



**Koech & 3 others v District Surveyor Narok & 3 others (Constitutional  
Petition E002 of 2020) [2022] KEELC 3711 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3711 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
CONSTITUTIONAL PETITION E002 OF 2020**

**CG MBOGO, J**

**JUNE 9, 2022**

**IN THE MATTER OF ARTICLES 10,20, 21 (1),22,40, 40 (3),  
40 (4), 47,50,60,64,165(6) 169(1), 232(2), OF THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 24,25,26 & 27 (A) & 4 OF THE  
DISPUTE TRIBUNALS ACT,1990(NOW REPEALED)**

**AND**

**IN THE MATTER OF SECTIONS 24,25,26 & 27(A) AND 28 (A)  
OF THE REGISTERED LAND ACT**

**AND**

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

**IN THE MATTER OF SECTION 4 OF THE FAIR  
ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**PAUL SALATON KOECH ..... 1<sup>ST</sup> PETITIONER  
SAMMY LEMASHON TOLOLO ..... 2<sup>ND</sup> PETITIONER  
JAMES OLE SEUR ..... 3<sup>RD</sup> PETITIONER  
MURERO OLE NKANAE ..... 4<sup>TH</sup> PETITIONER**

**AND**

**DISTRICT SURVEYOR NAROK ..... 1<sup>ST</sup> RESPONDENT**



## JUDGMENT

1. The petitioners filed a petition dated November 26, 2020 seeking the following orders: -
  1. A declaration that the tribunal and 1<sup>st</sup> respondent violated the provisions of the Land Disputes Tribunal Act; the *Fair Administrative Action Act* Section 4; and of *Constitution* of Kenya Articles 10,20,21(1), 40 (1), 40 (3),40 (4), 47,50, 60,64,68, 232 (1) and 232 (2);
  2. A declaration that the proceedings taken by the defunct Ololulunga Land Disputes Tribunal and registered as Narok Senior Resident Magistrate' Court in Miscellaneous Land No 13 of 2006 were taken in contravention of the petitioners rights to be heard as guaranteed under the *Constitution* and that the tribunal acted in excess of jurisdiction.
  3. An order of Certiorari to bring into this court and quash the decision of the defunct Ololulunga Land Dispute Tribunal and subsequently adapted by the 2<sup>nd</sup> respondent as Narok Senior Resident Magistrates' Court in Miscellaneous Land No. 13 of 2006 and acted upon by the 1<sup>st</sup> Respondent through the notice of November, 2020 with respect to the suit area Cismara/Ololulunga/9;
  4. An order of Prohibition prohibiting the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents from acting on the decree issued by the 2<sup>nd</sup> respondent or in any way interfere with the petitioner's title deeds;
  5. Costs.
2. In the petition, the petitioners averred that they are the registered proprietors of various parcels of land situate in suit area formerly known as Cis-Mara/Ololulunga/9 within Narok County and that on the November 23, 2020, the 1<sup>st</sup> respondent issued notice for re-adjudication of the suit area formerly known as Cis Mara/Ololunga/9 which group ranch was dissolved on June 26, 2002.
3. Further that upon dissolution in 2002, the suit area was subjected to adjudication processes as outlined in the *Land Adjudication Act* and on March 24, 2003, the Group Ranch officials applied for consent to transfer the parcels derived from the subdivision of the suit area to individual members. On March 25, 2003, the Land Control Board gave consent for the transfer parcels Cis-Mara/Ololulunga/11646-11709 arising from subdivision of the suit area being Cis-Mara/Ololulunga/9 from the group ranch to individual members.
4. The petitioners averred that the Ololulunga Land Dispute Tribunal delivered a judgment which has the effect of revoking or cancelling the petitioners title deeds as issued as a result of the subdivision of the suit area. It is the petitioners claim that the Ololulunga Land Disputes Tribunal acted in excess of its powers and the only remedy is to have the whole proceedings declared null and void. That Ololulunga Land Dispute Tribunal embarked on the hearing and proceeded to determine dispute over which it has no jurisdiction and the entire proceedings are empty of legal life and therefore null and void ab initio.
5. Further that disputes over land are not within the jurisdiction of the Tribunal and the Tribunal exceeded its mandate by ordering re-subdivision of the land which was registered under the existing land laws which were not the powers granted to the Tribunal by the act. That the dispute before the



- Tribunal did not relate to boundaries, claim to occupy or work the land but a claim to ownership. That taking into account the provisions of Section 3 of the Act, and what was before the Tribunal, the Tribunal went beyond its jurisdiction when it purported to order the surrender of collected titles.
6. It is the petitioners' averment that the Tribunal acted ultra vires as it had no colour of right to purport to cancel the registered titles as the same was registered subsequent to adjudication processes in 2003. The petitioners are apprehensive that the District Surveyor, Chief Land Registrar and the Director of Adjudication and Settlement shall proceed and implement the decree and that they were denied a right to be heard before making the determination contrary to the provisions of Article 50 (1) of the Constitution. There is also glaring violation of Article 47 and 47 (2) of the Constitution to the extent that the petitioners were not afforded an effective hearing before the Tribunal's decision was made.
  7. The petitioners further contend that the Tribunal's actions are a clear infraction of Section 4 of the Fair Administrative Action Act which provides guidance on the procedures of fairness in administrative action culminating in violation of Article 40 of the Constitution on the right to property. That the 1<sup>st</sup> respondent acted excessively, arbitrarily in violation of Article 10 of the Constitution and as such, the acts and decision of the 1<sup>st</sup> respondent not only offends the rules of natural justice but is also tainted with illegality, irrationality and procedural impropriety.
  8. The 3<sup>rd</sup> respondent filed a replying affidavit in opposition to the petition sworn on February 25, 2021 by Tom Chepkwesi. He deposed that the register for Narok/Ci-Mara/Ololulunga/9 was opened on July 10, 1980 and registered in the name of Olposare Group Ranch and measured approximately 150.5 Hectares and that on January 20, 1982, a title deed was issued for the suit property to the Group Ranch and on 18<sup>th</sup> November, 2004 the register for the suit property was closed for sub-division and new numbers being 11646-11709 were created.
  9. The 4<sup>th</sup> respondent filed a replying affidavit in opposition to the petition sworn on February 25, 2021 by Josephine Njeri Njoroge. She deposed that according to the register of members, Olposare Group Ranch had 15 members and the suit property measured approximately 150. 5 Hectares and the group ranch applied for dissolution of the group representatives on May 22, 2001 to pave way for sub-division and a consent to dissolve the group representatives was given to the Director-Land Adjudication and Settlement vide a letter dated June 26, 2002.
  10. The 4<sup>th</sup> respondent further deposed that the Group Ranch was issued with a letter of consent dated August 27, 2002 approving the sub-division to create Cis-Mara/Ololulunga/11646-11709 which are approximately 64 plots. Thereafter, the Group Ranch was issued with a letter of consent dated March 25, 2003 approving subdivision to individual members and that other persons who benefitted from the transfer of the subdivided plots were the sons of the members of the group ranch and acceptees.
  11. The 1<sup>st</sup> respondent filed a replying affidavit sworn on May 20, 2021 by Lawrence Mwenje in opposition to the petition. The 1<sup>st</sup> respondent deposed that the Group Ranch through a meeting held in the year 2000, unanimously resolved to dissolve the group and sub-divide the land to individual members and that through a court decree issued on April 17, 2009, their office directed the 3<sup>rd</sup> respondent to put back the original beacons which members resolved as the original boundary to equalize the share of parcel Cis-Mara/Ololulunga/9 and to rectify the map to confirm the amendments on the ground and the minutes of the group before dissolution.
  12. The 1<sup>st</sup> respondent further deposed that they were served with a copy of a ruling emanating from the Court of Appeal in Nyeri in Civil Application No NAI 267 of 2015 (UR 226/2015) dismissing an application for injunction/ stay of execution of the orders of Justice Mshila J, who had dismissed Constitutional Petition No 48 of 2012 alleging infringement of constitutional rights and Judicial



Review Application No 10 of 2011 and that in view of the dismissal orders by the Court of Appeal, their office wrote to the group ranch members vide a letter dated November 23, 2020 informing them of the intention to visit the suit property on November 30, 2020 to implement the court order which implementation did not take place owing to the orders of status quo given by this court.

13. The petitioners filed written submissions dated November 15, 2021. The petitioners raised 3 issues for determination as follows: -
  1. Whether the Ololulunga Land Dispute Tribunal had jurisdiction over titled land?
  2. Whether the petitioners' constitutional rights to property and fair administrative action were violated.
  3. Whether the petition is merited.
14. On the first issue, the petitioners submitted that the claim before the Tribunal and the Appeals Committee was over titles of parcels Cis-Mara/Ololulunga/ 11646-11709 arising from subdivision of Cis-Mara/Ololulunga/9 which Tribunal and Appeals Committee proceeded to cancel the title deeds in excess of its jurisdiction. The petitioners relied on the case of *Owners of Motor Vessel "Lillians" versus Caltex Oil (Kenya) Ltd* [1989]eKLR and *John Kipng'eno Koech & 2 Others versus Nakuru County Assembly & 5 Others* [2013] eKLR. The petitioners submit that the Appeals Committee failed in its decision to find out if the Tribunal had the powers to handle the case and that if the Tribunal lacked jurisdiction then the appeals committee too lacked jurisdiction and its decision ought to be declared null and void. That the powers of the Tribunal were limited to the dispute mentioned under Section 3 (1) of the *Land Dispute Tribunal Act* No 18 of 1990. The petitioners relied on the case of *Joseph Karobia Gicheru versus Michael Gachoki Gicheru* [2013] eKLR, *Wamwea versus Catholic Diocese of Murang'a Registered Trustees* [2003] KLR 389, *Moses Makboha Osanya versus Elekia Mabosio Marenga* [2018]eKLR and Nyeri Court of Appeal in *M'Marete versus Republic & 3 Others* [2004]eKLR.
15. The petitioners further submitted that the decree dated February 26, 2009 similarly had the net effect of cancelling the titles now held by the petitioners acquired in 2003 which powers were not granted to the Tribunal. The petitioners relied on the case of *Lucy Bosire versus Nyankoni Manga Robi, Joseph Oginga Onyoni & 2 Others versus The Hon Attorney General & 2 Others* and *Masagu Ole Naumo versus Principal Magistrate Kajiado Law Courts & Another* [2014]eKLR.
16. On whether the petitioners constitutional rights were violated, the petitioners submitted that the petitioners being the registered owners of the suit property, were entitled to a fair administrative action and entitled to the rules of natural justice before cancellation of their titles and that no evidence was produced in court that the petitioners were parties in Judicial Review No 10 of 2011, Petition No 48 of 2012 and Civil Appeal No 267 of 2015 and further there is no evidence that the petitioners were subjected to due process before their titles were purportedly cancelled. They relied on the case of *Hellen Wachuka Njoroge versus Attorney General & Another* [2016]eKLR, *Sceneries Limited versus National Land Commission* [2017] eKLR, *Mohamed Abdi Mohamud versus Ahmed Abdullahi Mohamad & 3 Others, Petition 7 of 2018 consolidated with Petition 9 of 2018* [2018]eKLR and *John Florence Maritime Services Limited & Another versus Cabinet Secretary, Transport and Infrastructure & 3 Others* [2021]eKLR.
17. On whether the petition is merited, the petitioners submitted that the defunct Ololulunga Land Disputes Tribunal and the Magistrate's Court-Narok acted illegally and against the rules of natural justice in failing to give the petitioners an opportunity to be heard and their actions being



unconstitutional cannot be left to stand. They relied on the case of Masagha versus Chief Justice & 7 Others Nairobi HCMCA no 1062 of 2004 [2006] KLR 553.

18. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed written submissions dated February 7, 2022. The respondents raised three issues for determination as follows: -
  1. Whether the petition is *res judicata*
  2. Whether the petitioners' constitutional rights have been violated.
  3. Whether the Ololulunga Land Disputes Tribunal had jurisdiction to cancel titles.
19. On whether the petition is *res judicata*, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that Justice Mshila J dismissed the petition entirely for being *res judicata* as the issues raised therein were similar as those raised in Nakuru High Court JR Case No 10 of 2011 which had been dismissed. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents reproduced the prayers sought in Constitutional Petition 48 of 2012 and Nakuru High Court JR Case No 10 of 2011 and the same meets all the elements set out in Section 7 of the Civil Procedure Act. They relied on the cases of John Florence Maritime Services Limited & Another versus Cabinet Secretary for Transport and Infrastructure & 3 Others [2015]eKLR and Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others.
20. On whether the petitioners' rights were violated, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the decision of the Land Disputes Tribunal affected not only the parties to those suits but also any person who would claim under them because it related to subdivision of Cis-Mara/Ololulunga/9, in this case, the petitioners included and the petitioners interests were represented by the petitioners in Constitutional Petition 48 of 2012 and Nakuru High Court JR Case No 10 of 2011. The respondents relied on the case of Godfrey Shimonya Peter & 3 Others versus Mary Anyango Ameka & Another [2018]eKLR.
21. On whether the Ololulunga Land Disputes Tribunal had jurisdiction to cancel titles, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that Section 3 of the now repealed Land Disputes Tribunal Act was clear to what issues the Tribunals under the Act were mandated to do including the division of or the determination of boundaries to land, including land held in common, a claim to occupy or work on land and trespass to land. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the decision of the land dispute tribunal touched on boundaries and ownership which was adopted by the Rift Valley Province Land Disputes Tribunal Appeals Committee and the Principal Magistrates' Court in Misc Land Case No 13 of 2006 which issued a decree on February 26, 2009. They further submitted that the Land Disputes Tribunal Act provided for avenues to a party aggrieved by its decision through Section 8 (1) of the Act and that the petitioners being aggrieved ought to have used proper channel to present their grievances. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents cited the case of Paul Muraya Kaguri versus Simon Mbaria Muchunu [2015]eKLR. They submitted that whereas the issue of jurisdiction is an issue of law that goes to the root of the matter, the petitioners herein failed to raise the issue as prescribed in the applicable law and as such, they must bear consequences of their laxy.
22. The 1<sup>st</sup> to 5<sup>th</sup> interested parties filed written submissions dated December 1, 2021. The 1<sup>st</sup> to 5<sup>th</sup> interested parties submitted that courts will not consider a constitutional question unless the existence of a remedy depends on it, if a remedy is available to an applicant under some other legislative provision or some other basis whether legal or factual, a court will decline to determine whether there has been addition to a breach of the other declaration of rights and, that the applicable principle of law is that where there is a parallel remedy, constitutional relief feature makes its appropriate to take that course. They further submitted that to seek constitutional relief in absence of such feature would be an abuse of the court process. They relied on the cases of Four Farms Limited versus Agricultural Finance



Corporation [2014]eKLR and Maggie Mwauki Mtalaki versus Housing Finance Company of Kenya [2015]eKLR.

23. The 1<sup>st</sup> to 5<sup>th</sup> interested parties further submitted that the petitioners have not disclosed whether there have been similar matters previously filed before any other court which were canvassed and ruling delivered. The case of North West Water Limited versus Binnie & Partners [1990] 3 ALL E.R. 547 was relied upon, and for this reason, the petition must fail as it is a blatant abuse of the court process and the courts must safeguard against such in the fair administration of justice.
24. I have analysed the petition, the responses thereof, documents in support and the written submissions together with the authorities cited and the issues for determination are as follows: -
1. Whether the petition is *res judicata*.
  2. Whether the petition is merited.
  3. Whether the Ololulunga Land Dispute Tribunal had jurisdiction to cancel the title deeds.
25. It is not in dispute that the register for Narok/Cis-Mara/Ololulunga/9 was opened on July 10, 1980 and registered in the names of Olposare Group Ranch and that the same measures approximately 150.5 Hectares. It is not in dispute that Narok/Cis-Mara/Ololulunga/9 was closed for subdivision on November 18, 2004 and dissolution of the group ranch took effect as well. However, what is in dispute is the decision of the Ololulunga Land Dispute Tribunal filed on February 5, 2009 and adopted by the Magistrates' Court on April 19, 2009 as judgment of the court.
26. Section 7 of the Civil Procedure Act provides for the ingredients of res judicata which states that: -
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”(emphasis mine)
27. The Civil Procedure Act has also provided explanations with respect to the application of the res judicata rule. Explanation 1-6 are in the following terms:
- Explanation (1) —The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.
- Explanation (2) —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
- Explanation (3) —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
- Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
- Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
- Explanation (6) — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.



28. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

29. The decree issued on April 19, 2009 was Miscellaneous Land No 13 of 2006 where the parties were Leteipa Ole Kipkoech & Others versus Stephen Ole Seur & Others and the claim was with respect to Cis-Mara/Ololulunga/9. In the High Court at Nakuru, there was Judicial Review No 10 of 2011 between Peter Muneria Ole Muiya, Stephen Ole Seur, Daniel Letuya Seur versus The Chairman Ololulunga Land Dispute Tribunal, The Principal Magistrate Court-Narok, District Surveyor, Narok North/Narok South and Leteipa Ole Kipkoech, Pariken Ole Ngeeti Morintat Ole Muiya Oreu Ole Kipkoech and John Oloonkishu as interested parties where a ruling was delivered on February 24, 2012 dismissing the notice of motion application that was seeking for orders of certiorari and prohibition with the claim being the interest on the suit property. Again, in the High Court at Nakuru, a Constitutional Petition No 48 of 2012 was filed between Peter Muneria Ole Muiya, Stephen Ole Seur, Daniel Ketuya Seur, Lerionka Ole Muiya, Lekumok Ole Sarbari versus The Principal Magistrate-Narok, District Surveyor Narok North/Narok South and Leteipa Ole Kipkoech, Pariken Ole Ngeeti, Morintat Ole Muiya, Oreu Ole Kipkoech and John Oloonkishu Seur which by a ruling dated September 17, 2014, the court dismissed the petition and found the same to be res judicata. Being dissatisfied with the decision, there was Civil Application No 267 of 2015 (UR 226 /2015) between Peter Muneria Ole Muiya, Stephen Ole Seur, Daniel Letuya Seur Lerionka Ole Muiya and Lekumok Ole Sararbi versus The Principal Magistrates’ Court-Narok and the District Surveyor Narok North/Narok South which ruling dismissed the application for stay of execution pending appeal.

30. A common denominator in all the applications filed in court was that the subject matter related to property known as Cis-Mara/Ololulunga/9, the claim or relief sought was similar in all the applications including the instant petition and all of them were dismissed after, in my view, parties were allowed the chance to ventilate their issues therein. As I place reliance in Maina Kiai case (*supra*), in order for a case to be determined as res judicata all the ingredients must be met and satisfied conjunctively which now brings the issue and the submissions by the petitioners that the instant petition is not res judicata for the reason that the petitioners were not parties in the other suit and or applications. Among the documents relied upon by the 4<sup>th</sup> respondent was a copy of Olpusare Group Ranch list of sons and acceptees. In this list, the names of the petitioners appear as numbers 1,20,6 and 16 respectively. It would beat logic that all along since the cause of action arose, that the petitioners were unaware of the existence of the dispute from the Land Disputes Tribunal all the way to the Court of Appeal. I am not persuaded by the submission that since they were not parties to the other suits in the different courts, they had been denied a right to a fair hearing. I find the excuse lame. I believe the decisions made by the other courts including the Court of Appeal applied to the petitioners being sons and acceptees as well. It would have been a different issue if for example they were innocent parties who acquired ownership by virtue of purchase.



31. For this reason, I find the instant petition *res judicata*. At this point I will not proceed to determine the other issues as I would be engaging in an exercise which is futile. It is only safe that I leave it here and down my tools.

32. Arising from the above, I find that the petition dated November 26, 2020 lacks merit and the same is dismissed with costs to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. It is so ordered.

**DATED, SIGNED and DELIVERED VIA EMAIL ON 9<sup>TH</sup> JUNE, 2022.**

**MBOGO C.G**

**JUDGE**

In the presence of: -

CA: Timothy Chuma

Petitioners:

Respondents:

Interested Parties:

