



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CONSTITUTIONAL PETITION NO. 2 OF 2016

**IN THE MATTER OF A PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION
OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE PETITIONERS**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE PETITIONERS UNDER ARTICLES 19, 20, 22, 23, 24, 40, 47 AND 50 OF
THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF UNPROCEDURAL, FRAUDULENT REGISTRATION, SUB-DIVISION
AND SALE OF LR NUMBER TRANSMARA/INTONA/2, NOW TRANSMARA/INTONA 33 AND
34 RESPECTIVELY**

BETWEEN

KITUI OLE YIAMBOI

OIBOO OLE KAPEEN (suing as the legal representative of the Estate of

JOSEPH MURUMBI (Deceased) PETITIONERS

VERSUS

AGRICULTURAL FINANCE CORPORATION 1ST RESPONDENT

INTONA RANCE LIMITED 2ND RESPONDENT

LAND REGISTRAR, KILGORIS 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

NORTH MOGOR HOLDINGS LIMITED 1ST INTERESTED PARTY

JOHN KINE OLE MASHARU & 98 OTHERS 2ND INTERESTED PARTIES

JUDGMENT

1. Introduction and Background:

The petitioners' state they are the legal representatives of the Estate of Joseph Murumbi (deceased). The petitioners by a petition dated 26th January 2016 seek the following reliefs:

- 1. A declaration that the purported sale of land reference number Transmara/Intona/2 to the 1st respondent was fraudulent, illegal, unlawful and unconstitutional.**
- 2. A declaration that any purported resultant subdivision and transfer of the suit property in favour of the interested party is null and void for want of compliance with the law.**
- 3. An order of injunction to restrain the respondents and interested parties by themselves, servants, agents or whosoever authorized on their behalf from howsoever interfering with or registering any dealings in respect of LR Numbers Transmara/Intona/33 and 34 respectively.**
- 4. An order for cancellation of title Nos. Number Transmara/Intona/33 and 34 and an order directing that transfer be effected in respect of the suit property in favour of the petitioners; or in the alternative.**
- 5. An order for compensation and payment of damages for violation of the petitioners' fundamental constitutional rights.**
- 6. The costs of the petition be borne by the respondents in any event.**

2. The 1st respondent, Agricultural Finance Corporation (AFC) had by notification of charge dated 19th December 1985 taken a charge over **LR No. Transmara/Intona/2** to secure a loan facility advanced to Intona Ranch Ltd, the 2nd respondent herein who were then the registered proprietors of the said property. The chargor defaulted in servicing of the loan facility and the AFC as chargee in exercise of its power of sale conferred under the charge sold the property in realization of the security. Firstly, the AFC bought the property at the public auction and had the same registered in its name before subsequently having the same subdivided and a portion thereof sold and transferred to North Mogor Holdings Ltd, the 1st interested party herein. The petitioner challenges these transactions in the present petition.

3. The petitioners contend the 2nd respondent, Intona Ranch Limited did not have a functional board of directors at the time it purported to take the charge and consequently the charge created over land parcel **Transmara/Intona/2** was null and void for want of authority and/or capacity on the part of the 2nd respondent to create a charge. The 3rd respondent, the land registrar Kilgoris is sued on account of the role he played in effecting the registration of the impugned transactions while the 4th respondent, the Attorney General is sued as the Principal Advisor to the Government of the Republic of Kenya to answer to the deeds of the 3rd respondent.

4. The 1st interested party is sued on account of having purchased one of the subdivisions of the suit property being **LR Transmara/Intona/34** in respect of which they are now the registered proprietors. The 2nd interested parties, John Kine Ole Masharu & 98 Others applied and were granted leave to be joined as the 2nd Interested Parties on account of the fact that they had been decreed in Nakuru HCCC

No. 104 of 2004 vide a judgment delivered on 29th July 2011 as being entitled to a portion of 1,089 acres out of **LR No. Transmara/Intona/2** on account of being adverse possessors.

5. The court on 21st April, 2016 dispensed with the petitioners' interlocutory application dated 26th February 2016 and gave directions that the petition be heard on its merits. The court directed the parties to argue the petition by way of written submissions and the parties filed their submissions as follows:

(i) The petitioners submissions dated 11th July 2016 were filed on 14th July 2016.

(ii) The 1st respondent's submissions dated 14th July 2016 were filed on 15th July 2016.

(iii) The 1st interested parties submissions dated 26th July 2016 were filed on 27th July 2016.

(iv) The 2nd interested party's submissions dated 27th July 2016 were filed on the same date.

The court in the premises in this judgment will rely on the petition and the affidavit sworn in support and the affidavits sworn in reply by the 1st respondent and the interested parties and the submissions filed on behalf of the parties. The 2nd, 3rd and 4th respondents did not file any responses and/or any submissions.

6. The Petitioners' Case

On 29th October, 2015 Kitui Ole Yiampoi and Oiboo Kapeen obtained grant of letters of administration Ad Litem to the estate of Joseph Murumbi (deceased) limited to the purposes only for filing suit and presumably the instant petition is that suit that the administrators wanted to file. The petitioners aver that the estate of the late Joseph Murumbi (deceased) had at all material times been one of the beneficial owners of land parcel **Transmara/Intona/2** being communal and/or ancestral land and as such owner the right over the property is infeasible by virtue of Article 40 of the Constitution. The petitioners allege that the 1st respondent had no legal right to sell the suit property which they claim had fraudulently been charged to the 1st respondent and want the court to declare that sale and the consequent and/or resultant subdivisions of land parcel **Transmara/Intona/2** into parcels **Transmara/Intona/33** and **34** a nullity.

7. The petitioners allege the 1st respondent acted fraudulently and cite the following particulars of fraud:

(i) Selling land to itself without an auction being carried out.

(ii) Selling the suit premises without the knowledge of the petitioners.

(iii) Obtaining title documents and registering the suit premises without the consent of the petitioners.

(iv) Purporting to create a charge on the suit property without a valid consent from the relevant land control board.

The petitioners further aver that the actions of the 1st respondent which were illegal and unlawful have deprived them their right to inheritance and their right to property. The petitioners allege that their right to fair administrative action under Article 47 has been violated and in consequence thereof their right to property and the protection thereof as guaranteed under Article 40 (1) (a) (b) and (3) of the Constitution has been violated and has come to court for redress.

8. The petition is supported by the affidavit sworn in support by Kitui Ole Yiamboi. By the affidavit the petitioners depone that Joseph Murumbi was allowed to settle on land parcel **Transmara/Intona/2** which they allege was both communal and ancestral for the benefit of the entire community until the time of his demise. The petitioners aver that they were unaware that the deceased had incorporated Intona Ranch Limited which company illegally obtained title to the suit property and fraudulently charged the same to

the 1st respondent. An abstract of title (green card) marked “**KOY-2**” is annexed and details the history and transactions respecting the parcel **Transmara/Intona/2**.

9. The petitioners further aver that the 1st respondent fraudulently and unprocedurally transferred land parcel **Transmara/Intona/2** to itself (annexture marked “**KOY-4**”) before allegedly causing the subdivision of the same and selling one of the subdivisions to recover the debt outstanding. The 1st respondent retained subdivision land parcel **Transmara/Intona/34** in its name while parcel **Transmara/Intona/33** was according to the petitioners transferred in the name of the 1st interested party. It is these titles the petitioners seek to be nullified and the title reverted to the petitioners or compensation to be paid to the petitioners as provided for under the Constitution.

10. The 1st Respondent’s Case.

The 1st respondent, Agricultural Finance Corporation opposes the petition vide a replying affidavit sworn by John K. Mutuma Advocate and a Legal Officer with the 1st respondent dated 1st March 2016. The 1st respondent avers that on or about 16th May 1985 the 2nd respondent applied for a loan from the 1st respondent amounting to kshs. 13,127,500/= to offset a bank overdraft, to finance development and equipment and for buying livestock. The loan application form is annexed and marked “**JKM1**”. The 1st respondent affirms that the loan application was approved and disbursed in the sum of kshs. 8,633,500/= against the security of **LR No. Transmara/Intona/2** as set out in the loan application form which was duly signed by the 2nd respondent. A copy of the certificate of official search dated 7th September 1998 annexed as “**JKM2**” indicates Intona Ranch Limited was registered as owner of **LR No. Transmara/Intona/2** on 9th February 1977 and that a charge for kshs. 8,683,500/= was registered against the title on 30th December 1985. The 1st respondent further avers that the 2nd respondent accepted the terms of the loan advanced to it by signing the certificate of acceptance of the loan offer on the terms set out on the letter of offer dated 16th September, 1985 annexed to the replying affidavit sworn by the said John K. Mutua and marked “**JKM3**”.

11. The 1st respondent asserts that contrary to the averments that the directors of the 2nd defendant did not execute the necessary documents, the directors of Intona Ranch Limited executed the loan application form and the certificate of acceptance of the term of the loan. Further, as the 2nd respondent experienced difficulties in repaying the loan, the 1st respondent states that its directors approached the 1st respondent on diverse occasions seeking indulgence to enable them to arrange for the repayment of the loan that had fallen due. For instance the 1st respondent avers that on or about 4th March 1993 Steven Omenge Mainda a director of the 2nd respondent wrote to the 1st respondent seeking to be allowed some time extension to enable the 2nd respondent to make arrangements to settle the loan. The copy of the letter is annexed and marked “**JKM4**”. The 1st respondent granted the accommodation to the 2nd respondent but the latter did not redeem the property as promised vide the said letter.

12. The 1st respondent further states that as the 2nd respondent did not make any single instalment payment towards the repayment of the loan, the 1st respondent initiated recovery process in exercise of its power of sale under the charge. The wife to one of the 2nd respondent’s directors one Sheila Murumbi approached the 1st respondent and pleaded for the suspension of the realization process as she was soliciting for money from friends and organizations to clear the outstanding loan. Letter by Sheila Murumbi dated 17th March 1997 carrying the proposal is annexed and marked “**JKM5**”. The 1st respondent states Sheila Murumbi did not honour the proposal and the 1st respondent conducted a sale by public auction on 20th November 1998 at which the 1st respondent bid for and purchased the property pursuant to the provisions of section 33 of the Agricultural Finance Corporation Act, Cap 323 Laws of Kenya which allows and permits the corporation to participate in an auction sale where it is the one exercising the power of sale. The 1st respondent thus denies the allegations it fraudulently and illegally transferred the land to itself. The 1st respondent asserts that following the purchaser and consequent

registration of the property in its name it became the absolute owner of the property and all the ownership rights were conferred upon it by virtue of the registration.

13. The 1st respondent further states, that there has been a similar suit over the same land the subject matter in the instant suit where similar issues were raised and canvassed and judgment was entered on merit namely-

(i) Nakuru HCCC No. 104 of 2004: John Kina Ole Masharu & 98 Others –vs- Intona Ranch Limited & Agricultural Finance Corporation.

(ii) Nakuru Civil Appeal No. 172 of 2012 Agricultural Finance Corporation –vs- John Kine Ole Masharu & 98 Others.

The court in Nakuru HCCC No. 104 of 2004 (above) delivered judgment after hearing evidence and visiting the land in question. The court vide the judgment delivered by **W. Ouko, J.** upheld the plaintiffs claim for adverse possession and entered judgment on the following terms:-

(i) The 99 plaintiffs are each entitled to eleven (11) acres of the suit property, Transmara/Intona/2 making a total of 1,089 acres while the balance of 1001 acres including the 20 acres where the farm occupies will be retained by AFC. Structures not belonging to the late Joseph Murumbi within this radius to be removed by the owners before (ii) below.

(ii) Both sides shall engage a surveyor to draw the extent of the two parcels as ordered in (i) above.

(iii) I award half of the costs of the plaintiff.

14. The copy of the judgment delivered on 29th July 2011 is annexed and marked “**JKM6**”. The 1st respondent avers that the judgment and decree in HCCC No. 104 of 2004 has been fully implemented and executed and that the petitioners’ instant petition is misconceived as it seeks to reverse an adjudication done by a competent court pursuant to a valid legal process. The 1st respondent contends that following the execution of the aforesaid court judgment it has regularly disposed the land decreed to it to the 1st interested party as the proprietor thereof.

15. The 1st Interested Party’s Case;

North Mogor Holdings Limited the 1st interested party filed a replying affidavit in response to the petition through Kitipa Ole Nashur a director of the company. The 1st interested party vide the replying affidavit sworn on 14th March 2016 asserts that it is the legally registered proprietor of Land **Parcel LR Transmara/Intona/34** and denies any imputations of fraud and/or impropriety in the acquisition and subdivision thereof as alleged by the petitioners. The 1st interested party states it made an offer to purchase the subject property which offer was accepted by the 1st respondent (Annexure “**KON-3**”). The 1st interested party executed a formal agreement of sale dated 19th October, 2015 with the 1st respondent (Annexure “**KON-5**”) and affirms that it honoured the full terms of the agreement of sale and that land parcel **Transmara/Intona/34** was transferred and a title issued in the name of North Mogor Holdings Limited on 17th November, 2015. The 1st interested party states that it took possession of the property and has since then been undertaking commercial farming activities on the property (certificate of title dated 17th November, 2015 annexed as “**KON-7**”).

16. The 1st interested party contends that its purchase of the property was procedural and lawful and asserts that the petitioners have no reasonable cause of action against it as at any rate the 1st interested party is a valid and bonafide purchaser for value without notice and its title is valid against all other competing interests.

17. The 2nd Interested Party's Case:

John Kine Ole Masharu swore a replying affidavit on behalf of himself and 98 others following their being enjoined as the 2nd interested parties. The deponent averred that he was one of the plaintiffs in the HCCC No. 104 of 2004 (OS) through which they had sought an order of ownership of land parcel **Transmara/Intona/2** by way of adverse possession. That as per the judgment delivered on 29th July, 2011 the interested parties were awarded by the court a total of 1089 acres which the court found they had acquired adversely from the 2nd respondent. The 2nd interested party further averred that Agricultural Finance Corporation (AFC) appealed the judgment vide Civil Appeal No. 172 of 2012 but the appeal was settled by consent in terms of the consent annexed and marked "**JKM2**". The deponent further deponed that the petitioner herein, his family and clan filed a petition No. 28 of 2013 challenging amongst others the legality of the sale of the suit property **Transmara/Intona/2** by AFC (Copy of petition and supporting affidavit marked ("**JKM3 (a) and (b)**"). The said petition No. 28 of 2013 was by consent of the parties withdrawn and marked as settled as per the consent and court order annexed and marked "**JKM4**".

18. The 2nd interested parties aver that the withdrawal of Petition No. 28 of 2013 paved the way for the subdivision of the suit property into **parcels 33 and 34** respectively and that presently the 2nd interested parties are the registered owners of land parcel No. **Transmara/Intona/33** as decreed by the court. The 2nd interested parties further state that the petitioners did not during the proceedings in Petition No. 28 of 2013 raise any issue of legal representation to the Estate of the late Joseph Murumbi and further aver that if the petitioners were genuine heirs of the Estate of the late Joseph Murumbi they would not have waited for over 25 years to petition for grant of letters of administration to the estate. The 2nd interested parties additionally state that the estate of Joseph Murumbi was fully administered by his late wife Sheila and that all his properties were bequeathed by way of a gift deed to the Joseph Murumbi Trust and that upon the demise of Sheila her estate was administered vide Succession Cause No. 2262 of 2000 at the High Court in Nairobi.

19. The 2nd interested parties further aver that the petitioners have not demonstrated they had any rights over the suit property which were capable of being violated. Besides the 2nd interested parties aver that the petitioners were aware of the proceedings in HCCC No. 104 of 2004 (OS) yet they never sought enjoinder in the suit to ventilate any interests they may have had.

20. The Parties Submissions, Analysis and Determination;

The petitioners in their submissions reiterated the facts and averments set out in the petition and the affidavit sworn in support. The petitioners submitted they were not aware and neither were they party to the previous suits concerning the suit property. It is further their submission that land parcel **Transmara/Intona/2** was communal land which was therefore not available to be offered as collateral by anybody. The petitioners further submitted Intona Ranch Limited neither had directors nor a secretary. The submission by the petitioners that the suit land **Transmara/Intona/2** was communal land owned by the Maasai Community and was ancestral land for the benefit of the entire community is considering the basis and foundation of the petition rather baffling. The petitioners have brought the petition claiming to be beneficiaries and heirs of the estate of the late Joseph Murumbi. The petitioners are in effect pursuing private property rights and not communal property rights on behalf of the Maasai Community as they are claiming their interest as beneficiaries.

21. The petitioners submission that they were unaware of the previous suits notably HCCC No. 104 of 2004 (OS) and Petition No. 28 of 2013 is hard to believe. The two suits were centered on **LR No. Transmara/Intona/2**. In HCCC No. 104 of 2004 (OS) 99 members of the Moitanik Clan who were squatting on the suit land filed the suit claiming adverse possession. This suit went on for hearing in Nakuru over a period of years and indeed the trial Judge Hon. Justice W. Ouko (as he then was) visited the locus in quo before he rendered the judgment on 29th July 2011. It is inconceivable that the petitioners who claim to be beneficiaries and heirs to the estate of the late Joseph Murumbi would have failed to know of the existence of the suit. I do not believe them and it is my view that they are being

economical with the truth.

22. Petition No. 28 of 2013 like the earlier suit was brought by members of the Uasin Gishu Clan of the Maasai Community and as earlier observed this petition which was brought by 359 petitioners against AFC, Intona Ranch Ltd and the members of the 2nd interested party (herein) was marked as settled by consent of all the parties. Again it is not possible that the petitioners would have been unaware of the suit. It is my view therefore the petitioners in bringing the instant petition concealed what was otherwise material information.

23. The petitioners have further in their submissions argued that the 1st respondent's exercise of power of sale was illegal as no notice of sale was given. It is evident from the evidence furnished by the 1st respondent that the 2nd respondent was advanced a loan that apparently it was unable to service. Directors of the 2nd respondent, notably Mr. S. O Mainda and Mrs. Sheila Murumbi acknowledged the indebtedness by the 2nd respondent and sought accommodation of the 1st respondent to be able to make arrangements to repay the loan. Despite being granted the accommodation they did not pay the loan necessitating the 1st respondent to exercise its power of sale over the property offered as security.

24. On the basis of the evidence placed before the court I accept and make a finding that the 2nd respondent was advanced a loan of kshs. 8,633,500/= on the security of **LR No. Transmara/Intona/2** and that owing to default on repaying the loan the 1st defendant in exercise of its power of sale sold the property and that the 1st respondent was properly entitled to buy the property at the auction under Section 33 of the Agricultural Finance Corporation Act, Cap 323 of the Laws of Kenya.

Section 33 (2) provides:

(2) At a public auction held in pursuance to of subsection (1) of this section the Corporation by its agent duly authorized in writing may bid for and purchase the whole or any part of the land offered for sale.

(3) The Corporation, as gent of the debtor, may transfer the land to itself or any other purchaser and give a good and unencumbered title to it, and may execute all such documents and do all such other acts as may be necessary to complete the transfer.

25. The transfer by chargee in exercise of power of sale dated 28th April, 1999 annexed as **"KOY-6"** by the petitioner was executed by AFC under section 33 (3) of the Agricultural Finance Corporation Act. On the face of it, stamp duty was paid on 29th April 1999. There is no evidence that the 2nd respondent challenged the said sale of the property to the AFC and in consequence therefore the transfer took effect from the date the transfer was executed although the same was registered on 8th May 2002 when the certificate of title was issued to the AFC. The 2nd respondents' interest in the suit property ceased following the sale and execution of the transfer to AFC and henceforth the AFC was entitled to deal with the property as the lawful owner. The contract of sale to the AFC was completed once the bid by the AFC to purchase the property was accepted at the auction.

26. The allegation by the petitioners that the 1st respondent acted fraudulently in having the property transferred to itself is unfounded and no evidence of fraud has been established. It is not enough to allege fraud; where fraud is alleged the party alleging fraud must specifically prove fraud and the standard of proof is much higher than on a balance of probability though not as high as in criminal cases where proof is beyond a reasonable doubt. I therefore do not consider the elements of Section 26 1 (a) and (b) of the Land Registration Act No. 3 of 2012 have been established or proved to enable the title issued to the AFC and the subsequent titles to the interested parties to be impugned. Accordingly the holding in the cases of **Arthi Highway Developers Ltd –vs- West End Butchery Ltd & 6 Others [2015] eKLR** and **Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another [2013] eKLR** which the petitioners have referred the court to have no application to the facts and circumstances of the present petition.

27. The 1st interested party's gist of the submissions was to the effect that the 1st interested party was the legal proprietor of land parcel **Transmara/ Intona/34** pursuant to a lawful purchase and that the 1st interested party was a bonafide purchaser for value without notice and was entitled to the protection of the court. Further the 1st interested party submitted that the petitioners have not satisfied the threshold for instituting their claim as a constitutional petition.

28. For its part the 2nd interested party submitted that the present petition is res judicata as the same subject matter was in issue in HCCC No. 104 of 2004 (OS) where the court determined ownership of the suit property conclusively and that determination of the suit can only be challenged either by way of appeal, review and/or setting aside of the judgment. The 2nd interested parties submission is that this court in entertaining and determining the instant petition may effectively alter and/or interfere with the decision of the court in the earlier suit which this court cannot properly do.

29. Issue of Bonafide Purchaser for Value Without Notice;

I have earlier in this judgment while summing up the case for the 1st interested party set out the circumstances leading to its purchase of parcel **LR No. Transmara/Intona/2** and on the basis of the facts, I am satisfied the 1st interested party was a bonafide purchaser for value without any notice. The petitioner did not demonstrate that the 1st interested party was party to any fraudulent dealing as from the evidence and documents availed the 1st interested party's sale was regular and procedural. In the case of **Zebak Limited –vs- Nadem Enterprises Ltd [2016] eKLR** I had occasion to consider and evaluate what constitutes bona fide purchase. In the case at paragraph 54 of the judgment I observed thus:-

“In the present case after carefully reviewing the evidence I am persuaded the defendant was a bonafide purchaser for value of the suit property without any notice of any defect in the title and I do not find it was party to any fraud that would entitle its title to be impeached. In my view its title cannot be impeached under Section 26 (1) (a) and (b) of the Land Registration Act, 2012. The plaintiff has not proved the defendant was party to any fraudulent dealing and from the evidence adduced it is clear the defendant regularly purchased the property and cannot be said to have acquired the property illegally, unprocedurally or through a corrupt scheme. I am satisfied the defendant met the test laid out in the Uganda case of Appeal in Katende –vs- Haridas & Company Ltd [2008] 2 E A 174 where the judges of appeal defined a bona fide purchaser thus:

“A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following:

- He holds a certificate of title;**
- He purchased the property in good faith;**
- He had no knowledge of the fraud;**
- He purchased for valuable consideration;**
- The vendors had apparent good title;**
- He purchased without notice of any fraud;**
- He was not party to any fraud.**

I agree with their Lordships itemization of what a person claiming to be a bonafide purchaser ought to show and I think the defendant in the instant suit has demonstrated all those requirements.”

In the present petition I would echo the same words in relation to the 1st interested party. I hold that the 1st interested party was a bonafide purchaser and that its title cannot be impeached.

30. Issue of Violation of Constitutional Rights;

As regards the 1st interested party's submission that the petitioners have not demonstrated they have a right or are entitled to the alleged right in respect to which an identifiable breach of a constitutional right has been occasioned by the respondents and/or the 1st interested party, the court finds the submission to be well founded as the alleged rights are not set out in any reasonable precision to enable the respondents to answer to them. The case of **Anarita Karimi Njeru –vs- The Republic [1976-1980] KLR 1272** established the threshold that a petitioner needs to satisfy in a constitutional petition. **Justices Trevelyn and Hancox** in the **Anarita Karimi** case 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 justice is done to his or her case) that he should set out with 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.”

31. The constitutional court in the case of **Trusted Society of Human Rights Alliance –vs- Attorney General & 2 Others [2012] eKLR** reiterated the principle in the **Anarita Karimi Njeru** case when it stated thus:-

“Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru that established the rule that requires reasonable precision in framing issues in constitutional petitions is an extension of this principle.”

I do not think the petitioners have satisfied the principle of precision in this case. The petitioners claim is to say the least imprecise. It is unclear whether they are staking claim to the suit land solely as beneficiaries to the estate of the late Joseph Murumbi and therefore entitled as his heirs or they are claiming the land for and on behalf of the community. The petition alleges the land was communal and ancestral and therefore intended for the benefit of the community. If that were the position there would have been no need to seek grant of letters of administration to present a public interest litigation. On the other hand if the claim is as a beneficiary of the estate of the late Joseph Murumbi it defeats logic why the petitioners waited for nearly 25 years to take out grant of letters of administration to the estate and even then only ad item letters of administration. The late Joseph Murumbi was survived by his wife Sheila Murumbi for nearly 10 years and one is left to wonder whether during her lifetime she did not take out letters of administration for her late husband's estate. The petitioners cannot claim a private right and at the same time claim a public interest right on the same facts.

32. However, as I have held earlier in this judgment that the 1st respondent had validly purchased the property and further having made a finding that the 1st interested party was a bonafide purchaser of land parcel **Transmara/ Intona/34** it follows that the petitioners cannot show that they had and/or have a right to the property deserving protection under Article 40 of the Constitution. To establish a breach to the right to property one has to demonstrate entitlement to the property. Halsbury's Laws of England, 4th Edition Vol. 8 (2) provides:-

“The protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned and that an applicant must establish the nature of his property right to enjoy it as a matter of domestic law.”

The petitioners have not shown they are entitled to the property or have any legitimate claim to it so that they can invoke the court's intervention for its protection. I hold there has been no constitutional

violation of the petitioners' rights deserving of any protection.

33. Questions of Res Judicata;

I believe I have said enough to show that the petition is unmeritorious but I wish to conclude by considering the 2nd interested parties submission that the petition is *res judicata*. Essentially the 2nd interested parties argue that to the extent a competent court has heard and determined a suit involving the same subject matter vide **Nakuru HCCC No. 104 of 2004 (OS)** and decreed that they were entitled to a portion of 1089 acres of the subject land the instant suit is *res judicata*. Section 7 of the Civil Procedure Act provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

34. The 2nd interested parties, it is a fact instituted the Nakuru HCCC No. 104 of 2004 (OS) claiming to have become entitled by reason of having been in adverse possession of **LR No. Transmara/Intona/2**. The claim was against Intona Ranch Limited and Agricultural Finance Corporation who are the 2nd and 1st respondents in this petition respectively. The court after full hearing of the suit rendered a judgment where it found and held that the 2nd interested parties who were the plaintiffs in the suit were in adverse possession of a portion of 1089 acres of the suit land and ordered that the suit land be subdivided and the said portion of 1089 be transferred to them. An appeal lodged by Agricultural Finance Corporation against this judgment was compromised on the terms that the judgment of the High Court was to be honoured and implemented. The judgment has since been implemented and the suit land has been subdivided into two portions **Transmara/Intona/ 33** and **34** and the former title has been transferred to the 2nd interested parties while the 1st respondent has sold and transferred land parcel **Transmara/Intona/34** to the 1st interested party. The petitioners had the chance to apply to be enjoined as a party in the suit. They did not and neither have they applied to the court that entered the judgment to set aside or review the judgment. That judgment remains intact and consequently the issues determined by the court remain final. The issue of ownership of the suit property **Transmara/Intona/2** was directly in issue in the Nakuru case and the court finally determined that issue.

35. I have elsewhere in this judgment held that the petitioners if they claim to be the administrators of the estate of the late Joseph Murumbi who was a co-owner of the 2nd respondent must have been aware of the case that was going on in Nakuru involving the suit land which they now lay claim to. After all, the plaintiffs in this suit (99 in number) were all residing on part of this land. Is it possible the petitioners could be unaware of the suit when even the court visited the land? I do not think so. This petition must be a belated attempt at turning back the clock in the guise that some fundamental rights of the petitioners have been infringed and/or violated. Thanks to the 2010 Constitution which opened doors to all citizenry to access the courts for protection of alleged and/or threatened breach or violations of fundamental rights. The courts have to be watchful that only meritorious constitutional petitions that satisfy the threshold of a constitutional petition are sustained. This petition falls short of meeting tht threshold.

36. The net effect of the present petition is that the petitioners in a sense are asking this court to annul and/or reverse the judgment in HCCC No. 104 of 2004 (OS). This court has concurrent jurisdiction with the court that passed the judgment and cannot sit on appeal on the decision of that court. If the petition were to be granted, the effect would be that this court will have set aside the earlier judgment rendered by **Hon. Justice W. Ouko** and it has no power to do so.

37. Considering the parties before the court and the issues that call for determination, I am of the view that the instant petition contravenes Section 7 of the Civil Procedure Act and that the same is *res judicata*. Although the petitioners have advanced the argument that they were not a party in the earlier suit, the position is that Intona Ranch Limited who was the registered owner was a party and the

petitioners interest, if any, can only arise through the said company which they admit was incorporated by Joseph Murumbi (deceased) and was the registered proprietor of the suit property. Although Joseph Murumbi (deceased) died in 1990 and his wife Sheila Murumbi (deceased) in 2000 the petitioners did not take out Ad Litem letters of administration until 29th October 2015 long after the judgment in the Nakuru case was given.

38. In the case of **Suleiman Said Shabhal –vs- IEBC & 3 Others [2014] eKLR** the Court of Appeal while considering what constitutes *res judicata* stated thus:-

“To constitute res judicata there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

Lenaola, J. (as he then was) in the case of **Okiya Omtatah Okoiti –vs- Communications Authority of Kenya & 14 Others [2015] eKLR** similarly stated thus:-

“For res judicata to be invoked in a civil matter therefore, the issue in the current suit must have been previously decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia & Another –vs- Attorney General and Others [2005] 1EA 83)”.

The doctrine of *res judicata* as espoused under Section 7 of the Civil Procedure Act seeks to entrench finality in litigation so that parties desist from relitigating on issues that the courts have already made determinations on in previous suits.

39. The court in the case of **E. T –vs- Attorney General & Another [2012] eKLR** succinctly set out the position when it stated:-

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi –vs- National Bank of Kenya Ltd and Others [2001] EA 177 the court held that,

“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J., in the case of Njangu –vs- Wambungu and Another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, “if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.”

40. In the present petition, the petitioners were in a long slumber, took a back seat and after the court labored and rendered its decision and there were attempts and progress in implementing the resultant judgment in the decided case, the petitioners suddenly were awakened from their slumber and filed the present petition. Never mind the 2nd respondent was the company registered as owner of the suit land and it is through the 2nd respondent which the petitioners admit was owned by Joseph Murumbi (deceased) and his wife Sheila Murumbi (deceased) that they claim an interest as beneficiaries of the Estate of Joseph Murumbi. Why they never joined in the Nakuru suit is difficult to understand as it is only in that suit that they could have asserted their interest and rights, if they had any. The court determined the rights of the parties who were before it and the subject matter was the suit property which the petitioners claim entitlement to in this petition. The ownership of that property has been finally determined by that court and this court cannot interfere with that determination. I hold the instant petition to be *res judicata* and

unsustainable.

41. In the premises and for all the reasons I have given above, I have come to the determination that the petition lacks any merit and the same is dismissed with costs to the 1st respondent, the 1st and 2nd interested parties.

Judgment dated, signed and delivered at Kisii this 25th day of November, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Otieno for the petitioners

Mr. Mamboga for the 1st Respondent

N/A for the 2nd Respondent

N/A for the 3rd and 4th Respondents

Ms. Ogonjo for the 1st interested party

Mr. Ogola for the 2nd to 100th interested parties

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE