



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

**AT NAKURU**

**PETITION NO.11 OF 2014**

**KITILAI OLE NTUTU.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NAROK.....RESPONDENT**

*Consolidated with*

**PETITION 306 OF 2014**

**JAMES KAITET OLE KIOOK & 3 OTHERS.....PETITIONERS**

**VERSUS**

**MICHAEL KOIKAI.....1<sup>ST</sup> RESPONDENT**

**DANIEL KOROMBO.....2<sup>ND</sup> RESPONDENT**

**NAROK COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**RULING**

***(Constitutional petitions alleging violation of right to property; respondents claiming that the parcels of land are situate in Mau Forest and therefore trust land; petitioners having title to the suit properties; court directs respondents to file suit to contest the titles of the petitioners; judgment on the petitions held in abeyance pending filing of the suit as directed)***

1. The suit Nakuru ELC Petition No. 11 of 2014, is closely tied to the case Nakuru ELC Petition No. 306 of 2014 and I have deemed it convenient to make a consolidated ruling. Both are constitutional petitions alleging inter alia breaches of rights to property as enshrined by Article 40 of the Constitution. The parties argued their cases, by way of affidavit and written submissions, and I retired to write judgments in both suits. However, for reasons that will soon be seen, I have not deemed it wise, at least at this stage, to write a judgment based on the material before me. Before I go to that, I think it is appropriate that I give some background to these two suits.

2. The first of these petitions is Petition No. 11 of 2014 commenced on 3 March 2014. The petitioner is Kitilai Ole Ntutu who claims to be the registered and legal owner of the two parcels of land in issue, namely CIS Mara/Nkareta/777 and CIS Mara/Nkareta/781, both situate within the County of Narok. The

former land parcel measures 580.52 Ha, whereas the latter measures, 142.82 Ha. In the petition, it is claimed that sometimes in the year 2014, the County Government of Narok, the sole respondent in the suit, caused its rangers to encroach and prevent access to these parcels of land. The petitioner avers that the two parcels of land do not form part of the forest and he does not understand why the rangers of the respondents have gained access to them. In the petition, he has inter alia sought orders for a declaration that his rights to property have been infringed and for an order of permanent injunction to restrain the respondent from the suit properties.

3. The County Government responded to the petition through the replying affidavit of Michael Koikai, its Director of Security. He has raised several issues, but the core of it, is the allegation that the parcels of land form part of the Maasai Mao Forest. He has deposed inter alia that a Committee of the The Prime Minister's Task Force on Conservation of the Mau Forest Complex noted that the two titles were unlawfully created. It is contended that the two parcels of land fall within a forest reserve and are therefore trust land. It is further alleged that no proper adjudication was done before the two titles were issued. These allegations were refuted in a supplementary affidavit filed by the petitioner.

4. In the case Nakuru ELC Petition No. 306 of 2014, the petitioners are three, namely James Kaitet Ole Kiok, Oloshiro Musere and Lesiamon Ole Koikai. They however state that they have brought the petition not only on their own behalf but on behalf of the Nkareta Community land owners. The respondents are respectively the Director of Security, Narok County; the Narok County Government Warden; and the County Government of Narok. In this petition, the petitioners aver that they own the parcels of land known as CIS Mara/Nkareta/ 494, 688, 692, 693, 694, 695, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 711, 712, 714, 715, 716, 717, 718, 719, 720, 721, 723, 724, 728, 729, 731, 734, 735, 736, 737, 740, 742, 743, 744, 746, 750, 751, 752, 753, 754, 755, 757, 764, 765, 766, 768, 779, 780, and 782. It is stated that they derived their titles after land adjudication was done and all disputes over the said parcels determined. They aver that they have endeavoured to protect the environment by maintaining trees on the land and monitoring ingress and egress. As a result the Nkareta area is said to be a forest comprising of both indigenous and planted trees. It is pleaded that about the year 2005, the 1st, 2nd and 3rd respondents, without any consultation or permission of the petitioners, sent game rangers who invaded the suit lands. They set up a camp with a view to protect the forest. This occupation is said to have initially been peaceful, but around late 2013 and early 2014, the respondents started logging and cutting down cedar trees on the petitioners' parcels of land resulting in massive destruction of the forest and degradation of the environment. It is averred that the respondents also barricaded the access road to these parcels of land and the petitioners cannot now access the same. Attempts to gain entry have been met with violent force. The petitioners aver that they sought intervention of the Governor of the 3rd respondent and the County Commissioner, Narok County. They had a discussion with the County Commissioner, who on 22 September 2014, wrote to the Governor seeking his intervention. However, it is said that the Governor did not intervene. The petitioners state that they also sought intervention of the Directorate of Criminal Investigations, Narok, who accompanied the petitioners to the parcels of land and established the massive destruction of forest.

5. In the petition, the petitioners have sought the following orders :-

*(a) A declaration that the respondents' and/or their agents' invasion of the petitioners' parcels known as CIS Mara/Nkareta/ 494, 688, 692, 693, 694, 695, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 711, 712, 714, 715, 716, 717, 718, 719, 720, 721, 723, 724, 728, 729, 731, 734, 735, 736, 737, 740, 742, 743, 744, 746, 750, 751, 752, 753, 754, 755, 757, 764, 765, 766, 768, 779, 780, and 782, the setting up of a camp and continued stay therein are illegal, amounts to trespass to land and violation of the Petitioners' right to property and to quiet possession of the said parcels in contravention of the provisions of Article 40 of the Constitution of Kenya, 2010.*

*(b) A declaration that the respondents and/or their agents' continued denial of the Petitioners' access to their parcels of land known as CIS Mara/Nkareta/ 494, 688, 692, 693, 694, 695, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 711, 712, 714, 715, 716, 717, 718, 719, 720, 721, 723, 724, 728, 729, 731, 734, 735, 736, 737, 740, 742, 743, 744, 746, 750, 751, 752, 753, 754, 755, 757, 764, 765, 766, 768, 779, 780, and 782, is illegal and amounts to an unlawful deprivation*

and/or interference with private property in contravention of the provisions of Article 40 of the Constitution of Kenya, 2010.

(c) A declaration that the respondents' and/or their agents' continued use and/or threat of violence on the Petitioners is illegal and contravenes the provisions of Articles 28 and 29 (c), (f) and (g) of the Constitution of Kenya, 2010.

(d) A declaration that the respondents' and/or their agents' continued logging and/or cutting down of trees in the Petitioners' parcels known as CIS Mara/Nkareta/ 494, 688, 692, 693, 694, 695, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 711, 712, 714, 715, 716, 717, 718, 719, 720, 721, 723, 724, 728, 729, 731, 734, 735, 736, 737, 740, 742, 743, 744, 746, 750, 751, 752, 753, 754, 755, 757, 764, 765, 766, 768, 779, 780, and 782 is illegal and amounts to a breach of the Petitioners' right to a clean and healthy environment and an unlawful deprivation and/or interference with private property in contravention of the provisions of Article 40 and 42 of the Constitution of Kenya, 2010.

(e) An order of injunction restraining the respondents, whether by themselves, their agents, servants, employees, invitees, hirelings and/or otherwise whomsoever from cutting down trees, digging, excavating or in any way interfering with the topography or in any way whatsoever from interfering with the Petitioners' parcels known as CIS Mara/Nkareta/ 494, 688, 692, 693, 694, 695, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 711, 712, 714, 715, 716, 717, 718, 719, 720, 721, 723, 724, 728, 729, 731, 734, 735, 736, 737, 740, 742, 743, 744, 746, 750, 751, 752, 753, 754, 755, 757, 764, 765, 766, 768, 779, 780, and 782.

(f) An order of injunction restraining the respondents, whether by themselves, their agents, servants, employees, invitees, hirelings, and/or otherwise whomsoever from trespassing, constructing or continuing with the construction of any structures or camp, occupying, managing, using, residing and remaining on the Petitioners' parcels known as CIS Mara/Nkareta/ 494, 688, 692, 693, 694, 695, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 711, 712, 714, 715, 716, 717, 718, 719, 720, 721, 723, 724, 728, 729, 731, 734, 735, 736, 737, 740, 742, 743, 744, 746, 750, 751, 752, 753, 754, 755, 757, 764, 765, 766, 768, 779, 780, and 782, or in any way whatsoever interfering with the Petitioners' exercise of proprietary rights including the right to quiet possession and peaceful enjoyment of their parcels aforesaid.

(g) An order of Mandatory Injunction do issue directing the respondents herein to forthwith remove all the foundations and/or structures erected thereon all the rangers, agents, personnel employed by or under the control of the respondents herein brought onto or let upon the Petitioners' parcels known as CIS Mara/Nkareta/ 494, 688, 692, 693, 694, 695, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 711, 712, 714, 715, 716, 717, 718, 719, 720, 721, 723, 724, 728, 729, 731, 734, 735, 736, 737, 740, 742, 743, 744, 746, 750, 751, 752, 753, 754, 755, 757, 764, 765, 766, 768, 779, 780, and 782.

(h) An award of general damages against the respondents jointly and severally for breach of the petitioners' fundamental rights and the Constitution of Kenya, 2010.

(i) The Honourable Court be pleased to award the Petitioners exemplary damages against the 1st, 2nd and 3rd respondents herein for acting contrary to the Constitution and in breach of the Petitioners' fundamental rights.

(j) The costs consequent upon this Petition be borne by the respondents in any event on indemnity basis.

(k) The Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances in enforcing violation of fundamental rights of the Petitioners.

6. The petition is supported by the affidavit of James Kaitet Ole Kiok, the 1st petitioner. He has deposed

that land adjudication in the Nkareta area was done and persons issued with titles. He has annexed copies of land adjudication documents, title deeds and certificates of searches. Having title, it is his contention that the petitioners enjoy all rights over these parcels of land as provided by law and that their rights are protected by Article 40 of the Constitution.

7. The respondents opposed the petition by filing three replying affidavits. But to me, it is the affidavit of Michael Koikai, the 1st respondent, which captures the main issues raised by the respondents. In his affidavit, Mr. Koikai has pointed to the existence of the other related petition, being ***Petition No. 11 of 2014, Kiitilai Ole Ntutu vs County Government of Narok***. He has deposed that the area claimed is part of the Maasai Mao Forest. It is averred that being forest land, the same falls under the jurisdiction of the County Government of Narok and it is the duty of the County Government of Narok to safeguard it for the benefit of the residents of Narok and the citizens of Kenya. In keeping with its role, it is stated that the County Government of Narok has established a security outpost. He has stated that he is a stranger to the claim that the petitioners have planted millions of cedar trees, as to him, the area consists of an indigenous forest and there are no demarcated parcels of land therein. He has averred that no person has ever had quiet possession of any part of the forest since it falls within the jurisdiction of the 3rd respondent. He has refuted claims that the respondents have interfered with any of the rights of the petitioners or that there has been any invasion of property. He has asserted that there is no private property inside the forest and hence nobody has been denied access, and that all that exists are security protocols to safeguard the forest. He has refuted all claims of destruction of the forest or interference with any private property. He contended that this petition is crafted to hoodwink this court into making orders that may sanction the alienation, encroachment and abuse of forest land and asked that the petition be dismissed.

8. I directed parties to file submissions and they did. I went through the same and retired to write judgment. But as I have mentioned at the beginning of this discourse, I have not deemed it appropriate to make a judgment on both petitions and I will explain why.

9. It is apparent to me that in both petitions, the petitioners contend that they do own various parcels of land. They claim that these parcels of land properly went through the process of adjudication after which titles were issued to them. On the other hand, the respondents assert that the land parcels in issue are trust land falling within the Mau Forest and any titles held by the petitioners were improperly issued. There is argument that the process of adjudication was already complete, and the boundaries of the forest established, and that any new exercise of adjudication that brought forth the titles herein was not a valid process.

10. Now, these being constitutional petitions, essentially, I am meant to determine the rights of the parties as given in the constitution. The petitioners of course allege that their right to property as provided for under Article 40 of the Constitution, has been infringed, but under Article 40 (6) of the Constitution, title that has been found to have been unlawfully acquired cannot benefit from the protection offered by Article 40. Although there has been no finding on whether or not the titles of the petitioners have been unlawfully acquired, I cannot wish away the contention by the respondents that the titles of the petitioners are irregular titles. It means that there is a substantive issue to be tried, and that is whether or not the titles of the petitioners are good titles which deserve the protection of the Constitution.

11. There is however one difficulty. The path that the petitioners chose to articulate their complaint is through a constitutional petition and not an ordinary suit by way of plaint. There is no avenue for the respondents to file a counterclaim, as one would have, if it were an ordinary suit. If the petitioners had come by way of plaint, then the respondents (as defendants in such suit) would have had the leeway to file a counterclaim to seek a declaration that the titles of the petitioners (as plaintiffs in such suit) are bad titles which need to be cancelled. But that route cannot now be available given the nature of the litigation.

12. There is of course no bar to the determination of the question whether the titles of the petitioners were lawfully acquired within this petition. It is indeed a course that has been taken in other suits. See for example the cases of ***John Joram Nyaga & Another vs The Honourable Attorney General, Nairobi High Court, Misc. Civil Application No. 1732 of 2004 (2007) eKLR*** (where the court held that the land

in issue was public land) and ***Clement Kipchirchir & 38 Others vs Principal Secretary, Ministry of Lands, Housing and Urban Development, Nakuru ELC, Petition No. 42 of 2013*** (where the titles of the petitioners were held to have been irregularly acquired as they were issued on forest land before degazettement of the forest) and ***Vekariya Investments Ltd vs Kenya Airports Authority & 2 Others (2014) eKLR*** (where the title of the petitioner was held to have been irregularly acquired) . The court has discretion to make a decision on whether or not the question of the legality of the title should be tried within the petition or by other means. It is however not easy task to make such determinations within constitutional petitions, for ordinarily, constitutional petitions are determined by way of affidavit evidence and submissions (although there is of course leeway to hear the petitions by way of viva voce evidence). On my part, I find it difficult to make a concrete finding as to the legality of the titles of the petitioners solely within the petitions before me and based exclusively on the affidavit evidence.

13. I would not wish to make any rash decision on whether or not the titles of the petitioners fall within the Mau Forest Complex. This is especially so given the importance of the Mau Forest, not only to the ecological stability of this country, but to the region and even the world at large. It follows that it is extremely critical that the question whether or not the titles of the petitioners are good titles be determined once and for all. This, in my view, can only adequately be done if the respondents are granted leeway to file a substantive suit seeking the cancellation of the titles of the petitioners (or such other appropriate orders and/or declarations that they may wish) so that their contention that the titles of the petitioners are bad titles and need to be cancelled, can be determined with finality. If such suit is filed as prescribed, then I will probably direct that the suit and the petition be heard together, and a conclusive order, on whether or not the titles of the petitioners are good titles worthy of the protection afforded by Article 40 of the Constitution, is made. Of course if no such suit is filed, then I will determine this petition based on the material before me. But I hesitate to move towards this step before first allowing the respondents the chance to file suit, and will only determine the petitions, as they are, as a last resort, if no suit as advised is filed.

14. I do admit that this is a rather unusual step that I have taken, for ordinarily, a petition is determined on what has been placed before the court. However, different cases present before the court with different challenges and the court cannot be beholden to technicalities of procedure. The court needs to be alive to the nature of the case before it, and come up with solutions that get to the bottom of the problem. It should not be forgotten that the core function of the court is to resolve disputes and to make determinate and conclusive findings on the rights of the parties. Where the court feels the need to deviate from what is standard procedure, the court should not be shy to do exactly that, if this is what it will take to get to the pith and core of the matters at hand. Indeed, that is the purpose of Article 159 of the Constitution, which demands that courts do justice to the parties without undue regard to technicalities. What is important, is that at the end of it all, justice is done, and seen to be done to the parties and to the public at large, especially where the issues at hand do not just affect the litigants who have presented themselves before court.

15. I do not believe that justice will be done in this case if I do not give opportunity to the respondents, to present a case on whether or not the titles of the petitioners are titles held within the Mau Forest. All I can give is an opportunity, and it falls upon the respondents to make a decision, whether or not to seize the opportunity given by the court. I therefore direct the respondents to file a suit seeking revocation of the titles of the petitioners or such other orders that they may deem fit, and to do so within 60 days from today.

16. I do not see any prejudice that is going to be caused to the petitioners. If the respondents take the opportunity given herein, the petitioners will have a golden opportunity to dispel any insinuation that their titles are bad titles. They do not need to live under the shadow or doubt that their titles are bad titles. In the event that their titles are clean titles, they will be afforded the full protection of the law. It is also therefore in their own interest that the question of the validity of their titles be determined with finality.

17. It is for the above reasons that I do not believe that it is in order to render a decision on this petition as matters stand. Instead, I make the following orders :-

**(i) The respondents are hereby granted 60 days to file an appropriate suit, which will determine the question whether the titles of the petitioners are genuine titles, whether the same should be allowed to stand, whether the same should be protected or whether the same should be cancelled and whether the land where the suit lands are situated are actually forest land forming part of the Mau Forest or such other related questions howsoever framed.**

**(ii) If no suit is filed as directed above, this petition will be heard and determined on the basis of the documents filed.**

**(iii) Depending on whether or not a suit is filed, further directions to be provided on a date to be given at the delivery of this ruling.**

18. For the moment, and for the reasons above, judgment on the two petitions is hereby held in abeyance.

19. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 12<sup>th</sup> day of October 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr. Ochang holding brief for Mr. Odhiambo for petitioners in petition No.306 of 2014.

Mr Karanja holding brief for Ms. Njoroge for petitioner in Petition no. 11 of 2014

Mr Kithinji Marete for respondents in petition No. 306 of 2014

Mr. Langat holding brief for Mr. Hari Gakinya for respondents in Petition no. 11 of 2014

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**