



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 48 OF 2012

**IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA**

AND

IN THE MATTER OF ARTICLES 165(6), 169(1) AND 22 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE REGISTERED LAND ACT CHAPTER 300 LAWS OF KENYA
(REPEALED)**

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (REPEALED)

**AND IN THE MATTER OF THE DECISION OF THE OLOLULUNGA DIVISION LAND
DISPUTE TRIBUNAL CLAIM NO. 10 OF 2006**

AND

**IN THE MATTER OF THE SUBSEQUENT ADOPTION OF THE TRIBUNAL'S AWARD BY
THE NAROK PRINCIPAL MAGISTRATE'S COURT IN MISC. LAND CASE NO. 13 OF 2006**

BETWEEN

PETER MUNERIA OLE MUIYA1ST PETITIONER

STEPHEN OLE SEURND PETITIONER

DANIEL KETUYA SEUR3RD PETITIONER

LERIONKA OLE MUIYA4TH PETITIONER

LEKUMOK OLE SARBABI 5TH PETITIONER

VERSUS

PRINCIPAL MAGISTRATE, NAROK 1ST RESPONDENT

DISTRICT SURVEYOR, NAROK NORTH/SOUTH2ND RESPONDENT

AND

LETEIPA OLE KIPKOECH1ST INTERESTED PARTY

PARIKEN OLE NGEETI2ND INTERESTED PARTY

MORINTAT OLE MUIYA3RD INTERESTED PARTY

OREU OLE KIPKOECH4TH INTERESTED PARTY

JOHN OLOONKISHU SEUR5TH INTERESTED PARTY

RULING

1. The Petitioners seek relief from this Court on the grounds that their rights to own property and protection from deprivation of property under the Constitution have been violated.
2. By a Petition dated 17th October, 2012 the Petitioners pray for the following orders as against the **Principal Magistrate's Court, Narok** and **The District Surveyor Narok North/South** hereinafter the 1st and 2nd Respondents respectively:
 - a. **A declaration that the fundamental rights to own property and to protection from deprivation of property has been and/or is likely to be infringed by the Respondents;**
 - b. **A declaration that the 1st Respondent decision/orders issued in adoption of the award by Olulunga Divisions Land Disputes Tribunal are illegal, unconstitutional and in breach of the Petitioners rights and interests over their individual parcels which they hold separate Title Deeds.**
 - c. **A declaration that the 1st Respondent proceedings and all consequential orders arising from Olulunga Divisions Land Disputes Tribunal Case No. 10 of 2006 and Narok Principal Magistrate's Court Misc. Land Case No. 13 of 2006 are null and void.**
 - d. **A permanent injunction restraining the 2nd Respondent from implementing the decision of the Olulunga Divisions Land Disputes Tribunal made on 4th September, 2006 and the decree issued by the 1st Respondent on 26th February, 2009.**
 - e. **In the alternative an order of prohibition to prohibit the Respondents from executing enforcing or implementing the decree issued by the 1st Respondent on 26th February, 2009 in Narok Principal Magistrate's Court Misc. Land Case No. 13 of 2006 in adoption of the award dated 4th September, 2006 made by the Olulunga Divisions Land Disputes Tribunal in Case No. 10 of 2006.**
 - f. **Costs of this Petition.**
3. The Petition is supported by the grounds on the face of it and the affidavit of **Peter Muneria Ole Muiya**, hereinafter referred to as the 1st Petitioner, and sworn on 17th October, 2012.
4. The facts of the case are set out in the Petitioners' deposition. At the centre of the dispute is parcel of land originally known as CIS-Mara/Olulunga/9 measuring approximately 150 hectares. The parcel was owned by the 2nd Petitioner who out of his own generosity invited members especially his relatives to form a group ranch which was named Olpusare Group Ranch. The 1st Petitioner was appointed the Secretary, the 2nd Petitioner the chairman and one Ole Kipkoech the treasurer of the ranch.
5. Sometime in 2000, members of the group ranch decided to subdivide the parcel of land amongst themselves. The exercise was undertaken between the year 2002- 2004 and it gave rise to title

- deeds for each of the resultant portions of land. The members were then allocated their respective portions and issued with the title deeds.
6. In 2006, the Interested Parties herein, some of whom were members of the ranch filed a complaint before Olulunga Divisions Land Disputes Tribunal against the 2nd Petitioner and Others. The deponent avers that despite the decision of the tribunal affecting all former members of the group ranch only some people were informed and summoned by the tribunal.
 7. The tribunal in its decision ordered that:-
 - a. That the former chairman, secretary and land officer to “put back” and rectify the map and put back the beacon to its original place which all members had resolved as the original boundary and the share of parcel CIS-Mara/Ololulunga/1164 be equalized to bring justice and fairness.
 - b. That the title deeds which were collected to be returned to the land registry for rectification of the records to conform with the amendments on the ground and the minutes of the group before dissolution.
 - c. Any aggrieved party by the award may lodge their appeal with the appeals committee within thirty (30) days.
 8. It is this decision and its subsequent adoption by the 1st Respondent in Misc. Case No. 13 of 2006 that forms the basis of the Petitioners’ case. They are advised by their advocate that the decision of the tribunal is a nullity as it exceeded its powers under Section 3 of the Lands Disputes Tribunal Act. Further that the 1st Respondent’s adoption of the said decision only amounted to perpetuating the same illegality.
 9. The Petitioners being apprehensive that the Interested Parties would execute the decree therein, proceeded to file Judicial Review No. 10 of 2011 and obtained a stay of execution. However the matter was subsequently dismissed on technicalities and the Petitioners thus aver that they shall suffer irreparable loss and damage if the Interested Parties proceed to execute the decree.
 10. In opposing the application, the Interested Parties filed Grounds of Opposition dated 17th July, 2013. They relied on the following five grounds:-
 - a. **That the application is an abuse of the court process to the extent that it seeks to repackage the motion for prerogative orders which was dismissed by the court and a subsequent motion for review dismissed.**
 - b. **That the application herein is an abuse of the court process to the extent that it seeks to appeal against the finding of the court in disguise that it raises a constitutional petition;**
 - c. **That the issues raised in the Petition are res judicata**
 - d. **That the entire Petition is a motion for judicial review disguised as a constitutional petition;**
 - e. **That the Petition offends the rule in Anarita Karimi Njeru V. Republic (1979) KLR 154**
 11. The Petition was canvassed before this court on 11th June, 2014 by the learned counsel **Mr. Kurgat** representing the Petitioners whilst the learned counsel, **Mr. Githui** was for the Interested Parties.
 12. **Mr. Kurgat** submitted that the Petition challenges the proceedings and award of the Land Disputes Tribunal. The Respondents in the tribunal case were listed as one Stephen Ole Seur & Others. There is however no evidence of the names of the others or whether Stephen Ole Seur was acting on their behalf. The 1st, 3rd, 4th and 5th Petitioners were not parties to the claim despite the orders adversely affecting their rights to property.
 13. **Mr. Githui** submitted that the prayers sought are similar to the prayers in Judicial Review No. 10/2011. That the said application was dismissed by a competent court and the only recourse was to appeal. However, the Petitioners have repackaged the application under Articles 165 and 169 of the Constitution. It was counsel submission that this is an abuse of the court process and the petition should be dismissed. He relied on the decision in **Anne Nyokabi Muguiya V. NIC Bank Limited**, Nairobi HC Petition No. 202 of 2011.
 14. Further counsel submitted that the Petitioners have failed to set out provisions of law which have been infringed and the manner of infringement. According to counsel infraction of rights to

property is a disguise as the Petitioners are challenging the decision of Lands Disputes Tribunal and subordinate court adopting that decision. He relied on the case in **Anarita Karimi Njeru V. Republic**, (1979) KLR 154 to support his case for dismissal of the Petition.

15. The Interested Parties urged the court to dismiss the Petition with costs as it was an abuse of court process.

ISSUES FOR DETERMINATION

16. Upon taking into consideration the submissions made by the respective parties I find the following issues for consideration;
 - i. Whether the Petition as framed constitutes a constitutional Petition?
 - ii. Whether the matter is *res judicata*?
 - iii. Costs

ANALYSIS

17. On the first issue this court has had the occasion to peruse the title of the Petitioners Petition which issue was also raised by the Interested Party in their submissions. The title cites **Articles 165 (6), 169 (1) and 22** of the **Constitution of Kenya (2010)**.
18. The provisions of **Article 165 (6)** provide for the supervisory jurisdiction of the High Court over subordinate courts and tribunals. **Article 169(1)** gives a narrative of the composition of subordinate courts. And the **Article 22** provides for the right to institute court proceedings when a right has been denied, violated or infringed or is threatened. The same Article also sets down the procedure for the enforcement of the Bill of Rights.
19. It is imperative to note that the aforementioned Articles only relate to the jurisdiction of the courts and none of them contain or confer a justiciable right to the Petitioners. This court notes that it is now an established principle of law that a party who alleges that there has been a violation of a constitutional right must cite with reasonable precision the provisions of the Constitution containing the rights which have been violated and must also establish the manner in which such rights have been violated. Reference is made to the case cited by the Interested Parties in their submissions, that is **Anarita Karimi Njeru V. Republic**, (1979) KLR 154 where it was held as follows:

“We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he shall set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

20. To summarize it all this court notes that in framing the Petition, particularly that the Title does not conform to the requisite format provided by Rules 11 and 12 of the Constitution as it does set out the specific right that is protected by the Bill of Rights.
21. This is an omission that has been noted but in the body of the Petition the Petitioners make reference to a breach of their fundamental right to own property and the right to protection of this property. Before addressing this limb on how this ‘unspecified’ right has been violated there is need to examine the Judicial Review application seeking for prerogative orders vis-a vis this Petition and then address this court’s issue that relates to *Res judicata*.
22. On examination of the judicial review that is Nakuru High Court JR. Case No.10 of 2011 it is noted that the 1st, 2nd, 3rd and 4th Petitioners herein were the *Ex-Parte* Applicants therein. The 1st Respondent in the judicial review is the Chairman of the Ololulunga Land Disputes Tribunal and the Tribunal is cited in the Title to the Petition. The 2nd and 3rd Respondents were cited in the Judicial Review appear as the 1st and 2nd Respondents in the Petition. Whereas the 1st, 2nd, 3rd, 4th and 5th Interested Parties in the judicial review are all the same Interested Parties in the Petition.
23. The issues in the Judicial Review relate to the decision and award of the Ololulunga Land Dispute Tribunal and the applicants challenge the legality of the Award and seek prerogative

orders to quash the award. The JR application was dismissed on the 24th February, 2012 by the Hon. Ouko J (as he then was). A subsequent application to review the decision for dismissal was also dismissed.

24. I will now address the provisions of **Section 7** of the **Civil Procedure Act** which deals with *Res Judicata*. For a matter to be *res judicata* the section sets down the following conditions which are;

- i. The subject matter is directly or substantially the same
- ii. The issues are directly and substantially the same
- iii. There is sameness in title. The parties litigating whether for a public right or private and under the same title, whether for themselves, are the same
- iv. The court that heard and determined the issue was competent
- v. Such issue has been heard and finally determined by such a court.

25. After taking into consideration the above factors and applying the same to the Judicial Review and the Petition this court is of the view the matters raised in the Petition are *res judicata* and concurs with the Interested Parties contention that the JR has been repackaged in the Petition and it is in actual fact an appeal disguised as a constitutional petition.

FINDINGS.

26. The court finds that the entire Petition is a challenge to the award of the Land Disputes Tribunal under the guise of a constitutional petition and as an infraction to rights to property.

27. This court further finds that there is sameness in title, sameness in issues and matters raised in the JR which matters have been heard and determined by a competent court therefore the matters raised in the Petition are *res judicata*;

28. On the issue of costs this court is disinclined to grant the same due to the fact that the parties are relatives and there is need for closure.

DETERMINATION

29. The Petition lacks merit in its entirety and is hereby dismissed with no order as to costs.

30. Each party to bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 17th day of September, 2014.

A. MSHILA

JUDGE