



Ndanuko (Suing as the Personal Representative of the Estate of Ndanuko Kamau Ndanuko) & 2 others v Njoroge & 3 others (Environment & Land Petition 16 of 2020) [2024] KEELC 377 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEELC 377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION 16 OF 2020
BM EBOSO, J
JANUARY 22, 2024**

BETWEEN

**ZIPPORAH WAITHIRA NDANUKO (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF NDANUKO KAMAU NDANUKO) 1ST PETITIONER
BENEDICT GAITHO NDANUKO 2ND PETITIONER
BENARD NDANUKO KAMAU 3RD PETITIONER**

AND

**RECHEAL NYAMBURA NJOROGE 1ST RESPONDENT
DIRECTOR OF SURVEYS 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT**

JUDGMENT

Introduction

1. Through this petition, the three petitioners allege that the respondents have violated the [Constitution](#) of Kenya 2010 and have breached their constitutional rights in the following verbatim manner:

“39. To the extent that the Tribunal arrogated itself jurisdiction and purported to issue orders that 1.50 acres of the suit land be divided equally between Ndanuko Kamau Ndanuko’s household and Recheal Nyambura Njoroge, the surviving child of Janet Woki, the following provisions of the [Constitution](#) were violated:



- i. Article 27 on the right of equal treatment of all persons including the right to equal protection and equal benefit of the law;
 - ii. Article 40 on the right to not to be arbitrarily deprived of property of any description or of any interest or right over property;
 - iii. Article 47 on the right to fair administrative action; and
 - iv. Article 50 on the right to have disputes decided in a fair and public hearing before a court or tribunal.
40. To the extent that the respondents have sanctioned a representative from the Kiambu District Land Surveyor Office to visit the suit property for purposes of identifying and marking 0.75 acres for Recheal Nyambura Njoroge on the basis of the Tribunal’s decision which was made without jurisdiction, the following provisions of the Constitution have been violated:
- i. Article 27 on the right of equal treatment of all persons including the right to equal protection and equal benefit of the law;
 - ii. Article 40 on the right to not to be arbitrarily deprived of property of any description or of any interest or right over property;
 - iii. Article 47 on the right to fair administrative action; and
 - iv. Article 50 on the right to have disputes decided in a fair and public hearing before a court or tribunal.
41. To the extent that the 1st respondent has been engaging the Estate of Ndanuko Kamau Ndanuko in various judicial and administrative processes with the view of frustrating their quiet enjoyment of land parcel Karai/Gikambura/404 including its subdivisions being Karai/Gikambura/7702 and Karai/Gikambura/7703, the 1st respondent has violated:
- i. Article 27 on the right of equal treatment of all persons including the right to equal protection and equal benefit of the law;
 - ii. Article 40 on the right to not to be arbitrarily deprived of property of any description or of any interest or right over property;
 - iii. Article 47 on the right to fair administrative action; and
 - iv. Article 50 on the right to have disputes decided in a fair and public hearing before a court or tribunal.”

2. Consequently, the petitioners seek:

- (i) a declaration nullifying and voiding the award of the Kikuyu Land Disputes Tribunal rendered on 29/6/2009 in Claim No KW/LND/9/6/55/2008 relating to land parcel number Karai/Gikambura/404 (hereinafter referred to as “the suit land”) and the resultant decree issued in Kikuyu SPMC Land Case No 27 of 2009;



- (ii) a declaration to the effect that land parcel number Karai/Gikambura/404 (including its two subdivisions, namely Karai/Gikambura/7702 and Karai/Gikambura/7703) does not constitute ancestral land but is private property belonging to the estate of Ndanuko Kamau Ndanuko;
- (iii) a permanent injunction restraining the respondents against excising any portion of the suit land or in any way giving effect to the above award and decree;
- (iv) a permanent injunction restraining the respondents against occupying and/or encroaching and/or trespassing and/or alienating and/or laying claim and/or interfering with the land register(s) relating to the suit land;
- (v) an order directing issuance of title to the suit land in the name of the petitioners to hold as trustees of the estate of Ndanuko Kamau Ndanuko;
- (vi) compensation in form of general and aggravated damages for violation and/or threatened violation of the petitioner’s fundamental rights to property and for continued disturbance of the estate of Ndanuko Kamau Ndanuko with respect to the suit land; and
- (vii) costs of the petition. One of the key issues to be determined in this Judgment is whether breach of the Constitution of Kenya 2010 has been demonstrated. Before I analyse and dispose the issues that fall for determination in the petition, I will outline a brief background to the petition, as discerned from the materials placed before this court.

Background

3. The 1st petitioner, Zipporah Waithira Ndanuko, is the widow of the late Ndanuko Kamau Ndanuko (also known as Ndanukio Kamau “A”). She is also the administrator of his estate. For convenience, I will, in this Judgment, refer to the late Ndanuko Kamau Ndanuko as “the late Ndanuko”A”). The late Ndanuko “A” died in 1993.
4. The second petitioner, Benedict Gaitho Ndanuko, is a son of the late Ndanuko “A”. The 3rd petitioner, Benard Ndanuko Kamau, is a grandson of the late Ndanuko “A” and a son to the late Geoffrey Kamau Ndanuko - a son of the late Ndanuko “A.” The late Geoffrey Kamau Ndanuko was one of the administrators of the estate of the late Ndanuko “A”.
5. The late Ndanuko “A” was a son of the late Kamau Ndanuko who died in 1941. I will, in this Judgment, refer to the late Kamau Ndanuko as “the Senior Ndanuko.” The Senior Ndanuko was a polygamist. Four of his wives are identified in the materials before court as:
 - (i) Wamwathi;
 - (ii) Murungari;
 - (ii) Muthoni; and Janet Woki. Wamwathi was the biological mother to the late Ndanuko “A”.
 Janet Wokabi was the biological mother to the 1st respondent, Recheal Nyambura Njoroge. Both Wamwathi and Woki lived and were buried on the suit land.
6. The petitioners contend that the suit land is the private property of the late Ndanuko “A”, adding that Woki’s occupation of the land was out of compassion. On her part, the 1st respondent contends that the suit land belonged to the Senior Ndanuko, adding that the late Ndanuko “A”, as the eldest son of the Senior Ndanuko, was registered as proprietor of the land to hold it in trust for the houses of



Wamwathi and Woki, two of the identified four wives of the Senior Ndanuko. She further contends that she is entitled to occupy and own Woki's portion of the suit land.

7. The 1st respondent's claim of the right to occupy and own a portion of what she considers to be Woki's portion of the land culminated in Land Dispute Claim No KW/LND/9/6/55/2008 (Kikuyu Division) in which the 1st respondent together with one John Mungai Njoroge and Joseph Njoroge Mungai were the claimants and Zipporah Waithira Ndanuko (1st Petitioner), as the administrator of the estate of Ndanuko "A", was the respondent. Upon listening to the claim, the Tribunal made a finding to the effect that the suit land was family land that belonged to the Senior Ndanuko and was registered in the name of the late Ndanuko "A" to hold it on behalf of the houses of Wamwathi and Woki. The Tribunal recognised the right of the family of Woki to occupy and own 0.75 of an acre out of the suit land. The Tribunal proceeded to award the claimants 0.75 of an acre out of the suit land.
8. The petitioners contend that they were aggrieved by the findings and award of the Tribunal, adding that the 1st petitioner lodged an appeal at the Provincial Land Appeals Committee. It is the case of the petitioners that when the Land Disputes Act was repealed by the *Environment and Land Court Act*, they did not pursue the appeal that was pending in the Provincial Land Appeals Committee. They state this:

" 34. Aggrieved by the decision of the Tribunal, Ndanuko Kamau Ndanuko's family through Zipporah Waithira Ndanuko, filed an appeal to the Nyeri Provincial Land Appeals Committee (hereinafter the PLAC). The Central Province Commissioner (as he then was) wrote to the Tribunal to notify them of the appeal before the Nyeri PLAC and to request them to maintain the status quo pending the hearing and determination of the said appeal. However, the appeal before the Nyeri PLAC did not proceed as the PLAC was restructured and done away with by the current land legal regime in Kenya. In any event the proceedings before the Nyeri PLAC are founded on a decision that was made without jurisdiction and thus a nullity."

9. The petitioners further contend that they challenged the award adoption orders of the Kikuyu Senior Principal Magistrate's Court through Nairobi High Court Civil Appeal No 488 of 2010, adding that they believe the said appeal was dismissed for want of prosecution. The petitioners state thus:

" 35. On the advice of their lawyers at the time, Ndanuko Kamau Ndanuko's family filed Civil Appeal No 488 of 2010 in the High Court at Nairobi on 1st December 2010, appealing the decision of the Principal Magistrate's Court at Kikuyu, on the grounds, inter alia, that the Tribunal did not possess the jurisdiction to determine the dispute. Unfortunately, the appeal proceedings at the High Court have never taken off and Ndanuko Kamau Ndanuko's family believes that the appeal was dismissed for want of prosecution."

10. This petition was initiated after surveyors entered the suit land to excise the 0.75 acres that the family of Woki was awarded.

Petitioners' Case

11. The case of the petitioners is that the 1st respondent is not entitled to a share of the suit property because the suit property is not ancestral land. They contend that the land solely belongs to the estate of Ndanuko Kamau Ndanuko, adding that the 1st respondent is not a dependant of the estate of Ndanuko Kamau Ndanuko.



12. The petitioners further contend that their constitutional rights under Articles 27, 40, 47 and 50 were violated as a result of the following actions:
- (i) to the extent that the Kikuyu Land Disputes Tribunal arrogated itself jurisdiction and issued orders that 1.50 acres of the suit property be divided equally between the late Ndanuko's household and the 1st respondent;
 - (ii) to the extent that the respondent has sanctioned a representative from the Kiambu District Land Survey Office to visit the suit property for purposes of identifying and marking 0.75 acres of the suit property in favour of the 1st respondent on the basis of the Tribunal's decision; and
 - (iii) to the extent that the 1st respondent has been engaging the Estate of Ndanuko Kamau Ndanuko in various judicial and administrative processes with the view of frustrating their quiet enjoyment of the suit property.

1st Respondent's Case

13. The 1st respondent filed a replying affidavit dated 13/5/2021. The 1st respondent's case is that her claim over the suit land is that of a dependent given that she together with her children and grandchildren have lived and built on the suit property for years. She adds that her deceased mother, Janet Woki, was buried on the suit property. She contends that it would be a miscarriage of justice under the provisions of Section 29 of the *Law of Succession Act* if she is denied the right of the benefit of the estate of Ndanuko Kamau Ndanuko.
14. She further contends that at the time of filing their claim at the Kikuyu Land Disputes Tribunal, the Tribunal was lawfully constituted to handle the claim as presented before it in accordance with the Land Disputes Act, No. 18 of 1990.

Case of 2nd, 3rd & 4th Respondents

15. The 3rd respondent's case is that the register for the suit property was opened on 16/4/1959 in the name of Ndanuko Kamau "A". Thereafter, there were no transactions that took place until 6/8/2008 when a letter from the District Officer, dated 9/5/2008, was brought to the 3rd respondent's Office, inviting the 3rd respondent to register a restriction preventing any dealings in the register until a family dispute involving the land was resolved. A restriction on the suit property was registered on 20/8/2009. Further, pursuant to a letter from the Deputy County Commissioner, Kikuyu Sub-County, referenced as K/LND/14/9/9/ VOLV(II) and dated 21/9/2020, restriction entry number 2 was lifted. It is the 3rd respondent's case that on 8/10/2020, restriction entry number 3 was lifted pursuant to a letter from the Deputy County Commissioner, referenced as K/LND/14/9/9/ VOLV(15) and dated 6/10/2020. The 3rd respondent contends that on 10/3/2021, the suit property was subdivided into two parcels and two new parcel registers were created namely Karai/Gikambura/7702 and Karai/Gikambura/7703 respectively. The mother title was cancelled and two subdivision titles were issued on 10/3/2021. It is the 3rd respondent's case that the petition is premature and an abuse of the court process and that the orders sought should not be issued, adding that there subsists two cases relating to the suit land namely Civil Appeal No. 488 of 2010 and Succession Cause No. HC29/1997.

Petitioner's Evidence

16. Benedict Gaitho Ndanuko testified as PW1. He adopted his supporting affidavit dated 9/12/2020 and his further affidavit dated 13/1/2022 as part of his sworn evidence-in-chief. He testified that the suit property belonged to and was registered in the name of his late father, Ndanuko Kamau Ndanuko. PW1 added that his mother, Zipporah Waithira Ndanuko, and his deceased brother, Geoffrey Kamau



Ndanuko, were administrators of the estate of the late Ndanuko “A”. PW1 added that Janet Woki (deceased) was the younger wife of his grandfather, Kamau Ndanuko [the Senior Ndanuko] and that she was invited by the late Ndanuko “A” to live on the suit property. PW1 stated that the ancestral land bequeathed by his grandfather, Kamau Ndanuko, measured 3.5 acres while the suit property which belonged to his late father, the late Ndanuko “A”, measured 2 acres. He produced 24 documents as part of their evidence.

17. Bernard Ndanuko Kamau testified as PW2. He adopted his affidavit sworn on 9/12/2020 as part of his sworn evidence-in-chief. He stated that he was the son of Geoffrey Kamau Ndanuko (deceased) who was a brother to Benedict Gaitho Ndanuko and a son to the late Ndanuko “A”. He testified that they initiated the suit because they were dissatisfied with the verdict of the Land Disputes Tribunal and the subsequent proceedings in relation to the suit property. PW2 stated that Janet Woki was a stepmother to the late Ndanuko “A”, adding that the 1st respondent was a daughter to Janet Woki (deceased). He further stated that the late Ndanuko “A” was registered as proprietor of the suit property in 1959. He testified that there were no succession orders conferring land rights over the suit property to Janet Woki (deceased).

1st Respondent’s Case

18. Rechael Nyambura testified as DW2. She adopted her replying affidavit sworn on 13/5/2021 as part of her sworn evidence-in-chief. She stated that she was a daughter of the Senior Ndanuko and a step sister to Ndanuko “A”. Her evidence was that they filed their claim at the Kikuyu Land Disputes Tribunal in 2009. She added that the Tribunal heard their claim and delivered its award which was adopted as an order of the court on 23/12/2009. She contended that the claim was brought by the respondents in their capacity as dependents of the estate of Ndanuko Kamau “A”. She added that she, together with her siblings, children and grandchildren, had lived on the suit property for decades, built on it, and had even buried her mother, Janet Woki (deceased), on it. She produced the documents contained in the 1st respondent’s bundle of documents as part of their evidence.
19. Joseph Njoroge Mungai testified as DW3. He adopted his witness statement dated 10/12/2021 as part of his sworn evidence-in-chief. He stated that his grandmother, Janet Woki (deceased), was the second wife to Kamau Ndanuko (the Senior Ndanuko) and that the 1st respondent was their last surviving child. DW3 contended that his family had continuously been disenfranchised by the 2nd petitioner who had prevented them from getting a share of the land the Senior Ndanuko. DW3 stated that he was aware of the findings of the Land Disputes Tribunal in Claim Number KW/LND/9/6/55 and he was also aware of the proceedings in Kikuyu Principal Magistrate’s Court Case Number 27 of 2009. He further stated that the petitioners sought redress at the Nyeri Provisional Land Appeals Committee and thereafter filed an appeal at the High Court in Nairobi challenging the award adoption order issued by the Magistrate Court. He added that the appeal at the High Court was dismissed for want of prosecution. DW3 stated that the petitioners were served with the letter informing them of the surveyor’s visit on the suit property long before 10/12/2020, adding that the petitioners only sought judicial intervention on the date of the surveyor’s visit.
20. John Mungai Njoroge testified as DW4. He adopted his witness statement dated 10/12/2021 as part of his sworn evidence-in-chief. He stated that Janet Woki was the fourth wife of the Senior Ndanuko and that the 1st respondent (his mother) was the last surviving child of Janet Woki and the Senior Ndanuko. He reiterated the averments by DW3.



Evidence of the 2nd, 3rd and 4th Respondents

21. Jacelyn Wangari testified as DW1. She adopted the replying affidavit sworn by Ruth Nyamongo on 14/1/2022 and the witness statement of Ruth Nyamongo as part of her sworn evidence-in-chief. She stated that she was a Land Registrar based at the Kiambu Land Registry. She reiterated their case as summarized above.

Petitioners' Submissions

22. The petition was canvassed through written submissions dated 28/2/2023, filed by M/s Muma & Kanjama Advocates. The petitioners identified the following as the three issues that fell for determination in the petition:
- (i) Whether the Land Disputes Tribunal at Kikuyu had jurisdiction to determine ownership of the suit property;
 - (ii) Whether the petitioners' claim to the suit land is merited; and
 - (iii) Whether the petitioners are entitled to the reliefs sought.
23. On whether the Land Disputes Tribunal had jurisdiction to determine ownership of the suit property, counsel submitted that the Tribunal lacked jurisdiction to determine issues relating to ownership and title to land, given that Section 3 (1) of the Land Disputes Act, No.18 of 1990 (repealed) only empowered the Tribunal to handle cases of civil nature involving a dispute as to the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work on land or trespass to land. Counsel argued that the decision made by the Kikuyu Land Disputes Tribunal was a nullity and was liable to being set aside ex debito justitiae. Counsel relied on the decisions in the cases of *Gabriel Karimi Mwangi v Karaya Ruire* [2016]eKLR; *Republic v Chairman, Lurambi Land Dispute Tribunal & 2 others* [2006] eKLR; and *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* (1989).
24. On whether the petitioners' claim was merited, counsel submitted that the petitioners' right to protection of property had been threatened and continued to be threatened for the following reasons:
- (i) the 1st petitioner is the wife to Ndanuko "A" who is the registered owner of the suit land;
 - (ii) Ndanuko "A" died leaving the suit land wholly under the care of his wife and children;
 - (iii) the 1st petitioner and her late husband Ndanuko "A" lived on the suit land since 1965;
 - (iv) there had never been succession proceedings in respect of the suit land; and
 - (v) the suit land had never been transferred to the 1st respondent or to her late mother, Janet Woki.
- Counsel added that the suit property qualified to be protected under Article 40 of the *Constitution*. Counsel relied on the decision in the case of *Wilfred Juma Wasike & 11 others v Ministry of Interior and Co-ordination & Another* [2022] eKLR. Counsel submitted that the 1st respondent was in contempt of court, given that she applied for subdivision of the suit property while there was a court order on record prohibiting further dealings in the suit property. Counsel further submitted that the contemptuous acts of the 1st respondent amounted to a violation of the petitioners' right to equal treatment, including the right to equal protection under the law.
25. On whether the petitioners were entitled to the reliefs sought in the petition, counsel submitted that the petitioners had established the grounds upon which the petition was based and proved them,



hence they were entitled to the reliefs sought. Counsel urged the court to affirm the Bill of Rights and specifically grant the reliefs sought in the petition.

1st Respondents' Submissions

26. The 1st respondent filed written submissions dated 25/7/2023 through M. Wangai & Co. Advocates. Counsel for the 1st respondent identified the following as the four issues that fell for determination:
- (i) Whether the issues raised in the petition are indeed to be canvassed by way of filing a constitutional petition or whether they form another attempt at an appeal;
 - (ii) Whether the Tribunal had jurisdiction to hear and determine claim number KW/LND/9/6/55/2008;
 - (iii) Whether the petitioners are entitled to the orders sought; and
 - (iv) Who should bear costs of the petition.
27. On whether the issues raised in the petition are to be canvassed by way of a constitutional petition or whether they form another attempt at an appeal, counsel submitted that the petition was an attempt by the petitioners to file a third appeal, hence it should be struck out. Counsel added that the petitioners' claim was repugnant to the doctrine of constitutional avoidance which forbids a claimant from relying directly on a constitutional right if legislation that gives effect to that right is in place. Counsel argued that there were other remedies available to the petitioners. Counsel submitted that the law provided a procedure for challenging the decision of the Land Disputes Tribunal which the petitioners failed to invoke despite having ample opportunity to do so. Counsel added that the petitioners filed the present petition in response to the 1st respondent's action of enforcing the decree obtained at the Kikuyu Senior Principal Magistrate Court.
28. On whether the Tribunal had jurisdiction to hear and determine claim number KW/LND/9/6/55/2008, counsel submitted that the Land Disputes Tribunal was properly constituted under the provisions of Section 4 of the *Land Disputes Act* (now repealed) and that each party was given a right to representation and a fair hearing. Counsel added that contrary to the petitioners' contention, the Tribunal did not deliberate on the title to the property, adding that the Tribunal deliberated on the division of the suit property to the remaining beneficiaries of the estate of the late Ndanuko Kamau Ndanuko - a function that fell squarely within their mandate.
29. On whether the petitioners are entitled to the orders sought, counsel submitted that the petitioners were not entitled to any of the order owing to their conduct. Counsel submitted that it was not in dispute that Janet Woki, together with the 1st petitioner, and their children, had been in occupation of the suit property, adding that Janet Woki was buried on the suit property. Counsel added that the petitioners filed Succession Cause No. 29 of 1997 with the aim of overtly excluding Janet Woki's heirs' right from the suit property in violation of the provisions of Section 29 (b)) of the *Law of Succession Act*, Cap 160, Laws of Kenya.
30. On costs, counsel submitted that while, ordinarily, constitutional petitions are a matter of public policy, it was the petitioners' palpable malfeasance, negligence, and ill-will that had brought the parties before Court. Counsel argued that not only had the petitioners wielded the court as a tool to shake down the 1st respondent, but they had done so while ignoring procedural and substantive law. Counsel urged the court to award the 1st respondent costs of the petition. Counsel relied on the decision in the case of *Makarena v Directorate of Criminal Investigations & 3 others*.



2nd, 3rd & 4th Respondent's Submissions

31. The 2nd, 3rd and 4th respondents filed written submissions dated 24/7/2023 through C. N Menge - Deputy Chief State Counsel. Counsel identified the following as the three issues that fell for determination in the petition:
- (i) Whether the issues raised in the petition are indeed to be canvassed by way of filing a constitutional petition;
 - (ii) Whether the petitioners have made full disclosure of material information needed in determining the petition; and
 - (iii) Whether the petitioners are entitled to the orders sought.
32. On whether the issues raised in the petition are to be canvassed by way of a constitutional petition, the Learned State Counsel submitted that the jurisdiction of the Environment and Land Court was prematurely invoked. Counsel argued that the issue for determination in the petition was a family dispute and the petitioners ought to have filed a civil suit as opposed to filing a constitutional petition. Counsel added that the petition as drawn did not meet the threshold of constitutional litigation, adding that it did not disclose any public law issues. Counsel relied on the decisions in the cases of *Speaker of National Assembly v Karume* [1992] KLR 21 ; *Kenya Agricultural and Livestock Research Organization (KALRO) v Edison Sonje Taura & 3 Others* [2021]eKLR and *Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority* [2016]eKLR in support of her submission.
33. On whether the petitioners had made full disclosure of all material facts needed by the court to determine the petition, counsel submitted that the petitioners had not disclosed the status of the other suits they had filed relating to the suit property. Counsel added that failure to disclose material facts amounted to approaching the court with unclean hands. Counsel argued that if the hands of a party seeking a remedy in a court of law are tainted, then the party must suffer the consequences, especially when the party seeks a remedy at the discretion of the court.
34. On whether the petitioners are entitled to the orders sought, counsel submitted that the petition was full of allegations of infringement of the petitioners' rights, allegations which had not been proved, hence the orders sought could not be granted. Counsel added that the suit was founded on the tort of trespass and revolved around the question of ownership of land which should be adjudicated through a civil suit. Counsel urged the court to dismiss the petition given that the petitioners had not proved their case against the 2nd, 3rd and 4th respondents.

Analysis and Determination

35. I have considered the petition, the responses to the petition, and the parties' respective evidence and submissions. I have also considered the relevant constitutional and statutory frameworks and the prevailing jurisprudence on the issues that fall for determination in the petition. Parties did not agree on a common concise statement of issues that the court is invited to determine.
36. Taking into account the petition, the responses to the petition, the evidence tendered, and the parties' submissions, the key issues that fall for determination are:
- (i) Whether the acts complained of constitute a violation of the *Constitution* of Kenya 2010 and a breach of the petitioners' rights under the said Constitution;
 - (ii) Whether the reliefs sought by the petitioners are available on the platform of this petition; and



- (iii) What orders should be made in relation to costs of this petition. I will analyse and dispose the three issues sequentially in the above order.
37. Do the acts complained of constitute a violation of the Constitution of Kenya 2010? Do they constitute a violation of the petitioners' rights under the Constitution of Kenya 2010? The acts complained of are set out in paragraphs 39, 40 and 41 of the amended petition. They are three. First, the petitioners contend that the Land Disputes Tribunal arrogated itself jurisdiction and purported to issue orders that the suit land be divided between the household of the late Ndanuko "A" and Rechael Nyambura Njoroge - the surviving child of Janet Woki. The petitioners contend that exercise of jurisdiction by the Tribunal and the award of the Tribunal violates Articles 27, 40, 47 and 50 of the Constitution.
38. The court has reflected on the above allegations in the context of the evidence tendered. The impugned proceedings were initiated in the Tribunal in 2008. The award of the Tribunal was rendered on 29/6/2009. This was before the Constitution of Kenya 2010 was enacted. One cannot therefore properly contend that the proceedings and the award violated the above Articles of the Constitution of Kenya 2010 which came into force in August 2010.
39. Secondly, in terms of violation of inalienable rights, it was the duty of the petitioners to demonstrate that the proceedings and the award violated their inalienable rights so as to bring the claim within the purview of the 2010 Constitution. Did the petitioners demonstrate that?
40. The 1st petitioner is the administrator of the estate of the late Ndanuko "A" and contends to be a beneficiary of the same estate. The 2nd and 3rd petitioners contend to be beneficiaries of the same estate. The dispute before the Tribunal was lodged by the 1st respondent and two other beneficiaries who claim to be descendants of the Senior Ndanuko. The claim was lodged against the 1st petitioner in her capacity as the administrator of the estate of the late Ndanuko "A." Parties submitted themselves to the jurisdiction of the Tribunal.
41. Upon the Tribunal hearing the dispute and rendering its award, the estate, through the 1st petitioner, exercised its right of appeal. Indeed, Section 8 of the repealed Land Disputes Act provided an elaborate appeal mechanism. Further, there was a mechanism for a second appeal to the High Court on matters of law only. In addition, there existed a clear mechanism for judicial review within the framework of the Judicature Act and the Civil Procedure Rules.
42. Evidence was tendered showing that besides filing an appeal at the Provincial Land Appeals Committee, the estate of Ndanuko "A" also filed an appeal in the High Court, challenging the adoption order of the Senior Principal Magistrate Court. It does, however, emerge from the evidence tendered in this petition that, having properly elected to exercise its right of appeal by lodging an appeal to the Provincial Land Appeals Committee, the estate of the late Ndanuko "A" failed to prosecute the appeal. Put differently, upon the repeal of the Land Disputes Act, the estate did not bother to cause the appeal to be moved to the Environment & Land Court for determination as contemplated under the law.
43. From the foregoing, it is clear that the estate of the late Ndanuko "A" is the one that chose not to prosecute the appeal that it filed before the Provincial Land Appeals Committee. It is also clear that the estate chose not to challenge the award of the Tribunal through the judicial review mechanism. Further, it is clear that the ill-conceived appeal which the estate filed in the High Court against the adoption order of the Senior Principal Magistrate Court was dismissed on the ground of want of prosecution on part of the estate of the late Ndanuko "A". Given the above evidence, I do not think the petitioners can be said to have demonstrated a violation of their inalienable rights or any of the post-2010 constitutional rights.



44. In my view, the question of the Tribunal’s jurisdiction was one to be ventilated through the appeal and the judicial review mechanisms that existed. Secondly, it emerges from the petitioners averments that there subsists an appeal that was lodged by the estate of Ndanuko “A” at the Provincial Land Appeals Committee but the estate has elected not to cause the appeal to be transferred to the Environment and Land Court for disposal. The totality of the foregoing is that exercise of jurisdiction by the Tribunal and the award of the Tribunal cannot be said to have violated Articles 27, 40, 47 and 50 of the Constitution of Kenya 2010. Similarly, exercise of jurisdiction and award of the Tribunal cannot be said to constitute violations of the petitioners’ rights.
45. Does enforcement of the order of the Senior Principal Magistrate Court through a subdivision survey exercise constitute a violation of Articles 27, 40, 47 and 50 of the Constitution and a breach of the petitioners’ rights? I do not think so. The family of the late Woki obtained an award against the estate of the late Ndanuko “A”. The award was adopted as a Judgment of the Senior Principal Magistrate Court. The estate filed an appeal which it has failed to prosecute. In my view, in the absence of an order staying enforcement of the adoption order or annulling the award, the decree holders are entitled to enforce the Judgment. The enforcement cannot be said to constitute a breach of Articles 37, 40, 47 and 50 of the Constitution.
46. The last allegation of breach which the petitioners itemised is that the 1st respondent has been engaging the estate of Ndanuko Kamau Ndanuko in various judicial and administrative process with the view of frustrating their quiet enjoyment of the suit land. The petitioners contend that the alleged actions constitute a violation of Article 27, 40, 47 and 50 of the Constitution and a breach of their constitutional right. The only evidence which was tendered indicates that the 1st respondent together with two other members of the family of the late Woki ventilated their right to occupy part of the suit land. The Tribunal found in their favour. They moved the Magistrate Court and obtained a decree as required under the law. In my view, the above actions cannot be interpreted as constituting a violation of Articles 27, 40, 47 and 50 of the Constitution or a breach of the petitioners’ rights.
47. For the above reasons, this court is not convinced that the petitioners have proved the alleged violation of the Constitution and breach of their rights by the respondents. Consequently, my finding on the first issue is that violation of Articles 27, 40, 47 and 50 of the Constitution and breach of the petitioners’ rights have not been proved in this petition.
48. Are the petitioners entitled to the reliefs sought in this petition? My answer to the above question is in the negative. First, this court has made a finding to the effect that the petitioners did not establish violation of the Constitution and breach of their rights. Secondly, the dispute relating to the right of the family of the late Woki to occupy a portion of the suit land was heard and determined by the Tribunal. The award of the Tribunal has not been overturned. There subsists an appeal which the estate of the late Ndanuko “A” has neglected to prosecute. In the circumstances, it would be irregular for this court to grant rival or parallel reliefs in this appeal in a dispute that is supposed to be the subject of the pending appeal.
49. On costs, given that the estate of the late Ndanuko “A” has a pending appeal relating to this dispute, which the 1st petitioner has neglected to prosecute, this appeal was completely unnecessary. In the circumstances, the petitioners will bear costs of the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF JANUARY 2024.

B M EBOSO

JUDGE



In the presence of: -

Mr. Muoki for the Petitioners

Mr. Menge for the 2nd, 3rd And 4th Respondents

Mr. Wangai for the 1st Respondent

Court Assistant: Osodo/hinga

