



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC PETITION CASE NO. 01 OF 2018

STANLEY MUTEGI G. MUGUONGO.....1ST PETITIONER

LAMECK MATI EDWARD (SUING AS LEGAL REPRESENTATIVE OF

EDWARD RUTERE.....2ND PETITIONER

KANAMIU M'MURITHI KABURI.....3RD PETITIONER

JUSTUS KARUKI MUNYUA.....4TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF THARAKA NITHI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

JUDGMENT

1. This Petition reads as follows:

TO:

THE HONOURABLE JUDGE

HIGH COURT OF KENYA

Introduction

1. The Petitioners are adults of sound mind and are residents of Maara Location Mwimbi Division, Tharaka Nithi County.

2. The Respondents are the County Government of Tharaka Nithi the Honourable the Attorney General and The National Land Commission.

Brief background

3. The Petitioners are residents of Maara Location and are Land owners.

4. The Petitioners own land parcels as follows:

a) 1st Petitioner – L.R. Nos. Kiera/East Magutuni/677 & 2165

b) 2nd Petitioner – L.R. Nos. Kiera/East Magutuni/1243

c) 3rd Petitioner – L.R. No. Kiera/East Magutuni/1242

d) 4th Petitioner – L.R. No. Kiera/East Magutuni/1663 – only became 3rd registered owner on 28.4.2014.

5. The Petitioner, during the Land Adjudication process in their area, gathered their lands within Kanyuru Unit, East Magutuni Land Adjudication Section.

6. That there were 3 units comprising the East Magutuni Land Adjudication Section namely; Kanyuru unit, Mugero unit and Nduri Unit.

7. The Petitioners never received any objections against their land parcels during the 60 days objection period and therefore, the lands that they gathered were demarcated on the ground and boundaries confirmed and the Petitioners were to await their title deed.

8. That the Petitioners discovered to their surprise that some of their acreages were illegally deducted from their lands and those acreages were placed in another unit (Mugero Unit) despite the fact that the Petitioners never gathered any land in Mugero unit and no land was demarcated for them in Mugero Unit.

9. The Petitioners aver that the 1st Petitioners P/No. 2165 was illegally moved from Kanyuru unit to Mugero unit and was placed on the ground where Rurama Secondary School, which is a project of Mugero unit was to be established.

10. That Edward Rutere's P/No. 1243, Kanampiu's P/No. 1243 & Kiruki's P/No. 1663 were also illegally moved from their originally demarcated positions in Kanyuru unit and were taken to Mugero Unit without their knowledge and approval.

11. That therefore, Mugero's unit project, namely Rurama Secondary School, was illegally pushed into Kanyuru unit and as such, the Petitioner's lands were affected as pleaded above.

LEGAL FOUNDATION

12. Article 2 of the Constitution of Kenya 2010 is to the effect that the constitution is the supreme law of the Republic and binds all persons and state organs at all levels of governance.

13. Article 10 of the Constitution with regard to National values binds all state organs, all public officers to take into consideration National values including equality, non-discrimination and rule of law in making decisions.

14. Article 19 of the bill of rights provides that the bill of rights belongs to each individual and are not granted by state and do not exclude other rights and freedoms not in the bill of rights.

15. The Respondents have acted completely in defiance of the law which requires that the Petitioners are entitled to enjoy their property and not to be deprived of the same arbitrarily, illegally whimsically and without following the due process of the law.

16. The Petitioners had a legitimate expectation that the respondents would consult the petitioners before maliciously and illegally excising portions of land and transferring them to the predecessor of the 1st Respondent. The District Land Adjudication and settlement (sic) of East Magutuni, excised land from the Petitioners' portions, thereby depriving the Petitioners their land.

17. The Petitioners pray that the unconstitutional actions of the 2nd Respondent ought to be reversed since Article 23(i) of the constitution gives the High Court jurisdiction to hear and determine application (sic) for redress of a denial, violation or infringement of a threat of a right for fundamental freedom in the bill of rights.

VIOLATION OF THE CONSTITUTIONAL AND FUNDAMENTAL RIGHTS

18. The Petitioners lost their portions of land illegally to Rurama Secondary School.

19. The Petitioners' land illegally taken from them was registered as part of L.R. No. Kiera/East –Magutuni/991 in the name of the defunct Meru County Council.

20. The Petitioners were not heard or consulted by the District Land Adjudication and Settlement Officer as required under article 174 of the Constitution, before the said portions were taken away from them.

21. The Petitioners aver that the Respondent violated the Provisions of Section 75 of the old constitution and in extension, article 40 of the constitution of Kenya, 2010.

THE RELIEF SOUGHT

REASONS WHEREOF the petitioners humbly pray for orders;

a) A declaration that the actions of the Respondents to hive off portions of land from the Petitioners' land was in violation of the Petitioners' constitutional rights.

b) A declaration that moving part of the Petitioners' lands from Kanyuru unit to Mugero unit was in contravention and violation of the petitioners' rights.

c) An order that the Respondents be compelled to return the Petitioners' lands to Kanyuru unit and in their original area of demarcation and acreage.

d) An order that the Respondents bear the costs of this petition.

DATED AT MERU THIS 23RD DAY OF JANUARY, 2018

FOR; MWIRIGI KABURU & CO.

ADVOCATES FOR PLAINTIFFS

2. The Petition is supported by the affidavit of Stanley Mutege G. Muguongo which states as follows:

SUPPORTING AFFIDAVIT

I **STANLEY MUTEGI G. MUGUONGO** of P. O. BOX **44 CHOGORIA** do hereby make oath and state as follows;

1. THAT I am the 1st Petitioner herein, very well versed with all the issues herein and therefore competent to make and swear this affidavit on my behalf and on behalf of the 2nd – 4th Defendants.

2. THAT I hail from **KERERENI** village, kiroo Sub locaiton, Maara location, Mwimbi division, Maara Sublocation, Tharaka Nithi County.

3. THAT all the four Petitioners own land parcels within the registration area known as **KIERA/EAST MAGUTUNI**.

4. THAT all the four Petitioners own land parcels as follows;

a) 1st Petitioner – L.R. NOS. KIERA/EAST – MAGUTUNI/667 & 2165

b) 2nd Petitioner – L.R. NO. KIERA/EAST – MAGUTUNI/1243

c) 3rd Petitioner – L.R. NO. KIERA/EAST MAGUTUNI/1242

d) 4th Petitioner – L.R. NO. KIERA/EAST MAGUTUNI/1663

Annexed and marked **SMM1, 2, 3 & 4** are copies of the respective green cards.

5. THAT during the land Adjudication process in our area, all the Petitioners gathered their lands and the demarcation process followed thereafter, with our lands being under the East Magutuni land Adjudication Section and it was divided into three units namely;

- Kanyuru unit

- Mugero unit

- Nduri unit

6. THAT the gathering process in the aforesaid units was done in the early sixties and the demarcation was completed as follows;

- Kanyuru unit – 1975

- Mugeru unit – 1978

- Nduri unit - 1980

7. THAT during the demarcation process, each person who had a land in that unit was shown his land boundaries and given parcel numbers. Before this processes each unit had set aside public utility lands for secondary and primary school, cattle dips, factories, chief's camps, hospitals and all other public utility land. These public utility lands were gotten from percentage cuts from the lands within a particular unit **AND** there was no crossing of borders during these percentage cuts for each unit.

8. THAT during the demarcation time, each unit had its land committees members totaling to 25 and the overall land committee

members for East Magutuni land Adjudication Section had 75 members. Each unit committee had its own chairman.

9. THAT after the demarcation process, the 60 days' objection period was gazzetted sometimes in the early 1980's and each unit committee members handled the objections which were confirmed to a unit with no cross-unit objections.

10. THAT it was the norm and a matter of public knowledge amongst each unit, that no public utility plot would be created in an unit, for the benefit of another unit. Simply put, each unit had its own, public utility plots and projects.

11. THAT during the 60 day's objection period, the Petitioners lands were not objected to by any person and as such, the Petitioners expected their gathered and demarcated pieces of lands to be placed on the ground where they were originally gathered and demarcated.

12. THAT it therefore came as a surprise, when the Petitioners were informed by the predecessor of the 1st Respondent, that they should move to allow Rurama Secondary School to be built where the Petitioner's lands were originally demarcated.

13. THAT I discovered that my land parcel No. KIERA/E-MAGUTUNI/2165 had been illegally moved from Kanyuru unit to Mugero Unit, and was placed on the ground where Rurama Secondary School, which is a project of Mugero unit was to be established.

14. THAT **EDWARD'S** parcel NO1243, KANAMPIU'S 1242 and KIRUKI'S parcel No. 1663 were all illegally moved from their originally demarcated positions in Kanyuru unit and were taken to Mugero unit without their knowledge and approval.

15. THAT therefore, Mugero's unit project namely, Rurama Secondary School, was illegally pushed into Kanyuru unit and as such, the Petitioner's lands were affected as pleaded above, hence this petition.

16. THAT I also lost land when a road was created across my land and I will be claiming that my original acreage of 8.36Acres which was demarcated to me within Kanyuru unit, be returned to its original position on the ground.

17. THAT we have since established that Rurama Secondary School has a land reserved for its construction which land is registered in the name of the defunct Meru County Council as L.R. NO. KIERA/EAST – MAGUTUNI/ 991 measuring 8.40 Ha.

18. THAT the above land is within Kanyuru unit, whereas it was a project of Mugero unit where it should be placed since the residents of Mugero unit gave up their lands by way of percentage cuts for creation of land for Rurama Secondary School among other public utility lands.

19. THAT I say that the proposed Rurama Secondary School ought not to have displaced the Petitioners from their lands and as such, the Petitioners were deprived of their properties unprocedurally, illegally and the Defendant's actions are unconstitutional ab initio.

20. THAT I even lodged a dispute before the then land disputes Tribunal and the Tribunal found in my favour. Annexed and Marked **SMM5** is a copy of the proceedings.

21. THAT I therefore urge the court to allow the Petition.

22. THAT all what is deposed to hereinabove is true to the best of my knowledge, information and belief.

DATED AT MERU THIS ...23rdDAY OFJanuary,.....2017

3. The Petition is responded to through the Replying Affidavit of Lilian Kiruja sworn on **21st March, 2019** which states as follows:-

REPLYING AFFIDAVIT IN RESPONSE TO THE PETITION AND THE SUPPORTING AFFIDAVIT TO THE PETITION

I, LILIAN KIRUJA of P.O. BOX 10-60400KATHWANA do hereby make oath and state as follows:-

1. THAT I am the Principal Legal Officer of TharakaNithi County hence competent to swear and make this replying affidavit.

2. THAT I have read and understood the contents of the petitioners' petition dated **23rd** day of **January 2018** together with the supporting affidavit to the said petition filed in Court on the same date and it is in response thereto I do wish to swear and make this replying affidavit.

3. THAT the subject matter in this petition is **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** which measures **8.40 Hectares**.

4. THAT the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** is currently registered in the name of County Government of TharakaNithi and is reserved for **RURAMA SECONDARY SCHOOL. (Annexed is the copy of the Search Certificate and a copy of the Register marked "LK1(a)" and "LK1(b)" respectively).**

5. THAT the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was created from “Percentage” cuts from East Magutuni Adjudication Section individual land owners during the process of demarcation and Adjudication with East Magutuni Section.
6. THAT after the adjudication register for East Magutuni Adjudication Section was completed, a notice was issued by the Land Adjudication Officer, Meru indicating that any person who had any objection had **60 days** to do so. (**Annexed is the said Notice marked “LK2”**).
7. THAT at the time when the said notice of 60 days of objection was being issued, **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** had already been preserved for public utility.
8. THAT even after the issuance of the said notice, none of the petitioners filed any objectionS claiming that their land was part of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** or that the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was reserved on the wrong unit as alleged by the petitioners.
9. THAT the 1st petitioner could therefore not file any Tribunal case or **APPEAL NO. 23 OF 2004** particularly having not filed any objection to reservation of the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** as a public utility within the **60 days** given by the Land Adjudication officer on **7th March 1979**.
10. THAT the filing of the Tribunal case and the subsequent appeal at the Provincial Appeals Committee could not defeat failure by the petitioners to file the objections as required under **Cap 283 and 284 Laws of Kenya**.
11. THAT it is also to be noted that the Land Dispute Tribunal case was filed over **24 years** from the date when Notice of Objection was issued by the Land Adjudication Officer.
12. THAT again, it is to be noted that this petition was filed in the year 2018, which is over **38 years** since the Notice of **60 days** was given by the Land Adjudication Officer and **11 years** from the time when Provincial Land Dispute Appeals Committee made their decision.
13. THAT it is clear that the petitioners are out to abuse the due court process to defeat the clear provisions of the **Land Consolidated Act, Cap 283 Laws of Kenya and the Land Adjudication Act, Cap 284 Laws of Kenya** which provides for the procedure and the process in regard to filing objections in the land situated with Adjudication Section.
14. THAT it is also to be noted that the Meru County Council was the 1st registered owner of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991**.
15. THAT in regard to hearing of the Land Dispute Tribunal Case and the subsequent appeal at the Provincial Land Dispute Appeals Committee, **Sections 3(a), (b), (c) and 8** of the Repealed **Land Disputes Tribunal Act No.19 of 1990** clearly provides what was the mandate (**jurisdiction**) of the Land Dispute Tribunal and / or Provincial Appeals Committee.
16. THAT it is trite law that neither the Land Disputes Tribunal nor the Provincial Appeals Land Dispute Committee had jurisdiction to give, take away a title and / or a portion of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** from the registered owner.
17. THAT the Provincial Appeals Committee did not have power and / or jurisdiction to order that the appellant (**1st petitioner**) get back his **1½** acres whereas the subject **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was registered under **Cap 300 (Now Repealed)**.
18. THAT the subject **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** is a public land preserved for Rurama Secondary School.
19. THAT in the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** there is an established Rurama Primary School with over **700** primary school pupils from class 1 to class 8 and the Rurama Secondary School is on the process of being established.
20. THAT if the orders sought by the petitioners are granted, people in Mwimbi and Magutuni in particular and the TharakaNithi County in general who have pupils at Rurama Primary School will suffer irreparably because the school will close down.
21. THAT further, if the orders sought by the petitioners are granted, it is likely to open a flood gate of litigation particularly from those people who contributed to the percentage cuts for the **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** reserved for Rurama Secondary School.
22. THAT it is not true that the petitioners lost any part of their land as alleged.
23. THAT no Article of the Constitution was violated as alleged by the petitioners.
24. THAT it is clear from **paragraph 4** of the 1st petitioners’ supporting affidavit sworn on **1st January 2018** that he and the other petitioners got registered with their respective parcels of land way back in **1996** when **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was registered and none of them raised any issues then.

25. THAT whereas it is true that after the demarcation and adjudication process, **60 days** period was gazetted, none of the petitioners filed any objection against the reservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** in the name of Rurama Secondary School.

26. THAT the allegations by the petitioners of not crossing of unit when it come to percentage cuts and preservation of public utility has no basis or force of the law.

27. THAT the preservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was for the benefit of all the people who live in Magutuni, Mwimbi, TharakaNithi and in Kenya in general and not for the purpose of a particular unit or people.

28. THAT Meru County Council could not object to the petitioner's parcels of land because it was within the knowledge of those carrying the demarcation and adjudication process that land for public utility use such as schools, cattle deeps, hospitals, playing ground e.t.c. had to be created and this was to come from the percentage cuts from the individual land owners in East Magutuni Adjudication Section and not from a few individuals as the petitioners want this court to believe.

29. THAT the contents of **paragraphs 12, 13, 14, 15, 18, 19 and 20** of the 1st petitioner's supporting affidavit are not supported by any evidence but mere allegations which have no basis or support of the law.

30. THAT the allegations by the petitioners that they have since established that **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** measuring **8.40 Ha** is registered in the name of the defunct Meru County Council is just made to mislead the Court because the said land was so registered way back in **1996** when the register of the said land was opened.

31. THAT none of the petitioners in the petition and in their supporting affidavit have demonstrated how the alleged Constitution Rights have been violated.

32. THAT nowhere does the Constitution of Kenya 2010 or the old Constitution provides that the individuals who were affected by percentage cuts should demand back the land which was preserved for public utility.

33. THAT there is no dispute that the petitioners never objected to preservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** for Rurama Secondary School.

34. THAT on the issue of Rurama Secondary School being established in a unit where it was not supposed to be, the petitioners are being cheap and infact going against Article which provides for Protection of the public land.

35. THAT the preservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** for Rurama Secondary School was done within the Law.

36. THAT the petitioners cannot invoke the provisions of Articles of the Constitution to achieve what they failed to achieve by failing to adhere to the **Provisions of Cap 283 and Cap 284 Laws of Kenya**.

37. THAT percentage cuts was within the mind of all the land individual owners of land within East Magutuni Adjudication Section from the time the demarcation process started all the way up to the conclusion of the Adjudication process and none of them raised the issue of preservation of the **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** except the petitioners who have to late in the day without reason filed this petition.

38. THAT the filing of the petition herein is against the public interest and policy as it is intended to take away the public land which will lead to disruption of the learning at Rurama Primary School which is a fully established school.

39. THAT **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** is a public land which is defined in **Article 62 of the Constitution** and the petitioners cannot invoke the same Articles of Constitution to defeat ad / or take it away from the County Government of TharakaNithi.

40. THAT what is deponed to hereinabove is true to the best of my knowledge, belief and information.

SWORN BY THE SAID, LILIAN KIRUJA

4. The 1st Petitioner filed a further affidavit sworn on **6th May, 2019** which states as follows:

1ST PETITIONER'S FURTHER AFFIDAVIT

I **STANLEY MUTEGI MUGUONGO** of P. O. BOX **44 CHUKA** do hereby make oath and state as follows;

1. THAT I have seen the replying affidavit of the Legal officer of the 1st respondent and I make this affidavit in response thereto.

2. THAT vide a decision made in LDT Appeal No. 23 of 2004, the said tribunal, reached a finding that the petitioners had gathered land at **KANYURU** unit and not at **MUGERO** unit and the tribunal ordered that the 1st respondent's predecessor, to return the 1st petitioner's land. Annexed and Marked **SM1** is a copy of the decision of the Appeals committee.

3. THAT the said decision was confirmed as the judgement of the court in chuka LDT Case No. 52 of 2002, and a decree was issued on **16/4/2008**. Annexed and Marked **SM2** is a copy of the decree.
4. THAT from the foregoing, it is clear that the issue of illegal taking of our lands was discussed and the 1st respondent was found culpable.
5. THAT I therefore say that the actions of the land adjudication officers was illegal because I am still in occupation of my land as it was originally demarcated.
6. THAT I urge the court to allow our petition and make the orders sought.
7. THAT all what is deponed to herein above is true to the best of my knowledge information and belief.

DATED AT MERU THIS6TH ...DAY OF ...MAY..... 2019

5. The 1st Respondent filed a further Replying Affidavit sworn on **10th May, 2019** which states as follows:

FURTHER REPLYING AFFIDAVIT

I, **LILIAN KIRUJA OF P. O. Box 10-60400 Kathwana** do hereby make oath and state as follows:

1. That I am the Principal Legal Officer of the 1st defendant hence competent to swear this further replying affidavit.
2. That I have read and understood the further supporting affidavit sworn by the 1st petitioner sworn on 06.05.2019 and it is in response thereto I do wish to swear this further replying affidavit.
3. That I still go by the contents of my replying affidavit sworn by me on 21.3.2019 and filed in court on 22.3.2019.
4. That the 1st respondent also entirely on the list of authorities dated 3.5.2019 and filed in court on the same date.
5. That the 1st respondent still maintains that neither the Meru South District Land Dispute Tribunal nor the Eastern Provincial Land Dispute Appeals Tribunal had the jurisdiction to determine the dispute relating to ownership in respect of Land Parcel No.Kiera/E. Magutuni/991 then registered under Cap 300 Laws of Kenya.
6. That due process was followed in reserving land parcel No. Kiera/E. Magutuni/991 for Rarama Secondary School in the name Meru County Council (which is now registered in the name of Tharaka Nithi County Government).
7. That none of the petitioners occupies or utilizes any part of land parcel NO. Kiera/E. Magutuni/991.
8. That Meru County Council was the 1st registered owner and the said title is indefeasible.
9. That both the old and the new constitution protects public land and the sanctity of the title to land.
10. That it is clear from the proceedings and decree annexed as SM1 and SM2 in the 1st petitioners further supporting affidavit that the Provincial Appeals Tribunal did specifically address Land Parcel No.Kiera/E.Magutuni/991.
11. That equally, it is clear that the said annexures did not address the issue whether the petitioners raised and / or following the laid down process and / or raised and dispute during the adjudication process and neither did it address the issue of Meu County Council being the 1st registered owner of land parcel No. Kiera/E.Magutuni/991.
12. That the petitioners could not use the land dispute tribunal or the provincial Appeals tribunal to achieve what they failed to achieve under the Land Adjudication Act, Cap 284 Laws of Kenya.
13. That equally, the petitioners cannot wake up from their slumber and now use the Constitutional Court to take away the public land after having failed to pursue their interest (if they had any but which is denied) as provided under the Land Adjudication Act, Cap 284 Laws of Kenya.
14. That it is onlyjust and fair that the petition herein be dismissed with costs.
15. That what I have stated herein above is true to the best of my knowledge, belief and information.

Sworn at Meru this 10th day of May, 2019

6. The Petition was canvassed by way of written submissions.

7. The petitioners' written submissions are reproduced in full herebelow without any alteration whatsoever including correction of spelling or any other mistakes:-

PETITIONER'S WRITTEN SUBMISSIONS

Your Honour, on behalf of the petitioners, we wish to submit as follows;

THE PETITION

As per the petition filed, the petitioners' main complaint, is that at the time of adjudication, the Adjudication officers, hived off part of their lands and displaced them to another unit, such that where the Petitioners are living, their lands are less than what they gathered and had registered in their names. The effect of the respondent's actions is that they lost acreage to Rurama Secondary School, which was introduced in the area, illegally. The petitioners are of the view that the hiving of their lands is illegal since no objections were filed against their portions of land.

A look at the petitioner's supplementary list of documents, will show that the petitioners have their land away from parcel No. 667, which is the original area where they gathered and demarcated their land.

The old constitution, at section 75, guaranteed the right to property and that a citizen should not be deprived of his land without due process.

The Respondents have not explained why the petitioners land were moved from their original positions within Kanyuru unit and pushed to Mugeru unit, which is a different area from the petitioners known unit.

The supporting affidavit of **STANLEY MUTEGLI**, has laid down the basis for the petition and the respondents have not shown that there exists a different set of facts. The petition is unopposed by the respondents.

We submit that once the court finds that the petitioners lands were hived off and pushed to a sloppy and unarable land, then the petitioner's rights to own property have been violated and we urge the court to allow the petition as prayed.

DATED AT MERU THIS ...14TH ... DAY OFMAY,.... 2018

FOR: MWIRIGI KABURU & CO.

ADVOCATES FOR PLAINTIFFS

8. The 1st Respondent's written submissions are reproduced in full herebelow without any alterations whatsoever including corrections of spellings or any other mistakes.

1ST RESPONDENT'S SUBMISSIONS

1. Your Lordship, the subject matter in this petition is **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** which measures **8.40 Hectares**. The said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was initially registered in the name of the defunct Meru County Council but is now registered in the name of the County Government of Tharaka Nithi and is reserved for **RURAMA SECONDARY SCHOOL**.

2. The said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was created from "Percentage" cuts from East Magutuni Adjudication Section individual land owners during the process of demarcation and Adjudication within East Magutuni Section.

3. After the adjudication register for East Magutuni Adjudication Section was completed, a notice was issued by the Land Adjudication Officer, Meru indicating that any person who had any objection had **60 days** to do so.

4. When the said notice of 60 days of objection was being issued, **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** had already been preserved for public utility. It is to be noted that after the issuance of the said notice, none of the petitioners filed any objection claiming that their land was part of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** or that the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was reserved on the wrong unit as alleged by the petitioners.

5. Your Lordship, the 1st petitioner could therefore not file any Land Dispute, Tribunal Case or **APPEAL NO. 23 OF 2004** particularly having not filed any objection against reservation of the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** as a public utility within the **60 days** given by the Land Adjudication officer on **7th March 1979**. The filing of the Tribunal case and the subsequent appeal at the Provincial Appeals Committee could not defeat failure by the petitioners to file the objections as required under **Cap 283 and 284 Laws of Kenya**.

6. Your Lordship, Land Dispute Tribunal case was filed over **24 years** from the date when Notice of **60 days** Objection was issued by the Land Adjudication Officer. Again, it is to be noted that this petition was filed in the **year 2018**, which is over **38 years** since the Notice of **60 days** was given by the Land Adjudication Officer and **11 years** from the time when Provincial Land Dispute Appeals Committee made their decision.

7. We submit that the petitioners are out to abuse the due court process to defeat the clear provisions of the **Land Consolidated Act, Cap 283 Laws of Kenya and the Land Adjudication Act, Cap 284 Laws of Kenya** which provides for the procedure and the process in regard to filing objections in the land situated with Adjudication Section.
8. As regards to hearing of the Land Dispute Tribunal Case and the subsequent determination of the Appeal at the Provincial Land Dispute Appeals Committee, **Sections 3(a), (b), (c) and 8** of the Repealed **Land Disputes Tribunal Act No.19 of 1990** clearly provides what was the mandate (**jurisdiction**) of the Land Dispute Tribunal and / or Provincial Appeals Committee.
9. It is trite law that neither the Land Disputes Tribunal nor the Provincial Appeals Land Dispute Committee had jurisdiction to give, take away a title and / or a portion of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** from the registered owner.
10. We submit that the Provincial Appeals Committee did not have power and / or jurisdiction to order that the appellant (**1st petitioner**) get back his **1½** acres whereas the subject **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was registered under **Cap 300 (Now Repealed)**.
11. Your Lordship, the subject **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** is a public land preserved for Rurama Secondary School. In the said **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** there is an established Rurama Primary School with over **700** primary school pupils from class 1 to class 8 and the Rurama Secondary School is on the process of being established.
12. Your Lordship, if the orders sought by the petitioners are granted, people in Mwimbi and Magutuni in particular and the Tharaka Nithi County in general who have pupils at Rurama Primary School will suffer irreparably because the school will close down.
13. It is also likely to open a flood gate of litigations particularly from those people who contributed to the percentage cuts for the **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** reserved for Rurama Secondary School.
14. Your Lordship, it is not true that the petitioners lost any part of their land as alleged. There is no Article of the Constitution which was violated as alleged by the petitioners.
15. Your Lordship, in **paragraph 4** of the **1st** petitioners' supporting affidavit sworn on **1st January 2018**, he swears that he and the other petitioners got registered with their respective parcels of land way back in **1996**. This was at the same time when **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was registered and none of them raised any issues then.
16. Your Lordship, whereas it is true that after the demarcation and adjudication process, **60 days** period was gazetted, none of the petitioners filed any objection against the reservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** in the name of Rurama Secondary School.
17. The allegations by the petitioners of not crossing of unit when it come to percentage cuts and preservation of public utility has no basis or force of the law.
18. We submit that the preservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** was for the benefit of all the people who live in Magutuni, Mwimbi, Tharaka Nithi and in Kenya in general and not for the purpose of a particular unit or people.
19. Your Lordship, Meru County Council could not object to the petitioner's parcels of land because it was within the knowledge of those carrying the demarcation and adjudication process that land for public utility e.g. schools, cattle deeps, hospitals and playing grounds had to be created and this was to come from the percentage cuts from the individual land owners in East Magutuni Adjudication Section and not from a few individuals as the petitioners want this court to believe.
20. As regards the contents of **paragraphs 12, 13, 14, 15, 18, 19** and **20** of the **1st** petitioner's supporting affidavit, we submit that they are not supported by any evidence but mere allegations which have no basis or support of the law.
21. The allegations by the petitioners that they have since established that **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** measuring **8.40 Ha** is registered in the name of the defunct Meru County Council is just made to mislead the Court because the said land was so registered way back in **1996** when the register of the said land was opened.
22. Your Lordship, none of the petitioners in the petition and in their supporting affidavits have demonstrated how the alleged Constitution Rights have been violated. Nowhere does the Constitution of Kenya 2010 or the old Constitution provides that the individuals who were affected by percentage cuts should demand back the land which was preserved for public utility. The petitioners never objected to preservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** for Rurama Secondary School and cannot later come to court to allege that their rights were violated.
23. On the issue of Rurama Secondary School being established in a unit where it was not supposed to be, the petitioners are being cheap and infact going against Article which provides for Protection of the public land. The preservation of **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** for Rurama Secondary School was done within the Law and the petitioners cannot invoke the provisions of Articles of the Constitution to achieve what they failed to achieve by failing to adhere to the **Provisions of Cap 283 and Cap 284 Laws of Kenya**.
24. We submit that the percentage cuts was within the mind of all the individual owners of land within East Magutuni Adjudication Section from the time the demarcation process started all the way up to the conclusion of the Adjudication process and none of them

raised the issue of preservation of the **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** except the petitioners who have too late in the day without reason filed this petition.

25. We further submit that the filing of the petition herein is against the public interest and public policy as it is intended to take away the public land which will lead to disruption of the learning at Rurama Primary School which is a fully established school and it will also affect the establishment of Rurama Secondary School.

26. **LAND PARCEL NO. KIERA / E. MAGUTUNI / 991** is a public land which is defined in **Article 62 of the Constitution** and the petitioners cannot invoke the same Articles of Constitution to defeat ad / or take it away from the County Government of Tharaka Nithi.

We urge the court to dismiss the petitioners' petition with costs to the 1st respondent.

We so humbly pray.

DATED AT MERU THIS 21ST DAY OF MARCH, 2019

NYAMU NYAGA & CO. ADVOCATES

ADVOCATES FOR THE 1ST RESPONDENT

9. In support of the Petition, the 1st Respondent proffered the following authorities:

1. Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) LTD [1989]KLR.
2. Nyeri Court of Appeal, Civil Appeal No. 124 of 2003, M'Ikiara M'Rinkanya & Another –vs- Gilbert Kabeere M'Mbijiwe.
3. Nyeri Court of Appeal, Civil Appeal No. 259 of 2000, Beatrice M'Marete VS Republic & 3 Others.
4. The Land Disputes Tribunals Act No. 18 of 1990.
5. Registered Land Act, Cap 300 (Now repealed).

10. Despite evidence of service several times, the 2nd and 3rd Respondents did not file written submissions.

11. I have carefully considered the pleadings and the submissions proffered by the parties in support of their assertions. The 3rd Respondent, like in some other cases and despite proper service, elected not to participate in the proceedings. The 2nd and 3rd Respondents did not file submissions to support or to oppose the petition. It is only the 1st Respondent who proffered authorities in support of its assertions.

12. The above authorities are, inter alia, good authorities in that they elaborate upon the principles apposite to jurisdiction. These are the cases of: The MV Lillian S [1989] KLR 1 and Nyeri Civil Appeal No. 124 of 2003 at Nyeri – M'Rinkanya & Another versus Gilbert M'Mbijiwe. Nyeri Court of Appeal, Civil Appeal No. 259 of 2000. The case of Beatrice M'Marete versus Republic of Kenya was not annexed to the submissions.

13. The principles apposite to the Land Dispute Tribunals Act, No. 18 of 1990 and the Registered Land Act, Cap. 300 (non-repealed) have been adequately elaborated upon in the written submissions and I find it rather pyrrhic to regurgitate them.

14. First things first. Section 3(1) of the Land Disputes Tribunals Act states 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 by a Tribunal established under section 4.

15. I do find that the Meru South District Tribunal and the Provincial Tribunal lacked jurisdiction to award part of public land to the 1st Petitioner, Stanley Mutegi G. Muguongo. The said petitioner cannot, therefore, predicate a constitutional claim for ownership of land upon a decision made by a tribunal that lacked requisite jurisdiction. That decision is void ab initio.

16. It has pellucidly not been claimed by the 2nd, 3rd and 4th petitioners that they were parties to the dispute heard by the two tribunals (op.cit). Nevertheless, even if they were heard before those tribunals, the decisions that would have been made by the tribunals would have lacked an iota of legal validity.

17. This court notes that the 4th Petitioner was registered as the 3rd proprietor of land Parcel No. KIERA/EAST MAGUTUNI/1663 on 28th April, 2014. This was about 18 years after one Munyua Kaburia was registered as proprietor of this land on 29th October, 1996. On 28th April, 2014, just before the 4th petitioner was registered as proprietor of the land, the land was registered in the name of Francis Kamondi Munyua. One cannot claim ownership of land through a petition and claim that the land became his even before he got registered as proprietor of the land. Indeed, it is clear that he did not gather his land during the adjudication process.

18. In their petition, the petitioners are laconic that demarcation was completed as follows: (a) Kanyuru Unit, 1975, 44 years ago (b) Mugero Unit; 1978, 41 years ago (c) Nduri Unit, 1980, 39 years ago. And yet the 1st, 2nd and 3rd Petitioners, according to the documents they have filed were registered as owners of their parcels of land on 29th October, 1996, 23 years ago. This petition was filed in January, 2018. The court is concerned that it took them about 22 years before they filed this petition.

19. From the pleadings, I find that the petitioners did not pursue the elaborate dispute resolution mechanisms succinctly and pellucidly set out in the Land Adjudication Act and in the Land Consolidation Act. Litigants should not be allowed to make nonsense of existing law by purporting to file Constitutional Petitions when disputes concerning their claims would have been adequately handled by the dispute settlement mechanisms contained in the apposite statutes. And to make matters worse, to bring such disputes decades after the settlement of such disputes should have taken place!

20. Litigants cannot arrogate unto themselves the mandate to declare themselves owners of land. If this is allowed, this would veritably spawn confusion in the settlement of disputes concerning land. In its preamble, the Land Consolidation Act clarifies that it is: "An Act of parliament to provide for the ascertainment of rights and interests in, and for the consolidation of land in the special areas; for the registration of title to, and of transactions and devolutions affecting such land and other land in the special areas and for purposes connected therewith and incidental thereto."

21. The Land Adjudication Act, in its preamble clarifies that it is: "***An Act of Parliament to provide for the ascertainment and recording of rights and interests in trust land, and for purposes connected therewith and purposes incidental thereto.***"

22. It, therefore, follows that ascertainment of rights and interests in land in special areas must be done strictly in accordance with the provisions of the Land Consolidation Act. It, also, follows that ascertainment of rights and interests in community land must be done strictly in accordance with the provisions of the Land Consolidation Act.

23. It is interesting that the petitioners do not say what would happen to the land they occupy which they say was transferred wrongly from where it should have been to where it is.

24. I agree with the submissions by the advocate representing the 1st Respondent that this petition lacks merit and is against public interest and public policy and is intended to take away public land. Ascertainment of rights can only be done through the provisions of the Land Consolidation and the Land Adjudication Acts. There is no other way. The 1st to 3rd petitioners were ascertained as owners of the land registered in their names. The 1st registered owner of the land registered in the 4th petitioner's name was also ascertained as owner of the land presently registered in his name. That ascertainment was done in accordance with the provisions of the Land Consolidation Act and the Land Adjudication Act. Without ascertainment of their claims in accordance with the apposite law, the petitioners have no constitutional property rights which have been breached.

25. In the circumstances, this Petition is hereby dismissed.

26. Costs are awarded to the 1st Respondent.

27. As the **2nd and 3rd Respondents** did not at all or meaningfully participate in the apposite proceedings, no costs will be awarded to them.

28. Orders accordingly.

Delivered in open Court at Chuka this 13th day of November, 2019 in the presence of:

CA: Ndegwa

Kiongo present for the 3rd Respondent

Mwiti h/b Mwirigi Kaburu for the Petitioner

Kiongo h/b Nyamu Nyaga for 1st Respondent

P. M. NJOROGE,

JUDGE.