebombai area. The Petitioners argued that they have done substantial developments on their parcels of land where they grow crops and also keep livestock. It was their evidence that partial registration and adjudication has already taken place in Chebombai area and some of the members of the Community have been issued with title deeds being North Malakisi/North Wamono/595, 565, 566 and 451 which belong to Rasta Ndege Matia, Wandiemu Mutio and Wanakawa Kirui. They contend that some areas



- outside the cutline where the Petitioners occupy are yet to be surveyed for purposes of registration and transfer since the exercise was halted due to insecurity in the area.
25. However, since March 2021 to – date, the Respondents have been and are still issuing threats to evict the Petitioners from the parcels of land which they occupy and live on outside the cutline and have also threatened to destroy and torch the Petitioners’ homes, crops and livestock terming them illegal squatters. Despite the Petitioners’ pleas, the Respondents have insisted that the Petitioners must vacate. The Petitioners claim that that is the only home they have known and that the Respondents actions have infringed on their Constitutional rights as enshrined under Articles 19,20,21,22,23,25,27,29,39, 40,47,48,60,61,63,64,66,67 and 68 of *the Constitution* of Kenya, 2010.
26. In their response, the Respondents led evidence to the effect that Cheptais Forest is a Gazetted Public Forest within the larger Mt Elgon Forest. It was their evidence that the forest has for a long time experienced serious degradation arising out of illegal encroachment and cultivation from the neighboring communities which prompted a multi – agency operation from 19th June to 22nd June 2020 to clear the forest from illegal encroachment. They stated that during this exercise, the communities around were notified of the operation through the Chief’s and ‘wazees’ and the exercise was peaceful and not forceful. They stated that the Kenya Forest Service does not arrest people since their mandate is on enforcement of regulations concerning conservation of the duly gazetted forest areas. It was their argument that they were not aware of any threat of eviction allegedly issued in March 2021 and neither have they interfered with the land parcel NO North Malakisi/North Wamono/595, 565, 566 and 451 which do not form part of Cheptais Forest. They submitted that the said Cheptais Forest was Gazetted in 1932 and there has been no de – Gazettment so far and that there is no land that is outside the Forest cutline since the forest ends where there is private property. They stated that they are not aware of any survey or boundary demarcation/setting done in the recent years and that as far as they were concerned, the alleged cutlines were figments of imagination of the Petitioners since the boundaries of the gazette forest area are elaborate and well defined by the existing natural boundaries such as cliffs, rivers and the Mountain itself. They argued that the Petitioners have not demonstrated that they own any land within Cheptais Forest or the alleged forest cutline and therefore their alleged rights had not crystalized to warrant the orders sought.
27. It is clear from the evidence adduced that Mt. Elgon Forest covers an expansive area and bestrides several communities. It is not in dispute that Mt. Elgon Forest was proclaimed and subsequently gazetted as a forest reserve protected by the state through *Proclamation No. 44 of 1932* and Legal Notice No. 174 of 20th May, 1964 respectively. That *Proclamation No. 44 of 1954* had been issued through the then Forest Ordinance. That the current legislation is the *Forest Conservation and Management Act* [ECMA], whose long title contains its aim which is to –
- “to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country and for connected purposes.”
28. From the foregoing, it is my view that where a forest is gazetted, there can be no lawful alienation of such forest unless the forest has been legally and regularly degazetted as a forest in accordance with the law. Likewise, where land was vested under a region as Trust Land, such land could only be legally set apart for alienation through a valid process under the Trust *Land Act*, cap 288 Laws of Kenya or the *Land Adjudication Act*, cap 284 Laws of Kenya.
29. It is also not in dispute that land parcels NO. North Malakisi/North Wamono/595, 565, 566 and 451 are private parcels of land and do not form part of gazetted Mt. Elgon Forest. Therefore, these parcels of land enjoy legal protection under Section 24, 25 and 26 of the *Land Registration Act*, 2012



and Article 40 of *the Constitution* of Kenya. It is noteworthy that the bone of contention between the parties herein is that the Petitioners allege that the Respondents caused destruction on their protected land and evicted them and by so doing, infringed upon their Constitutional rights. The Respondents on their part contend that no such destruction was caused by either of them.

30. It is trite law that he who alleges must prove as set out under Section 107 of the *Evidence Act* Cap 80 of the laws of Kenya which states as follows:-

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

31. This Courts attention has been drawn to the Petitioners oral evidence that there was a survey or boundary setting done in the year 2001 where the County Commissioner, area chief and Bungoma survey department settled the boundary/cutline between Chebombai community and Mt. Elgon Forest. However, this evidence has not been substantiated through oral or or any documentary evidence such as notice/circular of the exercise, minutes and or resolutions from the Petitioners. The Respondents in rebuttal have stated that they are not aware of any such exercise or any alterations to the gazetted forest area. From the record, the Petitioners have not denied knowledge of legal gazette Notice declaring Mt.Elgon Forest as a state forest exclusively under the management of the Kenya Forest Service. Instead, they argued that they reside outside the cutline. From their evidence, it is not clear what cutlines are and how the same are determined. The Respondents in rebuttal have asserted that the boundaries of Mt. Elgon Forest are natural and have been properly defined having not been varied since 1934.
32. On examination of the record in its entirety, this Honourable court finds that the Petitioners have not clearly established whether their claim falls within the boundaries mentioned above. Instead, they refer to "cutlines," which, as previously noted, are not known under any of our land laws. I have antagonized by what the Petitioners meant by using this word as opposed to using the term boundaries and I cannot for a fact understand their choice of word. I have searched the said term in both the Black's Law Dictionary and the Oxford English Dictionary and find that the said term is not defined in either of the sources. From the record, it is not clear whether the Petitioners allege that land parcels NO. North Malakisi/North Wamono/595, 565, 566 and 451 have been encroached and/or trespassed into or other parcels of land which have not been described? It is on record that the above mentioned parcels of land have been acknowledged by the Respondents as private land.
33. In my view, it was incumbent upon the Petitioners to bring evidence showing when, where and how they were allocated land instead of using title documents acquired legally and lawfully by third parties to agitate for non-existent claims based on alleged long occupation of the same to prove that the eviction was erroneous. In *Ledidi Ole Tauta & others v Attorney General & 2 others* (2015) eKLR, Nyamweya J (as she then was), Ougo and Mutungi JJ, held;

“At the time of instituting the present petition, the petitioners knew, and were aware that Ngong Hills Forest was a gazetted State forest...exclusively under the management of the Kenya Forest Service...Government forests are classified under *the Constitution* as public land...To conclude, this court notes that Ngong Hills Forest has not been degazetted as such, and its boundaries have not been varied to make it available for alienation to the petitioners. In our view, the petitioners ought to have petitioned the Minister through the Kenya Forest Service Board to consider whether any basis existed to have Ngong Hills Forest degazetted to accommodate their interests. The Forest Act provides a procedure, and mechanism for community participation in forest management under section 46 but does



not make provision for individualized ownership of land that had been brought under the operation of the Act.’

34. Further, in the case of Joseph Letuya & 21 others v Attorney General & 5 others (2014) eKLR, Nyamweya J (as she then was), held:

“The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer, and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated.”

35. Lastly in David Kiptum Yator & 23 others v Attorney General & 15 others supra it was held;

“That the only difference being in the names and description of some of the parties, and suit lands. That the decisions however, clearly show that the position taken by the petitioners herein that Embobut Forest is community land for reasons that it has been their ancestral land has no basis. That the findings in the above cases supports the Respondents’ position that pursuant to Embobut Forest having been proclaimed a forest reserve in 1954, and gazetted a central forest in 1964, then it forms part of public land as defined by article 62(1) (g) of *the Constitution* of Kenya, 2010, which is the Supreme law of Kenya. That further to the finding in (b) above that Embobut Forest is public land, the court finds that the Petitioners herein have not tendered any evidence to show or suggest that the said land had been legally, and procedurally degazetted as a protected forest or procedurally and legally alienated to them as the Sengwer community or petitioners.”

36. The import of the above case law which this Court finds to be both persuasive and binding is that the gazettment of Mt Elgon Forest as a public forest effectively extinguished any individual or community’s claim to the forest.

37. Again, it has been alleged by the Petitioners that officers from the 1st, 2nd and 3rd Respondents invaded their land and violently evicted them thereby destroying their homes, crops and livestock and are constantly threatening to evict them. Images have not been placed before this court as evidence of the alleged damage. However, there is also no evidence before this court that the damage alluded to was occasioned by the Respondents herein. The Petitioners witnesses claim that they made reports of the said destruction to the police but no evidence has been tendered to that extend. This Court agrees with the Respondents that in the Petitioners claim must fail in the absence of evidence of any injury or damage to property being made to the appropriate Government agencies at the County or National level.

38. Therefore, on the evidence, I am satisfied beyond doubt that the petitioners have not proved the petition to the required standard. The petitioners have not proved that any of their constitutional rights have been violated as alleged in the petition. This Petition is hereby dismissed in its entirety for lack of merit.

39. On the issue of costs, I am of the considered view that it would be punitive to order the petitioners to bear the costs of the petition. I therefore order that each party shall bear their own costs of the twin petitions and the cross petition.

40. Orders accordingly.



DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Onyando H/B Bwanchiri for the Petitioners.
2. M/S Kaweso H/B for Tarus for the Respondents.
3. Bett C/A.

