Akithi Ranching (Directed Agricultural) Company Limited v District Land Adjudication & Settlement Officer – Tigania East & West Districts & 4 others; Muthaura & 4 others (Interested Parties) (Suing on Behalf of themselves and on Behalf of more than 3316 Residents of Rwanda location in Tigania Meru County Collectively known as Rwanda Residents) (Environment & Land Petition 3 of 2018) [2023] KEELC 721 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 721 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND PETITION 3 OF 2018

CK YANO, J

FEBRUARY 15, 2023

BETWEEN

AKITHI RANCHING (DIRECTED AGRICULTURAL) COMPANY LIMITED ..... PETITIONER

AND

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER – TIGANIA EAST & WEST DISTRICTS ..... 1ST RESPONDENT

MERU COUNTY GOVERNMENT ..... 2ND RESPONDENT

MERU COUNTY COMMISSIONER ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

THE NATIONAL LAND COMMISSIONER ..... 5TH RESPONDENT

AND

BERNARD MUTHAURA ..... INTERESTED PARTY

ANDRIANO MWORIA ..... INTERESTED PARTY

PETER GAKUNE ..... INTERESTED PARTY

ANDREW NKIIRI ..... INTERESTED PARTY

PATRICK MITHIKA ..... INTERESTED PARTY

SUING ON BEHALF OF THEMSELVES AND ON BEHALF OF MORE THAN 3316 RESIDENTS OF RWANDA LOCATION IN TIGANIA MERU COUNTY COLLECTIVELY KNOWN AS RWANDA RESIDENTS

JUDGMENT

I. The Petitioner's Case

1. By a petition dated April 6, 2018 and amended on December 14, 2021, the petitioners seek orders against the respondents jointly and severally as follows-;

    a. A declaration that 1st 2nd and 3rd respondents actions in relation to the petitioner's said Ranch Land (measuring approximately 33,000 acres) unconstitutional, arbitrary, wrongful, null and void and should be stopped forthwith.

        aa)(i) A declaration be issued to the effect that the refusal by the 5th respondent to renew, for a further term, the lease over a parcel of Ranch land measuring around 33,000 acres situate at Tigania West constituency, Meru County in favour of the petitioner is discriminatory, unconstitutional, ultra vires its powers and a violation of the petitioner's fundamental rights and freedoms and is therefore a nullity.

        aa (ii) An order of prohibition by way of judicial review be issued against the respondents prohibiting them or any officer from their office or any officer in an office with a similar mandate as theirs, from subdividing, transferring, offering for lease, allocating and or in other manner interfering with the petitioner's proprietary rights over a parcel of Ranch land measuring around 33,000 acres situate at Tigania West Constituency, Meru County.

        aa (iii) An order of mandamus by of of Judicial review be issued directing and commanding the 5th respondent therein to renew the lease over a parcel of Ranch Land measuring around 33,000 acres situate at Tigania West Constituency, Meru County for a further term of 33 years in favour of the petitioner.

        aa(iv) A conservatory order by way of injunction be issued directed to the respondents prohibiting them or any officer from their offices or any officer in an office with a similar as theirs, from subdividing, transferring, offering for lease, allocation and or in any other manner interfering with the petitioner's proprietary rights over a parcel of Ranch land measuring around 33,000 acres situate at Tigania West Constituency, Meru County except in favour of the petitioner.

    b) An order of injunction restraining the respondents by themselves, their agents, employees, agents, representatives and/or anybody else whomsoever acting for/or behalf from continuing with the said adjudication process and or any other acts of interference in respect of the petitioner's said Ranch Land measuring approximately 33,000 acres until the lease renewal processes in respect thereto are completed.

    c) Costs of this petition and interest at court rates.

    d) Any other relief or order that this court may deem fit in the special circumstances of this matter.

2. The petition is supported by the facts set out in the amended petition and the affidavits of Benjamin Mwilaria sworn on April 6, 2018 and on December 14, 2021 and the annextures thereto. It is averred that the petitioner is a limited liability company incorporated in Kenya under the *Companies Act* and that its shareholding/membership is wholly made up of residents of Tigania District within Meru County.

3. The petitioner's case is that in or about the year 1982, the then County Council of Meru (the predecessor of the County Council of Nyambene) allocated to the petitioner a parcel of land for ranching measuring approximately 33,000 acres to use it for 33 years. The petitioner avers that the said county council held the said land in trust for the petitioner and for the benefit of the petitioner's shareholders. That the said land was surveyed, demarcated and boundaries thereof determined and the petitioner took possession and started using the same.

4. The petitioner avers that in or about the year 1991, the District Land Adjudication Officer started interfering with the petitioner's said land purporting to declare it an adjudication area and sub dividing and allocating it to other individuals which actions the petitioner terms as illegal, unlawful and fraudulent, and that this prompted the petitioner to file Nairobi HCC No 797 of 1992 which suit was determined in favour of the petitioner.

5. The petitioner states that it continued using and developing the said land, but in or about the year 2009, the County Council of Nyambene started interfering with the petitioner's possession, user and/or enjoyment of the said land by inter alia, alienating part of the petitioner's land and purporting to allocate it to the Kenya Airports Authority besides subdividing other parts thereof and allocating them to other individuals, and consequently, the petitioner filed Meru HCC No 11 of 2010 against the County Council of Nyambene which suit is said to be still pending todate, but in which the said County Council was ordered to stop all activities thereon pending the hearing and determination of the said suit.

6. The petitioner further avers that in or about the year 2012, the District Land Adjudication Officer started interfering with the petitioner's said land by again purporting to declare it an adjudication area and subdividing and allocating it to other individuals prompting the petitioner to file Meru ELC Petition No 23 of 2012 which suit the petitioner states was determined in its favour on October 2, 2013.

7. The petitioner avers that the 1st, 2nd and 3rd respondents have started interfering with the petitioner's use and enjoyment of the said land by purporting to inter alia, wrongfully, illegally and/or in breach of the petitioner's constitutional rights, sub-divide and distribute the said land to other individuals, thus infringing on the constitutional rights of the petitioner and those of its shareholders. The petitioner further avers that if the said actions are allowed to stand, anarchy may result since the 1st respondent is dishing out the petitioner's land to other people to the detriment of the petitioner's shareholders.

8. The petitioner avers that it has already engaged the National Land Commission, the 5th respondent herein, to have their lease which expired in 2015 extended and that the process is underway. The petitioner wants the 1st, 2nd and 3rd respondents stopped from any acts of interference of the said land until the National Land Commission completes its renewal and/or incidental processes. That todate, the 5th respondent has not informed the petitioner of its decision in writing whether or not it is willing to extend the lease despite its Meru County Administration Officer approving the extension vide a letter dated June 21, 2018 and the legitimate expectation by the petitioner that the lease would be renewed.

9. The petitioner contends that the constitutional duty imposed on the 5th respondent was to notify the petitioner the reasons why the lease cannot be extended or any expectations of conditions demanded of it, but this has not been done in breach of the petitioner's right to fair administrative action under article 47 (2) of the *Constitution*, adding that the decision not to grant an extension of lease of the suit property is a violation of the right to property under article 40 of the *Constitution*.

10. In the affidavit of Benjamin Mwilaria, the deponent has annexed copies of letters by the National Land Commission, the NLC Meru County Land Administration Officer and the 2nd respondent's Sub County District Livestock Production Officer and urged the court to grant the prayers sought in the amended petition.

II. The 1st, 3rd And 4thRespondent's Responses

11. In opposing the petition, the 1st ,3rd and 4th respondents filed a replying affidavit sworn by Dianah Mbugu, the 1st respondent on September 16, 2022 in which she avers inter alia, that the 1st respondent is duly appointed and empowered to act in accordance with the laid down laws and procedures under the *Land Adjudication Act* Cap 284 of the Laws of Kenya. That vide a Notice dated October 15, 2009, the suit land was declared an adjudication section pursuant to section 5 of the said Act and not in 2012 as alleged by the petitioner. A copy of the said notice has been annexed.

12. The 1st respondent states that the suit land is in new Kiare Adjudication Section which is situated in Tigania West sub-county which borders Isiolo County. The deponent avers that the said Notice called upon all those that had an interest within the adjudication Section to present their claim to the recording officer either in person or by a duly authorized agent within six months from the date of the notice and that there was no such claim from the petitioner within the stipulated time given.

13. It is the 1st, 3rd and 4th respondent's case that the adjudication section in question underwent all the adjudication processes in accordance with the provisions of the *Land Adjudication Act* and has more than 12,000 plots of land belonging to the members of Kiare community. That thereafter on August 31, 2020 and pursuant to section 25 (3) of the said *Act*, the Land Adjudication and Settlement Officer, Tigania West gave notice that the Adjudication Register for New Kiare Adjudication section had been completed and invited inspection for a period of 60 days from the date of the Notice. A copy of the letter dated August 31, 2020 is annexed which invited all persons affected by the adjudication register and who considered it to be incorrect or incomplete to submit a written objection to the Adjudication Officer Tigania West stating clearly the reason for the objection within 60 days.

14. That pursuant to section 26 of *cap 284*, the petitioner did not raise any objection to the Adjudication Officer in writing within 60 days of the date upon which the notice of completion of the adjudication register was published and on March 22, 2022, the Adjudication Officer Tigania West pursuant to section 26A forwarded to the Director of Land Adjudication the original Adjudication Records with no A/R objections. A copy of the forwarding letter is also annexed. The 1st, 3rd and 4th respondents contend that the petitioner did not exhaust the avenues provided for under the law before bringing the matter to the court. That the Adjudication section underwent all the adjudication process in accordance with the provisions of the *Land Adjudication Act* and that any failure by the petitioner to exercise its mandate should not be used as an excuse to declare a lawful process unlawful and as the maxim goes, equity aids the vigilant and not the indolent.

15. It is also contended that the petitioner has not demonstrated with precision how its fundamental rights and freedoms under the *Constitution* have been violated or are threatened and has not produced any evidence to prove the alleged violations contrary to the principles espoused in the locus classicus decision in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR and *Anarita Karimi Njeru* [1979] KLR 154. The respondents further contend that the petitioner has neither satisfied the conditions laid down by the law for the Honourable court to exercise its discretion in its favour, nor has it proved the grounds relied upon in its prayers to warrant grant of the orders sought.

16. It is also the respondent's contention that the petitioner lacks locus standi to institute this suit as it is not the proprietor of the suit land and the alleged lease expired in 2015 and therefore cannot purport to

be in occupation and use of the land. That subject to the *Land Act, 2012*, a title is *prima facie* evidence of ownership of land. They further argue that the court does not have jurisdiction to entertain the present petition since the petitioner has not exhausted the remedies available to it before instituting this present suit. The 1st, 3rd and 4th respondents contend that the petition lacks merit and warrants dismissal with costs.

III. Response By The 2nd Respondent

17. In opposing the petition, the 2nd respondent filed a replying affidavit sworn by Timothy Kaaria on March 1, 2022. It is denied that the petitioner was allocated 33,000 acres as alleged. The 2nd respondent's position is that the petitioner was granted a licence for 33 years from June 29, 1982 which was revocable anytime before the expiry of the 33 years period and that that did not give the petitioner any proprietary rights over the suit land. That the said licence expired on June 29, 2015 and as such, the petitioner's rights as a licencee over the said land came to an end. That the said licence did not confer any proprietorship rights to the petitioner who has neither occupied nor developed the 33,000 acres, which land is occupied by the area residents who have extensively developed the same.

18. The 2nd respondent contends that the said area is now undergoing an adjudication process which process is being undertaken by the National government in the best interest of the persons living within the declared adjudication section for purposes of issuing them with titles. That as correctly pointed out by Hon Justice PM Njoroge, in Meru petition No 23 of 2012, the petitioner's right were protected until their lease of 33 years expired. A copy of the ruling delivered on July 31, 2017 in petition No 23 of 2012 has been annexed.

19. The 2nd respondent states that the adjudication process has very elaborate procedure of ascertaining the existing rights of the individual land owners, including the members of the petitioner. That the 2nd respondent has not and will not agree to an extension of the licence to the petitioner because the said land is now under adjudication process to give titles to the area residents. A copy of a letter dated August 24, 2015 from the 2nd respondents CEMC lands and a resolution by the County Assembly of Meru are annexed. The 2nd respondent states that the land in question is held in trust for the area residents and not for the petitioner which is a private entity.

20. The deponent avers that no formal process was undertaken to issue a lease and eventually a letter of allotment and a certificate of lease to the petitioner, that the petitioner did not pay any consideration by way of a stand premium to the 2nd respondent's predecessor, and no letter of allotment was issued, and no letter was authored by the petitioner accepting the licence for 33 years. Further that No PDP was made for the land granted the licence, no gazette notice was issued for the said licence/lease, and states that in short, the petitioner was just granted a license of 33 years over the land and the said licence cannot confer the petitioner with any proprietary interest capable of protection by the law.

21. The 2nd respondent further states that the 5th respondent has no jurisdiction on the issue at hand because the suit land was declared an adjudication Section under the relevant provisions of the *Land Adjudication Act* and that in view of the refusal to renew by the CECM Lands and the County Assembly of Meru, the 5th respondents role ended at that point. It is the 2nd respondent's contention that the petition does not meet the threshold of a constitutional petition and that the petitioner has not suffered any breach of its constitutional rights as alleged and urged the court to find that the matter is res judicata and dismiss the petition with costs.

IV Response By The Interested Parties

22. The interested parties filed a response dated November 27, 2018 and amended on February 11, 2022. They aver that the subject land was trust land, now unregistered community land, owned by Rwanda residents and held in trust by the then County Council of Meru the predecessor of county Government of Meru. The interested parties further aver that any lease over the subject land, if any was issued by unscrupulous officials of the defunct Meru County Council without any consultation with Rwanda Residents. That in any event, the alleged lease to the petitioner lapsed in June 2015 at the end of 33 years.

23. The interested parties aver that the subject land was occupied by Rwanda residents starting late 1960s and early 1970s and have carried out farming and have put up institutions like schools, churches, dispensaries, shopping centres, Njuri Nceke shrines and chiefs camps within the said land as it is their land.

24. The interested parties aver that the land was not meant to remain trust land indefinitely and that the District Land Adjudication Office acted lawfully in establishing an adjudication section over the subject land to finally determine the portions owned by each person or family making up Rwanda residents. They state that they are unaware of Nairobi HCC 797 of 1992 and were not represented in that case where they would have championed their interests.

25. The interested parties further aver that it was within the powers of the government including the County Council of Nyambene to acquire any portions within the subject land in accordance with the law to launch public projects. They further deny that Meru ELC Petition 23 of 2012 was determined in favour of the petitioner, adding that the injunction granted by the court stopping adjudication process over the land expired upon the lapse of the lease of 33 years held by the petitioner. They also aver that Rwanda residents were not represented in that case where they would have championed their interests and that they only participated in an application to interpret the ruling of the court delivered on 2nd October, 2013. The interested parties reiterate that Rwanda residents are the actual owners of the subject land and that the adjudication and sub division processes going on over the land and being carried out by the 1st, 2nd and 3rd respondents are lawful, adding that the petitioner has no rights whatsoever in the land capable of being infringed or violated. They aver that they are not aware of an application for extension of lease which they state they are opposed to.

26. The interested parties contend that the case by the petitioner is dishonest and only intended to deny Rwanda residents their constitutional rights to own property through a recognized legal means. They further aver that the National Land Commission has the prerogative to extend or decline extension of any lease, adding that there is no existing lease over the subject land capable of being extended or renewed.

27. The interested parties further aver that the petition is res judicata as there has been a previous suit between the same parties and concerning the same subject matter being Meru ELC Petition No 23 of 2012 which has been conclusively determined. It is their contention that the petitioner has no rights whatsoever in the suit land and therefore not entitled to the reliefs sought in the amended petition and pray that the entire petition be dismissed with costs.

V. Petitioner's Submissions

28. The petitioner's submissions are dated October 5, 2022 and filed on the same date. Therein, the petitioner summarized the facts of the case and submitted inter alia, that the 2nd respondent is estopped from contesting the extension of the petitioner's lease in view of its own Sub County District Livestock

Production Officer's letter dated February 9, 2018 adding that the 2nd respondent has not furnished to court any evidence that the suit land has been allocated to the public and/or that the same has been set aside for any public project utilities or facilities for it to be no longer available for use by the petitioner. The petitioner submitted that the 5th respondent has also not informed the petitioner of it decision to extend the lease despite its Meru County Administration Officer approving the extension.

29. On the issue of jurisdiction of the court, the petitioner relied on the case of *Del Monte Kenya Limited v National Commission & another Kandara Resident Association & 3 others* [2022] eKLR in which the court rendered itself on the issue of jurisdiction on renewal of leases as follows-;

> "42. The National Land Commission has the constitutional function of managing public land and this court cannot usurp its function, guided by the principle of separation of powers. The *Land (Extension and Renewal of Leases) (amendments) Rules 2017*, makes provisions for the procedure and rules of renewal of leases which is a duty performed by National Land Commission. The jurisdiction of this court can only be invoked where a right has been infringed, violated and/or abused. Additionally, section 128 of the *Land Act* provides that
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> > 'any dispute arising out of any matter provided for under this Act may be referred to the Environment and Land Court for determination.'
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> 43. On renewal of leases, the rules under rule 7 (5) allows an aggrieved party to move this court. There are a number of cases that the court have pronounced themselves on the power of the Environment and Land Court to determine issues of renewal of lease. Relevant to the present suit is the case Del monte Kenya Limited v county Government of Murang'a & another [2019] Eklr where the court held-:
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> > 'In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under article 162 (2) of the *Constitution* as read with Section 13 of the ELC Act. We also find that although the petitioner claims violation of various constitutional rights, those claims are intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations.'
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> 44. This court has belabored so much on the issue of its jurisdiction on renewal of leases. As held above, the petition as drafted seeks prerogative orders, determination of constitutional infringement and constitutionality of the *National Land Commission Act*. The 1st respondent contends that the applicant ought to have filed judicial review proceedings. Article 23 now allows parties to move court for grant of prerogative orders by way of constitutional petitions.
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> 45. Under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013*, this court is defined thereunder as having the power to hear and determine constitutional petitions. This court agrees with the findings of the court in Kisiwo Community Self Help Group vs Attorney General and 6 others [2013] eKLR, that ELC has the statutory and constitutional mandate to hear and determine constitutional petitions touching on environment, land use and occupation and title, and it is immaterial how the suit has been instituted. This sentiments echoed in Patrick Musimba Vs National Land commission & 4 others [2015] eKLR. To this end, this court finds and holds that the

petition is properly before this court and the court has the requisite jurisdiction to handle the petition."

30. The second issue addressed by the petitioner is the issue on legitimate expectation and the petitioner submitted that from the facts the petitioner had a legitimate expectation that her lease would be renewed and more so after the following critical events-:

(a) On February 27, 2018 the NLC acknowledged receipt of the petitioner's letter for renewal of the lease and informed the petitioner that the same was receiving the necessary attention.

(b) The 2nd respondent Meru County Government did not respond to the aforesaid NLC letter dated 29th May 2018 seeking for its comments/recommendation on the petitioner's application for extension of lease.

(c) On June 21, 2018 the NLC Meru County Land Administration Office wrote a letter addressed to the NLC Chairman where he *inter alia* stated that the petitioner's ranch was sparsely settled by about 5,000 ranch owners and recommended the renewal of the petitioner's lease and

(d) On February 9, 2018 the 2nd respondents, Meru County Government, Sub County District Livestock Production Officer had by a letter addressed to NLC requested that the petitioner's Ranch had by a letter addressed to the NLC, requested that the petitioner's Ranch land be excluded from the adjudication exercise and members be given the authenticity read, authority, to develop their land.

31. The petitioner relied on the case of *Sirikwa Squatters v Commissioner for lands & 9 others* [2017] where the court stated on pages 21 and 22 as follows-;

> " A legitimate expectation is said to arise "as a result of promise, representation, practice or policy made, adopted or announced by or on behalf of government or public authority. Therefore, it extends to a benefit that an individual has received and can legitimately expect to continue or a benefit that he expects to receive. When such a legitimate expectation of an individual is defeated, it gives that person the locus standi to challenge the administrative decision as illegal. Thus even in the absence of a substantive right, a legitimate expectation can enable an individual to seek a remedy under the *Constitution*."

32. The court in the aforesaid case further at page 22 and 23 of the judgment quoted a treatise from the Supreme Court of India and held as follows;

> " The basic principles in this branch relating to "legitimate expectation" were enunciated by Lord Diplock in Council of Civil Service Union and others v Minister for Civil Service (1985 AC 374 408-409) commonly known as CCU case). It was observed in that case that for a legitimate expectation to arise, the decision of the administrative authority must affect the person by depriving him of some benefit or advantage which either
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> (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment, or
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> (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first opportunity of advancing reasons for contending that they should not be withdrawn..."

33. The petitioner similarly relied on the case of *Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development ex pate Soweto Residents forum COB* [2019] eKLR in which the court stated at page 4 as follows-;

> "A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two- step approach. First, it asks whether the administrator's action created a reasonable expectation in the mind of the aggrieved party. Second, if the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation."

34. The petitioner submitted that it was not unreasonable for it to have held legitimate expectation that her lease would be extended in light of the foregoing facts.

35. The third issue submitted by the petitioner is on preemptive rights of renewal and submitted that vide its letter dated March 29, 2018 the NLC whilst seeking for the 2nd respondent, Meru County Government comments/recommendation on the petitioner's application for extension of lease, the NLC advised the 2nd respondent that under section 13 (1) of the *Land Act*, the petitioner had the right of first refusal over the extension of the lease.

36. The petitioner contended that it has a preemptive right of renewal of the lease therein.

37. The petitioner relied on the case of *Serah Mweru Muhu v Commissioner of Lands & 2 others* [2014) eKLR where the court held as follows-;

> "(34) The commissioner [of lands] has admitted that the process of extension of the lease was started way back in 2009. That process was interrupted by the sale to the state. Under section 13(1) of the *Land Act* the lessee has the right of first refusal should the state wish to extend the lease. It provides that:
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> > "Where any land reverts back to the national or county government after expiry of the leasehold tenure the commission shall offer to the immediate past holder of the lease hold interest pre-emptive rights to allocation of the land provided by the national or the county government for public purpose."
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> In the absence of reason for refusal to extend the lease, the lease would be entitled to an extension of the lease"

38. The fourth issue addressed by the petitioner was Fair Administrative Action and the petitioner submitted that the Constitutional duty imposed on the NLC was to notify the petitioner the reasons why the lease could not be extended or any expectations or conditions demanded of it. That however, this was not being done in breach of the petitioner's right to fair administrative action under article 47 of the *Constitution* which provides as follows;

> "(1) Every person has the right to Administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action the person has the right to be given written reasons for the action".

39. The petitioner submitted that the silence of the NLC cannot be a substitute for written reason, adding that the NLC was duly served with the amended petition and all the court dates but failed to enter appearance or participate in the proceedings to give its version on the issue in dispute.

40. The petitioner stated that the NLC has the mandate of determining the issue of extension and renewal of leases but within the limits set by the *Constitution* and statute and in the absence of reasons for refusal to extend the lease by the NLC, the petitioner was entitled to an extension of the lease.

41. The petitioner further submitted that Article 40 of the *Constitution* guaranteed everyone of protection of right to property and submitted that the refusal by the 5th respondent to take into account the petitioner's ownership was an affront to its right to own property and that the action of the NLC amounted to deprivation of the petitioner of their property.

42. The petitioner relied on the case of Sirikwa Squatters v Commissioner for Lands & 9 others (supra) in which the court stated on page 27 with regard to article 40 of the *Constitution* as follows-;

> " The import of this Article of the *Constitution of Kenya* is twofold. The 1st instance is that it provides for the right to own property and the 2nd instance is that the property acquired should be protected by the state on condition that it was lawfully acquired."

43. The Petitioner urged the court to find and hold that the petitioner's right to property has been violated and also to find and hold that the petitioner's constitutional right have been breached and that it is entitled to the reliefs in the amended petition.

VI. 1st, 3rd and 4th Respondent's Submissions

44. The 1st ,3rd and 4th respondents identified two issues for determination, the first being whether the doctrine of constitutional avoidance applies, and whether the amended petition meets the threshold of a constitutional petition.

45. On the first issue that they contended that the amended petition offends the doctrine of constitutional avoidance, also referred to as the doctrine of exhaustion by seeking to constitutionalize a matter that is fully addressed by statute.

46. It is the respondents contention that the constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claim as stated in the case of *Southlake Panaroma Limited v Kenya Electricity Transmission Company Limited & 3 others* [2021] eKLR. Rather, the respondents stated that it is invoked pursuant to articles 22 (1) and 23 of the *Constitution* by filing a petition and further, the reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by article 23 (3).

47. The 1st 3rd and 4th respondents submitted that reliance is placed on the doctrine of constitutional avoidance to ensure that constitutional jurisdiction of a court is not misused, and relied on the Supreme Court case in Petition No 14 of 2014 *Communication Commission of Kenya v Royal Media Services Ltd & 5 others* which defined the aforementioned principle of avoidance, also known as 'constitutional avoidance" and that principle of avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. The Supreme Court also quoted with

approval the South African case in *S v Mhlungu*, 1995 (3) Sa 865 (CC) where Kentridge AJ articulated the principle of avoidance as follows;

> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed".

48. The 1st 3rd and 4th respondents contend that the amended petition does not raise a constitutional question and relied on Petition No 26 of 2015, *Tabitha Mugure Henry v District Adjudication & Settlement Officer Tigania East/West and 5 others* which under paragraph 54 had this to say about constitutional questions-;

> "A constitutional question has been termed as the one whose answers flow from either the interpretation of the *Constitution*, relate to the enforcement of constitutional right and freedoms, its role, powers, directions and decisions of state organs as they exercise power and whose reliefs must flow from the *Constitution* and not on a statute." (see also *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR]

49. Similarly, the respondents relied on the case of *Abdullah Mangi Mohammud v Lazarus Beja & 5 others* [2012] eKLR in which the court held that not each and every violation of the law must be raised as a constitutional issue, while in Speakers of National Assembly v James Njenga Karume [1992] eKLR, the court said alternative dispute mechanisms have to be exhausted first.

50. The 1st, 3rd and 4th respondents urged the court to decline to hear the petition as the dispute is more of a civil nature than constitutional hence capable of being resolved by other means other than the present litigation.

51. The 1st, 3rd and 4th respondents submitted that the amended petition is an abuse of court process as the petitioner, in ventilating her grievances, failed to follow the laid down procedures as set out under the Land Adjudication Act, cap 284 Laws of Kenya. They submitted that if the petitioner had a valid grievance with respect to the adjudication of the suit land, they ought to have raised an objection to be heard under section 26 of the *Land Adjudication Act*, Cap 284 Laws of Kenya, which provides as follows-;

> "Objection to adjudication register
>
> (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
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> (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquires as he thinks fit he shall determine the objection.

52. The 1st, 3rd & 4th respondent also cited section 29 which provides thus

> "29. Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may within sixty days after the date of the determination, appeal against the determination to the minister by -:

(a) Delivery to the Minister an appeal in writing specifying the grounds of appeal; and

(b) Sending a copy of the appeal to the director of land adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The minister shall cause copies of the order to be sent to the director of Land Adjudication and to the chief Land Registrar.

(3) When the appeals have been determined, the director of land adjudication shall-;

(a) Alter the duplicate adjudication register to conform with the determination, and

(b) Certify on the duplicate adjudication register that it has been final in all respects, and send details of the alterations and a copy of the certificate to the Chief land Registrar, who shall alter the Adjudication Register accordingly.

(4) Notwithstanding the provisions of section 38(2) of the *Interpretation and General Provisions Act* (cap 2) or any other written law, the Minister may delegate, by notice in the Gazette, this powers to hear appeal and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the minister."

53. The 1st 3rd & 4th respondents submitted that the foregoing provisions demonstrates that the petitioner also had a right of appeal to the Minister if they were dissatisfied with the decision of the adjudication officer in allowing the Adjudication Record Objection proceedings. Accordingly, they submitted that it was not open to the petitioner to institute the petition before exhausting the available remedies under statute.

54. The 1st , 3rd and 4th respondents submitted that the court has pronounced itself more than once that it is not open to an aggrieved party to seek redress outside the framework where statute provides clear internal remedies and relied on the case of *Abdullah Mangi Mohamed* (*supra*) where it was observed that;-

> "I would agree with the counsel for the respondents that where there is a dispute as to the applicant's entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property rather than clog the constitutional court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for the enforcement of the constitutional right to property should be discouraged."

55. The 1st, 3rd and 4th respondents relied also in the case of *Kenya Bus Services Limited & 2 others v Attorney General* [2005] KLR 787 at page 799, following Trinidad & Tobacco case of *Re-application by Bahaduir* [1986] LRC (Const) 297 at page 298 where the court said;

> " The *Constitution* is not a general substitute for the normal procedure for invoking judicial control of administrative action. Where infringement of rights can find a claim under substantive law, the proper course is to bring the claim under that law and not under the *Constitution*."

56. Similarly, the respondents submitted that it is the same reasoning that was reaffirmed in the case of *Nartosa & others v Minister of Education for Western Cap & others* where it was held;

> " The court was concerned with the appropriateness or otherwise of granting relief under the *Constitution* without a complaint that an Act of Parliament was constitutionally deficient in the remedies it provides. The court could not conceive that it is permissible for an applicant save by attacking the constitutionality of the statute to go beyond the regulatory frame works which is established."

57. The 1st 3rd and 4th respondents submitted that there is no evidence on record that the petitioner made attempts to have the matter resolved through the mechanisms provided under the *Land Adjudication Act* and that the amended petition by the petitioner is nothing more than a claim relating to land administration and management merely clothed and framed in the bill of rights language.

58. The 1st, 3rd and 4th respondents invited the court to find that as there is a remedy prescribed by the law regarding the petitioner's complaint and therefore the doctrine of constitutional avoidance applies, and submitted that the instant petition lacks merit and ought to be dismissed.

59. The respondents further submitted that the court is devoid of jurisdiction since the petitioner did not exhaust available remedies in law.

60. On the issue whether the amended petition meets the threshold of a constitutional petition, they submitted that the amended petition is fatally defective for it lacks the mandatory specificity required of the constitutional petitions. The 1st, 3rd and 4th respondents stated that the guidance as regards the legal threshold for a constitutional petition is clear enunciated in the case of *Anarita Karimi Njeru v Republic* [1975] eKLR where the court addressed itself thus;

> " We would however, again stress that if a person is seeking redress from the High court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case), that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

61. Similarly, the 1st, 3rd and 4th respondents relied on the case of *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021]eKLR where the court at paragraph 9 stated as follows-;

> " I have set out, albeit briefly, the facts giving rise to the petition to contextualize the consideration of the merits or otherwise of the preliminary objection. As to whether or not there is a competent constitutional petition before the court, it is necessary to consider whether the petition satisfied the threshold of what constitutes a constitutional petition as per the principle established in the case of *Anarita Karimi Njeru v the Republic* [1979]

eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. The principle established in the Anarita Karimi Njeru case (supra) was that a constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The *Mumo Matemo* case (*supra*) reaffirmed the principle in the *Anarita Karimi* case when the court at paragraph 44 of the judgment stated as follows-;

> (44) We wish to reaffirm the Principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of the short comings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent".

62. The 1st, 3rd and 4th respondents further submitted that the court in the *Mumo Matemo* case (*supra*) – in its judgment at paragraph 87 (3) – found that;

> "It is our finding that the petition before the High court was not pleaded with precision as required in constitutional petition. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the *Constitution of Kenya* and the Ethics and Anti Corruption Commission Act, 2011 accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case."

63. They submitted that the petition endeavors to seek redress on a matter that is said to involve a reference to the *Constitution* and therefore mandates that the petitioner sets out within the petition, with a reasonable degree of precision, that of which they complain of the provisions said to be infringed, and the manner in which they are alleged to be infringed.

64. The 1st, 3rd and 4th respondents submitted that although the petitioner have cited several provisions of the *Constitution* the petitioner's amended petition lacks constitutional underpinning and that the petitioner fails to demonstrate, with clarity the particulars of the alleged infringements as it relates to the respondents and that the petition fails to show how the petitioner's rights that is right to fair administrative action under article 47 of the *Constitution* and the right to property under article 40 have been denied, violated, infringed or threatened by the respondents.

65. The 1st 34d and 4th respondents relied on the case of *Bernard Ouma Omondi & another v Attorney General & another* [2021]eKLR where the court had this to say on the issue-:

> "It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged

infringements to enable the respondents to be able to respond to and/or answer to the allegation or complaints."

66. The 1st, 3rd and 4th respondents relied on the strength of the above authorities and contended that the amended petition as presented is not sustainable as it is yet to meet the constitutional threshold set out in the *Anarita Karimi* case (*supra*). Consequently, the 1st, 3rd and 4th respondents submitted that it is not enough for the petitioner to make general allegations and merely cite constitutional provisions and rather, it is of paramount input to give particulars with clarity of the alleged infringements thus enabling the respondents to be able to respond to and or answer the allegations or complaints.

67. The 1st 3rd and 4th respondents submitted that in view of the foregoing, the petitioner's suit is defective, a non starter and ought to be dismissed with costs.

VII. 2nd Respondent's Written Submissions.

68. The 2nd respondent submitted that vide the amended petition, the petitioner which is a private entity primarily seeks for a declaration that it is the requisite owner of the ranch land measuring approximately 33,000 acres and an order for renewal of the said lease be made in its favour which the 2nd respondent urged the court to decline.

69. The 2nd respondent submitted that it is settled that an application for a conservatory or interim order under rule 23 of the *Constitution of Kenya (protection of the rights and fundamental freedoms) Practice and Procedure Rules, 2013* must demonstrate that;

    a. He has a *prima facie* case

    b. Unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the *Constitution*.

    c. It would be in the public interest to grant the order.

70. The 2nd respondent submitted that no *prima facie* case had been established by the petitioner to warrant grant of the orders sought.

71. The 2nd respondent submitted that the petitioner has not provided proof or evidence that any person has been denied registration for whatever reason or whose names had been deleted from the list of members vetted and compiled by the adjudication committee. Secondly, that the Adjudication Officer followed the process and procedure set out in the Act and that the process set out under the Act protects property rights. Thirdly, that the process of adjudication is still in the initial stages and the committee is in the process of vetting and registering residents in the Adjudication section and it would not be in the interests of justice to intervene in the process.

72. The 2nd respondent urged the court not to interfere with the process of adjudication as that would bring confusion in the process and that it is also clear that section 30 of the *Land adjudication Act* provides that the court shall not entertain civil proceedings concerning an interest in land in an adjudication section until the adjudication register for the adjudication section has become final.

73. The 2nd respondent relied on the case of *Dickson Mukwe Lukeine (Petitioning on his own behalf and on behalf of the residents of Olderkesi Adjudication Section) v Attorney General & 4 others* [2012] eKLR.

74. The 2nd respondent submitted that none of the petitioner's rights has been violated or threatened within the meaning of article 27, 40 and 47 of the *Constitution* to warrant invocation of article 22 and there is no basis for grant of the prayers in the petition.

75. The 2nd respondent submitted that the invitation by the petitioner asking the court to review the decision of the 5th respondent for failure to renew the lease is misplaced and that section 9 (2) and (5) of the *Fair Administrative Action Act* No 4 of 2015 provides that the High Court and subordinate courts should not review administrative decisions under the Act unless internal mechanisms for appeal or review and all remedies under written law are exhausted. The 2nd respondent stated that there are no exceptional circumstances in this case to exempt application of the statutory mechanisms.

76. The 2nd respondent submitted that the law provides under the *Land (Extension and Renewal of Leases) Rules, 2017* LN 28/2017 the steps that the National Land commission must take before the lease is renewed and that the county government plays a critical role as the custodian of public interest on behalf of the residents of the county and that contrary to averment by the petitioner, the petitioner was granted a licence for 33 years from June 29, 1982, which was revocable any time before the expiry of the 33 years' period and that did not give the petitioner any proprietary rights over the suit land. That the said licence expired on June 29, 2015 and as such the petitioner's rights as a licencee over the said 33,000 acres came to an end.

77. The 2nd respondent further submitted that there did not exist a lease as defined by the *Land Act* No 6 of 2012, capable of being extended and as such section 13 (1) of the *Land Act* is inapplicable in the circumstances and further that the letter dated February 9, 2018 by Livestock Production Officer was done without authority and in excess of that Officer's Jurisdiction since the mandate to comment on the issues of extension of leases lies with the CECM for Land and that a refusal to renew the licence is well documented in the letter dated August 24, 2016.

78. The 2nd respondent submitted that the 5th respondent has no jurisdiction on the issue at hand because the suit land was declared an adjudication section under the relevant provisions of the *Land Adjudication Act* cap 284 laws of Kenya and that in view of the refusal to renew by the CECM Lands and the County Assembly of Meru the 5th respondent's role ended at that point.

79. The 2nd respondent submitted that the licence did not confer any proprietorship rights to the petitioner and the 33,000 acres is not occupied by the petitioner neither has the petitioner developed the same and that the land is occupied by the area residents who have extensively developed the same and that the area is now undergoing an adjudication process, which process is being undertaken by the National Government.

80. The 2nd respondent argued that the ongoing adjudication process is being made in the best interest of the persons living within the declared adjudication section for purposes of issuing them with titles. That the adjudication process has very elaborate procedure of ascertaining the existing rights of the individual land owners, including the members of the petitioner.

81. The 2nd respondent relied on *Republic v Kenya Revenue Authority ex parte Interactive Gaming & Lotteries* [2016] eKLR where Odunga, J (as he then was) stated-;

> "(43) In my view specialized bodies established under statutes ought to be given leeway to conduct their proceedings freely without unnecessary interference by the court."

82. The 2nd respondent submitted that the adjudication process is a people driven exercise where Adjudication and Demarcation Officers merely give technical guidance and that the Land Adjudication Officer is acting within his powers as provided for under the *Land Adjudication Act*, particularly section 5, section 6 and 20 of the *Act* and that the whole process of adjudication is participatory and that the Act has appeal mechanisms which the petitioner may have opted to pursue.

83. The 2nd respondent urged the court to guard the interest of the local inhabitants who are okay with the process and strictly caution the petitioner of unnecessary stalling an act auctioned process meant for the benefit of the public.

84. The 2nd respondent further submitted that the petitioner's matter is res judicata Meru Petition 23 of 2012 which dealt with the similar issue being raised herein and that vide a ruling delivered on July 31, 2017, the Honourable court in Petition No 23 of 2012 aforesaid, stated that the permanent injunction issued therein, expired with the expiry of the petitioner's 33 years licence.

85. The 2nd respondent submitted that the petition is filed contrary to section 7 of the *Civil Procedure Act* and therefore the Honourable court lacks jurisdiction to grant the orders prayed for and relied on the case of *John Njue Nyaga v Attorney General & 6 others* Civil Appeal 46 of 2015 (2016) eKLR which held:

> " Relying on the doctrine of *res judicata* the earlier decision of the High court and provincial appeals committee had dealt conclusively with the issues raised in the instant application brought now as a constitutional matter under article 40 (1) & (2) of the *Constitution, 2010*. The same was dismissed;"

86. Similarly the 2nd respondent relied on the case of *ANM V PMN* [2016] eKLR in which the court had the following to say;

> "... a court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties."

87. The 2nd respondent urged the court to dismiss the amended petition with costs since it is without any merit.

VIII. Interested Parties' Submissions

88. The interested parties submissions are dated August 4, 2022 and filed on September 1, 2022.

89. The interested parties submitted that the petition is res judicata in that the issues in the petition herein were conclusively addressed by the court in Meru Environment and Land Court petition 23 of 2012 in which Rwanda residents were allowed to join as interested parties on November 11, 2015. The interested party urged the court to down its tools.

90. The interested parties submitted that the land in question is not registered hence the adjudication process and that the land in question is trust land which fits the description set out under article 63(2)(3) of the *Constitution of Kenya, 2010*.

91. The interested parties further submitted that the land is ancestral lands traditionally occupied by the interested parties and the community members being more than 3,000 families who have been using the land for decades pursuant to a process known as gathering of the land. That the occupation started in the late 1960s and early 1970s and that their ultimate goal is to get title deeds and further that the subject land has always been Trust land held by the county Council of Nyambene but now vests in the County Government of Meru and urged the court to find that the land in question is unregistered community land. The interested parties relied on the *Adjudication and Settlement Officer Tigania East Sub County and 18 others* [2018] eKLR.

92. The interested party cited article 61 (1) of the *Constitution* which stipulates that

> "all land in Kenya belongs to the people of Kenya collectively as a nation as communities and as individual"

and submitted that the land in question belongs to the community made up of the interested parties.

93. The interested parties submitted that the subject parcel /Rwanda location is unregistered community land owned by Rwanda Residents after having exercised rights over the land which should be recognized as ownership under section 23 (2) of the *Land Adjudication Act*.

94. The interested parties urged the court to uphold that the new Kiarie/Mituntu adjudication section covering the area occupied by the Rwanda residents/ interested parties and who have exercised rights over the subject land should be recognized as owners.

95. The interested parties submitted on the issue of the Principle of Legitimate expectation and stated that the land in question is not idle land and has been occupied by the community members since time immemorial and that is why there are political, social and economic infrastructures already in place. They submitted that they had a legitimate expectation that they will one day get tile deeds over the property they have developed for a long time and that expectation has been there for decades.

96. The interested parties submitted that the community members can only acquire rights of proprietorship after the process of ascertainment of rights and interests in the land has been accomplished through the adjudication process and that such legitimate expectation stands to be thwarted should the adjudication process be halted.

97. On the alleged lease to the petitioner, the interested parties submitted that the petitioner has never held any lease of the subject land and that the petitioner has not availed any grant, allotment letter, certificate of lease, gazette notice, proof of consideration or otherwise. That allocation of land by the government land was then an elaborate process involving Gazettement, auction, payment or consideration, compliance with any conditions and under the repealed Government Lands Act. It is the interested parties submission that the petitioner has not attached any evidence that such process was ever followed and that in any event that such lease if it ever existed lapsed in year 2015 and was never renewed as admitted by the petitioner in the amended petition and effectively, there is no existing lease that the petitioner would be seeking extension of.

98. The interested parties further submitted that the petition is overtaken by events. The interested parties stated that the petitioner has applied for an order of mandamus compelling renewal and there was no evidence that follow up was ever started before lapse of lease term. Further that the government through its agencies has the discretion to renew any lease and may not be compelled to renew the lease. That the petitioner was aware of the alleged lease term and nothing has been pleaded or produced to demonstrate legitimate expectation that the term would be renewed and urged the court to decline the prayers for renewal of lease.

IX. Analysis And Determination

99. The court has carefully considered the evidence on record, the submissions made and the applicable laws. From the pleadings and the aforesaid evidence on record the issues that call for determination are:

    i. Whether the doctrine of constitutional avoidance applies in the matter.

    ii. Whether the matter meets the threshold of a constitutional petition.

iii. Whether the matter is res- judicata.

iv. Whether the petitioner is entitled to the reliefs sought.

v. Who bears the costs.

Whether The Doctrine Of Constitutional Avoidance Applies In The Matter

100. The subject of this petition is parcel of land measuring approximately 33,000 acres situate in Tigania West constituency, Meru county. The petitioner avers that in or about the year 1982, the then county council of Meru (the predecessor of county council of Nyambene) gave the petitioner a lease to hold the suit land for a period of 33 years. That lease expired in the year 2015 and the land was declared an adjudication section and the adjudication process is being undertaken by the respondents, led by the 1st respondent to settle the residents on the land. The petitioner contends that the said adjudication process is unlawful arguing that it should await its application for renewal of the lease which has since expired.

101. The submissions raised by the respondents and the interested parties bring into focus the doctrine of exhaustion/constitutional avoidance. The exhaustion of internal mechanisms is a concept that is also stressed under the law. The same was comprehensively dealt with in Mombasa High Court Constitutional Petition No 159 of 2018, Consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramgoi & 3 others v Attorney General & 4 others, Muslims for Human rights and 2 others (Interested Parties)* [2020] eKLR as follows:

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High court in R v Independent Electoral and Boundaries Commission (IEBC) exparte National Super Alliance (Nasa) Kenya and 6 others [2017], where the court opined thus:
>
> 42. This doctrine is now of esteemed judicial lineage in Kenya. It was perhaps most felicitously stated by the court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
>
> > Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> 43. While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the post 2010 era have found the reasoning sound provided justification and rationale for the doctrine under the 2010 constitution. We can do no better in this regard than cite another court of

appeal decision which provides the constitutional rationale and basis for the doctrine."

102. It has also been held that a constitutional question is one whose answers flow from either the interpretation of the *Constitution*, relate to the enforcement of constitutional rights and freedoms, its roles, powers, directions and decisions of state organs as they exercise power and whose reliefs must flow from the *Constitution* and not on a statute, and that not each and every violation of the law must be raised as a constitutional issue.

103. I have keenly looked at the dispute in this case. I am in agreement with the respondent's submissions that the dispute herein is more of a civil nature than constitutional hence capable of being resolved by other means than the present petition.

104. The *Land Adjudication Act* provides a clear procedure in which a dispute such as the one before court can be addressed. Section 26 of the said Act provides how one can raise an objection to adjudication register while section 29 gives a right of appeal to the minister if one is dissatisfied with the decision of the adjudication officer. In my view, the petitioner had the right to invoke the said provisions of the *Land Adjudication Act* if it felt aggrieved. It was not open to the petitioner to institute this petition before exhausting the available remedies under the said statute. There is no evidence on record to show that the petitioner made any attempts to have the matter resolved through the mechanisms provided under the said Act other than to state that it applied for renewal of a lease which had long expired. In my view, the petition herein is nothing more than a claim relating to land administration and management merely clothed and framed in the bill of rights language as rightly submitted by the respondents herein.

105. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if another mechanism exists through which the dispute could be resolved. The Supreme Court in *Communication Commission of Kenya & 4 others v Royal Media Services Ltd & 5 others* held that the principle of avoidance means that a court will not determine a constitutional issue when a matter may properly be decided on another basis.

In *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, the court of appeal stated that-

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the courts is invoked. Courts ought to be of last resort and not the first port of call the moment the storm brews..."

106. To me, this is a proper and fit case for this court to invoke the doctrine of constitutional avoidance and decline to entertain the matter as I hereby do.

Whether The Matter Meets The Threshold Of A Constitutional Petition

107. A reading of the issues presented in this petition and as I have stated above leave no doubt that the petitioner's grievances if any, can effectively be addressed by statute. When determining whether an argument raises a constitutional issue, the court is not strictly concerned whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values. Do the issues raised in this case raise any constitutional issues? I do not think so.

This is a case where the petitioner is seeking renewal of a lease which has long expired and which the 5th respondent is yet to extend. It is factual that the petitioner was given a lease for 33 years and the same expired in the year 2015 and has not been renewed. Consequently, there is no existing lease that the petitioner would be seeking to enforce. It is not clear to me which rights the petitioner is alleging have

been violated or infringed, or threatened with violation or infringement since licence granted to the petitioner has since expired and is yet to be renewed.

108. The threshold for a constitutional petition is clearly enunciated in the case of *Anarita Karimi Njeru* (*supra*) where it was held thus:

> " We would, however, again stress that if a person is seeking redress from the High court on a matter which involves a reference to the *Constitution* it is important (if only to ensure that justice is done to his case), that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

109. Having reviewed the petition and supporting affidavit, I find that the petition before me has not pleaded with precision that which the petitioner complains of and has not provided adequate particulars of the claims relating to the alleged violations of the *Constitution*. Accordingly, it is my finding that the petition does not meet the standard enunciated in the *Anarita Karimi Njeru* case.

Whether The Matter Is Res Judicata

110. The test for determining the doctrine of res judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, the Supreme court while considering the said provisions held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked that is:

> " a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

111. In the case of *Henderson v Henderson* [1843] 67 ER 313 res-judicata was described as follows-;

> " ... where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (expect under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

112. Similarly, in the case of *ET v Attorney General & another* [2012] eKLR where it was held that;

> " The courts must always be vigilant to guard litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court. The

test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v NBK & another [2001] EA 177 the court held that "parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit."

In that case the court quoted Kuloba J (as he then was) in the case of Njanju v Wambugu and another Nairobi HCC No 2340 of 1991 (unreported) where he stated: if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res-judicata..."

113. I have perused the pleadings in petition No 23 of 2012 together with the rulings therein. In that petition, the petitioner herein sought declaratory and injunctive orders in respect of the suit land herein just as in this present petition. The parties were almost the same, save that now the county government of Meru and the National Land Commission have been added.

114. In the ruling dated October 2, 2013, the court made final orders with regard to petition No 23 of 2012. Indeed the court made an interpretation to that effect vide its ruling dated July 31, 2017.

115. Res judicata originated from the Roman law "*ex captio res judicata*" which means-;

> " One suit and one decision is enough for any single dispute"

and the Latin phrase has further been defined by *Spencer Bower and Handley: Res Judicata(Butterworths Common Law)* 4th UK Ed Edition as:

> " ... a decision pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be re-litigated between the parties or their proxies"

116. Once a final judgment has been announced in a suit, the subsequent judges who are confronted with a suit that is identical to or substantially the same as the earlier one, they would apply the doctrine of res-judicata to preserve the effect of the first judgment and strike out the present suit. This is to prevent injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of time and prevent abuse of the court process.

117. The authority of res-judicata applies when the party pleading res judicata establishes a similarity in the following issues between the former and present suit: the parties in the former suit must be the same as those in the current suit or have been represented by a party to the prior action, the claim must be the same in the former and current suit, the parties must have been heard on merit and there must be a final judgment. The rationale behind the doctrine of res-judicata is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be re-opened. The rule of res judicata is based on two principles. There must be an end to litigation and the party should not be fexed twice over the same cause. It has also been stated that the court must be vigilant to guard against litigation evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court. It has also been held that parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit (see *Omondi v National Bank of Kenya Limited & others* [2001] EA 117)

118. In the present case, there is no dispute that the subject matter is the same, 33,000 acres of land in Tigania West Constituency, within Meru County. The parties in Meru Petition No 32 of 2012 and this petition

are the same, although some parties have been added. The prayers sought are also almost identical, declaration and injunction. The court in petition 32 of 2012 concluded the matter on October 2, 2013 and clarified that position in its ruling delivered on July 31, 2017.

119. It is quite clear to me this petition is res-judicata and I agree with the respondents submissions. No doubt, the petitioner cannot evade the doctrine of *res judicata* by merely introducing a different cause of action and adding new parties.

120. Having carefully considered the petition before me and the submissions, and for the reasons stated hereinabove, I find that the petition has no merit. The same is dismissed with costs to the 1st, 2nd 3rd and 4th respondents and the interested parties.

121. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF FEBRUARY, 2023.

CK YANO

JUDGE

In the presence of

CA Kibagendi

Mwenda for 1st and 4th respondents

No appearance for petitioner, though some parties are present

No appearance for 2nd, 3rd and 5th respondent

No appearance for interested parties.