REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO.3 OF 2014

(Formerly Nairobi HC Petition No. 310 of 2011)

IN THE MATTER OF ARTICLE 22(1), (2) & 23(1), (3)

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40(3) OF THE CONSTITUTION OF KENYA

BETWEEN

SILVESTER WANG'OMBE NDERI.....1ST PETITIONER

ANDREW GICHOHI NDERI.....2ND PETITIONER

PETER WANG'OMBE NDERI.....3RD PETITIONER

ELIZABETH WAMBUI NDERI.....4TH PETITIONER

SEBASTIANO WACHIRA NDIRANGU.....5TH PETITIONER

***(ON THEIR OWN BEHALF AND ON BEHALF OF 32 MEMBERS OF THE FAMILY OF THE SENIOR CHIEF NDERI WANG'OMBE*)**

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTRY OF MEDICAL SERVICES.....2ND RESPONDENT

AND

1. GICHURE MARINE WANG'OMBE

2. JOSEPH MATERO GITONGA

3. MICHAEL MUTERO MARINE

(ON THEIR OWN BEHALF AND ON BEHALF OF 14 MEMBERS OF THE FAMILY OF THE LATE MARINE WANG'OMBE)

JUDGMENT

Introduction

1. The petitioners herein who have described themselves as trustees of the entire family of the late Senior Chief Nderi Wang'ombe (hereinafter the Chief) brought this suit seeking the reliefs listed hereunder against the respondents.

2. Through the pleadings filed on 13th December, 2011 in Nairobi High Court Petition No. 310 of 2011 (later renamed Nyeri High Court Petition No. 1 of 2012 and subsequently Nyeri ELC Petition No. 3 of 2014), the petitioners have averred that in 1955, the Government of Kenya through the District Commissioner, Nyeri appeaed to the family of the Chief to donate part of their land Aguthi/Gatitu/582 for expansion of the Nyeri Provincial General Hospital.

3. It is the petitioners' case that the family in good faith donated 8.3 acres out of their 17.3 acres to the Government leaving 9 acres for the family. According to the petitioners, in 1956, the Provincial Medical Officer, Central Province, acknowledged the gift and asked for a photograph of the Chief to enable the Government have a bronze plaque made and placed in a ward to be named after the Chief as a token of its appreciation.

4. The petitioners contend that in 1959, in breach of the understanding between it and the Chief's family as to the portion of land that was being gifted, the respondents illegally and irregularly took over the balance of the land measuring 9 acres.

5. According to the petitioners, the Government promised to look for alternative land within Nyeri Municipality to compensate the Chief's family which promise never materialized.

6. The petitioners have averred that the family of the Chief has been in constant communication with the respondents regarding the alleged illegal and irregular acquisition of their land.

7. According to the petitioners, the respondents intimated an intention to compensate them for the 9 acres which were illegally/or irregularly alienated, which intention never materiarized. As a result, the petitioners instituted a suit to wit, Nyeri HCCC No.181 of 2010 which they later withdrew after the 1st respondent challenged it on the ground that it was time barred.

8. Terming the alleged illegal or irregular acquisition of their land unconstitutional and a violation of their fundamental rights under **Article 40** of the Constitution of Kenya (COK), 2010; the petitioners urge the court to enter judgment for them and against the respondents for:

> **(a) A declaration that alienation of part of their land reference Aguthi/Gatitu/582 measuring 9 acres is a violation of their Constitutional rights to property under Article 40 of the Constitution of Kenya and/or protection from deprivation of property contrary to law;**
>
> **(b) A declaration that they are entitled to compensation by the respondents on account of the unconstitutional deprivation of their property as follows:**
>
> **(i) Current open value of the land.....Kshs. 101, 146, 320.00/=**
>
> **(ii) Add 15% of (i) above in accordance with the Compulsory Acquisition Act, Cap 295 Laws of Kenya... Kshs.15,171,948.00/=**
>
> **(iii) Loss of use.....Kshs. 98, 512, 302.00/=**
>
> **Total.....Kshs. 214, 830, 570.00/=.**
>
> **(c) An order directing the respondents to pay the petitioners a sum of Kshs. 15, 000,000/= by way of punitive and/or aggravated damages;**
>
> **(d) Interest on (b) and (c) above at court rates;**
>
> **(e) Costs of the petition;**
>
> **(f) Such other order or orders as the court may deem just.**

9. The petitioners' claim is supported by the affidavit of **Silvester Wang'ombe Nderi** sworn on **1st February, 2012** and filed on **3rd February, 2012** in which it is deponed that before independence, the Chief donated 8.3 acres out of Aguthi/Gatitu/582 to the Government of Kenya for extension of the Nyeri Provincial General Hospital (hereinafter referred to as the hospital); that when the actual extension took place, the Government acquired the whole 17.3 acres of Aguthi/Gatitu/582 thereby compulsorily acquiring the extra 9 acres thereof; that the family of the Chief has been seeking from the Government of Kenya, Ministry of Health and lately, Medical Services, return of the excess 9 acres acquired over and above the 8.3 acres; that over time, there has been consensus on the following as a way of compensation:

> **(i) Acquisition of land of the same value and acreage elsewhere within Nyeri Municipality;**
>
> **(ii) Payment of fair price for the entire 9 acres including the loss of user for the entire period.**

10. It is further deponed that through further negotiations between the Government of Kenya, the Ministry of Health, the Ministry of Medical Services and the family of the Chief, it was resolved that the family be compensated by a fair price for the 9 acres as alternative efforts by the Government of Kenya and the Ministry of Health to obtain alternative land within Nyeri Municipality had failed. It is indicated

that the 9 acres were valued at **Kshs. 214, 830, 570.00/-.** Annexed to the affidavit is a bundle of documents marked **SWN-1**.

11. The petition is also supported by the affidavit of **Magdaline Nyakiine Nderi**, the 33rd petitioner, where it is *inter alia* deponed that the Chief had 28 wives; that the deponent is the only surviving wife of the Chief and reiterated that the Government illegally or irregularly acquired 9 acres out of their land. It is further reiterated that their family engaged the Government to compensate them.

12. Based on an opinion allegedly given by the Hon. Attorney General concerning their claim to the effect that their claim for compensation in respect of the 9 acres is valid, the 33rd petitioner urges the court to allow their claim.

13. The petition is opposed on the grounds that the hospital had been in occupation of the suit property even before 1959; that the suit land was reserved for the hospital on 21st January, 1959 and that the hospital's possession of the suit property has been pursuant to 1st registration effected in favour of the Chief Secretary Corporation.

14. Arguing that there is no evidence or official record to show that the suit land was compulsorily acquired from the petitioners either as alleged or at all, the 2nd respondent has put the petitioners to strict proof of their claim.

15. When the matter came up for hearing, **Sebastiano Wachira Ndirangu** (P.W.1) who took the place of the 1st petitioner, **Silvester Wang'ombe Nderi**, who passed on during the pendency of the suit, relied on his witness statement, the statement of Silvester Wang'ombe, the affidavits sworn by Silvester in support of the petition and the petitioner's bundle of documents. He placed particular emphasis on the letter by the Attorney General dated 3rd April, 2013 and the valuation by Camp Valuers.

16. On cross examination, he maintained that the suit property was owned by the family of the Chief.

17. Concerning the claim by the Marine family, he stated that the Marine family was given their own portion of land which did not include the 9 acres.

18. **James Githang'a** (P.W.2), a valuer trading in the name camp valuers, informed the court that he was approached by Silvester Wang'ombe (deceased) to value the suit property in 2005 and 2010. He carried out the valuation and added the 15% statutory interest for compulsory acquisition .

19. After taking into account all factors, he found the market price of the property to have been 214, 830, 570/-. He produced the valuation report as **Pexbt 1**. In 2014, he received instructions to make a further valuation in consideration of the changing market values. Using the criteria he used in making the earlier valuation, he found the current market value of the property to be Kshs. 402, 521, 010/-.

20. P.W. 2 informed the court that the suit property is flat, big and situated next to what was considered the town boundary. In his view, the assessed figures are conservative as the property is in an area which is very prime. He further informed the court that in 2014, one acre was going for 20 million and that the rent for 1 acre was one million per year.

21. For the period the Government has been in occupation of the suit property, he opined that the petitioners would have received 186 to 200 million.

22. He explained that when giving him instructions to value the suit property, Silvester, told him that the land though occupied by the hospital belonged to the Chief's family.

23. **Boniface Kamitu Nderi** (P.W.3), who testified on behalf of the 33rd petitioner, Magdaline Nderi (deceased), informed the court that Magdaline was his mother and the only surviving wife of Wambugu Nderi at the time the suit was filed.

24. He informed the court that the suit property, which is located in Nyeri town near the hospital, originally belonged to the Chief. On request from the hospital, they gave 8.3 acres out the property which measured 17.3 acres but the Government without their consent took the entire property.

25. The family approached the Government through the Provincial Administration and the Government accepted to compensate them.

26. The court heard that pursuant to the negotiations between their family and the Government, a valuation was done showing the value of the land was 54 million. He produced the affidavit sworn by his mother, Magdaline Nderi, and the annextures thereto as **Pexbt 3**.

27. Concerning the claim by Marine family, he stated that they are not part of the Chief's family and that they had their own land.

28. He maintained that the 8.3 acres given to the hospital plus the 9 acres allegedly compulsorily acquired by the hospital belonged to the Chief's family.

Submissions

29. On behalf of the petitioners, a brief background of the petitioners' claim is given and based on a letter from the Attorney General to the Principal Secretary Ministry of Medical Services dated 3rd April, 2013 and an offer by Counsel for the Respondents given on 10th October, 2013 to settle the petitioners claim at 54,000,000/=, it is submitted that liability is admitted.

30. It is further pointed out that it was agreed that the respondents carry out a formal valuation of the suit property but the respondents failed to do so.

31. Arguing that the respondents did not contradict their evidence, the petitioners urge the court to allow their petition as prayed.

32. The petitioners relied on the cases of **Kariuki Kimani (suing through James Thuo Kariuki) Power of Attorney No. 45330/1 vs. The Commissioner of Lands & the Attorney General petition No. 533 of 2008; Kanini Farm Limited vs. Commissioners of lands, klr (e & l); Anarcherry Limited vs. Attorney General Nairobi HC petition No. 248 of 2013; Jephtar & Sons Construction & Engineering Works Ltd vs. Ag HCT-OO-CU-CS-0699; Musisili vs. Editor, Mirror Newspaper and Others case No.CIV/T/275/2001 and Ntandazeli Fose vs. Minister of Safety & security CCT/4/96/(1997) ZACC6**.

33. In their submissions, the respondents have contended that the compensation offered by the respondents of 54,000,000 is sufficient; that the valuation report filed by the petitioners is exaggerated; that compensation ought to be to the extent of market value which obtained at the time of acquisition and not when the suit for compensation is determined.

34. Based on the authorities cited by the petitioners, it is submitted that compensation should be reasonable and commensurate to the market rates applicable.

35. In this case, it is pointed out that the idea of compensation was floated to the petitioners early enough but the petitioners delayed compensation by dragging the matter in court.

36. It is contended that the prescribed methodology of carrying out valuation was not complied with and that the law does recognize independent valuations.

37. According to the respondents, public funds can only be committed through valuations conducted by the National Land Commission, which was was never enjoined to the suit.

38. The foregoing notwithstanding, it is contended that the petitioners did not prove that the acquisition of the suit land was unlawful and/or unprocedural.

39. On their part, the interested parties supported the petitioners' claim as far as the liability of the state is concerned. In that regard, the petitioners' claim is said to have been confirmed by the petitioners' counsel, Lucy Mwai through her letter dated 15th October, 1999 to the Attorney General (that is to say the notice of intention to sue).

40. The petitioners' claim is also said to be admitted through the various correspondences exchanged between the respondents and the representatives of the petitioners and interested parties.

Analysis and determination

41. From the pleadings filed in this case, the evidence adduced in respect thereof and the submissions of the respective parties to this dispute the issues for determination are found to be?

(a) Whether the petitioners' claim has been admitted by the respondents?

(b) Subject to outcome of (1) above, whether the petitioners have proved that the 9 acres said to have been compulsorily acquired by the Government belonged to the Chief's family?

(c) Subject to the outcome of prayer (3) above whether the petitioners have made up a case for being granted the orders sought or any of them?

(d) What orders should the court make?

Whether the petitioner's claim has been admitted?

42. As pointed out above, based on a letter from the Attorney General to the Principal Secretary Ministry of Medical Services, dated 3rd April, 2013 and an offer to settle the petitioners' claim at 54 million, made by the respondents' counsel when the petitioners' case came up for hearing, it is contended that the question of Government's liability is admitted.

43. In the Attorney General's letter under reference, the Attorney General addressed the PS, Ministry of Medical Services as follows:

"**LAND PARCEL L.R NO. AGUTHI/GATITU 582**

CLAIM FOR NINE (9) ACRES OF NYERI PROVINCIAL HOSPITAL LAND BY THE FAMILY OF THE LATE SENIOR CHIEF NDERI

Please refer to the above matter and your letter dated 9th February 2011 in which your Ministry sought the above advise and guidance of the Attorney General in resolving a claim by the family of the late Senior Chief Nderi for 9 acres of the land

where Nyeri Provincial Hospital is situate. According to your letter, the family's claim is for land to be returned back or they be compensated.

After several correspondences as regards the background of the land dispute, we have noted that, indeed the Nderi family in 1955 donated 8.3 acres of their land as an extension to the land currently occupied by Nyeri Provincial Hospital. In acknowledgement, the Government was to honour the late Senior Chief Nderi with a statue and to have a newly constructed Tuberculosis ward named in his memory. From the various correspondences, it appears this was not done.

Following donation of 8.3 acres, the Government in 1959 took 17.3 acres of the Nderi's land. This position is confirmed by the green card supplied by the District Land Registrar Nyeri which shows the acreage of land parcel Aguthi/Gatitu 582 as 17.3 acres. The land is registered in the name of the Chief Secretary (Incorporation) established under the Chief Secretary (Incorporation) Ordinance, 1958 and the predecessor to the current Permanent Secretary to the Treasury (Incorporation). This means that land parcel Aguthi/Gatitu 582 is the property of the Government and that the Government took an additional 9 acres of the Nderi family's land.

We have noted from your letter under reference that a meeting to resolve the dispute was held on 13th May, 2010 under the Chairmanship of the Provincial Commissioner, Central Province. The meeting resolved vide min/6/5/2010 that the Government will pay ex-gratia for the 8.3 acres given freely by the family and full compensation for the extra 9 acres of land already taken and vested in the Government. The meeting also resolved to have the District Valuer engaged to value the land. The District Valuer did the valuation and gave the estimated value at Kshs. 6,000,000/= per acre. This makes a total of Kshs. 54,000,000/= for 9 acres.

In this regard, it is our advise:

1. No payment, either ex-gratia or of whatever nature can be made by the Government for the 8.3 acres donated by the family of the late Senior Chief Nderi since it was a gift.

2. The claim by the family of the late Senior Chief Nderi for the extra 9 acres taken by the Goverment and now a part of the land held by the Nyeri Provincial Hospital is valid. Your Ministry is therefore advised to offer compensation for the 9 acres as assessed by the District Valuer.

3. Since the land is already registered in the name of the Permanent Secretary to the Treasury (Incorporation), and thus vested in the Government as per the green card, an agreement between the Permanent Secretary to the Treasury (Incorporation) and family representatives of the beneficiaries of the late Senior Chief Nderi ought to be executed in order to have the land dispute settled."

44. When the matter came up for hearing, on 4th February, 2015 counsel for the respondents, **MS Masaka** addressed the court as follows:

"...I was informed that this matter was negotiated out of court and the petitioners were to be paid Kshs. 54,000,000/=. As at 15/9/2014 the treasury had been informed to process the agreed price and release the same to the petitioners...".

45. Although counsel for the respondents informed the court that the matter had been negotiated out of court the affidavit of Dr. Julius Kimani Mwago sworn on **9th October, 2012** and filed on the same day and the grounds of opposition dated **2nd October, 2012** and filed on the same day tell a different story.

46. In both pleadings, the respondents denied the petitioners' claim and put them to the strict proof of their claim. Through those pleadings, the respondents *inter alia* contended that there was no evidence that the suit property belonged to the petitioners.

47. Despite having reiterated their offer to settle the suit out of court at Kshs. 54 million, which they termed reasonable, in their submissions, the respondents maintained that the petitioners' claim is devoid of any legal basis and merit.

48. In the light of the foregoing, can the petitioner's claim be said to have been admitted?

49. In answering that question, it is important to put in perceptive what amounts to an admission of a claim.

50. What amounts to an admission was laid bare by the Court of Appeal in the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] e KLR** where it was stated:-

" With regard to the alleged appellants' admission of the respondents entire claim in HCCC No. 183 of 1998, we wish to refer to the case of *Choitram versus Nazari (1984) KLR 32),* which has laid down the parameters of what does or does not amount to an admission. In a summary, an admission must be premised on the provisions of order XII rule 6 Civil Procedure Rules as it was then (now order 13 rule 2); that the pleadings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from pleadings in instances where the defendant has specifically failed to deal with allegations of fact in the plaint , the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words "*or otherwise.*"

51. As pointed herein above, the petitioner's mainly based their claim on the advice by the Attorney General to the P/S Ministry of Health to the effect that their claim for compensation in respect of the 9 acres allegedly compulsorily acquired by the Government is valid.

52. As to whether the letter from the Attorney General amounts to an admission of the petitioner's claim or to prove of the petitioner's claim against the respondents, my view is that the letter is neither an admission of the petitioner's claim nor proof of the petitioner's claim. I say so because the letter was merely an opinion given to the Permanent Secretary for Health on the question presented before the Attorney General to give advice on. Although the letter was admitted in evidence, its admission does not amount to proof of its contents. In that regard see the case of **Kenneth Nyaga Mwige v. Austin Kiguta & 2 others (2015) e KLR** where the Court of Appeal observed:

> **"... mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."** (Emphasis supplied).

53. In my view if the petitioners wanted to rely on the contents of that letter in support of their case, they should have called the author of the letter to wit the Attorney General to come and vouch for its contents. This is so because the alleged author, through it's pleading, opposed the petitioners' case and put them to strict proof of any allegation in respect of their claim.

54. Whilst its true that at some point the respondents had the intention of conceding the petitioners' claim, it is clear from the foregoing analysis of what transpired in this case, that the intention did not ultimately materialize and/or was not formalized. Without any formal order on the issue of liability, all what the petitioners can talk about or rely on is that demonstrated intention to admit liability but not that the claim was admitted.

55. For the foregoing reason I return a negative verdict on the first issue.

56. **On whether the petitioners proved that the 9 acres allegedly irregularly taken from them belonged to them**, the evidence on record shows that the suit property was not at any time registered in the name of the Chief and/or any of the petitioners. According to the evidence produced in court, the suit property was registered in 1959 in favour of the Native Land Trust Board and reserved for the hospital.

57. The registration effected in respect of the suit property was done under the Native Lands Trust Ordinance Cap 100 Laws of Kenya and the Rules made thereunder which *inter alia* provided for ascertainment of rights to land, registration of the land in the name of persons found to be entitled to the land and the procedure of challenging that registration.

58. Whilst there is no dispute that the Chief donated his land measuring 8.3 acres for extension of the hospital, there is no evidence whatsoever that the Government took more than what the Chief's family donated.

59. The evidence on record show that the land the Chief's family gave was for expansion of the hospital meaning that the hospital was in existence and with its own land.

60. When the land was subjected to the process contemplated under the Native Trust Lands Ordinance, it ended up being set apart for the hospital.

61. There is no evidence that the petitioners or their predecessors in claim, raised any objection to the setting apart of the land for the hospital and/or registration of the land in favour of the Native Lands Trust Board.

62. There is also no evidence that the petitioners raised any complaint against use and occupation of the portion they now claim until sometime in 1999 when, through their advocate Lucy Mwai, they issued the state with a notice to sue. Through that notice, dated 1st October, 1999 the petitioners' advocate addressed the Attorney General as follows:

> **"TAKE NOTICE that M/S LUCY MWAI & COMPANY ADVOCATES intend; on behalf of the family of the late Senior Chief Nderi Wang'ombe, to institute civil proceedings in the High Court of Kenya against the Attorney General on behalf of the Ministry of Health and the Commissioner of Lands.**
>
> **THE CIRCUMSTANCES giving rise to the cause of action are that in 1956, the family donated 8.3 acres of their land to the then medical department, for the purposes of the extension of the central provincial general hospital.**
>
> **That as a token, the Government had agreed to name the proposed 52 bedded tuberculosis ward in memory of the late Senior Chief Nderi, and also put up a sculpture for the late Senior Chief at the said ward (We attach 6 letters relating to the above transactions.**
>
> **That the Ministry of Health neither used the land given for the purpose it was intended, nor did it live up to its promise to raise a sculpture for the late Senior Chief Nderi and name a hospital ward in his memory.**
>
> **Instead, the land which was donated for a noble cause has been allocated to undeserving private developers by the Commissioner of Lands.**

THE RELIEFS SOUGHT are as hereunder,

(a) A declaration that since there was no consideration for the 8.3 acres given to the Government, the acquisition is null and void.

(b) An Order that the 8.3 acres be transferred to the family of the late Senior Chief Nderi Wang'ombe.

(c) Mandatory injunction directing the Commissioner of Lands not to allocate any more land of the 8.3 acres until the case is heard and determined.

63. That letter forms part of the bundle of documents filed by the interested parties on 23rd April, 2013.

64. Although that letter does not form part of the documents produced by the petitioners, it is referred to in the letter dated 8th October, 2001 written by the Hospital's Medical Superintedent, Dr. I.G Mburu, to the Permanent Secretary Ministry of Health. In that letter the Hospital's Medical Superintedent addressed the P/S as follows:

"PROVINCIAL GENERAL HOSPITAL LAND REPORT

This is a follow up of the report we submitted to you on 28th August 2000 in which we explained our predicament over the hospital land.

On 1st October 1999 the family of the late Senior Chief Nderi Wang'ombe, through Lucy Mwai & Company Advocates, served the government with a notice to sue the commissioner of land for wrongfully allocating the hospital land to private developers and the ministry of health for having failed to honour the late Senior Chief Nderi. On september 2001 the hospital management board presented the problem to the central provincial commissioner who promised to provide an answer on a later date which we are still waiting.

The hospital members board then held a meeting on 27th September 2001 with three (3) representative members of the family of late senior Chief Nderi. These were:

1. Silvester Nderi

2. Charles G. Nderi

3. Sebastian W. Ndirangu.

They clarified that the initial hospital was located in town where the Town Health Centre is currently. That land had been donated by the late Chief Wang'ombe Nderi.

In 1955 the government decided to extend the hospital and requested the Nderi family to assist. The family donated 8.3 acres of land for this purpose. However, in 1959 the government took over 17.3 acres of land instead of the 8.3 acres donated. The government also promised to name one ward after the late senior Chief Wang'ombe Nderi and put up a statue in his honour but failed to fulfil the promise.

The Nderi family are requesting to have the 9 acres which were excess because of the following reasons:

1. The pledges were never honoured by the government.

2. The hospital land was being issued to private developers.

The provincial hospital board promised the Nderi's family representatives to fulfil the government pledge of honour if the Nderi's family was willing to allow for survey and consequent fencing of the hospital.

It was also decided that since the grabbed plots are in between the main hospital and medical stores depot they shall be fenced together with the rest of the hospital.

Sir, could you please advise us on the Nderi family's request for compensation."

65. It is clear from the foregoing, that the claim of the Nderi family had mutated to now include a claim for return of the 9 acres alleged to have been wrongly taken from them by the government and/or compensation in respect of those 9 acres.

66. Through a letter dated 11th February, 2002 written by the then P/S Ministry of Health Prof. Meme to the P.C, Central Province, the PS gave a brief history of the dispute *and inter alia* advised the PC to:

"Look at the possibility of finding an alternative parcel of land within Nyeri Municipality or its environs to compensate the Nderi family in view of the undertakings that have been cited in this letter and to ensure the land...the hospital remains intact

for future development."

67. Vide a letter dated 5th November, 2002 the Chief Health Administrative Officer, Ministry of Health, addressed the hospital superintedent as follows:

> **"RE: UNSURVEYED HOSPITAL LAND: NYERI PGH-CLAIM BY MEMBERS OF THE FAMILY OF THE LATE SENIOR CHIEF NDERI.**
>
> **Forwarded herewith for favour of your further action please find a copy of a letter Ref. No.LG/2/3/I/VIII/41 of 16th September 2002 on the above subject which was addressed to the P/S, Ministry of Health by the Provincial Commissioner Central Province.**
>
> **Your attention is drawn to the last paragraph concerning the 9 acres of land in excess of the original donation made to the hospital by the family of the late Senior Chief Nderi. It appears the family wants the ministry to buy the land in excess of the original donation. To resolve the issue you are requested to make arrangements for the parcel of land in question to be properly surveyed and valued after which you should initiate appropriate negotiations with the representatives of Nderi family with a view to agreeing on a fair price.**
>
> **Please ensure that you keep the undersigned informed of progress at each stage.**
>
> **Immediately you receive this letter please make a decision to whether you would want to acquire the whole parcel or part of it and if so how much of the 9 acres you wish to acquire."**

68. Whereas the above letter suggests that the 9 acres belonged to the Nderi family, as part of the alleged excess donation, and therefore the government needed to make a decision as to whether to acquire the whole or any part of it, the evidence adduced in this case, to wit the green card in respect of the suit property does not support that position.

69. That evidence shows that the suit property was, in accordance with the Native Lands Trust Ordinance, set apart for the Hospital and registration in respect thereof subsequently effected in favour of the Chief Secretary (Incorporation). There is no indication in the register that the Native Lands Trust Board in whose favour the suit property was first registered held the land or any part thereof in trust of the petitioners.

70. A review of the Native Lands Trust Ordinance shows that after the adjudication process contemplated under the Ordinance, title would issue in the name of the person entitled to it and if the land belonged to the community in the name of that community. In that regard see **Rule 9** of the Ordinance which provides as follows:-

> **"9. (1) There shall be prepared in respect of each unit a Record of Existing Rights.**
>
> **(2) Where a Committee has determined the claim of persons to be private right-holders of any piece of land within the unit it shall record, or cause to be recorded, all such rights in Part I of the Record.**
>
> **(3) There shall be entered in Part I of the Record-**
>
> ***(a)* the name and tribal particulars of every right-holder;**
>
> ***(b)* a description or other sufficient identification of each piece of land which any private right-holder is entitled to occupy and of any communal land;**
>
> ***(c)* in the case of any private right-holder who is a minor, the name of his guardian.**
>
> **(4) The District Officer shall enter or cause to be entered in Part II of the Record-**
>
> ***(a)* the name of every person in whose favour any land in the unit has been set apart, or to whom any land has been leased, or who has been granted any licence, in accordance with the provisions of Part III or V of the Ordinance;**
>
> ***(b)* a description or other sufficient identification of any land which has been set apart or leased;**
>
> ***(c)* the term and nature of any lease or licence."**

71. It is clear from the foregoing that the law did contemplate a situation where land belonging to an individual or individuals, as in this case, would be registered in the name of the Native Lands Trust Board.

72. Concerning the petitioners contention that part of their land ended up being registered as part of the land reserved for the hospital without their knowledge and/or consent, it is noteworthy that the law provided a procedure for dealing with such claims. In this regard see **Rules 10, 11** and **12** of the Native Lands Trust Ordinance which provide as follows:

" 10. When the Record in respect of any unit has been completed, the District Officer shall sign and date the same and shall give notice of the date of the completion thereof, and of the place at which the same can be inspected.

11. Any person named in or affected by the Record who considers the Record to be in accurate or in complete in any respect may, within thirty days of the completion thereof, so inform the District Officer, stating in what respect the Record is alleged to be inaccurate or incomplete; and in any such case the District Officer shall refer the matter to the Committee which shall consider and determine the same.

12. After the expiration of thirty days from the completion of a Record, or on the determination of all objections to a Record in accordance with rule 11, whichever shall be the later, the Record shall be deemed to be a true and complete record of all existing private right-holding in the unit to which the Record relates, but no in accuracy in or omission of, any particular relating to any lease or licence shall in any way affect the validity of such lease or licence."

73. In this case, there is no evidence whatsoever, that the petitioners raised an objection against the alleged unlawful alienation of their land either as required under that statute or at all.

74. The evidence on record shows that the petitioners waited for more than 40 years to raise their claim with the government. Even when they did so, it is noteworthy that the initial claim did not relate to alienation of an extra 9 acres but unlawful alienation of the initial 8.3 acres to private individuals and the government's failure to honour its promise to name one of the wards in the name of the Chief and put up a statue in honour of the Chief.

75. In view of the foregoing, notwithstanding the various correspondences exchanged between the representatives of the Petitioners and the respo- ndents suggesting that a portion of the petitioner's land was wrongfully taken by the government, I find and hold that the negotiations were premised on the wrong impression that the land belonged to the Chief's family, which impression is not supported by the totality of the evidence adduced in this matter. For instance, the evidence adduced in this matter shows that by the time the Chief's family donated the 8.3 acres the hospital was in existence. The 8.3 acres, donated were, in fact, for extension of the hospital. That means after consolidation and registration of the land held by the hospital and that which was donated by the Chief, the land set apart for the hospital would definitely be more than the 8.3 acres donated by the Chief's family!

76. Faced with a claim similar to the one by the petitioners, **Karanja J**., stated:

".. The history of the said portion from the extract of the Register and the certificate of search produced in evidence is not disputed. The parcel was registered on 16/1/1959 in the name of Native Lands Trust Board which is now the County Council of Kirinyaga- the defendant herein. The next entry shows that 0.180 H of the said plot was compulsorily acquired in 1974. The said register does not indicate anywhere that the land was ever held in trust for the plaintiff or for any other persons. There are no overriding interests indicated on that register. The correct position is that the plot is still reserved for a rural institute.

It was incumbent upon the plaintiff to prove on a balance of probabilities that the land in question belonged to them and that they surrendered the same to the defendant in 1954 to hold in trust for them. Has the plaintiff discharged this onus?

In my considered view, no tangible evidence has been adduced to show that the land in question ever belonged to the plaintiff herein. Even if for the sake of argument we were to make an assumption that the land initially belonged to the plaintiff, on what conditions did they give it back to the Government to build the said institute? Was it supposed to be given back to the plaintiff at any one time and if so after how long and on what conditions? If indeed a Trust existed in their favour, why was it not indicated as an overriding interest in the register in 1959? *"Trust"* is an issue of both fact and law. The existence of the same must be demonstrated through proper and credible evidence. A *"trust"* is not created just because a person wakes up one day and decides another has been holding the land on his behalf. There is no evidence in this matter whatsoever that after the land demarcation/adjudication exercise, the said plot was allocated to the plaintiff. That would have been the starting point. It would have been the foundation upon which to build their claim. I do not understand how or why the plaintiffs would expect the court to find in their favour in the absence of any shred of evidence that they owned the parcel in question before the same was registered in the defendant's name.

The plaintiff's submission appears to dwell on what the defendant has done with the land thereafter…… that the same has been reallocated to other third parties instead of being returned to the plaintiffs with respect, that was not the issue. The plaintiff's basic and most important duty was to demonstrate that indeed the land belonged to them and that thereafter they surrendered the same to the defendant to hold in trust for them. They have dismally failed to prove this.

The documentary evidence adduced shows that the land in question was registered in the name of *"Native Lands Trust Board"* – now County Council of Kirinyaga and the only easement recognized in the register is that it was reserved for *"Rural institute."* The other documents (p*exh 1 and Pexh 2)* are merely letters showing communication between the plaintiff's and the Provincial Administration asking for the land in question. These letters do not support their claim of ownership or existence of a trust in their favour. The plaintiff's have failed both in fact and in law to demonstrate even remotely the existence of a trust in their favour over the land in question.

In my considered view, the plaintiffs have no justiciable claim whatsoever against the defendant herein.

I find and hold that the plaintiffs have failed to prove their case on a balance of probabilities. Their suit is hereby dismissed with costs to the defendant." See the case of **Anselimo Ngeni Warui & 2 Others v Kirinyaga County Council [2010] e KLR**.

77. Although the above determination suffices to determine the petitioners claim, assuming that I am wrong on the issue of ownership of the suit property, the other question to determine is whether the petitioners have proved that the portion of the suit property they are claiming compensation in respect of was compulsorily acquired by the respondents.

78. With regard to that question, it is important to point out that compulsory acquisition of land presupposes that there was forcible acquisition of land which is privately owned for public use.

79. As pointed out hereinabove, there was no forcible taking over of any land belonging to the Chief or his family. What happened in the circumstances of this case is that the Chief's family donated 8.3 acres from their undisclosed parcel of land to the 1st respondent (I say undisclosed parcel of land because no evidence was adduced capable of showing that the suit property existed at the time of the donation and if it did, how big it was and/or whether it was the same parcel of land that ended up being registered as the suit property in 1959). Nevertheless, assuming that the suit property existed as at the time the donation was made and that it is the same property that ended up being registered as the suit property in 1959, then all what the evidence adduced in this matter would reveal is that there was a mistake in the registration of a portion of the suit property in favour of the Respondents.

80. A review of the evidence on record also shows that the mistake in the registration of the suit property, if any, in the name of the respondents, was not discovered until sometime in or about 2000 when the issue was raised for the first time.

81. In view of the foregoing, assuming that there was a mistake in the registration of the suit property in favour of the respondents, my view of the situation that obtained between the family of the Chief and the Respondent is a trustee-beneficiary relationship. I say so because, it has not been demonstrated that the Government had any intention of compulsorily acquiring the land in question before the mistake was discovered.

82. The evidence on record shows that it is only after the issue of the alleged compulsory acquisition of the property arose in or about 2000 when the government intimated an intention to acquire the property.

83. Even with that intimation, the evidence on record shows that the requisite legal processes for acquisition of the suit property were not undertaken hence this suit.

84. Upon reviewing the conduct of the respondents concerning the intended acquisition, I find it to be in violation of the duty imposed on them of promptly paying just compensation of the land to the owner of the land being compulsorily acquired.

85. In view of the foregoing, had I found that the 9 acres in respect of which the compensation for compulsory acquisition is sought belongs to the Chief's family, I would have entered judgment in favour of the petitioners as follows:

> (i) Kshs. 108,203,040/- being the gross acquisition value for suit property (calculated on the basis of the highest comparable provided by the petitioner's valuer of 320/= per square foot. Having based the valuation on the highest comparable, I don't see any justification for doubling the rate as proposed by the valuer. In arriving at this figure I was also guided by the report of Vine yard done almost at the same time as the report produced by the petitioners but more current by which put the gross valuation value of the property at Kshs.112, 125,000/=.
>
> (ii) I would also have awarded the petitioners Kshs. 58,806,000/= as loss of user for the period 1999 to 2014, being Kshs. 47,044,800 for the period between 2004 and 2014 as per the valuation tendered by the petitioners but based on the adopted rate herein above and Kshs. 11,761,200 for the period between 1999 and 2004 (based on the said valuation by the petitioner's valuer but on the rate adopted by the court) in total making **Kshs.167,009,040/=** plus costs and interest from the date of the judgment till payment in full.

86. However, having determined that the petitioners have not discharged the burden imposed on them by law of proving that the 9 acres allegedly comprised in the suit property belong to them and were compulsorily acquired by the 2nd Respondent, I find their claim to be unmerited and dismiss it.

87. Because the petitioners genuinely thought they had a good case against the respondents partly owing to how the respondents conducted themselves in this matter, I direct that each party bears their own costs of the suit.

Dated, signed and delivered in open court at Nyeri this 1st day of March, 2018.

L N WAITHAKA

JUDGE

Coram:

Wachira Nderitu for the petitioners

Elizabeth Wambui Nderi

Andrew Gichohi Nderi

Peter Wangombe Nderi

Boniface Kamutu Nderi - 33rd petitioner

N/A for 1st & 2nd Respondents

Gichuki Marine – interested party

Michael Marine – interested party