



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**PETITION NO. 6 OF 2017**

**(FORMERLY KERUGOYA PETITION NO. 9 OF 2017)**

**BETWEEN**

**SOSPETER KARIUKI NTHIGA**

**NDORO & 59 OTHERS.....PETITIONERS**

**VERSUS**

**THE DIRECTOR OF LAND**

**ADJUDICATION & SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF SURVEYS.....2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. By a petition dated 21<sup>st</sup> April 2011 and amended on 23<sup>rd</sup> February 2016 brought under **Articles 2(5), 19, 20, 21, 22(1), (2), (4), 23, 28, 29, 40, 43 of the Constitution of Kenya, 2010** (hereinafter *the Constitution*) and **Articles 1, 8(2), 9, 10, 18, 26, 28, 33, 17, 42, 43 & 46 of the United Nations Declaration on the Rights of Indigenous Peoples** (hereinafter *UNDRIP*) the Petitioners alleged contravention of their rights under the Constitution and UNDRIP in relation to the *cultural, settlement and economic* rights of the *Iguna* clan.

2. The Petitioners contended that their rights to their ancestral land had been violated in that they had been deprived of *Title Nos. Nthawa/Riandu/2580, 2507, 2404, 945, 316, 2240, 2247, 2248, 2500, 2501, 2502, 2693, 2747, 2750, 2351, 2352, 3501, 2687, 3501, 2687, 3502, 2353, 1169, 261, 1822, 2382, 2383, 2384, 1137, 905, 1097, and 902* (hereinafter collectively known as *the suit properties*)

3. The Petitioners contended that although land adjudication was conducted in their area in Mbeere North District in 1972 or thereabouts, members of their clan were never issued with Title deeds. It was alleged that the Respondents had issued the title documents to complete strangers who were not members of the clan.

4. As a result, the Petitioners contended that they have been living in fear as they have been receiving threats since 1975 or thereabouts requiring them to vacate the suit properties.

5. The Petitioners further contended that the land adjudication process was a scheme merely designed to deprive them of their ancestral land through unlawful and illegal means which were in contravention of the Constitution and **Article 10 of UNDRIP**.

6. As a result of the Petitioners' said grievances, they sought the following reliefs in the amended petition;

a) *An order of injunction restraining the Respondents/their agents/servants and/or employees from issuing Title Deeds to persons*

other than the Petitioners.

b) A declaration that the Petitioners are entitled to their respective parcels of land in Iguna Clan section and in Mbeere North as beneficial owners.

c) An order that the said land is community or held in terms of Article 63 (1) and (2) of the Constitution of Kenya belonging to the Petitioners, Successors and other bona fide residents members of the Iguna clan.

d) An order of permanent injunction directed to the Respondents or any other party from interfering with their ownership, occupation, use over the suit land or otherwise from evicting or attempting to evict the Petitioners and other residents from the suit land or from issuing Title deeds or in any other way alienating the suit land other than to the Petitioners and other residents. (Sic)

e) An order for revocation of titles for Title Nos. Nthawa/Riandu/2580, 2507, 2404, 945, 316, 2240, 2247, 2248, 2500, 2501, 2502, 2693, 2747, 2750, 2351, 2352, 3501, 2687, 3501, 2687, 3502, 2353, 1169, 261, 1822, 2382, 2383, 2384, 1137, 905, 1097, and 902.

f) An order that the Petitioners be issued with title deeds for their respective suit lands after a survey has been done.

g) Exemplary damages and costs of the petition.

7. The said petition was supported by an affidavit sworn by Sospeter Kariuki Nthiga Ngoro, the 1<sup>st</sup> Petitioner, sworn on 3<sup>rd</sup> May 2016 in which he reiterated and expounded upon the grievances set out in the amended petition. He stated that members of Iguna clan were the original inhabitants of the suit properties.

8. The Petitioners conceded that their members were involved in the land adjudication process under the **Land Adjudication Act (Cap. 284)** in 1972 or thereabouts. They stated that they were promised that they would be issued with title deeds upon conclusion of the process. They further stated that upon conclusion of the process title deeds for the suit properties were issued to strangers instead of their members.

9. It is also noteworthy that the Petitioners exhibited copies of proceedings, rulings and judgements before various courts and tribunals between 1962 and 1970 which tended to show that some portion of land known as *Kambora* belonged to members of Iguna clan.

10. The Attorney General filed a replying affidavit sworn by Consolata K. Mbui on 30<sup>th</sup> May 2019 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 5<sup>th</sup> Respondents. The deponent described herself as the District Land Adjudication and Settlement Officer for “Mbeere/Kirinyaga districts”. She stated that Nthawa/Riandu Registration section where the suit properties fall was declared an adjudication section **under section 5 of the Land Adjudication Act** in 1971. She further stated that the Land Adjudication Officer for the area notified all the concerned residents of Nthawa/Riandu to submit their claims to the recording officer.

11. It was further stated that the relevant Land Adjudication Committees and Land Arbitration Boards were set up which dealt with all the cases submitted under customary law. It was stated that the members of the Petitioners’ clan fully participated in the land adjudication process and that they were represented by one Wilson Ngoro (hereinafter *Wilson*) who was the father of the 1<sup>st</sup> Petitioner. It was pointed out that Wilson filed at least five (5) cases before the Land Adjudication Committees. Copies of the relevant documents were exhibited as CKM1.

12. The Respondents further stated that upon conclusion of the process and publication of the final adjudication register under **section 26 of the Land Adjudication Act**, the said Wilson filed six (6) objection cases on behalf of his clan. The particulars of the said objections and copies thereof were exhibited as exhibit CKM3.

13. The Respondents, therefore, contended that the Petitioners fully participated in the land adjudication process in Nthawa/Riandu Adjudication section hence had the opportunity of presenting and proving their claims to the suit properties. They considered the petition as lacking in merit hence they urged the court to dismiss it with costs.

14. When the court gave directions on the hearing of the petition, it was directed that the same be canvassed through written submissions. The record shows that the Petitioners filed their written submissions and authorities on 4<sup>th</sup> September 2018 whereas the Attorney General filed his on 11<sup>th</sup> February 2019. The 4<sup>th</sup> Respondent, the National Land Commission, did not file any documents or participate in the proceedings.

15. The court has considered the amended petition, the replying affidavit in opposition thereto as well as the documents exhibited by the parties. The court has also considered the submissions and authorities filed by and on behalf of the parties. The court is of the opinion that the following issues arise for determination;

- a) Whether members of Iguna clan are an indigenous community and whether UNDRIP is applicable to them in the circumstances.
- b) Whether the Petitioners have demonstrated a violation of the cited fundamental rights under the Constitution.
- c) Whether the Petitioners are entitled to the reliefs sought in the petition, or any one of them.

16. There is no doubt from the amended petition that the Petitioners have sued on behalf of all members of Iguna clan which they claimed was an indigenous community within the meaning of UNDRIP. They alleged violation of certain articles of that Declaration in relation to their land rights within Nthawa/Riandu Adjudication section. In particular, they relied upon Article 10 which stipulates that:

**“Indigenous peoples shall not be forcibly evicted from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”**

17. So, who are indigenous people? The court has noted that UNDRIP does not define the term ‘indigenous’ but merely stipulates what rights they are entitled to and the obligations of the state towards them. That means resort should be had to the natural, ordinary meaning bearing in mind its contextual usage in the Declaration.

18. The online encyclopedia *Wikipedia*, defines them as follows:

**“Indigenous peoples, also known as first peoples, aboriginal peoples or native peoples, are ethnic groups who are the original settlers of a given region, in contrast to groups that have settled, occupied or colonized the area more recently ...”**

[See [https://en.m.wikipedia.org/wiki/indigenous\\_peoples](https://en.m.wikipedia.org/wiki/indigenous_peoples) last visited on 10.6.2019]

19. The *United Nations Department of Economic Social Affairs* describes them as follows:

**“Indigenous peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of dominant societies in which they live ...”**

[See <https://www.un.org/development/desa/indigenouspeoples/about-us.html> last visited on 10.6.2019]

20. The *World Bank* website describes indigenous people as:

**“Indigenous peoples are culturally distinct societies and communities. The land on which they live and the natural resources on which they depend are inextricably linked to their identities, cultures, livelihoods as well as their physical and spiritual well-being ...”**

[See <https://www.worldbank.org/en/topic/indigenouspeoples#1> last visited on 10.6.2019]

21. The *United Nations Permanent Forum on Indigenous Issues* describes them as:

**“... they are descendants – according to a common definition – of those who inhabited a country or geographical region at the time when people from different cultures or ethnic origins arrived. The new arrivals later became dominant through conquest, occupation, settlement or other means”.**

[See [https://www.un.org/esa/socder/unpfill/documents/5\\_session\\_factsheet1.pdf](https://www.un.org/esa/socder/unpfill/documents/5_session_factsheet1.pdf) last visited on 10.6.2019]

22. The said website indicates that the United Nations system has not adopted an official or universal definition of indigenous people. However, an understanding has been developed on the following attributes;

- a) *Self-identification at the individual level and acceptance by the community as a member.*
- b) *Historical continuity with pre-colonial and or pre-settler societies.*
- c) *Strong link to territorial and surrounding natural resources.*
- d) *Distinct social, economic or political systems.*
- e) *Distinct language, culture and beliefs.*
- f) *Form of non-dominant groups of society.*
- g) *Resolve to maintain and reproduce their ancestral environment and system as distinctive peoples and communities.*

23. Whereas the court would readily agree that certain communities such as the *Ogiek* meet the said attributes of indigenous people, the court is far from satisfied that members of Iguna clan of the Mbeere tribe are such a community. There is no material on record on the basis of which the clan can be said to be a distinctive community in relation to neighbouring clans or communities. It was not demonstrated that they have a distinctive language, culture, or social-economic systems in relation to their neighbours. There was no demonstration of historical continuity with pre-colonial or pre-settler societies. It was not contended that their occupation of Nthawa/Riandu Adjudication section pre-dated that of the other clans of the Mbeere ethnic community.

24. The court is really at a loss as to how the Iguna clan could be an indigenous community in relation to their neighbouring clans which reside within Nthawa/Riandu Adjudication section. It is not clear why the Petitioners would consider themselves to be more indigenous than

their neighbours with whom they were fighting for the suit properties in the 1960s and 1970s. The court is thus far from satisfied that the Petitioners are an indigenous community within the meaning of UNDRIP.

25. The court has considered the case of **Joseph Letuya & 21 Others Vs Attorney General & 5 Others [2014] eKLR**, which was relied upon by the Petitioners. The court finds that case clearly distinguishable from the instant petition. First, the *Ogiek* community are recognized as indigenous people whose natural habitat was forests. Second, unlike the Petitioners, the *Ogiek* community had not been accorded a chance to obtain land through the land adjudication process in the forests where they resided. It was demonstrated that some of them were still dependent on hunting and gathering in those forests.

26. The issue of applicability of UNDRIP to Kenya **under Article 2(6)** of the Constitution was not well addressed by the Petitioners. It is clear from that Article that the only international treaties or conventions applicable to Kenya are those which have been **ratified** by Kenya. Whether or not UNDRIP was ever signed and ratified by Kenya is a question of fact to be proved by the Petitioner. There is no evidence on record to demonstrate that Kenya has ever ratified UNDRIP. The Attorney General submitted that Kenya has never ratified that convention and referred the court to the website of the Ministry of Foreign Affairs which maintains a database of all the treaties and convention which Kenya has signed and ratified. The court has found no evidence of ratification of UNDRIP hence the same is not applicable to Kenya under **Article 2(6) of the Constitution**.

27. The second issue is whether the Petitioners have demonstrated violations of their constitutional rights under the Constitution. The Petitioners cited various provisions of the Constitution such as **Article 28 (human dignity), Article 29 (Freedom and Security of the person), Article 40 (Protection of right to property), Article 43 (Economic and social rights)**.

28. It has been held that a person who alleges contravention of his fundamental rights must plead with particularity the rights alleged to have been violated, and the manner in which they have allegedly been violated in relation to him. See **Kenneth Stanley Njindo Matiba V Attorney General Nairobi Petition No. 94 of 2014 [2017] eKLR**. The court has carefully considered the material on record. The court has also considered the Petitioners' grievances in relation to the suit properties. There is no dispute that the Petitioners or their leaders were made aware of the commencement of the land adjudication process in Nthawa/Riandu Adjudication section. There is no doubt that they fully participated in the process and that their leaders lodged committee cases and objections during the process. They may have won and lost in some of the cases and objections as is normal.

29. If a person or group of persons participate in a process which is supported by an elaborate legal process and fail to get all they wanted, that by itself cannot necessarily raise a constitutional issue. The Petitioners in this matter were accorded every opportunity to lodge and prove their claims to the suit properties during the land adjudication process. Their leaders even lodged objections upon publication of the final adjudication register. They had the opportunity to ventilate their grievances all the way to the Minister under **section 29 of the Land Adjudication Act** or even to the judicial review court. The mere fact that the Iguna clan did not get the suit properties does not automatically mean that their constitutional rights were violated.

30. The court is far from satisfied that the Petitioners' right to human dignity, freedom and security of the person, right to property, or economic rights were violated by the application of the **Land Adjudication Act** in Nthawa/Riandu Adjudication section because the process of land adjudication was a lawful process which had mechanisms for ascertaining property rights of the residents including claims to ancestral land under customary law.

31. The third issue is whether the Petitioners are entitled to the reliefs sought in the amended petition. It would follow that since the Petitioners have failed to demonstrate violation of their rights under both UNDRIP and the Constitution, they are not entitled to any of the reliefs sought in the amended Petition.

32. Even if the Petitioners had demonstrated a violation of either UNDRIP or the Constitution, the court would not have granted them the reliefs sought for two reasons. First, the reliefs sought, if granted, would affect the property rights of third parties who may have vested rights on the suit properties. It is noteworthy that the current registered proprietors of the suit properties were not joined in the petition even though the Petitioners sought to have their titles cancelled. In the case of **Nicholas Njeru V The Attorney General & 8 Others Nyeri Civil Appeal No. 110 of 2011 [2013] eKLR** the Court of Appeal held, *inter alia*, that:

**“... Be that as it may, this matter is further compounded by the fact that the persons whose titles were cancelled were not named and worse still the parties who were allegedly issued with the over 200 titles that the court is asked to cancel were also not named. It is a cardinal principle of law that a court of law is supposed to hear parties before making orders that affect them.”**

33. The second reason is that there was substantial and inordinate delay in filing the instant Petition. Although the Petitioners pleaded that they had been receiving eviction threats since 1975, they did not file the instant Petition until 2014. There was no explanation whatsoever for the delay of about 39 years in filing the petition.

34. The upshot of the foregoing is that the court finds no merit in the petition dated 21<sup>st</sup> April 2011 and amended on 23<sup>rd</sup> February 2016 hence the same is consequently dismissed with no order as to costs.

35. It is decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 13<sup>TH</sup> day of JUNE, 2019.**

Mr. Yusuf holding brief for Mr. Ali for the Petitioners; in the absence of the Attorney General for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 5<sup>th</sup> Respondents and in the absence of the 4<sup>th</sup> Respondent.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**13.06.19**