



Mwasima Mbuwa Welfare Association v Teita Estate Sisal Limited & 8 others (Land Case Petition E004 of 2024) [2024] KEELC 7012 (KLR) (Environment and Land) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
LAND CASE PETITION E004 OF 2024**

EK WABWOTO, J

OCTOBER 23, 2024

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES
2(1), 3, 10, 19, 20, 24, 27, 39, 40, 42, 47, 50 & 53 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE BILL
OF RIGHTS AND CONSTITUTION UNDER ARTCILE 19, 20,
24, 27, 39, 40, 42, 50 & 53 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE FUNDAMENTAL RIGHT TO PROPERTY

BETWEEN

MWASIMA MBUWA WELFARE ASSOCIATION PETITIONER

AND

TEITA ESTATE SISAL LIMITED 1ST RESPONDENT

COUNTY GOVERNMENT OF TAITA TAVETA 2ND RESPONDENT

**THE TAITA-TAVETA COUNTY EXECUTIVE MEMBER MINISTRY OF
WATER, SANITATION & IRRIGATION 3RD RESPONDENT**

THE TAITA-TAVETA COUNTY EXECUTIVE 4TH RESPONDENT

**MEMBER MINISTRY OF LANDS & PHYSICAL PLANNING 5TH
RESPONDENT**

LAND REGISTRAR – TAITA TAVETA COUNTY 6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 7TH RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY 8TH RESPONDENT



JUDGMENT

1. What is before this court is the amended Petition dated 10th June 2024, brought by the Petitioner which it describes itself as a Welfare Association duly incorporated within the Societies Act Cap 108 Laws of Kenya. The Petitioner is also described as an organization whose membership is drawn from all communities within Kenya including but not limited to the Dawida Community who are the Taita people living within Mwatate area, Taita Taveta County.
2. The Petitioner seeks various reliefs which include the following:-
 - i. A declaration that property rights in Land reference Number 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9487 duly vests with the Petitioner.
 - ii. Permanent injunction restraining the 1st Respondent and/or its agents, servants and/or representatives from selling, allocating, transferring, leasing, subdividing and/or otherwise dealing or interfering with Land references 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9487.
 - iii. A declaration that the Respondent's failure and/or refusal to implement the recommendations of the endorsed and ratified survey report is in breach of Articles 19, 20, 24, 27, 39, 40, 42, 50 and 53 of the Constitution of Kenya.
 - iv. An Order of Certiorari to bring to the Environment & Land Court and quash all impugned title documents held by the 1st Respondent and in particular land references number 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9487.
 - v. An Order of Certiorari quashing all and/r if any charge, restrictions, encumbrances, easements and/or conditions registered against Land reference number 9487.
 - vi. An Order of Certiorari to bring to the Environment & Land Court and quash all impugned title documents issued after the illegal, unlawful and irregular sub-division of various portions of land within Land reference number 3880/4.
 - vii. An order of Mandamus directing the 2nd to 8th Respondents to implement the recommendations of the endorsed and ratified survey report within 45 days from the date of judgment and/or within a reasonable time in which this Honorable court deems fit and just.
 - viii. In default of prayer (vi) herein above, the Deputy Registrar to register and/or cause to be registered title documents in respect to L.R. Numbers 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9487 in the name of the Petitioner.
 - ix. Exemplary damages.
 - x. Costs of and incidental to the suit.
 - xi. Any other order and/or relief that the Honorable Court deems fit and just.
3. The subject petition is premised on various grounds alluded to and or enumerated in the body thereof and the same is supported by the affidavit sworn by Mnjala Mwaluma on 9th May 2024 and further affidavit sworn on 25th July 2024.



4. Upon being served with the Petition, the Respondents opposed the Petition. The 1st Respondent filed a Replying Affidavit sworn by Philip Kyriazi its Managing Director on 27th June 2024, the 2nd to 4th Respondents filed a Replying Affidavit sworn by Jimmy Mtawa, the County Chief Officer, Land, Physical Planning, Mining and Urban Development on 19th July 2024, the 5th and 6th Respondents filed a Replying Affidavit sworn by Richard Amati on 4th July 2024, the 7th and 8th Respondents filed a Replying Affidavit sworn by Samuel Njoroge, Clerk of the National assembly sworn on 17th July 2024.
5. Pursuant to the directions issued by this court, the Petition was canvassed by way of affidavit evidence and written submissions. Counsel for the parties were also allowed to make oral submissions in respect to the written submissions filed. Learned Counsel Mr. Motuka submitted on behalf of the Petitioner, Learned Counsel Mr. Chebon submitted on behalf of the 2nd to 4th Respondents, while Learned Counsel Mr. Penda submitted on behalf of the 5th and 6th Respondents and Learned Counsel Mr. Omondi submitted on behalf of the 7th and 8th Respondents.

The Petitioner's case and its submissions

6. The Petitioner's case as presented in the Amended Petition dated 10th June 2024, affidavits sworn on 9th May 2024 and 25th July 2024 together with written submissions dated 20th July 2024 is that it has been the legal, beneficial and/or bona fide owner of all those parcels of land being Land references No. 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9487.
7. It was contended that pursuant to Article 40 as read together with Article 63 of *the Constitution* of Kenya and Section 4 of the *Community Land Act*, the Petitioner is the proprietor of the aforementioned parcels of land and their proprietary interests in the said parcels of land can only be defeated, cancelled and/or revoked if due process is followed.
8. The petitioner averred that Land reference no. 3880/5, 3880/3 and 3880/4/1 are all subdivisions emanating from Land reference no. 3880 which essentially was the mother land having a valid title document to that effect.
9. It was also averred that Land reference number 3880/5 which measures approximately 16,875 acres in size harbours public utilities such as the railway station, Mwandisha Primary School, part of Maili Kumi Primary school, Mwatate airstrip and human settlement in respect of residents of Singila majengo and Majengo.
10. It was further averred that Land reference no. 9487 which measures approximately 55 acres in size harbours a dam which for all intents and purposes is meant to serve the general public including but not limited to respondents herein.
11. On or about the year 1988, that without any colour of right and/or permission the 1st respondent encroached upon Land references No. 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9487 with full knowledge and notice that the same were community Land.
12. It was the Petitioner's case that for the longest time possible the 1st Respondent in cahoots with members of the 2nd to 8th Respondents has misrepresented itself as the legal, beneficial and/or bona fide owner of Land reference No. 3880/5, 3880/3, 3880/4/R, 6924, 3881 and 9487 a fact which it knew and/or ought to have known to be false, fictitious and misleading in the circumstances much to the detriment of the petitioner.
13. According to the Petitioner on or about the 2nd December 2014, the Petitioner avers that a directive was issued by the 11th Parliament's Departmental Committee on Lands (Land issues in Taita-Taveta County) that key stakeholders in the Land ministry including but not limited to the ministry of lands,



- housing and urban development through the director of survey carry out a survey with a view of ascertaining the boundaries of the suit properties herein as per the records of 1992 from the survey of Kenya, their total acreage and whether the same belonged to the Petitioner or the 1st Respondent.
14. Subsequently, a joint survey exercise was conducted by a team of experts derived from the National Government (represented by the office of the Director of Survey), the County Government (represented by the office of the County Land Surveyor), the 1st Respondent (represented by Mr. Wallis Hime) and the Petitioner herein (represented by Mr. John Obel) all of whom were survey professional conversant with the task at hand.
 15. According to the Petitioner the survey exercise was successfully conducted jointly but parties differed on their respective reports resulting to two reports being forwarded to the then Cabinet Minister for Land Hon. Jacob Kaimenyi for consideration and subsequent debate in parliament for adoption.
 16. It was averred that after consideration of both reports, the then Cabinet Secretary for Land ratified the Petitioner's report by appending his signature and forwarded it to the National Assembly for debate and the same was overwhelmingly endorsed by the 11th Parliament for implementation which among other recommendations, Land references nos. 3880/5, 3880/3, 3880/4/R, 6924, 3881, 11378 and 9487 were declared community land which ought to be left in the possession and ownership of the Petitioner herein.
 17. It was averred that irrespective of the foregoing, in a show of might and defiance, the 1st Respondent has arbitrarily with use of force, threats, high handedness and under the table dealings continued to represent itself as the legal owner of the said parcels of land to the public to date despite clear and contrary evidence.
 18. It was also averred that the 2nd to 8th Respondents have without any justifiable cause blatantly refused and/or neglected to implement the recommendations despite numerous reminders of the same by the petitioner.
 19. The Petitioner averred that on 18th September, 2019 the 1st Respondent in cahoots with the 2nd to 5th Respondents illegally and irregularly acquired consent to sub-divide portions of land within Land reference number 3880/4 by dint of their impugned and/or falsified survey report prepared by Mr. Wallis Hime and title deeds processed to that effect despite having knowledge that he same is an illegality.
 20. It was stated that the blatant refusal to implement the recommendations captured in the Petitioner's endorsed report by the Respondents is actuated by malice and for all intents and purposes the Respondents actions are discriminative in nature with the intention to defeat the fundamental rights and freedoms of the petitioner to peacefully and quietly own property hence an affront to the dictates of the Rule of Law as envisaged in Article 3(1) of *the Constitution* of Kenya which is the cornerstone of *the Constitution* of Kenya.
 21. It was also stated that the 1st Respondent continues to man public amenities located within Land reference no. 3880/5 through its agents, servants, employees and/or representatives exercising full control and authority over such basic and fundamental utilities to the exclusion and detriment of the community. The 1st Respondent has arbitrarily without any justifiable reasons and authority privatized a public dam situated in Land reference no. 9487 without following the laid down procedures of Law hence depriving the community access to water which is a basic need integral to the survival of mankind. The 1st Respondent has barricaded all pathways and/or roads leading to the dam meant to serve the community with water which is an essential basic need to the enjoyment of the right to life



- and the protection, development and sustainability of a clean and healthy environment as envisaged in Article 42 of *the Constitution* of Kenya.
22. The Petitioner averred that the reckless, negligent, forceful and wilful encroachment by the 1st Respondent in Land reference no. 3880/5 and the subsequent manning and/or closure of all public roads, pathway and lead ways leading to the airstrip, railway station and urban roads is a gross affront to the fundamental right of movement as envisaged in Article 39 of *the Constitution* of Kenya as the members of the community are barred from free movement and access of one point to another.
 23. It was contended that the actions of 1st Respondent to limit access to public amenities situated within Land reference no. 3880/5 such as learning institutions is an affront to Article 53 of *the Constitution* of Kenya as it denies the children living within and outside its environs the right to access free and compulsory basic education which is an integral right to the proper, upright and morally accepted standard of upbringing of children in any legitimate society.
 24. It was also contended that the reckless, negligent, forceful and wilful encroachment by the 1st Respondent in Land reference no. 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9478 is a gross infringement of Article 40 of *the Constitution* of Kenya as it arbitrarily without any justifiable cause and/or reason deprives the petitioner its right to the peaceful and quiet enjoyment of its proprietary rights in the said parcels of land.
 25. The Petitioner contended that the illegal and/or unlawful actions of the 1st Respondent to arbitrarily convert community land and the public amenities thereto to private property without following the laid down procedures of law is contrary to public policy and an infringement to the fundamental rights and freedoms of the community which ought not be limited except by the Law as envisaged in Article 19, 20(2) and 24 of *the Constitution* of Kenya.
 26. The Petitioner faulted the 2nd to 8th Respondents for abdicated their constitutional mandate of protecting and promoting the interest and rights of the community contrary to the objectives, values and principles of *the Constitution* of Kenya as envisaged in Article 10 and 174 (d) – (g) of *the Constitution* by denying the community their right to social and economic development.
 27. According to the Petitioner, failure by the Respondents to provide written reasons for their blatant refusal, denial and/or negligence to implement the recommendations of the joint survey report despite numerous reminders and/or demands to do so is contrary to the dictates of the right to be heard and infringes on the Petitioner's right to equality before the law under Article 27 and to fair trial as enshrined under Article 50 of *the Constitution* of Kenya which guarantees the Petitioner a right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a Court of Law or if appropriate, another independent and impartial tribunal or body.
 28. It was the Petitioner's case that upon the endorsement of its survey report by the 11th Parliament Departmental Committee, ratification of the same by the then Minister for Lands Mr. Jacob Kaimenyi and the subsequent directive thereto that the Respondents herein implement the same, it was the Petitioner's legitimate expectation that the implementation process would have been executed within a timely manner.
 29. It was stated that through a gazette advertisement in the daily newspaper, the Petitioner became aware that the 1st and 2nd Respondents are actively engaged in negotiations with a proposed sale of the suit properties from the 1st Respondent without involving the Petitioner herein. The Petitioner is highly apprehensive that if the intended sale is permitted to proceed as it is, the same shall amount to an unlawful acquisition of the suit properties by the 2nd Respondent and/or any interested parties thereto



which is contrary to the dictates and principles of Article 40 read with Article 63 of *the Constitution* of Kenya.

30. It was contended that beyond the proposed sale of some and/or all of the suit properties, the 1st Respondent is illegally carrying out development plans on Land reference number 3880/5 with the intention to illegally develop the land for its own economic benefits and ground-breaking works soon to follow.
31. In its written submissions dated 29th July 2024, the Petitioner also submitted on the following issues:-
 - i. Does the 1st Respondent enjoy sanctity of title.
 - ii. Which report is the true report.
 - iii. Was the subdivision of L.R No. 3880/4 and subsequent issuance of title deeds valid.
 - iv. Is the Petitioner entitled to the prayers sought.
32. In respect to L.R. No. 2682 – L.R. No. 3880 and 3881, it was submitted that the same was issued to Sir Charles Sydney Goldman for 999 years from 1927 to 2996 and 20440 acres of land was transferred to the 1st Respondent as LR. No. 3880/4 on 27th July 2961 and a charge was created on 6th August 1964 to the 1st Respondent subject to the charge to Standard Bank Limited and Ralli Brothers created on 1st July 1964.
33. In respect to L.R No. 3383 L.R. No. 6924, the title was issued to Sir Charles Sydney Goldman for 999 years from 1930 to 2929 and the said land was transferred and registered to the Teita Sisal Estate Limited on 27th July 1964 and a charge was created on 6th August 1964 to Teita Sisal Estate Limited subject to the charge to Standard Bank Limited and Ralli Brothers Limited created on 1st July 1964.
34. C.R No. 9 – L.R. No. 9487 title was issued to Teita Concessions Limited for 99 years from 1950 and a charge created in favour of Teita Estate Limited on 10th August 1964 which was subject to the charges created on 4th July 1964 to Ralli Brothers Limited and Standard Bank Limited.
35. L.R. No. 19682 – L.R. No. 11378, the title was issued to Teita Sisal Estate Limited for 965 years and 10 months from 1963, a charge created in favour of Teita Sisal Estate Limited on 6th August 1964 which was subject to the charges created on 1st July 1964 to Ralli Brothers Limited and Standard Bank Limited.
36. Citing the cases of Salomon =Versus= Solomon & Company Ltd [1897] AC 22 and Root Capital Incorporated =Versus= Tekangu Farres Cooperative Society Ltd & Another [2016] eKLR it was argued that the 1st Respondent was incorporated in 1972 and could not have been able to have acquired the suit properties in 1961 and 1964.
37. Referring to the proceedings in Voi ELC No. 11 of 2023, Teita Estate Limited =Versus= Mnjala Mwaluma & 91 Others, it was submitted that the 1st Respondent could not substantially authenticate the legality of the procedure used to acquire the impugned title deeds while giving evidence in that matter. It was also argued that the exemptions granted by the then former President Jomo Kenyatta in respect to the consent of the Land Control Board did not extend to the acquisition of the impugned title deeds.
38. It was contended by the Petitioners that the joint survey process brought light that the suit properties were recommended to be registered in favour of the Petitioner. It was also contended that the Chair of the group of Surveyors Mr. Richard Amati was the only person tasked with forwarding the reports to the Cabinet Secretary for his signature. It was also contended that the allegations that the report were



forged was not true and that none of the Respondents stated that the report was indeed recalled and declared null and void.

39. On whether the subdivision of L.R. No. 3880/4 and subsequent issuance of title deeds was valid; it was argued that any action by the 1st Respondent to L.R. No. 3880/4 is null and void ab initio since there were status quo orders in force existing in VOI ELC NO. 11 OF 2023 TEITA ESTATE LIMITED =VERSUS= MNJALA MWALUMA & 91 OTHERS (PREVIOUSLY MOMBASA 352 OF 1998 CONSOLIDATED WITH 103 OF 2007). The said status quo orders had not been varied nor set aside.
40. Counsel for the Petitioner concluded his written submissions by urging this court to find that the Petitioner had proved beyond reasonable doubt that the title documents were acquired illegally, procedurally and through a corrupt scheme and thus grant the reliefs sought in the amended petition. Learned Counsel for the Petitioner Mr. Motuka also made oral submissions in canvassing the Petition and urged the court to grant the reliefs sought.

The case of the 1st Respondent and its submissions

41. The 1st Respondent's case is contained in its Replying Affidavit sworn on 27th June 2024 by Philip Kyriazi, its Managing Director, written submissions dated 17th July 2024 and supplementary submissions dated 26th August 2024.
42. It was the 1st Respondent's case that it is the registered proprietor of all parcels of land registered as Land Reference Number 3880, 3881, 6929, 9847 and 11378. In respect to L.R. No. 3880 and 3881 (measuring 60,784 acres), the first Grant was issued to Sir Charles Sydney Goldman on 1st April 1927, on 16th May 1929 the properties were transferred to Teita Concessions Limited, on 7th September 1944, 4,000 acres in respect of L.R. 3880/1 were surrendered vide LR. No. 2682/31. On 15th April 1953, 12,045 (less 12 acres for a road reserve and 33 acres for railway reserve) in respect of L.R. 3880/1 were surrendered. On 29th June 1953 some 24,267 acres (less 59 acres being road reserve and 127 acres being railway reserve) were transferred to Ngerenyi Plantation Limited. On 27th July 1961, there was a transfer of 20,440 acres (less 80 acres being road reserve and 141 acres being railway reserve) to Teita Sisal Estates Limited. The property was registered as LR No. 3880/4. On 17th August 1963, there was a surrender of 3,344 acres registered as L.R. No. 3880/4/1 to the Regional Assembly of the Coast Region in exchange of a new grant L.R. No. 11378. On 30th May 1964, 17,096 acres (less road reserve of 80 acres and railway of reserve of 141 acres) was transferred to T & T Sisal Company Limited and registered as L.R. 3880/55. A charge was on 1st July 1964 created to Standard Bank Limited and Ralli Brothers Limited. A charge was on 6th August 1964 created to Teita Sisal Estates Limited subject to the charge to Standard Bank Limited and Ralli Brothers Limited created on 1st July 1964. Pursuant to a presidential consent required by Section 24 of the [Land Control Act](#), a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on 19th April 1973. This exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXX (Volume 75) Number of 9th February 1973 Legal Notice Number 7.
43. In respect to L.R. 6924 [measuring 10,073 acres] it was averred that;-
 - a. The first Grant was issued to Sir. Charles Sydney Goldman on 1st May 1930 as registered at the Registered of Titles at Nairobi on 7th July 1931.
 - b. The land was thereafter sold and transferred to Teita Concessions Limited on 12th October 1932.



- c. A transfer was subsequently registered against the title on 27th July 1961 when the land was transferred to Teita Sisal Estates Ltd.
 - d. T & T Sisal Company Ltd acquired the land on 30th May 1964 and this was as well documented as entry number 1083.
 - e. A charge was on 1st July 1964 created to Standard Bank Limited and Ralli Brothers Limited.
 - f. A subsequent charge was created on 6th August 1964 to Teita Sisal Estates Limited subject to the charge to Standard Bank Limited and Ralli Brothers Limited created on 1st July 1964.
 - g. Subsequent charges were created to The Standard Bank Limited and Ralli Brothers Limited on 7th October 1964 which were subject to the charges created on 1st July 1964 and 6th August 1964.
 - h. Pursuant to a presidential consent required by section 24 of the [Land Control Act](#), a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on the 13th April 1973.
 - i. This exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXV (Volume 75) Number 7 of 9th February 1973 Legal Notice Number 7.
44. The 1st Respondent averred that in respect to L.R. 948:-
- a. The first Grant was issued to Teita Concessions Limited on 1st January 1950 as registered and a title recorded on 8th December 1959.
 - b. On the 4th July 1964, T & T Sisal Company Ltd purchased the land and a transfer was effected as entry number 35 on the title.
 - c. A charge was created on 4th July 1964 to rally Brothers Limited and Standard Bank Limited and documented as entry number 36 on the title.
 - d. A subsequent charge was created to Teita Sisal Estate Limited on 10th August 1964 which was subject to the charges created on 4th July 1964 to Ralli Brothers Limited and Standard Bank Limited.
 - e. A further charge was created on 7th October 1964 to Ralli Brothers Limited and Standard Bank Limited which was subject to the charges created on 4th July 1964 and 10th August 1964 and documented as entry number 48 on the title.
 - f. Pursuant to a presidential consent required by section 24 of the [Land Control Act](#), a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on the 16th April 1973.
 - g. This exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXV (Volume 75) Number 7 of 9th February 1973 Legal Notice Number 7.
45. In respect to LR. No. 11378 [measuring 3,344 acres] it was averred that:-
- a. The first Grant was issued to Teita Sisal Estates Limited on 1st July 1963 as registered and a title recorded on 14th August 1963.



- b. On the 30th May 1964, T & T Sisal Company Ltd purchased the land and a transfer was effected as entry number 1082 on the title.
 - c. A charge was created on 1st July 1964 to Ralli Brothers Limited and Standard Bank Limited and documented as entry number 24 on the title.
 - d. A subsequent charge was created to Teita Sisal Estate Limited on 6th August 1964 which was subject to the charges created on 1st July 1964 to Ralli Brothers Limited and Standard Bank Limited.
 - e. A further charge was crated on 7th October 1964 to Ralli Brothers Limited and Standard Bank Limited which was subject to the charges created on 1st July 1964 and 6th August 1964 and documented as entry number 241 on the title.
 - f. Pursuant to a presidential consent required by section 24 of the *Land Control Act*, a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on the 13th April 1973.
 - g. This exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXV (Volume 75) Number 7 of 9th February 1973 Legal Notice Number 7.
46. It was contended that the matters raised in the Petition are currently under determination in Voi ELC No. 11 of 2023 which consisted a consolidation of suits formerly known as MOMBASA CIVIL SUIT NO. 352 OF 1998 AND MOMBASA CIVIL SUIT NO. 103 OF 2007. In respect to the status quo that were in existence issued on 8th October 2014 it was contended that the same was issued to prevent any further encroachment and setting up of any more temporary or permanent structures by the Defendants thereon onto the 1st Respondent's land pending the determination of the suit.
47. In respect to the survey, it was averred that the same was conducted on 2nd December 2014 with the aim of re-establishing the beacons/boundaries of the property owned by the 1st Respondent, establishing the true acreage and limits of land owned by the 1st Respondent. All the parties were present during the survey exercise and upon conclusion, the report concluded as follows:-
- i. The total acreage of the four parcels of land under investigation which were legally owned by the 1st Respondent that is L.R. No. 3880/5(3880/4/R), L.R. No. 11378, L.R. No. 6924 and L.R. No. 9487 was 30,248 acres.
 - ii. That the 1st Respondent is operating within the four parcels under investigation.
 - iii. There was no encroachment by the 1st Respondent into the neighbouring trust, community or private land.
 - iv. That the settlement at Singila Majengo and other settlements mentioned under findings all fell within L.R. No. 3880/5 which legally belong to the 1st Respondent.
 - v. There was no encroachment whatsoever by the 1st Respondent into community land that was noted.
 - vi. The Petitioner and its members had encroached on the private property belonging to the 1st Respondent.
48. It was contended that the Petitioner sneaked into the report an appendix marked 'APPENDIX 9' which was by error signed by the then Cabinet Secretary of Lands Prof. Jacob T. Kaimenyi. The



Cabinet Secretary then in response to the 1st Respondent letter dated 1st August 2017 vide his letter dated 18th August 2017 distanced himself from the document marked Appendix 9 and advised the 1st Respondent to be guided by the actual report from the Department Committee on land issues. It was further contended that vide a letter dated 6th September 2017 from the Principal Secretary, Ministry of Lands and Physical Planning it was communicated that the Nduku Investigation Report was expunged and hence null and void.

49. In the 1st Respondent filed written submissions and further submissions submitting on the following issues:-
- i. Whether the Petition offends the doctrine of Constitutional avoidance.
 - ii. Whether the 1st Respondent is the true registered and beneficial owner of the suit parcels of land.
 - iii. Whether the parcels of land are community land as alleged by the Petitioner.
 - iv. Whether the constitutional rights have been or were violated.
 - v. Whether the Petitioners are entitled to the reliefs sought.
50. It was argued that the Petition offends the doctrine of Constitutional avoidance. The Petitioners claim is a claim challenging the ownership of the suit properties by the 1st Respondent which claim the Secretary General of the Petitioner raised in their statement of defence filed in Mombasa Civil Suit No. 352 of 1998 Teita Estate Limited =Versus= Mwanjala Mwaluma and Mombasa Civil Suit No. 103 of 2007 Teita Estate =Versus= Gibson Mwabili Lambo and 97 Others. It was argued that the same sought to have instituted through a normal suit as opposed to a Constitutional Petition. Reliance was placed on Section 13(2), 13(2)(d) and 13(7) of the Environment and Land Court Act 19 of 2021 and the cases of Emmanuel Nyongesa & 34 Others =Versus= County Government of Trans Nzoia (2021) eKLR, Communications Commission of Kenya & 5 Others =Versus= Media Services Limited & 5 Others (2014) eKLR, Speaker of the National =Versus= A.G & 3 Others (2013) eKLR and Centre for Rights Education and Awareness (CREAW) & 7 Others =Versus= A. G (2011) eKLR.
51. On whether the 1st Respondent is the true registered and beneficial owner of the suit parcels of land, it was argued that the 1st Respondent has presented copies of original title deeds for the suit parcels and no contrary evidence was adduced by the Petitioner. The cases of Embakasi Properties Limited & Another =Versus= Commissioner of Lands & Another (2019) eKLR, Muiruri =Versus= Kimemia (2002) 2 KLR 677 Munya Maina =Versus= Hiram Gathika Maina (2013) eKLR among others were cited in support.
52. As to whether the suit parcels was community land, Counsel for the 1st Respondent while placing reliance on the provisions of Article 40, 63(2) of the Constitution, Section 5, 7 and 13 of the Community Land Act together with the cases of Cheub Adan Ali & 3 Others =Versus= Community Land Registrar Northern Eastern Region – Mandera & 2 Others (2022) eKLR and Chongeywo & 10 Others (suing as representatives of the Ndorobo/Ogiek Community of Chepkitale, Mt. Elgon) =Versus= Attorney General & 4 Others; Kenya National Commission on Human Rights (Amicus Curia) Environment & Land Petition 1 of 2017 (2022) KEELC 13783 (KLR), it was argued that the Petitioner has failed to present any evidence demonstrating that the suit properties qualify as community land.
53. On whether the Petition is entitled to the reliefs sought, it was argued that the Petitioner is not entitled to the reliefs sought and the said Petition ought to be dismissed with costs.



54. Learned Counsel Mr. Mungai also made oral submissions on behalf of the 1st Respondent urging the court to dismiss the Petition.

The case of the 2nd to 4th Respondent and their submissions.

55. The 2nd to 4th Respondents case is contained in their replying affidavit sworn by Jimmy Mtawa on 19th July 2024 and their written submissions dated 14th August 2024.

56. It was contended the 1st Respondent vide Grant No. L.R 19682 under the Registration of Title Ordinance for a term of 965 years and 10 months from 1st July 1963 was granted parcel of land reference number 3880. The 1st Respondent was further granted a Grant No. G.R.N 9 for a term of 99 years from 1st January 1950.

57. A dispute relating to proprietorship of Land reference numbers 3880/5, 3880/3, 3880/4R, 6924, 11378, 3881 and 9487 led to the 11th Parliament of the National Assembly of the Republic of Kenya to authorize joint Surveys to be conducted in Mwatate Constituency of Taita-Taveta County. Upon the conclusion of the report the Committee of the National Assembly made the following recommendations:

- “a) All lands in occupation by the Teita Sisal Estate without valid title documents should revert to Mwasima Mbuwa Community Group.
- b) LR No. 3881 should be set aside and reverted to the petitioner, Mwasima Mbuwa Community Group.
- b) On LR No. 13007 (an Amalgamation of LR Nos 3881 and 6925) the committee recommended that further investigations be conducted and if found to be in doubt be reverted to Mwasima Mbuwa Community.”
- c) That further, the Ministry of Lands and Physical Planning carried survey work on the parcel and in concluding their report they made the following recommendations:
- d) Land settled on by the community be legally exercised from the Estate land to which the Estate does not object.
- e) Community be informed of the outcome of the survey and be cautioned against further encroachment on the Estate land.
- f) The Mwasima Mbuwa Welfare Association and the Mwatate Community be informed of the outcome of the resurvey and to be cautioned to desist from further encroachment into the Sisal Estate land.

58. It was averred that the 1st Respondent was granted two grants under the Registration of Titles Act.

59. It was contended that issuance of certificate of title under the Registration of Titles Act is conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner and can only be challenged where fraud or misrepresentation is proven.

60. It was also contended that the Petitioner has not adduced evidence to show that the grants issued under Native Lands Trust Ordinance (Chapter 100) (Now Repealed) and Registration of Title Ordinance (Chapter 281) (Now Repealed) upon the 1st Respondent was issued fraudulently. The grant gives absolute and indefensible title to land and can only be challenged on ground of misrepresentation and



fraud. The fact that the Petitioner's members have encroached the suit parcel does not automatically convert the land to Community Land.

61. It was further contended that the suit parcels are private land and therefore cannot be vested on the County Government of Taita-Taveta as unregistered community land.
62. It was averred that the joint survey found that the 1st Respondent had not encroached the neighbouring forest but persons living around L.R No. 3880/5, 3880/3, 3880/4/R, 6924, 11378, 3881 and 9487 had encroached the land. The said joint survey was done with the knowledge of the Petitioner and the Petitioner cannot move away from the findings and conclusions.
63. In their submissions dated 14th August 2024, Counsel submitted on the following issues:-
 - i. Whether the Petitioner is the legal and beneficial owner to the suit parcels.
 - ii. Whether the Community has a right over the suit property.
 - iii. Whether the County Government has abdicated its role of safeguarding community land.
 - iv. Whether Parliamentary report is binding to the County Government.
 - v. Who should bear the costs of the suit.
64. It was submitted that the 1st Respondent had been issued with certificate of title for the suit properties under the Registration of Titles Ordinance and the same was conclusive proof of ownership of land and can only be challenged by fraud and misrepresentation if proved. Reliance was placed to the cases of Dr. Joseph N. K. Ng'ok =Versus= Justice Moyo Ole Kaiwa & 2 Others (1997) eKLR, Carogot Investment Limited =Versus= Aster Holdings Limited & 4 Others (2019) eKLR, Moya Drift Form Ltd =Versus= Theuri (1973) EA 114, Park View Shopping Arcade =Versus= Kangethe & 2 Others (KLR) (E & L) 592 among others.
65. On whether the community has a right over the suit property, it was submitted that the land in dispute does not fall under the category of land defined as community land. The cases of Federation of Women Lawyers (FIDA KENYA) & 4 Others =Versus= The A. G & 2 Others (2016) eKLR and Stephen Men Kasio & 14 Others =Versus= Kadong Ranch Limited & Others (2015) eKLR.
66. It was contended that the County Government has not abdicated in its role of safeguarding community land since the suit parcels are not unregistered reliance was placed on Section 6 and Regulation 13 and 26 of the Community Land *Regulations of 2017* and the case of County Government of Taita Taveta =Versus= Isangaiwich Group Ranch & 3 Others (2021) eKLR.
67. It was also submitted that Parliamentary reports are generally not binding in nature and findings of parliamentary report cannot oust grants issued upon the 1st Respondent since the provisions of *the Constitution* protect the right to property and the same can be limited where land is compulsorily acquired and where the same is proved to have been acquired unlawfully.
68. Learned Counsel Mr. Chebon also made oral submissions in support of the 1st Respondent's case. He urged the court to expunge paragraph 28 of the Replying Affidavit sworn by Jimmy Mtawa on 19th July 2024 and prayed for dismissal of the Petition with costs.

The case of the 5th and 6th Respondents and submissions

69. The 5th and 6th Respondent filed an Affidavit sworn by Richard K. Amati on 24th July 2024 and also filed written submissions dated 16th August 2024. It was their case that the issue had been referred to



Parliament because there was a dispute. The 5th Respondent implemented the recommendations of the report and there is evidence showing which titles were issued.

70. In respect to their written submissions, Counsel submitted on the following issues:-
- i. Whether the right survey report was adopted by Parliament and whether the court has jurisdiction to determine the inner workings of the departmental committee on lands.
 - ii. Whether the survey report tabled before and adopted by Parliament has been implemented.
71. It was submitted that this court should take precaution in dealing into matters that are purview of the legislative. The Parliamentary Committee on Lands in its final report adopted the survey report as forwarded by the letter by the Principal Secretary, Ministry of Lands and that the annexure titled Nduku Investigation Report had been expunged from the report since the same was erroneously included.
72. It was further submitted that the judicial arm of the Government is precluded from interference with the actions and decisions of Parliament in performance of its constitutional duty. The case of Speaker of the Senate & another =Versus A. G & 4 Others (2013) eKLR was cited in support.
73. On whether the survey report tabled before and adopted by Parliament has been implemented, it was argued that in the affidavit of Richard K. Amati, the team leader of the joint survey team, evidence has been adduced to the effect that not only is the report of the joint survey team properly tabled and adopted by Parliament but the same was implemented and further the affidavit of Samuel Njoroge, Clerk of the National Assembly had confirmed as much.
74. Learned Counsel Mr. Penda made oral submissions of behalf of the 5th and 6th Respondents and urged the court to dismiss the Petition with costs.

The case of the 7th and 8th Respondents and submissions

75. The 7th and 8th Respondents filed a Replying Affidavit sworn by Samuel Njoroge, Clerk of the National Assembly on 17th July 2024.
76. It was averred that the Departmental Committee on Lands is established under Standing Order No. 216 (1) and (5) of the National Assembly Standing Orders. The Committee is mandated to handle matters related to lands and settlement, including:-
- a. Land policy, land transactions, survey & mapping.
 - b. Land adjudication, settlement, land registration.
 - c. Land valuation, administration and community and public land and land information and
 - d. Management system.
77. Due to the public outcry concerning land issues in Taita Taveta County, and pursuant to its mandate under the Standing Orders, the Departmental Committee on Lands resolved to conduct investigations into the matter by conducting a site visit at the county.
78. The Committee undertook various sittings where it noted public outcry in Taita Taveta County and rising tension due to land conflicts between the owner of the Teita Sisal Estate and the local community.



The Committee conducted an inspection tour in the area to ascertain the situation on the ground and propose a solution to the conflict.

79. On 21st March 2014, the Committee met with the Governor and Deputy Governor of Taita Taveta County. They informed the Committee that the main issue under contestation was the boundary dispute between the estate and the local community and difficulties in accessing public utilities, including schools, dams and roads within the Estate.
80. On the same date, the Committee met with the Deputy Commissioner, who briefed them on land matters in the County and their impact on peace and security. The Deputy Commissioner indicated that the entire land in dispute was 15,000 hectares with 2,000 hectares set aside in Taveta for government use.
81. On 22nd March 2014, the Committee received a Memorandum from Christopher Mwadime Mwambingu, a resident of Taita Taveta County. The Memorandum informed Parliament that Teita Sisal Estate Limited was involved in a dispute with Mwasima Mbuwa in High Court Case Number 103 of 2007 consolidated with H.C.C.C No. 352 of 2008.
82. The Committee was also made aware that the land is in dispute and being contested by Singila Majengo people as a land historical injustice occasioned by the colonial masters.
83. The Committee was requested to recommend against the procurement exercise in Teita Sisal Estate Limited and investigate issues surrounding land managed by the estate.
84. Furthermore, the Committee met with elders in Mwatate and received submissions from District Settlor Selection Committee in Taveta and Ministry of Lands, Housing and Urban Development Land Adjudication and Settlement Officer, and experts on satellite data on imagery processing, geo-referencing and analysis.
85. The Committee received evidence from members of Mwasima Mbuwa Group and the Managing Director of Teita Sisal Estate Limited and County District Surveyor, Taita Taveta County.
86. Subsequently, and flowing from the various views received from the various stakeholders elucidated above the Committee made the following recommendations: The Committee made the following General Recommendations -
 - a. The Ministry of Lands, Housing and Urban Development should bring proposals for legislation to ensure that investments in property benefits local communities and their economy as provided for in Article 66(2) of *the Constitution*.
 - b. The National Cohesion and Integration Commission should intervene for the purpose of averting possible land based ethnic clashes in the County.
 - c. The National Commission on Human Rights should intervene to ascertain the breach of the Bill of Rights.
 - d. *The Constitution* Implementation Commission to ensure that the entire process is constitutional, and that all respective government institutions and state agencies should undertake their responsibilities accordingly.
 - e. The National Land Commission should initiate an inquiry into the historical land injustices in Taita Taveta County and seek redress as provided for by law.



- f. Title Deeds should be reviewed in the entire county and land lease reviewed to establish whether their terms have expired or not and if they were renewed without legal procedures, if so, the land be surrendered to the local community.
87. Specifically, on the issue of Teita Sisal Estate land dispute, the Committee recommended as follows –
- a. The Ministry of Interior and Coordination of Government should with immediate effect ensure that all roads to the primary school, dam, railway and airstrip are open to allow members of the local community access.
 - b. The Ministry of Lands, Housing and Urban Development through the Director of Survey should carry out survey with a view to ascertaining the boundaries as per the records of 1992 from the Survey of Kenya, so as to ensure Teita Sisal Estate only occupies 30,000 acres as per the titles it holds and to release all extra land to the government.
 - c. Ministry of Environment should restore Tasha Hill Forest to its original state.

The Committee's Report was later tabled before the House by Honourable Alex Mwiru, Chairperson of the Lands Committee, on Thursday 25th June, 2015 for adoption pursuant to the provisions of the Standing Orders of the National Assembly.

88. It was also averred that upon adoption of the Report by the Departmental Committee on Lands, the Committee on Implementation was seized of the matter to monitor the implementation of the recommendations of the House.
89. The Committee on Implementation is a select committee established pursuant to Standing Order 209 of the National Assembly Standing Orders. The Committee has the function of scrutinising the resolutions of the house (including adopted committee reports), petitions and the undertakings given by the National executive and examine –
- a. Whether or not such decisions and undertakings have been implemented and where implemented, the extent to which they have been implemented; and whether such implementation has taken place within the minimum time necessary; and
 - b. Whether or not legislation passed by the House has been operationalized and where operationalized, the extent to which such operationalization has taken place within the minimum time necessary.
90. The Committee resolved to appraise itself of the implementation status of the recommendations in the Departmental Committee on Land Report regarding land issues in Taita Taveta County. In considering the implementation status of the Departmental Committee Report, the Committee on Implementation held various meetings with officials of the Ministry of Lands and Physical Planning, Mwasima Mbuwa Welfare Association, Taita Taveta County Security Intelligence Committee, the National Land Commission, and the management of the Teita Sisal Estate.
91. The Committee also conducted an inspection visit to Taita Taveta County on 5th to 8th April, 2018. The Committee satisfied itself with the implementation status of the Resolutions of the House and thereafter made the following recommendations –
- a. The Ministry of Lands and Physical Planning should complete the adjudication process of 6,000 acres excised from the Teita Sisal Estate to the squatters in Taita Taveta County within 6 months of the adoption of the Report.



- b. The Ministry of Lands and Physical Planning should, within six months of the Report, submit a list of all beneficiaries of the land surrendered by the Estate.
 - c. The Ministry of Lands and Physical Planning, the National Land Commission and the County Government of Taita Taveta should engage the local community for concurrence in the extension and renewal of leases for Teita Sisal Estate when they expire.
 - d. The Directorate of Criminal Investigations to investigate the activities of Mwasima Mbuwa Welfare Association for fraudulent activities targeting the squatters and members of the public and if found culpable, be subjected to due legal process within six months of the adoption of the report.
92. The Report was tabled before the House for adoption on Thursday 30th September, 2021 by Moitalel Ole Kenta, Chairperson of the Committee on Implementation.
 93. According to the 7th and 8th Respondents, it was evident from the aforementioned actions and recommendations that the National Assembly has not abdicated its constitutional mandate. On the contrary, it had actively engaged in addressing and resolving the land issues in Taita Taveta County through legislative, oversight, and consultative measures.
 94. The 7th and 8th Respondents also field written submissions dated 4th September 2024 wherein Counsel submitted on the following issues:-
 - a. Whether the Petition suffices as a Constitutional Petition.
 - b. What is the role of the National Assembly.
 - c. Whether the National Assembly discharged its mandate.
 - d. Who has the role of implementation.
 - e. Whether Parliamentary proceedings of the National Assembly can be challenged in a court of law.
 95. Counsel argued that the central complaint by the Petitioner is the failure and/or refusal to implement the recommendations of the endorsed and ratified survey report. It was argued that implementations of survey reports are not matters for *the Constitution* but rather for implementing resolutions of the House.
 96. In respect to the role of the National Assembly Counsel cited Article 95 of *the Constitution* and argued that the duty to implement, laws and recommendations made by the 7th and 8th Respondent lies elsewhere.
 97. On whether the National Assembly had discharged its mandate, it was submitted that on 21st March 2014, the Parliamentary Committee met with the Governor and Deputy Governor of Taita Taveta County, they also met the Deputy Commissioner and they also received evidence form the Petitioner and 1st Respondent. The Committee made several recommendations and later its report was tabled in the House which was adopted on 25th June 2015.
 98. It was also submitted that in considering the implementation status of the Departmental Committee Report, the Committee held various meetings with the Petitioner, Ministry of Lands, National Land Commission and other stakeholders. The Committee also conducted a site visit on 5th and 8th April 2018 and equally made a number of recommendations. Its report was tabled before the House for adoption on Thursday 30th September 2021 and hence the National Assembly has not abdicated on



its role. It was further submitted that the role of implementation of the report lies with the relevant government entities.

99. Learned Counsel Mr. Omondi also made oral submissions in opposition to the Petition and urged the court to dismiss the Petition with costs.

Analysis and Determination

100. The court has considered the case put forward by the Petitioner, the Respondents, the written submissions filed and oral submissions made by Counsel for the parties together with the authorities relied upon and has outlined the following issues for determination in this petition:-
- i. Whether this court lacks jurisdiction to hear this petition in view of the doctrine of constitutional avoidance.
 - ii. Whether the suit properties are community land.
 - iii. Who among the Petitioner and the 1st Respondent are the registered and beneficial owners of the suit properties.
 - iv. Whether the Petitioners Constitutional rights have been violated by the actions of the Respondents.
 - v. Whether the Petitioner warrants the grant of the reliefs sought.
101. This court shall now proceed to determine the said issues sequentially.

Issue No. (i) Whether this court lacks jurisdiction to hear this Petition in view of the doctrine of Constitutional avoidance

102. The 1st Respondent has objected to the Petition on the aspect of the doctrine of constitutional avoidance.
103. Constitutional avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. The 1st Respondent argued that the Petitioner's claim in this Petition is a claim of or challenging the ownership of the suit properties by the 1st Respondent which claim the Secretary general of the Petitioner and members of the Petition raised in their statements of defence filed in MOMBASA CIVIL SUIT NO. 352 OF 1998 TEITA ESTATE LIMITED =VERSUS= MWANJALA MWALUMA and MOMBASA CIVIL SUIT NO. 103 OF 2007 TEITA ESTATE =VERSUS= GIBSON MWABILI LEMBO AND 97 OTHERS. It was submitted by the 1st Respondent that the claim for ownership of the land can be instituted through a normal civil suit as opposed to a Constitutional Petition.
104. A party seeking to enforce constitutional rights must comply with Articles 19, 20, 21, 22, 23, 258, and 260 of *the Constitution*, as read together with *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013, by disclosing the party's capacity, the nature of the constitutional provisions breached, infringed or threatened, the particulars of injury, loss or damage, any previous or pending matters over the subject matter, the nature of the breach, the reliefs sought and the signature of the petitioner. In *Annarita Karimi Njeru vs. Republic* (1979) eKLR, *Mumo Matemu vs Trusted Society of Human Rights Alliance* (2013) eKLR, and *Communication Commission of Kenya vs Royal Media Services & others* (2014) eKLR, the courts held that a constitutional petition must be pleaded with specificity, clarity, and particularity so that the opposite party may know what questions or issues to answer to.



105. Clarity of pleadings in a constitutional petition is geared towards defining the issues in litigation, saving the court's time and resources. See *Kenya Medical Practitioners Pharmacists and Dentists Union vs University of Nairobi & another* (2021) eKLR and *Thort vs Holdsworth* (1876) 3 CHD 637.
106. In *CCK & 2 others vs Royal Media supra*, the court said a party invoking Article 22 (1) of *the Constitution* has to show the rights said to be infringed as well as the basis for their grievance and must link the claim with the Articles contravened and the manifestation of the contravention.
107. In *Nasra Ibrahim Ibren vs IEBC & others* (2018) eKLR, the court said that a party is under a constitutional forensic duty to set out the particulars of the constitutional transgression that, in his opinion, has been committed in a precise manner.
108. A constitutional petition must also raise constitutional questions or issues whose answers flow from *the Constitution* and not statutes. It must require the interpretation of *the Constitution*. See *Haki Ziman Abdul Abdulkarim vs Arrow Motors E.A Ltd & another* (2017) eKLR and *Fredrick & others vs MEC for Education and Training East Cape and others* 9200 23 L.J 81. Claims of statutory or statutory rights violations cannot give rise to a constitutional violation. See *Turkana County Government & others vs A.G. & others* (2016) eKLR.
109. In the instant case, the court has conscientiously perused the entire petition and is satisfied that the petition is properly before this court for determination. But as to whether or not the petition will succeed, the same is a different thing all together.

Issue No. (ii) Whether the suit properties are community land

110. Article 63(2) of *the Constitution* of Kenya provides:-

“Community land consists of—

- a. Land lawfully registered in the name of group representatives under the provisions of any law;
- b. Land lawfully transferred to a specific community by any process of law;
- c. Any other land declared to be community land by an Act of Parliament; and
- d. Land that is—
 - i. Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - ii. Ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - iii. Lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).”

111. Article 40 of *the Constitution* protects the right to property, including the right to acquire and own property of any description. It ensures that no one is arbitrarily deprived of their property, reinforcing the sanctity of registered land titles.

112. The *Community Land Act*, 2016 under Section 5 provides for the recognition, protection, and registration of community land. It outlines the procedure for the registration of community land and



mandates that such land must be documented, mapped, and registered in accordance with the Act. Section 7 of the Act stipulates that community land can only be registered after the community has been duly recognized and the land has been identified, mapped, and registered following a clear process that includes public participation. Further, Section 13 of the Act emphasizes the requirement for evidence of communal ownership and usage based on customary laws and practices. It underscores the need for historical and current proof of community involvement in land management and usage.

113. For the purposes of *Community Land Act* Section 2 of the *Community Land Act*, 2016 defines a community as follows:-

“Community” means a consciously distant and organized group of users of community land who are citizens of Kenya and share any of the following attributes:-

- a. Common ancestry.
- b. Similar culture or unique mode of livelihood.
- c. Socio-economic or other similar common interest.
- d. Geographical space.
- e. Ecological space.
- f. Ethnicity.

114. From the above definition, a distinction of what is a community amongst other attributes stems from the use of community land. The communal use of land is defined as holding or using land in undivided shares by community.

115. The court has considered the pleadings filed herein together with the affidavits made in support of the Petition and it indeed agrees with the submissions made by the Respondent on this issue that the Petitioners have not presented any evidence demonstrating that the suit properties qualify as community land as required by the provisions of Article 63 of *the Constitution* and Section 5, 7 and 13 of the *Community Land Act*.

Issue No. (iii) Who among the Petitioner and 1st Respondent are the legitimate owners of the suit properties

116. Article 40 of *the Constitution* is to be enjoyed by the proprietor, except where the property is found to have been unlawfully acquired as contemplated by Article 40 (6) thereof

117. Both the Petitioner and 1st Respondent are laying claim to the suit properties. The Petitioner is laying claim on the basis that they are properties of the said land pursuant to the provisions of Articles 40 as read together with Article 63 of *the Constitution* and Section 4 of the *Community Land Act*. It was contended by the Petitioner that the Petitioner’s proprietary interest in the said parcels of land can only be defeated, cancelled and or revoked if due process is followed.

118. The 1st Respondents on the other hand is claiming ownership and being the registered and lawful owner on the basis of purchase from other entities

119. Both parties having laid claim to the property are deserving proprietary protection and to adequately donate this protection this Court must look into the root to its ownership. This approach was well appreciated in the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR.



Equally in the case of Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

120. As earlier stated both parties are laying claim to the suit property. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

121. The court will be guided by the aforementioned provisions and cases. From the evidence presented herein it emerged that the suit properties were acquired by the 1st Respondent at different intervals. The evidence on record established the 1st Respondent is the registered proprietor of all parcels of land registered as Land Reference Number 3880, 3881, 6929, 9847 and 11378. In respect to L.R No. 3880 and 3881 (measuring 60,784 acres), the first Grant was issued to Sir Charles Sydney Goldman on 1st April 1927, on 16th May 1929 the properties were transferred to Teita Concessions Limited, on 7th September 1944, 4,000 acres in respect of L.R. 3880/1 were surrendered vide L.R. No. 2682/31. On 15th April 1953, 12,045 (less 12 acres for a road reserve and 33 acres for railway reserve) in respect of L.R 3880/1 were surrendered. On 29th June 1953 some 24,267 acres (less 59 acres being road reserve and 127 acres being railway reserve were transferred to Ngerenyi Plantation Limited. On 27th July 1961, there was a transfer of 20,440 acres (less 80 acres being road reserve and 141 acres being railway reserve) to Teita Sisal Estates Limited. The property was registered as LR No. 3880/4. On 17th August 1963, there was a surrender of 3,344 acres registered as L.R No. 3880/4/1 to the Regional Assembly of the Coast Region in exchange of a new grant L.R No. 11378. On 30th May 1964, 17,096 acres (less road reserve of 80 acres and railway of reserve of 141 acres) was transferred to T & T Sisal Company Limited and registered as L.R 3880/55. A charge was on 1st July 1964 created to Standard Bank Limited and Ralli Brothers Limited. A charge was on 6th August 1964 created to Teita Sisal Estates Limited subject to the charge to Standard Bank Limited and Ralli Brothers Limited created on 1st July 1964. Pursuant to a presidential consent required by Section 24 of the *Land Control Act*, a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on 19th April 1973. This exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXX (Volume 75) Number of 9th February 1973 Legal Notice Number 7.

122. In respect to L.R 6924, the evidence on record confirmed that the first Grant was issued to Sir. Charles Sydney Goldman on 1st May 1930 as registered at the Registered of Titles at Nairobi on 7th July 1931. The land was thereafter sold and transferred to Teita Concessions Limited on 12th October 1932. A transfer was subsequently registered against the title on 27th July 1961 when the land was transferred to Teita Sisal Estates Ltd. T & T Sisal Company Ltd acquired the land on 30th May 1964 and this was



as well documented as entry number 1083. A charge was on 1st July 1964 created to Standard Bank Limited and Ralli Brothers Limited. A subsequent charge was created on 6th August 1964 to Teita Sisal Estates Limited subject to the charge to Standard Bank Limited and Ralli Brothers Limited created on 1st July 1964. Subsequent charges were created to The Standard Bank Limited and Ralli Brothers Limited on 7th October 1964 which were subject to the charges created on 1st July 1964 and 6th August 1964. Pursuant to a presidential consent required by section 24 of the *Land Control Act*, a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on the 13th April 1973 and this exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXV (Volume 75) Number 7 of 9th February 1973 Legal Notice Number 7.

123. In respect to L.R. 948 the evidence adduced before this court confirmed that the first Grant was issued to Teita Concessions Limited on 1st January 1950 as registered and a title recorded on 8th December 1959. On the 4th July 1964, T & T Sisal Company Ltd purchased the land and a transfer was effected as entry number 35 on the title. A charge was created on 4th July 1964 to Ralli Brothers Limited and Standard Bank Limited and documented as entry number 36 on the title. A subsequent charge was created to Teita Sisal Estate Limited on 10th August 1964 which was subject to the charges created on 4th July 1964 to Ralli Brothers Limited and Standard Bank Limited. A further charge was created on 7th October 1964 to Ralli Brothers Limited and Standard Bank Limited which was subject to the charges created on 4th July 1964 and 10th August 1964 and documented as entry number 48 on the title. Pursuant to a presidential consent required by section 24 of the *Land Control Act*, a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on the 16th April 1973 and this exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXV (Volume 75) Number 7 of 9th February 1973 Legal Notice Number 7.
124. In respect to LR. No. 11378 the evidence adduced established that the first Grant was issued to Teita Sisal Estates Limited on 1st July 1963 as registered and a title recorded on 14th August 1963. On the 30th May 1964, T & T Sisal Company Ltd purchased the land and a transfer was effected as entry number 1082 on the title. A charge was created on 1st July 1964 to Ralli Brothers Limited and Standard Bank Limited and documented as entry number 24 on the title. A subsequent charge was created to Teita Sisal Estate Limited on 6th August 1964 which was subject to the charges created on 1st July 1964 to Ralli Brothers Limited and Standard Bank Limited. A further charge was created on 7th October 1964 to Ralli Brothers Limited and Standard Bank Limited which was subject to the charges created on 1st July 1964 and 6th August 1964 and documented as entry number 241 on the title. Pursuant to a presidential consent required by section 24 of the *Land Control Act*, a sale of the land by T & T Sisal Company Limited to Teita Estate (1972) was exempted from requirements of the act and consequently a transfer and a charge were registered against the title to the land on the 13th April 1973 and that this exemption was documented in the Kenya Gazette Supplement Number 7 Volume LXXV (Volume 75) Number 7 of 9th February 1973 Legal Notice Number 7.
125. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. Upon analysis the evidence that was adduced herein it emerged that the suit parcels were lawfully acquired by the 1st Respondent and this court is satisfied that the 1st Respondent is the bonafide and legal owner of the said suit parcels.



Issue No. (iv) Whether the Petitioner’s constitutional rights have been violated by the actions of the Respondents

126. The Petitioners contend that the 1st Respondent has denied them access to public facilities in the suit parcels, they have also been deprived access to water whereon the 1st Respondent has privatized a public dam, their right to clean and healthy environment has been violated, they have been barred from free movement and that the 1st respondent’s actions of arbitrarily converting community land to private land is contrary to public policy and an infringement to their fundamental rights and freedoms.
127. In respect to the 2nd to 8th Respondents it was contended that they have abdicated their constitutional mandate of protecting and promoting the interests and rights of the community contrary to the objectives, values and principles of *the Constitution* of Kenya.
128. From the analysis of the evidence that was availed to this court, it was evident that the recommendations from the Parliamentary Committee and joint survey team have been implemented. It was evident that part of L.R. No. 3880/5 has been lawfully excised to avail land to persons already settled there being Singila Majengo Settled Scheme. It was also evident that the excision of the land occupied by Mwandoto Primary School and its right of way has been completed and the process of registering it under the Ministry of Education is completed.
129. It was also evident that the recommendations for settling squatters on Plot Number L.R. 3880/5 being the 1st recommendation has been fulfilled and further all roads public or private that traverse the Teita Sisal Estate land are currently in undisrupted use by the public.
130. The court also notes that the Petitioner based its entire petition on the purported Nduku Investigation Report however the affidavit of Riachard K. Amati which was adduced in evidence confirmed that the said Nduku Investigations Report was not a report of experts and it had no methodology of the survey and had been expunged. The same cannot therefore be considered by this court.
131. The court in considering the said issues noted that regrettably the Petitioner failed to place before court evidential material to controvert the Respondents evidence and as such the Petitioner cannot be said to have established a basis for violation of any of their rights as enumerated in the Petition. It is therefore the finding of this court that the Petitioner has not established any violations of its constitutional rights by any of the Respondents.

Issue No. (v) Whether the Petitioner is entitled to any remedies

132. The Petitioner sought for various reliefs as was pleaded in the Amended Petition. The court is alive to the fact that the Petitioner alluded to various constitutional violations but without having availed tangible evidence of violation of its constitutional rights. The Petitioner herein ought to have produced cogent evidence to ensure that the court considers the same. Having held that the Petitioners have been unable to prove any violations of constitutional rights by any of the Respondents, it therefore follows that the Petitioners have been unable to prove their Petition to the required standard.
133. This court therefore finds and holds that the Petitioner failed to discharge the burden of proof to the required standard. The net result is that the Petitioner is not entitled to the reliefs sought in the Amended Petition.



Conclusion

134. In the end, it is finding of this court that the Petitioner has failed to prove its case to sustain this Petition and it is the holding of this court that the Petitioner has failed to prove any violations and or infringement of its constitutional rights by the Respondents.

135. In the circumstances the Amended Petition dated 10th June 2024 is hereby dismissed with an order that each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN VOI THIS 23RD DAY OF OCTOBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Motuka for the Petitioner.

Mr. Mungai for the 1st Respondent.

Mr. Chebon holding brief for Mr. Otieno for the 2nd to 4th Respondents.

Mr. Penda for the 5th and 6th Respondents.

Mr. Atingo holding brief for Mr. Omondi for 7th and 8th Respondents.

Court Assistant: Mary Ngoira.

