



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CONSTITUTIONAL AND JUDICIAL REVIEW APPLICATION**  
**MISCELLANEOUS CIVIL APPLICATION NO. 32 OF 2011**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER THE BILL OF RIGHTS OF THE CONSTITUTION OF THE REPUBLIC OF KENYA,  
2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22(1), (2)(b) and (4), 23, 24, 40 and 63 OF THE  
CONSTITUTION,**

**AND**

**IN THE MATTER OF ARTICLES 1,8(2)(b), 10, 26, 28, 42, 43 and 46 OF THE UNITED  
NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLE (UNDRIP)**

**AND**

**IN THE MATTER OF HISTORICAL AND CURRENT INFRINGEMENT OF HTE CULTURAL  
AND ECONOMIC RIGHTS OF THE MAASAI COMMUNITY OF OLOSAKWANA  
ADJUDICATION SECTION AS INDIGENOUS PEOPLE WITHIN THE MEANING OF THE  
UNITED DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE (UNDRIP) AND THE  
CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**BETWEEN**

SIMION SWAKEY OLE KAAPEI

OLOSAKWANA GROUP RANCH

NKAULO OLE OLOLTUA

KILUTORI OLE BIRRIDE

LEMAYIAN OLE MUSEKENYA

DANIEL S. SAIDIMU

JOHN LENASHON BARTA

LEDAMA

OLE LEKOKO

MOSEKA OLE LEDEMA

OREU OLE NGEETI

LEMISO OLE KIMOJINO AND 78 OTHERS.....PETITIONERS

**AND**

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE HON. ATTORNEY-GENERAL.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

DIRECTOR OF SURVEY.....4TH RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION.....5TH RESPONDENT

THE DISTRICT LANDS REGISTRAR TRANSMARA.....6TH RESPONDENT

THE DISTRICT LAND ADJUDICATION

OFFICER TRANSMARA DISTRICT.....7TH RESPONDENT

ELIJAH KIPRONO SOI & OTHERS.....INTERESTED PARTIES

**JUDGMENT**

By a Petition dated and filed on 4.10.2011, the eleven Petitioners on their own behalf and on behalf of 78 other Petitioners (*the Petitioners*) contended *inter alia* that the following constitutional rights over and above their property have been violated -

(i) *the fundamental rights to protection of their property and from deprivation of the said property without compensation under Article 40 of the Constitution of Kenya,*

ii. *the fundamental right to privacy in the enjoyment of their property and not to be compelled to allow entry by others except by their own consent,*

iii. *the fundamental right to protection of the law in safeguarding their property rights over the adjudication section,*

iv. *Article 40 of the Constitution of Kenya protects the humble petitioners from deprivation of property except where the same is done for the public good and there is prompt payment of full compensation.*

2. The Petitioners therefore prayed for the following orders -

(a) *A declaration that the Land adjudication process in relation to the Olosakwana Adjudication*

*Section done in 1978 and completed in 1981 was proper and in accordance with the applicable law,*

*(b) A declaration that the only lawful owners of the Olosakwana Land Adjudication Section are the owners at the time when the register was closed in 1981 after all the appeals had been heard and dismissed or decided upon,*

*c. A declaration that any subsequent sub-division of the Olosakwana Adjudication Section after 1978 is null and void and an abuse of the law,*

*d. An order of Mandamus compelling the 1st, 3rd, 4th and 5th Respondents to register the petitioners as the only proprietors of the parcel of land according to the awards given to them in 1981 upon the closure of the register.*

*(e) An order of mandamus compelling the 7th Respondent to issue the applicant with a true copy of the Map showing the demarcations that were made when the adjudication was made in 1981.*

*(f) An injunction barring the 3rd, 4th, 5th and 6th Respondents from issuing title deeds to other people on the said adjudicated land, knowing that the Petitioners as the genuine members still have interest in the property.*

3. Simultaneously with the Petition, the Petitioners also filed a Chamber Summons of even date therewith whereby they sought conservatory orders in terms of Article 23 of the Constitution of Kenya 2010, and which orders were granted on the same, 4th day of October 2011 and are still subsisting, pending determination of the Petition.

4. Pending the hearing of the Petition, a group led by Elijah Kiprono Soi filed on 14.11.2011 an application dated 10.11.2011 in which the Applicant on his own behalf and on behalf of twenty-eight others and sought to be enjoined in the Petition as Interested Parties. The Application by the Interested Parties was granted on 14.11.2011, and thereafter parties were allowed at various stages to file and exchange written submissions.

5. In Petition, the Petitioners relied upon the documents following -

1. *the Supporting Affidavit of Simion Swakey Ole Kaapei sworn on 28.09.2011,*
2. *the Further Affidavit of Simion Swakey Ole Kaapei sworn on 19.12.2011,*
3. *the Petitioners' Advocates skeletal submissions dated 25.05.2012 and filed on 14.06.2012.*

6. In their opposition to the Petition, the Hon. Attorney-General on his own behalf and on behalf of the other Respondents filed -

1. *a Replying Affidavit of Esther Nadupoi Ogega on behalf of the 5th Respondent sworn on 30.10.2011 and filed on 1.11.2011.*
2. *the Respondents' skeletal submissions dated 2.08.2012 and filed on 3.08.2012.*

7. Similarly in opposition to the Petition, the Interested Parties relied upon the following documents -

1. *the Affidavit of Elijah Kiprono Soi sworn on 10.11.2011 in support of the Application dated 10.11.2011 to be enjoined as Interested Parties, filed on 14.11.2011 sworn on his own behalf and on behalf of twenty-eight other Interested Parties under their authority filed in court on the same dated 14.11.2011.*
2. *Affidavit of Elijah Kiprono Soi sworn on 20.11.2011 and filed on 28.11.2011 in reply to the*

*Petitioners' Chamber Summons dated 4.10.2011.*

3. *the Further Affidavit of Elijah Kiprono Soi in reply to the Petitioners' Chambers Summons dated 4.10.2011, and sworn on 23.02.2012 and filed on 24.02.2012.*

4. *the Interested Parties skeletal submissions dated 28.6.2013 and filed on 29.06.2013.*

5. *the Interested Parties List of Authorities dated 14.06.2012 and filed on 17.06.2013.*

8. The case of **ANARITA KIRIMI VS. A.G. [1979] KLR** established the principle that any person who alleges breach or infringement or violation of his constitutional rights must establish the particulars of such breach in relation to him or other person. Therefore the fundamental issue to be determined in this Petition is whether the Petitioners' rights over and above their property, and to privacy and protection of their person as guaranteed under Articles 40 & 31 of the Constitution have been violated, and if so, in what manner and the consequences thereof (*if any*). The sub-issues set out herein later depend upon the determination of this issue.

9. To determine the said issue it is necessary to examine the Petition itself, the submissions of Counsel for the Petitioners, the Respondents and the Interested Parties.

10. **Firstly**, the Petition is premised upon the provisions of Articles 19, 20, 21, 22(1)(2)(b) and (4), 23, 24, 40 and 63 of the Constitution of Kenya 2010.

**Secondly**, the Petition is also expressed to be based upon the provisions of Articles 1,8(2)(b), 10, 26, 28, 42, 43 and 46 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

**Thirdly**, the Petition is further expressed to be in the matter of Historical and Current Infringement of the Cultural and Economic Rights of the Maasai Community on Olosakwana Adjudication Section as Indigenous People within the meaning of the United Nations Declaration on the Rights of the Indigenous Peoples and the Constitution of Kenya.

11. I will commence by reference to the Constitutional provisions, then, an historical discussion on the area covered by Olosakwana Adjudication Section and lastly the rights of indigenous people of Olosakwana Adjudication Section.

12. On the constitutional provisions, there is no gain saying that the Bill of Rights applies to all law and binds all state organs and all persons. There is no gain-saying that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. There is further no gain-saying that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Those are the provisions of Articles 19, 20 and 21 of the Constitution.

13. Article 22 thereof donates to every person or any person acting on behalf of another (*person*) the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. This court is granted by Article 23, the jurisdiction in accordance Article 165, to hear and determine applications for redress or denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. Article 24, severely restricts limitation except by law, of any right, and if so, only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the factors enumerated in that Article.

14. Article 40 gives the right for every person, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Parliament is prohibited from enacting any law that permits the State or any person to arbitrarily deprive any person of his property or limit the right of that person to enjoyment of his property on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin.

15. Article 61 of the Constitution classifies land and declares that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Land in Kenya is classified as public, community or private land. Article 63 states that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest, and community land comprises -

(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 traditionally occupied by hunter-gatherer communities, or*

*(iii) lawfully held as trust land by the county government.*

16. Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples, confers upon indigenous people the right to full enjoyment as a collective or as individuals, all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and International Human Rights law.

17. Articles 8(2)(b), 10, 26, 28, 42, 43 and 46 of the said Declaration provide as follows -

Article 8(1) -

*“8(1) Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture,*

*2. State, shall provide effective mechanisms for prevention of, and redress for -*

*(a) ....*

*(b) any action which has the aim or effect of dispossessing them of their lands, territories or resources.*

18. Article 10 says -

***10. Indigenous people shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.***

19. Article 26 says -

***“Article 26(1) Indigenous Peoples have the right to the lands territories and resources which they have traditionally owned, occupied or otherwise used or acquired,***

***(2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired,***

**(3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.**

20. Article 28 provides -

**“28 (1) Indigenous peoples have the right to redress, by means that can include restitution or when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent,**

**(2) Unless otherwise freely agreed upon by the peoples concerned compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.**

21. Articles 42 and 43 say -

**“Article 42 – The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and the specialised agencies, including at the county level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.**

**22. Article 43 – The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.**

23. In addition to the above articles cited by the Petitioners in their Petition, but not in their submissions, I will, for the purposes of completeness of this judgment add the provisions of Article 46(2) relating to the application and limitations of the Declaration. The article says -

**46(1) ..**

**(2) In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitation shall be non-discriminatory and strictly necessary solely for the purpose of securing the recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”**

*[This Article sounds very much like Article 24 of the Constitution of Kenya 2010] - my addition*

24. In a departure from the order in paragraph 11 (*supra*), in which I said I would discuss the issues raised in this Petition, the constitutional provisions, the historical perspective of the Olosakwana Adjudication Section, and the rights of the indigenous people, I shall commence this discussion by reference to the historical perspective of the Olosakwana Adjudication Section, the indigenous people of that area, and their consequential rights under adjudication, appeals therefrom and acquisition of lands in that area.

## **25.0 The Historical Perspective of Olosakwana Adjudication Section**

25.1 The Petitioners are residents of Narok County, Transmara East and West Sub-Counties which used to be Districts and are now known as sub-counties, and are in particular residents of Olosakwana Adjudication Section.

25.02 Olosakwana Adjudication Section covers Kapsasian, Emarti Mogondo and Emurua Dikirr Locations/Wards both in Transmara East and West Districts (*Sub-counties*) of Narok County. The communities living in those area are Kipsigis, and members of the Uasin Gishu clan of the Maasai

nation. In the milieu of the African nations at the dawn of colonialism in the 19th Century both of those communities were jostling for space and territory in those areas.

25.03 Upon the advent of colonial subjugation and reign, the colonial government found, in its wisdom or lack of it, that the dominant group in the area were the Maasai. The colonial administration also found that members of the Kipsigis sub-nation of the Kalenjin nation, were so embedded and enmeshed in the area, that it accepted them as bona fide residents of the area, but not being members of the Maasai nation, the colonialists baptised them with a new name, “*Acceptees*”. Members of the Kipsigis group thereafter carried the document of “*acceptee*” within the area. In the march of time, both groups increased in numbers, members of the acceptees begot sons and daughters who too wanted space and land of their own. They acquired the land in Olosakwana both before and after adjudication and became entitled thereto as purchasers.

25.04 Fast-forward the positions on the ground to the post Independence years, and in particular year 1978 when the Olosakwana area was declared an Adjudication Section in accordance with the provisions of Section 5 of the Land Adjudication Act, (*Cap. 284, Laws of Kenya*). Following that exercise eighty-eight (88) parcels of land were demarcated and recorded. While parcels Nos. 2-87 were recorded as individual holdings, Parcel No.1, was reserved and recorded as Olosakwana Group Ranch. This is the Petitioners talking point and basis of claim in this Petition.

## **26. The Facts and the Law**

**26.01** The uncontroverted facts are clear. The Adjudication Register for Olosakwana Adjudication Section was published as complete on 8th April 1981 in accordance with the provisions of Section 25(1) of the Land Adjudication Act, and the statutory period of sixty (60) days was allowed to enable interested persons to raise and register objections, if any, regarding the process of demarcation and recording. The Petitioners' contention to freeze the number of holdings as at 8th April 1981 would ignore the statutory right of objection and appeals by *bona fide* land holders whether by inheritance or purchase as at that date. The contention would also ignore the right to lodge late appeals to the Minister, and subsequent declaration of 10th December 1996 that the Register for Olosakwana Adjudication Section was complete and inviting further objections.

26.02 The individual holdings for parcels Nos. 2-87 resulted in one thousand three hundred and twenty-six (1326) objections being filed. Those objections were heard and determined and implemented and resulted in the creation of one thousand nine hundred and forty-nine (1949) parcels. In my count from the copy of the register of objections attached to the Replying Affidavit of Esther Nadupoi Ogega, over two hundred objections were dismissed. So far as parcels 2-87 are concerned, the Petitioners have no case at all. Their main concern is parcel No. 1.

26.03 Section 23(5)(c) of the Land Adjudication Act provides that where a group is recorded as the owner of land or as entitled to an interest not amounting to ownership of land, the adjudication officer shall – notify the Registrar of Group Representatives that the group has been so advised.

26.04 When the Registrar of Group Representatives has been so advised, he is required under Section 5(1) of the Land (*Group Representative*) Act, (*Cap. 287, Laws of Kenya*), to convene a meeting of the members of the group, at a specified time and place to -

(a) *adopt a Constitution,*

(b) *elect not more than ten and not less than three persons to be group representatives of the group, and*

(c) *elect persons to be officers of the group in accordance with the Constitution.*

and the Registrar or a public officer appointed by him for the purpose was to preside at the meeting to be held under the said provision.

26.05 It is not disputed that the procedure provided for under Section 23(5)(c) of the Land Adjudication Act, as read together with the provisions of Section 5(1) of the Land (*Group Representatives*) Act were never followed, and consequently Parcel No. 1 of Olosakwana Adjudication Section was never incorporated as a Group Ranch as required under those provisions of the law. There were valid reasons for not doing so.

26.06 **Firstly**, no sooner had the Adjudication Register been closed than the 4th Petitioner, Kilutori Ole Birride lodged an objection for the sub-division of the proposed group ranch. His objection is No. 5 in the Objection Case register Exhibit - ENo. "I" to the Replying Affidavit of Esther Nadopoi Ogega, the 5th Respondent's Chief Executive Officer. **Secondly**, while the proposed group ranch had two hundred and eighteen (218) members, the objection to the Adjudication Register led by the said Kilutori Ole Birride and appeals to the Minister resulted in an increase of members to three hundred and thirty four (334). **Thirdly**, the late objections for sub-division of parcel No. 1, in turn resulted in one thousand one hundred and eighty-one (1181) parcels being demarcated and registered. It is clear from the Register of objections that objections cut across both Maasai and Kipsigis Communities, Maasai vs. Maasai and Kipsigis vs. Kipsigis.

26.07 Once the process of objections and appeals is complete, Section 28 of the Land Adjudication Act requires the Adjudication Officer to forward the Adjudication Register to the Director of Land Adjudication and Settlement who then issues a Certificate of Finality which he then forwards to the Chief Land Registrar (*under Section 27 of the Land Adjudication Act*), and the Chief Land Registrar causes registration of individual titles in accordance with or pursuant to Section 28 of the said Act, on application of each individual adjudicated to have a parcel of land. The Certificate of Finality was issued on 2-10. 2010 following the completion of the process of objections and appeals.

## **27.0 ISSUES FOR DETERMINATION**

**27.01** Following that narrative of both the historical perspective the facts and the law, there are five sub-issues for determination and those are -

1. *Whether the adjudication process and objections thereto were in accord with the law;*
2. *whether the registration process was procedural;*
3. *whether the resultant titles can be impeached;*
4. *whether the Petitioners rights to ownership of land were infringed.*
5. *Whether the Petitioners rights as indigenous people, and citizens of Kenya were breached in terms of the United Nations Declaration on the Rights of Indigenous People.*
6. *Conclusion*
7. *Costs*

## **28.0 Of Whether the Adjudication process was in accord with the law**

**28.01** There is no dispute that the entire provisions of the Land Adjudication Act were followed in the declaration of Olosakwana as an Adjudication Section in 1978. There is no dispute that objections were raised within the sixty (60) day period. Those objections were heard and determined, and parties who were dissatisfied with some of those determinations, went on to appeal to the Minister. The appeals took time to determine, and once completed the Adjudication Officer acted in accordance with the provisions of Section 27 of the Land Adjudication Act, and forwarded the Adjudication Register, comprising of the map and record of adjudication to the Director of Land Adjudication and Settlement with all particulars of determination of objections. The Director is donated with the power to alter the duplicate adjudication register in accordance with the determinations, and the Land Registrar is thereafter empowered under Section 28 of the Land Adjudication Act to cause registration to be effected in accordance with the adjudication register.

28.02 In altering the register to give effect to the 1326 determinations in respect of Parcels No. 2-87, and to the 1181 parcels arising out of Parcel No. 1 (*the Olosakwana Group*), the Commissioner of Lands (*the 1st Respondent*) through his officers, the Chief Land Registrar (*3rd Respondent*), the Director of Survey (*4th Respondent*), the Director of Land Adjudication and Settlement (*5th Respondent*), the District Land Registrar, Transmara (*6th Respondent*), the District Land Adjudication Officer Transmara (*7th Respondent*) were doing no more than what the law required them to do. I therefore agree with the contention of the Attorney-General (*2nd Respondent*) that those Respondents acted in accordance with the law and did not breach any of the Petitioners' rights under the Constitution.

28.03 The above holding essentially answers the Petitioners' contention that the process of adjudication, objections and appeals thereon were fraught with fraud. Both counsel for the Respondents and the Interested Parties cited to me the case of **MUTSONGA VS. NYATI [1989] KLR 428**, which had very similar claims to the Petition herein, and where the Plaintiff claimed that the Defendant had obtained title by fraud. The court (*Kneller J as he then was*), found and held *inter alia* that -

***“allegations of fraud must be strictly proved and although the standard of proof may not be as heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and is a question for the trial judge.”***

28.04 Having examined the processes of adjudication, objection and appeals as disclosed in the Petitioners' own Affidavits, and the Affidavits for the Respondents and the Interested Parties, I find and hold that there was no fraud at all.

## **29.0 OF THE RIGHTS OF INDIGENOUS PEOPLE**

29.01 If there was no fraud, as I have held, the Petitioners contend that as indigenous peoples within the meaning assigned to it under the United Nations Declaration on the Rights of Indigenous Peoples, the process of adjudication and registration and issuance of titles has had the aim and effect of dispossessing them of their lands, territories or resources contrary to Article 8(2)(b) of the said United Nations Declaration on the Rights of Indigenous People.

29.02 The question then becomes *who are indigenous peoples?* According to the United Nations Declaration on the Rights of Indigenous Peoples, a **Manual for Human Rights Institutions (HR PUB/13-2 2009)**, citing a study (*the Martinez Cobo Study*) the most widely cited “*working definition*” of indigenous peoples is:

***“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems: (E/IN4/sub.2/AC 1986/7 Add. 4, para. 379).”***

29.03 According to the United Nations Study, debate over a definition of Indigenous Peoples was often focused on African and Asian Indigenous Peoples. In the Asian context, the term “*indigenous peoples*” is generally understood to refer to distinct cultural groups such as “*Adivasis*”, “*tribal peoples*” “*hill tribes*” or “*scheduled tribes*”, while some indigenous peoples in Africa are referred to as “*pastoralists*”, “*vulnerable groups*” or “*hunter-gatherers*”. In Africa, it is often argued that all African peoples are indigenous to Africa. This debate was addressed by the Working Group of Experts on Indigenous Populations/Communities in Africa which noted that a modern approach should put “*less emphasis on the early definitions focusing on aboriginality*” and instead emphasise -

1. *self-definition as indigenous and distinct different from other groups within a State,*
2. *a special attachment to and use of their traditional land whereby their ancestral land and*

*territory has a fundamental importance for their collective physical and cultural survival as peoples.*

3. *an experience of subjugation, marginalisation, dispossession, exclusion or discrimination because of their different cultures, ways of life or modes of production than the dominant model.*

*(Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples Rights at its 28th Ordinary Session (2005) pp 92-93).*

29.04 Despite this lack of any definition of who is indigenous, the African Commission on Human Rights agreed in the case of **CENTRE FOR MINORITY RIGHTS DEVELOPMENT (Kenya) and MINORITY GROUP INTERNATIONAL ON BEHALF OF ENDOROIS WELFARE COUNCIL VS. KENYA, AFRICAN COMMISSION ON HUMAN & PEOPLES RIGHTS (NO. 276/2003/4 February 2010)**, para 162, and stated -

***“The African Commission on Human and People Rights agrees that ENDOROIS consider themselves to be a distinct people, sharing a common history, culture and religion, the African Commission is satisfied that the ENDOROIS are a “people”, a status that entitles them the benefit from the provisions of the African Charter that protects collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of the indigenous rights – the right to preserve this identity through identification with ancestral lands.”***

29.5 On the other hand according to the World Bank Operational Manual (OD.4.20 September 1991), which describes the Bank's policies and processing procedures for projects that affect indigenous peoples, the term “*indigenous peoples*”, “*indigenous ethnic minorities*” “*tribal groups*” and “*scheduled tribes*” describes -

***“social groups with a social and cultural identity distinct from the dominant society that make them vulnerable to being disadvantaged in the development process.”***

29.06 Again according to the World Bank's said document, Indigenous Peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics -

- (a) a close attachment to ancestral territories, and to the natural resources in these areas;***
- (b) self-identification and identification by others as members of a distinct cultural group;***
- c. an indigenous language often different from the national language;***
- (d) presence of customary, social and political institutions, and***
- (e) primarily subsistence – oriented production.***

29.07 Whether under the UN, the World Bank definition or the African Charter of Human and Peoples Rights, all the forty-two (42) sub-nations of Kenya would qualify as either “*indigenous peoples*”, “*indigenous ethnic minorities*,” or “*tribal groups*” because each of those sub-nations of Kenya including the Endorois are to varying degree subject to World Bank characterisation in development terms. For instance they all speak distinct languages, none of which is the national or language of commerce.

29.08 Though the Maasai and their closest cousins the Samburu are about the only communities in Kenya with a distinctive dress code of the red shuka (*like the Roman toga*), and the only people who are never stopped and questioned, even in the Centre of Nairobi, why they carry clubs (*rungus – all referred to as Maasai rungus*) and swords sheathed in red scabards around the waist (*Maasai swords – like the Roman short stabbing dagger*), this characteristic does not qualify them to

exclusive ownership or residence of any parts of Kenya. As much as their members travel and live among other communities of Kenya, so members of other communities of Kenya and in particular those with whom they have had the closest association by proximity of territories and lands, and commercial interaction are equally entitled to land and other resources in areas where they the Maasai or other communities are numerically the dominant group.

29.09 However and whereas the Constitution of Kenya 2010 recognizes (*in Article 44*) the right to use the language and to participate in the cultural life of the person's choice, and to belonging to a cultural or linguistic community and with other members of that community to enjoy the person's culture and use of that person's language, and to form, join and maintain cultural and linguistic associations and other organs of civil society, principles of land tenure are clearly stated in Article 60 of the Constitution and Article 61 declares that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Again, whereas Article 63 refers to community land, legislation in relation thereto is yet to be enacted pursuant to Article 65(5) of the Constitution. At this point in time therefore, other than land held by individuals, whether as a dominant community within an area, or as individuals, there is as yet no land which can legally be defined and identified as community land within the parameters of Article 63 of the Constitution. In addition Article 40 of the Constitution guarantees every person in Kenya the right to own any property or land in any part of Kenya.

30. Further Article 46 of the Declaration on the Rights of Indigenous Peoples, clearly states that none of its Articles may be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states. And the provisions of the Declaration are to be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

31. While in the final stages of writing this judgment, I came across in the Star Newspaper Edition of February 19, 2014, an article – entitled “COMMENT” - “Climate Change Discourse more Relevant Now” by Santeto Ole Tiampati (the National Coordinator of the Pastoralist Development Network of Kenya), and I fell into the temptation of including excerpts of it in this judgment.

32. After discussing the plight of Kenya's pastoralists in the arid and semi-arid lands and noting that droughts, famines and floods have historically been part of their lives, and their predictability enabled these communities to develop adaptive capacities to mitigate against such shocks, the author concludes that this not the case any longer as the frequency of these conditions has increased several folds over the last 100 years and become more unpredictable. Since pastoralism is based on mobility in response to the vagaries of nature, those changes have brought a new dimension to the whole equation -

***“...Encroachment on the community grazing areas brings fierce competition for resources which in turn forms the causitive aspect of pastoralist conflicts. A burgeoning population, changing climate and opportunities created by the myriad development projects and the energy sector will bring further encroachment and take over of land in the arid and semi-arid lands. This could further undermine the security of tenure for pastoralists communities and raise tensions between the resident communities and new arrivals.***

***..It would therefore be prudent for all Kenyans and their government to learn from changes that are happening around us and understand the fact that climate change is here with us and that all planning and implementation of programmes should have adaption and a cross cutting theme.***

***The Lapset and oil, gas and geothermal exploration projects should serve as examples of how the government is streamlining climate change within all its development programmes.***

***On the other hand, pastoralist conflicts and peace building must also form another cross-cutting issue to be integrated in all projects and programmes targeting pastoralist counties as pressures from land use change continue to expose these communities to vulnerabilities of climate hazards.”***

33. Olosakwana Adjudication Section is of course not an arid or semi-arid area. The conflict there as shown in this Petition is about dwindling resources, land, caused by and large a burgeoning population which has caused human conflict, but also degradation of the environment through encroachment of forest cover and thus enhancing climate change. The issues therefore ceases to be purely one of “indigenous peoples” versus “the new arrivals”. Part solution lies for an integrated approach at the clan, village, location, division and sub-county levels, and involving all disciplines, not merely to protect pastoralist grazing, because the land is no longer merely pastoralist land, but a national resources, (*the largest quantity of beef is consumed not by pastoralists but by urban dwellers*), but also to ensure that the pastoralists who supply the cities with beef, are in turn protected from the vagaries of nature by ensuring pastoralist venture or way of life does not condemn the pastoralist to a life entirely subjected to nature.

### **34.0 CONCLUSION AND FINAL ORDERS**

34.01 In light of all the foregoing, it seems to be quite fallacious for the Petitioners or for that matter, any other person or group of persons in Kenya, to claim on the basis of the Declaration, that it has more or exclusive right to resources or in this case, land, than other people of Kenya, whether as communities indigenous to particular areas of Kenya such as the Luo and Suba around Lake Victoria or individuals of other communities. In my view that argument runs contrary to the clear provisions of Articles 40, and 60 of the Constitution of Kenya 2010, and are consequently not tenable. In my view further the more positive approach to issues of marginalisation is to seek redress by moving more resources to those economically depressed areas, but not seek a remedy in exclusivity or exclusion.

In the premises therefore, I find and hold that -

1. *the adjudication and subsequent registration process was substantively and procedurally in accord with the law;*
2. *the resultant titles cannot be impeached or impugned;*
3. *the Petitioners rights as individuals and as the dominant ethnic community in Olosakwana area were not breached either in terms of our law, the Land Adjudication Act, or the United Nations Declaration on the Rights of Indigenous People.*
4. *No fundamental rights or freedoms of the Petitioners were or are being breached as Articles 40 and 60 give to every person the right to own land in any part of Kenya, and in respect of Olosakwana Adjudication area, the other ethnic group being opposed were “acceptees” culturally before the adjudication processes were set in motion.*
5. *The Petition raised no constitutional issue, and I must say, it was no more than one of those Petitions filed under the umbrella of the Constitution, merely to perpetuate conflict between the Petitioners and members of other ethnic groups who are either “acceptees” or bona fide purchasers on a willing seller willing buyer basis.*

In conclusion therefore, I find no merit on the Petitioners' Petition dated and filed on 4.10.2011. It is dismissed with a direction that each party bears his own costs. It is an equitable order to maintain calm and harmony.

It is so ordered.

**Dated, signed and delivered at Nakuru this 21st day of February, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**