



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC PETITION No. E1 OF 2020**

**BETWEEN**

**PATRICK KARANJA MWAHUKI.....1<sup>ST</sup> PETITIONER**

**JOHN KIMANI KAMAU.....2<sup>ND</sup> PETITIONER**

**PETER NGAHU MARA.....3<sup>RD</sup> PETITIONER**

**AND**

**H.E GOVERNOR LEE KINYANJUI.....1<sup>ST</sup> RESPONDENT**

**AD HOC COMMITTEE ON NG'ATI FARM CONFLICTS**

**ALTERNATIVE DISPUTE RESOLUTION.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAKURU.....3<sup>RD</sup> RESPONDENT**

**NGATI FARMERS COOPERATIVE SOCIETY.....INTERESTED PARTY**

**JUDGMENT**

1. In the petition dated 2<sup>nd</sup> October 2020, the petitioners herein describe themselves as farmers who are residents of Ng'ati Farm in Naivasha Sub County of Nakuru County. They bring the petition against the 1<sup>st</sup> respondent who is the Governor of the County Government of Nakuru elected under **Article 180** of the **Constitution of Kenya, 2010**. They describe the 2<sup>nd</sup> respondent as an Ad Hoc committee appointed by the 1<sup>st</sup> respondent on 31<sup>st</sup> October 2018 pursuant to **Article 159 (2) (c)** of the **Constitution of Kenya, 2010** in respect of Ng'ati Farm and the 3<sup>rd</sup> respondent as a County Government established under **Article 176 (1)** of the **Constitution of Kenya, 2010**.

2. It is averred in the petition that the petitioners are members/shareholders of Ng'ati Farmers Cooperative Society Limited which is a land buying cooperative society registered in 1964 under the Cooperative Societies Act Cap 490, Laws of Kenya with its key objective being to buy land and settle its members and that as members/shareholders of the said society, title deeds in respect of the parcels of land known as Maela/ Ndabibi Block 5/827 & 2666, Maela/ Ndabibi Block 5/969 & 969 & 1686 and Maela/ Ndabibi Block 5/1212 & 2748 were issued to the 1<sup>st</sup> petitioner, 2<sup>nd</sup> petitioner and 3<sup>rd</sup> petitioner respectively. That on 31<sup>st</sup> October 2018, the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent committee citing long standing dispute that affected the security and socio-economic lives of Ng'ati members.

3. That further the said committee forwarded its report to the 1st respondent on 5<sup>th</sup> February 2020 which was read to the society members on 23<sup>rd</sup> September 2020. That recommendations in the said report have far reaching consequences which include; revocation of all subdivision schemes and cancellation of titles, the petitioners' arrest and prosecution among others and seizure of properties by various government agencies. That the recommendations in the report were arrived at contrary to the principles of natural justice, that recommendations are an infringement of their right to private property, that the 1<sup>st</sup> respondent had no powers to appoint the 2<sup>nd</sup> respondent thereby rendering the report null and void and that the 2<sup>nd</sup> respondent had no powers to deal with a land dispute.

4. The Petitioners therefore prayed for judgement as follows:

*a. A declaration that the appointment of 2<sup>nd</sup> respondent committee by the 1<sup>st</sup> respondent and the resultant report on Ng'ati Farmers Cooperative Society Ltd dated 5<sup>th</sup> February 2020 and released on 23<sup>rd</sup> September 2020 is unconstitutional, null and void.*

b. An order of certiorari do issue to remove by this court and quash the 2<sup>nd</sup> respondent's report on Ng'ati Farmers Cooperative Society Ltd dated 5<sup>th</sup> September 2020 and released on 23<sup>rd</sup> September 2020.

c. Costs of this petition plus interest thereon at court's rate.

5. The petition is supported by a supporting affidavit and a supplementary affidavit sworn by Patrick Karanja Mwahuki, the 1<sup>st</sup> petitioner. In the supporting affidavit, he deposed that he and his co-petitioners are members/shareholders of Ng'ati Farmers Cooperative Society Limited and that they and other members/stakeholders of the said society are affected by the recommendation of the 2<sup>nd</sup> respondent since they were not given an opportunity of being heard before the far-reaching decisions were arrived at to the contrary to the principles of natural justice. He also added that the revocation of all subdivision schemes and titles issued to members/stakeholders of the said society was arrived at without following due process and is an outright infringement of their right to private property and it ought to be reversed. He deposed further that they were challenging the legality of appointment of the 2<sup>nd</sup> respondent committee for having been done unlawfully or in excess of powers conferred upon the 1<sup>st</sup> respondent under the Constitution of Kenya thus rendering the impugned report invalid, null and void. That the summary recommendations made by the 2<sup>nd</sup> respondent for confiscation of their properties and our prosecution was arrived at without serving them with any notice or granting them an opportunity to defend themselves thereby making the said recommendation unconstitutional, null and void.

6. The respondents filed a replying affidavit sworn by Francis Mwangi Njuguna, the County Executive Committee Member for Land Housing and Physical Planning of the 3<sup>rd</sup> respondent. He deposed that Ng'ati Farmers' Co-operative Society located in Maela Ward, Naivasha Sub-county has for the past three decades been faced with various disputes concerning the division of the land among its members and the members of Ng'ati Cooperative Society petitioned the 1<sup>st</sup> respondent to intervene and come up with a solution that would enable the *bona fide* members of the society to get the value of their shares. He deposed further that the 1<sup>st</sup> respondent in exercising his powers as may be necessary for the execution of the duties of governor, in observing the county's constitutional mandate to regulate and oversee the development of cooperative societies and further in the spirit of embracing alternative dispute resolution mechanism, the 1<sup>st</sup> respondent on 12<sup>th</sup> October, 2018 appointed an Ad Hoc Committee with specific Terms of Reference (TOR) in the appointment letters. He added that the Ad Hoc Committee embarked on its mandate and held a total of thirty-one sittings whereby it received oral and written submissions from various stakeholders including the petitioners herein and it evaluated the evidence submitted before it and that a public notice was published in the Nation newspaper on 6<sup>th</sup> January 2019 inviting all stakeholders to submit their memoranda on the Ng'ati Farm dispute.

7. He deposed further that as part of the key stakeholders, the Committee had identified the former and current members of the management committee of Ng'ati Farmers Cooperative Society to appear before it to tender evidence on 16<sup>th</sup> January 2019. That the petitioners on the material day appeared as expected and requested for time to avail more documents. He added that the petitioners appeared again before the Ad Hoc Committee on 1<sup>st</sup> February 2019 and 24<sup>th</sup> February 2019 and that a picture of the petitioners appearing before the 2<sup>nd</sup> respondent can be seen at page 37 of the report. He further deposed that while indeed the society was incorporated for the purpose of purchasing land for its 581 members, the petitioners being in position of leadership failed to properly subdivide the land and ensure that all the members received their share as balloted for and that the petitioners managed to successfully undertake their first land subdivision (Phase 1) whereby 3,896 acres were subdivided. Each of the 581 members balloted and took possession of their 5.5 acres and a commercial plot measuring 50x100 feet except for 172 members who did not get their commercial plots so they agreed that the said members would get their commercial plots in the next subdivision after balloting, Ng'ati members disputed the subdivision because the petitioners herein had allocated themselves land in prime areas in some cases allocated themselves huge chunks of land beyond their shareholding; some members were allocated land in non-arable areas; the ballots were inflated beyond the 581 members in some instances citing some government officers as beneficiaries, Ng'ati members protested and demanded that subdivision be done afresh but this has not happened to date.

8. He also deposed that public utility lands had not been secured and some had been sold out by the petitioners and that Land Reference No. 8398/2 was sold for KShs 505, 000,000.00 by the former officials of Ngati Society on 19<sup>th</sup> April 2013 to Kenya Electricity Generating Company Limited (Kengen). That the petitioners were managing the said property on behalf of the Society and the same cannot be accounted for properly. He added that at the time of tendering their evidence before the ad hoc committee the petitioners confirmed that the society's accounts had been depleted and they were later charged on 5<sup>th</sup> April 2016 at the Naivasha Law Courts with various criminal offences including conspiracy to defraud and stealing by directors which case the petitioners confirmed was still pending.

9. He concluded by deposing that the recommendation by the 2<sup>nd</sup> respondent that investigations be conducted and assets of the petitioners be recovered was justified and timely and that by the time the 2<sup>nd</sup> respondent was carrying out its mandate, a new management committee was already in office, thus the petition as filed by the petitioners is premature for the following reasons; the 2<sup>nd</sup> respondent carried out its mandate and gave recommendations which can only be done by the requisite authorities after conducting the necessary investigations, it did not raise any constitutional or statutory precepts and no law is alleged to have been violated as to attract the courts discretion as sought and thus it violates the principle of specificity, clarity and precision in pleadings in constitutional litigation.

10. The Interested party filed a replying affidavit sworn by David Mbochi Gathii who described himself as a resident of Ngati Farm. He deposed that the society bought three blocks of land with a total size of 16,708 acres from an Italian settler known as Mr Olomando Roska in 1967 being land reference number Narok/Maiela Estates No, 1380 with 8,248 acres, L.R No. 8398/2 with 3,463 acres and L.R No. 2682 with 5,000 acres. He added that the Society managed to successfully subdivide 3,896 acres through balloting to the 6881 members with each getting 8.6 acres and a commercial plot measuring 80 by 100 feet each, a portion of 4,207 being L.R No. Maiela Ndabibi Block 5/2283. That however, 173 members did not get their commercial plots in the next subdivision. Further, that 4207 acres out of the 18,708 acres of land was acquired through adverse possession by a group of people from Maasai community vide judgement in Nakuru HCC No 89 of 1996 which judgment was upheld on appeal.

11. He deposed further that Phase I of Ngati farm subdivision of LR 1380 (3,213 acres); LR 2662 (1,989) and LR 8398/2 (3,093 acres) all totalling to 8,298 acres was completed in 2011 and Ngati members balloted and each was to get 2.5 acres from LR 2662 commonly known as Mara area; 8.5 acres in LR 8398/2 commonly known as Olkaria; 1.6 acres within LR 1380 commonly known as Ngunvumu area and 1.025

acres within the hilly (Kirima) area for individuals to plant trees. That after balloting, Ngati members disputed the subdivision because the management committee had allocated themselves land in prime areas in some cases allocated themselves huge chunks of land beyond their shareholding. He added that following the disputed subdivision, Ngati Society members sought to elect a new Management Committee but several attempts to hold special general meetings to elect new leaders were thwarted by provincial administration officers on security grounds and that he was personally victimized together with other members of the Interested party when they sought for change of officials. He added that it was during this period that the management committee led by the petitioners in which members had no confidence proceeded to sell the society's land LR 8398/2 to KenGen without the members' involvement, consent or resolution.

12. He further deposed that the petitioners being the management committee made an arbitrary decision to pay each member KShs 415,000.00 instead of the total pay-out of KShs 241,115,000.00 and the balance of KShs 263,885,000.00 was embezzled by the petitioners. He added that Ngati members have continuously been harassed by Kenya Forest Service (KFS) security officers over unclear boundary areas between the Nakuru and Narok counties. That chaos erupted and when the members sought for accountability and as a result the members petitioned the 1<sup>st</sup> respondent and the national government for intervention and thus the establishment of the 2<sup>nd</sup> respondent to help the members of the society to adjudicate over their dispute of almost 20 years and to realize their well-deserved right to access justice in respect of the mismanaged properties of the society.

13. The petitioners filed a supplementary affidavit in which it was deposed that the purported disputes concerning division of land among the society's members is politically instigated by a few people led by one Patrick Munjing'a Kariuki a former member of Nakuru County Assembly for Maiella Ward all who are suspects in Naivasha CMC Criminal Case No. 223 of 2016 wherein they are charged with arson. He added that the same group is using the 1<sup>st</sup> respondent for their political benefit and that 1<sup>st</sup> respondent has not attached any petition by members of the society to address the purported dispute as it alleges. That the process of acquisition of land, subdivision, balloting and issuance of title in respect of the society took place prior to the coming into existence of the 1<sup>st</sup> respondent's office thus could not undo what had already been concluded.

14. He further deposed that the appointment of the 2<sup>nd</sup> respondent was illegal, null and void and that the newspaper notice did not lessen the duty to inform them of the nature of specific allegations levelled against them. That their appearance before the 2<sup>nd</sup> respondent was purely as former officials of the society and no charges or allegations were made against them as individuals to enable them put in a defence and the same extends to the allegations of illegal acquisition of property/title, misappropriation of the society's funds or any other accusation of a similar nature. He added that all the members of the society got their entitlement of land and denied that they allocated to themselves land in prime areas or huge chunks of land beyond their shareholding as alleged. He further denied that the ballots were inflated or that government officers or non- members were allocated land and added that no case was instituted in court or at the cooperative tribunal relating to protested subdivision and balloting exercise in phase 2.

15. He deposed further the sale of land to KenGen was done pursuant to a resolution that has never been challenged in any court of law and that the allegation of the sum KShs 404 million not being properly accounted for is the subject matter in Naivasha CM Criminal Case No. 559 of 2016 and the respondent was not entitled to pursue parallel proceedings. He added that the title documentation process has never been stopped through a court order and all the records have been submitted to the Naivasha Land registry and title issued by the Land Registrar.

16. The petition was canvassed through written submissions. All the parties save for the 2<sup>nd</sup> respondent filed and exchanged submissions. The petitioners started by addressing distribution of functions between the national and county government under **Article 186 (1)** of the **Constitution of Kenya, 2010** under the **fourth schedule** of the **Constitution**. They relied on the case of **County Government of Kiambu & Another vs. Senate 7 Another** [2017] eKLR where the court cited the case of **Judicial Service Commission vs. Speaker of The National Assembly & 8 Others** on separation of powers. They submitted that under the fourth schedule of the Constitution land planning is placed under the national government and that the dispute the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent to investigate concerned the subdivision of Ngati Farmers Cooperative Society land for purpose of allocation to members, therefore the 2<sup>nd</sup> respondent sought to perform judicial function and their recommendations amounted to a judgement which under **Article 159 (1)** is a judicial authority to be exercised by court and tribunals. The petitioners argued that the 2<sup>nd</sup> respondent was appointed to do what the Cooperative Tribunal is established by the national government to do under **section 76** of the **Cooperative Societies Act, Cap 490**.

17. The petitioners argued further that the recommendations of the 2<sup>nd</sup> respondent offend **Article 40** of the Constitution and the said recommendations did not fall within the exception laid down in the said article. They cited the case of **Evelyn College of Design Ltd vs. Director of Children's Department & Another** [2013] eKLR and submitted that the 2<sup>nd</sup> respondent is not a court, impartial tribunal or a body as envisaged under **Article 50 (1)** of the Constitution.

18. The petitioners further argued that they were denied a fair hearing by the 2<sup>nd</sup> respondent during its proceedings by not being notified of the allegations against them or being allowed to be present throughout the proceedings and to cross-examine witnesses. That far-reaching recommendations were made against them which included that the Asset Recovery Agency (ARA) and the Directorate of Criminal Investigations to recover assets allegedly acquired by them and their families. That they were not served with any allegations requiring them to respond to and that the recommendations fly in the face of the right to a fair hearing as contemplated in **Article 50 (1)** of the Constitution. They cited the case of **SM vs. HGE** [2019] eKLR and added that their right to fair administrative action was infringed. They therefore urged the court to allow the petition with costs.

19. The 1<sup>st</sup> and 3<sup>rd</sup> respondents filed their written submissions where they identified the following issues for determination; firstly, whether the appointment of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was valid; secondly, whether the petitioners were accorded an opportunity to be heard; thirdly, whether this honourable court has jurisdiction to determine this matter; fourthly, whether the petition meets the set threshold for a petition; fifthly, whether the orders of certiorari should issue and lastly whether the 1<sup>st</sup> and 3<sup>rd</sup> respondents should be condemned to pay costs. On the first issue, they submitted that **Constitution** and the **County Government Act, 2012** vests the 1<sup>st</sup> respondent with such powers as may be necessary for execution of the duties of the Governor. They referred to **Article 180** of the **Constitution of Kenya, 2010** and **section 31** of the **County Government Act, 2012**. They submitted further that the **Article 159 (2) (c)** of the Constitution recognizes and promotes alternative dispute resolution mechanisms and that under the fourth schedule of the Constitution the 3<sup>rd</sup> respondent has a key role

to play in ensuring that cooperatives within its jurisdiction are run in accordance with the stipulated laws. They submitted that the petitioners had not demonstrated the unconstitutionality of the formation of the Ad Hoc committee and also not shown the extent to which the formation of the 2<sup>nd</sup> respondent is not in consonance with the powers and functions of the governor. They relied on the case of **Third Alliance Kenya & Another v Head of the Public Service – Joseph Kinyua & 2 Others; Martin Kimani & 15 Others (Interested Parties)** [2020] eKLR.

20. On the second issue as to whether the petitioners were accorded an opportunity to be heard, the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted that the petitioners were given ample time to appear before the Ad Hoc committee, present their case and even submit the documents they deemed relevant in assisting the 2<sup>nd</sup> respondent to make informed recommendations. They relied on the following cases; **Republic v National Police Service Commission Exparte Daniel Chacha Chacha** [2016] eKLR, **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009** and **Russel vs. Duke of Norfolk** [1949] 1 ALL ER at 118.

21. On the third issue, whether this court has jurisdiction to determine this matter they argued that this court lacks jurisdiction as the matter is purely an administrative matter and well undertaken by the 1<sup>st</sup> respondent and that the court should abide by principles of separation of powers. They relied on the following cases; **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** [2013] eKLR and **Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR.**

22. On the fourth issue as to whether the petition meets the set threshold for a petition, they asserted that for this to be a petition the petitioners should have raised their grounds on constitutional issues that the respondents have in one way or another infringed. That the petitioners did not show how their rights have been infringed by the respondents. The case of **Anarita Karimi Njeru vs. The Republic (1976-1980) KLR 1272** is cited in support of those contentions.

23. The Interested Party also filed its submissions where they addressed the following issues: firstly, whether the appointment of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was valid; secondly, whether the petitioners were accorded an opportunity to be heard and lastly, what orders should issue in respect of the petition. On the first issue it submitted that the long-standing disputes amongst its members have raked terror in the past three decades and the same revolved around mismanagement of the affairs of the cooperative by the management committee led by the petitioners. It submitted further that it was at its invitation that the 1<sup>st</sup> respondent established the 2<sup>nd</sup> respondent herein to help its members adjudicate over their disputes. It argued further that **Article 159 2 (c)** of the Constitution recognizes and promotes alternative dispute resolution mechanisms and therefore the 1<sup>st</sup> respondent in exercising powers conferred on him by the law constituted the 2<sup>nd</sup> respondent to amicably resolve the longstanding disputes. They referred to the case of **Thirdway Alliance Kenya & Another v Head of Public Service –Joseph Kinyua & 2 Others; Martin Kimani & 15 Others (Interested Parties)** (supra).

24. On the second issue on whether the petitioners were accorded an opportunity to be heard, it submitted that the petitioners were given ample time to appear before the 2<sup>nd</sup> respondent, present their case and even submit the documents their deemed relevant. That all stakeholders were duly notified on print and audio media concerning the committee and the petitioners consequently chose voluntarily to appear before the 2<sup>nd</sup> respondent and that they cannot therefore claim that they were never given an opportunity to be heard. They referred to the case of **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009.**

25. On the third issue on what orders should issue in respect of the petition. They submitted that the court in considering among other reliefs sought by the petitioners that an order of certiorari be issued, it should be concerned with the process leading to the making of the decision. That in considering the said process there are several questions to be raised and the same should be heard by way of judicial review and this court is not entitled to act as a Court of Appeal. It concluded by submitting that the petition is merely an attempt to delay the inevitable and deny its members their right to access justice and that there is real and imminent danger in the delayed resolution of the said disputes.

26. I have considered the petition, the affidavits and submissions. The issues that arise for determination are whether this court has jurisdiction, whether appointment of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was unconstitutional, whether the petitioners were accorded an opportunity to be heard and whether the reliefs sought should issue.

27. The 1<sup>st</sup> and 3<sup>rd</sup> respondents have argued that the petition challenges the exercise of executive prerogative and offends the doctrine of separation of powers by inviting the court to direct the 1<sup>st</sup> and 3<sup>rd</sup> respondents on how to run their affairs. That accordingly, this court lacks jurisdiction. Jurisdiction is the entry point in any litigation. Without it, a court cannot take any further step. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** [1989] eKLR. The Supreme Court reiterated in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** [2012] eKLR thus:

*A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...*

28. As provided for under **Article 162** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011**, this court has jurisdiction in matters to do with the environment and the use and occupation of, and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69** and **70** of the **Constitution**. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. See **Daniel N Mugendi v Kenyatta University & 3 others** [2013] eKLR. To the extent that the petition concerns appointment of the 2<sup>nd</sup> respondent to look into conflicts within a land buying cooperative society and land disputes therein with the attendant allegations of infringement of the right to landed property, the petition falls firmly within this court’s jurisdiction.

29. Was the appointment of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent unconstitutional? The petitioners have argued that the appointment was made pursuant to **Article 159 (1)** of the **Constitution** and that the 1<sup>st</sup> respondent thereby purported to exercise judicial authority. Additionally, that land planning is a function of the national government under the **Fourth Schedule** of the **Constitution** while under

**Section 76** of the **Cooperative Societies Act** disputes within cooperatives shall be referred to the tribunal established under **Section 77** of the said Act. That consequently, by appointing the 2<sup>nd</sup> respondent the 1<sup>st</sup> respondent interfered with functions bestowed on the judiciary and the national government.

30. The 1<sup>st</sup> respondent is a governor in charge of a county government established pursuant to **Article 176** of the **Constitution** and the **County Governments Act, 2012**. He was elected into office pursuant to **Article 180** of the **Constitution** and is in essence the chief executive officer the government of the county in respect of which he was elected. His functions under **Section 30 (2) (a)** of the **County Governments Act, 2012** include diligently executing the functions and exercising the authority provided for in the **Constitution** and legislation. Such functions and authority include devolved functions under **Part 2** of the **Fourth Schedule** of the **Constitution** such as agriculture, trade development and regulation including cooperative societies as well as county planning and development including land survey, mapping, boundaries, fencing and housing. Further, under **Section 30 (3)** of the **County Governments Act, 2012**, he is required to among others promote peace, order, democracy, good governance, unity and cohesion within the county.

31. The petitioners concede that the key objective of Ng'ati Farmers Cooperative Society is to buy land and settle its members and that the society has had long standing disputes concerning distribution of land and proceeds of sale of the land. To the extent that it is a co-operative which deals primarily in land, it follows that such issues as agriculture, trade development, county planning, land survey, mapping, boundaries, fencing and housing revolve around it and the 1<sup>st</sup> respondent cannot be faulted for appointing the 2<sup>nd</sup> respondent to enquire into conflicts within it with a view to finding alternative means of resolving such disputes. While it is true that there is a specific regime for resolution of disputes within cooperatives under **Part XV** of the **Co-operative Societies Act** which provides for referral to the Co-operative Tribunal, the 1<sup>st</sup> respondent did not purport to exercise that jurisdiction.

32. The reference to **Article 159 (2) (c)** of the **Constitution** in the instruments of appointment of members the 2<sup>nd</sup> respondent was probably made to point to the alternative dispute resolution aspects of its origin and mandate. It has not been shown that the respondents purported to exercise judicial authority by issuing any judgment of a court of law or an award of the Co-operative Tribunal. I would look at the substance of the appointment and the resultant actions as opposed to narrowly focusing on the mention of **Article 159 (2) (c)**.

33. While exercise of judicial authority is the preserve of the courts and tribunals established under **Article 162** of the **Constitution**, deployment of alternative forms of dispute resolution is open to all and is even encouraged. If anything, alternative dispute resolution is a late entrant in the judicial system. The impugned report of the 2<sup>nd</sup> respondent has recommendations without a binding effect on either the petitioners or even the statutory entities mentioned therein. The respondents acknowledged as much. The entities have their own statutory procedures which they would have to activate and comply with prior to taking any action against the petitioners. I doubt whether the 2<sup>nd</sup> respondent's said recommendations *per se* would form any basis for action by the said entities or even for cancellation of the petitioners' title deeds. The end product of the 2<sup>nd</sup> respondent's recommendations is just that: recommendations. They are neither orders nor directives. In sum, it is my finding that the appointment of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was not unconstitutional.

34. Were the petitioners accorded an opportunity to be heard? I am persuaded that they were. The right to a fair hearing is at the core of every dispute resolution process. As stated by the Court of Appeal in **Evans Thiga Gaturu & another v Naiposha Company Ltd & 13 others [2017] eKLR**:

*... It cannot be overemphasized that Article 50 of the Constitution guarantees every party to a dispute that can be resolved by the application of law a fair and public hearing by a court or other independent and impartial tribunal or body. Implicit in the fair hearing guaranteed by the Constitution is the right of a party to know in advance the allegations against him and a reasonable opportunity for rebuttal.*

35. The petitioners argued that they were not allowed to be present during the proceedings of the 2<sup>nd</sup> respondent and to question witnesses that appeared before it. The respondents have placed material before the court, including a picture, demonstrating that a public notice was published in the Nation newspaper on 6<sup>th</sup> January 2019 inviting all the stakeholders to submit memoranda and that the petitioners appeared before the 2<sup>nd</sup> respondent on 16<sup>th</sup> January 2019, 1<sup>st</sup> February 2019 and 24<sup>th</sup> February 2019.

36. In view of the foregoing, the petitioners have not made out a case for the orders sought. I dismiss the petition. Each party to bear own costs.

**Dated, signed and delivered at Nakuru this 25<sup>th</sup> day of February 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the Petitioners

Ms Litunda for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents

No appearance for the 2<sup>nd</sup> Respondent

Mr Ndegwa for the Interested Party

