Mutua v Makarai & 4 others (Environment & Land Petition 11 of 2021) [2023] KEELC 15750 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15750 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 11 OF 2021

LL NAIKUNI, J

FEBRUARY 13, 2023

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION AND THREATENED VIOLATION OF RIGHTS

AND

FUNDAMENTAL FREEDOMS UNDER ARTICLES 1, 2, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 35, 39, 40, 43, 45, 47, 48, 50, 53, 60, 73, 75, 157, 232, 258, 259,

AND

260 OF THE CONSTITUTION OF KENYA 2010, THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATER OF: LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: ARTICLES 1, 2, 3, 6, 7, 8, 9, 10, 12, 13, 16 (1), 17, 23 AND 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

AND

IN THE MATTER OF: ARTICLES 2, 3, 4, 7, 9-17, 23, 24 AND 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS JUDGMENT ELC. PET. 11 OF 2021PAGE 1 OF 51JUSTICE L.L. NAIKUNI (JUDGE)

AND

IN THE MATTER OF: ARTICLES 1, 2, 3, 4, 5, 6, 10, 11 AND 12 OF THE INTERNATIONAL CONVENT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF: ARTICLES 1, 2, 3, 4, 5, 6, 7, 9, 12,14, 15, 16 AND 18 OF THE AFRICANCHARTER ON HUMAN AND PEOPLE'SRIGHTS

BETWEEN

DOMINIC KIOKO MUTUA ..... PETITIONER

AND

ELIZABETH MUTHINA MAKARAI ..... 1ST RESPONDENT

LAND REGISTRAR, TAITA TAVETA ..... 2ND RESPONDENT

ASSISTANT DIRECTOR, LAND ADJUDICATION AND SETTLEMENT, TAVETA ..... 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

JUDGMENT

I. Preliminaries

1. This Judgement emanates from a Constitutional Petition dated 25th February, 2021 instituted in this Court on 1st March, 2021 by Mr. Dominic Kioko Mutua – the Petitioner herein, against Elizabeth Muthina Makari, The Land Registrar Taita Taveta, Assistant Director Land Adjudication and Settlement, Taveta, Director of Public Prosecution and The Hon. Attorney General the Respondents herein.

   The Petition was filed along with a Notice of Motion application dated 25th February, 2021 under Certificate of Urgency. Despite all the Respondents having been served with the pleadings as demonstrated from the Affidavit of service of High Court Process Server- Mr. Herbert Ngisiang'e sworn and filed on 16th March, 2021 which held under Paragraph 4 to wit:-

   "That I did on 12th March, 2021 proceed to Chumvini Area within Taveta in search of the 1st Respondent, Elizabeth M. Makarai whom I found and explained to her the purpose and contents of the Court documents which she understood and I did serve her with the same on 12th March, 2021 at 4.15pm but she declined to sign the principal".

2. In addition to the above and in order to demonstrate that all the Respondents have periodically continued being served and notified of all the stages of the proceedings hereof, the Petitioner has made all efforts to retain proof of the service- in form of Affidavit of Service sworn by the said High Court Process Server.

   These are one dated 6th May, 2021 and filed on 18th May, 2021; dated 27th July, 2021 and filed on 27th July, 2021; dated 15th September, 2021 and filed on 14th October, 2021; dated 10th January, 2022 and filed on 14th January, 2022; dated 21st January, 2022 and filed on 24th February, 2022; dated 15th May, 2022 and filed on 25th May, 2022 dated 24th June, 2022 and filed on 29th June, 2022; dated 16th September, 2022 filed the same date; and 11th November, 2022 and filed on even date.

3. On 16th March, 2021 the Counsel, M/s Kiti appeared for the 2nd, 3rd and 5th Respondents. The Counsel indicated that they had yet to respond and requested for fourteen (14) days to do so. Although the 2nd, 3rd and 5th Respondents were granted leave to file responses, they never complied for no apparent or justifiable good reason whatsoever.

   On 11th June, 2021 the 4th Respondent filed Written Submissions for the Notice of Motion Application dated 25th February, 2021 while opposing the said application whatsoever. On 28th July, 2021 the Honorable Court delivered its Ruling in favour of the Petitioner and fixed the direction on the main Petition on 19th October, 2021.

4. On 19th October, 2021, in the presence of the Counsels for the Petitioner and the 2nd , 3rd and 5th Respondents and while in the absence of the 1st and 4th Respondents the Honorable Court granted the following directions that:-

   a. The 2nd, 3rd and 5th Respondents granted 14th days leave to file and serve Replies to the said Petition.

   b. The Petitioner be at liberty within 7 days of service to file and serve further Affidavit to the new issues raised by the Respondents herein.

   c. The 1st and 4th Respondent to be served with all the Pleadings and mention date accordingly.

   d. The matter to be mentioned on 18th November, 2021 to ascertain compliance and taking further direction which would include filing of Written Submissions.

5. On 18th November, 2021, once again none of the Respondents had complied instead they sought for more time to do so. The Honorable Court granted them twenty one (21) days to comply and the matter be mentioned on 19th January, 2022. On 19th January, 2022, Mr. Mwandage Advocate for the 2nd, 3rd and 5th Respondent informed Court that the Land Registrar Wundanyi where the Suit land is situated had requested for a further extension as there was a high likelihood of resolving the matter amicably out of Court. By the Consents of the Parties the Respondents were accorded twenty one (21) days leave to have filed the Replies and the Petitioner granted 7 days corresponding leave to file further Affidavit. The matter was fixed for further Mention on 1st March, 2022 for ascertainment on whether there would have been any settlement or further directions on the hearing of the case. It was marked as the last adjournment.

6. On 1st March, 2022 unfortunately despite all the long leverage the Respondents had been accorded, they once again not only failed to appear in Court, filed any replies but also provide any report on the out of Court negotiation and hence settlement whatsoever leaving the Court with no alternative but to direct that the Petition be heard by both way of adducing "viva voce" evidence and thereafter submission. The matter was fixed for hearing on 6th July, 2022. The Petitioner was directed to serve all the Parties with a hearing notice accordingly. On 6th July, 2022 the Counsel for the Petitioner and the 2nd, 3rd and 5th Respondent were all present. Subsequently the matter proceeded on as follows:-

II. The Petitioner's Case

7. The Petitioner filed a Petition dated 25th February, 2021 and a Supplementary Affidavit sworn on 30th April, 2021. He sought for the following reliefs:-

   a. A declaration that Petitioner is a beneficiary as a squatter of the former Gicheha farm and was therefore entitled to settlement on the Ziwani Phase 1 Scheme Taita Taveta.

b. A declaration that the Petitioner had acquired prescriptive rights on Plot 590/ Ziwani Phase 1 Scheme Taita Taveta under the Limitation of Actions Cap 22 of Laws of Kenya through open, continuous and uninterrupted occupation and use of the subject land for over thirty (30) years.

c. A declaration that the Petitioner was the rightful owner of Plot No. 590 Ziwani Phase 1 Scheme Taita Taveta.

d. A declaration that the removal and omission of the Petitioner from the list of beneficiaries for Plot No. 590/ Ziwani Phase 1 was illegal, invalid and unconstitutional.

e. An order of certiorari to remove to this Honorable Court and to quash the Title Deed for Plot No. 590/ Ziwani Phase 1 Scheme Taita Taveta dated 9th August, 2016.

f. An order of mandamus to compel the 2nd Respondent to cancel the registration of Plot No. 590/Ziwani Phase 1 Scheme Taita Taveta measuring 1.1301 Ha in the name of the 1st Respondent.

g. An order of mandamus to compel the 2nd Respondent to register the Petitioner as the absolute proprietor of Plot No. 590/ Ziwani Phase 1 Scheme Taita Taveta measuring 1.1301 Ha and to issue a title deed in the Petitioner's name.

h. A Permanent Injunction restraining, preventing and restricting the 1st Respondent or her servants or agents from trespassing, entering, farming, interfering with the Petitioner's occupation and/or possession of Plot No. 590/ Ziwani Phase 1 Scheme Taita Taveta.

i. General damages for damage to reputations, mental anguish and psychological fortune suffered by the Petitioner.

j. Costs.

On 7th July, 2022, the Petitioner's case commenced and whereby he testified as follows:-

Examination In Chief of the Petitioner – Mr. Njoroge Advocate.

8. He was sworn and testified in the Kiswahili language.

He identified himself by name as being Dominic Kioko Mutua. He was a holder of the national identity card bearing numbers 1186311. His date of Birth was year 1969. He was 53 years old. He lived at a place known as Sir. Ramson C1 Village Njukini in the County of Taita Taveta. He was a farmer and Community Health Volunteer. He also assisted persons with disabilities.

He was the Petitioner in this case. It was a case pertaining to all that parcel of land known as Land Reference Numbers Taita Taveta Ziwani Phase I Scheme/590 measuring 1.1301 HA (approximately 2.78 acres). It was currently registered in the names of Elizabeth Muthina Makarai, the 1st Respondent (see page 48).

9. He filed an affidavit dated 25th February, 2020 and a Supplementary affidavit dated 21st October, 2021. He lived on this parcel of land all his life. He got onto the said land Ziwani Phase I Scheme/590 from the year 1989. He got onto the land as his father had bought it for the Petitioner. He stated that Sir. Ramson was a settler and owned the whole of the land. He had employed so many workers who used to settle on the land. People got into the land known as "Kithitu". They were all squatters. The Petitioner continued being a farmer there. Sir. Ramson later on sold the land to the Gecheha company associated with the Kenyatta family.

10. In the year 2015, all the squatter were promised to be given land. That is to the squatter by the family of the Kenyatta measuring 2, 000 acres in total. The people to benefit were those of who resided onto the Sir Ramson's land. Each squatter was to get 2 acres each.

In the year 2006, as farmers the squatters, including the Petitoner got registered as the farmers of Kithitru Farm – Sir Ramson irrigation Scheme. This was on 3rd October, 2006. The Petitioner was registered as No. 295 on Page 11 and on Page 13 of the List of Squatters in the Gicheha Farm. From the year 2006, a list was prepared by elders. The Gicheha were the registered owners. The Petitioner was registered on Page 19 as No. 170. They we continued being the occupants of the land.

In the year 2018 they were informed that the Kenyatta Family now wanted to settle the squatters on their portion. As earlier on promised, each one of them were to be allocated 2 acres. They would be giving a number marked on the door of their houses. The Petitioner was given No. 340. He was to benefit by being given 2 acres.

In the year 2017, the Deputy President of the Republic of Kenya came over to the land and confirmed the land allocation project. In year 2018, they were all assured of each to be given title deeds.

11. However this did not happen smoothly. Some people who missed their title deeds complained. The Petitioner was one of those who missed being allocated title deeds as had been promised.

From the lodge complaints, it led the then Regional Commissioner Mr. Nelson Marwa to come over to try and resolve the matter. He caused a list of the beneficiaries to be published and also urged those who had benefited but were not squatters to be identified. People got some hope. Unfortunately, he was transferred from this region to serve elsewhere before the problem could be finally resolved. Eventually, the list of the beneficiaries was published and hanged at the Notice board. However, the Petitioner noticed that his name was missing from the said list. Hence, he came to learn to know that was the reason he had not been issued with a title deed. The D.C.C.C. advised those whose names were missing and had no title deed to take their complaint to Wundayi.

12. Later on, on the ground, the government surveyors came and planted beacons. They asked the Petitioner for his title deed. This was to enable them plant beacons – to be in tandem with the title. The Petitioner informed them he had not gotten one as yet. He noticed that the Title deed had been printed from the year 2018. They continued to plant beacon. It was an exercise by the officials from lands offices. The Petitioner's was no 340 based on household identification. Its this number that were used to issue title deed.

He stated that M/s. Elizabeth had never been a resident within the Ziwani area. Her names were not appearing in any of the records, she had been allocated land at a place called Chumvini sub-location but declined it. The Petitioner had been on the same spot where the plot No. 590 was situated. But now she was pushing him out the said parcel so that she may take it. He stated that all his neighbors were all allocated their portions where they lived all these years. The surveyor would come and issue number of title. He had been complaining to the public offices – Lands Registrar and Surveyors and urging them to visit the land. On 1st August, 2018 -they visited the land and found out that the land was for the Petitioner. Elizabeth Mathani Karai was asked to be given alternative land. She declined.

Later on the Land Registrar suggested that the land be subdivided into two. The Petitioner refused. He filed this suit. The Court ordered that the Petitioner be supplied with these documents:-

a. Lists of all the beneficiaries of the Land;

b. List of House identification. But despite all efforts, none of them were supplied. The officers deliberately refused to comply.

In his opinion, the public officers failed to adhere with laid down procedure due to high cases of Corruption. They were all compromised benefiting only their friends and relatives. The Petitioner had no land elsewhere. He had occupied the land for over 30 years. His late wife – Anna Ngina Kivungi and 3 children were buried on the said parcel of land. He urged Court to grant him the land. He stated having incurred costs seeking for justice and the suit land. He had been arrested and intimidated severally. He prayed for the prayers as sought from the filed Petition. That was all.

III. The Submissions

12. On 7th July, 2022 upon the closure of the hearing herein the Parties were directed to file their Written Submissions on given timeframe. Subsequently, the Honorable Court reserved a day to deliver its Judgment accordingly on notice.

A. The written submissions by the petitioner

12. On 14th September, 2022, the Learned Counsel for the Petitioner; the Law firm of Messrs. Njoroge & Katisya Advocates filed their Written Submissions dated even date. Mr. Njoroge Advocate commenced his Submission by quoting the famous Indian Leader and freedom fighter Mahatma Gandhi – to wit:-

> "A nation's greatness is measured by how it treats its weakest members" while making reference to the plight of the lowest cadre or caste in India- being the Harijans or the untouchables".

He held that in Kenya where land was a means of production and hence being landless one is perceived to be poor. He held that real squatters were caused by numerous historical injustice factors. He averred that the Gicheha farm set apart Two Thousand (2000) acres of its land to be distributed to squatters living on it. Unfortunately, the Petitioner was singled out and denied the portion he had squattering for the last thirty three (33) years, taking that the Respondents have not been able to explain to this Court why the Petitioner has faced this predicament; he has been forced to turn to Court and seek the reliefs sought.

IV. The 4th Respondent (odpp) Case

15. The 4th Respondent played a very limited role in this matter. Although the 4th Respondent entered an appearance and filed a Reply to the Petition dated 8th March, 2021. It was restricted to the response on the decision to prefer but charges against Petitioner in the Criminal Case before the Taveta Law Court. Unfortunately, it never dealt on the Land matters at all. That was their only participation in this matter.

A. The written submissions by the petitioners

16. The Counsel for the Petitioner submitted under the following five (5) issues.

Firstly, whether the ELC had jurisdiction to hear and determine this Petition. He held that aspect in affirmative taking that the fundamental rights of the Petitioner had been violated, infringed and/or threatened. To buttress its point he relied on the decision of "*Mohammed Sais – Versus- County Council of Nandi* (2013) eKLR" where Court held that so long as it was matters involving interpretation of *the Constitution* or enforcement or claims of Constitutional infringements of fundamental rights and freedom this Honorable Court has exclusive jurisdiction.

Secondly, whether the Petitioner was a squatter at Sir Ramson's farm or Gicheha Farm were never disputed nor challenged by any of the Respondents. Indeed, the Counsel held that from the particulars

of the Charge sheet upon which the Petitioner had charges of forceable detainer preferred against him held that: -

> "Dominic Kioko Mutua on 11th day of November, 2020 at Saramson "C" Njukini in Taveta Sub-County within Taita Taveta County being in possession of 1.1301 Hectares of land of Elizabeth Muthina Makarai without colour of right held possession of the Suit land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace against Elizabeth Muthina Makarai who was entitled by law to the possession of the said land.

17. Based on this assertion, the Counsel held that it put the Petitioner right in the centre of occupation of the suit property where he testified having been in occupation since the year 1989. This was a clear case the Petitioner was a squatter on the suit land.

Thirdly, whether the Petitioner was entitled to the Suit land? The Counsel held that the Petitioner had already been identified as a squatter and hence the next issue was to confirm that he was entitled to the portion of the two (2) acres from the Gicheha Farm.

The land which was private land had been donated as a gift to be apportioned to squatters a process to be supervised by the Ministry of Lands. The Counsel averred that this was completely opposed to the fact where the Court was settling people down from a Land adjudication process or allocation of Government land as a settlement scheme.

He stressed that the Ministry of Land had a very simple task – to identity who were genuine squatters on the land, cause its sub-division of two (2) acres each and allocate title deeds. He argued that there was a promise to respect already established homes and development by squatters to avoid disruption, demolition and unnecessary movements.

18. The Counsel argued that, the Petitioner was able to produce two (2) lists – (a) the Kithito Irrigation and Sir Ramsons "C" Irrigation Scheme list of squatters where he was No. 295 and the Gicheha farm from the year 2006 where he was No. 000170. The Counsel held that there was another list of households where his house was physically identified as No. 340.

Unfortunately, he was never able to access the list of squatters prepared by the Ministry of Lands despite all efforts made. He was able to testify having lived in occupation of the suit Land from the year 1989 and buried his wife - Anna Ngina Kivungi on the Suit land in the year 2004. All his children and grand children resided there.

The Counsel referred Court to the letter by the land Registrar dated 11th June, 2019 addressed to the Assistant Director Land Adjudication & Settlement – 3rd Respondent upon him conducting a site visit. The Counsel informed Court that the Land Registrar stated that: -

i. The Petitioner was from Ziwani Settlement.

ii. During the settlement exercise he was allocated Parcel No. 462 already developed by Mzee Kazi moto.

iii. Prior to the commencement of the settlement exercise, the Petitioner had settled on Parcel No. 590 and had developed it.

iv. From a ground visit by the Land Registrar on 11th August, 2018, showed graveyards for Petitioner's wife and a child. He had built his house and extremely cultivated the Parcel No. 590.

v. The Parcel No. 590 had been allocated to Elizabeth Muthina Makarai. It would be unjust to have Dominic Kioko vacate the Parcel.

vi. He proposed that the parcel of land be subdivided into two (2) giving the Petitioner the portion that had been developed.

Additionally, the Counsel argued that the 1st Respondent was never a squatter nor a farmer at Ziwani but a resident of Chumvini village which was a different area altogether. She never deserved to be given land at Ziwani.

19. The Counsel pressed that not only did the 1st Respondent fail to respond to the Petition despite adequate and proper service, but the Ministry of Lands failed to produce a list of all genuine squatters for the verification by Court despite a Court order.

The Counsel argued in the circumstances where the Government decided to go silent, it was not its responsibility to go on fishing expedition to ascertain the Defence or to conjure up defences on behalf of the State. The Court was left to strive out any issues raised and grant the orders sought by the Petitioner where the same was unchallenged or undefended as was the case in this instant. To support its argument he relied on the decision of "*Mohammed Balala & 11 others –Versus- Attorney General & 7 others* (2012) eKLR, where the Attorney General though entered appearance but failed to file any responses.

Fourthly, the Counsel submitted that the 2nd, 3rd & 5th Respondent contravened several Provisions of *the Constitution* of Kenya by allocating the Parcel No. 590 Ziwani/ Taita Taveta Phase 1 to the 1st Respondent. He held that the particular Provisions violated were Article 40 (1) and (3) of *the Constitution* of Kenya on his right to be granted title deed and acquire private property on all the other squatters and right to own a home and away from being evicted without following the due process of the law. The Counsel also held that there had been created legitimate expectations to occupy the land he had lived on from the year 1989.

20. According to the Counsel the legitimate expectation had been created by the continuous and uninterrupted occupation of the Suit land. This was private land and not Government land and hence the Petitioner had acquired prescriptive rights and this was by way of land adverse possession having exceeded the twelve (12) years prescribed by law.

In this case, the Government officials were the ones causing the denial of the Petitioner to acquire the land.

The Counsel further argued that under Article 40 (3) of *the Constitution* of Kenya the Government had no right to deprive a person of property of any description or any interest of property. The Petitioner argued that he being a squatter on the Gicheha farm had been granted the land but it was the Government which wished to deprive him of his fundamental right to acquire land. Instead of giving him his right and portion the Government proceeded to give it to the 1st Respondent.

21. The Counsel further argued that there was absence of fair Administration Action under Article 47 of Constitution of Kenya. Although the squatters among themselves had already identified who were the genuine squatters, the Government was only tasked with such a simple exercise of identifying the genuine squatter and allocating them the two (2) acres demarcated by the Gicheha farm. They were to pick up their houses, sub-divide the land, allocate the land and identify the beneficiaries and hence issue title deeds. These process would have involved holding Government Board meetings which would be minuted, documentation and records well kept; it would have been a full public participation process where objection and complaints such as the one by the Petitioner would have been entertained and dealt with before the final issuance of title deed. Unfortunately, the Counsel argued that the process

was so opaque- as the Ministry of Lands failed to present even a single document on the process to either be approved or disapproved by the beneficiaries.

The Petitioner being a genuine squatter he was entitled to the right of being heard before being condemned.

22. He argued that The Government ought to have followed all the required and laid down procedure. To support his argument the Counsel relied on the decision of:- "*South East Development Co. Limited – Versus - Registrar of Titles* (2021) eKLR & *Mwangi Stephen Mutithi – Vs- National Land Commission & 3 others* (2018) eKLR.

Further, the Counsel averred that the Petitioner had been denied the light to a fair and access to justice under Article 157 (ii) of Constitution of Kenya. The Trial Court had found the Petitioner being innocent and acquitted him of the offence of forceable detainer under Section 210 of Civil Procedure Rules, 2010 taking that the facts of the case pertained genuine land dispute.

Finally, the Counsel submitted that there existed no alternative remedy available to the Petitioner apart from filing this Petition.

The Counsel held that Petitioner could not sue the 1st Respondent over the title in a normal suit taking that the 1st Respondent had been issued the title through processes initiated by the 2nd & 3rd Respondent.

23. Those very processes violated the Constitutional Provisions and hence the dispute was of a Constitutional nature to be handled through a Constitutional Petition. He held that even if the Petitioner had an alternative remedy, the same should not act as a bar to the Petition filed by the Petitioner so long as the remedies sought were efficacious in resolving the dispute. To support this argument he relied on the case of:- "*Martin Lemayian Mokoosio & Anor – Versus- Reshman Praful Chandra Vedera & 3 others* (2011) eKLR.

24. He argued that the Honorable Court has the powers to grant the prayers sought by the Petitioner on the issue whether the Honorable Court has power to cancel the 1st Respondent's title – the Counsel argued that under the Provision of Article 40 (6) of *the Constitution* of Kenya and Section 26 (1) (b) of *Land Registration Act* do not provide any protection to property unlawfully acquired. He held that the 2nd & 3rd Respondents by failing to file any responses to the Petition failed to provide how the title was accorded to the 1st Respondent. He stressed that the title acquired by the 1st Respondent was acquired unlawfully and hence could not be protected.

Therefore, the Counsel argued that for a title deed that was acquired illegally and /or without following the due process or procedure and its roots not known backed with documents, it had had to be impeached by way of its cancellation by Court.

Further, while the 1st Respondent had never settled on the land nor used it, the Petitioner had cultivated and occupied the Suit land for a long time. Besides, the 2nd & 3rd Respondents would be capable of granting the 1st Respondent an alternative portion of land elsewhere within the Ziwani area. To support this argument, the Counsel relied on the decision of "*David Maina Kanyoro – Versus- Nelson Gathime & 2 others* (2021) eKLR" where a title which could not be backed by written documents, it was therefore successfully impeached and cancelled by Court.

Taking that the Petitioner was discriminated for no apparent reason, the Counsel proposed that he be compensated by way of being paid up a sum of Kenya Shillings Five Million (Kshs. 5,000,000.00) as general damage, distress, anxieties and breach of the constitutional right.

Finally, he urged the Petitioner to be awarded costs as he was to have been evicted from the Suit land had he not instituted this Suit and sought the reliefs herein.

V. The Issues For Determination

25. The Court has keenly considered all the filed pleadings, both the oral and documentary evidence adduced, the Written Submissions, the cited authorities, the relevant Provisions of *the Constitution* of Kenya 2020 and the Statutes herein.

For the Honorable Court to arrive at an informed, reasonable, just and fair decision, there are four (4) salient issues to be determined. These are: -

a. Whether the Constitutional Petition instituted by the Petitioner herein dated 25th February, 2021 meets the laid down threshold of a Constitutional Petition.

b. Whether the Petitioner is entitled to the relief sought from the filed constitutional Petition.

c. Whether the title deed that was issued to the 1st Respondent by the 2nd and 3rd Respondents should be impeached and/or cancelled thereof.

d. Who will bear the costs of this Suit?

VI. Analysis And Determination

Issue No. a). Whether the Constitutional Petition instituted by the Petitioner herein dated 25th February, 2021 meets the laid down threshold of a Constitutional Petition.

Brief facts

26. Before embarking on the analysis of the issue under this sub – heading, it is imperative that the Honorable Court extrapolates on the brief facts to this case. From the filed pleadings and the evidence adduced in Court, the Suit land namely- Plot No. Taita Taveta Ziwani Phase 1 Scheme /590 was part of what was then a colonial farm known as Sir. Ramson's Farm in the Njukini area of Ziwani situated in Taveta Sub-county the County of Taita Taveta County.

In the year 1982, the commercial activities with the said farm stopped and the employees were left in limbo. They were without any further employment. Despite of this they still continued residing in the farm. The Petitioner's father was one of them. They were rendered as squatters on the land. In the year 1990, pursuant to a local arrangement, the Petitioner's father bought a portion of land of the farm from a fellow squatter. Later on this portion was subdivided and allocated a title deed Plot No. Taita Taveta Ziwani Phase 1 Scheme/590 and it's on this portion that the Petitioner and his family continue to farm and live upon up todate.

Subsequently, and in the course of time the farm changed hands from Sir Ramson's Farm to another ownership of Gicheha farm. By this time the Petitioner and other squatters on the suit land had formed themselves into a group known as "Kithito Irrigation Scheme". After some time after taking over the farm. The Gicheha farm decided to set apart some portions of the suit land measuring Two Thousand (2000) acres to be gifted to the squatters. Ideally they decided to involve the Government. Through the Ministry of Lands each squatter was to obtain two (2) acres. The Petitioner was identified as squatter No. 000170 on the Squatter list prepared by the Provincial Administration. His house or physical location was mapped or picked as House No. 340. The portion of the land was noted as portion No. 77. At the end of the process, the two (2) acres where the Petitioner lived were allocated Title No. Taita

Taveta Ziwani Phase 1 Scheme /590. However, despite of all this it was the 1st Respondent, who resides at Chumvini Village and not Njukini area who was allocated this title.

27. Despite the complaint lodged by Petitioner to resolve this anomaly the 2nd to 3rd Respondents', all attempts attempt to resolve the issue had become unsuccessful, necessitating him to file this Petition. In the process two 92) issues seem to have been emerging. First, the 2nd and 3rd Respondents seem to be accelerating the problem while Secondly, the 1st Respondent emerged and was laying claim on this parcel. While this was the case the 1st Respondent had made all efforts to evict the Petitioner from the Suit land and take possession of part of the land. Indeed there had been cases of Criminal nature- Taveta MCCR/E095/2020 where he was arrested and charges of creating disturbance and later on charged to forceable detainer were preferred. However, upon being heard on 31st August, 2022 a ruling was delivered by the Court dismissing the said Case. That is adequate on the facts of the case.

28. Now turning to the issues under this Sub – heading. The Constitutional basis of the Further Amended Petition for the five Petitioners include:-

    a. Article 25(c) of *the Constitution* which provides that the right to a fair trial shall not be limited despite any other provisions of *the Constitution* of Kenya.

    b. Article 40 (1) and (3) of *the Constitution* of Kenya declares the right to acquire and own property of any descriptions in any part of Kenya and protection from state deprivation unless procedurally done and due compensation was made.

    c. Article 47 of Constitution of Kenya on fair administrative action which provides for written reasons to be served upon a person whose right has been or is likely to be adversely affected by acts of the government.

    d. Article 22 of Constitution of Kenya declaring the right upon any person or authorized representative to commence proceedings for declaration and compensation for violation of rights and fundamental freedom.

    e. Article 23 of *the Constitution* of Kenya giving High Court jurisdiction to deal with such matters and out timing the nature of relief that can be granted.

    f. Article 64 on the right to private property in Kenya.

    g. Article 165 (3) (d) and 5 as read with Article 162 (2) (b) of *the Constitution* of Kenya giving this court jurisdiction to determine the questions whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened inland matters

    As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

    This Constitution shall be interpreted in a manner that:-

    a. Promotes its purposes, values and principles;

    b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

    c. Permits the development of the law; and

    d. Contributes to good governance……"

29. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided.

Further, it is important to fathom that *the Constitution* is "a living instrument having a soul and consciousness of its own" . I dare add that *The Constitution* is a real living tissue. And like any other tissue, it has to be fed and watered. They breathe and require oxygen supplied in them throughout. Without it they would die. These statements are not mere metaphorical. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

30. Based on the principles set out in the edit of The Court of appeal case of "the *Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another* (2013) eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of "*Anarita Karimi Njeru –Versus - Republic* [1980] eKLR 154 where the court is satisfied that the Petitioners' claim were well pleaded and articulated with absolute particularity. It held:-

> " Constitutional violations must be pleaded with a reasonable degree of precision....."

Further, in the "*Thorp – Versus – Holdsworth* (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

> "The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing".

31. While applying, these set out principles for filing a Constitutional Petition to this case, the honorable court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the 1st, 2nd, 3rd, 4th and 5th Respondent and the pleading for the prayers sought.

Issue No. b). Whether the Petitioner is entitled to the relief sought from the filed constitutional Petition.

32. In order to establish whether the Petitioner herein is entitled to the reliefs sought is a matter of assessing the surrounding facts inferences and the law. To begin with it is not in dispute by any of the Respondents herein or anyone elsewise that the Petitioner was a squatter at Sir Ramson's farm or Gicheha Farm. Indeed, from the particulars of the Charge sheet of a criminal case upon which the Petitioner was arrested and arraigned in Court on several charges including forceable detainer preferred against him held that: -

> " Dominic Kioko Mutua on 11th day of November, 2020 at Saramson "C" Njukini in Taveta Sub-County within Taita Taveta County being in possession of 1.1301 Hectares of land of Elizabeth Muthina Makarai without colour of right held possession of the Suit land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace against Elizabeth Muthina Makarai who was entitled by law to the possession of the said land".

33. Clearly, from this charges, it is evident that the Petitioner was right in the centre of occupation of the suit property where he testified having been in occupation since the year 1989. This was a clear case that indeed the Petitioner was a squatter on the suit land.

The other pertinent issue was whether the Petitioner was entitled to be granted title, rights and interest of two (2) acres over the Suit land. Taking that it was not in dispute that the Petitioner had already been identified as a squatter, I hold that he was entitled to it. It is instructive to note that this was not Government – settlement scheme as it would be misconstrued, but one the land was private land donated as a gift to be apportioned to squatters a process to be supervised by the Ministry of Lands. This was completely opposed to the fact where the Court was settling people down from a Land adjudication process or allocation of Government land as a settlement scheme.

The Court has observed that the Ministry of Land had a very simple task – only to identity who were genuine squatters on the land, cause its sub-division of two (2) acres each and allocate title deeds. The Government was to respect already established homes and development by squatters to avoid disruption, demolition and unnecessary movements.

34. The Court noted from the evidence adduced that the Petitioner was able to produce two (2) lists – (a) the Kithito Irrigation and Sir Ramsons "C" Irrigation Scheme list of squatters where he was No. 295 and the Gicheha farm from the year 2006 where he was No. 000170. Further to this, there was another list of households where the house for the Petitioner was physically identified as No. 340.

Unfortunately, although he sought and was granted Court order for the production of lists of the beneficiaries and land allocates, the Petitioner was never able to access the list of squatters prepared by the Ministry of Lands despite all efforts made. He was able to testify having lived in occupation of the suit Land from the year 1989 and buried his wife - Anna Ngina Kivungi and three children on the Suit land in the year 2004. It was his testimony that all his children and grandchildren resided there. It is my view that this information held by the Government on the list of beneficiaries and the location of the land was made available to the Petitioner it would have extensively shed more light on these pertinent issues of who were the squatters, beneficiaries of the land allocated and the shares thereof. But now that was never provided for no good reason nor justifiable cause whatsoever.

The Court was referred to the letter by the Land Registrar dated 11th June, 2019 addressed to the Assistant Director Land Adjudication & Settlement – 3rd Respondent upon him conducting a site visit. The Counsel informed Court that the Land Registrar stated that: -

i. The Petitioner was from Ziwani Settlement.

ii. During the settlement exercise he was allocated Parcel No. 462 already developed by Mzee Kazi moto.

iii. Prior to the commencement of the settlement exercise, the Petitioner had settled on Parcel No. 590 and had developed it.

iv. From a ground visit by the Land Registrar on 11th August, 2018, showed graveyards for Petitioner's wife and a child. He had built his house and extremely cultivated the Parcel No. 590.

v. The Parcel No. 590 had been allocated to Elizabeth Muthina Makarai. It would be unjust to have Dominic Kioko vacate the Parcel.

vi. He proposed that the parcel of land be subdivided into two (2) giving the Petitioner the portion that had been developed.

35. Further, from the evidence adduced, the Court was satisfied that indeed that the Petitioner had been denied the right to a fair and access to justice under the Provisions of Article 157 (ii) of Constitution of Kenya. The Trial Court had found the Petitioner being innocent and acquitted him of the preferred

offence of forcible detainer under Section 210 of Civil Procedure Rules, 2010 taking that the facts stated in the Criminal case squarely related to land, dispute than on criminal allegations perpetrated against the Petitioner. For that reason, the trial court dismissed the case.

36. It is instructive that the Petitioner who took occupation of the land from the year 1989 has had to undergo immense and grotesque suffering and loss, anguish, trauma, torture and reputation pursuing this matter. This has caused him being placed incarceration following malicious and unlawful arrest on trumped up charges for no apparent nor justifiable reason or cause. It trite law that the Petitioner ought to be compensated by the Government for all these general damages meted on him. Hence, taking that into account, the Honorable Court proceeds to grant them to the Petitioner accordingly.

37. For all these reasons, the Honorable Court is persuaded that the Petitioner is entitled to be granted all the reliefs sought from the filed Constitution Petition herein.

Issue No. c). Whether the title deed that was issued to the 1st Respondent by the 2nd and 3rd Respondents should be impeached and/or cancelled thereof.

38. Based on the elaborate analysis made out herein, there is no doubt that the Petitioner is entitled to the ownership, and title deed to the suit land. On the other hand, it is noteworthy from the evidence adduced that the 1st Respondent was never a squatter nor a farmer at Ziwani but a resident of Chumvini village which was a different area altogether. It follows that she never deserved to be given land at Ziwani. Furthermore, the Court has noted that the 1st Respondent failed to respond to the Petition despite adequate and proper service upon her. It follows that the evidence by the Petitioner was not only unchallenged but also uncontroverted from the face value. Additionally, the Ministry of Lands failed to produce a list of all genuine squatters for the verification by Court despite a Court order.

    Thus, in the circumstances where the Government decided to go silent, it was not its responsibility to go on fishing expedition to ascertain the Defence or to conjure up defences on behalf of the State. The Court was left to strive out any issues raised and grant the orders sought by the Petitioner where the same was unchallenged or undefended as was the case in this instant. The Court fully concurs with the Learned Counsel while relying on the decision of "Mohammed Balala & 11 others (Supra) where the Attorney General though entered appearance but failed to file any responses as it is in the Instant case.

39. I also concur with the Learned Counsel that the 2nd, 3rd & 5th Respondents contravened several Provisions of *the Constitution* of Kenya by allocating the Parcel No. 590 Ziwani/ Taita Taveta Phase 1 to the 1st Respondent. The violated provisions Article 40 (1) and (3) of *the Constitution* of Kenya on Petitioner's right to be granted title deed and acquire private property on all the other squatters and right to own a home and away from being evicted without following the due process of the law. By so doing, there had been created legitimate expectations to occupy the land. It's instructive to note that the Petitioner had lived on the land from the year 1989. Hence, legitimate expectation had been created by the continuous and uninterrupted occupation of the Suit land. I fully, concur that this was private land and not Government Settlement Scheme Land and hence the Petitioner had acquired prescriptive rights and this was by way of land adverse possession having exceeded the twelve (12) years prescribed by law. In this case the Government officials were the ones causing the denial of the Petitioner to acquire the land.

40. The Court stresses that based on the Provision of Article 40 (3) of *the Constitution* of Kenya the Government had no right to deprive a person of property of any description or any interest of property. The court has appreciated the argument by the Petitioner to the effect that he being a squatter on the Gicheha farm had been granted the land but it was the Government which wished to deprive him

of his fundamental right to acquire land. Therefore, instead of giving him his right and portion the Government proceeded to give it to the 1st Respondent.

41. The Court has observed and confirm that there was absence of fair Administration Action under Article 47 of Constitution of Kenya. Although the squatters among themselves had already identified who were the genuine squatters, the Government was only tasked with such a simple exercise of identifying the genuine squatter and allocating them the two (2) acres demarcated by the Gicheha farm. They were to pick up their houses, sub-divide the land, allocate the land and identify the beneficiaries and hence issue title deeds. These process would have involved holding Government Board meetings which would be minuted, documentation and records well kept; it would have been a full public participation process where objection and complaints such as the one by the Petitioner would have been entertained and dealt with before the final issuance of title deed. Unfortunately, the process was so secretive, squid and opaque- as the Ministry of Lands failed to present even a single document on the process to either be approved or disapproved by the beneficiaries.

The Petitioner being a genuine squatter he was entitled to the right of being heard before being condemned.

The Government ought to have followed all the required and laid down procedure. To support his argument the Counsel relied on the decision of:- "South East Development Co. Limited (Supra),.

The Honorable Court fully concurs with the Learned Counsel for the Petitioner to the effect that the Petitioner could not sue the 1st Respondent over the title in a normal suit taking that the 1st Respondent had been issued the title through processes initiated by the 2nd & 3rd Respondents.

42. Those very processes violated the Constitutional Provisions and hence the dispute was of a Constitutional nature to be handled through a Constitutional Petition. I fully agree that even if the Petitioner had an alternative remedy, the same should not act as a bar to the Petition filed by the Petitioner so long as the remedies sought were efficacious in resolving the dispute as rightfully cited from the decision of "Martin Lemayian Mokoosio & Anor (Supra).

Besides, the Honorable Court has the powers to grant the prayers sought by the Petitioner on the issue whether the Honorable Court has power to cancel the 1st Respondent's title – the Counsel argued that under the Provision of Article 40 (6) of *the Constitution* of Kenya and Section 26 (1) (b) of *Land Registration Act* do not provide any protection to property unlawfully acquired. He held that the 2nd & 3rd Respondents by failing to file any responses to the Petition failed to provide how the title was accorded to the 1st Respondent. He stressed that the title acquired by the 1st Respondent was acquired unlawfully and hence could not be protected.

43. Therefore, the Counsel's contention that for a title deed that was acquired illegally and /or without following the due process or procedure and its roots not known backed with documents, it had to be impeached by way of its cancellation by Court.

Further, while the 1st Respondent had never settled on the land nor used it, the Petitioner demonstrated to court that he had cultivated and occupied the Suit land for a long time. Besides, the 2nd & 3rd Respondents would be capable of granting the 1st Respondent an alternative portion of land elsewhere within the Ziwani area. To support this argument, the Counsel relied on the decision of "*David Maina Kanyoro –Versus- Nelson Gathime & 2 others* (2021) eKLR" where a title which could not be backed by written documents, it was therefore successfully impeached and cancelled by Court.

44. Taking that the Petitioner suffered great loss and damage for the long time he spent chasing for his land. He had to undergo and endure such grotesque hardships, humiliation, harassment, trauma, anguish, torture frustration and which included malicious arrest, prosecution and charges preferred against

him based on tramped up charges perpetrated by the Respondents herein. These all tantamounted to violation, denial and infringement of his fundamental rights. He will be entitled to a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3, 500,000.00) as general damage, distress, anxieties and breach of the constitutional right.

Issue No. d). Who will bear the costs of this Suit?

45. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. It is trite law that the issue of Costs is the discretion of Courts. In the case of "*Reids Heweet & Company – Versus – Joseph* AIR 1918 cal. 717 & *Myres – Versus – Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

> "The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

46. The Supreme Court fortified this position in the case of "*Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others* [2014] eKLR thus:

> " so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

From these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the Petitioner has succeeded in his case. For that very fundamental reason, therefore, it is just fair, reasonable and equitable that the Petitioner is awarded the costs of the suit. He is also entitled to general damages for the loss, suffering, reputation anguish and anxiety he has and to undergo for all those years defending this case.

IV. Conclusion & Disposition

47. The upshot of all the foregoing and having conducted an indepth analysis of the framed issues herein, the Honorable Court is persuaded that the Petitioner has been able to establish its case in accordance with the required standards and guidelines of a Constitution Petition. For that reason therefore, I proceed to specifically grant the following orders.

    a. That Judgement entered to the effect that *the Constitution* Petition dated 25th February, 2021 by the Petitioner be and is hereby found to meritorious and hence allowed accordingly.

    b. That a declaration be and is hereby made that the Petitioner is a beneficiary as a squatter of the former Gicheha farm and was therefore entitled to settlement on the Ziwani Phase 1 Scheme Taita Taveta.

    c. That a declaration be and is hereby made that the Petitioner had acquired prescriptive rights on Plot 590/ Ziwani Phase 1 Scheme Taita Taveta under the Limitation of Actions Cap 22

of Laws of Kenya through open, continuous and uninterrupted occupation and use of the subject land for over thirty (30) years.

d. That a declaration be and is hereby made that the Petitioner was the rightful owner of Plot No. 590 Ziwani Phase 1 Scheme Taita Taveta.

e. That a declaration be and is hereby made that the removal and omission of the Petitioner from the list of beneficiaries for Plot No. 590/ Ziwani Phase 1 was illegal, invalid and unconstitutional.

f. That an order of Certiorari be issued to remove to this Honorable Court and to quash the Title Deed for Plot No. 590/ Ziwani Phase 1 Scheme Taita Taveta dated 9th August, 2016.

g. That an order of mandamus be issued to compel the 2nd Respondent to cancel the registration of Plot No. 590/Ziwani Phase 1 Scheme Taita Taveta measuring 1.1301 Ha in the name of the 1st Respondent.

h. That an order of mandamus be issued to compel the 2nd Respondent to register the Petitioner as the absolute proprietor of Plot No. 590/ Ziwani Phase 1 Scheme Taita Taveta measuring 1.1301 Ha and to issue him with a title deed in the Petitioner's name.

i. That an order of Permanent Injunction be and is hereby granted restraining, preventing and restricting the 1st Respondent or her servants or agents from trespassing, entering, farming, interfering with the Petitioner's occupation and/or possession of Plot No. 590/ Ziwani Phase 1 Scheme Taita Taveta.

j. That general damages for damage awarded to the Petitioner to reputations, mental anguish and psychological fortune suffered by the Petitioner being a sum of Kenya Shillings 3, 500, 000.00.

k. That Costs of the suit to be awarded to the Petitioner.

It is so ordered accordingly

JUDGEMENT DELIVERED SIGNED AND DATED AT MOMBASA THIS 13TH DAY OF FEBRUARY, 2023

HON. JUSTICE MR. L. L. NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT MOMBASA

In the presence of:-

a. M/s. Yumnah, the Court Assistant,

b. Mr. Benjamin Njoroge, Advocate for the Petitioner.

c. No appearance for the 1st Respondent.

d. No appearance for the 2nd, 3rd and 5th Respondents.

e. No appearance for the 4th Respondent.