Migiro (Suing on Behalf of the Late Christopher Orenge Makori) v James & another (Environment & Land Petition E001 of 2022) [2024] KEELC 5965 (KLR) (17 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5965 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND PETITION E001 OF 2022

M SILA, J

SEPTEMBER 17, 2024

BETWEEN

PETER ORENGE MIGIRO (SUING ON BEHALF OF THE LATE CHRISTOPHER ORENGE MAKORI) ..... PETITIONER

AND

SAMWEL OMAGWA JAMES ..... 1ST RESPONDENT

HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

(Constitutional petition alleging a violation of rights including the right to property under Article 40; petitioner suing on behalf of estate of a deceased; deceased having land titled in his name; deceased having previously filed suit against the 1st respondent in the Magistrates' Court in 2001 and judgment entered in his favour; 1st respondent in 2008 proceeding to sue the deceased before the Land Disputes Tribunal alleging that the deceased wrongly acquired the title; Tribunal holding in favour of the respondent and making an order that the land belongs to the respondent's family; award made in 2008 and adopted as a judgment by the Magistrates' Court in 2010; no appeal preferred against the award and no application for judicial review filed within 6 months thereof; constitutional petition now filed in the year 2022 to quash the award and decree; whether such petition should be allowed; conflicting decisions of the Court of Appeal regarding this issue; court inclined to follow the decision that would allow a constitutional challenge as this is the more justiciable position; delay in filing petition; constitutional petitions not liable to the same limitation period that other suits may suffer; award and decree not having been executed to date and court inclined to admit the petition in those circumstances despite the lapse of time; apparent that the tribunal had no jurisdiction to hear the dispute and affect the title of the deceased especially in light of the earlier decision of the Magistrates' Court in favour of the deceased; court persuaded to quash the award and decree; judgment entered for the petitioner)

1. The petitioner is the administrator ad litem of the estate of Orenge Makori (deceased) who died on 23 March 2020. He asserts that the land parcel Majoge/Magenche/670 is still registered in the name of the deceased, who is his late father, and thus forms part of his estate. He avers that his late father and the family of the 1st respondent had a long running dispute over the ownership of the suit land. In 2001 they had a dispute in the Chief Magistrates' Court at Kisii registered a Kisii CMCC No. 542/2001 and he has annexed the judgment thereto. He states that pursuant to the judgment the 1st respondent was barred from trespassing into the suit land. He continues to state that in a crafty scheme to defeat the said judgment, the 1st respondent filed a dispute before the Kenyenya Land Disputes Tribunal, registered as Cause No. 99 of 2008, and that a decision was made on 16 July 2008 giving the suit land to the 1st respondent. The award was adopted in Kisii CMCC Miscellaneous Land Dispute Case No. 132 of 2008 and a decree issued. He states that since the award was made it is 12 years thereto and the 1st respondent has not sought for registration of the suit land into his name and it is his position that the award is extinguished by operation of law. He avers that after the death of his father the 1st respondent filed an application dated 26 June 2020 for eviction. He contends that the orders of the Land Disputes Tribunal were made without jurisdiction. He claims a violation of Article 40 of the *Constitution* (right to own property); Article 31 (a) and (b) (right to privacy) ; Article 28 (right to inherent dignity); Article 47 (right to fair administrative action). He seeks the following orders :

    a. A declaration that land parcel Majoge/Magenche/670 is private property registered on first registration in favour of the late Orenge Makori and as such could not be subjected to the jurisdiction of the Kenyenya Land Disputes Tribunal.

    b. A declaration that the award by the Kenyenya Land Disputes Tribunal over the land parcel number Majoge/Mageche/670 in Land Dispute Case No. 99 of 2007 is null and void for want of jurisdiction.

    c. An order of judicial review in the nature of certiorari to issue removing to this court and revoking the court proceedings and consequential orders premised on the Kenyenya Land Dispute Tribunal Case No. 99 of 2007 and specifically as relates to land parcel Majoge/ Magenche/670.

    d. An order of permanent injunction against the 1st respondent by himself, his agents, assigns, relatives, family members and anybody claiming through him from trespassing, claiming, using, occupying and/or evicting the beneficiaries of the estate of the late Orenge Makori from land parcel Majoge/Magenche/670.

    e. Costs of the petition.

2. The 1st respondent appointed the law firm of M/s Ocharo Kaba & Company Advocates to act for him and the said firm filed a Notice of Appointment of Advocates on 26 July 2022. No reply was however filed by the 1st respondent to oppose the petition.

3. The Attorney General, as 2nd respondent, through the State Law Office, filed a response to the petition. It was contended that by virtue of the award of the Kenyenya Land Disputes Tribunal and its subsequent adoption in Kisii CMCC Miscellaneous Land Case No. 132 of 2008, the deceased ceased to be owner of the suit land and that it became the property of the 1st respondent. It was urged that the deceased did not have good title as he procured registration by fraud, mistake, and misrepresentation, as the person who sold him the land, one Osoro Mabumburi, had not title in the first place. It is pressed that the right to property under Article 40 and 64 of the *Constitution* does not extend to property that has been procured illegally or fraudulently, and that the title of the deceased was impeached through a legal process. It is pointed out that the decision of the Tribunal was never appealed, reviewed, or set

aside, as provided under the Land Disputes Tribunal Act and this petition cannot be construed as an appeal over the said decision and subsequent judgment of the court. It is opined that the petition is basically an action to recover land coined as a constitutional petition in order to defeat the limitation period under the *Limitation of Actions Act*, Cap 22, Laws of Kenya, and that the petitioner is guilty of laches due to unexplained delay. It is claimed that all the provisions of the *Constitution* cited are inapplicable and that the petition fails the test set in the case of *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272 and restated in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR. The 2nd respondent also argues that the petition is an abuse of the process of court and that the petitioner has failed to observe the well established doctrine of exhaustion and that there is nothing constitutional about the petition.

4. The petition was canvassed through written submissions.

5. For the petitioner, Mr. Begi, learned counsel, submitted that Article 40 of the *Constitution*, 2010, guarantees the right to property and submitted that this petition is based on the said provision together with Article 65. Counsel submitted that the tribunal had no jurisdiction in the first instance to deal with the suit property and referred to the case of The Lillian S ,where it was impressed that jurisdiction is everything, and since the tribunal had none, its award amounts to nothing. He submitted that what was presented before the tribunal was a dispute over ownership of land which dispute the tribunal had no jurisdiction to sit over. Counsel pointed out that a court of competent jurisdiction in the suit Kisii CMCC No. 542 of 2001 had earlier ruled in favour of the deceased. Counsel further submitted that the 1st respondent filed no pleadings to oppose the petition and it should be presumed that he has no objection to the petition. On the contention that remedy lay with judicial review, counsel submitted that judicial review only deals with process and not merits of the decision. He nevertheless submitted that the petitioner challenges the decision making process and asked the court to grant the orders.

6. In his submissions, Mr. Wabwire, learned State Counsel for the 2nd respondent, urged that the petitioner accepted the outcome of the decision of the tribunal and subsequent decree, and only woke up when the 1st respondent embarked on the process of execution of the decree. It is submitted that records will indicate that there are applications that he filed in the year 2020 culminating in the filing of a judicial review application No. 1 of 2021 which was however unsuccessful. It is submitted that challenging the award and decree through a petition is strange. Learned State Counsel referred to Section 8(1) of the *Land Disputes Tribunal Act* which provided as follows :

> " Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated."

7. Counsel submitted that there is nothing on record to show that the petitioner, who all along participated in the tribunal proceedings, lodged an appeal to the Appeals Committee constituted under the Act. He submitted that there being no appeal, the irrefutable presumption is that the petitioner was not aggrieved by the award of the tribunal, and that in his presence and knowledge the award was adopted by the Kisii Chief Magistrates' Court. He added that even assuming that the petitioner was unable to file an appeal to the Appeals Committte, nothing stopped him from challenging the award and decree in the High Court through Judicial Review proceedings. He submitted that the *Land Disputes Tribunal Act* did not contemplate filing of a petition as a way of challenging the award. He submitted that the petitioner failed to take advantage of the procedures provided in the *Land Disputes Tribunal Act* and cannot now allege that his rights under the

Constitution were violated. Counsel referred me to the case of *Paul Muraya Kaguri v Simon Mbaria Muchunu* (2015) KLR where it was held as follows :

> "It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say that their rights were denied."

8. Counsel also referred me to the case of Republic v Marakwet District Land Disputes Tribunal & 6 Others ex parte Shaban Clan & 3 Others (2016) eKLR and submitted that it was held that the Land Disputes Tribunal Act did not contemplate filing of declaratory suits whether by plaint or through petition. He also referred to the case of Lilian Barngetuny v Nandi Land Registrar & Others, Eldoret E & L Petition No. 3 of 2016, and submitted that it was held that the *Land Disputes Tribunal Act* does not contemplate a constitutional petition in challenging awards made under the Act.

9. Counsel submitted that even assuming that the proceedings herein are properly before court, it is incumbent upon the court to determine whether the tribunal was properly seized with the matter before it, and if so, whether parties were afforded opportunities under the *Act*. Counsel submitted that what was before the tribunal was the 1st respondent's right to use, work or occupy the suit land, thus within the jurisdiction of the tribunal. Counsel submitted that the tribunal did not concern itself with title to registered land nor did it address questions relating to subdivision but recommended boundary re-establishment. Counsel further submitted that the parties were given an opportunity of being heard and called and questioned witnesses.

10. On whether the remedies sought are capable of being granted, counsel submitted that once it was adopted as a judgment of the court, the award ceased to exist, hence prayers (a) and (b) cannot be granted. It was urged that prayer (c) cannot be granted since the court which adopted the award is not a party to this case. It was also urged that certiorari can only be granted within 6 months of the decision as provided under Order 53 Rule 2 of the *Civil Procedure Rules*, but the decision herein was made more than 14 years ago, and the prayer for certiorari is time barred and cannot issue. Counsel relied on the case of *Republic v Registrar of Societies & Others* (2014) eKLR. It was finally submitted that the award was made on 16 October 2008 and the *Constitution*, 2010, cannot apply retrospectively. Counsel relied on the case of *Jivraj v Jivraj* (1968) EA 263 to urge that a law cannot apply retrospectively. Counsel submitted that the petitioner has not explained why it took him 14 years to file this petition and that the delay is inordinate, inexcusable, and prejudicial to the respondents, and the petition must fail.

11. I have taken all the above into account and my take is as follows.

12. Starting with the facts, it is evident that the suit property is a first registration in favour of the deceased. He got registered as proprietor on 10 February 1970 and was issued with a title deed on 26 July 1973. Again, from the material before me, it appears that he purchased this land from one Osoro Mabumburi sometimes in the year 1963. There does not seem to have been any issue with his ownership and occupation of the suit land until the family of the 1st respondent came from Tanzania and claimed that this land belonged to them. I see from the evidence tendered at the tribunal that it was claimed that the father of the 1st respondent, one James Nyangoto, was the true owner of the land, and that Osoro Mabumburi, who was his step-brother, had no right to sell it. Within the same tribunal it was claimed that the family came back from Tanzania in 1987 and it was also mentioned that James Nyangoto died in 1983. It would appear that it was their emergence from Tanzania, and the claim that this land ought to belong to them, that precipitated disputes between the family of the petitioner and that of the 1st respondent. I have no evidence of a case being lodged by either family until 2001. What happened in that year is that the wife of one Elijah Nyangoto, who was the brother of the 1st respondent, died, and

the family of the 1st respondent proceeded to inter her body in land that traversed the suit land and the parcels No. 1514 and 1515. The three proprietors of the affected parcels, that is Orenge Makori (father of the petitioner, now deceased), Orenge Nyangechi and Nyatwanga Osaso, filed the suit Kisii CMCC No. 542 of 2001 against Elijah Nyangoto, the 1st respondent, and three other persons, seeking orders to have them exhume the interred body and an injunction to restrain them from these parcels of land. The case was defended with the defendants therein putting forth the claim that this land belonged to their late father James Nyangoto and that Osoro Mabumburi had no right to sell it in 1963 to the plaintiffs. The case was decided in favour of the plaintiffs through a judgment delivered on 18 August 2004.

13. There is no evidence of any appeal having been filed against this judgment which for all intents and purposes appears to be a judgment issued by a court of competent jurisdiction.

14. What happened thereafter is that the 1st respondent in 2007 proceeded to the Kenyanya Land Disputes Tribunal and filed the case Kenyanya Land Disputes Tribunal Case No. 99 of 2007 against Orenge Makori. He claimed that his family was entitled to the land, on the same argument that Osoro Mabumburi had no right to sell it to Orenge Makori, and contended that the land belonged to his late father. Orenge Makori did appear before the tribunal and asserted that he properly purchased the land and had a title deed to it. The tribunal made its award on 16 July 2008 allowing the claim of the 1st respondent. It held that the land in dispute belongs to the late James Nyangoto (father of the 1st respondent) and his family. This award was filed for adoption before the Chief Magistrates' Court at Kisii, in the case Kisii CMCC Land Dispute Cause No. 132 of 2008. The award was adopted by the court on 15 November 2010 and a decree issued. The decree was to effect inter alia that the suit land belongs to the late James Nyangoto and his family but I have seen no move to execute it by way of transferring the title to the 1st respondent. What I have seen is material demonstrating that in 2020 the 1st respondent moved the Magistrate's Court for an eviction order and an application dated 29 June 2020 for police assistance to supervise the eviction order, which led the petitioner herein to move court in August 2020 contending that there was never an award for eviction. By that time Orenge Makori had died. He died on 23 March 2020 and I do not know the outcome of this application to set aside the order of eviction as it was never pleaded within this petition. Nevertheless, it was mentioned in the petition, though I have not seen the pleadings thereof, that the petitioner filed a judicial review suit in 2021 being Kisii ELC Judicial Review Case No. 1 of 2021 seeking to quash the award of the tribunal and that the said suit was struck out. It was not mentioned why it was struck out and the striking our order was not annexed. It would appear that it is after he failed to convince court to admit his judicial review motion that the petitioner filed this constitutional petition. He of course claims that the tribunal ought not to have entertained the dispute as it had no jurisdiction and that there had already been an earlier settlement of the case by a court of competent jurisdiction. It is his case that the award and its adoption violated the constitutional right to own property as enshrined in Article 40 of the *Constitution*. The case is hinged more or less on the contention that the tribunal had no jurisdiction to entertain the dispute and I will now proceed to interrogate that hypothesis.

15. The jurisdiction of the Land Disputes Tribunal was set out in the Land Disputes Tribunal Act, 1990, Cap 303A (now repealed). The Act came into operation on 1 July 1993 and was repealed by the *Environment and Land Court Act*, 2011. The *Land Disputes Tribunal Act*, at Section 4, established the Land Disputes Tribunal and Section 3 (1) thereof provided for the jurisdiction of the tribunal as follows :-

> 3.
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> (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

16. It will be observed from the foregoing that the tribunal's mandate was to hear claims relating to division of land, or claim to occupy or work land, or trespass to land. There was certainly no jurisdiction to hear disputes touching on title or ownership of land.

17. It is clear to me that the dispute that was lodged by the 1st respondent before the tribunal was a dispute over ownership of land. Indeed, the case was that the suit land was owned by James Nyangoto, the deceased father of the 1st respondent, and not the registered owner thereof who is the father of the petitioner. It was put forth that the person who sold the land to Orenge Makori had no mandate to do so and therefore Orenge Makori did not obtain a good title to the land. The tribunal accepted this assertion and made an award that the land belonged to the late James Nyangoto and his family.

18. It will be recalled that in his submissions, counsel for the 2nd respondent presented an argument that the tribunal did not concern itself with title to registered land but recommended boundary establishment. There is nothing further from the truth. This clearly is an award relating to ownership and title. In effect the tribunal was making a finding that Orenge Makori did not receive good title from Osoro Mabumburi and that his title ought to be cancelled. There was of course a direction for ascertainment of boundaries but that was because Orenge Makori had claimed that the land was only 2 acres and not 3.5 acres as noted in the title. The tribunal therefore recommended the Land Registrar to send surveyors to the site to reinstate the boundaries of the plot. This was never a boundary dispute. A boundary dispute is a dispute relating to the extent and border of two neighbouring parcels of land. It would mean that the two persons have two distinct titles to their separate parcels of land but what they are quarreling over is the extent of each parcel vis-à-vis the other. That was not what was before court. There was never an issue relating to the extent of two neighbouring parcels of land with two distinct titles or any issue relating to encroachment by the owner of one parcel of land into the abutting land. That is what would constitute a boundary dispute, and it cannot, by any stretch of imagination, be asserted that the tribunal was dealing with a boundary dispute. It was definitely dealing with the question whether the land should be owned by Orenge Makori or the family of the late James Nyangoto. That was not a dispute that the tribunal had jurisdiction to hear. Its decision was out of jurisdiction hence null and void.

19. The 2nd respondent urged that this court should not entertain this petition because the petitioner ought to have challenged the award of the tribunal through the appellate process provided in Section 8 (1) of the *Land Disputes Tribunal Act*, or file a judicial review case to quash the award. It is true that the Land Disputes Tribunal Act provided for avenue to appeal the decision of the tribunal through Section 8 thereof which was drawn as follows :-

8.

(1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

(2) –

(8) ... (not relevant)

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.

20. It is correct, as submitted by counsel for the 2nd respondent, that an aggrieved party could appeal the award of the tribunal, and it is discernible that there were two tiers of appeal; the first before the Appeals Committee and the second to the High Court on a point of law. There is no evidence that an appeal was filed.

21. The other option, again impressed rightfully by counsel, was that the deceased ought to have filed a judicial review suit for certiorari to quash the award, and that none was filed within 6 months as stipulated under Section 9 (2) and (3) of the *Law Reform Act*, Cap 26, Laws of Kenya. It is also true that no suit for judicial review was filed within 6 months. One however was filed in 2021 which was out of time and it is probably for this reason that the same was struck out.

22. The argument of the 2nd respondent is that because no appeal was filed, and because no application for certiorari was filed within the stipulated period, then the petitioner or his predecessor, failed to take advantage of the avenues provided by law, and this court should not entertain this constitutional petition pursuant to the doctrine of constitutional avoidance.

23. I do not wish to contest the hypothesis that where the law provides for a particular dispute resolution mechanism, or an appellate mechanism, then the court ought to hesitate from entertaining the dispute as a constitutional petition. Where such alternative avenues are available and accessible then the court should avoid receiving and hearing the dispute as a constitutional petition. We however have to be alive to the fact that nothing bars a person from filing a constitutional petition contending that his rights under the *Constitution* have been violated, and if there are specific constitutional rights cited that are alleged to have been violated, the court has a duty to hear such dispute, albeit still vested with discretion to remit the dispute to other processes if such processes are available and convenient for the disposition of the dispute. It is upon the court to consider such petition and determine for itself if the employment of this path is suitable and acceptable for the resolution of the dispute.

24. In his address, beseeching this court not to take up jurisdiction, Mr. Wabwire, in his submissions, mentioned two cases, that of *Republic v Marakwet District Land Disputes Tribunal & 6 Others ex parte Shaban Clan & 3 Others* (2016) eKLR and *Lilian Barngetuny v Nandi Land Registrar & Others*, Eldoret E&L Petition No. 3 of 2016. Unfortunately, counsel did not annex these two decisions. I will underscore that where counsel file submissions and cite cases, it is their duty to annex copies of these decisions so that it is clear what they are referring to and also for the convenience of the court. I went out of my way to try and see whether these cases are available on the Kenya Law Reports website. I couldn't find the case of *Lilian Barngetuny v Nandi Land Registrar & Others* so I cannot tell what the issue in that case was or what was decided. I however found the Shaban Clan case which I digested. That case is clearly distinguishable to what we have here. That case concerned a dispute by some clans regarding rights over unregistered land that they presented before the Land Disputes Tribunal. An award was made granting the land to one of the clans and an application for certiorari was filed. The court dismissed it finding that the land was unregistered and the tribunal had the requisite jurisdiction. I don't know why that case was cited for it does not have any relation to the nature of dispute that we

have here. In that case the application for certiorari was filed within 6 months and the tribunal had jurisdiction which is very different from our case. I do not see what it is that I need to pick from that case in order to apply it here.

25. To be fair to counsel, apart from the two cases cited in the submissions, which were not provided, counsel did annex one other decision, though not mentioned in the submissions. This is the case of *Joseph Maren & 4 Others v Chairman Ololulunga Division Land Disputes Tribunal & 4 Others*, Court of Appeal at Nyeri (sitting at Nakuru), Civil Appeal No. 179 of 2014, (2017) eKLR. In that case, a dispute was presented before the Land Disputes Tribunal by the 5th respondent and an award made. The award was duly adopted by the Magistrates' Court. This award and decree aggrieved the appellants and they proceeded to file a constitutional petition. Among the issues that the appellants raised was that they were never invited to be parties before the tribunal and further that the award was made without jurisdiction. They inter alia claimed that their constitutional right to own property had been infringed, and that the decision of the tribunal and the Magistrates' Court were illegal, and unconstitutional. The petition was dismissed by the High Court provoking the appeal to the Court of Appeal. The Court of Appeal was not persuaded that there was any error made dismissing the petition. The Court of Appeal held as follows :

> Suffice to state that the appellants' cause of action would have been to have the proceedings before the Land Disputes Tribunal quashed and/or setting aside the orders of the 2nd respondent (the Magistrates' Court). As of today, the decree issued on 6th February, 2009 pursuant to the Award of the Land Disputes Tribunal still stands. No amount of litigation outside Narok PMCC No. 17 of 2006 will set aside the decree issued on 6th February, 2009, not even a constitutional petition. It may be true that the orders issued in Narok PMCC No. 17 of 2006 were in contravention of the rules of natural justice as the appellant may not have been heard in the Land Disputes Tribunal but their recourse was not in filing a constitutional petition but to challenge the award of the Land Disputes Tribunal and its subsequent confirmation in court. AS stated above even if the constitutional petition were to succeed, the orders of Narok PMCC No. 17 of 2006 would still remain intact, hence the futility of the constitutional petition, the subject of this appeal.

26. Mr. Begi, learned counsel for the petitioner, did not make any submissions on the above case. Nevertheless, I am aware of a decision of the Court of Appeal, differently constituted, that is at variance with the case cited above. The said decision is the case of *Lemita Ole Lemein v Attorney General & 2 Others*, Court of Appeal at Nakuru, Civil Appeal No. 64 of 2016 (2020) eKLR. In the said case, the 3rd respondent had purchased the disputed property from a third party in 2009 and was issued with a title deed. The appellant lodged a suit before the Land Dispute Tribunal against the seller of the land but he did not sue the 3rd respondent who was by then already registered as proprietor of the land. Without the involvement of the 3rd respondent the tribunal made a decision that the land should be awarded to the appellant. The appellant proceeded to the Magistrates' Court at Narok, got the award adopted on 26 January 2010, and extracted the decree, which he used to get himself registered as proprietor and caused the title of the 3rd respondent to be cancelled. It was on 20 September 2010 that the 3rd respondent discovered that his title had been cancelled and that there had been proceedings regarding his title which he was never involved in. He proceeded to file a constitutional petition inter alia seeking a declaration that the proceedings before the tribunal and the Magistrates' Court contravened his rights, including his right to property under Article 40, a declaration that the proceedings before the tribunal and the court were a nullity, and an order to reverse the cancellation of his title. I had the privilege of hearing the petition and among the objections raised was that the 3rd respondent ought not to have presented his case through a constitutional petition. I dismissed this argument and entered judgment

for the 3rd respondent as prayed. On appeal it was urged that the judgment should be set aside as it did not raise constitutional issues. This argument was dismissed by a majority judgment which inter alia held as follows :

> 42. On whether the 3rd respondent established a case for violation of constitutional rights in respect of the right to property, it was not disputed that the 3rd respondent was the registered proprietor of the suit property. It is not in doubt that his rights as a registered proprietor enjoyed constitutional protection and anchorage. He moved the court protesting deprivation of his proprietary interest as a result of the manner in which a dispute was lodged and determined before a tribunal without jurisdiction, and without being accorded an opportunity to be heard, his land was taken away from him. It is clear from this that his right to own property, and his right to fair hearing were violated.

27. The court continued as follows :

> 50. The learned Judge was therefore in order to address the issue and in my view, his finding on the jurisdiction of the tribunal reflects the correct position in law. It bears repeating that the defunct Land Disputes Tribunal had no jurisdiction to hear and determine issues related to registered land. It could not divest anybody of his/her right to property nor order cancellation of a Title Deed. The cancellation of the 3rd respondent's title deed to the suit property was therefore a nullity. It is axiomatic that any action predicated on a nullity is itself void. As Lord Denning pronounced in the locus classicus case of *Macfoy v. United Africa Company Limited (West Africa)* [1962] A.C 152;
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> > "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."
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> 51. Having found want of jurisdiction on the part of the tribunal, was the learned Judge supposed to fold his hands and proclaim "here is a gross injustice committed against the petitioner as he was deprived of his land unjustly and without being heard, by a tribunal without jurisdiction, but wait a minute, the petitioner cannot get redress because he ought not to have moved the court by way of constitutional petition, yet there is no other avenue open for him to get justice". In my view, such a position would amount to serious abdication of the Court's duty to dispense justice.
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> 52. The time honoured maxim of equity "*ubi Jus Ibi Remedium*" pronounces that there cannot be a wrong without a remedy, or in other words, where there is a right there is a remedy. The 3rd respondent established that his land was taken away from him illegally. All other avenues he could have used to recover it save through the constitutional petition appeared blocked or less expedient and inefficacious. I cannot fault the learned Judge for arriving at the decision appealed from.

28. A court's duty is to do justice. I do not see how justice can be done when one proceeds to a forum that has no jurisdiction, obtains orders that in fact go against what a court of competent jurisdiction had pronounced, and insist that it is these orders made by an institution that had no jurisdiction that should be upheld. That would be preposterous and completely against any sense of justice. Weighing the decision of Joseph Maren and the decision in Lemita Ole Lemein, it is my considered opinion that

it is the decision of Lemita Ole Lemein which asserts the proper justiciable position and it is this that I opt to follow when deciding this suit.

29. In our case, I have already established that the tribunal had no jurisdiction. The Magistrates' Court was wrong in adopting an award made by a body with no jurisdiction. I do not think that the role of the Magistrates' Court was merely mechanical i.e to rubberstamp whatever award came from the tribunals irrespective of their legality. My opinion is that the court had a duty and mandate to only adopt what was legal and made within jurisdiction, for two wrongs cannot make a right, and I am not persuaded that the court was there to affirm something that could be seen to be outrightly illegal. Awards made without jurisdiction ought to have been rejected and not adopted by Magistrates' Courts. In our instance the court did not reject the award but proceeded to adopt it and allow issuance of a decree that could be executed. The award and the resultant decree deprived the deceased of his constitutional right to property. Where an entity facilitates the deprivation of one's property that entity violates the individuals constitutional right to property. I see nothing that can bar such person from approaching court to urge that his right to property has been violated particularly where other avenues of redress cannot be made available.

30. In our case, I do not see any other available means of redress for the petitioner. At the time he filed this petition, he could not appeal to the Appeals Committee as the same was no longer in existence given the repeal in 2011 of the *Land Disputes Tribunal Act*. He could not succeed in a judicial review motion given the lapse of time. The path of a constitutional petition appears to be the only path that was ultimately available to him and I see nothing wrong in him using this path to seek redress.

31. It was urged that this court ought not to assist the petitioner given the lapse of time. Whereas I appreciate that there was some lapse of time I am not persuaded that that lapse of time shuts the door in the face of the petitioner's rights. It is trite that a constitutional violation does not suffer from limitation of time in the same way that other statutory rights do, though depending on the right violated and the surrounding circumstances, a court can reject a petition that has been brought after considerable lapse of time. This was canvassed by the Supreme Court in the case of *Monica Wangu Wamwere & 5 Others v The Attorney General*, SC Petition Nos. 6,34, & 35 of 2019 (Consolidated) (2023) KESC 3 (KLR) where the court stated as follows :

> 37. In point of fact, the two superior courts affirmed the position that the *Limitation of Actions Act*, Cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under the *Constitution*, which are evaluated and decided on a case by case basis. Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights.

32. In the instance of this petition, I am not convinced that the circumstances herein should militate against the petitioner. The deceased whose estate the petitioner represents already had previous litigation with the 1st respondent where he succeeded and judgment given in his favour. This was a judgment by a competent court. The 1st respondent could not try to reverse this judgment through the Land Disputes Tribunal which could not sit as an appellate court over a judgment of the Magistrates' Court or rehear a dispute that has already been decided by the Magistrate's Court. If the 1st respondent was aggrieved by the decision of the Magistrates' Court he ought to have appealed to the High Court not file a fresh case before a tribunal that had no jurisdiction. To uphold that award of the tribunal that was made without jurisdiction, in light of the fact that there was already a judgment of a competent court, would be the epitome of injustice. Moreover, there was no execution of that judgment to the extent of cancelling the title of the deceased. Maybe if the title had been cancelled and registered in the name of the respondent and the respondent had taken possession, and there was lapse of more than 12

years, which is the limitation of time on land title disputes pursuant to Section 7 of the *Limitation of Actions Act*, then I would have been persuaded that the deceased had completely acquiesced to the award and this petition was coming too late in the day. But his title was never cancelled and the deceased is still registered as proprietor and this title needs to be given sanctity. In addition, to date, the 1st respondent has never taken possession of the suit land.

33. It was urged that this petition is based on the *Constitution* of 2010 yet the issues herein arose before it. A constitution is a live document that looks both backwards and forwards. Whatever the case, the right to property was also enshrined in the previous constitution under Section 75 thereof. The right to property was maintained in the 2010 constitution and it follows that this right crossed over into the current constitutional regime and never went away. The question of retrospective application of the Article 40 right to property was indeed addressed in the case of *Zehrabanu Janmohamed (SC) (Suing as the Executrix of the Estate of the Late HE Daniel Toroitich arap Moi & Another v Nathaniel K. Lagat & Others*, Petition No. 17 (E021) of 2022 as consolidated with Petition No. 24 (E027) of 2022 where the Supreme Court stated as follows :

> 82. Applying the principle established in the S.K Macharia Case, this Court determined that Article 40 of the *Constitution*, specifically sub-articles (3) and (4) thereof, applies retrospectively in *Town Council of Awendo v Nelson O Onyango & 13 Others; Abdul Malik Mohamed & 178 Others* (Interested Parties), SC Petition No. 37 of 2014; (2019) eKLR....
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> 85. It is therefore clear to us from the foregoing pronouncements that, Article 40 of the *Constitution* has ingredients of retrospectivity embedded in it. Any any rate, the provisions of Article 40 merely embody a right that was hitherto protected under Section 75 of the repealed Constitution that inhered to individuals ..."

34. It will be observed from the foregoing that the Supreme Court held that the right to property exisited in the previous constitutional regime and was carried forward to the present regime. It cannot therefore be argued that this petition needs to fail on the basis that the matters herein took place before the current constitution was promulgated in 2010.

35. Lastly it was argued that the court cannot issue an order of certiorari 6 months after the order sought to be quashed. That limitation does not apply to the order of certiorari under Article 23 (3) (f) of the *Constitution*, which empowers the Court to issue orders of judicial review when enforcing the Bill of Rights, but to orders of certiorari under the *Law Reform Act*. As I have earlier discussed, there is generally no limitation when it comes to constitutional matters. The argument that the order of certiorari cannot issue under the *Constitution* because it comes beyond a 6 month period is therefore misguided.

36. I have not forgotten that an issue was raised that the tribunal and/or court are not parties herein. My short answer to that is that the Attorney General has been joined in this suit on behalf of those institutions.

37. I think I have said enough to demonstrate that I find this petition merited. I find that the proceedings and award of the tribunal, the adoption of the award by the Magistrates' Court, and the ensuing decree, violated the right to property of the deceased whose estate the petitioner represents both under Section 75 of the previous constitution and Article 40 of the current constitution. I declare the award and the decree null and void. I hereby issue an order of certiorari quashing the award and the decree. That award and decree should never be enforced and the suit land will remain in the name of the deceased unless a proper legal challenge to it is made.

38. The final issue will be costs. It is the 1st respondent who was the chief perpetrator of the illegalities herein and he will shoulder the costs of this petition to the petitioner. I make no orders as to costs for or against the 2nd respondent.

39. Judgment accordingly.

DATED AND DELIVERED THIS 17 DAY OF SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Wabwire, State Counsel, for the 2nd respondent

N/A on part of Mr. Begi for the petitioner

N/A on part of M/s Ocharo Kaba & Co for the 1st respondent

Court Assistant – David Ochieng'