



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 16 OF 2016**

**MARIA JEBET ARAP MASOIN.....1<sup>ST</sup> PETITIONER**

**EMMANUEL KIPTANUI TOROITICH.....2<sup>ND</sup> PETITIONER**

**RICHARD KIPROTICH.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**KIPKOECH LAGAT.....1<sup>ST</sup> RESPONDENT**

**TOROITICH CHELAGAT BUSIENEI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Maria Jebet Arap Masoin** (hereinafter referred to as the 1<sup>st</sup> Petitioner) is the mother to the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners and widow to the late Kili Arap Masoin who was the son to the late Chelagat Chebasa Ribison alias Chelagat Chebasa. Kili Arap Masoin was brother to Chesire Robinson (deceased), Kipkoech Lagat, the 1<sup>st</sup> respondent, Toroitich Chelagat Busienei, the 2<sup>nd</sup> respondent. It is claimed that Kili Arap Masoin was the 2<sup>nd</sup> born amongst his siblings and died in 1971 before his father, the late Chelagat Chebasa who also passed on in 1999. The 1<sup>st</sup> petitioner claims that all along, her children, thus, the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners together with all their families and herself have resided, possessed, used and occupied the suit land.

The 1<sup>st</sup> petitioner claims that the 1<sup>st</sup> respondent Kipkoech Lagat resides at Kamolo area, Kaptagat on over 100 acres of land where he has established his homestead, which land was given to him by the 1<sup>st</sup> petitioner's father-in-law, the late Chelagat Chebasa Ribison. The 1<sup>st</sup> petitioner further states that her beneficial interests in the suit land are two folds; One; as the daughter in law of the late CHELAGAT CHEBASA RIBISON alias CHELAGAT CHEBASA, having been married to her late son Kili Arap Masoin (deceased, died in 1971) and hence entitled to inherit her husband's share of the suit land and; Two; she is entitled to the suit land by virtue of being given 30 acres of the suit land as a gift inter vivos by her father in law, the late CHELAGAT CHEBASA RIBISON (deceased, died in 1999).

The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners beneficial interests in the suit land are by virtue of being grandsons to the late CHELAGAT CHEBASA RIBISON alias CHELAGAT CHEBASA, and children of Kili Arap Masoin (deceased, died in 1971) who is the son of the said CHELAGAT CHEBASA RIBISON alias CHELAGAT CHEBASA, are entitled to inherit their father's share of the suit land, and; Having stayed on the suit land together with their families for the rest of their lives, they claim occupational rights and hence entitled to the same.

It is claimed that on or about 9<sup>th</sup> September 2016, the Respondents jointly and severally maliciously, illegally, unlawfully and without any colour of right demolished the 1<sup>st</sup> Petitioner's newly constructed house and further threatened to evict the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners from the suit land. The particulars of malice and illegalities on part of the respondents are: -

- (a) Invading the Petitioners home without their permission.**
- (b) Demolishing the 1<sup>st</sup> Petitioner's house without any legal mandate/authority.**
- (c) Destroying the 1<sup>st</sup> Petitioner's property without any legal mandate/authority.**
- (d) Destroying the Petitioners developments on the suit land without any legal mandate/authority.**
- (e) Threatening to evict the Petitioner's from the suit land.**

As a result of the Respondents' malicious and unlawful actions, the Petitioners have been tormented, distressed incurred loss and hence suffered damages and therefore claims for damages (compensation) against the Respondents, jointly and severally. The particulars of general and special damages are that the petitioners have been deprived by the Respondents, peacefully and quiet possession and occupation of the suit land. 1<sup>st</sup> Petitioner has been deprived by the Respondents' exclusive ownership of the 30 acres of land gifted to her, gift inter vivos, by the late Chelagat Chebasa Ribison alias Chelagat Chebasa. The cost of the destroyed property as per the valuation report filed herein.

The petitioners state that their rights have been contravened and or threatened to be violated by the respondents in the terms that the Respondent's demolition of the 1<sup>st</sup> Petitioner's house violates Article 40(1) of the Constitution that envisages the **right to acquire and own property**, as the 1<sup>st</sup> Petitioner's personal property, that is an improvement on the land parcel CHEPTIRET/CHEPLASKEI/BLOCK I(KIPCHAMO) 58, was destroyed by the Respondents. The Respondents' threat to evict the 1<sup>st</sup> Petitioner is a threat to the 1<sup>st</sup> Petitioner's beneficial interests in the suit land, land parcel registration No. Cheptiret/Cheplaskai/Block I(Kipchamo) 58, measuring 17.816 Ha. (44 acres), which interests are described in terms that the 1<sup>st</sup> Petitioner is entitled to the suit land by virtue of being given 30 acres of land thereof as a gift **inter vivos** by her father in law, the late Chelagat Chebasa Ribison alias Chelagat Chebasa, Deceased.

The 1<sup>st</sup> Petitioner is also entitled to inherit her husband's share, the late Kili Arap Masoin, deceased, who is the son to the late Chelagat Chebasa Ribison alias Chelagat Chebasa, the registered owner of the suit land.

The Respondents' threat to evict the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners' from the suit land is a threat to the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners beneficial interests in the suit land which beneficial interests are that the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners being the sons of the late Kili Arap Masoin, are entitled to inherit their father's share of the late Chelagat Chebasa Ribison alias Chelagat Chebasa's estate comprised in the suit land. Having stayed on the suit land together with their families for the rest of their lives, they claim occupational rights and hence they are entitled to the same. In the premises, the petitioner4s claim that the Respondents actions threaten and infringe the Petitioners' beneficial interests in the suit land guaranteed and protected under the provisions of Article 40 as read together with Article 260 of the Constitution by virtue of beneficiaries of the deceased estate comprised in the suit land. The petitioners claim that as a result of the foregoing, they have suffered loss and damages.

The remedies sought are that It be declared that the Respondents (jointly and severally) illegally and unlawfully demolished the 1<sup>st</sup> Petitioner's house and destroyed her property and as such violated the provisions of Article 40(1) & (2) as read together with Article 260 of the Constitution of Kenya, 2010 that guarantee and protect the 1<sup>st</sup> Petitioner's right to own property and therefore the 1<sup>st</sup> Petitioner is entitled to damages thereof and hence be compensated by the Respondents, jointly and severally, for the loss incurred amounting to Kshs.88,700.00/= (Kenya Shillings Eighty Eight Thousand Seven Hundred).

The pray that It be declared that the Respondents' threat to evict the Petitioners from the land parcel registration No. No. Cheptiret/Cheplaskai/Block I(Kipchamo) 58 measuring 17.816 Ha. (44 acres) is unconstitutional and violates the provisions of Article 40(1) & (2) as read together with Article 260 of the Constitution of Kenya 2010 and therefore threatens the Petitioners' proprietary interests in the land parcel No. CHEPTIRET/CHEPLASKEI/BLOCK I(KIPCHAMO) 58 measuring 17.816 Ha (44 acres).

They further pray for an injunction to issue restraining the Respondents, jointly and severally, their agents, servants and/or employees from harassing, insulting, intimidating or threatening to evict the Petitioners from the suit land, demolishing their houses and from disposing with the and/or interfering with the Petitioners access, possession, occupation and use of the property being land parcel No. Cheptiret/Cheplaskai/Block I(Kipchamo) 58 pending succession in respect to the Estate of the late Chelagat Chebasa Ribison alias Chelagat Chebasa, comprised in the said land parcel No. Cheptiret/Cheplaskai/Block 1(Kipchamo) measuring 17.816 Ha (44 acres). Lastly, that The Respondents be ordered to pay the costs of the petition and interests.

In the supporting affidavit to the petition, the 1<sup>st</sup> petitioner states that she resides on the suit parcel of land which is registered in her father-in-law's land and that she was allocated a portion of the parcel of land. Ultimately, the petitioner states that the court should grant orders of injunction restraining the respondents from interfering with their peaceful and quiet possession and occupation of the suit land pending succession in relation to the estate of the deceased.

The petition is also supported by the affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners who support the petition. In the further affidavit filed by the petitioners, she states that the respondents who are her brothers-in-law are determined to deny her family inheritance from the deceased estate and have demolished her newly built house and threatened to evict her from the land. She has reported to the police but now lives in fear. She has attempted to obtain temporary letters of administration but has failed.

She has valued the part of the estate her family occupies and found that it is valued at Kshs. 20,000,000. She has filed an application for grant of temporary letters of administration but the application filed in the High Court was declined and it was ordered that it be mentioned for further directions. The petitioner states that her attempt to commence succession proceedings is not successful and therefore, she seeks redress in this court. The petitioner has filed a citation in the succession court which is due for hearing on 27.3.2017.

The gravamen of the submissions by **Mr Nabasenge, learned counsel for the petitioners** is that Article 40 of the Constitution of Kenya was violated when the petitioners newly built house was demolished by respondents which was an improvement on land pursuant to the provision of Article 260 of the Constitution. He submits that the land in dispute belongs to the late Chebasa Ribison alias Chelagat Chebasa who is the father in law to the petitioner and grandfather to the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners. The petitioners occupy, possess and utilize the property and are entitled to the property as an inheritance since they belong to the lineage of Kili Arap Masoin, son of Chebasa Ribison.

He submits further that the petitioners are entitled to the property as a gift inter vivos from the late Chelagat Chebasa. It is argued that the late Chelagat Chebasa gifted the 1<sup>st</sup> petitioner 30 acres of land comprised in the land in question. Further, that a gift inter vivos is capable and ripe for protection pursuant to the provision of Article 40(1) and (2) as read with Article 260 of the Constitution. The petitioners further argue that the respondents have not rebutted the allegation in the petition that the petitioners' rights have been violated or are threatened to be violated.

On reliefs sought by the petitioners, the petitioners argue that they have demonstrated that there is a threat and/or violation of their right to property and therefore they have suffered both special and general damages. They claim special damages of Kshs. 88,700 as per the valuation report and Kshs. 2,000,000 for constructive and threatened eviction from the property for the 1<sup>st</sup> petitioner and Kshs. 1,000,000 each for the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners. The petitioners also pray for a conservatory order and lastly, costs.

Last but not most important, the petitioners submit that this court has the power to enquire into the dispute at hand being a dispute between private entities. He cites articles 2, 20, 23, 259 and 260 of the constitution of Kenya. According to Mr Nabasenge, the court should apply the Bill of rights as provided in the constitution vertically and horizontally. He relies on the decision of justice Lenaola in Jemima Wambui Ikere Case (supra), where the Court stated as follows;

***“I am clear in my mind that the Constitution in Articles 2 and 20 and the definition of the term “person” under Article 260 envisaged both vertical and horizontal application of the Bill of Rights; vertical application between the citizen and the State and horizontal application between one citizen and another citizen. Article 2 of the Constitution provides that ‘this Constitution is the supreme law of the land and binds all persons and all state organs at both levels of government’. Similarly, Article 20 provides that; ‘The Bill of Rights applies to all and binds all state organs and all persons’. Article 260 has defined a person as ‘including a company, association or other body of persons whether incorporated or unincorporated’. My reading of the above provisions of the Constitution reveals that no person is above the Constitution and every person is bound by the provisions of the Constitution including the Bill of Rights. It therefore means that the Petitioners are entitled under Article 22 of the Constitution to institute a claim alleging a violation of the Constitution whether those violations are by a private citizen or the State.”***

The respondent submits that the petitioners are seeking injunctive orders against the respondents and a declaration that the respondents violated the petitioners’ right to property as enshrined in Article 40 of the Constitution. The respondents through their **learned counsel, Bundotich Korir** argue that for one to invoke Article 40 of the Constitution and seek protection of court, such a person must demonstrate that indeed he has acquired and owns the property. That at the heart of these proceedings is that property known as Cheptiret/Cheplaskei/Block 1 (Kipchamo) 58 and 44 acres. That from the affidavits, it is not in dispute that the properties in question from part of the estate of the late Chelagat Chebasa Ribison who died on 12<sup>th</sup> November, 1998. That it is also not in dispute that the probate and administration proceedings have neither been conducted as such the estate of the deceased remains unadministered. The petitioner thus does not wield any instrument recognized in law as conferring her proprietary rights over the assets of the deceased person.

He cites Section 61(1) of the land registration act which provides for transmission on death of a sole proprietor or proprietor in common dies, the proprietor’s personal representative shall on application to the Registrar in the prescribed form and on production to the Registrar of the grant be entitled to be registered by transmission as proprietor in the place of the deceased.

He also cites section 61(2) of the Act which provides that upon confirmation of a grant, and on production of the grant, the Registrar may without requiring the personal representative to be registered, register by transmission any transfer by the personal representative and any surrender of a lease or discharge of a charge by the personal representative. That it is only until the procedure set out in section 61 of the Land Registration would a person be said to have acquired and or owned land as envisage in Article 40 of the Constitution to warrant the grant of orders sought. The petitioner has not exhibited any grant of letters of administration of the deceased estate nor is the petitioner the registered proprietor of the suit land. That the documents annexed by the petitioner do not confer any proprietary rights over land as such cannot invoke Article 40 for protection of non-existent rights. Lastly, that the court can only protect rights of registered person as is provided for by section 24(A) and 25 of the Registered Land Act.

I have considered the petition, supporting affidavit and rival submissions and do find that the facts of this case as stated by the petitioners are that the petitioners possess and occupy the suit land being Cheptiret/Cheplaskei/Block 1(Kipchamo) 58 registered in the name of Chelagat Chebasa Ribison alias Chelagat Chebasa (deceased) who was the father in law to the 1<sup>st</sup> petitioner and grandfather to the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners. It is not contested that prior to his death, Chelagat Chebasa gifted the 1<sup>st</sup> petitioner with 30 acres of land comprised in the suit property.

The late Chelagat Chebasa Ribison had four sons that is; Chisire Robinson who is deceased, Kili Arap Masoin also deceased and Kipkoech Lagat, the 1<sup>st</sup> respondent and Torotich Chelagat Busienei, the 2<sup>nd</sup> respondent. The late Chelagat Chebasa died intestate. The petitioners herein resides on the property of a deceased person. The petitioners are not seeking to be granted the property rights but are seeking for protection of their right to property. The legal issues raised in this matter are:

**1. Whether the court has jurisdiction.**

**2. Whether the petitioners’ right have been violated or are likely to be violated.**

On the first issue, this court’s jurisdiction is underpinned on Article 162 of the Constitution which provides for the creation of the ELC as one of the Superior Courts in Kenya. That provision is drawn as follows: -

**162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).**

**(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

**(a) employment and labour relations; and**

**(b) the environment and the use and occupation of, and title to, land.**

**(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).**

*(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

Article 162(2)(b) of the Constitution Mandated Parliament to create a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

Parliament did create the Environment and Land Court through the Environment and Land Court Act, Act No. 19 of 2011 and did elaborate the jurisdiction provided by the Constitution at Section 13 of the Act. The said provision is drawn as follows: -

*13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

*(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes?*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.*

*(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

*(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

*(5) (Deleted by 12 of 2012, Sch.).*

*(6) (Deleted by 12 of 2012, Sch.).*

*(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including: -*

*(a) interim or permanent preservation orders including injunctions;*

*(b) prerogative orders;*

*(c) award of damages;*

*(f) compensation;*

*(g) specific performance;*

*(g) restitution;*

*(h) declaration; or*

*(i) costs.*

The general jurisdiction is set out in Section 13 (1) which emphasizes that The Environment and Land Court has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution, relating to environment and land. Section 13 (2) clarifies the general jurisdiction in Section 13 (1), probably to elaborate more, as to what a matter touching on land and environment is. It sets out matters touching on environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. Section 13 (2) (e) in very broad terms, states that the court has jurisdiction to hear any other dispute relating to environment and land.

Section 13 (2) (d) and (e) confers jurisdiction on the Environment and Land Court to hear a matter *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.*

The jurisdiction of the Environment and Land Court in so far as a dispute revolves on land or the environment is very wide and unlimited. As to the remedies that the Environment and Land Court can grant, it will be observed that this includes an award of damages.

I do find that the petitioners have satisfied this court that they are in occupation and use of the land in dispute and therefore the court has jurisdiction to determine the petition as the same is grounded on the use, occupation and utilization of the land in dispute. The petitioners are seeking orders that they be protected from the respondents who are attempting to evict them from the parcel of land.

The second issue is whether the plaintiffs' right to own property was infringed or violated and or threatened by the respondents. **Article 20 of the constitution of Kenya** provides for the application of Bill of Rights thus, the Bill of Rights applies to all law and binds all State organs and all persons. **Article 21 of the constitution of Kenya** provides for the Implementation of rights and fundamental freedoms and gives the fundamental duty to the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

The State is mandated take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

The State is to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. Article 22 provides for the enforcement of Bill of Rights Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

The respondents are not a state or state organs who have the fundamental duty to Implement of rights and fundamental freedoms of the individual. The principle of horizontal application of the Bill of Rights as argued by Mr. Nabasenge learned counsel for the petitioner does not apply to land disputes that are based on the Law of succession as Parliament has made provision for settling of such land disputes between the individuals by enacting adequate specific legislation such as the **Land Act No 6 Of 2012**, the **Land Registration Act No 2 Of 2012** and therefore petitioners should pursue their rights as envisaged by these Acts. Courts should be reluctant to apply the bill of rights horizontally where there is an exhaustive legal mechanism for a remedy. This case also revolves on **the Law of Succession Act Cap 160 Laws of Kenya** and the petitioner have commenced succession proceedings in the High Court and therefore they should exhaust those proceedings in the succession cause before filing a petition to enforce their rights.

In the case of **Isaac Ngugi v Nairobi Hospital & 3 Others, Nairobi Petition No. 407 of 2012 [2013] eKLR**, the court held as follows regarding the application of the Constitution to private relationships;

*[22] The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. (See Satrose Ayuma and 11 Others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010 [2013] eKLR). The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature of the right and fundamental freedom and the circumstances of the case....*

*[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly."*

The South African Constitutional Court in **Motala & Another v University of Natal (1995) 3 BCLR 374** remarked that;

*"It goes without saying that many of the entrenched rights are, by their very nature, exclusively 'vertical' in their operation. But many of them are, in my view, not. For the purpose of furnishing these reasons I need only say that I consider that the rights entrenched in sections 8(1), 8(2) and 32, which are the only entrenched rights in issue before me, are enforceable not only against the state or its organs as defined, but also against individuals, natural or juristic, who may be disposed to threaten them or interfere with the exercise of them."*

It would be fair to observe that many a person's day to day activities and relations are largely transacted in the private spheres, be it commercial or social. As the Court, (Gacheche J) remarked in **Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi (Supra)**,

*"The rigid position that the human rights apply(sic) vertically is being overtaken by the emerging trends in the development of human rights law and litigation. We can no longer afford to bury our heads in the sand, for we must appreciate the reality, which is that private individuals and bodies such as clubs and companies wield great power over the individual citizenry, who should as of necessity be protected from such non-State bodies who may for instance discriminate unfairly, or cause other Constitutional breaches... I need not point out that this is the beginning of a new dawn for Kenya; one that should be embraced enthusiastically by all and it will not matter who the duty holder is, rather, what matters is who should enjoy the rights as enshrined in the Constitution. It must be clear by now that I find that the fundamental rights are applicable both vertically and horizontally, save that horizontal application would not apply as a rule but it would be an exception, which would obviously demand that the court do treat on a case by case basis by examining the circumstances of each case before it is legitimized."*

I do find that though the petitioners are claiming their property rights as enshrined in the Constitution, the respondent are also claiming the same property as dependents of the deceased and beneficiaries of the estate of the deceased and therefore the dispute herein is private that be

resolved by private law as opposed to public law. The petitioner's occupation and use of the property has not crystallized into rights envisaged under Article 40 of the Constitution of Kenya. The petitioners have a right to acquire and own the property though the property in issue belongs to a deceased person. The only procedure of acquisition of the property of a deceased person is through succession. It is true that the Bill of Rights applies to all law and binds all State Organs and all persons but it is the state that has an obligation to protect the rights of individuals and not the respondents. The State protects the rights by enacting the laws. To protect the rights of beneficiaries of the Estate of a deceased person, the State has enacted the law of Succession Act which provides for the property of a deceased person. The parties herein should commence probate and/or administration proceedings and administer the property of the deceased.

The State through parliament has further enacted the Land Registration Act no 2 of 2012 that provides for the transmission on death of the sole proprietor or proprietor in common upon death. The property in dispute is still registered in the names of Chelagat Chebara Ribison who died in 1998. Section 61 of the Act does not apply as the deceased was a sole proprietor. Section 61(2) is applicable and provides for Transmission on death of a sole proprietor or proprietor in common thus that:

**(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of [deceased]" or "as administrator of the estate of [deceased]", as the case may be.**

**(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—**

**(a) any transfer by the personal representative; and**

**(b) any surrender of a lease or discharge of a charge by the personal representative.**

**(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.**

#### **Effect of transmission on death**

**(1) Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.**

**(2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.**

The petitioners are not the personal representatives of the estate of the deceased person and have not obtained any grant as the administrators of the estate of the deceased. No confirmation of grant has been done to bestow unto them any right to property of the deceased person.

Ultimately, the petition is found to be without basis and is dismissed with no order as to costs.

**Dated and delivered at Eldoret this 19<sup>th</sup> day of March, 2018.**

**A. OMBWAYO**

**JUDGE**