



**Karialong & 2 others v Chief Land Registrar & 3 others (Environment and Land Constitutional  
Petition 1 of 2022) [2022] KEELC 4807 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4807 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 1 OF 2022**

**L WAITHAKA, J**

**SEPTEMBER 21, 2022**

**FORMERLY ELDORET ELC CONSTITUTIONAL PETITION NO 20 OF 2020**

**IN THE MATTER OF ARTICLES 10(2)(A) AND (B), 21, 22(2)  
(B), 23, 27 (1) AND (2), 48, 50 & 165 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (2010) (ALLEGED  
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES  
40, 47 AND 258 AND IN THE MATTER OF THE REGISTRY INDEX MAPS, KNOWN  
AS ELGEYO MARAKWET DISTRICT/KAPSOWAR REGISTRATION SECTION  
SHEET NUMBER 15, 90/1/2/6, SCALE 1.2500 RIFT VALLEY PROVINCE/ELGEYO  
MARAKWET DISTRICT/LOCATION MOIBEN/KAPSOWAR REGISTRATION SECTION  
SHEET NUMBER 11, SCALE 1:2500 RIFT VALLEY PROVINCE/ELGEYO MARAKWET  
DISTRICT/MOIBEN LOCATION/KASOWAR REGISTRATION SECTION SHEET  
NUMBER 11, SCALE 1:2500 AND RIFT VALLEY PROVINCE/ELGEYO MARAKWET  
DISTRICT/LOCATION MOIBEN KAPSOWAR REGISTRATION SECTION SHEET NO.12**

**AND**

**IN THE MATTER OF LAND PARCELS IN SHIOMO AREA AND ITS ENVIRONS  
AFFECTED BY THE REGISTRY INDEX MAPS AFOREMENTIONED**

**BETWEEN**

**PETER KARIALONG ..... 1<sup>ST</sup> PETITIONER**

**JOHNSTON CHEPTOO ..... 2<sup>ND</sup> PETITIONER**

**FREMIN YATOR ..... 3<sup>RD</sup> PETITIONER**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY ..... 2<sup>ND</sup> RESPONDENT**



THE COUNTY LAND'S SURVEYOR ..... 3<sup>RD</sup> RESPONDENT

THE LAND REGISTRAR, ELGEYO MARAKWET COUNTY ... 4<sup>TH</sup>  
RESPONDENT

### JUDGMENT

1. The petitioners herein who have described themselves as male adults of sound mind residing and working for gain within Elgeyo Marakwet county, filed this suit on behalf of land owners and/or registered proprietors of land in Shiomo area within Elgeyo Marakwet county and on their own behalf.
2. As can be discerned from the averments on the face of the petition, the affidavit sworn in support of the petition and the reliefs sought, the petitioners' case is premised on the grounds that the land adjudication process undertaken by the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents in shiomo area, which yielded registry index maps (RIMS) namely Elgeyo Marakwet district/Kapsowar registration sheet number 15, 90/1/2/6, scale 1:2500; Rift Valley province/Elgeyo Marakwet district/location Moiben/Kapsowar Registration section Sheet number 16, 90/1/2/7, scale 1:2500; Rift Valley/Elgeyo Marakwet District/Moiben Location/Kapsowar Registration sheet number 11, scale 1:2500 and Rift Valley Province/Elgeyo Marakwet district/location Moiben Moiben Kapsowar registration sheet number 12; were done haphazardly and without participation of the residents of Shiomo area.
3. It is the petitioners' case that the RIMs drawn by the 3<sup>rd</sup> respondent arising from the impugned land adjudication process do not reflect the actual boundaries and/or position on the ground (are erroneous) and that the RIMs have brought tension and threat of boundary disputes among the residents of Shiomo area and its environs.
4. Explaining that there is need to have the RIMs amended and/or rectified in order to reflect the actual boundaries on the ground in order not to disettle and/or interrupt the peaceful coexistence in the area, the petitioners lament that their plea to the 4<sup>th</sup> respondent, through their area chief and advocate, to address their concerns did not elicit any response.
5. Terming the alleged action of the respondents of denying them an opportunity to participate in the impugned adjudication process a contravention of articles 10(2)(a), 40 and 47 of the Constitution of Kenya 2010, the petitioners seeks the following reliefs:-
  - i) A declaration that their fundamental right to property has been violated and/or infringed upon in total contravention of article 40 of the Constitution of Kenya; 2010;
  - ii) An order to compel the respondents to amend, correct and/or rectify the registry index maps listed in paragraph 2 herein above in an open and transparent manner so as to conform and/or reflect the correct existing boundaries on the ground;
  - iii) An order that the residents of Shiomo area be invited and allowed to participate in the adjudication process, rectification, amendment, and/or undertake the adjudication process afresh with the involvement of the petitioners and all land owners in Shiomo area and its environs;
  - iv) An order to remove to this court and quash the decision by the respondents to alter and/or vary and/or change the boundaries as appears in RIMs listed in paragraph 2 herein above;
  - v) Costs of the petition



- vi) Any other orders this court may deem just, fit and expedient to grant.
6. The petition is opposed through the replying affidavit of Emmanuel K Sang Chelugess, the In-charge Kapsowar survey office, sworn on March 23, 2021 on the grounds that it is a non-starter, frivolous, scandalous, devoid of substance; that the affidavits in support thereof contain falsehoods and misrepresentations of facts tailored to hoodwink the court unfairly and unjustly; that it does not meet the threshold for constitutional violations; that there has been inordinate and unexplained delay of over 40 years in challenging the alleged wrongful actions of the respondents and that the petitioners' cause of action is not justiciable on account of the doctrine of ripeness and exhaustion.
  7. Further, that the petitioners' contention that the adjudication process was not participatory lacks basis as there is evidence of their involvement in the process; that the adjudication process was carried out in strict adherence with the law and procedures; that deviations, if any, in land sizes on the ground and in the RIMs cannot be a creation of the respondents; that by dint of the provisions of sections 18 and 19 of the Land Registration Act (LRA), 2012 boundary disputes ought to be lodged with the county land registrar at the first instance; that the court has no jurisdiction to hear and determine boundary disputes in the first instance and that the court cannot re-open a concluded land adjudication process or order fresh adjudication.
  8. Further, that the petitioners have neither demonstrated proprietary interest in parcels of land falling in Kapsowar adjudication section nor demonstrated that the petition is a matter of public interest; that there is no proof of violation or threatened violation of the petitioners' right to property; that the alleged mismatch between the RIMs and the ground, if it exists, is historical thus cannot be corrected in the manner suggested by the petitioners; that the orders sought cannot be granted as they may affect persons who are not parties to the petition; that the petitioners have not precisely defined which parcels of land in the region are affected and the owners thereof and that the petitioners have not demonstrated whether they sought and obtained authority to sue on behalf of the other persons allegedly affected by the impugned adjudication.
  9. Further, that the orders sought have astronomical commercial consequences as most of the properties have been sold to third parties resulting in subdivisions while others have been used as collateral in financial institutions; that some of the original owners are either deceased or have transferred their portions to purchasers or beneficiaries; that the studies privately conducted by the respondents do not show any notable difference between the features on the ground and the RIMs and that the petition is presented in bad faith with intention of destabilizing the region economically and occasioning unnecessary hardships. For the foregoing reasons, the respondents urge the court to dismiss the petition with costs.
  10. The petition was disposed of by way of written submissions.

### **Respondents' Submissions**

11. The respondents filed submissions out of the time ordered by the court, without leave of the court. The submissions were expunged out of the court's record through the ruling of this court delivered on September 21, 2022.

### **Petitioners' Submissions**

12. In their submissions filed on October 22, 2021, the petitioners have identified the following as the issues for the court's determination:-



- (i) Whether the process leading to the adjudication process, the making and/or drawing of RIMs that are the subject of these proceedings (hereinafter referred to as the impugned process) was subject to adequate public participation?
  - (ii) Whether the petition offends the doctrines of ripeness and exhaustion of available remedies?
  - (iii) Whether the petitioners deserve the reliefs sought and/or what are the appropriate reliefs in this case.
13. On whether the impugned process was subject to adequate public participation, it is contended that the members of Shimo area whose parcels of land were demarcated by the respondents were not involved in the process; that there was no consultation whatsoever in the adjudication process which resulted in the impugned maps; that the petitioners raised pertinent issues which were not addressed by the respondents and submitted that the respondents failed to adhere to the provisions of article 10 of the *Constitution* which imposed an obligation on them to facilitate a consultative process with the public (according to the petitioners the impugned process was carried out secretly).
  14. It is further submitted that the respondents did not adhere to section 13 of the *Land Adjudication Act*, cap 284 Laws of Kenya (LAA).
  15. Concerning the respondents' contention that there was public consultation, the petitioners have submitted that there is no evidence of involvement or engagement of the residents as alleged.
  16. Based on the decisions in the cases of *Poverty Alleviation Network & Others v President of South Africa & 19 others* [2010]ZACC5 and *Doctors for Life International v Speaker of National Assembly and others*, (Instant citation)[2006]ZACC11, the petitioners maintain that there was inadequate public participation in the impugned process.
  17. On whether the petition offends the doctrines of ripeness and exhaustion of available remedies, reference is made to the case of *Wanjuri Gikongo Okeri v National Assembly of Kenya and 4 others* [2016] eKLR where the court inter alia observed that the court is prevented from determining an issue when it is too early and submitted that the doctrine of ripeness is inapplicable to the circumstances of this case because the petitioners' attempt to get their issues addressed by the respondents was in vain.
  18. It is the petitioner's case that section 26 of LAA is not couched in mandatory terms and that it is incapable of overriding constitutional provisions. The petition herein being for enforcement of constitutional rights, it is submitted that it is not subject to the doctrine of ripeness or exhaustion of remedies.
  19. Explaining that the nature of reliefs sought in this petition are in the nature of an inquiry as to whether their rights have been infringed by the respondents, the petitioners have submitted that it is this court that has the capacity and jurisdiction to hear and determine the issues raised in the petition.
  20. As to whether the petitioners deserve the reliefs sought and/or what reliefs are appropriate in the circumstances of this case; based on article 23(3) of the *Constitution* and the decision in the South African case of *Minister of Health & Others v Treatment Action Campaign & others*; it is submitted that this court has power to grant and/or issue reliefs that are beneficial and geared at protecting the petitioners' rights.
  21. Terming their petition as one for protection of their constitutional rights, the petitioners have submitted that this court should ensure that their constitutional rights are not infringed.



22. Concerning section 18(2) and (3) of the *Land Registration Act* (LRA), 2012 which vests the mandate of resolving boundary disputes on the respondents, it is submitted that the said provisions of the law mandates this court to receive evidence regarding boundary disputes.
23. Pointing out that the subject matter of this petition is RIMs drawn on the parcels of land mentioned herein which do not reflect the correct position on the ground, the petitioners maintain that the respondents refused to heed to their request to rectify the RIMs to reflect the correct and actual position on the ground necessitating the filing of this petition.
24. Maintaining that the process that yielded the impugned RIMs did not involve the rightful owners of the parcels of land captured in the RIMs and that no reason was given by the respondents for coming up with erratic RIMs, the petitioners submit that the actions of the respondents violated their right to lawful, reasonable and procedurally fair administrative action under article 47 of the *Constitution*. The error in the RIMs is said to be a violation of the petitioners right to property under article 40 of the *Constitution*.
25. Explaining that they will suffer irreparable injury if the reliefs sought are not granted, the petitioners submit that they have made up a case for being granted the orders sought.

### **Analysis And Determination**

26. I have carefully read and considered the pleadings filed in this case, the affidavit evidence adduced and the submissions by the petitioners.
27. From the pleadings and the submissions by the petitioners it is clear that the petitioners are challenging the outcome of the adjudication process carried out in Shiamo area on the ground that there was inadequate public participation and that the RIMs generated as a result of the process are not correct (do not reflect the petitioners' land entitlement on the ground). Claiming that their attempts to get the RIMs amended to reflect their lawful entitlements to land on the ground were not heeded by the respondents, the petitioners seek the reliefs mentioned herein above.
28. Although the petitioners have fashioned their claim as a constitutional petition, from the averments in the petition and their submissions, it is clear that the suit is a boundary dispute disguised as a constitution petition. As such, the suit raises a question of law to wit, whether this court has jurisdiction to entertain boundary disputes as a court of the first instance.
29. Concerning that question, it is trite law that this court does not have jurisdiction on matters touching on determination of boundaries before intervention and determination of the subject boundary by the designated officer. In that regard see the case of *Sasomuna Holdings Co Ltd v Kenya National Highways Authority* [2022] eKLR where, based on the provisions of section 18(2) of the LRA, 2012 the court stated:-
 

“From the foregoing provisions it becomes apparent that this court is denied and/or deprived of jurisdiction, on matters touching on determination of boundaries before the intervention and determination of the subject boundaries by the designated officer.”
30. The need to exhaust the other processes availed by other statutory dispute resolution organs, which are established by law, was underscored by the Court of Appeal in the case of *Bethwell Allan Omondi Okal v Telkom (K) Ltd (founder) & 9 others* [2017] eKLR where it was stated:-
 

“The appellant might want to argue that he has a constitutional right of access to justice and we agree that he does, but the High Court and this court have pronounced themselves many



times to the effect that a party must exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of constitutional petition.”

31. In the circumstances of this case, the petitioners acknowledge that under section 18(2) of the LRA, 2012 the land registrar has mandate to resolve boundaries disputes. Citing lack of cooperation by the respondents, the petitioners have argued that they were within their right to file the instant suit before this court.
32. As was pointed out in the case of *Sasomuna Holdings Co Ltd v Kenya National Highways Authority*, supra, this court lacks jurisdiction to hear and determine matters touching on determination of boundaries before the intervention and determination of the subject boundaries by the designated officer. Failure to act by the designated officer does not and cannot confer jurisdiction on this court where none is conferred by law. In that regard see the case *Sasomuna Holdings Co Ltd v Kenya National Highways Authority*, supra, where it was held:-

“Where a statute denies a court jurisdiction, the court cannot purport to assume jurisdiction, either by way of craft of innovation, interpretation and/or endeavors, meant to discern the position of the law, which is clear.”
33. In my considered view, the reliefs sought in this suit cannot be granted because the court lacks jurisdiction to hear and determine the subject matter of the dispute before it as a court of first instance. Secondly, the reliefs sought cannot be granted as they will affect persons who are not parties to the suit. If the averment in the petition is anything to go by, there are over 1000 residents in Shioimo yet the persons who have given authority to the petitioners to institute the suit are merely 23 in number. In the circumstances, the suit cannot be said to be a representative suit on behalf of all the people of Shioimo but a suit by specific individuals affected by the impugned RIMs.
34. In my considered view, the remedy available to the petitioners, if there was refusal to act on their plea for amendment of the RIMs, is for the persons aggrieved by the failure, to move the court for compellance of the officer to perform his duties.
35. For the foregoing reasons, I find the petition herein to be lacking in merit and dismiss it with costs to the respondents.
36. Orders accordingly.

**DATED, SIGNED AND DELIVERED, AT ITEN THIS 21ST DAY OF SEPTEMBER, 2022.**

**L. N. WAITHAKA**

**JUDGE**

