



**REPUBLIC OF KENYA**

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

**ELC PETITION NO.9 OF 2017**

**IN THE MATTER OF ARTICLES 20(1) & (2), 22(1), 23(1), 27(1) & (2), & 64 OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOM UNDER  
ARTICLE 40(1) & (3) 43(1) (b), 47(1), 50(1), 60 (1) (b) (d) OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOM UNDER  
SECTION 75 AND 77(9) OF THE FORMER CONSTITUTION (1963) (REPEALED)**

**IN THE MATTER OF SECTION 24, 25, 26, AND 80(2) OF THE LAND REGISTRATION ACT (2012) AND THE  
ENVIRONMENT AND LAND COURT ACT (2011)**

**AND**

**IN THE MATTER NUMBERS NYAR/S/KINANGOP/5685,5686, 10845, 6106, 5628, 5634, 6093, 6094,6095, 6102, 6104, 6090,  
6091,3601,3602,3604,5622,5673,5623,6096,5663,5638,5660,6108,5678,3601,5661,5662,6107,6101,5658,6105,5682,6103,5622,3578,5667  
AND 5633**

**BETWEEN**

**BONIFACE DAVID CHEGE.....1<sup>st</sup> PETITIONER**

**BENSON MURAYA MWANGI.....2<sup>nd</sup> PETITIONER**

**PETER BENU KAHORO.....3<sup>rd</sup> PETITIONER**

**LOISE WANJIKU MURU.....4<sup>th</sup> PETITIONER**

**VIRGINIA WANGUI NJENGA .....5<sup>th</sup> PETITIONER**

**JAMES KAMAU MBURU.....6<sup>th</sup> PETITIONER**

**PAUL KAMOTHO WAWERU.....7<sup>th</sup> PETITIONER**

**PETER KINYIRIA MAKUMI.....8<sup>th</sup> PETITIONER**

**SAMSON GACIBI MAINA.....9<sup>th</sup> PETITIONER**

**SIMON GATEI NJUGUNA.....10<sup>th</sup> PETITIONER**

**JOSEPHAT MWANGI.....11<sup>th</sup> PETITIONER**

**ALICE WAMBUI NJUGUNA.....12<sup>th</sup> PETITIONER**

**DAVID MACHARIA WATIRI.....13<sup>th</sup> PETITIONER**

**MARY WATIRI.....14<sup>th</sup> PETITIONER**

JOSEPH NJUGUNA NGANGA.....	15 <sup>th</sup> PETITIONER
FRANCIS THUO WAMBUI.....	16 <sup>th</sup> PETITIONER
TERESIA MUTHONI NGANGA.....	17 <sup>th</sup> PETITIONER
JOSEPH MANYARA.....	18 <sup>th</sup> PETITIONER
GEORGE K. NJAU.....	19 <sup>th</sup> PETITIONER
PETER GATHIL.....	20 <sup>th</sup> PETITIONER
JAMES NJUGUNA MWAURA.....	21 <sup>st</sup> PETITIONER
GRACE W. MWANGI.....	22 <sup>nd</sup> PETITIONER
JOHN RUGU.....	23 <sup>rd</sup> PETITIONER
JIMFRACK PROPERTIES AGENCY LTD.....	24 <sup>th</sup> PETITIONER
JOSEPH GITHUMBI MBURU.....	25 <sup>th</sup> PETITIONER
MARY WANJIRU NGURE.....	26 <sup>th</sup> PETITIONER
ESTHER WAMBUI WAITHIRA.....	27 <sup>th</sup> PETITIONER
MOSES MBURU WAMBUI.....	28 <sup>th</sup> PETITIONER
PATRICK GACHAU MACHARIA.....	29 <sup>th</sup> PETITIONER
BEATRICE WAIRIMU.....	30 <sup>th</sup> PETITIONER
SIMON NJUGUNA.....	31 <sup>st</sup> PETITIONER
JOSEPH NJUGUNA.....	32 <sup>nd</sup> PETITIONER
PRISCILLAH NJERI WAIHUMBU.....	33 <sup>rd</sup> PETITIONER
PATRICK MAINA WAMAI.....	34 <sup>th</sup> PETITIONER

**AND**

THE HON ATTORNEY GENERAL.....	1 <sup>st</sup> RESPONDENT
THE LAND REGISTRAR NYAHURURU, LAND REGISTRY.....	2 <sup>nd</sup> RESPONDENT
JEREMIAH GITAU.....	3 <sup>rd</sup> RESPONDENT
BERNARD K THAIRU.....	4 <sup>th</sup> RESPONDENT
IRENE KANYI WAINAINA.....	5 <sup>th</sup> RESPONDENT

**JUDGEMENT**

1. On the 31<sup>st</sup> August 2016, the Petitioners filed their Petition dated 30<sup>th</sup> August 2016 which they brought under a galaxy of provisions of the Constitution of Kenya. The said petition was filed together with an application by way of a motion dated 30<sup>th</sup> August 2016 and filed on the 31<sup>st</sup> August 2016.

2. On 31<sup>st</sup> August 2016, the matter was placed before the Hon Judge Sila Munyao under certificate of urgency who issued the following directions:

- i. the parties to maintain the status quo
- ii. prayer 2 granted as drawn
- iii. Interparte hearing for the 22<sup>nd</sup> September 2016

3. On the 22<sup>nd</sup> September 2016 Mr. Nguyo Advocate appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and requested for time respond to the Application. There was no appearance for the rest of the Respondents.

4. The court granted all the respondents 30 days to respond to the Petition and Application and gave them the 14<sup>th</sup> November 2016 as a mention date for further directions. Interim orders were extended. Further orders were to the effect that the 3<sup>rd</sup>-5<sup>th</sup> Respondents be served with the Mention Notice.

5. On the 14<sup>th</sup> November 2016 when the matter came up for mention, no appearance had been entered by the Respondents. The court therefore directed that pending the hearing of the Petition, that orders sought in prayer 2 of the application dated 30<sup>th</sup> August 2016 remain in force to preserve the subject matter.

6. Further directions were to the effect that the Petition be heard by way of Affidavit evidence and written submissions. Counsel for the Petitioners was further directed to file and serve his written submissions within 30 days. Corresponding leave was granted to the Respondents to respond within 30 days after service.

7. The hearing of the Petition was slated for the 9<sup>th</sup> March 2017, with a Hearing Notice to the Respondents to issue.

8. On 9<sup>th</sup> March 2017, the matter was placed before me, after the transfer of the same from the Environmental and Land Court (herein referred to as ELC) Nakuru. Mr. Wanjohi Counsel for the Petitioners was present, there was neither appearance nor filing of any documents by the Respondents. Mr. Wanjohi informed the court that although he had filed his submissions in the ELC Nakuru file, he had subsequently filed the same in the present file. Which the court took note of.

9. Counsel informed the court that he had diligently served the Respondents with all the Notices as directed by the court and evidenced by the Affidavits of Service filed thereafter. He prayed for another date and undertook to serve. The court obliged him and fixed the matter for hearing for the 29<sup>th</sup> May 2017 with a hearing notice to issue.

10. On the said date, the 29<sup>th</sup> May 2017, while the petitioners had filed their written submissions, there was neither appearance nor filing of any response by the Respondent yet again despite service.

11. Since the court had certified the petition ready of hearing on the 14<sup>th</sup> November 2016 and there having been no response nor presence of the Respondent despite numerous services of the hearing notices. I allowed the Petitioners to proceed and prosecute their Petition dated the 30<sup>th</sup> August 2016 the absence of the Respondents notwithstanding.

12. Delivery of Judgment was then scheduled for the 28<sup>th</sup> June 2017.

### **The Petitioner's Case**

13. The Petition is drawn and filed by Wanjohi & Wawuda Advocates and is supported by an affidavit sworn on 30<sup>th</sup> August 2016 by Boniface David Chege the 1<sup>st</sup> Petitioner herein and who was authorized by his Co-Petitioners to swear the same on their behalf. Authority document marked as annexure 'BDC1.'

14. The Petitioners' written submission is to the effect that they are the registered owners of all parcels of land known as NYAR/S/KINANGOP/5685, 5686, 10845, 6093, 6094, 6095, 6102, 6104, 6090, 6091, 3601, 3602, 3604, 5622, 5673, 5623, 6096, 5663, 5638, 5660, 6108, 5678, 3601, 5661, 5662, 6107, 6101, 5658, 6105, 5682, 6103, 5622, 3578, 5667, and 5633, respectively, which resulted from the sub-division of NYANDARUA/SOUTH-KINANGOP/688.

15. They purchased the same on diverse dates between the year 2000 and 2010, from a third Party Mr. John Ngugi Rubia who was not a party to these proceedings. Each of them was issued with their respective titles.

16. The Petitioners submitted that at the time the 3<sup>rd</sup> - 5<sup>th</sup> Respondents had also allegedly bought 23 acres of land from the same Mr. John Ngugi Rubia, however at the time, the land was still under the Settlement Scheme and the said vendor had not obtained the title deed to the land.

17. That subsequently upon obtaining of the title to the entire piece of the land, the said Mr. John Ngugi Rubia reserved 23 acres known as

parcel No. NYANDARUA/SOUTH-KINANGOP/688 for the 3<sup>rd</sup> to 5<sup>th</sup> Respondents.

18. However instead of transferring the land to the Respondents, he sub divided the same and sold it to various people the herein, so as to defeat the Respondent's claim.

19. That as a result of the subdivision and sale, there arose a multiple number of suits filed against the said John Ngugi Rubia filed by the 3<sup>rd</sup> to 5<sup>th</sup> Respondents, suits which were either successful or failed to produce the 3<sup>rd</sup> to 5<sup>th</sup> Respondents' desired results.

20. Subsequently, the said Respondents filed a dispute before the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008.

21. The tribunal subsequently found John Ngugi Rubia, to have acted fraudulently and ordered all subdivisions and transactions made in respect of NYANDARUA/SOUTH-KINANGOP/688 be cancelled and registered in the favor of the 3<sup>rd</sup> to 5<sup>th</sup> Respondents notwithstanding that the Petitioners were in occupation of the land since acquiring the same.

22. Subsequently the award was adopted in Nyahururu Principle Magistrate's court Land Dispute case No. 1 of 2012 and thereafter a decree was issued on the 27<sup>th</sup> May 2012.

23. The Respondents then applied to execute the said decree which application was allowed and an order issued on the 8<sup>th</sup> April 2014. On the strength of that order the 2<sup>nd</sup> Respondent cancelled the Petitioners' title deeds.

24. That in the proceedings before the tribunal, the 1<sup>st</sup>, 3<sup>rd</sup> -34<sup>th</sup> Petitioners were neither represented nor served with pleadings nor given an opportunity to be heard as they were not parties to the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 as well as in Nyahururu Principle Magistrate's Court Land Dispute Case No. 1 of 2012.

25. The Petitioner's claimed that South Kinangop District Land Disputes Tribunal did not have jurisdiction to adjudicate over the ownership dispute and cancel the titles of the petitioners and as such prayed that the decree should be quashed and they be reinstated as the proprietors of the suit land.

26. The petitioners further alluded to the fact that their Constitutional rights under Article 40(1) & (3) (Section 75 of the repealed constitution) to own property had been infringed.

27. Further that they had not been accorded a fair hearing, in contravention of article 50(1) of the Constitution. (Section 75 and 77(9) of the former Constitution)

28. That the proceedings in Nyahururu Principle Magistrate's court infringed on their right to property, housing, fair Administrative action and fair hearing enshrined in Articles 40, 43(1)(b), 47(1) and 50(1) of the Constitution.

29. The petitioners thus prayed inter alia, for the following:

i. A declaration that the proceedings both before the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 as well as in Nyahururu Principle Magistrate's Court Land Dispute case No. 1 of 2012 contravened the Petitioners' rights to property, housing, fair administrative action and fair hearing under Articles 40(1) & (3), 43(1) (b) 47(1) and 50(1) of the Constitution.

ii. A declaration that the proceedings both before the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 and the Nyahururu Principle Magistrate's Court Land Dispute case No. 1 of 2012 contravened rules of natural justice.

iii. A declaration that the rule of law doctrine prohibits taking away of a citizen's property or liberty without being given a chance to be heard.

iv. A declaration that the proceedings both before the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 and the Nyahururu Principle Magistrate's Court Land Dispute case No. 1 of 2012 are null and void.

v. An order that the judgment entered by the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 and the Nyahururu Principle Magistrate's Court Land Dispute case No. 1 of 2012 be set aside.

vi. An order that the cancellation of the registration of the Petitioners as the registered proprietors of NYAR/S/KINANGOP/5685,5686,10845, 6106,5628,5634,6093,6094,6095,6102,6104,6090,6091,3601,3602,3604,5622,5673,5623,6096,5663,5638,5660,6108,5678,3601,5661,5662,6107,6101,5658,6105,5682,6103,5622,3578,5667, and 5633, be reserved.

vii. An order of mandamus do issue to the 2<sup>nd</sup> Respondent to restore the name of the petitioners as the registered proprietors of NYAR/S/KINANGOP/5685,5686,10845, 6106,5628,5634,6093,6094,6095,6102,6104,6090,6091,3601,3602,3604,5622,5673,5623,6096,5663,5638,5660,6108,5678,3601,5661,5662,6107,6101,5658,6105,5682,6103,5622,3578,5667, and 5633, respectively.

viii. Cost of the petition

30. The petitioners also submitted that the South Kinangop District Land Disputes Tribunal had no jurisdiction to issue the award they issued. In so submitting, the Petitioners relied on Section 3(1) of the Land Disputes Tribunal Act (repealed) to wit gave limited jurisdiction to the Tribunal to the effect that:

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

- 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,

shall be heard and determined by a Tribunal established under section 4.

31. Further submission was to the effect that the Tribunal having been found not to have such jurisdiction, similarly, the Principle Magistrate's adoption of such an award and the issuance of decree thereafter were null and void in the circumstance.

32. Finally the cancellation if the Petitioner's titles to their respective pieces of land infringed on their constitutional rights to property. In summary therefore the Petitioners submitted that they were entitled to the orders sought.

33. I have read the written submissions herein and looked at the annexures annexed thereto.

34. The questions framed for this court to determine include inter alia:

- i. Whether the Petitioners were granted a fair hearing,
- ii. Whether the tribunal had the jurisdiction to cancel the plaintiff's title and order that the suit property be registered in the name of the 3<sup>rd</sup>-5<sup>th</sup> Respondents.
- iii. Whether the Petitioner's right to property had been, in the circumstance if this case, infringed.
- iv. Whether the Petitioners are entitled to the prayers sought in the petition.

On the first issued raised:

35. It is clear from the Petition filed therein and the written submission thereto, as well as the annexure attached and marked as 'CBD 6', that the petitioners herein were not parties to the proceedings held at both the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 as well as the Nyahururu Principle Magistrate's Court Land Dispute case No. 1 of 2012 and yet they were condemned unheard.

36. According to the written submissions, the Petitioners more so Petitioners 1, 3<sup>rd</sup>-34<sup>th</sup>, having been the proprietors and occupiers of the respective pieces of lands adversely affected by the orders, were denied a fair trial when they were excluded as parties during the proceedings held at the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 as well as the Nyahururu Principle Magistrate's Court Land Dispute case No. 1 of 2012 which adopted the award and issued the decree. Yet they were the registered proprietors and were in actual possession of the respective pieces of land since the years 2000-2010 when they made the purchases respectively.

37. Their right to a fair trial was violated by both the tribunal and the Magistrate's court. Petitioners 1, 3<sup>rd</sup>-34<sup>th</sup>, having been the proprietors and occupiers of the respective pieces of lands were never parties before the tribunal as the parties and were therefore deprived of their land without first being given an opportunity to be heard. The awards of this nature are usually set aside, counsel relied on the case of **James N Wa Wambu vs Republic, and 7 others [1995] eKLR**. He submitted that the right to be heard is a rule of natural justice. In this case the JJA held that:

*'...if the parcels of land of which they claim to be registered owners, were to be subjected to fresh adjudication under the Act the titles held by them would be rendered null and void. The registered owners were, therefore, in our view persons directly affected and ought to have been given a hearing and natural justice demanded that they be informed of the allegations made against them or the reasons why it was proposed to cancel their title deeds.'*

The Judges of the court of appeal then went ahead to allow the appeal.

38. Similarly, the petitioners relied on the case of **Barasa W. Wabomba & another v Omunyin Kituyi & 2 others [2016] eKLR** Where the court of appeal held that:

*'...Clearly, the property known as North Teso/Kocholya/210 did not exist from the onset of the proceedings before the tribunal in 2006 and the registered owners of the subsequent subdivisions were not privy to, nor were they heard in the proceedings before the tribunal. To order the cancellation of the titles in the names of those parties, including that of the 2<sup>nd</sup> appellant, at a stage subsequent to those proceedings in which they were not heard or to which they were not privy to, was in our view in breach of the principles of natural justice.'*

39. The tribunal proceeded to cancel the title of the petitioners when they not party. The rule of natural justice, *audi alteram partem*, requires a party not to be condemned unheard. In my view there was a clear breach of the constitutional right of the petitioner to a fair hearing.

40. The award resulted in a taking of the property of the petitioner without due process. This was clearly a violation of his right to own property.

41. On the second issue raised, under Section 3(1) of the Land Disputes Tribunal Act, 1990 (now repealed), the jurisdiction of the Tribunal was limited to:

*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,*

42. As can be seen from the foregoing, The Land Disputes Tribunal did not have jurisdiction to issue declaratory orders on the ownership of land and neither did it have jurisdiction to determine disputes revolving around ownership of land. It could not issue orders compelling the cancellation of title as it did in this case. I am therefore in agreement with the submissions by the Petitioners that the tribunal herein acted in excess of its jurisdiction when it purported to cancel the Petitioners' titles and order that the suit property be registered in the name of the 3rd to 5<sup>th</sup> defendants.

43. The tribunal acted without jurisdiction, and therefore the award was a nullity and void *ab initio*. In the case of **Omega Enterprises Kenya Limited vs. Kenya Tourist Development Corporation & 2 Others, [1988] eKLR** where Tunoi, JA. (as he then was), stated as follows:

*“It follows therefore in my judgment that all proceedings before the learned judge which were based on the null and void order having been allegedly disobeyed are a complete nullity since with such a faulty foundation, the entire house of cards must collapse without much ado.”*

44. Having had made a finding on the first two issues that were framed for determination and more so on the issue touching on Jurisdiction of the Land Disputes Tribunal, I need not dwell into the other issues that were framed for determination as jurisdiction is the foundation of all proceedings without which the whole house of cards must collapse as stated inter alia.

45. As afore stated the petition was unopposed, but then again if the same was opposed, I do not see what argument would have been brought forward to sway my findings having found that the South Kinangop District Land Disputes Tribunal acted in excess of their jurisdiction which resulted into the petitioners' right to own property being blatantly infringed.

46. I allow this petition. I quash the award of the South Kinangop District Land Disputes Tribunal and the subsequent decree of the Nyahururu Principle Magistrates Court for the reasons given herein above touching on the jurisdiction and the violation of the petitioners right to a fair hearing and the net effect was to violate his right to own property contrary to the provisions of Sections 75 and 77 of the former constitution and the provisions of Articles 40 (1) & (3) of the current constitution. The 1<sup>st</sup>-34<sup>th</sup> Petitioners must be reinstated as proprietors of the suit properly.

47. I therefore order the registration of the 3<sup>rd</sup>-5<sup>th</sup> Respondents as proprietor of the suit property to be cancelled and the petitioners be reinstated as proprietor thereof. The petitioners will also have costs of this petition.

48. It is so ordered.

***Dated and delivered at Nyahururu this 28<sup>th</sup> day of June 2017.***

***M.C. OUNDO***

***JUDGE OF ELC NYAHURURU***