



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**PETITION 42 OF 2014**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES, 40, 43(1) (b) & 28 CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 2,19,20,21,22,23,24,25,35,40,43,45,48,50,53,54 & 57, 62 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA & RULE 11 & 12 (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL PRACTICE AND PROCEDURE RULES AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW)**

**AND**

**IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**AND**

**IN THE MATTER OF ARTICLE 11 OF INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS**

**PETER KINOTI MIKWA.....1<sup>ST</sup> PETITIONER**

**ABRAHAM MBAABU ARAIGUA.....2<sup>ND</sup> PETITIONER**

**STEPHEN MERU ARITHO.....3<sup>RD</sup> PETITIONER**

**MICHAEL MBOBUA KIRIMANIA.....4<sup>TH</sup> PETITIONER**

**KAINDA KARUGOI.....5<sup>TH</sup> PETITIONER**

**MIRITI MBERIA.....6<sup>TH</sup> PETITIONER**

**(SUING ON THEIR OWN BEHALF AND ON BEHALF OF PERSONS BEING THE LAWFUL/REGISTERED AND BENEFICIAL OWNERS OF PARCELS OF BOUNDERING LOWER IMENTI FOREST AT KAMUTUNE & MUCIONGAI VILLAGES WITHIN RUIRI)**

**AND**

**KENYA FOREST SERVICES.....1<sup>ST</sup> RESPONDENT**

**KENYA WILDLIFE SERVICES.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This suit was settled via a consent Judgment recorded on 19.9.2018. The content thereof is as follows: “A consent judgment is hereby entered in terms of the harmonized survey report on boundary re-alignment in lower Imenti forest filed in court on 4.7.2016. The issue of costs to be determined by the court based on the submissions filed by the petitioner’s 1<sup>st</sup> and 2<sup>nd</sup> respondent”.

2. Petitioner's counsel had abandoned the claim on costs as against the 3<sup>rd</sup> respondent (the Attorney General). This is hence a ruling to determine who is to pay costs to who.

3. According to petitioner's, costs follow events and since there is a consent by the parties to adopt the harmonized reports, and since 1<sup>st</sup> and 2<sup>nd</sup> respondents had agreed to remove the fence and had put it in the correct boundary, the logical conclusion is to award costs to petitioners. To this end, petitioners have proffered the case of **Supermarine Handling Services Ltd vs Kenya Revenue Authority (2010)eKLR, Jasbir Singh Rai & 3 others vs Tarlochan Sing Rai & 4 others (2014) eKLR, Attorney General vs Theuri (1985) eKLR, John Kamunya & another vs John Nginyi Muchiri & 3 others (2015) eKLR.**

4. The petitioners aver that they are the successful litigants in this petition and therefore they are entitled to costs. This is because had the first and second respondents not erected the offending electric fence thus annexing the petitioner's private land, the petitioners would not have brought this petition before the court.

5. For the 1<sup>st</sup> respondent it has been submitted that neither of the parties can be said to have been successful, averring that the resolution of the matter came about because of the consent adopted by the parties. Therefore the successful determination of the dispute is attributable to the cooperation of all the parties. In support of its arguments the 1st respondent has relied on the case of **Rufus Njuguna Miringu and another vs Martha Murithi and 2 others (2012) eKLR and the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others.** The 2<sup>nd</sup> respondent wholly associated itself with the submissions of the 1<sup>st</sup> respondent. Therefore the 1<sup>st</sup> and 2<sup>nd</sup> respondents urge the court to rule that each party should bear their own costs of the petition.

6. Section 27 (1) of the civil procedure act provides that; ***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.***

7. As rightly submitted by the parties, the court has the discretion to award costs but generally costs follow events whereby a successful litigant is entitled to costs.

8. In the harmonized survey report filed on 4.7.2016 which has been adopted as a judgment of the court the findings and recommendations were as follows:

#### ***Findings***

**(i) Measurements taken along parcels of land between parcel numbers Kiirua/Ruiri/1157 and Kiirua/Ruiri/1671 were found to have been encroached onto. The encroachment on private land ranges between 25 to 45 m as reflected on the attached map.**

**(ii) Measurements taken along the parcels of land between parcel numbers Kiirua/Ruiri/2011 and Kiirua/Ruiri/887 to the boundary with the forest were found to have encroached onto the forest between 11 and 20m.**

**(iii) The community considered the electric fence constructed to protect wild animals from crossing to their shambas as the boundary between their parcels and the forest hence the dispute.**

**(iv) Both the community and Kenya forest service had encroached onto each other's side (parcels).**

#### ***Recommendations***

**1) The fence be shifted to the newly aligned and agreed boundary line.**

**2) All stakeholders be advised to respect the currently established/agreed boundary.”**

9. It is quite apparent that the boundary was not clear before the fence was erected. The situation was one whereby some parcels of land belonging to petitioners had been encroached upon by the forest reserve and in other instances some parcels of the petitioners had encroached onto the land falling under the forest reserve. It is also apparent that this dispute was successfully resolved through the cooperation of all the parties herein where a consent judgment was recorded based on the harmonized survey report.

10. I'm therefore in agreement with the submissions of the 1<sup>st</sup> respondent that neither party can claim to be successful. I have also taken into consideration that the petitioners land borders the forest reserve, and there is a need to promote harmonious existence in order to reduce human wildlife conflict. The erection of the electric fence therefore promotes this harmonious existence which is ultimately beneficial to the petitioners. In the circumstances I exercise my discretion and I order that each party bears their own costs of the suit. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2018**

**IN THE PRESENCE OF:-**

**Court Assistant:** Janet

Mwiti H/B for M. Kariuki for 2<sup>nd</sup> defendant

Kiongo for 3<sup>rd</sup> defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**