



**REPUBLIC OF KENYA**

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

**CHUKA ELC PETITION CASE NO. 04 OF 2019**

**IN THE MATTER OF LAND PARCEL NO. MWIMBI/MUGUMANGO/594 AND**

**IN THE MATTER OF ARTICLES 40 AND 165 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**NYAGA MUCHIRI .....1<sup>ST</sup> PETITIONER**

**PURITY MWATHOKO .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THOMAS NJIRU KANYUNGA .....1<sup>ST</sup> RESPONDENT**

**MICHERU KANYUNGA.....2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION &**

**SETTLEMENT OFFICER MERU SOUTH.....3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR, MERU SOUTH.....4<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....5<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petition in this matter states as follows:

**PETITION**

**TO:**

**THE ENVIRONMENT AND LAND COURT AT CHUKA**

The humble petition of Nyaga Muchiri and Purity Mwathoko showeth as follows:-

1. The Petitioners are adult citizens of sound mind and address of service for purposes of this suit is care of M/s. Mutwiri Arimi & Co. Advocates, Alpha House, Ground Floor, Room 5, P. O. Box 2319-60200 Meru.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are adult persons of sound mind and residents of Tharaka Nithi County within the Republic of Kenya (Service to be effected through the Petitioners' advocates' office).
3. The 1<sup>st</sup> Petitioner is the registered owner of the parcel of land known as Mwimbi/N. Mugumango/594.

4. The 1<sup>st</sup> Respondent is the claimant/applicant in Chuka SRM LDT Case No. 19/2002 alongside Micheu Kanyungu who is since deceased.
5. The subject matter in Chuka SRM LDT Case No. 19/2002 is MWIMBI/n.Mugumango/594.
6. That Mwimbi/N.Mugumango/594 was the subject matter in LDT Case No. Mwimbi/10/2001 which was later confirmed and adopted in Chuka LDT Case No. 19 of 2002.
7. That Chuka LDT No. 19 of 2002 is still pending in court for determination of some issues.
8. That Mwimbi/N. Mugumango/594 was registered land and any issues relating to ownership could only be handled by a court of law and not a tribunal.
9. That contrary to the law, the dispute over the ownership of land parcel No. Mwimbi/N. Mugumango/594 was handled by the tribunal in land dispute Tribunal Case No. MWI/10/2001 wherein it was decided that the 1<sup>st</sup> Petitioner should cease to be the owner of the subject matter herein and that the same should be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
10. That the Petitioners were adversely affected by the decision of Land Dispute Tribunal Case No. Mwi/10/2001 and they are still fighting the adverse decision in the case stated above.
11. That the tribunal of fact acted ultra vires as it had no jurisdiction to handle and determine issues relating to ownership of land duly registered under an act of parliament.
12. That jurisdiction in adversarial matters is everything and to act without the same is unlawful, illegal and contrary to the Constitution.
13. That Article 40 of the Constitution is clear on the right to private property and it can only be affected as per the constitution and law.
14. That the letter and spirit of the Constitution is that the right of protection to private property must be guarded by the procedural, substantive and constitutional law.
15. That Article 165 (2) of the Constitution is clear as to the issue of jurisdiction of courts in relation to land.
16. That section 9 of The Land Disputes Tribunals Act (repealed) conferred only limited jurisdiction to the tribunal.
17. That to allow the decision of the tribunal as confirmed by the lower court would be tantamount to allow perpetration of an illegality and application of bad law.
18. That the deprivation of private property should be sanctioned by the constitution and the law.
19. That courts should not be used to give effect to any illegality and in the event of any misadventure by the lower court, the High Court has the supervisory and revisionary powers to correct and protect the lower court.

**REASONS WHEREFORE** the Petitioners pray that the decision of the tribunal as confirmed in the lower court be quashed and set aside and the following declaration be issued:

- a) That the decision of the Tribunal was ultra vires, null and void for lack of jurisdiction.
- b) That the 1<sup>st</sup> petitioner is the bonafide registered owner of land parcel No. Mwimbi/N. Mugumango/594.
- c) That the decision of the tribunal in Land Dispute Tribunal case No. Mwi/10/2001 was an abrogation of the petitioner's rights to private property as envisaged in Article 40 of the Constitution of the Republic of Kenya 2010 and therefore unconstitutional.
- d) Costs of the petition be awarded to the petitioners.

**Dated at Chuka this 9<sup>th</sup> day of October, 2019.**

2. The petition is supported by the **affidavit of Nyaga Muchiri**, the first petitioner which states as follows:

**SUPPORTING AFFIDAVIT**

I, Nyaga Muchiri an adult male person of sound mind and of C/O P.O.Box 2913, Meu do hereby make oath and state as follows:-

1. That I am the 1<sup>st</sup> Petitioner herein properly versed with all the issues stated herein.

2. That I have the authority of my co-petitioner to make and swear this affidavit.

3. That the subject matter of this petition is L.R.No. Mwimbi/N.Mugumango/594 which is registered in my names. (*Annexed herein and marked "NMI" is a copy of a certificate of official search in respect of the said parcel of land*).

4. That the 1<sup>st</sup> Respondent is soliciting for buyers of the suit property and has brought several potential purchasers to inspect the same.

5. That I am apprehensive that the 1<sup>st</sup> Respondent shall deal with the suit property in a manner that shall jeopardize the proper litigation of this petition.

6. That it is in the interest of justice and fairness that these orders are sought.

7. That I depose to the foregoing believing the same to be true to the best of my knowledge, belief and understanding.

3. The petition has been responded to through the affidavit of Thomas Njiru Kanyunga, the 1<sup>st</sup> respondent, sworn on **18<sup>th</sup> February, 2020** which states as follows:

### **1<sup>ST</sup> RESPONDENT'S REPLYING AFFIDAVIT TO THE PETITION**

I, THOMAS NJIRU KANYUNGA care of P.O BOX 302 CHOGORIA within the Republic of Kenya do hereby make oath and state as follows

1. That I am the 1<sup>st</sup> respondent herein thus competent to swear this affidavit.

2. That I have read the petition herein and in response I wish to state as follows.

3. That this petition is an abuse of the process of this honourable court.

4. That it is true the honourable tribunal in Mwimbi/10/2001 awarded myself land parcel no.Mwimbi/Mugamango/594 and the 2<sup>nd</sup> respondent (*annexed and marked TNK1 is the proceedings of land disputes tribunal*).

5. That the 2<sup>nd</sup> respondent is deceased. (*Annexed and marked TNK 2 is the death certificate*).

6. That this ruling of the land disputes tribunal was adopted as an order of the court in LDT 19 of 2002 which is now concluded .

7. That the petitioners herein filed Misc Application No.58 of 2007 before the high court of Kenya at Meru seeking for leave to appeal to the provincial appeals committee which application was dismissed by the honourable court on 30<sup>th</sup> June 2008.(*Annexed and marked TNK 3 is the ruling*)

8. That the petitioner later filed an application for reviewing and setting aside adoption orders in LDT 19 of 2002 which application was dismissed by the honourable court on the 17<sup>th</sup> October 2008 .( *Annexed and marked TNK4 is the ruling*).

9. That the petitioner went to the Environment and land court in ELCA case no.6 of 2017 and filed an appeal which was dismissed by this honourable court for want of prosecution on 13<sup>th</sup> July 2017 (*Annexed and marked TNK 5 is the ruling*)

10. That the petitioners are frivolous litigants who have basically filed the above applications and suits which they have either lost or failed to prosecute prompting the court's to dismiss them.

11. That it is not true that the petitioners have been deprived of their constitutional rights of being deprived their rights to property as they have been in court and had chances of ventilating their cases.

12. That the Judgement of the tribunal which was adopted as an order of the court has never been reviewed appealed or set aside in any court of law and the same stands valid to date.

13. That the petitioners have not filed any judicial review proceedings against the Judgement of the tribunal and we submit that this is an appeal through the backdoor.

14. That I am in the process of obtaining my title deed out of land parcel no.Mwimbi/Mugomango/594 after the honourable court in LDT No.19 of 2002 ordered the land registrar Tharaka-Nithi to transfer the land to us and the executive officer of the honourable court to execute registration documents in my favour and also issued me with another order to lifting a restriction registered against the said land parcel on 11<sup>th</sup> September 2019.(*Annexed and marked TNK 6 are orders issued on 3<sup>rd</sup> December 2018 and 25<sup>th</sup> September 2019 respectively*).

15. That infact I have already obtained consent to transfer land to me from the Land Control Board. (*Annexed and marked TNK 7 is*

**the consent).**

16. That all this time we have canvassed these applications with the petitioners in court so they have throughout been given a fair hearing.
17. That the land disputes tribunal heard us also on merit and infact the land parcels the petitioner's alleges was theirs is infact our land parcels only that it was registered with the 1<sup>st</sup> petitioner so we have not deprived the petitioners of any land where we live and have developed it. **(Annexed and marked TNK 8 are the photographs).**
18. That initially this land parcel was registered under the names of Muchiri Muramba who is our eldest brother.
19. That after the death of our brother the 1<sup>st</sup> petitioner who was the grandson fraudulently registered this land parcels in his own names whereas he knew very well that this land belongs to us. **(Annexed and marked TNK 9 is the green card).**
20. That infact the 2<sup>nd</sup> respondent and myself live on land parcel No. Mwimbi/Mugomango/594 while the petitioners live on their land parcel No. Mwimbi/Mugomango/598 though there have subdivided it amongst themselves.
21. That the 2<sup>nd</sup> petitioner has never been registered as the owner of land parcel No. Mwimbi/Mugomango/594 and I do not know how her property rights were violated whereas she has never owned the land parcel the subject of this suit.
22. That therefore land parcel No.Mwimbi/Mugumango/594 did not belong to the petitioners irrespective of that current registration.
23. That this is an appeal through the backdoor as the petitioner's appeal was dismissed by this honourable court for want of prosecution and it seems the petitioners have exhausted their forums forming to this court on allegations of deprivation to right to property.
24. That this application is an abuse of the court's process as litigation ought to come to an end.
25. That I am advised by my advocate on record which advice I really belief to be true that the issues the petitioners raise in this petition have been canvassed in other courts of competent jurisdiction and therefore this petition is Res Judicata.
26. That I pray that this petition be dismissed with costs as it lacks merits.
27. That what is deponed herein is true to the best of my knowledge information and belief.

4. The petition was canvassed by way of written submissions. **The 2<sup>nd</sup>** respondent is deceased. From a total examination of the proceedings, it is pellucid that the **3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents** did not evince any appreciable interest in canvassing this petition.

5. The submissions filed by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners state as follows:

#### **1<sup>ST</sup> AND 2<sup>ND</sup> PETITIONERS' SUBMISSIONS**

**Your Lordship,**

We are on record herein on behalf of the Petitioner and we proceed to submit as follows:-

The Petitioner commenced these proceedings herein by way of a Petition dated 9/10/2019 and filed in Court on 14/10/2018. In the said Petition, the Petitioner seeks for the following prayers:-

- a) THAT the decision of the Tribunal was *ultra vires*, null and void for lack of Jurisdiction.
- b) THAT the 1<sup>st</sup> Petitioner is the bonafide registered owner of land parcel NO. MWIMBI/N.MUGUMANGO/594.
- c) THAT the decision of the tribunal in LAND DISPUTE TRIBUNAL CASE NO. MWI/10/2001 was an abrogation of the Petitioner's rights to private property as envisaged in Article 40 of the Constitution of the Republic of Kenya 2010 and therefore unconstitutional.
- d) Costs of the Petition be awarded to the Petitioners.

This Petition emanates from the proceedings and decision in LAND DISPUTE TRIBUNAL CASE NO. MWI/10/2001.

The 1<sup>st</sup> Petitioner is the registered owner of the parcel of land known as MWIMBI/N.MUGUMANGO/594 which was the subject matter in LTD CASE NO MWIMBI/10/2001 which was later confirmed and adopted in CHUKA LDT CASE NO. 19 OF 2002.

The said tribunal after hearing the dispute over the ownership of Parcel No. MWIMBI/N.MUGUMANGO/594 in its wisdom ruled:

the Panel is of the opinion that Parcel No. MWIMBI/N.MUGUMANGO/594 which is currently registered under Nyaga Muchiri should be subdivided by the two defendants who are brothers to each other i.e Thomas Njiru Kanyunga and Micheu Kanyunga who are the complainants and Nyaga Muchiri who is now the custodian of the title deed of the disputed Land Parcel NO. MWIMBI/N.MUGUMANGO/594 should cease to be the legal owner and surrender it to the Plaintiffs (i.e Thomas Njiru Kanyunga and Micheu Kanyunga of P.O. BOX 10 Chogoria). (*Annexed herein is a copy of the said tribunal judgment*).

Being aggrieved by the decision of the said tribunal, the Petitioners have now preferred this Petition.

It is our submission that the said Tribunal had no jurisdiction to entertain and/or determine issues touching on title to land and ownership of land and therefore the Tribunal erred in ordering that she surrenders Land Parcel No. MWIMBI/N.MUGUMANGO/594 to the 1<sup>st</sup> Petitioner.

Our contention is that since the 1<sup>st</sup> Petitioner is the registered owner of the subject Land Parcel No. MWIMBI/N.MUGUMANGO/594 and therefore the said Ruling was a miscarriage of justice as the said tribunal did not have jurisdiction to hear matters of ownership and title.

Your Lordship, we rely on the provisions of the Land Disputes Tribunal Act, of 1990 (now repealed) specifically Section 3(1) which states:-

***“The jurisdiction of the Land Dispute Tribunals are:-***

- a) To determine boundaries to the land held in common.***
- b) Claim to occupy or work on land and finally;***
- c) Trespass to land.***

We submit that the Land Disputes Tribunal Act does not grant powers to the District Land Disputes Tribunal to determine issues touching on title to land ownership or cancellation of any transfer documents and/or Share Certificate.

In the case of Gibson Sengete Matolo...Vs...Eastern Provincial Land Disputes Committee & 3 Others, HCC Misc.Appl No.33 of 2003, as referenced in Rose Wambui Wanyoike v Land Dispute Tribunal Kakuzi & another; Mwea Mwathe & another (Interested Parties) [2019] eKLR (a copy annexed) the Court held that:-

***“District Tribunals or even Land Disputes Appeals Committee have no powers to entertain matters touching on ownership and title to land.”***

Further, in the case of “In the matter of Asman Maloba Wepukhulu & Another...Vs...Francis Wakwabubi, Kisumu Court of Appeal No.157 of 2001, as referenced in Rose Wambui Wanyoike v Land Dispute Tribunal Kakuzi & another; Mwea Mwathe & another (Interested Parties) [2019] eKLR (supra) where the Court held that:-

***“Where a title to land has been unlawfully interfered with by bodies which lacked jurisdiction, such an award or any subsequent order emanating from and/or pursuant to the illegal award is also illegal and should be quashed”***

When a court or a Tribunal realizes that it lacks the requisite jurisdiction, then the best thing to do is to down its tools and move on further. This can assist in stemming the unnecessary costs being incurred by litigants in the wrong forums and counter applications on jurisdictional issues. This will also help in reducing time taken in resolving a matter and serve justice.

Your Lordship, we submit that jurisdiction is everything. In the case of Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR, the Court held that:-

***“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction”.***

In conclusion Your Lordship, we submit that Land Parcel No. MWIMBI/N.MUGUMANGO/594 was a registered land and any issues relating to ownership could only be handled by a court of law and not a tribunal. We implore you to find and hold that the decision of the tribunal in LAND DISPUTE TRIBUNAL CASE NO. MWI/10/2001 was ultra vires, null and void and proceed to quash the same with costs to the Petitioners.

We so pray Your Lordship.

DATED AT CHUKA this .....13<sup>th</sup> .....day of.....December,..... 2019

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FOR: M/S MUTWIRI ARIMI & CO.

**ADVOCATES FOR THE PETITIONERS**

6. The 1<sup>st</sup> respondent's written submissions state as follows:

**1<sup>ST</sup> RESPONDENT'S WRITTEN SUBMISSIONS TO THE PETITION**

The petitioners are relatives of the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> respondent is dead. He died on 26<sup>th</sup> July 2003 before the petition herein was filed.

The subject land parcel of these proceedings is land parcel no. MWIMBI/MUGUMANGO/594.

The same was initially registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's late step brother Muchiri Muramba to hold it in trust for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

After the death of the said Muchiri Muramba the 1<sup>st</sup> petitioner had this land parcel registered in his names prompting the 1<sup>st</sup> and 2<sup>nd</sup> respondent filing LDT case no. 10 of 2002.

That the land dispute tribunal ruled in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondent that the said land be subdivided to the 1<sup>st</sup> and 2<sup>nd</sup> respondent and the 1<sup>st</sup> petitioner herein surrenders title deed to land parcels no MWIMBI/MUGUMANGO/594 to the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein.

That the ruling of the tribunal was adopted as an order of the court in Chuka case no. LDT 19 of 2002 which case is now finalized.

The parties in the said LDT were the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the 1<sup>st</sup> petitioner and one GRACE NGURU MUCHIRI who is the mother of the 2<sup>nd</sup> petitioner herein.

That the 1<sup>st</sup> petitioner and the said 2<sup>nd</sup> petitioner's mother filed Misc Application no. 58 of 2007 before the Meru High court seeking leave to file an appeal to the provincial appeals committee which application was dismissed on 30<sup>th</sup> June 2008.

The petitioner and his counterpart filed an application in LDT 19 of 2002 seeking review and setting aside of the adoption orders which was dismissed by the honourable magistrate on 17<sup>th</sup> October 2008.

They later filed Chuka ELC Case Appeal no. 6 of 2017 which was dismissed by this honourable court on 13<sup>th</sup> July 2017.

The parties have also canvassed many applications in LDT 10 of 2002 and the honourable court gave several orders to the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to mandate implementation of the tribunal's decree which the 1<sup>st</sup> respondent is now in the process of obtaining a title deed and has even obtained consent to transfer from the land control board.

The petitioners aver that the tribunal acted ultra vires it had no jurisdiction to handle and determine ownership of land duly registered under an Act of parliament.

It is the 1<sup>st</sup> respondent's submissions that the petitioners did not file any judicial review proceedings to set aside the orders of the land disputes tribunal.

There was no appeal that was filed against the decree of the honourable court which adopted the tribunal orders and the appeal that was filed was dismissed for want of prosecution.

It is the 1<sup>st</sup> respondent submissions that the decree issued in LTD 19 of 2002 is still valid todate the same has not been reviewed and or set aside and the same stands to date.

The 1<sup>st</sup> respondent submits that this petition serves as an appeal through the backdoor as the petitioners and specifically the 1<sup>st</sup> petitioner has exhausted all means of his attempts to set aside the said decree of the honourable court.

It is also our submissions that the petition herein is Res Judicata.

The 1<sup>st</sup> petitioner has had numerous litigation with the 1<sup>st</sup> respondent herein in all those forums we have mentioned above. The issues raised in this petition are substantially the same issues raised the land disputes tribunal, LTD 19 of 2002, ELC appeal and the 1<sup>st</sup> petitioner has had a chance of ventilating his issues in all those forums.

Section 7 of the civil procedure Act states

***“no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

This doctrine of Res Judicata is anchored on the fact that litigation must come to an end. The parties herein begun to litigate in the year 2001 and 20 years down the line they are still litigating over the same subject matter which is land parcel no. MWIMBI/MUGUMANGO/594 which issues have substantially been determined by competent courts.

The 1<sup>st</sup> respondent has clearly deponed that the petitioners have their own land parcel MWIMBI/MUGUMANGO/598 where they have lived and developed.

The family of the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent herein are the ones who are in occupation of this subject land parcel.

In the case of **KENYA BUS SERVICES LIMITED & 2 OTHERS VERSUS AG QOUTED in the case of Michael Kungu Kigia versus Agricultural finance corporation & 6 others [ 2019 ] eKLR (copy attached).**

It was held that.

***“The constitution mandated given to the High court under section 84 of the constitution is a serious one. The courts cannot countenance the process being trivialized or abuse and applications falling under this category can in my view be challenged and dismissed or struck court except on grounds of lack of due process or anything that borders on constitutionality.”***

It was also held in the same court it was held.

***“The constitution is not a general substitute for the normal procedures for involving judicial control of administrative action. Where infringements of rights can be found a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution.”*** The suit herein has been brought therefore to substitute judicial review proceedings which the petitioners failed to file at the appropriate time.

The petitioners aver in the petition that their constitutional rights over their property were infringed.

It is our submissions that the petitioners’ constitutional rights were not infringed. In fact the 2<sup>nd</sup> petitioner has never owned land parcel no. MWIMBI/MUGUMANGO/594 the subject of these proceedings and we therefore cannot understand how her constitutional rights were infringed.

We submit that the petition herein does not meet the threshold expected to be met in constitutional petitions as clearly indicated in the case of **ANARITA KARIMI NJERU VERSUS TRUSTED TRUSTEE FOR HUMAN RIGHTS AND 5 OTHERS (2013) eKLR.**

**QOUTED IN Residents of Chania Methodist Witemere village viz Ernest Wagura Kigano & 87 others versus AG & 7 OTHERS (2016) eKLR. (Copy attached)**

Where the court stated that pleadings in a constitution petition should be precise on the

- Provisions of the constitution violated.
- The rights said to be infringed.
- The manner of infringement and the
- Judicial basis for it.

It is our submissions that the petition herein does not meet the threshold as held in the case above and in particulars it doesn’t indicate what it is that the 1<sup>st</sup> respondent did that infringed on the petitioners’ right property bearing in mind that the 2<sup>nd</sup> petitioner has never been registered as the owner of the land the subject of these proceedings.

In conclusion we submit that the petition herein is an abuse of the court’s process. The issues raised herein have been canvassed in court and the tribunal before the courts and this honourable court is being invited to sit on the Judgement of the lower court whereas this is not an appeal. In fact the petition herein is an appeal through the backdoor and we submit that it be dismissed with costs as it lacks merit and its an abuse of the court’s process.

We so humbly submit.

DATED AT EMBU 18<sup>th</sup> THIS DAY OF February, 2020

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**MUTHONI NDEKE & CO.**

**ADVOCATES FOR THE 1<sup>ST</sup> RESPONDENTS**

7. The petitioners replied to the 1<sup>st</sup> respondents' submissions in the following terms:

**PETITIONERS' REPLY TO THE 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

Your Lordship, we wish to reply to the 1<sup>st</sup> Respondent's submissions as follows:

It is the 1<sup>st</sup> Respondent's contention that the Petitioners' suit is *res judicata*. Curiously though, the 1<sup>st</sup> Respondent has not filed any Preliminary objection or Grounds Of Opposition.

It is common knowledge that that the issues raised in this Petition are not *res judicata* as alleged as the issues for determination therein have never been previously conclusively determined by a court of competent jurisdiction. Accordingly, **Section 7** of the **Civil Procedure Act** applies to cases where the issue in dispute is similar to an issue that was previously in dispute between the same parties when they were litigating under the same title and which was conclusively determined on merit by a court of competent jurisdiction.

Your Lordship, LDT Case No. 10 of 2002 was not an independent case *per se*. It was only meant to adopt the decision of the Tribunal in LDT CASE NO. MWIMBI/10/2001 which has been challenged herein as being unconstitutional for the fundamental reason that the said tribunal lacked jurisdiction to arbitrate on matters touching on ownership of registered land.

CHUKA ELC CASE APPEAL NO. 6 OF 2017 was dismissed on a technicality and therefore the same was not cannot be said to have been previously conclusively determined by a court of competent jurisdiction.

The issue of lack of jurisdiction of the tribunal in LDT CASE NO. MWIMBI/10/2001 and the contravention of the rights of the Petitioners remain uncontroverted and the same have never been previously conclusively determined by a court of competent jurisdiction.

Your Lordship, it is the Petitioners' contention that **Article 159 (2) (d)** of the **Constitution** mandates this Court to disregard any technicalities and as such, this Court is well seized with the jurisdiction to hear and determine this petition.

It is the Petitioners' case that the Application does not in any way contravene **Section 7** of the **Civil Procedure Act** and this Court has the jurisdiction to grant the orders sought in regard to the suit property. Accordingly, that the instant Petition deals with right to own property, and that of fair trial is not in any way vexatious and as such, this Court ought to allow the same and overrule the 1<sup>st</sup> Respondent's argument.

The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. In *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR (a copy herein annexed)*, the court distilled the essential ingredients of the doctrine the five ingredients mandatory to establish that a matter is *res judicata*:

- a) **The suit or issue was directly and substantially in issue in the former suit.**
- b) **That former suit was between the same parties or parties under whom they or any of them claim.**
- c) **Those parties were litigating under the same title.**
- d) **The issue was heard and finally determined in the former suit.**
- e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

Considering the above stated five ingredients makes the instant task quite straightforward that the instant Petition is not *res judicata*.

Your Lordship, **Article 23 (1) of the Constitution** provides as follows:-"The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights".

**Section 13 (2) of the Environment and Land Court Act** provides as follows:-"(2) In exercise of its jurisdiction under Article 162 (2) (b) of the constitution, the court shall have power to hear and determine disputes:- a.Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;b.....c.....". (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a

clean and healthy environment under Articles 42, 69 and 70 of the Constitution”.

In conclusion Your Lordship, we submit that this Honourable Court is seized with the requisite jurisdiction to hear and determine this Petition based on merit and ignore the 1<sup>st</sup> respondent’s call to dismiss this Petition which seeks redress of a denial, violation and infringement of a fundamental Constitutional rights.

This is our most humble submission for and on behalf of the Petitioners herein.

DATED AT CHUKA this .....3<sup>rd</sup> ...day of.....March,..... 2020

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FOR: M/S MUTWIRI ARIMI & CO.

**ADVOCATES FOR THE PETITIONERS**

8. I have carefully considered the assertions proffered by the parties to buttress their diametrically incongruent assertions.

9. I have also, in arriving at my determination in this matter, considered the authorities the parties have proffered when supporting their assertions. I opine that those authorities are valid in their facts and circumstances and I have taken them into account before reaching my determination. I opine that it would be veritably pyrrhic to regurgitate those authorities as the legal principles they enunciate have been expounded in full in the parties’ submissions which have been reproduced in full in the earlier part of this judgment.

10. The main issue for determination in this matter is if this court should quash the decision of a tribunal which was made in 2002, eighteen years ago and which decision had been canvassed in the lower court and in this court. In the event that the court quashes this decision then it is asked to make several declarations and award costs to the petitioners.

11. It is not controverted that the litigants are close relatives. It is also pellucid that that the 2<sup>nd</sup> respondent is deceased.

12. The decision of the land disputes tribunal was adopted as an order of the court in LDT 19 of 2002. The petitioner filed Misc. Application No. 58 of 2007 at the High Court in Meru which was seeking leave to appeal the tribunal’s decision to the Provincial Appeals Tribunal which application was dismissed on 30<sup>th</sup> June, 2008, twelve years ago. An application for reviewing and setting aside the adopted orders in LDT 19 of 2002, was dismissed. Thereafter, the petitioner moved to the ELC Court (this Court) in ELCA. No. 6 of 2017. This suit was dismissed for lack of prosecution. There is no evidence that the petitioners moved the court to vacate the dismissal order. The dismissal order was issued three years ago.

13. A perusal of the pleadings tendered by the parties has persuaded me to find that the respondents live on Land Parcel No. Mwimbi/Mugumango/594 and that the petitioners live on their Land Parcel No. Mwimbi/Mugumango/598 which they have subdivided to themselves.

14. The principal ground adduced by the petitioners in support of this petition is that the Land Tribunal lacked jurisdiction. Going through the pleadings, there is no doubt that the parties had their dispute adjudicated in various legal forums. Those forums were established under written law. At one time their suit was dismissed at the High Court in Meru. It is clear that a court of concurrent jurisdiction like this one vis a vis the High Court at Meru cannot overrule the decision of its partner court even if such an attempt is couched in a way that it is declared by the petitioners to be a constitutional petition.

15. The issue of jurisdiction must be raised at the earliest moment in the judicial institution hearing a matter. There is no evidence that this was done and if it was done the claim of lack of jurisdiction must have been dismissed. Yes, the **classic case of *The MV Lilian S [1989] KLRI***, is unequivocal that a court of law must only act with jurisdiction. However, Justice Nyarangi in the case also opined as follows: **“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity”**.

16. The issue of jurisdiction is not one of procedural technicality. It is a substantive issue which the petitioners should have vigorously ventilated in the various judicial institutions that handled their dispute with the respondents. Having not done so, I opine that a claim that constitutional provisions have been abrogated cannot, except perhaps in very exceptional cases such as that the petitioner was a minor when the alleged infraction took place, cannot be allowed to be made almost 20 years after the impugned decision was made. At some point, litigation must come to a close. I do not find it useful in the circumstances of this case to delve into the issue of if or if not this suit is res judicata previous proceedings. I also opine that litigants, when they fail to employ available remedies such as judicial reviews, ordinary reviews and appeals, cannot succeed by simply baptizing their suits **“Constitutional Petitions”**. In the circumstances of this case, I opine that substantial justice will be rendered where the petitioners and the respondents, who are close relatives, are separated from further acrimony by unequivocally finding that the respondents were lawfully, through a legally mandated judicial process, found to be beneficial owners of Land Parcel No. Mwimbi/Mugumango/594.

17. I find that the respondents were awarded the suit land through a valid legal process which process included adjudication by the High Court at Meru. I, therefore, do not find anything unconstitutional in the award by multifarious judicial authorities of Land Parcel Mwimbi/Mugumango/594 to them.

18. In the circumstances, judgment is hereby entered for the respondents against the appellants in the following terms:

a) This petition is hereby dismissed.

b) Costs shall follow the event and are awarded to the respondents.

**Delivered in open Court at Chuka this 30<sup>th</sup> day of September, 2020 in the presence of:**

CA: Ndegwa

Nyaga Muchiri 1<sup>st</sup> Petitioner

Purity Mwachoko 2<sup>nd</sup> Petitioner

**P. M. NJORGE,**

**JUDGE.**