



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 35 OF 2014

LEKINYOT OLE LANKEPETITIONER

VERSUS

ATTORNEY GENERAL1ST PLAINTIFF

LAND REGISTRAR NAROK COUNTY...2ND DEFENDANT

LEMITA OLE LEMEIN.....3RD DEFENDANT

JUDGMENT

(Constitutional petition claiming infringement of right to own property and right to a fair hearing; petitioner having bought land from 3rd party and becoming registered proprietor; 3rd respondent also claiming to have bought the same land and filing suit before the Land Disputes Tribunal; petitioner despite being title holder not party to Tribunal proceedings; Tribunal cancelling title of petitioner; 3rd party filing judicial review not prosecuted; petitioner also filing two other suits; whether this petition is res judicata; petition not res judicata; constitutional rights clearly infringed; held that title of 3rd respondent be revoked; petitioner be reinstated a proprietor).

A. INTRODUCTION AND PLEADINGS

1. This is a constitutional petition filed on 19 May 2014. The petitioner, Lekinyot Ole Lanke, has averred in the petition, that he was at all material times the registered proprietor of the land parcel CIS-Mara/Oldonyo Rasha/377 measuring about 50 acres. He has sued the Attorney General on behalf of the judicial arm of the State taking the form of the Land Disputes Tribunal and the Narok Senior Principal Magistrate's Court and also on behalf of the Ministry of Lands in which the Land Registrar, Narok, the 2nd respondent works. It is averred in the petition that the former Constitution at Section 75 protected the right to property and that the current Constitution of Kenya, 2010 at Article 27 guarantees every one of the right to equal protection and equal benefit of the law.

2. It is stated in the petition that on 4 November 2009, the petitioner and one Oloishuro Ole Sipiyai entered into a contract for the sale of the land parcel CIS-Mara/Oldonyo Rasha/377 (the suit land) at a consideration of Kshs. 550,000/=, which money was paid, and the petitioner became the registered proprietor, and was duly issued with a title deed. It is averred that under the former Constitution a person was entitled to a fair hearing, and it is contended that the Land Disputes Tribunal Act, 1990, was null and void for being ultra vires Section 77(9) of the former Constitution to the extent that it permitted any

proceedings which take away the rights of a party not before it and result in an adverse judgment on the person not made a party.

3. It is averred that on 5 January 2010, the 3rd respondent, Lemita Ole Lemein, instituted before the Ololunga Land Disputes Tribunal fraudulent proceedings aimed at securing a cancellation of the petitioner's title to the suit land. It is contended that the said proceedings contravened Sections 75 and 77(9) of the former constitution to property and a fair hearing. The particulars of fraud pleaded inter alia are filing the case No. 6 of 2010 before the tribunal while he knew that the tribunal lacked jurisdiction; failing to include the petitioner as a party to the proceedings; tendering evidence in absence of the petitioner; procuring an award in absence of the petitioner; procuring a judgment and decree in Narok Senior Principal Magistrate's Court Land Case NO. 2 of 2010 which confirmed the award of the tribunal; and proceeding to execute the decree which led to transfer of the suit land to the 3rd respondent. The petitioner has faulted the award, as in his view, evidence was led before the tribunal that the petitioner is the registered proprietor of the suit property, yet the tribunal did not enjoin him as a party. He has also contended that the Narok Senior Principal Magistrate, needed to order the petitioner to be enjoined as a party since he stood to lose his land without first being heard. It is contended that the tribunal proceedings contravened the Land Disputes Tribunal Act, the rules of natural justice and the provisions of Sections 75 and 77(9) of the former Constitution.

4. It is averred that following the decree in the Narok SPM's court, the title of the petitioner was cancelled and the name of the 3rd respondent inserted. The petitioner avers that he is entitled to have the award and decree quashed and for an order that the petitioner be reinstated as proprietor of the suit land by an order of mandamus directed at the 2nd respondent.

5. The petitioner has stated that on knowing of the award, he instituted the suits Nakuru HCCC No. 245 of 2010 *Lekinyot Ole Lanke vs Lemita Ole Lemein* and *Nakuru High Court Judicial Review Case No. 12 of 2011, Republic vs Commissioner of Lands and Land Registrar, Narok*. It is stated that prior to filing of this petition the petitioner withdrew the suit Nakuru HCCC No. 245 of 2010 whereas the suit Nakuru JR No. 12 of 2011 was declined and a Notice of Appeal filed. It is stated that prior to the filing of this petition, the Notice of Appeal was withdrawn. It is the position of the petitioner that the previous proceedings cannot form a basis for the operation of the doctrine of res judicata.

6. In the petition, the petitioner has sought the following orders :-

(a) *A declaration that the proceedings both before the Land Disputes Tribunal and the Narok Senior Principal Magistrate's Court contravened the Petitioner's rights under Articles 40, 47 and 50 of the Constitution.*

(b) *A declaration that the proceedings before both the Land Disputes Tribunal and the Narok Senior Principal Magistrate's Court contravened rules of natural justice.*

(c) *A declaration that the rule of law doctrine prohibits taking away of a citizen's property or liberty without being given a chance to be heard.*

(d) *A declaration that the proceedings both before the Land Disputes Tribunal and the Narok Senior Principal Magistrate's Court are null and void.*

(e) *An order that the judgment entered in terms of the Award by the Narok Senior Principal Magistrate's Court on 26th January, 2010, be set aside.*

(f) *An order that the cancellation of the registration of the Petitioner as the registered proprietor of CIS-Mara/ Oldonyo Rasha/377 be reversed.*

(g) *In the alternative, an order of mandamus do issue to the 2nd respondent to restore the name of the petitioner as the registered proprietor of the property.*

(h) *Costs of this suit.*

7. The petition is supported by the affidavit of the petitioner. He has deposed inter alia that on 4th November 2009, he purchased the suit property from one Oloishuro Ole Sipiyyai for a sum of Kshs. 550,000/= . He then became registered as proprietor on 11th November 2009 and was issued with a title deed. The suit property was as a result of the sub-division of a land parcel CIS-Mara/Oldonyo Rasha/71. He has stated that in late September 2010, he heard rumours circulating to the effect that the 3rd respondent is now the new owner of the suit property. He did a search which confirmed the rumour. He then filed the two suits Nakuru HCCC No. 245 of 2010 and the suit Nakuru JR No. 12 of 2011 through the law firm of M/s Gordon Ogolla & Associates of Nakuru. The judicial review was refused. In March 2014, he sought advice from Senior Counsel Gibson Kamau Kuria, thus this suit. He has explained that the 3rd respondent filed a case No. 6 of 2010 before the Ololulunga Land Disputes Tribunal against Oloishuro Ole Sipiyyai without including him as a party yet he was the registered proprietor of the suit property. An award was made in favour of the 3rd respondent which was adopted as a judgment by the Senior Principal Magistrate's Court in Narok and a decree issued. The award was to the effect that the two had an agreement dated 2nd May 2002, and that the second agreement between the petitioner and Ole Sipiyyai, was a breach of law given that Ole Sipiyyai had already sold the land to the 3rd respondent. The tribunal directed Lemita Ole Lemein to pay back the sum of kshs. 65,000/= to Ole Sipiyyai, being half unpaid amount, and further directed the title deed of the petitioner to be cancelled. The decree was executed, leading to the 3rd respondent now being registered as proprietor of the suit property. He has deposed that although he was named as respondent in the tribunal proceedings, he was never served. It is his position that the proceedings violated his rights to own property and rights to a fair hearing under the former and present constitutions.

8. The 1st and 2nd respondents replied to the petition through the replying affidavit of N.N. Mutiso, the District Land Registrar, Narok North and South Districts. He deposed that Oloishoro Ole Sepayai was the initial registered owner of the land parcel Oldonyo Rasha/71 which he sub-divided on 18th January 2008, into the parcel numbers 374-378. The suit property (parcel No. 377) was transferred to the petitioner on 10th November 2009. He has stated that as a result of a court order issued in Narok SPM's Land Case NO. 2 of 2010, the property was transferred to Lekinyot Ole Lanke, the 3rd respondent. He has deposed that the petitioner purports to have made an application dated 4 November 2008, for consent to transfer, but this does not appear in the minutes of the Land Control Board.

9. The 3rd respondent also filed a Replying Affidavit. He has attacked the manner in which the pleadings are drawn as they are not confined to the facts only. He has averred that he has evidence that there was no valid sale agreement drawn on 4 November 2009 between Oloishuro ole Sipiyyai and the petitioner. He has deposed that if the petitioner purchased the land on 4 November 2009, this cannot be reconciled by the consent of the Land Control Board dated 13th November 2008. He has also annexed minutes of the Land Control Board of 13 November 2008 which show that there was no agenda on that day for the transfer of the suit property to the petitioner. He has deposed that he confronted Ole Sipiyyai and Ole Sipiyyai offered him (the 3rd respondent) an alternative land parcel No. 451 which the 3rd respondent rejected. It is his view that the petitioner acquired the land through fraud, and that the truth of the matter is that it is him, who purchased the 50 acres of land from Ole Sipiyyai. He has deposed that when Ole Sipiyyai sub-divided the land, the 50 acres that he had bought became comprised in the land parcel No. 377. He has deposed that he has been in possession of this portion since the year 2002. He has agreed filing the proceedings before the tribunal and has averred that all parties were heard including the petitioner. The tribunal found in his favour and the award was adopted by the Narok SPM's court and a decree issued. The decree was executed and the land transferred to the 3rd respondent. He has deposed that the petitioner filed the suit Judicial Review No 21 of 2010 seeking leave to commence judicial review proceedings to quash the tribunal decision but never pursued the matter nor paid court fees. Having abandoned the matter, he filed the suit Nakuru HCCC No. 245 of 2010 which he withdrew. It is stated that he also filed Nakuru Judicial Review Case No. 12 of 2011 which was dismissed. A Notice of Appeal was filed which was later withdrawn. It is averred that this petition is an abuse of the court process and that the petitioner is guilty of filing a multiplicity of suits. It is further averred that there is nothing constitutional about this petition as the remedies that the petitioner is seeking are not dissimilar to those he sought in the previous suits. It is his view that this petition is *res judicata*. It is also averred that the

affidavit in support of the petition is undated.

B.SUBMISSIONS OF COUNSEL

10. In his submissions, M/s Kamau Kuria & Company Advocates for the petitioner, submitted that the petitioner's right to own property and the right to a fair trial were violated by the tribunal and the Magistrate's court. Counsel submitted that the petitioner was never a party before the tribunal as the parties were the 3rd respondent and Ole Sipiayi and therefore he was deprived of his land without first being given an opportunity to be heard. He submitted that awards of this nature are usually set aside and he relied on the case of *James Ndungu Wambu vs Republic, Civil Appeal No. 85 of 1992*. He submitted that the right to be heard is a rule of natural justice and referred me to *Wade & Philips, Constitutional Law* and the case of *Mradula Suresh Kantaria vs Suresh Nanalal Kantaria, Civil Appeal NO. 277 of 2005*. He submitted that the court has power through a petition to provide for judicial review remedies such as orders of mandamus and relied on the case of *Kenya Bankers Association vs Minister for Finance & Another (2002) 1 KAR 61; Gathigia vs Kenyatta University (2008) KLR 587; and Ramanoop vs Attorney General of Trinidad & Tobago (2004) LRC*. He submitted that the tribunal and the SPM's court ought not to have proceeded without the involvement of the petitioner since he was the one to lose the land. It was submitted that the two institutions are organs of the State.

11. The State Law Office for the 1st & 2nd respondents submitted that the 2nd respondent effected all registrations and processes according to law and cannot be faulted. It was also submitted that the consent of the Land Control Board leading to the registration of the petitioner as proprietor was suspect.

12. Mr. Karanja Mbugua for the 3rd respondent submitted that in as much as the petition sounds good, one issue needs to be addressed, that is, whether the petition is an abuse of the court process. It was submitted that the petitioner has filed a multiplicity of cases seeking similar reliefs over the same complaint. Counsel submitted that a party cannot file a constitutional petition as a substitute after losing previously adjudicated cases. It was his view that the petitioner is a vexatious litigant and a perfectionist in filing endless cases. He submitted that the petitioner had previously gone the judicial review route and cannot now, through this petition, seek similar reliefs. It was his position that it is not fair for a party to play lottery with the judicial process.

13. In reply, counsel for the petitioners submitted that the issue of ownership of land cannot be determined through judicial review proceedings and that judicial review ought not be used to determine property disputes. He relied on the case of *Kenya Africa National Union vs President of the Republic of Kenya & 6 Others*. He submitted that res judicata only applies where a court has heard a suit on merit and given a judgment and submitted that the 3rd respondent has not attached any judgment in which the issues before the court had been canvassed and determined. It was submitted that the 3rd respondent cannot complain of abuse of process having himself fraudulently instituted proceedings before the tribunal. He quoted an article by I.H Jacobs on abuse of court process.

C. DECISION

14. From the pleadings, it will be noted that the core complaint of the petitioner is that the hearing of the dispute over the ownership of the land parcel CIS-Mara/Ololulunga/377 by the Ololulunga Land Dispute Tribunal, together with the award and the subsequent judgment and decree of the Narok SPM's court, violated his constitutional right under both the former and present constitution. The end result of the proceedings was to cancel the registration of the petitioner as proprietor of the suit property and have the 3rd respondent registered in place of the petitioner. It is the position of the petitioner that the proceedings violated his rights to own property and further violated his right to a fair hearing. The 3rd respondent has argued that this petition is res judicata and an abuse of the court process.

15. Before I can consider the merits or demerits of the petitioner's case, I first need to address this threshold point, for if I find that the petition is an abuse of the court process, I will have to dismiss the petition summarily.

16. It is not disputed that prior to the filing of this petition, several other cases had been filed which attack the proceedings of the tribunal and the decree of the Magistrate's Court in Narok, or in one way or the other, the manner in which the registration of the petitioner as owner of the suit property was cancelled. It is not clear when the award itself was made, but it was filed in court on 18 January 2010 and adopted as a judgment of the court on 26 January 2010. On 5 February 2010, Oloishuro Ole Sipiayi, the respondent in the tribunal proceedings, filed at the High Court of Nakuru, through the law firm of M/s Wambuu-Wainaina & Company Advocates, the case Judicial Review No. 21 of 2010. I have perused the said file which shows that an application for leave to commence judicial review proceedings was made but it was never prosecuted. On 7 May 2014, a Notice was issued asking the applicant to show cause why the said suit ought not to be dismissed for want of prosecution. No one appeared in court to show cause and the matter was eventually dismissed for want of prosecution on 6 June 2014.

17. The second suit filed is Nakuru HCCC No. 245 of 2010 which is a suit commenced through a plaint filed on 30 September 2010 through the law firm of M/s Kiplenge & Ogolla Advocates. The plaintiff is the petitioner herein and the defendant is the 3rd respondent in this cause. From the plaint, annexed to the supporting affidavit of the 3rd respondent, it is discernible that the complaint of the plaintiff was that the defendant unlawfully caused the suit land to be transferred into his name. Inter alia, it is pleaded that the 3rd respondent used an award of a Land Dispute Tribunal in which the plaintiff was not a party and that he caused the transfer of the property to his name despite there being a pending suit being Judicial Review No. 21 of 2010. In the suit, the petitioner, as plaintiff, asked for a declaration that the registration of the 3rd respondent as proprietor was illegal and for an order to rectify the register to have the plaintiff as proprietor of the suit property. That suit was withdrawn on 7 May 2014 and has never been determined.

18. The last suit is Nakuru High Court, Judicial Review No. 12 of 2011 which was commenced as a judicial review action on 15 February 2011. The ex-parte applicant was the petitioner herein, whereas the respondents in the action, were the Commissioner of Lands and the District Land Registrar, Narok, with the 3rd respondent being named as interested party. The relief sought was for an order of certiorari to quash the cancellation/rectification of the register of the suit land through which the name of the petitioner was removed and replaced with that of the 3rd respondent. The grounds for the application were inter alia that the cancellation of title was premised on an award of the Land Disputes Tribunal in which the ex-parte applicant was not a party. That cause was heard and dismissed by a judgment rendered on 17 February 2012. The main reason why the judicial review failed was because the action was not against the decision of the tribunal but rather against the Land Registrar and his decision to cancel the title of the petitioner. The court (Wendoh L.J) held as follows :-

"There is no attack on the decision of the Tribunal. So that even if the court were to grant the order sought and quash the decision of the Land Registrar and Commissioner of Lands, yet the award of the Tribunal and the order of the court adopting the award would still remain subsisting. It would not be beneficial to the applicant. For those reasons, the order of certiorari cannot be granted in vain because it is not the most efficacious remedy in the circumstances."

19. The court held that the Land Registrar could not be faulted for giving effect to the court's order that the petitioner's title be cancelled.

20. The above are the previous suits filed touching on this matter. Mr. Karanja Mbugua argued that this petition is res judicata owing to the above suits. On my part, I beg to differ. First, the suit Nakuru J.R No. 21 of 2010 cannot be taken into account because it was not a suit filed by the petitioner. Mr. Karanja in his submissions argued, that the petitioner was using the name of Ole Sipiayi, but I have no evidence of this. The record shows that the ex-parte applicant was Ole Sipiayi and not the petitioner herein. Ole Sipiayi certainly is not one and the same person as Ole Lanke, the petitioner in this suit. It cannot therefore be argued that it is the petitioner who filed that suit. I refuse to hold that the ex-parte applicant in that suit was the petitioner herein.

21. The second suit, that is Nakuru HCCC No. 245 of 2010, was withdrawn before it could be heard. That withdrawal must be deemed to have been made under Order 25 of the Civil Procedure Rules, 2010, which

allows a party to withdraw a suit before it has been heard. There is no bar to a subsequent suit, where a case is withdrawn pursuant to Order 25, the only consequence being that the court has discretion to order that the costs of the withdrawn suit first be paid before the second suit can proceed. This is brought out by Order 25 Rule 4 which is drawn as follows:-

Stay of subsequent suit [Order 25, rule 4.]

If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.

22. Given the above provisions, I am unable to hold that the petitioner cannot file a subsequent suit, as the suit Nakuru HCCC No. 245 of 2010 was simply withdrawn before it could proceed for hearing. There is no bar to a subsequent suit, and this suit can pass for a subsequent suit, albeit filed not through plaint, but vide the route of a Constitutional petition. It cannot therefore be said that this suit is *res judicata* owing to the suit Nakuru HCCC No. 245 of 2010.

23. The last case is Nakuru J.R No. 12 of 2011. As noted earlier, that suit never attempted to impugn the decision of the tribunal or the subsequent decree of the Narok Magistrate's Court. It was a suit attacking the decision of the registrar to cancel the title of the petitioner. But as held by the court, the Land Registrar was merely executing a court order and he could not be faulted for the decision that he made. The court held that there were no pleadings attempting to set aside the award or decree.

24. From the foregoing, I do not think that it can be said that the petitioner has ever filed any pleadings attempting to set aside the award of the tribunal and the subsequent decree of the Narok Magistrate's Court. The only suit that came closest to doing so is the case Nakuru HCCC No. 245 of 2011 but which as we saw above, was withdrawn before it could be heard, and the mode of withdrawal could not be a bar to a subsequent suit. I therefore do not agree with the submissions that this suit is an abuse of the process of court or that it is *res judicata*. Having held so, I can now go into the merits of the petition.

25. This petition is hinged on two grounds. First, is that there was a violation of the constitutional rights of the petitioner in the manner in which the tribunal conducted its proceedings which denied him a right to a fair hearing. Secondly, is that the award of the tribunal was a violation of the petitioner's right to own property. These rights in the former constitution were set out in Section 75 and 77 (a) of the said constitution which was drawn as follows: -

75. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for –

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation: Provided that if Parliament so provides in relation to a matter (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).

(4) and (5) (Deleted by 13 of 1977, s. 3.) (6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) - (a) to the extent that the law in question makes provision for the taking of possession or acquisition of property

(i) in satisfaction of any tax, duty, rate, cess or other impost;

(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;

(vi) in consequence of any law with respect to the limitation of actions; or

(vii) for so long only as may be necessary for the purposes of an examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of –

(i) enemy property;

(ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(7) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament.

77 (9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

26. The complaint of the petitioner is that the Ololulunga Land Dispute Tribunal proceeded to hear the matter in his absence and make an award which affected his property yet he was not a party to the matter. It is his case that this violated his right to own property and also violated his rights to a fair trial.

27. I agree. It is inconceivable that the tribunal could proceed to order the property of the petitioner to be transferred to the 3rd respondent without the petitioner being a party to the proceedings. In essence, the petitioner was condemned unheard. The tribunal clearly caused the taking away of the property of the petitioner without him being in a position to defend himself, forget for a moment that the tribunal did not even have jurisdiction to determine such a dispute. The jurisdiction of the Land Disputes Tribunal (now defunct owing to the repeal of the Land Disputes Tribunal Act by the Environment and Land Court, Act No. 19 of 2011) was set down in Section 3 of the Land Disputes Tribunal Act which provided as follows :-

3. (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.

28. It will be seen from the above, that the jurisdiction of the Tribunal, was only on matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land. The Land Disputes Tribunal did not have jurisdiction to issue declaratory orders on the ownership of land and neither did it have jurisdiction to determine disputes revolving around ownership of land. It could not issue orders compelling the cancellation of title as it did in this case.

29. To make it worse, the tribunal proceeded to cancel the title of the petitioner where he was not a party. The rule of natural justice, *audi alteram partem*, require a party not to be condemned unheard. How could the petitioner be heard if he was not a party to the proceedings? Obviously he was never heard. In my view there was a clear breach of the constitutional right of the petitioner to a fair hearing.

30. The award resulted in a taking of the property of the petitioner without due process. This was clearly a violation of his right to own property.

31. It was argued that the registration of the petitioner as proprietor was irregular in the first place owing to doubts on the authenticity of the Land Control Board consent. But that is missing the boat by a river. The complaint herein is in the manner in which the petitioner's title to land was cancelled. Whether or not the petitioner acquired title properly is not the subject of these proceedings. If the respondents have an issue to raise as to the title of the petitioner, they are free to file an appropriate suit for consideration on merits. If the 3rd respondent feels that he is the rightful owner of the property, let him file suit against the

petitioner and the same will be heard on merits. He cannot however hide behind a clearly unlawful award, passed without regard to the constitutional rights of the petitioner.

32. It was also argued that the petitioner had other avenues to seek redress and that there is nothing constitutional about this petition. What was the petitioner supposed to do? He was not a party to the tribunal proceedings and could not avail himself of the avenue of appeal. True, he could have filed a judicial review action, but one had already been filed and abandoned by Ole Sipiyai. Again I pose, what was he supposed to do? Was he supposed to be left without remedy owing to technicalities of the law? My conscience cannot allow the petitioner to be left stranded. The law must be given purpose and justice must be done. The tribunal and the Narok Magistrate's court meted out an abhorable injustice upon the plaintiff. This court cannot stand by helpless and let the 3rd respondent benefit from such an injustice. The petitioner has properly approached this court and this court is obliged to remedy the injustice.

33. I allow this petition. I quash the award of the Land Disputes Tribunal and the subsequent decree of the Narok Magistrates Court for the reason that the proceedings violated the petitioners right to a fair hearing and the net effect was to violate his right to own property contrary to the provisions of Sections 75 and 77 of the former constitution and the provisions of Articles 40 of the current constitution. The petitioner must be reinstated as proprietor of the suit properly.

34. I therefore order the registration of the 3rd respondent as proprietor of the suit property to be cancelled and the petitioner be reinstated as proprietor thereof. The petitioner will also have costs of this petition.

35. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 11th day of June 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of : -

Mr Linus Ndungu for petitioner

Mr G K Mbiyu holding brief for Mr Karanja Mbugua for 3rd respondent.

N/A for state Law office for 1st and 2nd respondent

CA: Violet

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU