



**Mbersesia v Kapsabet Land Disputes Tribunal & 9 others (Environment & Land
Petition 4 of 2021) [2022] KEELC 14736 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION 4 OF 2021
MN MWANYALE, J
NOVEMBER 9, 2022**

BETWEEN

NATHAN SHIVULU MBERSESIA PETITIONER

AND

KAPSABET LAND DISPUTES TRIBUNAL 1ST RESPONDENT

PRINCIPAL MAGISTRATES, KAPSABET LAW COURTS 2ND RESPONDENT

LAND REGISTRAR, KAPSABET' 3RD RESPONDENT

DAVID MBELESIA ASEGA 4TH RESPONDENT

ABRAHAM SIMIYU MISIKO 5TH RESPONDENT

LABAN SHITAMBASI KWATEMBA 6TH RESPONDENT

SETH KHAYAMBI 7TH RESPONDENT

GEORE IMBUGWA 8TH RESPONDENT

THOMAS ILAYESA MOTOKE 9TH RESPONDENT

ATTORNEY GENERAL 10TH RESPONDENT

JUDGMENT

1. Vide his petition dated August 26th August 2021, the Petitioner Nathan Shivulu Mbersesia petitioned this Honourable Court and sought the following reliefs;
 - a. An order of *certiorari* be issued quashing the decision of the 1st Respondent Kapsabet Lands Dispute Tribunal delivered on February 17, 2000.



- b. A declaration that the adoption of the decision of the Kapsabet Lands Dispute Tribunal by the 2nd Respondent Chief Magistrate Kitale Land Case No 614 of 2000 infringed on the petitioners right to ownership of land and as such was null and void *ab initio* and order be issued cancelling titles Nandi/Kamobo/3871/3872, 4188, 4190,4510,4511, 5830, 5831, 5832, 6781 and 6782 and the 3rd Respondent be directed to rectify the register back and/or revert all parcels do its original number Nandi/Kamobo/258.
2. The above reliefs were sought against all the 10th Respondents.
 3. The facts giving rise to the petition were expressed in paragraphs 7 to 15 of the Petition, and are summarised as here follows;
 - i. That the Petitioner is the bonafide owner of NANDI/KAMOBO/258 measuring 3.4 Ha granted to the Petitioner on May 31, 1990.
 - ii. That sometimes in the year 1987, the 4th Respondent's father sued the Petitioner in Eldoret High Court Civil Case No 86/1987 claiming ownership of the land Nandi/Kamobo/258, which case was determined in Petitioner's favour and the 4th Respondent's father who is now deceased namely Meshack Mbelesi, was ordered to vacate.
 - iii. The judgment of the Eldoret High Court Civil Case No 86 of 19987 was upheld by the Court of Appeal.
 - iv. That he discovered in 2016, that the parcel NANDI/KAMOBO/258 had been subdivided into 13 portions namely Nandi/Kamobo 3871, 3872, 4188, 4189, 4190, 4510, 4511, 5830, 5831, 5832, 6781 and 6782.
 - v. That he reported the 4th Respondent to the police where he charged in Kapsabet SPMCR 2074/2016 for the offence of obtaining registration by false pretence which he was convicted and sentenced to pay a fine of kshs 100,000 and 12 months imprisonment; and he discovered that the 4th Respondent had filed a land dispute tribunal which tribunal purported to award him 3 ½ acres though the 4th Respondent took the whole property, the decision was awarded by the 2nd Respondent.
 - vi. The Petitioner was never aware of the Lands Dispute Tribunal case No 17 of 2000 he was never served with the pleadings nor informed of the existence of the same by the 4th Respondent.
 4. The foundation of the petition is on Article 2, Article 21 (ii) Articles 47 and 73 of the Constitution Article 40, Section 3 (1) of the Repealed Lands Dispute Tribunal Act No 18 of 1990.
 5. The 4th Respondent against whom the gravaman of the Petition was directed entered appearance and filed a Replying Affidavit through the firm of Kipkosgei Choge Advocates. In his reply the 4th Respondent stated that;
 - i. The petition is an abuse of the Court process – in that there have been proceedings before the High Court, Court of Appeal.
 - ii. There have been proceedings too before the lands Disputes Tribunal.Proceedings before the Magistrates Court in respect of the adoption and enforcement of the award by the Land Disputes Tribunal.The petition is thus *resjudicata* as the same deals with ownership of Nandi/ Kamobo/258.



- iii. That due process was followed in moving the Lands Disputes Tribunal, Adoption of the award and its enforcement.
 - iv. That the judgment of the Court of Appeal was not enforced. The Petitioner failed to evict the deceased Meshack Mbelesia. That the title deed by the Petitioner was cancelled by the 3rd Respondent on November 17, 2000, vide Gazette. Notice number 7395, and the Gazettement was never reviewed, set aside, varied or appealed against.
 - v. That the Petitioner has in fact sold a share of what become Nandi/Kamobo/2071 after execution of the decree in the LDT case to Simon Ongayo parcel number Nandi/Kamobo/4511 vide a LCB consent dated December 14, 2006.
 - vi. That the Petitioner's son Eric Lilyagaho Shivulu sold a portion to Caleb Mhindi. (1/1) that the Petitioner sold Nandi/Kamobo/387 to other persons who are in occupation and possession and are users.
 - vii. The 4th Respondents admits that having sold several portions out of Nandi/Kamobo/3872, hired out of Nandi/Kamobo/3872, hived out of Nandi/Kamobo 258, pursuant to the decree and the resultant parcels are known as 4188/4189, 4190 and 4191, as well as 5829, 5839, 5831 and 5832 out of Nandi/Kamobo 4188 pursuant to the decree made from the Land Dispute Tribunal.
 - viii. That the Petitioner had filed Eldoret High Court Civil Suit No 40 of 2006 to set aside the proceedings of the Land Dispute Tribunal that had been adopted, but the suit was dismissed.
 - ix. That it is more than 22 years ago since the L D T proceedings took place that he equally had rights that crystallised when the Decree was executed.
 - x. The petition is an abuse of the Court process and contrary to the Article 159 that requires justice to be administered without delay.
 - xi. The 4th Respondent further sought for dismissal of the petition as it related to Kitale Land Case No 614/2000.
 - xii. That there was a misstep in his pursuit of legal redress and owing to that, the Petitioner/Applicant may have to live with the consequences. He did not appeal against the award of the Land Disputes Tribunal, the prosecution of the declaratory suit and/or those before the High Court and the Court of Appeal.
6. The 6th, 7th, 8th Respondents, equally responded to the petition and filed individual replying affidavits but similarly worded all claiming to be innocent purchasers for value having purchased from David Mbelesia Asega the 4th Respondent herein.
 7. The 6th Respondent Laban Shitamcasi Kwatemala deponed having purchased 0.04 Ha known as Nandi/Kamobo/4109 in 2002 and a title issued on April 4, 2004. That a purchaser for value with no notice of the defect, he relied on Section 26 (i) of the [Land Registration Act](#) and sought protection of his title.
 8. The 7th Respondent, Seth Khayumbi, stated that he had purchased 0.0228 from one Eliakim Ejuluto although the property was registered in the name of the 4th Respondent, David Mbelesia Asega. He claimed that he is a purchaser for value with no notice of the Defect and relied on Section 26 (1) of the [Land Registration Act](#) to seek protection of his title.



9. George Imbugwa, the 8th Respondent indicated that he was a son of Joseph Luvanda Chalenga, who had purchased Nandi/Kamobo/5832 from Alfred Achevi. He claimed that he is a purchaser for value with no notice of the defect and placed reliance on Section 26 (1) of the [Land Registration Act](#) to claim protection of his title.
10. Goerge Imbugwa equally claimed Nandi/Kamobo/6782 on behalf of his father the late Joseph Luvanda Chalenga, having purchased the same from the 4th Respondent. He claimed being a purchaser for value without Notice, and claimed protection of Section 26 (1) of the [Land Registration Act](#) for protection of his property.
11. The 9th Respondent Thomas Ihayesa Matoke did not file a response in the matter; as did the 5th Respondent Abraham Simiyu Misiko.
12. The Honourable Attorney General's Office entered appearance for the 1st, 2nd, 3rd and 4th Respondents, and Miss Tigoi Learned State Counsel, whose brief Mr Letting learned State Counsel held on June 7, 2022, indicated to the Court that she was not opposed to the petition, hence did not file any Responses and submissions.
13. Parties were directed to file written submissions on the petition. The Petitioner did not file a further affidavit in response to the Replying Affidavits filed by the 4th, 6th, 7th and 8th Respondents. As noted above the 5th and 9th Respondents did not file any responses to the petition, while the 1st, 2nd, 3rd and 10th Respondents were not opposed to the petition.
14. Thus the submissions filed were by the Petitioner and the 4th, 6th, 7th, 8th Respondents, although the 9th Respondents was named in the submissions filed by Mr Kipkosgei Choge.
15. In his submissions the Petitioner has identified two issues for determination.
 - i. Whether the Kapsabet Land Dispute Tribunal had jurisdiction to determine the dispute at hand
 - ii. Whether the issue brought before the Kapsabet Land Dispute was *resjudicata* as having been determined to its conclusion by the High Court of Eldoret and the Court of Appeal at Kisumu.
16. The 4th, 6th, 7th, 8th and 9th Respondents, in their submissions, have identified the following as issues for determination;
 1. *Res judicata*
 2. Estoppel
 3. Doctrine of laches
 4. Doctrine of limitation of time in constitutional petitions
 5. Jurisdiction of the Land Dispute Tribunal
17. I have perused, the petition, the supporting affidavit, the replying affidavits and the submissions and the authorities filed by the parties and I frame the issues for determinations as follows;
 - i. Whether the issues before the Kapsabet Land Dispute Tribunal were *resjudicata*.
 - ii. Whether the Kapsabet Land Dispute Tribunal had jurisdiction to determine the issues before it
 - iii. Whether the doctrine of limitation applies in Constitutional petitions; vis a vis doctrine of laches.



- iv. Whether the Petitioner's rights were infringed, and whether the Petitioner has proved his case on the required standards.
- v. What reliefs ought to be issued?

PETITIONERS SUBMISSIONS:-

18. The Plaintiff submits that the Kapsabet Lands Dispute Tribunal acted *ultra vires* since the tribunal lacked jurisdiction to determine issue of ownership, hence the dispute before the Kapsabet Land Dispute Tribunal was a nullity, since the same had dispute had been determined by the High Court in Eldoret case no 86 of 1987 and settled in the Court of Appeal in Kisumu Case No 117 of 1994, hence Kapsabet Lands Dispute Tribunal decision was *res judicata*.
19. To buttress this point, reliance is placed on Section 7 of the *Civil Procedure Act* as well as the decision in the case of *Independent Election and Boundaries Commissions vs Maina Kiai and 5 others* (2017) eKLR.
20. On the second issue of the tribunal lacking jurisdiction, the Petitioner has cited the decision in the case of *M'Marete Vs Republic*, Court of Appeal Civil Appeal 259/2000 (2004) eKLR where the Appellate Court held *inter alia*,

“In our view, the dispute before the Tribunal did not relate to boundaries, a claim to occupy or work on the land, but a claim of ownership, taking into account the provisions of Section 3 of the Act, and what was before the tribunal, and we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of Land registered under the Registered Land Act to the Appellant. In our view, the Tribunal acted in excess of its jurisdiction.”
21. The Petitioner further have cited the decision in the case of *Masagu Ole Naumo vs Principal Magistrate Kajiado Law Courts and Another* High Court JR 370/2013 (2014) eKLR, where the Court stated

“in my view, the view that the tribunal had no powers to deal with registered land is incorrect. What the tribunal was prohibited from undertaking is a determination with respect to title to land.”
22. As noted earlier in the judgment, the 1st, 2nd, 3rd and 10th Respondents, represented by the Attorney General's chamber, did not respond to the petition as they are not opposed to the same. Consequently they did not file submissions.
23. With respect to the 5th Respondent, he did not enter appearance, file a Response nor file submissions.

The 4th, 6th, 7th, 8th and 9th respondents submissions: -

24. Although the 9th Respondent did not file response to the Petition, he filed submissions jointly with the 4th, 6th, 7th and 8th Respondents through Mr Choge their Counsel.
25. In their submissions the Respondents submit that they are strangers to the Petition filed by John Wamalwa Wamei in relation to Kitale Lands Case No 614 of 2000.
26. On *res judicata* the Respondents submits that the issues raised herein were similar to the issues raised in Eldoret High Court Civil suit No 40 of 2006.



27. In this regard the Respondents submit that the Petition is resjudicata as the issues raised were also raised in Eldoret High Court Civil case No. 40 of 2006. In support of this submissions the Respondent place reliance on Section 7 of the [Civil Procedure Act](#) as well as the decision in the case of *Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others* (2017) eKLR. They have also placed reliance on the reliance in the case of *Suleiman Said Shababal vs Independent Electoral and Boundaries Commission and 3 others*.
28. They further submit placing reliance in the decision in *Peter Ngume vs Plantex Company Limited 1983* (eKLR), where the said Court held interalia “a dismissal is a judgment for the Defendant against the Plaintiff.....” and urge the Court to find that since Eldoret High Court Civil Case No 40 of 2006 was dismissed. The dismissal was thus a judgment and hence the Petition as framed, even with the addition of new parties is resjudicata; and that the Court cannot sit to reopen issues that have been heard and determined with finality by a Court of competent jurisdiction.
29. On Estoppel, the Respondents submit relying on *Trade Bank Limited versus L.Z Engineering Construction Limited* 2001 ira 266.
30. Under this head of submissions, the Respondents submit that parties cannot litigate in instalments and addition of new parties cannot escape the fate of the *resjudicata* and Estoppel.
31. The Respondent submit that by opening issues that had been heard and determined the present Petitioner is subjecting the 1st Respondent to double jeopardy and condemning him which actions amount to an infringement of the his right to access justice as guaranteed under Article 48 of the [Constitution](#) and right to fair hearing as guaranteed under Article 50 of the [Constitution](#).
32. With regard to issue of Limitation of Time in Constitutional Petitions; alleging violations of fundamental right and freedoms, the Respondents place reliance in the High Court Petition No. 306 of 2012 *Ocheing Keneth Oguto vs Kenyatta University and 2 others* where a petition was dismissed and it was found to have been filed after an inordinate delay.
33. The Respondents urge the Court to find that there was an untimely delay and dismiss the matter, since the actions of Kapsabet LDT Case No. 17/2000 and the petition was filed some 21 years later; and that there is no explanation has been offered.
34. The Respondent submit that the Petitioner is guilty of laches, and have placed reliance in the decision in *Edward Akong’o Oyugi and 2 others vs Attorney General* (2019) eKLR. Where the Court stated *interalia*

“to invoke laches the delay by the opposing party in initiating the lawsuit must be unreasonable and the unreasonable delay must prejudice the Defendant becoming lost or degraded, witnesses favourable to the Defendant, dying or losing their memories, the Defendant making economic decisions that it would not have done, had the law suit been filed earlier.”
35. The Respondent submit that the duty of the Magistrate’s Court at Kapsabet was to adopt the decision of the Land Dispute Tribunal, and thereafter an aggrieved party was either to appeal or file Judicial Review proceedings. In this regard the Respondent has place reliance on the decision of *Florence Nyaboke Machani vs Mogere Amosi Ombuni & 2 Others*; as well as *Paul Muraya Kaguni vs Simon Mbaria Muchunu*.
36. On the strength of the above submissions as a whole, the 4th, 6th, 8th and 9th Respondents have urged this Court to dismiss the petition.



Analysis and determination:-

37. The Court has been called upon to determine a petition alleging violations of fundamental rights of the Petitioner.
38. At paragraph 17 of this judgment the Court framed 6 issues for determination; the Petitioner having framed 2 issues as summarised at paragraph 15 and the 4th, 6th, 7th, 8th and 9th Respondents having framed 5 issues as summed up at paragraph 16 above.
39. The Court now answers the issues it had framed for determination based on the affidavits as well as the rival submissions and authorities filed by the parties.
40. Issue number No 1, where the issues before Kapsabet Lands Dispute Tribunal were *resjudicata*, and whether the petition is *res judicata*.
41. On this issue, it is the Petitioner's position that the issues raised before the Kapsabet Lands Dispute Tribunal were *resjudicata*, as the issue of ownership of Nandi/Kamobo/258 as it then was, were heard and determined in Eldoret High Court Civil Case No 861/1987, and the decision was upheld by the Court of Appeal case No. 117/1994.
42. In response the Respondent submitted that the current petition is *resjudicata* as there was Eldoret HCC No 40/2006 which sought similar reliefs and that the matter was dismissed and that a dismissal is nonetheless a judgment for the Defendant against the Plaintiff.
43. The leading decision on the issue of *res judicata*, is the recent Supreme Court decision in the case of [John Maritime Florence vs Cabinet Secretary for Transport and Infrastructure and 3 others](#) (2021) eKLR.
44. In that decision, the elements for a case to be declared *resjudicata* were held to be as follows,
 - a. There is a former judgment or order which is final
 - b. The judgment or order was on merit
 - c. The judgment or order was rendered by a Court having jurisdiction over the subject matter or the parties and
 - d. There must be between the first and second action identical parties, subject matter and cause of action."
45. The above elements as stated in the John Florence Maritime Florence case mirror what is set out in Section 7 of the [Civil Procedure Act](#) and what was stated by the Court of Appeal decision in the case of Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others (2017) eKLR cited by the Respondent. In that case the Appellate Court stated as follows:-
 - 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 same title
 - d. The issue was heard and finally determined in the former suit.
 - e. The Court that heard and finally determined the issue was competent to try the subsequent suit in which the issue is raised.”
46. Applying the above elements to the Land Dispute Tribunal and to this petition, the inevitable conclusion is thus, the issue of ownership of Nandi/Kamobo/258 having been heard and determined in Eldoret High Court Civil Case No 86 of 1987 which decision was upheld by Court of Appeal in case No 117/1994 Kisumu the issue of ownership could not be opened by the 4th Respondent before the tribunal. Thus the issues before the Kapsabet Lands Dispute Tribunal were clearly *resjudicata*.
 47. This petition has been submitted by the Respondents to be *resjudicata*, as similar issues were raised in Eldoret High Court case No 40 of 2006, which case was dismissed and the dismissal is thus a judgment for a Defendant against a Plaintiff as was submitted by the Respondents.
 48. In both the Supreme Court decision in John Florence Maritime and the Court of Appeal Decision, in Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others; there is an element that the suit must have been heard and determined on merit. Eldoret High Court Civil Case No 40/2006, was dismissed for want of prosecution as stated in paragraph 18 of the 4th Respondent Affidavit.
 49. Consequently Eldoret HCC No 40/2006 was not heard and determined on its merits, hence this Petition is not *resjudicata*. The Court however notes that the issue of ownership was settled in Eldoret High Court Case No 86/1987 and affirmed by the Court of Appeal Kisumu 117/1994 and the issue of ownership of Nandi/Kamobo/258 shall not be re-opened in this petition.
 50. Thus in answer to issue number 1 Court finds that the dispute before the Kapsabet Lands Dispute Tribunal in so far as it related to ownership of Nandi/Kamobo/258 was clearly *resjudicata*.
 51. The Court further finds this petition not *res judicata*, as Eldoret High Court case No. 40/2006 was not heard and finally determined but was dismissed for want of prosecution, but further finds that the issue of ownership of Nandi/Kamobo/258 was settled in Eldoret High Court No. 86/1987 and the Court of Appeal Case in Kisumu 117/1994, and this Court shall not open the issue of ownership.
 52. On the second issue of the jurisdiction of the Land Dispute Tribunal, the Petitioner submits that the Kapsabet Lands Dispute Tribunal did not have jurisdiction to determine ownership of Nandi/Kamobo/258.
 53. In support of this Limb of submissions the Petitioner has cited the decision in the case of *Masagu Ole Naumo vs Principal Magistrate Kajiado Law Courts and Another* High Court JR 370/2013, where the Court observed “In my view, the view that the tribunal had no powers to deal with registered land is incorrect what the tribunal was prohibited from undertaking is a determination with respect to title to land.”
 54. The Petitioner has also cited, the Court of Appeal decision in *M'Marete vs Republic* – Civil Appeal 259/2000 (2004) eKLR – where the Appellate Court held *inter alia* “in our view, the dispute before the Tribunal did not relate to boundaries a claim to occupy or work on the land, but a claim of ownership, taking into account the provisions of Section 3 of the Act and what before the tribunal, and we are of the view that the tribunal went beyond its jurisdiction when it purported to award parcels of land registered under the registered Land Act to the appellant. In our view the tribunal acted in excess of its jurisdiction.



55. On jurisdiction of Kapsabet LDT, the Respondents submit that the Magistrate’s Court was under a duty to adopt the decision of the Lands Dispute Tribunal. The Respondents submission are silent on the issue whether the Land Dispute Tribunal, but they have submit on the Magistrates Court adopting the award of the Land Dispute Tribunal.
56. The Magistrate’s Court indeed had a duty to adopt the award of the Lands Dispute Tribunal; as was the case of *Florence Nyaboke Machani vs Mogere Ombwi and 2 others* and in *Paul Muraya Kaguri vs Simon Mbaria Machunu*.
57. The Court has found that the issue before the land dispute Tribunal was an issue of ownership of Nandi/Kamobo/258 which it has found was *resjudicata*, but in relation to jurisdiction to deal with an issue of ownership, as was before the Tribunal, this Court agrees with the Petitioner with regard to the issue that the Tribunal could not deal with an issue of ownership under Section 3 of the Act, as was held in the case of *Masagu Ole Naumo vs Principal Magistrate Kajiado Law Courts* as well as the Court of Appeal in *M’mere vs Republic* Civil Appeal 259 of 2000 (2004) eKLR. Where the Court was of the view that the jurisdiction of the Tribunal was not deal with title and/or ownership to land.
58. From the foregoing, it is apparent that the Kapsabet Land dispute Tribunal could not deal with an issue involving ownership of Nandi/Kamobo/258, firstly because it was *resjudicata* and secondly because the tribunal could not deal with issues pertaining to title to Land/Ownership to the property.
59. Consequently the Kapsabet Lands Dispute Tribunal acted *ultravires* and their decision is thus null and void, *abintio*.
60. On issue number 3 on limitation of time in Constitutional litigation, the Petitioner submissions were silent on this, the Respondent has submitted that they are no timeline on constitutional petitions but any delays must be explained. In support of this limb of submissions the Respondent has cited the decision in High Court petition No. 306 of 2012, Kenneth K’ogutu vs Kenyatta University and 2 Others as well as the decision in Abraham Kaisha Kanzika and Another vs Cnetral Bank of Kenya.
61. In the above cases, both petitions failed because they had filed more than 10 years after the alleged, infringement of rights had occurred. In the present petition, the Respondents submits that the actions complained of occurred more than 21 years before the filing of the present petition and that the delay herein has not been explained.
62. The position with regard to Limitation of Time in Constitutional Petition was recently restated by the Court of Appeal in the case of *Chief Land Registrar and 4 Others vs Nathaniel Tirop Koech and 4 others* (2018) eKLR, where the Court held as follows;

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitution petition, we find the ground that the trial judge, erred in failing to dismiss the petition on account of delay acquiescence and laches has no merit. Unless expressly stated in the *constitution*, the period of Limitation in the Limitation of Actions do not apply to violation of rights and freedom guaranteed in the *Constitution*.... In our view, subject to the Limitations of Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions, Act. However, each case is to be decided on its merits...”



63. The Court of Appeal took the same view in the case of *James Kanyita Nderitu vs Attorney General and Another* (2019) eKLR where the Court held that
- “in our view, subject to the Limitations in and freedoms cannot be tied to the shackles of *Limitation of Actions Act*. However, each case is to be decided on its own merits and a caveat need to be stated.....”
64. In the present petition, the Petitioner states that he learnt of Subdivision in 2016, however nothing can be further from the truth, since in the Replying Affidavit of the 4th Respondent the Petitioner had filed Eldoret High Court Civil – Suit No 40 of 2006, so he became aware of the subdivisions in 2006.
65. The Petitioner filed a criminal complaint with the police and the 4th Respondent was charged with obtaining Lands Registration by false pretences contrary to Section 320 of the *Penal Code*; and perjury contrary to Section 108 (1) (a) of the *penal code*.
66. The 4th Respondent was convicted of the second count of perjury in that he gave false testimony before Land Tribunal in the case No. 17/2000; this conviction was made on 5th November 2019.
67. Was the Petitioner guilty of laches I think not, he reported to the police and a criminal trial took place leading to conviction of the 4th Respondent on 5th November 2019 and the Petition filed in 2021? I believe that thus the 2 year period was not inordinate delay, as from the copies of register the properties did not change hands then.
68. The 6th, 7th and 8th Respondents have stated in their Respective replies, that their titles ought to be protected as they are innocent purchasers for value; without Notice. The Petitioner did not file any further affidavit, and the 6th, 7th and 8th Respondents, depositions are thus unchallenged.
69. On the issue of innocent purchaser for value, the case of *Arthi Highway Developers vs West- End Butchery and 6 others* (2015 eKLR), gave a qualification to the doctrine. At paragraphs 66 – 68 the Appellate judges, discussed the doctrine as not to apply to legal rights as opposed to equitable rights. They learned judges observed that “the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights as distinct from equitable rights.”
70. In the totality of the evidence adduced herein the Court has already found that the LDT lacked jurisdiction to deal with issue of ownership, and that it dealt with issues that were resjudicata, the criminal court also found the 4th Respondent guilty of perjury in the LDT proceedings, it follows therefore that process leading to the registration of the property in the name of the 4th Respondent was illegal, null and void abintio and the protection under section 26 (1) of the *Land Registration Act* does not extend to title procured illegally. As observed in the *Arthi Highway Developers vs West End Butchery*; the doctrine of a purchaser without Notice never enabled a purchaser to take free from legal rights as distinct from equitable rights. The Court finds that the titles that emanated from an illegal process not capable of being protected by the law.
71. The Respondent has submitted that the Petitioner is described as John Wamalwa Wamae, although the title of the matter refers the Petitioner as Nathan Shivulu Mbersesia, this looks like two different persons. The documentation, affidavits and annexure however all refer to Nathan Shivulu Mbersesia hence there is no doubt that the Petitioner is Nathan Shivulu Mbersesia and the mix up in the names is a mere misdescription of the parties which does not confuse the Respondents, who have replied to the petition as well as the Court and is thus curable under the provisions of Article 159 (1) of the *Constitution*.



72. On issue No 5, has the Petitioner proved his petition; and has the petition met the threshold, the Petitioner has described the alleged infringements of his fundamental rights, and has proved that the Lands Dispute Tribunal lacked jurisdiction to deal with an issue of ownership, and that the 4th Respondent was guilty of perjury in the proceedings before the Land Dispute Tribunal and that the issues of the Land Dispute Tribunal were *resjudicata*, hence the protection of the right to property was this infringed as a result; and having not been heard, the right to fair administrative action was equally infringed.
73. The 4th Respondent in his replying affidavit, deponed that Nandi/Kamobo/3871 is not vacant as the Petitioner did sold portions of it after the judgment of the Court of Appeal and that his son Eric Shivulu sold a portion to Caleb Mlindi, in which the Petitioner was aware. The Petitioner did not respond to this by way of a further affidavit. The green card in respect of Nandi/Kamobo/3871 does not reveal that the 4th Respondent was ever registered as a proprietor prior to the subdivisions and mutations.
74. In respect of Nandi/Kamobo/3871 and its subsequent subdivisions, the Court is not convinced that the 4th Respondent acquired any proprietary Interest therein, but from the copy of the green card only the Petitioner was previously registered hence the Petitioner claim with regard to Nandi/Kamobo/3871 and its subsequent subdivisions is not proved and it fails entirely.
75. With regard to Nandi/Kamobo/3872 and its subsequent subdivisions to wit 4188, 4189, 4190 and 4191. There is prove that the 4th Respondent was registered as a proprietor as a result of the illegal LDT process as the Court has found, and the Petitioner has proved his claim on this parcels number Nandi/Kamobo/4188 was later subdivided to 5829 to 5832, while subdivision 4191 was subdivided to 6781 and 6782, which were all at one time owned by the 4th Respondent, as a result of the decree in LDT found to have been a nullity and the 4th Respondent has admitted having sold the same in paragraph 17 of the Replying Affidavit, the Court finds that the Petitioner has proven his case on the above titles.
76. The above subdivisions having been made pursuant to a process that the Court has found to have been a nullity as the decree used to procure ownership to 4th Respondent has been found to have been a nullity due to the fact that;
- i. The LDT did not have jurisdiction, to determine ownership
 - ii. Issued before the LDT were *resjudicata*
 - iii. The 4th Respondent having been convicted of perjury in the LDT proceedings.
77. The Court guided by the decision of the Court in the case of [Edward Ndungu Wambui vs Francis Kanyanjua Mwangi](#) (2021) KECA 144, which observed at paragraph 60, that “our take on the Appellants above complaint as supported by the 3rd Respondent is that the legal position is as was properly comprehended and appreciated by the Judge that once the High Court proceedings were declared a nullity, no sanction able benefits could flow there from. We therefore affirm the Judge’s position that the Appellant’s title was tainted with nullity.”
78. The inescapable conclusion is that once the LDT process has been found to be a nullity the titles that were as a result of subdivisions 3872 are all a nullity.



Disposition:-

79. The Petitioner has proved infringement of his proprietary rights with regard to Nandi/Kamobo/3872 and the following subdivisions, Nandi/Kamobo/4188, 4189, 4190, 4191, 5829, 5830, 5831 and 5832, but the claim against Nandi/Kamobo/3871 has not been proved.
80. An order therefore issues to the 3rd Respondent to rectify the register of Nandi/Kamobo 4188, 4189, 4190, 5829, 5830, 5831, 5832, 6781 and 6782 and register the Petitioner Nathan Shivulu Mberseisa as the proprietor thereof.
81. An order of certiorari hereby issues quashing the decision of the 1st Respondent Kapsabet Lands Dispute Tribunal delivered on February 17, 2000 as the same was a nullity.
82. Each party to the petition shall bear its own costs.

Judgement accordingly.

DATED AT KAPSABET THIS 9TH NOVEMBER, 2022.

Hon M N Mwanyale,

JUDGE

In the presence of;

- 1. Mr Choge for the 4th, 6th, 7th, 8th and 9th Respondents**
- 2. NNo appearance for the Petitioner**
- 3. No appearance of the Attorney General.**

