



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**PETITION NO. 3 OF 2016**

**LILIAN BARNGETUNY.....PETITIONER**

**VERSUS**

**ESTHER SUGE.....1<sup>ST</sup> RESPONDENT**

**THE NANDI LAND DISPUTES TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE, KAPSABET LAW COURTS....3<sup>RD</sup> RESPONDENT**

**THE NANDI COUNTY LANDS REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

a. **The petition**

*Lilian Barngetuny*, herein referred to as the petitioner has sued the respondents claiming that she is the registered proprietor of a parcel of land known as title No. Nandi/Kaptildi/297 measuring Five Decimal Seven One (5.71) hectares. The suit land was transferred to her by the late Sulo Chumo upon conclusion of succession proceedings in Kapsabet Principal Magistrate's succession Case No. 9 of 2001.

The 1<sup>st</sup> respondent lays claim to a portion of the suit land measuring 7 acres whose claim she bases on an award made by the 2<sup>nd</sup> respondent in her favour on 13<sup>th</sup> August, 2009, which award was later adopted by the 3<sup>rd</sup> respondent in Kapsabet Principal Magistrate's Court LDT No. 55 of 2009. The petitioner avers that the 2<sup>nd</sup> respondent violated her right to fair administration action as enshrined in Article 47 of the Constitution of Kenya in making the award. This was by upholding an unlawful transaction in which the 1<sup>st</sup> respondent claimed that her deceased husband bought the suit land from the petitioner's deceased husband whereas he had no title to the same. Moreover, that the award violated her right to property as enshrined in Article 40 of the Constitution thus, seeking to enforce an unlawfully founded claim by the 1<sup>st</sup> respondent over the suit land at the expense of the petitioner who is the registered proprietor.

The petitioner states that the 4<sup>th</sup> respondent has proceeded to effect sub-division of the suit land into two parcels and allocated numbers to the two portions being numbers Nandi/Kaptildil/625 and Nandi/Kaptildil/626 and that the 4<sup>th</sup> respondent has also proceeded to close the green card register for the suit land. The 4<sup>th</sup> respondent is in the process of issuing title deeds for the two parcels of land resulting from the abovementioned sub-division. The petitioner further claims that the proceedings by the 2<sup>nd</sup>

respondent were conducted illegally since the Tribunal lacked the requisite jurisdiction to hear and determine the disputes as envisaged under Section 3 of the Land Disputes Tribunal Act (Now repealed hence the award was made in error of law). That the 1<sup>st</sup> respondent exceeded its jurisdiction while making the subject award hence its decision is ultra vires.

The petitioner alleges that the 1<sup>st</sup> respondent failed to consider a material and relevant fact in coming up with its award being that at the time of its proceedings, the subject land had been registered under the name of the petitioner herein and a Title deed issued to that effect and failed to consider a relevant fact being that the suit land has never been owned by Mr. Thomas Barngetuny but rather the same was owned by the late Mr. Sulo Chumo at the time of the alleged sale to the 1<sup>st</sup> respondent's husband. The alleged transaction between the late Thomas Barngetuny and the late Thomas Suge is illegal and amounted to a criminal offence under Section 45 of the Law of Succession Act, Chapter 160 of the Laws of Kenya which prohibit any dealing and criminalizes and dealing in an estate of a deceased person without letters of administration hence the award by the 1<sup>st</sup> respondent only went to aid an illegality.

According to the petitioner, the 1<sup>st</sup> respondent considered irrelevant facts in reaching its decision and making the award being inquiring into the marital status of the parties before it, an issue which was not properly before it for determination and acted ultra vires its mandate by inquiring into and making a determination on the validity of the Succession proceedings with respect to the estate of the late Sulo Chumo, a mandate reserved exclusively to the High Court of Kenya. The proceedings before the 3<sup>rd</sup> respondent and the incidental order and decree are a nullity, the same having been based on an unlawful or illegal award. Reasons wherefore, the petitioner prays that:

- a. **a declaration that the petitioner has lawful title to the suit land.**
- b. **A declaration that the alleged sale transaction between the 1<sup>st</sup> respondent's deceased husband and the petitioner's deceased husband was null and void.**
- c. **A declaration that the award made by the 2<sup>nd</sup> respondent on 13<sup>th</sup> August, 2009 is null and void.**
- d. **A declaration that 3<sup>rd</sup> respondent's order and Decree in Kapsabet PMC LDT No. 55 of 2009 adopting the 2<sup>nd</sup> respondent's award is null and void.**
- e. **A declaration that subdivision and any other subsequent process undertaken by the 4<sup>th</sup> respondent is null and void.**
- f. **Costs of the petition.**

**(b)The supporting affidavit**

In the supporting affidavit, the petitioner ***re-states*** that she is registered owner of all a parcel of land known as Nandi/Kaptildil/297 which was transferred to her from the late Sula Arap Chumo after conclusion of Succession proceedings with respect to his estate. That sometimes in the year 2009, the 1<sup>st</sup> respondent herein raised allegations that her husband namely the late Thomas Suge had bought a portion of her land from her late husband namely Thomas Barngetuny and registered a dispute with the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent herein made an award in favour of the Interested Party as against her on 13<sup>th</sup> August, 2009.

The Award of the 2<sup>nd</sup> respondent was then adopted by the 3<sup>rd</sup> respondent herein through Kapsabet PMC LDT Case No. 55 of 2009. The 4<sup>th</sup> respondent acting on the above-mentioned Decree has proceeded to effect a subdivision of the suit land and has gone further to prepare new parcel numbers being parcel numbers 625 and 626 and therefore there is an imminent risk that the 4<sup>th</sup> respondent will proceed to

conclude subdivision of the suit land and close the parent parcel file hence compromising the substratum of the petition. There is an imminent risk that the 4<sup>th</sup> respondent will proceed to effect an amendment of the Registry map, open new parcel files and issue a Title Deed to the 1<sup>st</sup> respondent hence depriving her of her property. She is advised by her advocates on record which advice she believes to be true that the sub-division and any subsequent process undertaken by the 4<sup>th</sup> respondent with respect to the suit land is founded on an illegality because the decision by the 2<sup>nd</sup> respondent was reached per incuriam.

She is further advised by her advocates on record which advice she believes to be true that 2<sup>nd</sup> respondent conducted its proceedings without taking cognizance of its limited jurisdiction as envisaged under section 3 of the Land Disputes Tribunal Act, Chapter 303 A of the Laws of Kenya (now repealed) hence its award was made in error of law and that the 2<sup>nd</sup> respondent exceeded its jurisdiction and powers while making the subject award by determine matters of ownership and title of land hence its decision is ultra vires. The 2<sup>nd</sup> respondent failed to consider a relevant fact in coming up with its decision being that at the time of its proceedings, the subject land had been registered under the name of the Exparte applicant and a Title Deed issued in that respect. The 2<sup>nd</sup> respondent failed to consider a relevant fact being that at the subject land has never been owned by Mr. Thomas Barng'etuny but rather the same was owned by Mr. Sulo Chuma at the time of the alleged sale to the Interested Party.

The petitioner believes that the 2<sup>nd</sup> respondent's Award is tainted with an illegality since the same is based on an alleged illegal transaction between the late Thomas Barng'etuny and the late Thomas Suge which amounted to a criminal offence under section 45 of the Law of Succession Act, Chapter 160 of the Laws of Kenya which prohibit any dealing in an estate of a deceased person without letters of administration or probate and the 2<sup>nd</sup> respondent aided this illegality through its award. The 2<sup>nd</sup> respondent considered irrelevant facts in reaching its decision and making the award being inquiring into the marital status of the parties before it, a fact which was not properly before it.

That she is advised by her advocates on record which advice she believes to be true that the 2<sup>nd</sup> respondent acted ultra vires in its mandate by inquiring into and making a determination on the validity of the Succession Proceedings with respect to the estate of the late Sulo Chumo, a mandate reserved for the High Court of Kenya and that the 2<sup>nd</sup> respondent's decision is tainted with illegality being in contravention of section 45 of the Law of Succession Act since the proceedings before it were brought on behalf of the estate of the late Thomas Suge without letters of administration having been issued. That the 2<sup>nd</sup> respondent did not make a fair administrative act as envisaged under Article 47 of Constitution of Kenya.

**(c) The 1<sup>st</sup> respondent replying affidavit.**

The gist of the 1<sup>st</sup> respondent's affidavit is that she referred a dispute to the now defunct Land Disputes Tribunal on 13<sup>th</sup> August, 2009 claiming that on the 31<sup>st</sup> January, 2001 her late husband one Kiplimo Suge had purchased 7 acres from Nandi/Kaptildi/297 from the late Thomas Barng'etuny (the petitioner's husband). That a dispute occurred between the petitioner and herself and that a reference was filed before the now defunct Land Disputes Tribunal for arbitration.

The tribunal made an award which was filed at the Principal Magistrate's Court at Kapsabet for adoption vide LDT No. 55 of 2006 as per the provisions of Section 7 of the Land Disputes Tribunal Act (Repealed). The award of the Tribunal was adopted by the Honourable Magistrate on 24.3.2010. That the Petitioner lodged an appeal against the decision of the Tribunal and Honourable Magistrate vide Eldoret Environmental and Land Court Civil Appeal No. 3 of 2013 and that Judgment was delivered on 21<sup>st</sup> May, 2015 in favour of the 1<sup>st</sup> respondent.

According to the The 3<sup>rd</sup> respondent did not exceed its jurisdiction because Section 7 of the Land Disputes Tribunal Act (repealed) gave the court jurisdiction and mandate to adopt the award of the Tribunal. That the jurisdiction of the land Disputes Tribunal (now repealed) is clearly set out in section 3

of the Act and deal with;

- a. **The division of or the determination of boundaries to land including land held in common.**
- b. **A claim to occupy or work land or**
- c. **Trespass to land**

In further reply, the 1<sup>st</sup> respondent avers that Section 3 of the Land Disputes Tribunal Act (repealed) did not limit the jurisdiction of the Tribunal to lands outside the regime of Registered land or any other regime but what the Tribunal is restricted from undertaking is a determination with respect to title to land.

That Section 8(1) of the Land Disputes Tribunal Act (repealed) stated that any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may appeal to the Appeals Committee. Furthermore, it is trite law that any matters arising from Quasi-Judicial Bodies are to be subjected to Judicial Review if the laid down procedures are not allowed in making any decision.

That the Petitioner never appealed the Tribunal's decision to the Appeals Committee or to the High Court through a Judicial Review as is required by the law. That no Article of the constitution has been violated and the petitioner has been violated and no constitutional rights of the petitioner were violated or threatened as alleged in the petition and that she is a lawfully abiding citizen who adheres to and subscribes to all the tenets of the constitutional rights, norms and values.

The 1<sup>st</sup> respondent in reply to the issues raised in the petition avers that the petitioner herein failed to comply with the law by either preferring an appeal against the decisions of the Tribunal or commencing proceedings in the nature of Judicial Review to quash the decision of the Tribunal. The petition herein is an abuse of court process herein is an abuse of court process. The court process is being used for extraneous, male fide and illegitimate purposes. The petitioner alleges the existence of a criminal offence however, she never reported the matter to the police. The 1<sup>st</sup> respondent avers the same to be an afterthought. That the petition herein lacks merit and cause of action and the reliefs sought are not attainable before this honorable court. The petitioner has failed to disclose all material facts surrounding the suit property.

Moreover, the 1<sup>st</sup> respondent claims that the orders sought herein were determined in Eldoret Environmental and Land Court Civil Appeal No. 3 of 2013 which the petitioner herein has not disclosed in her petition. Therefore, the petition herein does not pass the threshold of a constitutional petition as required by law. That the petitioner herein seeks to quash a decision of a Tribunal through unprocedural means. That the petition herein is res-judicata and the 1<sup>st</sup> respondent will raise a preliminary objection to have the same dismissed for being an abuse of the court process.

### **SUBMISSIONS BY PETITIONER**

The petitioner argues that the award made by the Tribunal was made without jurisdiction. The award is thus a nullity ab initio and that this honourable court should declare it as such so that the award is not enforced in any hearing to the deterrent of the petitioner.

The petitioner further argues that the 1<sup>st</sup> respondent lacked locus standi to file the claim before the Tribunal. The proceedings in the Tribunal were tainted with illegality considering that it concerned the estates of the deceased persons who were both deceased and no letters of administration had been taken out with respect to their estates.

According to the petitioner, the power to institute suits on behalf of deceased persons is reserved extremity to the personal representatives. The petitioner argues that the Tribunal failed to consider relevant facts and considered irrelevant facts. They ignored the fact that the petitioner was the registered proprietor of the suit land.

On limitation of time, the petitioner argues that 12 years have not accrued since the award was made and that this being a constitution petition seeking protection and enforcement of fundamental rights, there can be no limitation to enforcement and protection of fundamental human rights. Moreover, that limitation of time is a matter of procedure and not substance hence Article 159 should be applied to give the petitioner the right to be heard though out of time.

On the issue of res-judicata, the petitioner argues that the current petition is concerned with the property of the 2<sup>nd</sup> respondent's decision. The previous matter was Eldoret Environment and Land Court Appeal No. 3 of 2013 whose grounds were whether the Honourable Magistrate's Court sitting in Kapsabet was right in dismissing an application challenging the adoption of the decision of the Tribunal. It is argued that the appeal did not concern itself with the merit of the decision of the Tribunal. The subject matter in the two suits are different.

On infringement of constitution right, the petitioner argues that the decision of the 2<sup>nd</sup> respondent gave the land to the 1<sup>st</sup> respondent without the consent of the petitioner. That there was no adequate compensation to the petitioner for the loss of land.

The petitioner argues that under Article 47(1) of the Constitution, every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The proceedings before the 2<sup>nd</sup> respondent and decision thereof, offended the principles underpinning a fair administrative action as averred by the Tribunal was unreasonable, unlawful, procedurally unfair.

The 2<sup>nd</sup> – 4<sup>th</sup> respondents are represented by the Honourable Attorney General through **Mr. Odongo, learned State counsel**. He submits that the procedure adopted by the petitioner is strange in law and in particular the Land Disputes Act. Section 8(1) of the Act provides that any party aggrieved with the decision of the Tribunal can appeal to the Appeals Committee. The petitioner did not file an appeal as envisaged by section 8(1) of the Land Disputes Tribunal Act. The petitioner objected to the adoption instead of appealing.

Moreover, he argues that the award was adopted and therefore, ceased to exist hence it became a judgment of the court. Further, the respondents submit that the petitioner has not demonstrated through evidence that her constitution rights were violated.

Moreover, the respondents submit that the subject matter is res-judicata as Kapsabet Principal Magistrate's Court LDT No. 55 of 2009 and Eldoret Environment and Land Appeal No. 3 of 2013 rendered award to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

The 1<sup>st</sup> respondent submits that the issue before court is whether the Land Disputes Tribunal had jurisdiction to hear and determine the matters and argues that the matter before the Land Disputes Tribunal was within section 3 of the Act and therefore, the Tribunal acted within its jurisdiction.

Furthermore, he argues that the court had no jurisdiction to award, set aside, review or in any manner interfere with the Land Disputes Tribunal's award. Moreover, that the petitioner does not have a lawful title of the land after losing the case in the Tribunal. Furthermore, that this is not the right forum as the petitioner was required to appeal to the Appeals Committee or file an application in the High Court or Environment and Land Court for judicial review.

The 1<sup>st</sup> respondent argues that the petition is res-judica to issues herein having been determined in the Eldoret Environment and Land No. 3 of 2013. Last but not least, that the petitioner does not raise any constitution issue.

## **DETERMINATION**

The genesis of this matter are the land dispute proceedings in respect of Nandi/Kaptildil/797 between Esther Suge therein referred as plaintiff but herein referred to as the 1<sup>st</sup> respondent and Lilian

Barngetuny therein referred to as the defendant but herein referred to as the petitioner. The 1<sup>st</sup> respondent filed a claim in the Nandi Land Disputes Tribunal claiming that with her husband, they bought the suit land measuring 7 acres from Thomas Barngetuny. Her husband died but she continued staying on the land and utilizing it until 2008 when the land was fenced and the house destroyed. The matter was heard by the panel of elders who decided that the land be subdivided into two and be registered in the names of Lilian Barngetuny and Esther Suge. It is not controverted that the decision of the Nandi Land Disputes Tribunal was adopted by the court in Kapsabet Principal Magistrate's Court Land Disputes Tribunal No. 55 of 2009.

The 4<sup>th</sup> respondent went ahead and effected the award of the Tribunal as adopted by the court and proceeded to effect the subdivision of the suit land into two parcels and allocated numbers to the parties being numbers Nandi/Kaptildil/625 and Nandi/Kaptildil/626 and closed the green card register for the suit land and is in the process of issuing title deeds for the two parcels of land resulting from the above said subdivision. The petitioner contends that due process was not followed and that Articles 40 and 47 of the Constitution of Kenya were violated by the respondents in this matter.

I have considered the petition and supporting affidavit, replies to the petition and do find the following issues ripe for determination:

1. Whether this is a proper forum to adjudicate this dispute.
2. Whether the petitioner has demonstrated that his constitution rights were violated.
3. Whether the petitioner is entitled to the relief sought.
4. Whether the dispute is res-judicata.

### **1. WHETHER THIS IS A PROPER FORUM TO ADJUDICATE THIS DISPUTE**

This dispute was commenced in the Nandi Land Disputes Tribunal by the 1<sup>st</sup> respondent. On 14.9.2009, the Tribunal delivered its decision which was forwarded to the Principal Magistrate, Kapsabet for adoption and Kapsabet Principal Magistrate's Court LDT No. 55 of 2009 was instituted. The award was adopted as the judgment of the court and a decree issued on 22.2.2010. The petitioner appealed against the decree but the appeal was dismissed.

Section 8(1) of the Land Disputes Tribunal is very clear on how to challenge an award of the Tribunal. The person intending to challenge a decision of the Tribunal has the right of appeal within 30 days of the award to the Appeals' Committee. If dissatisfied with the decision of the Appeals' Committee, he has the right to appeal to the High Court only on points of law. The petitioner neither appealed to the Appeals' Committee nor filed an application for Judicial Review under the Land Registration Act, Cap. 26, Laws of Kenya within 6 months of the decisions impugned.

Now the petitioner is challenging the decision of the Tribunal relying on Articles 40 and 47 of the Constitution. I agree with Mr. Odongo, learned State Counsel for the 2<sup>nd</sup>-4<sup>th</sup> respondents that under the current constitutional dispensation, judicial review orders can be issued on constitution petition, however, where a party comes under order 53, the applicant has to come to court within 6 months of the making of the decision. However, in this matter, the petitioner is not seeking judicial review remedies; he is seeking a declaration that he is the rightful owner of the suit property *inter alia*:

I agree with the holding by learned Justice L. N. Waithaka that where a statute establishes a dispute resolution mechanism that mechanism ought to be followed. Where a party fails to follow the mechanism established by law, they cannot be heard to say that their rights were violated. See Paul Muraya Kaguri Vs Simon M. Muchunu (2015) eKLR, considered the prayers sought by the petitioner, which are not declaration of rights but declaratory orders, this is the wrong forum.

In *Florence Nyabuke Machari Vs Mogere Amosi Ombui, Simon Tengeri Mogere, Nelson Omwenga Nyakundi (2014) eKLR*, the Court of Appeal upheld the decision of the High Court that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable the issue of jurisdiction notwithstanding.

I do find that the petition herein is not properly founded as it seeks to revive a stale matter wherein the petitioner went to sleep after the decision. This court has jurisdiction to nullify an award of the Tribunal that is made outside jurisdiction, however, this can be done before the decision is adopted by the Magistrate's court as a judgment. This is because after the adoption of the award as a judgment of the court, it does not stand on its own and not subject to a declaration as sought in this matter. The only option for the petitioner, was to file a judicial review application in compliance with Order 53 of the Civil Procedure Rules, 2010 or a petition under Article 23 of the Constitution of the court.

## **2. WHETHER THE PETITIONER HAS DEMONSTRATED THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED**

The petitioner commenced this petition citing Articles 40 and 47 of the Constitution. Article 40 of the Constitution provides that:

**40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

**(a) of any description; and**

**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person—**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law. Freedom of movement and residence.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired**

The petitioner's claim is that her father's parcel of land was sub-divided as a result of a court order. She participated in the proceedings of the Tribunal, the adoption and even appealed to the Eldoret Environment and Land Court and therefore, he cannot be heard to state that his right to property as guaranteed by Article 40 of the Constitution of Kenya were violated as there was due process of law

The respondents are saying that the Petitioner has not reached the threshold in **Anarita Karimi Njeru case supra**. It was submitted that the Petitioner has referred to various articles of the constitution as having been violated without giving particulars of the alleged violations. The principle in **Anarita Karimi case** is captured in the words of the Justices Trevelyan and Hancox when they stated as follows:

*We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.*

The Petitioner has cited Articles 40 and 47 of the constitution without any particulars of the alleged violations of those provisions. The Court of Appeal in **Mumo Matemu** case found that the petition did not meet the threshold in **Anarita Karimi Njeru case** for similar reasons like in this case where there is no evidence to support the allegations of violations of constitutional provisions.

On Article 47 of the Constitution that provides for a fair administrative action, thus that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action and that Parliament shall enact legislation to give effect to the said right. This court finds that the petitioner has not demonstrated that the administrative action was not fair and that it was unlawful, as the Tribunal was a creature of statute and therefore the proceedings were lawful. The Tribunal could have made a wrong decision but the petitioner was entitled to appeal or file a Judicial review application. Moreover, the petitioner all along participated in the proceedings and was afforded a fair hearing and all the issues raised by the petitioner are on the merit of the decision of the tribunal. This court finds that this petition does not pass the threshold of a constitutional petition.

### **3. WHETHER THE RELIEFS SOUGHT CAN BE GRANTED**

The petitioner herein who was the defendant in the matter before the Tribunal is seeking orders spelt out in the petition as follows:-

- a. **a declaration that the petitioner has lawful title to the suit land.**
- b. **A declaration that the alleged sale transaction between the 1<sup>st</sup> respondent's deceased husband and the petitioner's deceased husband was null and void.**
- c. **A declaration that the award made by the 2<sup>nd</sup> respondent on 13<sup>th</sup> August, 2009 is null and void.**
- d. **A declaration that 3<sup>rd</sup> respondent's order and Decree in Kapsabet PMC LDT No. 55 of 2009 adopting the 2<sup>nd</sup> respondent's award is null and void.**
- e. **A declaration that subdivision and any other subsequent process undertaken by the 4<sup>th</sup> respondent is null and void.**

I have looked at the reliefs sought hereinabove and do find that they are not remedies envisaged under Article 23 of the Constitution of Kenya which provides that the High Court (***Read the Environment and Land Court***) has jurisdiction, in accordance with Article 165, to hear and determine applications for

redress of; a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Sub- Article 3 provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including—a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

#### **4. WHETHER THE PETITION IS RES JUDICATA**

The respondents have failed to demonstrate that the petition is res-judicata as the proceedings before the Kapsabet Principal Magistrate court have not been availed to this court. Same applies to the proceedings before the Eldoret Environment and Land Court Case no 3 of 2013 on appeal from the proceedings of the Magistrate's court. Moreover, the parties to the petition are different from the parties in the Eldoret Environment and Land Court Case no 3 of 2013.

#### **CONCLUSION**

The upshot of the above is that the petitioner has not demonstrated that his right to property under the provisions of Article 40 of the Constitution has been violated and that his right to a fair administrative action under Article 47 of the constitution has also been violated. The petition is therefore dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF MARCH, 2017.**

**A. OMBWAYO**

**JUDGE**