Kamozu & others v Attorney General & 7 others; Taveta Farmers Association (Interested Party) (Constitutional Petition 6 of 2019) [2023] KEELC 220 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEELC 220 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 6 OF 2019

M SILA, J

JANUARY 23, 2023

(FORMERLY NAIROBI HIGH COURT PETITION NO. 325 OF 2011)

BETWEEN

MATHENGE RAMATHANI KAMOZU & OTHERS ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

SETTLEMENT FUND TRUSTEES ..... 2ND RESPONDENT

KENYA ANTI-CORRUPTION COMMISSION ..... 3RD RESPONDENT

COMMISSIONER OF LANDS ..... 4TH RESPONDENT

TAVETA TOWN COUNCIL ..... 5TH RESPONDENT

PUBLIC SERVICE COMMISSION ..... 6TH RESPONDENT

DIRECTOR LAND ADJUDICATION & SETTLEMENT ..... 7TH RESPONDENT

MINISTER FOR LOCAL GOVERNMENT ..... 8TH RESPONDENT

AND

TAVETA FARMERS ASSOCIATION ..... INTERESTED PARTY

JUDGMENT

A. Introduction and Pleadings

1. The suit herein was commenced by way of a Petition filed on 19 December 2011 in the High Court at Nairobi and registered as Nairobi High Court Petition No 325 of 2011. The matter was subsequently transferred to the Environment and Land Court at Mombasa on 25 December 2018 and was re-registered as Mombasa ELC Petition No 6 of 2019.

2. The petition was instituted by three persons, namely, Mathenge Ramathani Kamozu, Wilson Abuyah and Athumani Moze Msafiri. However, in the petition, they aver that they have brought the petition "on behalf of other Kenyans presently residing on the suit land and who may be evicted at any time thus rendering them destitute." These "other Kenyans" are not disclosed in the petition, and there is no authority from them annexed, though there are various identity cards attached to the supporting affidavit. On 14 June 2019, an application dated 13 June 2019 was filed by 7 persons, namely, Simon Mwongi, Masua Ndumbua, Graton Ngume, Joseph Kitindi Kiminza, Mwanaisha Hassan, Charles Vetelo Mwanzia and Penina Nzomo, seeking to be joined to the petition and to act on behalf of some persons who were mentioned in a schedule that was attached. The application was allowed by consent on 17 June 2019 before my predecessor Omollo J. On 16 July 2019, a list of 1131 people was filed, said to be those who will be represented by the applicants in the application of 13 June 2019. There are some identity card numbers indicated but no copies of identity cards displayed and it is difficult to vouch that the persons named therein hold the identity cards indicated against their names. There is also no filed written authority from these named persons demonstrating that they have given authority to the 7 applicants to represent them. What was attached as authority was in the application of 13 June 2019 and is signed by only 24 persons, namely Paul Maswili Mulu, Mwania Masyuki, Benard Mutuku, Joseph Mambo, Clement Ngugi, Jomo Kilonzo, Joseph Mangondu Malombe, Julius Micheni, Sabas William, MC Simion Mbatha, Msafiri Wambua, Daniel Kimuyu, Peter Wali, Matano K. Makau, Michael Mutunga, Patrick Mutuku, Julius Ndambuki, Yusuf Malli, John Muthiani, Charles Moki, James Muloki, and Shadrack Mutisya Kiawa. There are some identity card numbers against these names but no identity cards attached. It is not therefore possible to say with certainty whether these people actually exist as indicated. Neither was the petition amended to add these persons in the body of the petition.

3. The 1st respondent, the Honourable Attorney General is the principal legal adviser to the government of Kenya; the 2nd respondent, the Settlement Fund Trustee (SFT) is a corporate body of Trustees that was established pursuant to the provisions of Section 167 of the *Agriculture Act*, Cap 318 (repealed in 2013), with mandate to settle persons within Government Settlement Schemes. The 3rd respondent, Kenya Anti-Corruption Commission, is now defunct, but it was a body corporate established under the *Anti-Corruption and Economic Crimes Act, 2003*. It has been succeeded by the Ethics and Anti-Corruption Commission, a corporate body established under Section 3 (1) of the *Ethics and Anti-Corruption Commission Act, 2011*. The 4th respondent, the Commissioner of Lands, was an office in the Ministry of Lands and Physical Planning. It is also now defunct. The 5th respondent, Taveta Town Council was a local authority. It is similarly defunct. The 6th respondent, The Public Service Commission, is an independent government commission established under Article 233(1) of the *Constitution of Kenya* to manage human resources in the Kenya Civil Service. The 7th respondent, the Director, Land Adjudication and Settlement, is an officer in the Ministry of Lands and Physical Planning, with responsibility of managing matters relating to land adjudication and settlement. The 8th respondent, The Minister for Local Government, was a Minister mandated to be in charge of the affairs of the Local Authorities, but the Ministry is defunct, given that local authorities were done away with after the *Constitution of Kenya, 2010*, and replaced with County Governments. Despite the fact that various offices went defunct, no amendment to the petition was done and the parties remain as above described.

4. When the petition was filed, it had two persons sued as interested parties. The 1st interested party was Kenya National Capital Corporation (Kenyac) and the 2nd interested party was Basil Criticos. Basil Criticos was initially the owner of the property in dispute, which is LR No 5865/2 (the suit land) situated in Taveta, within Taita Taveta County. He had charged this property to Kenyac. Kenyac, in

exercise of its statutory power of sale, sold the suit land to SFT, the 2nd respondent. SFT purchased the land with intention to settle some persons on it. In the course of this petition, both Kenyac and Basil Criticos (Mr Criticos) were removed from the proceedings, respectively on 5 May 2017 and 2 March 2015. They are no longer participants in the case although they had filed replies to the petition. Through an application dated 1 March 2015 and filed on 2 March 2015, Taveta Farmers Association applied to be joined to this suit as interested party. Their application was allowed on 2 March 2015 and they are described in this petition as the 3rd interested party. In reality, they are the only interested party in the suit and thus the reason the title of this judgment has Taveta Farmers Association as the sole interested party.

The Petitioners' Pleadings

5. The petitioners have pleaded that they were employed by Mr Criticos in the suit land and they derived their livelihood from the sale of sisal (the suit land appears to have been a sisal farm). They also claim that a majority of the employees were born and raised on the suit land and many have resided in it for more than 50 years. They plead that Mr Criticos charged the suit land to Kenyac, and Kenyac subsequently sold the land to SFT allegedly in contempt of court orders obtained in the following suits: Milimani HCCC No 270 of 200, Amos Mutuki Mutungi & Another vs. Basil Criticos & Agro Development Company Ltd; Milimani HCCC No 108 of 2006, Agro Development Company Ltd and Basil Criticos vs. National Bank of Kenya Ltd; and Milimani HCCC No 292 of 2007, Basil Criticos vs. National Bank of Kenya Ltd. According to the petitioners, following the illegal sale of the land, they have now been rendered destitute and risk being evicted. They aver that notices have been issued and government surveyors have been demarcating the suit land in disregard of their interest. They claim infringement of their Constitutional right to own land by the SFT and Kenyac and also infringement of their right to human dignity.

6. The petitioners further plead that the 2nd respondent (SFT) has acted illegally and in breach of the *Constitution* and the following particulars are pleaded.

    a. The petitioners are not aware that there are no rules that govern how the SFT is supposed to acquire land for purposes of settling the landless citizens of Kenya.

    b. SFT has been operating illegally and in a reckless and capricious manner by not having a transparent and equitable distribution policy of land allocation and redistribution.

    c. SFT has been allotting land to strangers who do not reside on the suit land and to the Taveta Town Council in total disregard to the petitioners' interests.

    d. SFT should be ordered to immediately stop any further dealings with the suit land until rules are established to cater for the interests of the voiceless citizens.

    e. SFT should be ordered to give a concise account of the persons to whom land has been allocated by name, tribe and the amount of money received by each allottee.

7. Against the Taveta Town Council, it is pleaded that SFT has without due process of law purported to allocate the Town Council land, and in turn the Council has been selling allotment letters to members of the public who are not indigenous to the suit land and have not resided on it. They wish that the Town Clerk be compelled to give a report of the names and tribe of those allotted land and whether they genuinely resided on the suit land. They want produced a full account of all the monies collected to persons given allotment letters. They also seek that the Town Council be barred from proceeding with the allotment process until investigations are carried out by the Minister for Local Government. They are alarmed that the Council is making profit from the sale of land at their expense.

8. It is contended that SFT officials, the District Land Adjudication and Settlement Officer, and the local Administration Officials, have deprived the petitioners of a livelihood as they are not accounting for the proceeds of sisal sales, that they claim appear to be pocketed by government officials, and should be forced to account for the secret profits.

9. The petitioners aver that it is the statutory duty of the 2nd respondent to avail land for settlement of all Kenyans who are landless at an affordable cost and facilitate such through settlement schemes. They fault the Town Council for issuing allotment letters without consideration to the petitioners and the general public who are in occupation of the land, and they want the court to determine that the sale and allocation of land (by the Council) is null and void.

10. They claim that there has been abuse of office by Government officials; that the land is sold to connected individuals and no account appears to have been done; that they have a right to information under Article 35 of the *Constitution* to access information concerning how the land has been allotted and the proceeds of the sisal sales; and that the SFT officials, the District Land Adjudication and Settlement Officer (DLASO) and the Town Clerk of Taveta Town Council, should be investigated. They want them investigated inter alia for conflict of interest; to account for public property; to submit wealth declaration; to investigate why their interests have been ignored; the amount of money collected from each parcel allotted; the criteria used for allotment; investigate how much land has been allotted to Government officials and Council officials; and for KACC to investigate whether any corrupt conduct has taken place.

11. The petitioners allege that they have been discriminated by dint of poverty. They assert that they are entitled to protection and exercise of their fundamental constitutional rights such as Article 20(1)-3(b), 22(1), 23(1) and (3), 25(c), 27, 35, 48, 60, 62, 63, 232 and 234. They contend that public policy will be violated if the suit land is not interfered with.

12. In the petition, the petitioners seek the following orders :-

    1. A permanent injunction be issued preventing the 2nd, 4th, and 5th respondents (respectively the SFT, Commissioner of Lands and Taita Town Council) its servants or agents from issuing letters of allotment of titles and titles or certificate of lease pending the setting up of rules giving priority to the rights to own land to the petitioners who reside on the suit land LR No 5865/2 Taveta.

    2. A permanent injunction be issued against the government servants, public officers, or any private surveyor from surveying, demarcating, or distributing the suit land LR No 5865/2 Taveta until the determination of this petition or further orders of the court.

    3. A permanent injunction be issued preventing all government public servants and officers from forcibly evicting the petitioners and all persons presently residing and occupying the suit land LR No 5865/2 Taveta until the determination of this petition and further orders of the court.

    4. A declaration that the suit land was illegally sold to the 2nd respondent by the 1st interested party in contravention of court orders.

    5. A declaration that the Settlement Fund Trustees has failed in its mandate to settle landless people in Kenya and should be injuncted from dealing with the suit land LR No 5865/2 Taveta until rules have been set up providing for equitable and fair distribution of land with priority being given to the landless citizens of Kenya.

6. A declaration that the petitioners are entitled to be given priority to own land out of the subdivisions from LR No 5865/2 Taveta and that the 2nd, 4th, 5th, and 7th respondents should be mandated to carry out a survey of all petitioners and determine their entitlement to a fair and equitable distribution of the land.

7. An order directing the 3rd, 6th, and 8th respondents to investigate all public officers concerned with the allotment of land arising out of subdivision from LR No 5865/2 Taveta and to give a concise account of all proceeds received from the issuance of allotment letters and the sale of sisal proceeds since September 2007 to the date of judgment in the present matter and file the report in court within 30 days of the order of the court.

8. An order directing the 5th and 7th respondents to give a concise breakdown of all public officers and private citizens who have been allotted land and the amount that each paid for the letters of allotment. The breakdown should attach the letters of allotment.

9. A declaration that the petitioner is entitled to protection under the *Constitution* to their right to land acquired by the government to settle them.

10. The honorable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

13. The petition is supported by the affidavit of the 1st petitioner, Mathenge Ramathani Kamozu. In it, he has deposed that he has lived on the suit land "together with the petitioners and other Kenyans" for over 20 years and that they resided on the suit land as squatters while working for Mr Criticos. He has deposed that in the year 2007 the suit land was illegally sold by Kenyac to the SFT resulting in legal battles which are still proceeding. He has stated that during the pendency of the cases, SFT sold part of the land to Taveta Town Council. He has continued that Taveta Town Council has in turn allocated part of the land to people who are not landless, and who are not ordinarily resident in Taveta, and from a tribe that does not ordinarily reside in Taveta. He has added that the Council is selling the land indiscriminately and at a profit, and that the allocation did not take into consideration that the petitioners are in residence of the suit land together with thousands of other Kenyans. He has averred that SFT is mandated to settle squatters and give priority to landless people but SFT has embarked on selling land to other 3rd parties while aware that they (petitioners) are on the land. He has alleged that SFT did this illegally and in a manner that was not transparent or equitable.

14. The 2nd petitioner Wilson Abuya, and 3rd petitioner Athumani Moze Msafiri, swore affidavits confirming the averments made by the 1st petitioner in the Supporting Affidavit.

Response on behalf of the Government

15. In response to the petition, the 1st, 2nd, 4th, 6th, 7th, and 8th respondents, which are Government agencies and/or offices, represented in the petition by the State Law Office, filed a replying affidavit sworn by Ngugi Stephen Maina, the then District Land Adjudication and Settlement Officer in Taveta District. He avers that the petition is misconceived, bad in law, fatally defective, and an abuse of the court process for the following reasons: that the petitioners lack the *locus standi* to originate, prosecute, and sustain this legal action, and that the petitioners are strangers to the respondent; that the petitioners do not have any demonstrable registered interest over the suit land; that the suit land belongs to the SFT; that the petition does not raise any constitutional questions; that the facts found no cause of action; that the petition is against the public good. Mr Ngugi has deposed that SFT legally bought the land from Kenyac for a consideration of Kshs. 55,000,000/= and SFT now holds the certificate of title. He has stated that it is not in the place of the petitioners to question the legality of the transactions between

SFT and the 1st and 2nd interested parties. He has deposed that SFT did not sell land to Taveta Town Council but allocated the Council 2,000 acres for the expansion of Taveta Town, after the Council applied for the land and paid the nominal outright purchase price. He has information that the Council is at an advanced stage of settling over 5,000 people. He has stated that SFT have a statutory mandate to buy land for resale. He has added that stricto sensu, SFT has no duty to settle the landless and squatters, because if that was the case, then the task would be insurmountable. He has deposed that the 1st petitioner (Mr Kamozu) resides in Challa location whereas the land is in Bomeni Location and that he has no known settlement in the suit land. He has stated that the 1st petitioner did not apply to be allocated land. He has deposed that the 2nd and 3rd petitioners have failed to disclose that they have been considered to be squatters and listed as beneficiaries for allotment of the suit land. He states that they have been allocated the plots Nos. 3153 and 3106 in Bura Ndogo area – Taveta Settlement Scheme, Phase I, Scheme No 889. He has asserted that the rightful and deserving persons who have been catalogued as squatters have benefitted from allocations done. He has annexed an inventory of squatters indicating their names, ID cards, the years they occupied the land, and the acreage they occupied before allocation. He has questioned the attachment of ID cards by the petitioners and stated that those persons are not properly joined to this petition. He has contended that most of the persons do not in fact know of the existence of this petition, as they have not given their consent, and that the IDs attached in the petition were given out to some village elders on the promise that they would be given land by Mr Criticos. He has annexed a letter signed by 43 persons, whose identity cards were attached by the petitioners, denouncing this petition. He has pointed out that other ID cards annexed are of people from the larger Taveta County, Makueni County, and other areas outside the suit land. He has added that the ID cards do not indicate the holders' places of residence. He has deposed that the list of beneficiaries of the land in the scheme was prepared by the local leadership together with the Provincial Administration from the year 2003 and the list was meant to cater for all the landless people in Taveta, the squatters, trading centre, public utilities, public installations, and government institutions. He has stated that the final allocation proposals were done after several meetings of stakeholders and he has annexed various minutes of meetings. He has stated that if the orders in the petition are granted, they will stall a noble cause, whose end objective is to settle over 10,000 landless and poor Kenyans.

16. The 1st and 2nd interested parties filed responses to the petition, but I see no need of going through the same, given that they were struck out of the suit.

17. I have not seen responses in the file from the Town Council of Taveta and the KACC.

Response of the 3rd interested party

18. The 3rd interested party, Taveta Farmers Association, responded to the petition through two affidavits. The first is sworn by Joyce Ledemi, and the second, a supplementary affidavit, is sworn by Josiah Malombe. In her affidavit, Joyce Ledemi has deposed that she is the Secretary of Taveta Farmers Association which has over 800 members. They are registered land owners of part of the land that comprised the suit land. She avers that there does not exist any specified contravention of the *Constitution* regarding allotment and subsequent issuance of titles to their members. She has deposed that the 1st petitioner (Mr Kamozu) opted not to be allotted land and that the 2nd and 3rd respondents have been considered for allocation of land. She avers that the petitioners have admitted being employees of Mr Criticos and they are therefore not squatters, and that they have not brought any case for adverse possession. She has deposed that no judicial review proceedings have been filed to challenge the manner in which the land was allotted. She states that the petitioners were ably represented in the allocation process through the Taveta District Settler's Selection Committee which constituted squatter representation. She has stated that the 1st petitioner on 25 February 2015 incited

locals to invade their land and was subsequently charged with incitement to violence and malicious damage to property.

19. In the supplementary affidavit, Mr Josiah Malombe has introduced himself as the Chairman of Taveta Farmers Association. He has deposed that the 1st petitioner (Mr Kamozu) is not a squatter as he owns a parcel of land at Chala Cooperative Society Scheme No 5, measuring one (1) acre, and that he sold it to one Ibrahim Chawucha Mkirimi. He has annexed a copy of the sale agreement. He has added that the 2nd and 3rd petitioners are also not squatters, having been allotted the Plots Nos. 3153 and 3106 in Bura Ndogo. He deposed that after SFT acquired the suit land, it directed various settlement officers to liaise with the respective District Physical Planning Offices for purposes of identifying beneficiaries and for planning. The Taveta Adjudication & Settlement Officer was then granted authority to hold District Settlement Committee meetings with local residents and other stakeholders. He has stated that a public stakeholders meeting was called on 8 September 2008 at Danida Hall, a public community hall, and that at the meeting, it was agreed that the SFT land be planned for both agricultural and commercial purposes subject to regulatory approvals from the Ministry of Agriculture, Public Health, NEMA, Physical Planning and the Local Authority. He has annexed copies of the minutes of the meeting. He proceeded to state that Taveta Town Council acquired 2,000 acres for purposes of developing a new town, and the attendant utilities. The Town Council then applied for change of user from agricultural to residential, commercial, recreational, industrial, public purposes, health utilities, transport and educational plots, which application was approved by Taveta District Physical Planning Liaison Committee on 26 November 2008. He has annexed the application and minutes of approval. Upon commencement of planning and survey work in 2007, there was ground visitation to demarcate roads and public utilities, and after taking care of the public utilities, a total of 5,525 plots became available for allocation. The Town Council of Taveta then placed an advertisement of plot allocation on 9 May 2008, and posted it in all public places, places of worship, and public barazas, inviting members of the community to take part and purchase the plots. He has stated that in the Stakeholder meeting of 8 September 2008, there were 141 representatives from all divisions in Taveta County, including the area Member of Parliament, Hon. Naomi Shaban, and allocation for public utilities was approved. He has elaborated that those interested in purchasing the plots were required to submit an application, copies of their IDs and Kshs. 2,000/=. He has stated that two schemes were approved, being Taveta Settlement Scheme Phase I and 2. The criteria for allocation of plots in the two phases was done by Taveta District Plot Allocation Committee in its sittings held on 15 March 2010 and 19 April 2010. The team comprised of three (3) elders of each of the nine (9) villages within Taveta, being Njoro, Malkiroriti, Chachewa, Langata, Lessesssia, Lotima, Riata, Mshekesheni and Bura Ndogo, their respective assistant chiefs and land settlement officers. Their duty was to identify and pick squatters from the nine squatter villages and a list was prepared. He has referred to the list annexed in the affidavit of Mr Ngugi. He added that the allottees were issued with title deeds in September 2013 through the initiative of the Jubilee Government and President Uhuru Kenyatta. He contends that the allegations of the petitioners are baseless as they also benefitted from the allocation of plots within the suit land. On the claim by the petitioners that transfer of the land to SFT was illegal, he has deposed that they have not sought to be joined in the suits between Mr Criticos and the National Bank of Kenya (the successor of Kenyac) and he reads collusion between the petitioners and Mr Criticos. He avers that it beats logic for the petitioners to challenge how title of Mr Criticos was jeopardised yet claim that the allocation of land to squatters was illegal. He has alluded to the case of incitement against the 1st petitioner and others.

20. I directed that the petition be heard by both affidavit and viva voce evidence, where the deponents of the affidavits could elaborate their depositions and be cross-examined.

B: Evidence of the Parties

Evidence of the Petitioners

21. The 1st petitioner testified on behalf of all the petitioners. He affirmed reliance on his supporting affidavit. He added that Lenaola J (as he then was) issued an order on 17 February 2012 stopping the exercise of subdivision of the suit land and issuance of title. He stated that allotment letters and titles were issued in 2013 after this order. He testified that the court, through the order dated 17 February 2012, stopped the subdivision of the suit land and the allotment and issuance of titles, however, in contempt of this order, titles were issued in the year 2013.

22. Upon cross-examination by Mr Moimbo, learned State counsel for the 1st, 2nd, 4th, 5th, 6th, 7th, and 8th respondents, PW-1 testified that he did apply and was allocated a parcel of land. He elaborated that allocation was done in a manner that one got a three (3) acre piece of land and a 50 X 100 feet plot, and he benefited in this fashion. He stated that he filed the petition so that all squatters can get land. He was questioned on the authority to file suit and he stated that he got authority from squatters in some villages and acknowledged that not all squatters gave him authority. On the letter written by some persons, who he had annexed ID of, but who in their letter disowned the petition, he claimed that they were agreeable to the case being filed but were called to repudiate the case. He affirmed that the number of squatters has swelled from the time the petition was filed because children have grown up and other people from outside have invaded the land. He stated that more than 5,000 people have titles but nobody has been shown the location of their land.

23. Cross-examined by Mr Kihanga, learned counsel for the 3rd interested party, he reiterated that he is a beneficiary of the Scheme and his other two petitioners are also beneficiaries. He acknowledged that there was a selection committee during the allotment exercise and they went round the 11 villages in Taveta. He admitted that there were adjudication meetings held in Danida Hall but he claimed that there was no agreement. He was questioned on the alleged order by Lenaola J stopping the process of adjudication of the land but he said he has not seen any such order. He affirmed that there is the New Town (in Taveta) which is a commercial centre and that there are areas set aside for public utilities but which are now occupied by squatters. He elaborated that to get a plot in the new town, one filled a form and needed to make payment, and meetings were held informing people that they can apply. He stated that the titles to the land came out in the year 2013. He acknowledged being charged with a criminal offence and he used the title issued to him to get out on bond. He wouldn't be happy if he found someone occupying his land. He mentioned that the land was about 15,000 acres and about 5,000 people got 3 acres of land which would constitute the whole of the land. He claimed that the squatters are now about 10,000 and that some squatters call others to occupy the land. He stated that because of the order issued by Lenaola J, stopping prosecution of these occupants, no action can be taken against them, and he admitted that some people are abusing the order. He averred that there are now squatters and invaders on the land. He claimed to have a list of the squatters and the invaders though he did not display it.

24. Re-examined, he testified that the verification committee did not involve all squatters but consulted with leaders, councillors, chiefs and Government officers. He claimed that they gave out the names of squatters but they were not consulted on the distribution of the land.

25. With that evidence, the petitioners closed their case.

Evidence on behalf of the Government

26. The 1st, 2nd, 4th, 6th, 7th, and 8th respondents called as their witness, Stephen Maina Ngugi, He also relied on his replying affidavit, which I have alluded to above, as his evidence in chief. When he swore the affidavit, he was the District Land Adjudication and Settlement Officer in charge of Taveta District. He is now an Assistant Director, Land and Settlement, Ministry of Lands and Physical Planning. In court, he elaborated that the original owner of the suit land was Mr Criticos. He defaulted on his loan, after which Kenyac took over the land. The Government then purchased the land, through the SFT, at Kshs. 55 million, in order to settle squatters. He was given authority to take possession of the land, pick the squatters, plan the scheme, demarcate and survey it, and do the allocation to squatters. He referred to the lists of squatters in his affidavit. He explained that there was first a list prepared by the District Commissioner (DC) in the year 2003, drawn at the time the leaders of Taveta started pressing the Government to buy the land. The DC took stock of the squatters on the land and this list was among what was considered during allocation of the land. Another list was prepared by the Government Surveyors when they went to pick squatters on the ground. This list has GPS Coordinates and is therefore specific to a particular place settled by a squatter. A third list, the allocation or beneficiary list, was also prepared. He explained that this list was a combination of the squatters in the DC's list, the Surveyor's list, and some additional squatters referred either by the Ministry or the local leaders. He stated that this was a "convectional scheme" meaning that squatters locally and outside could benefit. He gave an example of a family from Kisumu that had been displaced during the 2007-2008 post-election skirmishes and were considered for allocation as they were originally from Taita. This was the final list. He testified that he held many meetings and there were barazas and other stakeholder meetings. He completed the process and now there are title deeds, though there are some pending functions, such as pointing out to the beneficiaries their parcels of land on the ground. He has been unable to do this owing to security reasons. He stated that this petition has brought about a lot of tension, as some people, including the petitioners, have a misguided notion that an order was issued stopping their work. He testified that there has been violence and two lives have been lost. He has also received reports from people of their inability to access their land. He testified that the Government also invested a lot to allocate land to Government institutions such as the Kenya Medical Training College (KMTC) where an investment of over Kshs. 500,000,000/= has been made and it is currently operating. He also mentioned that Jomo Kenyatta University of Agriculture and Technology (JKUAT) have constructed a university. There is also a Technical School, a bus stop, a one stop border for the immigration, among others. He wished that the petition be dismissed so that the Government can complete its work.

27. Questioned by Mr Kihanga, learned counsel for the 3rd interested party, he testified that there has been no suit against them complaining that they have acted arbitrarily or unfairly.

28. Cross-examined by Mr Wandaka, learned counsel for the petitioners, he testified that he was not aware of any conservatory orders issued in the year 2012 stopping their work. He affirmed the land to be about 15,000 acres and stated that there was no specific number of squatters that was to be settled. He testified that there was a Committee which included persons selected by the wanainchi themselves (for purposes of dealing with the allocation issues). People were grouped depending on their area, and they were asked to appoint representatives, though he had no document showing how the representatives were voted in. He denied that these comprised of wealthy people in Taveta purporting to represent the 10,000 people (squatters). He denied that each squatter was to get a 3 acre piece of land and a ¼ acre plot. He explained that this arrangement was for some 6 villages where people had settled. They would get plots where they had settled, which varied from 50 X 100 feet plots to ¾ acre plots depending on the area settled. The farming land ranged between 2 and 3 acres, the allocation being dependent on the

decision of the Committee. He denied that the only persons who were to benefit were those on the ground before the year 2006 and he reiterated that this was a "convectional scheme" where people from outside could also benefit. His allocation list had two Phases, Phase I with 2,339 people and Phase II with 3,205 people. Phase I was a portion where Mr Criticos himself had tried to do an allocation. He stated that they gave land according to households but where a family was big, they could break it.

29. He was cross-examined on allocation to some specific individuals but he could not recall these names explaining that the scheme was big and he could not possibly know all persons. He was referred to an allocation to one Frank Marre who was given two plots and his ID number indicated, and an allocation to one Letiaki Jumapili Mmare (said to be his wife) with the same ID number and with two plots (Plots Nos. 2522 and 2913). His explanation on why the same ID number was used was that there was a problem with the entry of ID numbers. A list bearing names of who the petitioners regard as "irregular beneficiaries" was put to him. It contained about 220 alleged irregular allocation of plots. Given the number of the entries, I directed the witness to prepare an affidavit explaining each entry before proceeding for further cross-examination. An affidavit was filed though it did not explain each entry. What was deposed in the affidavit was that some land had been sold by Mr Criticos and these (the buyers) were left undisturbed; that some squatters had sold their balloted plots; that some families had large numbers and shared a common family name and occupied vast portions. An attached explanation sheet stated that the entry of wrong ID cards could have been due to typographical errors, in answer to the contention that this was intended at concealing the true identities of the persons, so as to hide the fact that they were getting more than one plot in the allocation. Further cross-examined, he conceded that there are people who have several parcels of land; that there are some with altered names but using the same identity card (for example an entry to Plot No 353 and 2564 has the same ID number but the names are Nawatoi Letiaki Nathaniel and Nawatoi M. Melekinoi; and entry to plots No 2524 and 2775 has the same ID number and the names slightly altered so that one plot reads Esther Eunice Ngene and the other Esther E. Ngene Christopher. Another is allotment of Plots 515, 516, 773, and 1935 respectively to the names Victoria Navuwasi, Victoria Navuasi, Victoria Nawasi, and Vicky Nawasi Mariangumu with the last three names having the same ID number but the first a different ID number but said to refer to the same person). The explanation of Mr Ngugi was that these were errors. He affirmed that some people have over 20 acres of land and some are Government officers and not squatters. His explanation was that some Government officers qualified having been found to be squatting on the land and that some bought for value from other people. He was referred to the name Mathew Mtawa Saningo and conceded that he has over 20 plot allocations. His explanation was that this was a large family who were picked on the ground. Another name put to the witness was of one Enock Mukambas Sailewu who had 9 plot allocations. He denied that he allotted plots according to directions given by the 3rd interested party and insisted that it was done by the Selection Committee which encompassed all stakeholders. He was referred to one of his attached minutes, which were minutes of "District Settlers Selection Committee" and he affirmed that this Committee did not have squatter representatives. He elaborated that the squatters were not allowed to choose a representative from amongst themselves but were represented by their Chiefs, Assistant Chiefs, Village Elders and Church Elders. He referred to Minutes of the Allocation Committee which captured the Chiefs and local leaders. He agreed that the minutes do not show the manner of allocation and explained that what happened is that the persons present would table a list of persons to be allocated land which list was then adopted. The final list constituted people from different sources. He denied the insinuation that anybody could get land in the Scheme even at present. He was not aware that Mr Kamozu had been allocated land in the year 2019 and he was not aware whether he was in his list of persons who had been allotted plots. He did not know about his allocation. Asked what his explanation would be if he was not in the list, he stated that the process is ongoing, and exhibited surprise that someone has title but is not in the allocation list. He stated that the issue of titles is the responsibility of Land Registrars. He

was not aware of findings of a Parliamentary Committee that proposed investigation into how land was allocated in the Scheme.

30. Cross-examined by Mr Munyithya, learned counsel representing the other persons who joined the petition, he testified that on the ground, some people possess what they were allotted, some have sold land, some have invaded other person's land, and he conceded that there is confusion. He averred that work under the Scheme is not complete; that not all persons have been issued with titles; that some titles have not been collected; and not everybody has been shown their plots on the ground. Some administrative issues such as double allocation and correction of ID numbers have also not been resolved. Arising out of this confusion, some homes were demolished by invaders and a life lost. He was not aware that some deserving squatters did not get land and explained that not all squatters could be settled. He stated that their target group was the persons settled on the land, those who had purchased part of the land, and landless persons. He agreed that titles are being issued even at the moment. He had nothing to show that they are dealing with the confusion created, his statement being that they were awaiting the outcome of this suit.

31. Re-examined, he testified that the title to the suit land has entries indicating some sales to individuals and they did not disturb them. He reiterated that squatters were represented and denied being controlled by the 3rd interested party. On several allocations to the same person, he stated that one could have settled in one place but bought land in another place, or his family may be settled elsewhere. He did not find it extraordinary to have one person in different locations. He stated that there was no criteria that all allocations be equal, and acreages could thus vary. He added that some persons could have gotten land after applying to Taveta Town Council. He averred that it was not possible to individually know all persons allotted land in the scheme and denied that it was due to their lapse that there are skirmishes on the land.

32. The court asked him to elaborate on how one would buy allotted land and he stated that it was done after the allocation list was prepared. A multiple allocation in the list was therefore not arising out of purchase. He explained that when people hear of a Scheme they rush to the land and occupy multiple parcels but he conceded that this can be noted during verification. He also agreed that more than one plot allocation is not justifiable unless there is good reason.

33. With the above evidence the State closed its case.

Evidence of Taveta Farmers Association – the 3rd interested party

34. The 3rd interested party called as its witness Josiah Malombe Kimanzi, its chairman. He is retired police officer. He started working in Taveta in 1992 and resigned in 2002 and started doing business in Taveta. He relied on his replying affidavit which I had earlier set out. He testified that the three original petitioners were not squatters though they benefited from the allocation. He testified that whilst living in Taveta, he heard that Mr Criticos was selling bits of his land using his company known as Agro Development Company. In 2008 the government started the process of settling the occupants of the suit land who had no documents. He testified that there was a committee formed, with three elders from each of the nine villages in Taveta, with the role of identifying the occupants of the suit land in their respective villages. There were also public awareness programmes. The chiefs and assistant chiefs presented information to the DC on who had settled on the land. He recalled that there was a meeting at Danida Hall with several persons present.

35. He offered that Taveta Farmers Association is comprised of persons who benefited from the Scheme. He stated that nobody raised query about the process from the year 2008 to 2011. They got allotment letters in the year 2012 and titles were issued in the year 2013. He testified that out of the 15,000-

acre of the suit land, the first to purchase was the Town Council of Taveta, who bought 2000 acres to build a 'new town' while the remainder was split into two phases, identified as Phase I and Phase II. The Town Council put up advertisements for those interested in buying a plot within their 2000 acres and one paid Kshs. 2,000/= for balloting. Depending on where one's ballot fell, the land ranged from Kshs. 50,000/= to Kshs. 150,000/=. Some plots were set aside as public utilities, such as that for immigration, the university and colleges. He asserted that this allocation for the 2,000 acres went smoothly and has no complaint. He himself balloted for about 10 plots which he got and also other members of his family balloted. However, some of these town plots have been invaded by outsiders including public utility plots which has stalled development of the town. For Phase I and II, they got allotment letters and titles, and it is when surveyors were showing them their land that a court order was issued. He testified that a large percentage of those occupying this land are invaders. He added that Taveta is cosmopolitan and all tribes benefited. In his opinion, the process was open and he is not aware of any order for cancellation of titles. He stated that there are criminal cases for trespass which have been stopped by a court order and invaders are inviting other people to occupy their land. He mentioned that at the time of the exercise, the allottees were about 6,000, but those who have now moved in and taken possession are more than 15,000.

36. Cross-examined by Mr Moimbo, he testified that the Association has about 5,000 members and is comprised of those with title deeds in Phase I and II, though there are some people who have title deeds but are not members. The Association was formed in the year 2015 to protect the interests of the members. He testified that the indigenous people of Taveta got 80% of the suit land and the rest was allocated to those from outside. He testified that he has two plots in Phase I and two in phase II. For Phase I, he and a friend purchased one acre from a person who had bought from Agro Development Limited which they split so that each gets ½ acre. When the SFT came they found him on the land. For the second plot in Phase I, he also purchased from a person who had bought from Agro Development Limited. This was in the year 2007. For the land in Phase II, he stated that he was tilling it and he was found there and for the second plot in this Phase, he purchased it from a person with an allotment. Both are 3 acre parcels of land. He stated that he is not in occupation of the land in Phase II since some people took it over. The land is surveyed but they have not been shown their beacons as they were accosted. He added that some people have several parcels of land but not all of it was through Government allotment as some purchased from Agro Development Limited or National Bank of Kenya.

37. Cross-examined by Mr Wandaka, he stated that he is aware that there are 9 villages though he could not tell their population and three elders were chosen from each village. He did not know these elders as he lived in town and not in any of the 9 villages. He did not know who was in the Committee, how they were selected, and he was not involved in their meetings. He was not aware of any order that stopped issuance of titles though he was aware of an order issued on 17 December 2014 prohibiting Magistrates' Courts from handling criminal cases arising from the land. He knew of another order issued on 24 February 2012 stopping allotment, subdivision and dealing of LR No 5865 but at that time subdivision and allotment had already been done and they got titles in 2013. He was not aware that allocation was to be 3 acres per family. He was not a squatter and he paid for what he has. He was aware of some with large tracts of land, such as one Enock Mukamba, but he stated that he (Enock) bought 26.9 acres. He could not explain the list tabled by Mr Ngugi where the plots shown are 'unknown.' He stated that some persons had squatted on the land and they benefited from the allocation. His members comprise of those who were settled or who purchased land. He denied engaging in 'State capture.' He denied that they forcefully took possession through burning of structures of squatters in occupation. He was aware that one of his members was shot with an arrow and killed by invaders. He acknowledged that the situation is now a time bomb since they have squatters and invaders. The invaders come everyday seeking land. Regarding the 1st petitioner (Mr

Kamozu), he stated that he is not a squatter and comes from Chala where they have family land. He stated that titles are still being issued at present.

38. Cross-examined by Mr Munyithya, he testified that the unoccupied land is targeted by invaders. He reiterated that he came to Taveta as a civil servant and has never been a squatter. He purchased land and was picked on the ground. He claimed that the person he purchased land from purchased it in the year 1999 from Agro Development Limited and that the Government purchased all the land including what the company had sold. He stated that allocation was not restricted to where one was residing.

39. Questioned by the court, he stated that a man and wife would have a single allocation of land. On his part, he registered one plot in the name of his wife because this was land that he purchased.

40. With the above evidence, the interested party closed its case.

C. Submissions Of Counsel

41. I invited counsel to file submissions and I have taken note of the submissions filed.

Submissions of Counsel for the Petitioners

42. In his written submissions, Mr Wandaka, learned counsel, first urged the court to take judicial notice of the widespread landlessness in the Coast province and its notoriety, and to reflect on the sorry state of land holding, management, and insecurity of land tenure in this country. He submitted that the petitioners and the squatters represented in the petition have lived on the suit land for many years and that they are entitled to protection of their constitutional right to land acquired by the Government to settle them. He submitted that they presented evidence of having lived on the suit land which was unchallenged. He submitted that the evidence of Mr Ngugi could not confirm that there was public participation and did not demonstrate involvement of the petitioners and the squatters who lived on the suit land. He added that there was no evidence showing how the list of squatters was compiled and verified. On the evidence of the 3rd interested party, he submitted that no agreements were produced to substantiate claims of purchase. Counsel then posed six issues that he attempted to answer. The first was on whether the petitioners have *locus standi* to bring this petition. He referred to Article 22 and Article 258 (1) and (2) of the *Constitution* as giving a person *locus standi* if he is acting as a member of, or in the interest of, a group or class of persons. On this point, counsel relied on the case *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR , *Priscilla Nyokabi Kanyua vs. Attorney General & another* (2010)eKLR; *Trusted Society of Human Rights Alliance vs Nakuru Water and Sanitation Services Company & another* (2013) eKLR. He submitted that the three petitioners have sufficient interest in the outcome of the matter and their grievances are representative of the interests of the thousands of squatters living on the suit property. He added that the suit land is public land.

43. Secondly, counsel submitted on whether the petitioners and the groups have any constitutional and/or statutory rights capable of being enforced. Counsel submitted that the *Land Act, 2012*, provides for the creation of the Settlement Fund Programmes to help provide shelter and livelihood for squatters and internally displaced persons and that the National Land Commission (NLC) is charged with the oversight role of implementing the said programmes as outlined in Section 134 (5) of the *Land Act*. He further submitted that the settlement of the Taita Taveta squatters is a legal requirement and a human right recognized under national, regional, and international law. To put emphasis on this claim, counsel referred me to the decision of the Indian Supreme Court in the case of *Francis Carolie Mullin vs. Administrator, Union Territory of Delhi* as cited in the case of *Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railways* (2013) eKLR. He then submitted that the government has an obligation

placed on it by the various laws to provide for its citizens who are vulnerable. According to counsel, Article 9 and Article 25 of the *Constitution*, guarantees the right to dignity, the right to life, and also the right to a standard of living where there is adequate health and well-being for everyone, food, and clothing. Counsel submitted that eviction should not result in individuals being rendered homeless or vulnerable in violation of other human rights. He referred to Article 43(3)(b) of the *Constitution* and submitted that every person has the right to accessible and adequate housing. He submitted that the *Land Act, 2012* provides that land settlement schemes shall be allocated to households in accordance with the national values and principles of governance in Article 10 of the *Constitution* and the principles of land policy in Article 60 (1) of the *Constitution*, which is implemented through the NLC. On this, he referred to the case of *Joseph Letuya & 21 Others v Attorney General & 5 Others* which inter alia addressed the new institutional framework provided by the *Constitution* on alienation and allocation of public land following the 2010 Constitution and affirmed that this is now under the NLC. He argued that if land is allocated to people in violation of Articles 10 and 60 of the *Constitution*, then the petitioners are entitled to reliefs for the violation.

44. Thirdly, counsel posed whether the NLC violated procedure for allocation of land to squatters. He submitted that the petitioners allege massive corruption in the whole process, citing lack of public participation, and added that if this is proved it would indicate violation of the *Constitution*. He emphasized the importance of public participation and the requirement of the *Land Act*, Section 134 (4), on the *Constitution* of settlement committees, which should comprise of a sub-county administrator (as chairperson), a representative of the County Government approved by the County Assembly, a representative of the Commission, a national Government representative, a representative of persons with special needs, a women's representative nominated by a local women's organization, and a youth representative. He reiterated the right to housing in Article 43 (1) (b) of the *Constitution*, and submitted, that not only has the State the obligation to fulfil this right but also a negative obligation not to do anything that impairs this right. He submitted that it appears that the public did not participate in the process of distribution of the land and that other than Government officers and the Local Member of Parliament it is not known who the other persons in the list provided by Mr Ngugi are. He submitted that there was no committee set up as provided by the law and that the purported stakeholders were only meant to hoodwink the public. He asserted that the process of allocation of land was opaque; and that Government officers and people who are not squatters benefitted from the allocation. He cited the Plots Nos. 1770 to 1778 which had no names or acreage shown. He also referred to the cases where persons have multiple allocations of land.

45. Fourthly, counsel submitted on whether the petitioners are/were squatters on the suit property and what is the legal definition of a squatter. He submitted that it is established that the petitioners and the squatters represented in the petition lived on the suit land for as many as 50 years and that the respondents and 3rd interested party admitted that they were allocated land in their capacity as squatters. He submitted that they have a legitimate expectation to be allocated land from the suit land. He added that their right to own property was violated. Counsel referred to the case of Sirikwa Squatters Group vs Commissioner of Lands & 9 Others (2017)eKLR, where it was opined that a legitimate expectation arises "as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority" and where various authorities on legitimate expectation were analysed.

46. Fifthly, counsel posed the question what constitutes public participation and whether the respondents met this requirement. He submitted that there was no public participation by the affected residents of Taveta county, and in particular, by the petitioners and the other squatters residing on the land. He reiterated that the purported stakeholder meetings were merely meant to hoodwink the public. He submitted that there was complete disregard of the set up of the committee as provided for in the *Land*

Act. On what would constitute public participation, counsel referred to the case of *Abe Seme Bvere vs County Assembly of Tana River & Another ; Speaker of the National Assembly & Another (Interested Parties)* (2021)eKLR and *Robert N. Gakuru & Others vs Governor Kiambu County & 3 others* (2014) eKLR. He submitted that the expected standards of public participation espoused in these cases was not met. He repeated that squatters were not involved in the process of land allocation yet they were the intended beneficiaries. He added that the respondents' allegation that there were notices and that they held meetings and barazas, was not backed by evidence of such notices and minutes of meetings, and could not confirm attendance and representation of all the involved squatters and residents on the land.

47. Sixthly, counsel submitted on the legal procedure and process of allocation of land to squatters and identification of squatters. He referred to Section 134 of the *Land Act*, dealing with establishment of settlement schemes and the *Constitution* of such scheme, which will be noted was an issue earlier on submitted. He repeated that the committee was not constituted as provided by the said law.

48. He closed his submissions by stating that the petitioners have made out a good case and urged the court to grant the prayers sought.

Submissions of Counsel for the 1st, 2nd, 4th, 6th, 7th , and 8th respondents

49. On the part of the 1st , 2nd, 4th, 6th, 7th, and 8th respondents, Mr Moimbo, learned State Counsel, first reviewed the petition and the prayers sought and the affidavits filed in response thereto. In his view, the following issues are for determination,

    a. Whether the petitioners had the requisite *locus standi* to file and prosecute this petition.

    b. Between the *Agriculture Act*, Cap 318, Laws of Kenya, and the *Land Act, 2012*, which was the relevant and applicable law at the material time; and which was the relevant statutory body ? Was it the Settlement Fund Trustees as established under the *Agriculture Act* or the National Land Commission as established under the *Land Act* ?

    c. Whether there was a requirement, in law, for public participation and whether there was public participation.

    d. Whether any laws were violated in the process leading to the allocation of the suit land.

    e. Whether the petitioners are squatters and whether they are entitled to be given first priority in allocation of the suit land upon the same being subdivided.

    f. Whether the petitioners' claims are justiciable.

    g. Whether the petitioners are entitled to the information sought under Article 35 of the *Constitution*.

    h. Whether granting the orders and declarations sought will serve public interest.

    i. Lastly, whether the orders, declarations and directives being ultimately sought by the petitioners can issue or they are spent.

50. On *locus standi* he conceded that the petitioners have the requisite standing but submitted that pursuant to the decision of the Court of Appeal in the case of *Public Service Commission & 4 others vs. Cheruiyot & 32 others (Civil Appeal 119 & 139 of 2017) (Consolidated)* (2022) eKLR , they do not have *locus standi* in regard to the following issues being :- the legality of the proceedings leading to the sale of the suit land between SFT and Mr Criticos; the legality of the sale agreement between SFT and Mr Criticos; the legality of the proceedings leading to the sale of part of the land to Taveta Town Council and the Ministry of Local Government; and questions over accounts for sale of sisal.

51. On what is the applicable law, Mr Moimbo pointed out that the petition was filed on 19 November 2011 and the same has never been amended. He submitted that the applicable law is the *Agriculture Act*, which was repealed in 2013 by the Agriculture, Fisheries and Food Act, 2013. Counsel also added that the *Land Act, 2012* commenced on 2 May 2012, way after this petition had been filed, and referred to Section 162 thereof which stipulates that the applicable law is that prior to the commencement of the said Act. He submitted that legislation does not apply retrospectively and referred to a couple of authorities to buttress this point. He further submitted that the NLC was established on 20 February 2012 following appointment of its first Commissioners through Gazette Notice No 2224 and 2225 and the petition was never amended to include the NLC. His opined that reference to the *Land Act*, and to the Settlement Committees thereof, by counsel for the petitioners, is made in ignorance of the applicable law.

52. On public participation, counsel first submitted that this is not an issue pleaded in the petition and that it was raised from the bar. He submitted that parties are bound by their pleadings. He relied on the case of *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* (2014) eKLR and the Supreme Court decision in the case of *Raila Amolo Odinga & Another s IEBC & 2 Others* (2017) eKLR. He nevertheless submitted that Mr Ngugi produced exhibits containing lists of beneficiaries as identified by members of the defunct provincial administration working in consultation with the local leadership and representatives from the affected villages. He particularly referred to the letter dated 1 September 2008, reference No LND.1. Vol. 1/13, which he averred was a letter convening a stakeholders meeting on 8 September 2008 at Danida Hall in Taveta, which meeting was convened by the District Commissioner (DC). He also referred to the letter dated 2 September 2008 to the District Physical Planner, District Land officer, and the District Surveyor, informing them to attend the meeting. He pointed out that both letters are titled "Stakeholders Meeting." He continued to submit that the meeting took place and referred to the minutes attached to Mr Ngugi's affidavit indicating those in attendance. He added that there were three subsequent stakeholder meetings held on 1 March 2010, 1 April 2010 and 17 May 2010, and urged that the area MP and the Chairlady of Maendeleo Ya Wanawake played a representative role. He submitted that the meeting of 8 September 2008 encompassed a membership representative of all stakeholders including the squatters; that there were deliberations about the land separately sold by National Bank of Kenya and Mr Criticos to private individuals where the purchasers had not been given title documents or even shown the physical location of the land; that the meeting also deliberated on the need to reserve land for Government institutions and public amenities; that recommendations were made that squatters were to be considered first where they had developed and settled; that the squatter list prepared by the DC be considered; and special allocations to be done upon application by individuals. He added that the 1st petitioner, in his evidence, did acknowledge that there were public meetings though he had disquiet that squatters were left out. He contended that the only problem with the said meetings is that they did not meet the criteria and expectations of the petitioners, but submitted that these meetings suffice because they were representative, and not all affected people could have been directly involved. He referred to the decision of Kenya Small Scale Farmers Forum & Others vs Republic of Kenya and 2 Others (2013) eKLR and opined that it was determined that citizens can take part in the administrative affairs of their countries either directly or through their elected representatives. He submitted that issuance of Certificates of Title only marks the final stages of the process of allocation and resettlement, and the noble principle of public participation came way after the process had substantially been concluded. He referred to the same case (Kenya Small Scale Farmers Forum) to urge that Article 10 and 60 of the *Constitution* are not applicable herein as the allocation process and list of beneficiaries had already been generated before the *Constitution* 2010 came to force and these provisions cannot apply retrospectively. He continued that the international instruments cited

by the petitioners are inapplicable since there is no indication that they had been domesticated as Kenya was then a dualist State. He urged that the allegation of lack of public participation cannot automatically in themselves vitiate the process in question. On this point he referred to the Supreme Court decision in the case of British American Tobacco Kenya Limited vs Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (interested parties) where it was inter alia held that "public participation is not necessarily a process consisting of oral hearing. Written submissions can also be made. The fact that someone was not heard is not enough to annul the process. Allegations of lack of public participation do not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case; the mode, degree, scope and extent of public participation is to be determined on a case by case basis."

53. On the right to information under Article 35 of the *Constitution*, he averred that the petitioners are seeking information on all persons allocated land, the amount that each paid and copies of allotment letters issued. He submitted that jurisprudence has established strictures within which this right is to be enjoyed and referred to the case of *National Association for the Financial Inclusion of the Informal Sector vs Minister of Finance & another* (2012) eKLR and the principles set out in that case. He also added the cases of *Kenya Society for the Mentally Handicapped (KSMH) vs Attorney General & others*, Nairobi Petition No 155A of 2011 (unreported) and *John Harun Mwau vs Linus Gitahi & 13 Others* (2016) eKLR. He submitted that it needs to be demonstrated that the information required was first requested and denied. The foregoing notwithstanding, he pointed out that the list of allottees is in the replying affidavit annextures MWA-1 and MWA-2.

54. On the justiciability of the petition, he submitted that the Minister, under the *Agriculture Act* (repealed) at Section 198, is protected from liability for acts done in good faith. He submitted that Mr Ngugi is protected by law for any actions that he undertook in good faith and there is no proof that he acted mala fides. He submitted that the Parliamentary Report on the Taveta Squatters Settlement Scheme was never produced and should not inform the decision of this court. He submitted that the process herein is being undertaken by the Executive and the ultimate effect of allowing the petition is to overturn the resettlement process. Counsel submitted that granting the orders will be an affront to the twin doctrines of separation of powers and deference enunciated by the Court of Appeal in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* (2013) KLR. He further urged that the petition is drawn in violation of both Gicheru and Mutunga Rules. He added that it was unsubstantiated that the petitioners derived their livelihood from selling sisal; that the land was sold in disobedience of court orders; that the right to own land and earn a living are violated; that the right to human dignity is violated; that the 2nd respondent has a mandate to settle squatters and give them priority in land allocation; that there are unsubstantiated claims of allocation to strangers; that there is no proof that the respondents are treating the suit land as a cash cow; that the petitioners are being discriminated for being poor and that no particulars of violation of the *Constitution* are provided.

55. Counsel continued to submit that the petitioners are not squatters in law and referred to the definition of squatters in Section 2 of the *Land Act*, as a person who occupies land that legally belongs to another person without that person's consent. He submitted that the petitioners aver to have been employees of Mr Criticos thus they occupied the land with his consent as their employer. He submitted that the exhibition of ID cards does not qualify these persons to be squatters and added that some of them have renounced the petition. He submitted that the three petitioners have been allocated land and it was in bad faith for them to approach court without disclosing this fact.

56. Mr Moimbo also pointed out that the 2nd, 3rd, 4th, 5th, 7th and 8th petitioners no longer exist and no orders can be issued against a party that does not exist. He contended that their successors ought to have been brought in through an amendment to the petition and that failure to amend renders this

petition incompetent. He relied on the case of *John Michael Waweru vs Municipal Council of Eldoret* (2013) eKLR.

57. Counsel submitted on public vs private interests. He submitted that the court needs to examine the nature of the individual claims made by the petitioners vis-à-vis the wider public interest of settling the large number of squatters in the suit land, which process is near completion and a large majority have titles. He submitted that granting the orders sought is likely to reverse the arduous task that the respondents have undertaken since 2003 and it is likely to cause panic, pandemonium and disillusionment, to the entire population of Taveta County. He submitted that this petition should be dismissed on account of public interest. He relied on the cases of *Okiya Omtatah Okoiti vs IEBC & 2 Others* (2017) eKLR and some authorities mentioned therein which aver that the claims of a litigant sometimes need give way to that of the general public.

58. On the allegation of multiple or double allocation, he submitted that these are not pleaded. He continued to state that Mr Ngugi explained the same. Counsel closed his submissions by stating that prayers 1, 2, 3 and 5 are spent in so far as they seek injunction pending hearing of this suit. He urged that the petitioners failed to get any injunctive orders and the process never stopped and that the resettlement process is almost complete. He referred to annexture MRK-2 of the petitioners, being a notice dated 2 August 2011, a notice informing persons to be available to be shown their plots. He submitted that this date is important as it confirms that by the time the petitioners were filing suit the allocation process had run its course and people were only waiting for issuance of certificates of lease. He submitted that this petition was filed after the event. He pointed out that the list provided shows that it was compiled between 26 February 2010 and 15 October 2010 and that it confirms that the respondents physically visited the affected area, mapped out the squatters, identified individuals in occupation, and picked them for resettlement. On prayer 4, seeking to cancel the sale to SFT, he urged that this was a self- defeating prayer and will also defeat the large public interest of settling squatters. He also submitted that the other prayers ought not to be granted. He urged that the petition be dismissed.

Submissions of Counsel For the 3rd Interested Party

59. For the 3rd interested party, Mr Kihanga, learned counsel, also submitted that prayers 1, 2, 3 and 5 of the petition are spent. On the other prayers, he framed the following issues :-

    a. Whether the petition meets the competency threshold set out in the case of Anarita Karimi Njeru vs Republic.

    b. Whether the jurisdiction of this court is ousted owing to the failure of the petitioners to set out statutory dispute resolution mechanisms.

    c. If so, whether the transfer of LR No 5865/2 amounted to violation of the petitioners' rights and freedoms guaranteed under the *Constitution* as presently canvassed.

    d. Whether the petitioners are entitled to the reliefs as sought in the petition.

    e. The consequences of non-amendment of the petition.

    f. Whether there is any available land within the suit property capable of re-allocation.

    g. Did the petitioners exhaust available local remedies known to them ?

60. Counsel also reviewed the evidence and submitted that there is no evidence linking the holders of the ID cards, annexed by the petitioners, to the suit property and there is also no written consent from the holders of these documents. On the photographs said to be of the residences on the suit property, counsel submitted that there was no certificate of electronic evidence indicating the author and when

the photographs were taken and their authenticity cannot be established. He referred to the evidence of Mr Malombe and submitted that it confirms that there were meetings held in presence of village elders and members of the community. He aligned himself with the submissions of Mr Moimbo, on public participation.

61. On the issues that he raised, Counsel first submitted that the petitioners failed to particularise with precision the relevant articles of the *Constitution* violated and how the violations were committed. He for example referred to paragraph 36 of the petition which alleges that the petitioners are being discriminated by dint of poverty and submitted that there was no evidence led to prove this position. On the claim for right to information under Article 35 and access to justice under Article 48, counsel submitted that it is not clear what information was withheld and by whom and it is also not clear how they were denied from accessing justice. He averred that there is no evidence of any request made for information. He submitted that it was the duty of the petitioners to provide the evidentiary foundation and relied on the case of Leonard Otieno vs Airtel Kenya Limited (2018) eKLR. He submitted that although the petitioners allege that the 2nd respondent acted in a reckless manner by not having a transparent and equitable distribution policy, they failed to provide details of all squatters who were not allocated land or were evicted from their property; failed to provide particulars of the parcels of land where these squatters are said to have resided, and failed to give particulars of how the 2nd respondent acted capriciously. He submitted that it was the petitioners to provide the particulars of violation and not shift the burden of proof to the respondents or interested parties.

62. On his second issue, counsel submitted that the petitioners failed to invoke the statutory dispute resolution mechanism provided under the *Land Adjudication Act*, Cap 284, Laws of Kenya. He invoked the exhaustion of alternative remedies doctrine captured in the case of *Okiya Omtata Okoiti vs Judicial Service Commission & 2 Others; Katiba Institute (Interested Party)* (2021)eKLR and *Speaker of National Assembly vs Karume* (1992) KLR 21. He also added the case of *Geoffrey Muthiga Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others* (2015) eKLR.

63. On his third issue, Mr Kihanga submitted that the petitioners failed to establish that they wielded any rights in relation to the suit property and that such rights were breached. He averred that though it was claimed that nearly 2,000 persons were discriminated against, in the allocation of the property by dint of poverty, no list of names of these persons was tendered, nor was any evidence provided on how the discrimination occurred, nor the parcels of land and acreages that these people occupied. He submitted that to the contrary, Mr Ngugi provided an elaborate detail of how the process of allocation was arrived at, and that this was after meeting of various stakeholders was held. He was of the view that any party that did not participate in this all-inclusive process, which was available to all members resident on the suit land, willfully elected not to participate in the process. He added that the petitioners did not avail any local leader, chief or administrative officer who would have been better placed to identify members of the community.

64. On whether there was violation of the proprietary rights of the petitioners under Article 40 of the *Constitution*, counsel submitted that the petitioners were squatters and have no right to the subject property, nor can they claim any legitimate expectation, since it will create a class of favoured squatters as against others over the same land. He referred to the case of *Nelson Kazungu Chai & 9 Others vs Pwani University College* (2017) eKLR.

65. On the alleged violation of the right to dignity under Article 28, and violation of economic and social rights under Article 43 of the *Constitution*, counsel submitted that no particulars of violation were provided, and it would be remiss for the petitioners to merely cite the existence of a right without leading any evidence as to how such right was violated. He submitted that there was no evidence that the petitioners derived their livelihood from the land, no evidence how their livelihood or shelter

was affected and no evidence of any eviction or displacement. On this point, he relied on the case of *Friends of Lake Turkana Trust vs Attorney General & 2 Others* (2014) eKLR. He submitted that it was impossible to establish how many of the alleged squatters claiming violation of their rights actually reside within the suit property nor had they established how they benefited from sisal farming. He added that it is impossible to establish how many of the petitioners were eligible for allocation but were left out or not considered for allocation. He closed his submissions by going through the prayers in the petition and was of opinion that the petitioners do not deserve any of them as some were spent and others unproved. He was also of opinion that failure to amend the petition was fatal as some of the named respondents no longer exist. He asked that the petition be dismissed.

Submissions In Rejoinder

66. Mr Wandaka filed submissions in rejoinder. On the question whether the petitioners were on the suit land prior to the filing of the petition, he submitted that this has never been in dispute and what seems to be in dispute is the duration of time that the petitioners were on the suit property prior to the year 2011. Without pointing to any particular application, he invited court to look at the preliminary applications filed after 19 December 2011. He submitted that as landless squatters, they qualified for consideration. On public participation, he reiterated that the petitioners pleading is that they were discriminated because they were poor and that they were never considered for allocation and further that the process was not transparent. He submitted that any process employed to identify the beneficiaries without audience of those in actual occupation is a violation of Article 27 of the *Constitution*. He stated that no evidence was shown of a meeting where the squatters were in attendance and this itself is discrimination. He submitted that so long as the petitioners were on the suit property, the respondents were under an obligation to engage them, and the thought of using elected representatives to represent them was not acceptable to them. He submitted that the burden shifted to the respondents the moment the integrity of the process was challenged. He denied the contention by counsel for the respondents and 3rd interested party that the petitioners are relying on propositions which are not in the petition. He submitted that public participation is not new in our laws and is covered by the maxim that justice must not only be done but be seen to be done. He had a title of public interest vs private interest but my perusal of what is under that heading did not address the issues raised by Mr Moimbo on public vs private interest. What I see under that heading is submission that the petition is brought not just by the three petitioners and there is reference to the other persons who sought to later join the petition.

D. Analysis and Disposition

67. I will start by agreeing with counsel for the State and the 3rd interested party, that parties are bound by their pleadings. A court pronounces itself based on what the parties in the suit have brought as constituting their cause of action and the court will thus proceed to determine only what is before it as envisaged in the pleadings. This is not only trite law but is also exemplified in authorities. One is the case of *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others*, cited by Mr Moimbo. In that decision, the judges of the Court of Appeal censured the High Court judge for proceeding to determine an issue that was not raised by the petitioners nor answered by the respondents, and held that in doing so, the judge fell into error. The Court of Appeal approved various authorities presented before it in the said case, including an address in a journal article by Sir Jack Jacobs, titled "*The Present Importance of Pleadings*" , (1960) Current Legal Problems at pg 174,

cited by the Malawi Supreme Court of Appeal in the case of *Malawi Railways Limited vs Nyasulu* (1998) MWSC 3, where it was written as follows :-

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

68. I adopt the above statement, as I am unable to put it any better. I find that it aptly captures the importance and purpose of pleadings and the role of the court when determining a matter before it. As stated, both parties and the court are bound by the pleadings presented to the court, and the duty of the court is to determine the case based on the pleadings as presented. It is the pleadings that inform the court the dispute that is sought to be determined, and going beyond the pleadings and addressing a matter not before court, would be akin to the court going on frolic of its own that was not contemplated by the parties. The duty of the court is not to fashion a case for itself but to make a determination based on the case that the parties have presented before it. If the court does not adhere to this principle , it will be ambushing the parties, particularly the defendant or respondent in the suit, who would not have had the opportunity to address himself on the issue and will lead to a denial of the right to be heard. A defendant or respondent will certainly only address himself as to the case that has been presented against him and going beyond the case as presented in the pleadings will thus prejudice him. I therefore find it prudent to first lay down the case of the petitioners as outlined in their petition. I am aware that I did capture the same in the early paragraphs of this judgment and I will only briefly skim through it.

69. The petition is brought by three individuals and the other persons who subsequently joined the petition. The petitioners did state that they bring it on behalf of other Kenyans presently residing on the suit land and who may be evicted at any time thus rendering them destitute. They raised issue about the sale of the land to the SFT which they contended went contrary to various court orders and they cited the said cases. They also claimed that they have been rendered destitute and are at risk of being evicted. They alleged the SFT has infringed their constitutional rights by inter alia not having rules on how to settle them and allotting land to strangers who do not reside on the suit land, and also to Taveta Town Council, in disregard of the interests of their interests. They also sued the Taveta Town Council for selling allotment letters to the public who are not indigenous to the suit land and have not resided in it, and they wished to have full information of the persons allotted land by the Town Council and monies collected to be accounted for. They claimed discrimination in the manner land was allotted by both SFT and the Town Council. They also alleged secret profits, by sale of sisal planted by Mr Criticos,

and in the allocation of the land. They want investigation by the Ministry of Local Government and the Kenya Anti-Corruption Commission. They allege various breaches of the *Constitution*, which they laid down in the petition, and they set out the prayers they wished to have from this court. The prayers are well captured in paragraph 12 of this judgment. Following the stricture that parties are bound by their pleadings, this is thus the case that this court needs to determine, and this court needs to determine whether or not the petitioners deserve to be granted the prayers that they have sought in the petition.

70. It was raised by both Mr Moimbo and Mr Kihanga, respectively for the State and the 3rd interested parties, that prayers 1, 2, 3 and 5 of the petition cannot be granted as they are spent and/or overtaken by events. Mr Wandaka, in his replying submissions, did not address himself on this important point.

71. I have to agree with the submissions that prayers 1, 2, 3 and 5 of the petition are spent and this court cannot consider them. Prayer 1, seeks a permanent injunction to stop the 2nd, 4th and 5th respondents from allotting land and issuing titles pending the setting up of rules giving priority to the petitioners who reside on the suit land. It emerged in the course of hearing this suit, that by the time the petition was filed, the persons who were to be allotted land were already identified and in fact some persons have already obtained titles. The 1st petitioner himself has a title. It is therefore apparent that prayer 1 has been overtaken by events. It would probably have served the petitioners well if they had managed to obtain an order of injunction to stop allotment of land and issuance of titles pending hearing of the petition. I have seen that the petitioners had such an application which was filed alongside the petition. That application inter alia sought orders that pending hearing of the petition, there be issued an order to stop the government and the Town Council of Taveta, from issuing letters of allotment, surveying or demarcating the suit land, or issuing titles. I have seen no record of any interim orders being given, nor this application being allowed, meaning that the issuance of allotments and titles proceeded. An injunction is an order issued to stop an event and it goes without saying that it will be futile to issue an order of injunction on an event that has already occurred. I thus find prayer 1 of the petition already spent and this court is unable to consider it. Prayer 2 of the petition seeks a permanent injunction to stop the survey, demarcation and distribution of the suit land "until determination of this petition or further orders of the court." As couched, this is actually an interim order pending determination of the petition and ought to have been the subject of an interlocutory application. I have already mentioned that the there is no record of the interlocutory application for injunction being allowed. It follows that prayer 2 is also spent. The same goes to prayer 3 which seeks an order of injunction to stop the public servants from evicting the petitioners "until the determination of this petition and further orders of the court." Prayer 5 must also suffer the same fate. It seeks an order of injunction to stop the SFT from dealing with the suit land until rules have been set up to provide for equitable and fair distribution of land. I have mentioned that the suit land has already been dealt with. From the above, it will be observed that prayers 1, 2, 3 and 5, in so far as they seek orders of injunction pending hearing of the petition and seeking to stop any dealings, are spent.

72. While I am on this issue of spent prayers, I feel the need to straight away address prayer 4 of the petition, which seeks a declaration that the suit land was illegally sold to the SFT in contravention of court orders. There was absolutely no evidence led by the petitioners of any order stopping the sale of the suit land to the SFT. In any event, I am at a loss as to the purpose of this order, if the intention of the petitioners is to be granted land within the settlement scheme. They of course cannot be granted land within the settlement scheme if it will be ordered that the SFT did not acquire the land legally and if the sale to the SFT is nullified. The petitioners cannot approbate and reprobate at the same time. I am also persuaded by the submissions of Mr Moimbo that this is an issue that ought to have been presented by the owner of the land, and not by the petitioners, and the petitioners have no locus to question how SFT acquired the suit land from the previous registered proprietor. The petitioners were not the ones with title to the land and they had no pending case which asserted any claim to ownership

of the land. Moreover, my research has revealed to me that the issue of the sale of the suit land to SFT was fully addressed by the Court of Appeal in Nairobi, in Civil Appeal No 80 of 2017, *Basil Criticos vs National Bank of Kenya Limited & Kenya National Capital Corporation* (2022) eKLR (judgment of 28 April 2022). That was a suit filed by Mr Criticos challenging the sale of the suit land to SFT and seeking damages. The Court of Appeal issued the following orders :-

(a) A declaration that the plaintiff is discharged and released from all liability under the Legal Charge dated 29th January, 1991 and Guarantee dated 22nd January, 1991.

(b) A declaration that the Defendant did not have any legal right to exercise the statutory power of sale in respect of the LR No 5865/2 and that the Agreement for sale and transfer dated 5th September, 2007 were executed in contempt of the injunctive orders issued in Milimani HCCC No 270 of 2007 Amos Mutuki Mutungi & Another vs Basil Criticos, Agro Development Company Limited, National Bank of Kenya Limited and the Registrar of Titles and Milimani HCCC No 108 of 2006 Agro Development Company Limited & Basil Criticos vs National Bank of Kenya Limited.

(c) A declaration that the sale of LR No 5865/2 for the sum of Kshs. 55,000,000 to the 2nd Defendant was a gross under value.

(d) A mandatory injunction compelling the 1st Defendant to pay to the Plaintiff the sum of Kshs.35,000,000 being the surplus realised from the sale of LR No 5865/2.

(e) Damages of Kshs.2,284,101,000 for the unauthorised improper and irregular sale assessed at the market value of the property LR No 5865/2 together with interest at court rates thereon from the date of this judgment until payment in full.

(f) Costs of the suit.

73. It will thus be observed that the issue of the sale of the suit land to SFT was fully ventilated by the Court of Appeal. The Court of Appeal, found the sale irregular, but did not reverse the sale to SFT, instead making an order for payment of damages to Mr Criticos. This court cannot revisit the issue, for doing so would be going against the res judicata rule. I also need to add that the damages awarded to Mr Criticos, in the above suit, inter alia covered the cost of the sisal on the land, where the Court of Appeal awarded him the sum of Kshs. 2,284,101,000/- for this loss. This, in my view, deals with the demand by the petitioners in prayer 7 of the petition, that seeks accounts for sisal proceeds. Damages for such sisal have already been awarded to the person who was the legal owner of the land and I do not see how this court can revisit the issue to now ask for accounts or make an order for damages in favour of the petitioners. But even without the benefit of the decision of the Court of Appeal, I would still have dismissed this prayer for accounts of sisal proceeds, for absolutely no evidence was led that the respondents dealt with sisal on the land for which they need to give account of. That aside, the sisal was never of the petitioners, but of the legal owner of the land, and I see no basis for the petitioners seeking an account of what they never owned in the first place. Prayer 7 is thus dismissed in so far as it is seeking accounts for the sale of sisal proceeds. However, if the petitioners feel that there was a separate act of corruption regarding sale of any sisal, they are liberty to make a report to the Ethics and Anti-Corruption Commission, or other investigatory body, mandated to investigate claims of corruption. One does not need an order of court in order to make a report of an alleged corrupt practice.

74. From the foregoing, it will be observed that I have outrightly dismissed prayers 1, 2, 3, 4 and 5 and part of prayer 7. I will therefore only substantively address myself on the remaining prayers, which are prayers 6, part of 7, 8, 9, 10 and 11.

75. I think the gist of the petition is in prayer 6 of the petition. Prayer 6 seeks a declaration that the petitioners are entitled to be given first priority to own the suit land, and further seeks orders for the land to be surveyed to all petitioners, and determine their entitlement pursuant to a fair and equitable distribution of the land. Within the petition, the petitioners pleaded that they and thousands of other Kenyans were employed in the sisal estate within the suit land (paragraph 14 of the petition). They pleaded that following the illegal sale to SFT notices were issued and surveyors were on the ground in total disregard of their interests. They complained, in the particulars of infringement, that SFT operated capriciously by not having a transparent and equitable distribution policy of the land, and that SFT has been allotting land to strangers who do not reside on the suit land, and also to Taveta Town Council, in total disregard of their interests. They alleged that they are being discriminated by dint of poverty. They claimed that the Town Council has been selling land to persons who are not indigenous in the suit land and contended that the land was being sold to connected individuals. In the affidavit in support of the petition, sworn by Mr Kamozu, he deposed that they came to be resident on the suit land while working for Mr Critios. He deposed further that while they were residing on the suit land they had portions thereof for their gardening which they have been using. On the sale by the Town Council, it was alleged that the sale was being done indiscriminately and at a profit. The rejoinder of the State was inter alia that the petitioners have not demonstrated any right over the suit land. It was averred that the 2nd and 3rd petitioners have already been allotted land. It was mentioned that land was allocated after a list of beneficiaries was prepared by the local leaders and the provincial administration, and that meetings were held to verify those to be allocated land. On the land to Taveta Town Council, it was stated that this was allotted to it for expansion of Taveta Town. The 3rd interested party supported the State in asserting that land was fairly allocated.

76. When the 1st petitioner testified, he did not refute that he has been allotted land. He also affirmed that the 2nd and 3rd petitioners were allotted land. I did not hear of any complaint from the petitioners about the size and location of the land that they were allotted. I am actually at a loss as to the very foundation of this petition, which alleged that the petitioners have not been considered for land allocation, and I find the petitioners to be guilty of material non-disclosure when they filed the petition. Nothing in their affidavits disclosed that they have been allotted land. I find it really curious that the petitioners would file a suit complaining that they have not been considered for allocation of land, complain that they have been discriminated by dint of being poor, yet the facts reveal that they have actually been allotted land.

77. It was never disclosed within this petition, who exactly among the petitioners (or even among the persons in the list presented by the additional petitioners represented by Mr Munyithya) was an employee of Mr Criticos, or was a settler/squatter on the suit land, but was never considered for allocation. You would imagine, when going through the petition, that none of the petitioners was given land, and that the former employees or persons who squatted in the suit land were never considered for allocation of land, but the facts displayed reveal that the petitioners were granted land, and as I have mentioned I have no evidence of a person who was entitled to get land but was not considered. It would probably have helped the petitioners if they had listed the persons who were employees of Mr Criticos and had settled on the land, or persons who were squatters in the land, but were never considered for allocation. The petition at paragraph 17 claims that they are at risk of being evicted and being rendered destitute. How can this be the case if they have been allotted land ? The whole petition is actually founded on an alarmist statement that the petitioners are on the verge of being evicted from land that they have been living for a considerable number of years, yet they have actually been allotted part of the suit land and they have titles. Without there being evidence of persons who were not considered for allocation of land, and who the petitioners feel were entitled to be allotted land, but were not, the petition herein has no substratum.

78. The petitioners also base their case on the allegation that they did not participate in the deliberations leading to allocation. In his submissions, Mr Wandaka ventured to submit that the petitioners needed to be engaged since they were on the land. The response of the respondents, and 3rd interested party, is that all stakeholders, including the occupants of the land, were engaged and there is reference to various notices and minutes of meetings.

79. It needs to be recalled that there are actually two allocations in issue in this petition. The first is the allocation by the State and the second is the allocation done by the Taveta Town Council after SFT distributed to the Town Council 2,000 acres. In as much as the petitioners questioned the allocation by the Taveta Town Council, I see no issue here. The allocation to the Town Council was not for squatter settlement, but was for the expansion of Taveta Town, and indeed, some of the land was in fact set aside for public utilities such as the airport and schools. If the case of the petitioners is that all land needed to be allocated to squatters then they are misguided. In the circumstances of this case, there had to be consideration for public utilities, and consideration for commercial expansion of the town, otherwise all you would have ended up with is unplanned settlements without facilities. That is why there was involvement of the Physical Planner in the planning of the scheme and in allocation process.

80. It was demonstrated within this petition that the Town Council of Taveta subdivided the land that was allotted to it into plots and invited applications for those interested in these plots. Those interested needed to pay to be allowed to ballot. This, to me, appears to be a fair process, and the petitioners brought no evidence to demonstrate that this is not what was followed. In fact, when cross-examined by Mr Kihanga for the 3rd interested parties, Mr Kamozu did affirm that to get a plot in the new town, one needed to fill a form and make payment depending on the plot applied for. He did acknowledge that meetings were held informing people that they can apply. I reiterate that the land to the Town Council was not to settle squatters but was meant to have a town which was planned and with facilities. You need a commercial centre to develop and for this you need persons who are ready to invest by putting up buildings for example. I have no evidence that the balloting exercise was not transparent and the evidence disclosed in fact shows that it was open to all. If the petitioners or any of the squatters also wished to be considered for allocation of these town plots they were at liberty to apply for them. Nowhere in this petition, nor in the evidence presented at the hearing of the petition, was it claimed that the petitioners, or the persons they claim to represent, were ever excluded or barred from applying for these town plots. I was also not pointed to any law which can be said to have been violated by the Town Council of Taveta in the manner in which they sold off the plots. I am thus unable to vitiate the process employed by the Town Council of Taveta to allocate the plots for the new town.

81. The other allocation is of plots outside the new town which was done by the Settlement office. It was claimed that this allocation was irregular in law and in his submissions Mr Wandaka referred me to various sections of the *Land Act, 2012* that he claimed were violated. The rejoinder was that the *Land Act* was not applicable at the time the allocation was done. It will be recalled that Mr Moimbo submitted that the applicable law was the *Agriculture Act* (repealed) and that Mr Kihanga submitted on the application of the *Land Adjudication Act* (Cap 284) Laws of Kenya. I am not persuaded as to the applicability of the *Land Adjudication Act* as submitted by Mr Kihanga, but neither am I persuaded as to the applicability of the *Land Act*, as submitted by Mr Wandaka. The *Land Adjudication Act*, states in its preamble that it is

> "An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto."

When you go through the said Act, you will realise that it is meant for demarcation of land to persons where such land was unadjudicated. Under Section 4, the *Act* comes into play once the Minister declares an area to be an adjudication area. The process of determining rights as laid down in the *Land Adjudication Act* was thus not applicable to the situation herein. The suit land was never declared to be an adjudication area by the Minister. The *Land Act, 2012*, could also not be applicable, as it was assented to on 27 April 2012, way after the issues raised in this petition had taken place, and indeed after this petition had already been filed. The process of allocating land to squatters as elaborated in the *Land Act*, was not there in 2007 or in the years thereafter when the matters herein took place, and this petition could not have been filed to allege violation of a process outlined in a statute that never existed. Thus, the petitioners cannot claim a violation of Section 134 of the *Land Act*, when this law did not exist and was not there to be followed. It cannot be alleged that there was not constituted a selection committee in compliance with Section 134 of the said Act. The reliance on Section 134 to assert that the process was flawed, and to argue that the required standard of public participation laid down therein was not met, is completely misplaced. The submissions of Mr Wandaka, that there was violation by the National Land Commission (NLC), are similarly misplaced as the NLC was not in existence when this petition was filed.

82. I agree with Mr Moimbo, that the applicable law is the *Agriculture Act*, Cap 318, Laws of Kenya, which was repealed in the year 2013 by the *Agriculture and Food Authority Act*, Act No 13 of 2013. The SFT was established by Section 167 of the old *Act* which provided as follows :-

> 167. Settlement Fund Trustees
>
> (1) There is hereby established a body of trustees, to be known as the Settlement Fund Trustees, which shall consist of the Minister, the Minister for the time being responsible for Agriculture and the Minister for the time being responsible for Finance.
>
> (2) The Settlement Fund Trustees shall, by that name, be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued, and, for and in connexion with the purposes of this Part, may purchase, hold, manage and dispose of movable and immovable property, and may enter into such contracts as it may deem necessary or expedient.
>
> (3) The seal of the Settlement Fund Trustees shall be authenticated by the signature of one of its members or of the officer administering the Fund.
>
> (4) All documents, other than those required by law to be under seal, made by, and all decisions of, the Settlement Fund Trustees may be signified under the hand of one of the Trustees or of the officer administering the Fund.

83. It will be seen from the above, and particularly Section 167 (2), that the SFT was empowered to purchase and dispose movable and immovable property and enter into such contracts deemed necessary and expedient. It is common knowledge that the SFT has been employed in the past to purchase land and settle persons and this is within their mandate. What land to buy, which people to settle, and the terms thereof, appears to have been within their discretion. They could buy land to settle

squatters or buy land for resale to other categories of persons. It cannot be said that their mandate was solely to settle squatters.

84. It appears to me that the purpose of the SFT buying the suit land was at least two pronged. One was to have the new Taveta town created under the auspices of the Taveta Town Council, and the second was to settle people, some of whom were squatters in that land. In his evidence Mr Ngugi testified that this was a 'convectional scheme' meaning that squatters both locally and outside could benefit. Mr Ngugi testified that allocation was done following two lists. One was prepared by the DC, and the other by Government surveyors who picked squatters from the ground. He stated that the final list was a compilation of these two lists plus some few squatters referred by the Ministry and local leaders. He mentioned that there were notices and meetings held to help in the process of allocation. I have indeed seen the minutes of the meeting of 8 September 2008 held at Danida Hall. Those in attendance included the DC, the area MP, Mr Ngugi as the District Land Adjudication and Settlement Officer (DLASO), the District Physical Planner, the District Land Officer, the District Surveyor, the Chairman Taveta Town Council, the D.O Bomeni Division, and Mr Kamau of the Land Adjudication office in Taveta. There were also in attendance 106 other persons and it is indicated where they came from. Of these 106 people, save for a few identified as Chiefs and Councillors, the rest appear to be individuals from the various locations of the area including Bomeni, Mboghoni, Njukini, Jipe, Chala, Mahoo Ward, Kimorigo, and Rashia. There is evidence to suggest that this meeting was open to all, as Mr Kamozu himself stated that he also attended that meeting. I have not heard anything in this petition which states that any of the petitioners or squatters were barred from attending the meeting or that they asked to be given audience in the said meeting but they were denied. I therefore wonder where the complaint that the squatters needed to be represented in the said meeting comes from as there is nothing before me that purports to conclude that the squatters were not aware of this meeting or that they were denied participation in such meeting.

85. Mr Wandaka went at length to state that there was no public participation and quoted various provisions of the *Constitution*, 2010 and authorities. the *Constitution* 2010 was not there in 2008 when these meetings took place and I do not see how counsel can rely on provisions of Article 10 of the *Constitution*, which outlines the national values and principles of governance, including public participation, nor the various authorities interpreting the principle of public participation in the current constitution. In other words the actions that took place in 2007/2008 when the allocation process was going on cannot be benchmarked on the demands of the 2010 Constitution. But having said that, I think that even if I am to apply the former or current constitution, in so far as public participation is concerned, I would still find that there was adequate public participation given the circumstances. I have already stated that there was notice calling for attendance to a stakeholder meeting. It was not uncommon to find such notices being given to Chiefs so that they can address the people in barazas and have them sensitized on what is going on. It is not said that the petitioners or squatters were not aware of the notice of the stakeholder meeting of 8 September 2008 and I have already pointed out that the 1st petitioner affirmed being present. In light of the sheer number, it could not be possible to hear all persons affected, as their number was in the thousands. In such an instance hearing could only be meaningfully held through representatives. Nothing stopped the petitioners or squatters from appointing representatives of their own if they felt that the local administrative, social, and political leaders who attended the meeting did not adequately represent their interests. In any event, the outcome of the deliberations was nothing that prejudiced the petitioners or the squatters on the land, for I have seen that the following were the first two resolutions made in the meeting held at Danida Hall :-

    1. All the squatters in this land to be considered first since they have their developments on the land.

2. The land people to pick all those who have settled in this land.

86. There was nothing wrong with these two resolutions which would cater for the interests of squatters. I have seen that in a subsequent meeting of a smaller committee comprising of the DC, the DLASO, the area MP, the District Physical Planning Officer, the District Surveyor, the Representative of the District Agricultural Officer, the Chairlady Maendeleo Ya Wanawake, and the Vice Chairman of Taveta Town Council, the DLASO stated that he had taken the inventory of squatters and he subdivided the land into two phases. Phase I was a portion of 5,000 acres. It was said to constitute a portion sold by National Bank of Kenya and some given by Mr Criticos. There were 1137 plots said to be vacant and which were to be allocated. Phase II was land not subdivided by National Bank but had some squatters settled there; 550 squatters were identified to benefit and a total of 3,189 plots were to be allocated. It was also mentioned in the said meeting that squatter registration had been done in the year 2006 and this would form the basis of squatter allocation in the settlement scheme. There is evidence that supports the assertion that some land had been sold by National Bank of Kenya and/or Mr Criticos, for when you look at the title of the suit land, you will see several subdivisions, which are then transferred to other persons, and to accommodate these, you will find partial discharges of the existing charge. It is therefore probable that there were some people who had purchased land but were yet to be given titles and there were also squatters, or former workers, on the land. I see no problem with the manner in which the land was identified and carved out into the two phases.

87. Neither am I able to find any fault in the planning of the scheme. The technical persons thought that this was the best way to go about allocating land in the scheme and it is not in my place to replace their wisdom with mine. If you look at the list prepared by the surveyor, said to be that which picked people from the ground, you will find that it is quite elaborate. It has names of people, and their identity card numbers, and what structures they have on the ground. It observes that there are some with permanent houses, some with temporary structures, those on the railway reserve, those farming, those proposed to be moved to other areas, and such like remarks. The surveyor's list from September 2010 identifies the location of the occupant using GPS coordinates. This, to me, was a painstaking and complex exercise that must have taken a considerable amount of time. At the end of it, in the final list, there are 2339 plots in phase I and 3205 plots in phase II, thus a total of 5,544 plots.

88. The only evidence that the petitioners provided to allege that the allocation of plots was unfair was a list said to a list of "irregular beneficiaries" of the scheme. At the outset, it is important to put this list into context. It was never one that the petitioners pleaded in their petition and it was not annexed to the supporting affidavit of Mr Kamozu. Neither was it presented to court when the petitioners testified and indeed the petitioners closed their case without exhibiting this list. The list was put to Mr Ngugi when he was being cross-examined by Mr Wandaka. I allowed that list to form part of the record if only to appreciate in full the testimony of Mr Ngugi in cross-examination. I have analysed that list. It of course alleges irregular allocations and provides the names of the persons said to have benefited irregularly. There is contention that some persons may have used their influence to get plots, or gave false names and ID numbers to conceal their true identity. It is correct that some persons in that list appear to have benefited from multiple plots. I cannot however vouch that they held the positions identified against their names or that they were influential characters. I have seen some changed ID numbers for the same name, and the same ID number used against different names. It could be that there were some people who took advantage of the settlement scheme to have themselves allocated land irregularly. However, I am unable to reach the conclusion that those persons named in the list were not entitled to land or that they got more land than they deserved. That needs a different type of investigation and interrogation. It will also be against the rules of natural justice to condemn these people unheard. They were not made parties to this petition and they have not had a chance to defend

themselves. It could be that there is an explanation that they can provide to excuse themselves from the allegation that they were irregularly allocated land within the scheme.

89. But even assuming that the list presented actually contains irregular allocations, in the circumstances of this case, I do not think that it is in the public interest to nullify the whole settlement scheme. The settlement scheme appears to me to have been finalized either late in the year 2010 or early 2011. There are 5,544 plots or thereabouts, not including the plots sold by Taveta Town Council. The list of "irregular beneficiaries" is of 220 or so plots. That is just about 3.968% of the settlement scheme (you can round that off to 4%). Some people within the scheme already have title deeds and have developed their plots. Nullifying the whole scheme would mean nullifying all these titles. This court cannot nullify the titles, first, because it may end up nullifying titles of people who are properly entitled to the land and who hold proper titles, and secondly, which is most important, it is against the principle of natural justice to nullify somebody's title without first giving them a hearing. Nullifying the scheme at this point in time will only lead to more chaos. I foresee a situation where some unscrupulous persons will use that to invade other people's land, evict them, and now claim to be the genuine squatters. The situation now is not the same as the situation in the year 2010 when squatters were picked from the ground; 13 years is a long time to expect the same situation to continue existing. The ground must have shifted after 13 years. Some who were children are now adults. There must be others who have sold their land. There are also those who have illegally taken over other people's land, taking advantage of the existing uncertain state of affairs and the length that this case has taken, to invade other people's land. If you now go to the ground, you may be hard pressed to separate the genuine squatter from the invader. It is most prudent that we rely on the list that was prepared when squatters were picked from the ground. If there are concerns about people who ought not to be in that list, it is best that a complaint which is specific to these people be lodged, so that they have a chance to be heard before condemning them and/or their titles nullified. I am unable to take an action that will nullify 96% of what is not disputed so as to satisfy the petitioners who allege that 4% of the scheme has issues, not forgetting that it is not even ascertained that truly this 4% is of persons that ought not to have benefited from the Scheme. That will be akin to throwing away the baby together with the bathwater and missing the forest for the trees.

90. From the above discourse, it will be seen that I am not persuaded to grant prayer 6 of the petition which more or less seeks a fresh survey and fresh allocation of the settlement scheme. This is actually the backbone of this petition and its collapse pours cold water on the rest of the petition. I had already mentioned that I am unable to allow prayer 7 in so far as it deals with the alleged sale of sisal. The residue of that prayer is for an order that the public officers be investigated. I have on my part not found any concrete evidence against any public officer named in this petition, but as I stated earlier, if the petitioners feel that there is any public officer that is culpable, they are free to make a complaint to the investigation agencies who are at liberty to take up the matter. I repeat that one does not need a court order so as to make a complaint of corruption against a public officer. Prayer 8 seeks a breakdown of public officers and private citizens who have been allotted land and amount paid for the allotment. Mr Ngugi in his replying affidavit already presented the list of beneficiaries of the Scheme falling under him. The Scheme falling under the Taveta Town Council was an open scheme and any person could bid for land. Unless there is some culpability revealed, and there is none in this case, I am hard pressed to grant this order. Prayer 10 is a declaration that the petitioners are entitled to protection under the *Constitution* to the land acquired by the Government to settle them. I am unable to make such declaration when I have not found any violation of the *Constitution* by the public officers. I have stated time and time again within this judgment, and I will not tire repeating it, that none of the petitioners provided any evidence of being left out of the scheme or of being settled in another place that prejudiced them. They in fact have titles. This court cannot make empty declarations without

there being any substance to back up the foundation of such declaration. Prayer 10 is for other orders that the court deems fit to grant. I see no other order that this court may grant save to state that all interim orders issued herein are hereby vacated. For the avoidance of doubt, that includes the orders stopping any prosecution of persons for criminal offences related to invasion or trespass to land. The cases that were stopped can proceed to their logical conclusions.

91. The final prayer, which is prayer 11, is an order for costs. I would ordinarily not make an order for costs on litigation such as this, as I consider it to be public interest litigation. But such litigation must be demonstrated to be made in good faith. In our case, the petitioners came to this court alleging that they have not been allocated land. They failed to make material disclosure that indeed they were considered for allocation and some have titles. I am not persuaded that this litigation was filed in good faith. The petitioners will therefore pay the costs of this petition.

92. There were of course arguments raised about the locus of the petitioners and the fact that some respondents are now defunct. It is not necessary for me to address these arguments deeply as either way, this petition will still be dismissed. I will only briefly give my views. I do agree that where institutions and offices have become defunct and have been succeeded by others, it is advisable that amendments be made to the pleadings, so as to reflect the new institutions and offices as the prevailing litigants. In our case, there was no amendment to the petition such as assuming orders were made in favour of the petitioners, it would have been difficult to execute them. On the issue of filing of representative suits, where one, or a few, file suit on behalf of many others, my position is that it is very necessary for it to be clear who the other persons are and whether they have given authority for the suit to be filed. It is not possible to know with precision who these other persons are, if they are not named in the body the suit, and their identities disclosed, say by annexing copies of their ID cards. Merely pointing at names in a schedule is not good enough as nobody knows whether these names are of actual people or are just names. Even names with ID numbers without annexing the ID cards wouldn't be good enough for you can insert a name and any ID number in a schedule. It is important for the parties and the court to know exactly which people are before it and who are supposed to benefit from the litigation. On the authority, it is mandatory that the persons named in the suit, need to sign an authority to those who are representing them. Without such authority, one cannot purport to represent the others.

93. In respect of this case, it was never clear who the petitioners purport to represent. Thus in so far as costs are concerned, I will state that the costs will be paid jointly and/or severally by the original three petitioners, the 7 persons who filed the application dated 13 June 2019, and the 24 persons who signed authority to be represented by these 7 persons. I have no evidence that the other persons named in lists or in attached ID cards ever gave authority to the petitioners and to these other people so as to be represented in this petition. It will be unfair in those circumstances to burden them with costs.

94. The result is that this petition is hereby dismissed with costs as I have ordered above.

95. Judgment accordingly.

DATED AND DELIVERED THIS 23 DAY OF JANUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

In the presence of :

Mr Munyithya instructed by Munyithya, Mutugi, Umara & Muzna Advocates and also holding brief for Mr Wandaka instructed by M/s Kinuthia Wandaka & Company Advocates, for the petitioners.

Mr Moimbo, State Counsel, instructed by the State Law Office for the 1st, 2nd, 4th, 6th, 7th, and 8th respondents and holding brief for Ms. Shamalla instructed by the 3rd respondent.

Mr Kihang'a, instructed by M/s Mwangi & Kihang'a Advocates for the interested party.

No Appearance on behalf of the 5th respondent.