

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION NO. E010 OF 2024

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27 (1) & (2), 40, 47, 48 AND 50 OF THE
CONSTITUTION OF KENYA.

AND

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE
22, 23 AND 162 (2) (b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4 5(2) (b) & (c) & 6 OF FAIR ADMINISTRATION
ACTIONS ACT NO.4 OF 2015

AND

IN THE MATTER OF THE LAND ACT 2012 [2016].

AND

IN THE MATTER OF LAND REGISTRATION ACT 2012[2016].

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT 2012

AND

IN THE MATTER OF THE REGISTRATION OF TITLE ACT CAP 281(REPEALED)

AND

IN THE MATTER OF THE GOVERNMENT LAND ACT CAP 280 (REPEALED)

AND

IN THE MATTER OF THE REGISTER LAND ACT CAP 300 (REPEALED)

AND

IN THE MATTER OF THE ILLEGAL ALIENATION OF LAND REGISTRATION
NUMBER TIGANIA/KIRIMACHUMA/6 BELONGING TO KIRIMACHUMA
PRIMARY SCHOOL

BETWEEN

JOSEPH NGULU MUNGANIA.....	1 ST PETITIONER
ZAKAYO MUGAMBI.....	2 ND PETITIONER
JOHN MUTURIA MUNGANIA.....	3 RD PETITIONER
PAULINE KENDI JULIUS.....	4 TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF MERU.....	1 ST RESPONDENT
LAND REGISTRAR MERU.....	2 ND RESPONDENT

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NATIONAL LAND COMMISSION.....	3 RD RESPONDENT
ADMINISTRATION POLICE COLLEGE MERU.....	4 TH RESPONDENT
FULL GOSPEL CHURCH.....	5 TH RESPONDENT
AFRICAN INDEPENDENT PENTACOSTAL	
CHURCH OF AFRICA (A.I.P.C.A).....	6 TH RESPONDENT
ATTORNEY GENERAL.....	7 TH RESPONDENT

JUDGMENT

1. The Petitioners have approached the court *vide* Petition dated the 28th May 2024 and wherein the Petitioners have sought the following reliefs;
 - i. *A declaration be issued. that LR. NO TIGANIA/KIRIMANCHUMA/6 measuring 4.21a (10.374 Acres) should remain on the same position where it was gathered and demarcated on the ground as possessed, occupied, utilized by KIRIMANCHUMA PRIMARY SCHOOL.*
 - ii. *A declaration be issued, that the subdivision, transfer and/or dealing with LR. NO. TIGANIA/KIRIMANCHUMA '6 belonging to KIRIMANCHUMA PRIMARY SCHOOL violates the petitioners. Constitutional rights to equality before the law and equal protection and benefit of the law. to acquire and own property, fair administrative action, access to justice and fair hearing under ARTICLES 27(1)&(2) 40, 48, and 50 of the constitution of Kenya.*
 - iii. *A mandtatory injuncion be issued, compelling the 2nd and 3rd Respondents to rectify or amend the register by cancelling the illegal title deeds in respect of LR.NO.IIGANIA/KIRIMANCHUMA/235 .236 .237 and 238 the resultant subdivisions of LR.NO TIGANIA/KIRIMANCHUMA/6*
 - iv. *A conservation order be issued. prohibiting the 1st, 2nd and 3rd respondents and their representatives, servants. agents and or anybody else acting at their behest, direction or instructions, from interfering, implementing and/or in any way whatsoever dealing with LR.NO. TIGANIA KIRIMANCHUMA 6 measuring 10.374 Acres belonging to KIRIMANCHUMA PRIMARY SCHOOL*

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v. *A permanent injunction be issued restraining the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents and their representatives, servants, agents and/or anybody else acting at their behest, direction or instructions from entering into trespassing onto, hiking any portion from evicting KIRIMANCHUMA PRIMARY SCHOOL from dealing with and or whatsoever interfering with quiet, peaceful, uninterrupted and undisturbed actual possession occupation. user and enjoyment of L.R. NO. TIGANIA/KIRIMANCHUMA/6 measuring 10.374 Acres by KIRIMANCHUMA PRIMARY SCHOOL*

vi. *Costs of the petition and interests thereon at court rates, against the respondents jointly and severally.*

2. The instant petition is premised on the various grounds which have been enumerated in the body thereof. Furthermore, the petition is supported by the affidavit of the 1st Petitioner sworn on even date. In addition, the deponent has exhibited various annexures including a copy of the certificate of official search in respect of L.R. No. Kirimachuma/6 [the suit Property] showing that the said property was reserved specifically for Kirimachuma school and not otherwise.
3. The 1st Respondent duly entered appearance and thereafter filed a replying affidavit sworn by David Kinoti Arithi. The replying affidavit is sworn on the 28th November 2024. Moreover, the deponent of the replying affidavit has annexed thereto five [5] documents including the minutes of the board of management of Kirimachuma primary school relating to [sic] the unanimous agreement/resolution regarding the suit property subdivided into various portion.
4. The 2nd, 4th and 7th Respondents similarly entered appearance and filed their replying affidavit in opposition to the petition. For coherence, the 2nd and 7th Respondents filed a replying affidavit sworn by one J. M Mwambia. The said replying affidavit is sworn on the 14th November 2024. Furthermore, the deponent of the said replying affidavit has annexed thereto a total of seven [7] annexures including the green card of the suit property which evidently confirms that same is currently registered in the name of Meru County Council [now defunct] but reserved for Kirimachuma Primary School.

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5. The 4th Respondent filed a replying affidavit sworn by one Juma Kendo. The replying affidavit under reference was sworn on the **14th November 2024**. Furthermore, the deponent of the replying affidavit has annexed thereto a total of seven [7] documents including minutes of the board of management of Kirimachuma School, the mutation forms relating to the sub-division of the suit property and a letter from the county government of Meru [1st Respondent] seeking for gazettelement of [sic] the subdivisions arising out of the suit property.
6. The 5th Respondent has relied on the replying affidavit sworn by Joshua Mugambi Ambutu. The replying affidavit is sworn on the **30th November 2024** and same has referenced various annexures including the minutes arising from the meeting held on the **9th January 2014**.
7. The 6th Respondent duly entered appearance and filed a replying affidavit sworn on the **5th December 2024**. The replying affidavit has been sworn by one Naftali Murangiri Wanjau [the chairperson of the 6th Respondent].
8. The 3rd Respondent [National Land Commission] though served with the petition neither entered appearance nor filed any response. Furthermore, it is imperative to state that the 3rd Respondent did not participate in the proceedings.
9. Additionally, it suffice[s] to posit that no documents are obtainable on the Court tracking record of the Court [CTS] as pertain[s] to any response from the 3rd Respondent herein.
10. The petition beforehand came up for directions on the **30th January 2025** whereupon the advocates for the parties covenanted to canvass the Petition on the basis of affidavit evidence. Moreover, the parties agreed to file and exchange written submissions.
11. Arising from the position taken by the parties, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions. For good measure, the various parties duly complied and the submission[s] are on record.

a. THE PETITIONERS' CASE:

12. The Petitioners' case is anchored on the supporting affidavit of Joseph Ngulu Mugania [1st petitioner]. The said deponent has averred that same has the authority and mandate to depone to the affidavit on behalf of the rest of the Petitioners.

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13. Moreover, the deponent has averred that the rest of the Petitioners and himself are parents and members of the community wherein Kirimanchuma Primary School is situated. To this end, the deponent has averred that the Petitioners have approached the court in their personal capacities as well as in a representative capacity to represent members of the community.
14. Additionally, the deponent has averred that Kirimanchuma Primary School is standing on L.R No. Tigania/Kirimanchuma/6 [the suit property] measuring approximately 10.374 acres. To this end, the deponent has availed a copy of the certificate of official search relative to the suit property.
15. It has been averred that the suit property was registered in the name of Meru county Council, but same was/is reserved for Kirimanchuma Primary School. Nevertheless, the deponent has contended that despite the fact that the suit property was exclusively reserved for Kirimanchuma primary school, the 1st, 2nd and 3rd Respondents have colluded and connived with the 4th, 5th and 6th Respondents and same have undertaken the sub-division of the suit property with a view to divesting the school of its rights to and interests over the suit property.
16. Furthermore, it has been averred that arising out of the collusion and/or connivance between the 1st, 2nd and 3rd Respondents on one hand and the 4th, 5th and 6th Respondents on the other hand, the suit property has since been sub-divided into various portions and the resultant portions have been registered in the name of the 4th, 5th and 6th Respondents albeit to the detriment of the school and by extension the community that donated the land.
17. In addition, the deponent has averred that there was a suit [case] namely Meru HCC No. 374 of 1990 wherein the issue of ownership of the suit property was addressed. In particular, it has been averred that the judgment in respect of the said case decreed that the suit property does revert to Kirimanchuma Primary School. In any event, it was posited that the said judgment has never been challenged and/or overturned to date.

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18. It was the further contention by the deponent that the board of management of Kirimanchuma Primary School purported to hold a meeting with the leadership of the administration police culminating into inter-alia the agreement to subdivide the suit property. Nevertheless, it has been contended that the agreement to have the suit property subdivided and thereafter transferred to the 4th, 5th and 6th Respondents was illegal and unconstitutional.
19. Arising from the foregoing, the deponent has contended that the suit property was and is public land reserved for Kirimanchuma Primary School. In this regard, it has been contended that the suit property is therefore a public land which was duly reserved and thus unavailable for purposes of subdivision and allocation to third parties for private purposes and use.
20. Arising from the foregoing, the deponent on behalf of the petitioners has therefore contended that the impugned minutes arising from the meeting held between the board of management of the school and the 4th Respondent, as well as the attendant subdivision of the suit property, are illegal, unlawful and unconstitutional.
21. To this end, the petitioners have thus implored the court to find and hold that the suit property could not be subjected to sub-division, allocation and or alienation in favour of the 4th, 5th and 6th Respondents.

b. THE 1ST RESPONDENT'S CASE:

22. The 1st Respondent's case is premised on the replying affidavit by one David Kinoti Arithi. The replying affidavit is sworn on the 28th November 2024.
23. The deponent of the replying affidavit avers that same is the deputy director Department of Lands, Physical Planning, Urban Development, Housing and Public Works at the county government of Meru. By virtue of his portfolio, the deponent has contended that same is therefore conversant with the facts and issues pertaining to the subject matter.
24. Furthermore, the deponent has averred that the demarcation, survey and subdivision of the suit property was arrived at after a meeting between the board of management of Kirimanchuma Primary School and the various stakeholders. In particular, it has been averred that there was a unanimous resolution of the board of management of the school to have the suit property subdivided and surveyed.

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25. Moreover, the deponent has averred that the decision to undertake demarcation, survey and sub-division of the suit land and the subsequent change of reservation was done in consultation and participation of all key stakeholders including the national land commission; the ministry of education; the county government of Meru; the ministry of interior; the parents of Kirimanchuma primary school and the entire community. To this end, the deponent has referenced a plethora of correspondence that were exchanged between the board of management of the school and key stakeholders.
26. It was the further averment of the deponent that the 1st Respondent herein acted upon the request and resolution of the board of management of the school and thereafter proceeded to and prepared a scheme plan for purposes of the intended subdivision. In addition, it has been averred that the scheme plan was thereafter endorsed and approved by the relevant stakeholders as required under the law.
27. The deponent further averred that arising from the approval of the scheme plan, the department of survey was authorized and mandated to prepare the requisite mutation in respect of the suit property. Besides, it has been averred that the mutation was equally prepared and thereafter approved by the stakeholders.
28. The 1st Respondent has therefore contended that the demarcation, survey, subdivision and the change of reservation was undertaken with accordance with the law. In any event, it has been contended that the impugned change of reservation was carried out in accordance of Article 66[1] of the Constitution.
29. Arising from the foregoing, it has been contended that the actions complained of were undertaken in accordance with the law and the constitution. In this regard, the deponent has averred that the petition beforehand is not only premature and misconceived but same is coloured with mala fides.

c. THE 2ND AND 7TH RESPONDENTS' CASE:

30. The 2nd and 7th Respondents' case is premised on the replying affidavit sworn by J M Mwambia. The replying affidavit is sworn on the 14th November 2024.
31. The deponent has averred that the contention by the petitioners that the 2nd, 4th and 7th Respondents have trespassed onto the suit property and thereafter subdivided same with the intention of evicting the school from the suit land is false and misleading.

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32. In any event, it has been averred that the sub-division and survey of the suit property was arrived at after a successful meeting held on the 25th April 2014 between the board of management of the school and the 4th Respondent. To this end, the deponent of the affidavit has annexed a copy of the minutes arising out of the said meeting.
33. Furthermore, the deponent of the replying affidavit has averred that arising from the meeting held between the board of management of the school and the 4th Respondent, it was agreed that the suit property be subdivided and thereafter the resultant portions [s] be transferred to the 4th, 5th and 6th Respondents. For good measure, it has been posited that the demarcation, subdivision and survey of the suit property was undertaken after public participation of and consultation with various stakeholders, including the National Land Commission, the county government as well as the sub-county security committee.
34. Moreover, the deponent has averred that the headteacher of Kirimanchuma Primary School generated and wrote a letter addressed to the deputy inspector general of police and wherein the headteacher confirmed the approval and concurrence of the school to have the suit property sub-divided.
35. Other than the foregoing, the deponent of the replying affidavit has averred that the suit property is registered in the name of Meru County Council [now defunct] and same was reserved for Kirimanchuma Primary School for educational purposes and nothing else.
36. The deponent of the replying affidavit has equally contended that a meeting was held on the 25th June 2021 between the board of management of the school, the community and the 4th Respondent. Furthermore, it has been averred that the 1st petitioner herein was one of the attendees of the said meeting. Moreover, it has been contended that the 1st Petitioner even spoke during the meeting and same did not express any reservation about the subdivision of the suit property.
37. Finally, the deponent has averred that even though the petitioners have contended that the suit property was on the verge of alienation, no evidence has been tendered to demonstrate the alleged alienation or conversion of the suit property from one use to another.

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38. In view of the foregoing, the deponent of the replying affidavit has contended that the petition beforehand does not disclose any reasonable cause of action. In any event, it has been posited that the activities complained of have brought much improvement[s] and hope to the community at large in terms of security, educational opportunity and business opportunity in the said community.

39. Arising from the foregoing, the 2nd and 7th Respondents have implored the court to find and hold that the Petition is not only mischievous, but constitutes an abuse of the due process of the court.

d. THE 4TH RESPONDENT'S CASE:

40. The 4th Respondent's case is premised on the replying affidavit sworn by Juma Kendo. The replying affidavit is sworn on the 14th November 2024.

41. The deponent has averred that the 4th Respondent is a public institution and same plays a critical role in offering experimental leadership training to various officer[s] from different government agencies, including the national police service. Kenya Wildlife Service, Kenya Forest Service, Kenya Prisons, the judiciary, the county government, doctors, school teachers and university students' leaders. Furthermore, it has been averred that the training focuses on soft skills, leadership, teamwork and integrity, which are stated to be essential for public servant.

42. It was further averred that upon its establishment in the year 2014, the 4th Respondent received a donation of land from Kirimanchuma School Management Committee and the surrounding community in consideration of security and health services from the 4th Respondent.

43. Moreover, it has been averred that the process leading to the donation of the land from Kirimanchuma school management committee followed public participation which involved various stakeholders, including the County Government of Meru; the ministry of education; the ministry of interior and the board of management of the school.

44. It was the further contention by the deponent that the donated land had been set aside for school under the trusteeship of the county government of Meru and that the demarcation of the land was merely meant to ease the operations of parties to actualize and formalize the co-existence of the parties.

45. Besides, it was averred that the parties who are beneficiaries of the sub-division[s] and survey of the land in question were already in occupation of the suit land.
46. It was the further averment of the deponent that the 4th Respondent is a public institution and thus same [4th Respondent] has no capacity to convert the suit property to any private use, either as alleged or at all.
47. The deponent further averred that following the donation of the land to the 4th Respondent, an application was made to the land registrar to facilitate the subdivision of the suit property and thereafter the subdivision be transferred and registered in the names of the various beneficiaries including the 4th Respondent. To this end, the deponent averred that a mutation was thereafter prepared, approved and perfected, culminating into the subdivision of the suit property.
48. Additionally, the deponent has contended that from the time when the 4th Respondent took occupation of the donated portion of land, there was no dispute between the school; the community and the 4th Respondent. However, it has been averred that it is the petitioners herein who are keen to provoke a dispute, yet same [Petitioners] are neither parents nor members of the board of management of the school.
49. Moreover, it has been averred that ever since the 4th Respondent was established on the suit land, same [4th Respondent] has had a very cordial relationship with the school and the surrounding community. In any event, it has been averred that the 4th Respondent has been offering community social responsibility by enhancing security in the area, providing street lighting, free water and furthermore, the 4th Respondent has even facilitated the establishment of the first secondary school in the area.
50. Arising from the foregoing, the deponent has contended that the 4th Respondent which is a public institution has acquired the suit land in strict adherence to the law and after undertaking public participation with all stakeholders. In this regard, it has been posited that the allegations being canvassed by the Petitioners are therefore misleading and misconceived.
51. Flowing from the foregoing, the deponent of the replying affidavit has contended that the petition beforehand is malicious and driven by ulterior motive. To this end, the court has been invited to find and hold that the petition is *devoid* of merits and thus ought to be dismissed with costs.

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e. THE 5TH AND 6TH RESPONDENTS' CASE:

52. The 5th and 6th Respondents' case[s] are premised on two [2] sets of replying affidavit. The first replying affidavit is sworn by one Joshua Mugambi Ambutu. The replying affidavit is sworn on the 30th November 2024.
53. The second replying affidavit that anchors the 5th and 6th Respondents' case is sworn by Naftali Murangiri Wanjau. The same is sworn on the 5th December 2024.
54. Joshua Mugambi Ambutu has averred that same is a retired chief of Muciimukuru Location. Furthermore, the deponent has averred that same was the area chief for a period of over 20 years.
55. Moreover, the deponent has averred that currently same is the chairperson of the board of management of Kirimanchuma Primary School. To this end, the deponent has averred that same is therefore conversant with and knowledgeable of the facts of the case.
56. The deponent has averred that the board of management of the school conducted and held a meeting on the 9th January 2014 and wherein it was agreed that the suit property be sub-divided into various portions. To this end, the deponent has referenced the minutes arising from the meeting held on the 9th January 2014.
57. Additionally, the deponent has averred that the process leading to the subdivision and reservation of the suit property to and in favour of various institutions was carried out in accordance with the law. Moreover, it has been averred that the process followed the preparation of a scheme plan which was prepared by the Directorate of Physical Planning and which was thereafter duly approved.
58. It was the further testimony/averment of the deponent that following of the preparation of the scheme plan and the approval of same, the directorate of survey, County of Meru proceeded to and prepared the requisite mutation form culminating into the subdivision of the suit property.
59. On the other hand, the deponent averred that process leading to the subdivision, survey and the transfers of the suit property to the 4th, 5th and 6th Respondents was undertaken in accordance with the law.

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60. In the premises, the deponent has averred that the petition beforehand is not only premature and misconceived but same is driven by ulterior motive on the part of the petitioners. To this end, the court has been implored to find and hold that this is a classic abuse of the due process of the court.
61. The second replying affidavit has been sworn by Naftali Murangiri Wanjau. The said replying affidavit is sworn on the **5th December 2024**.
62. The deponent of the replying affidavit has averred that same is the chairperson of the 6th Respondent. To this end, it has been posited that by virtue of being the chairperson of the 6th Respondent, the deponent is therefore conversant with and knowledgeable of the facts of this case.
63. Moreover, the deponent has averred that the 6th Respondent has been in existence for more than 58 years. Furthermore, it has been contended that during its existence, the 6th Respondent has built permanent structures and developments on the suit property. Besides, the deponent has averred that the 6th Respondent has continued to support both the primary school and the surrounding community in various endeavours.
64. Additionally, the deponent has averred that there has never been any dispute between the 6th Respondent and the school. On the contrary, it has been posited that both the institution and the Church [the 6th Respondent] have lived and worked in harmony.
65. Regarding the subdivision of the suit property, it has been averred that the subdivision followed the resolutions arising from the meeting held on the **9th January 2014** and which approved the subdivision of the suit property. To this end, the deponent has referenced the minutes of the meeting held on the **9th January 2014**.
66. Other than the foregoing, the deponent has averred that the subdivision of the suit property and the reservation of the same, including the transfer of the resultant subdivision to the 4th, 5th and 6th Respondent followed the due process of the law. In particular, it has been averred that a scheme plan was duly prepared and thereafter approved.
67. It was the further averment/testimony of the deponent that following the approval of the scheme plan, the county surveyor of Meru County proceeded and prepared the requisite mutation. Furthermore, it has been posited that the mutation in question has since been registered culminating into the creation of L.R No. Tigania/Kirimanchuma/235, 236, 237 and 238, respectively.

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68. Arising from the foregoing averments, the deponent has invited the court to find and hold that the petition beforehand is not only misconceived, but same is inspired by mala fides and ulterior motives. Simply put, the deponent has invited the court to dismiss the petition with costs.
69. The parties herein filed written submissions. For coherence, the petitioners filed written submissions dated the **12th February 2025** whereas the 2nd, 4th and 7th filed written submissions dated the **4th March 2025**.
70. The 5th and 6th Respondents filed written submissions dated the **7th March 2025**. The written submissions are on record. Furthermore, the court has reviewed the said written submissions and the issues highlighted thereunder have been duly noted and taken into account.
71. Having reviewed the petition; the response thereto and the annexures referenced by the various parties and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject petition turns on three [3] key issues, *namely*; whether the suit property is alienated public land and if so whether same is available for subdivision and alienation for private use or otherwise; whether the process leading to the subdivision of the suit property and the consequential change of user including transfers was lawful and constitutional; and whether the Petitioners are entitled to the reliefs sought [if at all] or otherwise.
72. Regarding the first issue, *namely*; whether the suit property is alienated public land and if so whether same is available for subdivision and alienation for private use or otherwise, it is imperative to underscore at the onset that prior to the promulgation of the **constitution 2010**, land was categorized into three groups. The groups included government land, trust land and private land [being land that belonged to and was registered in the name of private entities].
73. As pertains to government land, same were further clustered into two categories, namely, unalienated government land [being land belonging to the government and which at the point in time was neither subject to any letter of allotment or reservation]. The other cluster was alienated government land, namely, such land that stood reserved for public use and/or purpose. For good measure, government land could be reserved *vide* several mechanisms, including reservation thereof for occupation of a public institution or for public utilities.

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74. The dichotomy between unalienated public land and alienated public land was aptly highlighted by the Supreme Court of Kenya [the apex Court] in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court stated as hereunder;

51. Article 62 of the Constitution defines 'public land' to include: 62 (1)(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; [Emphasis Added].

52. The Government Lands Act (repealed), which was the Act in force at the effective date defined 'unalienated government land' in section 2 as follows;

"unalienated Government land" means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. [Emphasis Added]. section 3 of the Physical Planning Act, cap 286 defines unalienated land in similar terms.

53. This court in Kiluwa Limited & another v Business Liaison Company Limited & 3 others, (Petition 14 of 2017); [2021] KESC 37 (KLR) had this to say about un-alienated government land:

"(55) A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding the fact that, the expression "Public Land" only came to the fore with the promulgation of the 2010 Constitution. What article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of "public tenure". The retired constitution used the term "government" instead of "public" to define such lands".

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75. What constitute unalienated public land as defined vide the provisions of Article 62 of the Constitution 2010, was equally highlighted by the Court of Appeal in the case of **Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others** (Civil Appeal E038 of 2021) [2024] KECA 714 (KLR) (21 June 2024) (Judgment), where the court stated thus;

31. The Supreme Court of Kenya in Kiluwa Limited & Another vs. Business Liaison Company Limited & 3 Others, (Petition 14 of 2017) [2021] KESC 37 (KLR) explained as follows as regards unalienated government land:

“[55]A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding the fact that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What Article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands”.

32. In this respect, section 2 of the repealed Government Lands Act defined “unalienated Government land” to mean Government land which was not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. Government land in this context is land that was held by government ministries, departments, statutory bodies and agencies, and land which has not been registered. Section 3 of the then Physical Planning Act defines un-alienated Government land in similar terms. A similar definition is now given to public land under Article 62 of the Constitution, which includes

a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

b. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease...

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33. The Supreme Court of Kenya noted these definitions in Torino Enterprises Ltd vs. The Attorney General, SC Petition No. 5 (E006) of 2022; [2023] KESC 79 (KLR), and also cited with approval the decision of this Court in Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 Others, Civil Appeal No. 79 of 2007; [2015] eKLR that the legal effect of registration of land is to convert property from un-alienated government land to alienated land, with the consequence that the property became private property and moved out of the ambit and confines of the Government Land Act).

76. Bearing in mind the meaning and definition of what constitutes unalienated public land, it is now apposite to revert to the subject matter and to discern whether the suit property was unalienated public land or otherwise. Pertinently, it is worthy to underscore that the suit property though public land stood alienated and was reserved for a designated purpose.
77. Notably, the suit property was registered in the name of the county council of Meru [now defunct] albeit reserved for Kirimanchuma Primary School. For good measure, the fact that the suit property was reserved for Kirimanchuma school is highlighted by the certificate of official search issued on the 2nd March 2021 and which has been annexed to the replying affidavit sworn by J. M Mwambia on behalf of the 2nd and 7th Respondents.
78. Additionally, the fact that the land in question was registered in the name of Meru County council [now defunct] but reserved for Kirimanchuma school is also underpinned by the green card [copy of register] which has similarly been attached to the replying affidavit of J. M Mwambia.
79. Moreover, the fact that the suit property was reserved for Kirimanchuma school has equally been highlighted at the foot of paragraph 9 of the replying affidavit of J M Mwambia. For good measure, the contents of paragraph 9 of the said replying affidavit are reproduced as hereunder

9. THAT from the Search conducted at the Land Registry on the 2nd March 2021 clearly shows that the true proprietor of the land parcel No. Tigania/Kirimanchuma/6 is actually Meru County Council and is only reserved for Kirimanchuma Primary School for educational purposes and nothing else. (Attached and marked JMM 7 is a copy of the said Search conducted at the Lands Registry).

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80. Arising from the foregoing deposition, it is common ground that the suit property was indeed alienated public land. Instructively, the alienation of the suit property was *vide* reservation thereof for purposes of Kirimanchuma School and not otherwise.
81. Having found and held that the suit property was alienated public land by virtue of its reservation for Kirimanchuma School, the next perspective that merits interrogation is whether the suit property [which is alienated public land] can be subject to subdivision and alienation for inter-alia private use.
82. To start with, it is imperative to point out that once a particular piece of land is alienated, the land in question ceases to be available for further alienation and/or re-alienation unless the public purpose for which it was reserved ceases to exist or better still, where the land is surrendered back to the government.
83. Barring surrender, the alienated public land remains for use in the manner prescribed under the law. In this regard, the suit property stood alienated *vide* reservation in favour Kirimanchuma School.
84. To the extent that the suit property stood alienated on the basis of reservation, neither the county council of Meru [now defunct] nor the county government of Meru could purport to [sic] alienate and/or deal with the suit property in a manner contrary to the purpose for which it was reserved.
85. Moreover, there is no gainsaying that even the institution namely; Kirimanchuma school could not purport to enter into any arrangement and/or engagement in an endeavour to subdivide and thereafter alienate any portion of the suit property. The institution, namely Kirimanchuma School stood as a beneficiary of the suit property albeit on behalf of the public and the suit property was meant to facilitate the growth and progress of Kirimanchuma School. No more.
86. In my humble view, any endeavour that was being undertaken by the board of management of Kirimanchuma School, as pertains to the demarcation, survey and subdivision of the suit land was itself a nullity ab initio. Such an endeavour could not and cannot birth any legal sub-division and/or consequential title.

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87. Arising from the foregoing, my answer to issue number one is two-pronged. Firstly, the suit property was alienated public land, same having been reserved for Kirimanchuma school. Such reservation took the suit property outside the purview of further alienation or otherwise. *[See the case of Benja Properties Ltd versus S.S Seydna Burhannudin Saheb [2015] eKLR]*
88. Secondly, to the extent that the suit property was alienated on the basis of reservation, neither the county council of Meru [now defunct] nor the county government of Meru could or can purport to undertake any subdivision thereof and the consequential transfer to third parties, including private persons.
89. Moreover, it is not lost on this court that the 5th and 6th Respondents are private entities. Being private entities and organizations, irrespective of same being churches, same cannot purport to be furthering the purpose for which the land was reserved.
90. Next is the issue, *namely*, whether the process leading to the subdivision of the suit property and the consequential change of user including transfers, was lawful and constitutional. As pertains to the issue herein, it is worthy to recall that even when the land in question is unalienated public land, the process pertaining to conversion of same from public land to private land must comply with and adhere to the provisions of **Article 62 of the Constitution 2010** and read together with **Sections 9, 12 and 13 of the Land Act, 2012**.
91. Given the importance of **Article 62 of the Constitution 2010** in determining the process underpinning the conversion of land from public land to private land, it is imperative to reproduce the said provisions.
92. For ease of appreciation, the said provisions are reproduced as hereunder;

62. (1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;*
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;*

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(c) land transferred to the State by way of sale, reversion or surrender;
(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

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(a) clause (1) (a), (c), (d) or (e); and (b) clause (1) (b), other than land held, used or occupied by a national State organ.

(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

(4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

93. Other than the provisions of Article 62 of the constitution [supra], it is also imperative to reproduce the provisions of Section 9 and 12 of the Land Act, 2012.

94. Same states as hereunder;

9. Conversion of land

(1) Any land may be converted from one category to another in accordance with the provisions of this Act or any other written law.

(2) Without prejudice to the generality of subsection (1)—

(a) Public land may be converted to private land by allocation;

(b) subject to public needs or in the interest of defence, public safety, public order, public morality, public health, or land use planning, public land may be converted to community land;

(c) private land may be converted to public land by—

(i) compulsory acquisition;

(ii) reversion of leasehold interest to Government after the expiry of a lease; and

(iii) transfers; or

(iv) surrender.

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(d) Community land may be converted to either private or public land in accordance with the law relating to community land enacted pursuant to Article 63(5) of the Constitution.

(3) Any substantial transaction involving the conversion of public land to private land shall require approval by the National Assembly or county assembly as the case may be.

95. The provision of Section 12 of the Land Act [supra] stipulate thus;

12. Allocation of public land

(1) Whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the Commission for the necessary action by way of—

(a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;

(b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;

(c) public notice of tenders as it may prescribe;

(d) public drawing of lots as may be prescribed;

(e) public request for proposals as may be prescribed; or

(f) public exchanges of equal value as may be prescribed.

(2) The Commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—

(a) public land that is subject to erosion, floods, earth slips or water logging;

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(b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;

(c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;

(d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and

(e) natural, cultural, and historical features of exceptional national value falling within public lands;

(f) reserved land; or

(g) any other land categorized as such, by the Commission, by an order published in the Gazette.

(3) Subject to Article 65 of the Constitution, the Commission shall upon the request of the national or a county government set aside land for investment purposes.

(4) In fulfilling the requirements of subsection (3), the Commission shall ensure that the investments in the land benefit local communities and their economies.

(5) Subject to the Constitution and any other law, the Commission may, in consultation with the National and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the Vienna Convention on Diplomatic Relations.

(6) At the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be.

(7) Public land shall not be allocated unless it has been planned, surveyed and serviced and guidelines for its development prepared in accordance with section 17 of this Act.

(8) Public land allocated under this section shall not be sold, disposed off, subleased, or subdivided unless it is developed for the purpose for which it was allocated.

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(9)Where the land allocated under subsection (8) is not developed in accordance with the terms and conditions stipulated in the lease, that land shall automatically revert back to the national or county government, as the case may be and the Commission shall include in its annual report the status of implementation of this subsection.

(10)In an allocation of public land under this section, the Commission may impose any terms, covenants, stipulations and reservations that the Commission considers advisable, including—

(a)that the applicant shall personally occupy and reside on the land for a period set by the Commission;

(b)the applicant shall do such work and spend such money for permanent improvement of the public land within the period specified by the Commission; or

(c)the consideration that must be paid for a disposition of public land.

(11)The Commission shall make regulations prescribing the criteria for allocation and for connected matters.

(12)The Commission shall make regulations prescribing the criteria for allocation of public land and without prejudice to the generality of the foregoing, such regulations may prescribe—

(a)forms of ownership and access to land under all tenure systems;

(b)the procedure and manner of setting aside land for investments;

(c)procedures to be followed with respect to auction and disposition of land;

(d)appropriate mechanisms for repossession of land given to citizens at the expiry of a lease; and

(e)mechanisms of benefit sharing with local communities whose land have been set aside for investment.

96. There is no gainsaying that unalienated [and not alienated] public land can be subject to conversion. Indeed, the provisions of Sections 9[3] and 12[1] of the Land Act

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clearly stipulate the procedure and/or process to be deployed in an endeavour to undertake conversion.

97. Pertinently, the endeavour to convert unalienated public land into private land and for private use must involve the gazettment of the process and similarly, the endeavour must be subjected to the approval of either the county assembly of the designated county government or the national assembly.
98. Be that as it may, it is not lost on this court that even though the Respondents were engaged in a process pertaining to conversion of public land into private use, no evidence has been tendered and/or provided that the county assembly of Meru was involved in the impugned process or better still, that same passed any resolution.
99. Nevertheless, I must still point out that the conversion of public land into private use or better still the change of user can only be undertaken as pertains to unalienated public land. Instructively, where the public land in question has been alienated and/or reserved then such land ceases to be available for conversion, alienation or disposal until and unless the purpose for which it was reserved ceases to exist.
100. Other than the foregoing, it is also worthy to underscore that the process of conversion of public land to private use, including the impugned transfer in favour of the 5th and 6th Respondents, must involve the National Land Commission. For coherence, it is imperative to underscore that national land commission is the body chargeable with the management and administration of public land on behalf of the county and national governments.
101. The role of the National Land Commission [NLC] as pertains to management and administration of public land was elaborated upon in the case of **National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)** (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) (2 December 2015) (Advisory Opinion), where the supreme court stated as hereunder:

[222] The Land Act defines "alienation" as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The

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NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent, for such disposal.

[223] It may be inferred that, the power of alienation of public land is one of the ways through which the NLC administers such land. The requirement of consent to such a transaction, from the National or County Government, is certainly a check-and-balance relationship between the two State organs. The NLC's function of monitoring the registration of all rights and interests in land, is another mechanism of checking the powers of the body responsible for registration.

- *Section 5(2)(e) of the NLC Act-versus-the Constitution's terms*

[224] Section 5(2)(e) of the NLC Act mandates the Commission to manage and administer all unregistered trust land and unregistered community land on behalf of County Government. Counsel for the Commission for the Implementation of the Constitution submitted that this provision was contrary to the terms of the Constitution. In the case, In Re IIEC, this Court had held that while exercising its Advisory Opinion jurisdiction, it may undertake the interpretation of the Constitution.

102. Furthermore, the meaning and tenor of what constitutes management and administration of public land was also elaborated upon by the court of appeal in the case of *Cordison International (K) Limited v Chairman National Land Commission & 44 others* [2019] KECA 830 (KLR), the Court of Appeal stated thus;

30. Article 67 of the Constitution that establishes the National Land Commission gives it power to, inter alia, manage public land on behalf of the national and county governments. The suit land is public land as defined under Article 62(1) (a) of the Constitution and therefore vests in and is held by the County Government of Lamu in trust for the people resident in the County.

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Article 62 (2) of the Constitution provides that the land shall be administered on behalf of the County residents by the National Land Commission. Section 5 (1)(a) of the National Land Commission Act is also explicit that one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments. Under section 5(2) of the Act the Commission may,

“on behalf of, and with the consent of the national and county governments, alienate public land.”

31. Section 12 of the Land Act grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the Act specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land.

103. I must pause to ask myself whether the national land commission [NLC] was involved in the impugned process?
104. Suffice it to state that even though the Respondents, including the attorney general have indicated that the impugned process was undertaken in accordance with the due process of the law, none of the Respondents has availed the minutes of the National Land Commission or the approval [if any] by the commission.
105. It is imperative to observe that the best that has been provided by the 1st Respondent is an incomplete letter dated the 28th February 2021 that was addressed to the County Coordinator, NLC – Meru county. However, there is no gainsaying that NLC is an independent constitutional commission and its affairs are transacted by the designated officers in a manner prescribed under the National land Commission Act, 2012.
106. I am afraid that the impugned process commencing with the survey, subdivision, preparation of the scheme plan, the mutation and the subsequent creation of parcel numbers Tigania/Kirimanchuma/235, 236, 237 and 238, respectively; were illegal null and void.

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107. Sadly, the Honrauble Attorney General who by dint of Article 156 of the Constitution is enjoined inter-alia to promote the rule of law and the protection of the constitution, has joined the rest of the Respondents in vindicating a flawed process. Surely one must ask the question as to what happened to the import and tenor of Article 156 of the Constitution 2010.

108. Just to remind myself and perhaps the Respondents herein of the import of Article 156 of the Constitution, it is imperative to reproduce same.

109. The said provisions under reference stipulates as hereunder;

Attorney-General. 156.

(1) There is established the office of Attorney-General.

(2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.

(3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.

(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

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(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

110. To my mind, the process impacting upon and affecting the suit property was not only illegal and unlawful but also unconstitutional. It is immaterial whether or not the 4th, 5th, and 6th Respondents have contributed to the uplifting the welfare of the surrounding community or otherwise. For good measure, the law is no respecter of anyone.

111. Respecting the third issue, *namely*; what reliefs if at all, it is apposite to recall that whilst discussing issue number two, this court has found and held that the manner in which the Respondents dealt with the impugned process violated the provisions of Article 62[4] of the Constitution 2010, as read together with Section 9[3] and 12[1] of the Land Act, 2012[2016].

112. Flowing from the foregoing, there is no gainsaying that the Petitioners who are public spirited and proponents of the rule of law have demonstrated that the Petition beforehand is meritorious.

FINAL DISPOSITION:

113. For the reasons which have been highlighted and adverted to in the body of the Judgment, I come to the conclusion that the petition beforehand is meritorious.

114. In the premises, the final orders that commend themselves to this court are as hereunder

- i. *A declaration be and is hereby issued that LR. NO TIGANIA/KIRIMANCHUMA/6 measuring 4.21a (10.374 Acres) should remain on the same position where it was gathered and demarcated on the ground as possessed, occupied, utilized by KIRIMANCHUMA PRIMARY SCHOOL.*
- ii. *A declaration be and is hereby issued, that the subdivision, transfer and/or dealing with LR. NO. TIGANIA/KIRIMANCHUMA/6 belonging to*

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KIRIMANCHUMA PRIMARY SCHOOL violates the petitioners. Constitutional rights to equality before the law and equal protection and benefit of the law. to acquire and own property, fair administrative action, access to justice and fair hearing under ARTICLES 27(1)&(2) 40, 48, and 50 of the constitution of Kenya.

- iii. **An order of mandatory injunction be and is hereby issued, compelling the 2nd and 3rd Respondents to rectify or amend the register by cancelling the illegal title deeds in respect of LR.NO.TIGANIA/KIRIMANCHUMA/235; 236; 237 and 238 the resultant sub-divisions of LR.NO TIGANIA/KIRIMANCHUMA/6**
- iv. **For good measure, the green cards/register of land relating LR.NO. TIGANIA KIRIMANCHUMA 6 measuring 10.374 Acres and the certificate of titles [if any] that may have been issued be and are hereby cancelled and revoked.**
- v. **A conservation order be and is hereby issued. prohibiting the 1st, 2nd and 3rd respondents and their representatives, servants, agents and or anybody else acting at their behest, direction or instructions, from interfering, implementing and/or in any way whatsoever dealing with LR. NO. TIGANIA KIRIMANCHUMA 6, measuring 10.374 Acres, belonging to KIRIMANCHUMA PRIMARY SCHOOL.**
- vi. **An order of permanent injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents and their Representatives servants, agents and/or anybody else acting at their behest, direction or instructions from entering into trespassing onto, hiking any portion from evicting KIRIMANCHUMA PRIMARY SCHOOL from dealing with and or whatsoever interfering with quiet, peaceful, uninterrupted and undisturbed actual possession occupation. user and enjoyment of L.R. NO. TIGANIA/KIRIMANCHUMA/6 measuring 10.374 Acres by KIRIMANCHUMA PRIMARY SCHOOL.**
- vii. **Furthermore, a Prohibitory order be and is hereby issued prohibiting the Respondents or any of the Respondents from subdividing and/or alienating the suit property LR.NO. TIGANIA KIRIMANCHUMA/6 measuring 10.374 Acres without due regard to the provisions of Article 62[4] of the Constitution 2010 as read together with Sections 9[3] and 12[1] of the Land Act, 2012[2016]**

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viii. Costs of the petition be and are hereby awarded to the Petitioners.

ix. The costs in terms of clause [viii] shall be borne by the 1st, 2nd, 4th, 5th, 6th and 7th Respondents jointly and/or severally.

115. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF APRIL
2025.

OGUTTU MBOYA, FCI Arb.

JUDGE.

In the presence of

Mutuma- Court Assistants

Mr. Omari for the Petitioners

Mr. Eric Obura [Principal Litigation Counsel] for the 2nd, 4th and 7th Respondents.

Mr. Kanyimoo for the 1st Respondent.

Mr. Nyaga for the 5th and 6th Respondents