



Ongany (Suing as the Personal Representative of the Estate of Juma Ondenge - Deceased) & another v District Land Registrar (Nyando, Nyakach and Muhoroni) & 5 others; Bondo & 2 others (Interested Parties) (Environment and Land Petition E001 of 2023) [2025] KEELC 5400 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5400 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND PETITION E001 OF 2023

SO OKONG'O, J

JULY 17, 2025

(FORMERLY HIGH COURT CONSTITUTIONAL AND HUMAN RIGHTS PETITION NO. E014 OF 2022)

IN THE MATTER OF ARTICLES 22(1) AND 23(1) AND (3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4 AND 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 25 (C), 28,29,31(B), 40(1), (3) AND (6), 47, 50(1) AND 60 (B) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP. 284 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND CONSOLIDATION ACT, CAP. 283 LAWS OF KENYA

AND

IN THE MATTERS OF THE REGISTERED LAND ACT, CAP. 300 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF SURVEY ACT, CAP. 299 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012



AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

JACK ORICHO ONGANY (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JUMA ONDENG - DECEASED) 1ST PETITIONER

JECONIA OTIENO 2ND PETITIONER

AND

THE DISTRICT LAND REGISTRAR (NYANDO, NYAKACH AND MUHORONI) 1ST RESPONDENT

THE DISTRICT LAND SURVEYOR (NYANDO, NYAKACH AND MUHORONI) 2ND RESPONDENT

PRINCIPAL MAGISTRATE (NYANDO LAW COURTS) 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 6TH RESPONDENT

AND

GEDFREY JOHN BONDO INTERESTED PARTY

JUSTINA ONDU OBIERO INTERESTED PARTY

JOHN MARTIN RIANY INTERESTED PARTY

JUDGMENT

1. Gordon Odhiambo Moto, Sospeter Abila and Jeconia Otieno filed a petition dated 19th September 2022 against the Respondents and the Interested Parties in the High Court at Kisumu namely, Kisumu HC.PET.No.E014 of 2022. The High Court transferred the petition to this court on 29th November 2022 due to lack of jurisdiction and the same was given its current case number. The petition was subsequently amended on 11th March 2024 following the death of Gordon Odhiambo Moto. In the amended petition, the Petitioners sought the following reliefs against the Respondents;

1. A declaration that the ex parte orders issued by the 3rd Respondent in Miscellaneous Application No. 40 of 2018 directing the 1st and 2nd Respondents to carry out a boundary survey between land Title Nos. Kisumu/Koguta East/579 and Kisumu/Koguta East/585 without affording the Petitioners an opportunity to be heard and to make presentation on their side of the story are unlawful, unconstitutional, null and void.



2. An order of certiorari be issued to remove into this Honourable Court and quash the 3rd Respondent's ex parte orders issued in Miscellaneous Application No. 40 of 2018 for being unlawful, unconstitutional, null and void.
3. A declaration be and is hereby issued that the action of the 1st and 2nd Respondents in surveying and placing beacons between land Title Nos. Kisumu/Koguta East/579 and Kisumu/Koguta East/585 on 15th November 2018 without affording the Petitioners a chance to be heard was unlawful, unconstitutional, null and void.
4. A declaration that the actions of the 1st and 2nd Respondents in surveying and placing beacons between land Tile Nos. Kisumu/Koguta East/579 and Kisumu/Koguta East/585 on 15th November 2018 while relying on inaccurate Registry Index Map (RIM), instead of being guided by the Practice Instructions of 8th March 1985, issued by the then Chief Land Registrar (J. E. MURIUKI), are unlawful, unconstitutional, null and void.
5. A declaration that the arrest and putting in custody of the 3rd Petitioner by the officers of the 4th Respondent and his subsequent charging, prosecution, conviction and sentencing in Nyando Criminal Case No. 634 of 2019 was unlawful, unconstitutional, null and void.
6. An order of certiorari be issued to remove into this Honourable Court and quash the criminal case proceedings, together with all consequential outcomes, against the 3rd Petitioner in the Nyando Criminal Case No. 634 of 2019 for being unlawful, unconstitutional, null and void.
7. A declaration be and is hereby issued that the ex parte orders issued by the 3rd Respondent in Miscellaneous Application No. E001 of 2021 directing the 1st and 2nd Respondents to carry out a boundary survey between land Title Nos. Kisumu/Koguta East/576 and Kisumu/Koguta East/585 without affording the Petitioners an opportunity to be heard and to make presentation on their side of the story are unlawful, unconstitutional, null and void.
8. An order of certiorari to remove into this Honourable Court and quash the 3rd Respondent's ex parte orders issued in Miscellaneous Application No. E001 of 2021 for being unlawful, unconstitutional, null and void.
9. A declaration that the action of the 1st and 2nd Respondents in surveying and placing beacons between land Title Nos. Kisumu/Koguta East/576 and Kisumu/Koguta East/585 on 20 August 2021 without affording the Petitioners a chance to be heard, was unlawful, unconstitutional, null and void.
10. A declaration that the actions of the 1st and 2nd Respondents in surveying and placing beacons between land Title Nos. Kisumu/Koguta East/576 and Kisumu/Koguta East/585 on 20 August 2021 by relying on an inaccurate Registry Index Map (RIM), instead of being guided by the Practice Instructions of 8th March 1985, issued by the then Chief Land Registrar (J. E. MURIUKI), are unlawful, unconstitutional, null and void.
11. A declaration that the boundaries of land Title Nos. Kisumu/Koguta East/585, Kisumu/Koguta East/579 and Kisumu/Koguta East/576 as determined, marked and fixed between the parties during the adjudication process are absolute and that they cannot be changed based on any subsequent Registry Index Maps.
12. A declaration that land boundaries fixed at adjudication and accepted by parties having interests in adjoining parcels of land as final and binding for more than 12 years are final and binding upon the parties and shall form the basis for resolving subsequent boundary disputes.



13. An order enjoining the 1st and 2nd Respondents to identify, ascertain and fix the boundaries between land Title No. Kisumu/Koguta East/585 and Kisumu/Koguta East/576 and the boundaries between land Title No. Kisumu/Koguta East/585 and Kisumu/Koguta East/579.
 14. General damages.
 15. Such other order as this Honourable Court shall deem fit and just to grant.
2. The petition was supported by the affidavit of the 1st Petitioner. The Petitioners averred that the 1st Petitioner was a grandson and an administrator of the estate of Juma Ondenge, deceased (hereinafter referred to only as “the deceased”). The Petitioners averred that the 2nd Petitioner was also a grandson of the deceased. The Petitioners averred that they brought the petition on behalf of the beneficiaries of the deceased. The Petitioners averred that the deceased, Juma Ondenge was the registered proprietor of all that parcel of land known as Title No. Kisumu/Koguta East/585(hereinafter referred to as “the suit property”).
 3. The Petitioners averred that the 1st and 2nd Interested Parties were the registered proprietors of the parcel of land known as Title No. Kisumu/Koguta East/576, while the 3rd Interested Party was the registered proprietor of the parcel of land known as Title No. Kisumu/Koguta East/579.

The Petitioners’ case

4. The Petitioners averred that the family of the deceased owned all that parcel of land which after adjudication in the 1969 was officially and lawfully registered in the name of the deceased as Title No. Kisumu/Koguta East/585 (the suit property). The Petitioners averred that 1st and 2nd Interested Parties and the 3rd Interested Party and their family members owned the parcels of land which were registered in their names as Title No. Kisumu/Koguta East/576 and Title No. Kisumu/Koguta East/579 (hereinafter referred to as “Plot No. 576” and “Plot No. 579”).
5. The Petitioners averred that during the land adjudication exercise, the interests of the owners of the land parcels within Kisumu Koguta East Adjudication Section were ascertained and boundaries established and marked with trees, sisal plants and other vegetation as beacons to signify the extent of every owner’s parcel of land. The Petitioners averred that the boundaries and live beacons as established at the closure of the adjudication process were still ascertainable, as the trees and vegetation that were planted at the time were existing and clearly demarcated the boundaries between the suit property and Plot Nos. 576 and 579. The Petitioners averred that the boundaries that existed before the adjudication were the ones confirmed during adjudication process.
6. The Petitioners averred that once the adjudication register was closed, the boundaries established during the adjudication process became effectively binding upon all individuals whose interests in the parcels of land adjudicated were ascertained which included the suit property and Plot Nos. 576 and 579. The Petitioners averred that the suit property was registered in the name of the deceased in 1974 and a title deed was issued to him in 1977 based on the adjudicated boundaries which were marked with trees and sisal plants as hedges that still existed.
7. The Petitioners averred that the deceased died on 8th September 1988 and no succession in respect of his estate was not done until 2022. The Petitioners averred that the suit property had never been distributed amongst the beneficiaries of the estate of the deceased, who are the Petitioners and their respective nuclear and extended families. The Petitioners averred that since the death of the deceased, there had never been any dispute over the boundary between the suit property and Plot Nos. 576 and 579.



8. The Petitioners averred that their families and their extended family members had always enjoyed quiet and peaceful possession of the suit property until the 3rd Interested Party unlawfully started claiming a portion of the property around 2018 and the 1st and the 2nd Interested Parties doing the same in 2021. The Petitioners averred that sometime in 2018, the 3rd Interested Party sought an order from the 3rd Respondent in Miscellaneous Application No. 40 of 2018 for the 1st and 2nd Respondents, with the assistance of the 4th Respondent, to determine the boundaries between the suit property and Plot No. 579. The Petitioners averred that the said application was never served upon them.
9. The Petitioners averred that the 3rd Respondent issued the order that had been sought, on 11th October 2018. The Petitioners averred that the order was issued on affidavit evidence only, and neither the deponent of the affidavit nor the identity of the applicant/s was disclosed in the order. The Petitioners averred that the order was granted ex parte without an inter partes hearing. The Petitioners averred that the order was issued in breach of the rules of natural justice, which require a party to be heard before an adverse decision is made against him. The Petitioners averred that the order also directed the 1st Respondent and the local sub-chief to serve notices upon the owners of the neighbouring land parcels, especially the owners of Title Nos. Kisumu/Koguta East/ 535, 529, 565, 579 and 578 to witness the exercise.
10. The Petitioners averred that on 15th November 2018, the 1st and 2nd Respondents under the escort and protection of the police officers from Pap Onditi Police Station conducted an unlawful survey of Plot No. 579 and fixed the boundary beacons that encroached into the suit property, despite the objection raised by the Petitioners and some of the family members. The Petitioners averred that at the time of the survey, there was already a live boundary dispute between the Petitioners and the Interested Parties. The Petitioners averred that the survey and fixing of the beacons were done at a time when there was still no personal representative of the estate of the deceased, Juma Ondenge, in whose name the suit property was registered.
11. The Petitioners averred that despite knowing that there was a dispute over the boundary between the suit property and Plot No. 579, the 1st and 2nd Respondents went ahead to survey and place beacons on the suit property without affording the Petitioners a chance to make representations and be heard on the boundary dispute. The Petitioners averred that despite knowing that the registered owner of the suit property was deceased at the time and a personal representative of his estate was not yet appointed, the 1st and 2nd Respondents, went ahead to survey and place beacons on the suit property, an act that resulted in the encroachment of the property from Plot No. 579.
12. The Petitioners averred that the survey and placement of illegal beacons on the suit property effectively annexed a portion of it to Plot No. 579 without affording them the opportunity to be heard on the boundary issue between them and the Interested Parties. The Petitioners averred that the actions of the 1st and the 2nd Respondents as described above were also replicated with respect to the survey and fixing of the boundary between the suit property and Plot No. 576.
13. The Petitioners averred that the boundaries that were illegally placed on the suit property by the 1st and 2nd Respondents were later removed which led to the 2nd Petitioner and Sospeter Abila (now deceased) being unlawfully arrested, charged, convicted and sentenced to six (6) months non-custodial sentence which they served to completion in Nyando Criminal Case No. 634 of 2019. The two were charged with two counts of interference with boundary features contrary to the provisions of the Land Act, No. 3 of 2012 and undermining authority of a public officer contrary to Section 132 of the Penal Code.
14. The Petitioners averred that encouraged by the ease with which the 3rd Interested Party obtained an order and had the 1st and 2nd Respondents survey and place boundary beacons to annex part of the suit



- property to 579, the 1st and 2nd Interested Parties also sought and obtained a similar order in Nyando Miscellaneous Application No. E001 of 2021, directing the 1st and 2nd Respondents to conduct a survey on and place boundary beacons between the suit property and Plot No. 576. The Petitioners averred that once again, they were never served with the application, neither were they notified and given an opportunity to respond to the application.
15. The Petitioners averred that on 20th August 2021, the 1st and 2nd Respondents under the escort and protection of the police officers from Pap Onditi Police Station, unexpectedly arrived at the Petitioners' homesteads on the suit property and started conducting survey activities and fixing boundary beacons. The Petitioners averred that the order had not been served upon the Petitioners previously and they were never informed of the intended survey and fixing of beacons by the 1st and 2nd Respondents. The Petitioners averred that given that there was also an ongoing boundary dispute that had just started between the Petitioners and the 1st and 2nd Interested Parties in 2021, the Petitioners expected that the 1st Respondent would have afforded them an opportunity to be heard but, the 1st Respondent just proceeded with the placing of beacons on the parcels' boundaries after survey by the 2nd Respondent.
 16. The Petitioners averred that they were shocked by the 1st Respondent's conduct of erecting the beacons without hearing the Petitioners on the boundary disputes that the owners of Plot No. 576 and Plot No. 579 had raised against the owner of the suit property. The Petitioners averred that the 1st Respondent assisted by the 2nd Respondent claimed to have been acting on an ex parte order issued by the 3rd Respondent in Nyando Miscellaneous Application No. E001 of 2021. The Petitioners averred that they were never parties to the said application and the 3rd Respondent failed to order an inter parte hearing so that the Petitioners could have a chance to be heard which was necessary because the order affected their interest in the suit property.
 17. The Petitioners further averred that the 3rd Respondent granted to the 1st, 2nd and 3rd Interested Parties ex parte orders on the basis of which the 1st and 2nd Respondents under the protection of the 4th Respondent's officers, went ahead to survey Plot No. 576, Plot No. 579 and the suit property without involving the Petitioners. The Petitioners averred that the 1st Respondent went ahead to erect boundary beacons annexing and making portions of the suit property part of Plot No. 576 and 579.
 18. The Petitioners averred that the survey conducted by the 1st and 2nd Respondents resulted in a boundary line passing right through Sospeter Abila's portion of the suit property, an act that violated his right to property. The Petitioners averred that when the 1st and 2nd Respondents under the escort and protection of the 4th Respondent's officers invaded their homes to enforce the unlawfully obtained orders by the 3rd Respondent, they used inaccurate Registry Index Map (RIM) that failed to reflect the boundaries of the parcels of land as physically identified during the adjudication of the land in the area in 1969.
 19. The Petitioners averred that following the illegal surveys and erection of boundary beacons, the 1st and 2nd Interested Parties had filed a suit at Nyando Law Courts namely, MCELC No. E031 of 2022 seeking the eviction of the Petitioners from the suit property claiming that they had encroached and trespassed on Plot No. 576 a claim which was not correct because the survey and the placing of beacons conducted by the 1st and 2nd Respondents unlawfully annexed part of the suit property and made it part of Plot No. 576 without giving the Petitioners an opportunity to be heard or an opportunity to represent the estate of the deceased in the exercise.
 20. The Petitioners averred that in surveying, demarcating and erecting boundaries of the said parcels of land, the 1st and 2nd Respondents acted contrary to the Practice Directions issued pursuant to Section 21 (1) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) to all the Land Registrars



in March 1985 by the then Chief Land Registrar (J. E. W. Muriuki), directing that the Registry Index Maps should be amended and not the ground boundaries, should there be a discrepancy between the information in the maps and the physical boundaries established by more reliable evidence which evidence entailed boundaries as determined during adjudication as ascertainable by neighbours and family members. The Petitioners averred that by violating this directive, the 1st and 2nd Respondents violated the Petitioners' property rights, as they failed to afford them a hearing before arriving at their decision to determine the said boundaries.

21. The Petitioners averred that the 1st and 2nd Respondents acted ultra vires their powers by relying on prohibited Registry Maps instead of using the boundaries as established during the adjudication process and accepted by all concerned parties at the time.

The 1st to 5th Respondents' case

22. The Attorney General entered appearance on behalf of the 1st- 5th Respondents. The 1st-5th Respondents filed grounds of opposition dated 24th February 2023. The 1st-5th Respondents averred that the Petition was misconceived, bad in law and amounted to an abuse of the process of this court. The 1st-5th Respondents averred that the suit was time barred by virtue of Section 9 of the Law Reform Act, Chapter 26 Laws of Kenya. The 1st - 5th Respondents averred that the orders made in Miscellaneous Application No. 40 of 2018 were issued in 2018, and as such, the Petitioners should have brought their suit by March 2019. The 1st-5th Respondents averred that the petition was frivolous, vexatious and trivial and should be dismissed with costs.

The 6th Respondent's case

23. The 6th Respondent did not file a response to the petition.

The Interested Parties' case

24. The Interested Parties opposed the petition through a replying affidavit sworn by the 1st Interested Party on 12th April 2024. The 1st Interested Party averred that he moved Nyando Law Court under Miscellaneous Application No. E001 of 2021 seeking orders compelling the 1st and 2nd Respondents to carry out a survey and boundary demarcation exercise in respect of his parcel of land, Plot No. 576. The 1st Interested Party averred that he moved to court to protect his property rights. The 1st Interested Party averred that the Petitioners admitted that there was an existing boundary dispute between the owners of Plot No. 576 and the owners of Plot No. 585.
25. The Interested Parties averred that due to lack of clarity on who to serve with the court documents, because there was no known legal representative of the estate of the deceased registered owner of Plot No. 585, service of the court processes was effected through the office of the local administration which was deemed satisfactory by the court hence the grant of the orders sought. The Interested Parties averred that the belated and/or failure to take out Grant of Letters of Administration in respect of the estate of the deceased, Juma Ondenge, the registered proprietor of Plot No. 585, could not be blamed on the Interested Parties.
26. The Interested Parties averred that the petition was a spirited attempt by the Petitioners to impugn the decision of a competent Court, which was directed at particular public officers who proceeded to enforce the said orders. The Interested Parties averred that they had made several attempts to get the said government officers to come to the ground and conduct surveys on the subject parcels of land to enable them to subdivide the same for the purposes of distribution of the estate. The Interested Parties averred that despite having knowledge of the impending visit by the public officers sued herein by the



Petitioners, the Petitioners chose not to approach a competent court of law, including that which they claimed issued the adverse orders against them, to protect the property rights they claimed to have been violated. The Interested Parties averred that the Petitioners decided to take matters into their own hands, which made them criminally liable, hence their prosecution, conviction and sentencing. The Interested Parties averred that the Petitioners had no one to blame for their conviction in the criminal case, as the same resulted from their wrongdoing.

27. The Interested Parties averred that upon learning that adverse orders had been issued against them, the Petitioners had the option of applying to the same court to have the orders stayed or even moving the High Court to exercise its supervisory powers in respect to how the lower court case was determined. The Interested Parties averred that the impugned court orders were served upon the Petitioners' families through the area chief due to hostility from them.
28. The Interested Parties averred that the facts and issues in dispute in Nyando MCELC No. E031 of 2022 and the present suit were substantially similar and the Petitioners ought to choose the case to pursue instead of clogging the judicial process with unnecessary litigation. The Interested Parties averred that the Petitioner was seeking to have Nyando MCELC No. E031 of 2022 determined in this petition without following due process of the law. The Interested Parties averred that by filing this petition, the Petitioners were trying to avoid the substantial questions regarding Plot No. 585 by targeting public officers who were carrying out their duties as required by the law. The Interested Parties averred that the petition should be struck out for being sub-judice to Nyando MCELC No. E031 of 2022.
29. The Interested Parties averred that having realised the consequences of their failure to defend themselves in Nyando PMC Miscellaneous Application No. E001 of 2021 and Nyando MCELC No. E031 of 2022, the Petitioners had resorted to using the present petition as a device to make a comeback in the said suits without following the laid down procedure. The Interested Parties averred that the Petitioners, who were the grandsons of Juma Ondege, deceased, chose to litigate over Plot No. 585 when they had two paternal uncles alive. The Interested Parties averred that the Petitioners had no locus standi in the circumstances to bring the petition.
30. The Interested Parties averred that the petition was filed in bad faith with the intention of vexing the Respondents and the Interested Parties as well as embarrassing and delaying the disposition of the 1st Interested Party's claim in Nyando MCELC No. E031 of 2022.

The Submissions

31. The petition was heard through written submissions. The Petitioners filed submissions dated 12th August 2024 in which they argued that the survey and fixing of boundaries in respect of Plot No. 576, Plot No. 579 and Plot No. 585 were unlawful and unconstitutional. On their part, the Respondents submitted that the Petitioners' petition was time-barred, having been brought in breach of the provisions of Section 9 (3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules. The Respondents submitted further that the Petitioners had not proved the alleged violation of their constitutional rights. The Respondents cited Anarita Karimi Njeru v. Republic [1976-1980] KLR 1272 and submitted that the petition did not meet the constitutional threshold and lacked justifiable cause of action against the Respondents. The Respondents submitted that the actions taken by the 1st and 2nd Respondents in conducting surveys and boundary determination were based on court orders issued by Nyando Magistrate's Court in Miscellaneous Applications No. 40 of 2018 and No. E001 of 2021 and as such were lawful and procedural. The Respondents submitted that the Petitioners had the opportunity to challenge the said orders but failed to do so. The Respondents submitted that the actions of the Respondents were lawful, hence the Petitioners' constitutional rights were not violated. The Respondents submitted further that the court had no jurisdiction to entertain the petition under



the doctrine of exhaustion. The Respondents averred that the Petitioners had statutory remedies which they had not exhausted at the time they approached the court.

32. The Interested Parties filed submissions dated 25th November 2024. The Interested Parties submitted that the survey conducted on Plot No. 579 was lawful. The Interested Parties submitted that they followed due process and sought to involve the Petitioners in the survey but the Petitioners proved hostile and were uncooperative in bringing the survey to its logical conclusion. The Interested Parties submitted that the court order authorising the survey was issued after the Petitioners' refusal to cooperate during the initial process and this demonstrated that the survey was conducted lawfully and in accordance with the law.
33. The Interested Parties submitted further that the Petitioners' constitutional rights were not violated and that the petition was bad in law as the Petitioners had not exhausted the available remedies. The Interested Parties submitted that the Petitioners alleged violation of Articles 40 and 47 of *the Constitution* among others. The Interested Parties submitted that the survey did not dispossess the Petitioners of their property but merely determined the boundary between Plot No. 579 and Plot No. 585. The Interested Parties submitted that the process clarified ownership and ensured respect for all parties' rights. The Interested Parties cited *Patrick Musimba v. National Land Commission & Others* [2015] eKLR and submitted that lawful actions by statutory authority cannot be deemed unconstitutional unless they result in outright deprivation of property.
34. The Interested Parties submitted further that the Petitioners were given notice and an opportunity to participate in the survey and boundary determination. The Interested Parties submitted that the Petitioners' non-participation in the exercise was voluntary and did not amount to a breach of the rules of procedural fairness. In support of this submission, the Interested Parties cited *Sceneries Limited v. National Land Commission* [2017] eKLR and *Abu Chiaba Mohammed v. Mohammed Bwana Bakari & 2 Others* [2005] eKLR.
35. On the Petitioners' trial and conviction in the criminal case, the Interested Parties submitted that the Petitioners were lawfully charged and convicted under Section 24 of the *Land Registration Act* 2012, which criminalises interference with boundaries. The Interested Parties submitted that the Petitioners' criminal conviction supported the Interested Parties' position that the Petitioners acted with malice and sought to undermine a lawful process. The Interested Parties submitted that a criminal conviction can only be challenged through the appellate process. In support of this submission, the Interested Parties cited *Lilian Wairimu Ngatho & Another v. Moki Savings Co-operative Society Limited & Another* [2014] eKLR, where the court held that collateral attacks on criminal convictions are impermissible and that those challenging a conviction should follow the appeal process.
36. On the issue of costs, the Interested Parties submitted that the Petitioners had failed to demonstrate any illegality or violation of rights arising from the impugned survey process. The Interested Parties submitted that the Petitioners' refusal to participate in the survey process and subsequent actions demonstrated lack of good faith. The Interested parties urged the court to dismiss the petition with costs to the Interested Parties.

Analysis and Determination

37. I have considered the petition together with the supporting affidavit. I have also considered the grounds of opposition and replying affidavit filed by the Respondents and the Interested Parties in opposition to the petition. Finally, I have considered the submissions by the advocates for the parties. I am of the view that the issues arising for determination in the petition are as follows;



1. Whether the Respondents violated the Petitioners' right to a fair hearing, fair administrative action, human dignity, legitimate expectation and right to property.
 2. Whether the Petitioners are entitled to the reliefs sought.
38. The procedure for determining land boundary disputes is provided for in Sections 18 and 19 of the [Land Registration Act](#) 2012, which provide as follows:

QUOTE{startQuote “}

Boundaries.

- 18.(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Cap. 299.

Fixed boundaries.

- 19.(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section”.

Regulations 40 and 41 of The Land Registration (General) Regulations No. 278 of 2017, which deal with re-establishing and ascertainment of the disputed boundaries provide as follows:

- “ 40. Application for re-establishing a missing boundary or ascertainment of a boundary in dispute



- (1) An interested person may apply to the Registrar for the ascertaining of a missing boundary or a boundary in dispute under section 18(3) of the Act in Form LRA 23 set out in the Sixth Schedule.
- (2) The Registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the Registrar may deem necessary for resolution of the dispute if a person has complied with paragraph (1).
- (3) The Registrar shall notify the office responsible for survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
- (4) In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the office responsible for survey of land.
- (5) The Registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
- (6) Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court.”

39. In my view, the provisions of Sections 18 and 19 of the *Land Registration Act* 2012, and Regulations 40 and 41 of the Land Registration (General) Regulations No. 278 of 2017, made thereunder, are rooted in the twin concepts of fair hearing and fair administrative action.

40. Article 47 of *the Constitution* of Kenya provides as follows: -

“ 47. Fair administrative action

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”



Section 4 of the *Fair Administrative Action Act* 2015, provides as follows:

- “4. Every person has the right to
- (1) administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 - (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-



- a. attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

Section 7 of the Act provides as follows:

“7. Any
(1) person
who
is
aggrieved
by
an
administrative
action
or
decision
may
apply
for
review
of
the
administrative
action
or
decision
to-

- a. a court in accordance with section 8; or



b. a
tribunal
in
exercise
of
its
jurisdiction
conferred
in
that
regard
under
any
written
law.

(2) A
court
or
tribunal
under
subsection
(1)
may
review
an
administrative
action
or
decision,
if-

a. the
person
who
made
the
decision-

(i) was
not
authorized
to
do
so
by
the
empowering
provision;



- (ii) acted in excess of jurisdiction or power conferred under any written law;
- (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
- (iv) was biased or may reasonably be suspected of bias; or
- (v) denied the person to whom the administrative action or decision relates,



- a
reasonable
opportunity
to
state
the
person's
case;
- b. a
mandatory
and
material
procedure
or
condition
prescribed
by
an
empowering
provision
was
not
complied
with;
- c. the
action
or
decision
was
procedurally
unfair;
- d. the
action
or
decision
was
materially
influenced
by
an
error
of
law;
- e. the
administrative
action



or
decision
in
issue
was
taken
with
an
ulterior
motive
or
purpose
calculated
to
prejudice
the
legal
rights
of
the
applicant;

f. the
administrator
failed
to
take
into
account
relevant
considerations;

g. the
administrator
acted
on
the
direction
of
a
person
or
body
not
authorised
or
empowered
by
any



written
law
to
give
such
directions;

h. the
administrative
action
or
decision
was
made
in
bad
faith;

i. the
administrative
action
or
decision
is
not
rationally
connected
to-

i. the
purpose
for
which
it
was
taken;

ii. the
purpose
of
the
empowering
provision;

iii. the
information
before
the
administrator;
or



- iv. the reasons given for it by the administrator;
- j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- k. the administrative action or decision is unreasonable;
- l. the administrative action or decision is not proportionate to



the
interests
or
rights
affected;

m. the
administrative
action
or
decision
violates
the
legitimate
expectations
of
the
person
to
whom
it
relates;

n. the
administrative
action
or
decision
is
unfair;
or

o. the
administrative
action
or
decision
is
taken
or
made
in
abuse
of
power.”

Article
50(1)
of
the



Constitution

provides
as
follows:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

41. In *Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR, the Supreme Court stated as follows:

“Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard)



and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias.”

42. In Harlsbury’s Laws of England, 4th Edition at page 76 paragraph 64, the authors have stated as follows regarding the rules of natural justice:

“Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (nemo iudex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication.”

43. In Attorney General v Ryath [1980] AC 718 at page 730, Lord Diplock stated that:

“It has long been settled that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority”.

44. From the evidence before the court, it is clear that the Interested Parties did not follow the laid down procedure for boundary determination while invoking the jurisdiction of the 1st Respondent to determine the boundaries between their parcels of land and the suit property owned by the deceased, Juma Ondenge. Section 18 (2) of the [Land Registration Act](#) bars the court from entertaining disputes over boundaries in the first instance. Neither Sections 18 and 19 of the [Land Registration Act](#) nor Regulations 40 and 41 of the Land Registration (General) Regulations, 2017, which deal with the procedure for boundary determination, provide for the initiation of the boundary determination process by the Land Registrar through a court order. Although the Interested Parties claimed that before seeking an order for the 1st Respondent to determine the boundaries between their parcels of land and the suit property, they had unsuccessfully requested the 1st Respondent to undertake the process, no evidence was placed before the court in proof of this allegation. The Interested Parties did not place before the court evidence of any application they had made to the 1st Respondent under Regulation 40 of the Land Registration (General) Regulations 2017, for the determination of the boundaries in question. In any event, if the 1st Respondent had refused to perform its statutory duty as alleged, the Interested Parties should have moved this court for an order of mandamus to compel the 1st Respondent to act on the Interested Parties’ application. The 3rd Respondent had no such jurisdiction.
45. Even assuming for argument’s sake that the 1st Respondent had refused to act on the Interested Parties’ application for boundary determination and that the 3rd Respondent had jurisdiction to compel the 1st Respondent to perform its statutory obligations, the Interested Parties and the 3rd Respondent had a duty to ensure that the Petitioners who were to be affected by the decision of the 3rd Respondent were accorded an opportunity to be heard before the decision was made. From the material before the court, the proceedings before the 3rd Respondent were ex-parte, meaning that the Interested Parties were not notified of the same and were not heard. I am also of the view that although the 1st Respondent was acting on the orders of the 3rd Respondent, that did not stop it from observing the rules of natural justice and fair administrative action set out in Sections 18 and 19 of the [Land Registration Act](#) and Regulations 40 and 41 of the Land Registration (General) Regulations 2017. Boundary determination is a special jurisdiction exercised by the Land Registrar. There is a reason why the court does not get involved in boundary disputes in the first instance. As stated in Section 18(1) of the [Land Registration Act](#), until the boundary between two or more parcels of land has been fixed, the boundaries of such parcels of land shown in cadastral maps or survey plans are general and, as such, are approximations



of the actual boundaries. Where there is a dispute over the boundaries of parcels of land with general boundaries, the Land Registrar is supposed to conduct a hearing to determine the actual boundary. Such a hearing is necessary because cadastral maps such as the Registry Index Maps/Preliminary Index Diagrams, only show approximate boundaries which may not be the actual boundaries. It is after hearing the owners of the parcels of land whose boundaries are in dispute and their witnesses if any, considering the land marks on the ground and the said cadastral maps that the Land Registrar can say whether the boundaries as shown in the cadastral map are the actual boundaries or not for any particular parcels of land.

46. From the material on record, there is no evidence that the 1st Respondent carried out any form of a hearing or an inquiry on the disputed boundaries. It appears to me to have been a pure survey exercise based solely on the Koguta East Registry Index Map Sheet No. 11. As I have stated earlier, the boundaries shown in the Registry Index Maps are approximations. It follows that a Registry Index Map is only for guidance and is not an authority on boundaries. This fact is clearly stated on the face of all Registry Index Maps. Any boundary determination which is based solely on the Registry Index Map is faulty. In this case, the owner of Plot No. 585, Juma Ondenge was deceased at the time of the boundary determination and no Grant of Letters of Administration had been issued in respect of his estate. It follows that no notice of the proceedings was served upon him or the administrators of his estate. The fact that no administrators of his estate had been appointed did not excuse the Interested Parties' failure to involve the estate in the proceedings. The law provides a procedure for compelling beneficiaries of the estate of a deceased person who have failed to take out a Grant of Letters of Administration to do so. The Interested Parties should have followed the procedure instead of instituting and prosecuting legal proceedings against a deceased person.
47. In *Geothermal Development Company Limited v. Attorney General & 3 others* [2013] eKLR, the court stated as follows:
- “The issue of a notice is a key component of due process. In *Kenya Anti-corruption Commission v Lands Limited and Others* Nairobi Misc. App. 583 of 2006 the court noted, “Constitutional provisions are procedural safeguards aimed at ensuring due process before any right to property can be taken away and also incorporating the right of hearing. The right of hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of *the Constitution* must be implied in every Act especially, the right to due process and it cannot be taken away. Constitutional rights cannot be taken away without due process”
48. In the determination of the boundary between Plot No. 585 and Plot No. 579 owned by the 3rd Interested Party, the 1st Respondent held that Juma Ondenge, deceased had encroached on Plot No. 579 to the extent of 0.0904 Ha. For the boundaries of Plot Nos. 576 and 585, the 1st Respondent also found that the deceased had encroached on Plot No. 576. Based on these findings, the Interested Parties have claimed portions of Plot No. 585 owned by the deceased. The 1st and 2nd Interested parties have even filed a suit in the 3rd Respondent against the Petitioners seeking to restrain them from the alleged encroachment on Plot No. 576.
49. In *Kenya Human Rights Commission v. Non-Governmental Organizations Co-Ordination Board* [2016] eKLR, the court stated that:
- “A person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the*



Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached”

50. It is my finding that the purported determination of the boundary between the suit property owned by the deceased, Juma Ondenge and Plot No. 576 and Plot No. 579 owned by the Interested Parties was arrived at through a flawed process, which was irregular and unlawful. The actions of the 1st and 2nd Respondents not only violated the petitioners’ constitutional rights to fair administrative action and fair hearing but were also contrary to the provisions of the Land Registration Act and the regulations made thereunder.

51. On whether the Petitioners are entitled to the reliefs sought, the Respondents and the Interested Parties argued that the petition was brought in breach of the doctrine of exhaustion. In *Abidha Nicholus v. The Attorney General & 7 others*, Supreme Court Petition No. E007 of 2023, the Supreme Court stated as follows in paragraphs 82, 94 and 105:

“(82) In making the above findings, the superior courts both applied the doctrine of exhaustion and the question as to whether a party is required to exhaust any dispute resolution mechanism provided by a statute and/or any other law before resorting to the courts. More specifically, whether exhausting the appeal process set out under Sections 129 and 130 of EMCA as well as the dispute resolution system as set out under Sections 10 and 36 of the Energy Act, for the claim against KPLC, is an issue that must be resolved by this judgment.

(94) The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law.

105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.”

52. I have set out earlier in the judgment the reliefs sought by the Petitioners in the amended petition. This court has no criminal jurisdiction even for crimes related to environment and land matters. The court therefore, has no jurisdiction to exercise its supervisory powers over subordinate courts while exercising criminal jurisdiction. It follows from the foregoing that this court has no power to issue the orders sought in prayers (v) and (vi) relating to Nyando Criminal Case No. 634 of 2019. As for the other orders sought, I am of the view that, given the nature of the Petitioners’ complaints and the reliefs



sought, it is this court that can provide the most efficacious redress to the Petitioners. The petition is therefore not bad in law for violating the doctrine of exhaustion. The Petitioners have not proved that they suffered any loss or damage as a result of the actions of the Respondents and the Interested Parties complained of. They are therefore not entitled to an award of damages.

Conclusion

53. In conclusion, I find merit in the petition. I therefore enter judgment for the Petitioners against the Respondents and the Interested Parties for:

1. A declaration that the ex parte order issued by the 3rd Respondent in Nyando Senior Principal Magistrate's Court, Miscellaneous Application No. 40 of 2018 directing the 1st and 2nd Respondents to determine the boundary between land Title No. Kisumu/Koguta East/579 and Title No. Kisumu/Koguta East/585 without affording the Petitioners an opportunity to be heard is unlawful, unconstitutional, null and void.
2. An order of certiorari removing the said order issued by the 3rd Respondent in Nyando Senior Principal Magistrate's Court, Miscellaneous Application No. 40 of 2018 into this Honourable Court and quashing the same.
3. A declaration that the action of the 1st and 2nd Respondents in surveying and placing beacons between land Title Nos. Kisumu/Koguta East/579 and 585 pursuant to the impugned order without affording the Petitioners a chance to be heard was unlawful, unconstitutional, null and void.
4. A declaration that the ex parte orders issued by the 3rd Respondent in Nyando Senior Principal Magistrate's Court, Miscellaneous Application No. E001 of 2021 directing the 1st and 2nd Respondents to determine the boundary between land Title Nos. Kisumu/Koguta East/576 and Title No. Kisumu/Koguta East/585 without affording the Petitioners an opportunity to be heard is unlawful, unconstitutional, null and void.
5. An order of certiorari removing the said order issued by the 3rd Respondent in Nyando Senior Principal Magistrate's Court, Miscellaneous Application No. E001 of 2021, into this Honourable Court and quashing the same.
6. A declaration that the action of the 1st and 2nd Respondents in surveying and placing beacons between land Title Nos. Kisumu/Koguta East/576 and 585, without affording the Petitioners a chance to be heard, was unlawful, unconstitutional, null and void.
7. The Interested Parties and the 1st and 2nd Respondents are at liberty to commence afresh the process of determining the boundaries between land Title Nos. Kisumu/Koguta East/585 and Kisumu/Koguta East/576 and the boundaries between land Title Nos. Kisumu/Koguta East/585 and Kisumu/Koguta East/579 in accordance with Sections 18 and 19 of the [Land Registration Act](#) and Regulations 40 and 41 of the Land Registration (General) Regulations 2017.
8. Any entries made in the registers of land Title No. Kisumu/Koguta East/585, Title No. Kisumu/Koguta East/576 and Title No. Kisumu/Koguta East/579, or in the survey records regarding the impugned boundary determinations, are cancelled.
9. Each Party shall bear its costs of the suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF JULY 2025



S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Petitioners

N/A for the Respondents

Ms. Nyambeki for the Interested Parties

Ms. J. Omondi-Court Assistant

