



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
PETITION NO. 4 OF 2014
(FORMERLY KISII HC PETITION NO. 19 OF 2013)

BETWEEN

DAVID SHIRA OLE KAKA 1ST PETITIONER
OLAISUKUNKUI MANANGOI 2ND PETITIONER
RIORINGE MANANGOI3RD PETITIONER
OLE KALEM KERIAKO 4TH PETITIONER

AND

THE OCS,

NTIMARU POLICE STATION 1ST RESPONDENT

THE COMMANDANT,

RAPID DEPLOYMENT UNIT,

KURIA DISTRICT 2ND RESPONDENT

OCPD, KURIA EAST DISTRICT3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

SAMWEL CHACHA

WILSON WAGURU

THOMAS POSIRO

RIOBHACHI WAGUI

HELOB GATI

ANNA ROBI

RULING NO. 3

1. I once again express my regret that this matter has not been finalized since it was filed in 2013. The petitioners' claim that they are the owners of 16 head of cattle which were seized by the respondents or their agents without lawful cause or excuse and in violation of their fundamental rights and freedoms. The respondents', on their part, contend that the animals were seized as they had been suspected to be stolen and taken to Ntimaru Police Station for identification by their owners. The interested parties claim that the 16 head of cattle belong to them.

2. Although the matter was lodged as a petition for enforcement of fundamental rights and freedoms, I held that at the heart of the matter was who owned the head of cattle which are still being held at Ntimaru Police Station. I further held that the issue of ownership could easily be resolved by the Resident Magistrate at Kehancha and by a ruling dated 10th December 2014, I made the following orders;

(a) *I direct the **Ag. Senior Resident Magistrate at Kehancha** to take evidence and determine the ownership of the 16 head of cattle which are still at Ntimaru Police Station as between the petitioners and the interested parties.*

(b) *The magistrate shall issue any further and other orders necessary to ensure expeditious determination of the issue.*

(c) *The matter shall be mentioned on **16th January 2015** before the Magistrate for further orders and directions.*

(d) *Such determination shall be made within **sixty (60) days** from the date hereof.*

(e) *Upon filing the determination before this court, the court give further directions regarding the manner in which the petition will be determined.*

(f) *Either party shall be at liberty to apply for further and other orders.*

3. Following my direction, the Resident Magistrate, Kehancha did carry out an inquiry and determined that the 10 head of cattle and the respective calves belong to the petitioners. The finding was contained in a ruling dated 9th February 2015. After the ruling was filed before this court, the interested parties were dissatisfied with the decision. I directed the parties to file written objections and submissions to the decision.

4. The thrust of the interested parties' objection is that they were not given the opportunity to be heard. Mr Ogari, learned counsel for the interested parties, submitted that one of the interested parties, Mary Nyasebe was not present and did not participate in the proceedings. He further submitted that the learned magistrate did not accord the parties a fair hearing and did not take oral evidence which would enable him make a conclusive finding on identity of the animals. He pointed out that he learned magistrate relied heavily on the **Branding of Livestock Act (Chapter 357 of the Laws of Kenya)** yet the marks on the animals were not done in accordance with the provisions of the **Act** and that the learned magistrate did not carry out an inquiry as to whether to branding was done in accordance with the **Act**.

5. The petitioners' advocate, Mr Oguttu-Mboya, contended that the parties were afforded a fair hearing and given an opportunity to identify the stock and give evidence. He submitted that the proceedings were carried out in a manner consistent with the rules of natural justice. As regards the absence of one Mary Nyaseba, he submitted that all the interested parties were represented by counsel and it was upto their advocate to ensure that she was present as a party. As regards the substance of the decision, learned counsel submitted that the learned magistrate believed the

evidence of the petitioners and could not be faulted in his analysis. He urged the court to dismiss the objection so as to end this litigation.

6. In my view, there are only two issues for determination. First, whether the interested parties were denied the opportunity to fairly present their case. Second, whether the learned magistrate was correct in holding that the head of cattle belonged to the petitioners.

7. The first issue for consideration is whether the parties were afforded a fair opportunity to present their respective cases. According to the proceedings before the subordinate court, directions were taken on 29th January 2014 in the presence of the petitioner's advocate and all the interested parties whose advocate did not attend. The court issued the following directions;

The time allocated by the Judge is short. In the interest of meeting the deadline, I hereby issue directions as follows;

- 1) *On a date to be agreed on by parties present, the court shall proceed to view the animals.*
- 2) *The petitioner and interested parties shall be given a fair chance to identify their animals. The Court shall take note.*
- 3) *Parties may file detailed submissions thereafter.*
- 4) *Decision to be rendered.*

In accordance with direction No. 1 the date agreed upon is 2/2/2015

8. On the day set for identification of the animals, Ole Karem Keriako, Rioringe Manangoi, Olisunkui Manangoi, David Shira Ole Kaka, Roba Genga Mohonge, Anna Robi, Helen Gati, Thomas Posiro, Chacha Samuel and Wilson Waguru attended the session. The record of proceedings show that each party identified the animals, gave a brief descriptions of the animal and the other side given an opportunity to cross-examine the party. It is therefore not correct for the learned counsel for the interested parties to submit that the trial court did not take notes of the proceedings or give the parties an opportunity to be heard and to cross-examine the witnesses.

9. In the accordance with the directions given earlier, the parties filed written submissions commenting on the proceedings and the manner of identification. None of them faulted the court in the manner it carried out the proceedings. Counsel for the interested party did not raise the issue of the presence or otherwise of Mary Nyaseba Motatiro who was represented by his firm. I therefore find the claim that the interested parties were denied an opportunity to be heard is an afterthought and lacks merit.

10. As regards the second issue, the learned magistrate delivered his analysis in the ruling which is the subject of consideration. He summarized his findings as follows;

[8] The identifying features pointed out by each set of parties were similar. The petitioners identified the cattle using branding marks and notches on their ears. The interested parties, on the other hand, identified the cattle by their skin colour. None of the parties pointed out identifying feature pointed out by another on the opposing side.

11. In dealing with this issue the learned magistrate had to decide which party to believe. On the one hand the petitioners relied on the identification by notches on the ear and branding and on the other hand the interested parties described the livestock by colour. After analyzing the evidence, the learned magistrate concluded thus;

[15] All other cattle had marks on their ears. The ears were notched; i.e., part of the

ear was cut off as if in a pattern. In some, the left ear was cut off at the tip. The right ear was notched twice in all of them. The interested parties all said that they identified their animals by their colour. They maintained that the ears were not interfered with in any way at the time the animal[s] [were] stolen from them. They had no photographs of the animals prior to the theft. Just as in the case of branded animals, it is difficult to disregard the marks on the ears. There has to be concrete evidence of the likeness of the animal before theft, e.g., if in the initial report they had described the ears. There is none.

[16] The petitioners maintain that the cattle were marked by them or while under their care. Cross-examination did not shake this position. They identified all ten head of cattle present. The interested parties only identified eight (8) of the ten present yet they are the one who caused the police to seize the animals after identifying them. This suggests that either they do not know their animals well or that they were wrong from the very beginning.

[17] The upshot of this is that I find that the ten (10) head of cattle and their respective calves belong to the petitioners in accordance with their identification of specific animals.

12. I have read the evidence and the proceedings and I find that the learned magistrate did not rely exclusively on branding to identify the animals. He relied on the descriptions and ear notches given by the petitioners and the colour descriptions given by the interested parties. As regards the dead animals, he found that the photographs were not useful. He weighed the evidence of both sides and made his conclusions. It must be recalled, that it is the learned magistrate who saw the parties and heard them and I cannot fault his approach to the issue of identification of the animals.

13. I therefore uphold the decision of the learned magistrate and direct that the animals be released to the petitioners forthwith.

DATED and DELIVERED at MIGORI this 19th day of June 2015

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Oguttu-Mboya & Company Advocates for the petitioners.

Mr Ogari instructed by B. N. Ogari & Company Advocates for the interested parties.