



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

**AT NAKURU**

**PETITION 56 OF 2014**

**KARINO OLE NAKURO.....1<sup>ST</sup> PETITIONER**  
**JOHN OLE PARSAMBA.....2<sup>ND</sup> PETITIONER**  
**SAITOTI OLE KILOKU.....3<sup>RD</sup> PETITIONER**  
**JACKSON MANAI MARIMBE.....4<sup>TH</sup> PETITIONER**  
**IPITIET OLE KILONGU.....5<sup>TH</sup> PETITIONER**  
**KUSEU OLE MALOI .....6<sup>TH</sup> PETITIONER**

**VERSUS**

**NGATI FARMERS CO-OP SOCIETY.....1<sup>ST</sup> RESPONDENT**  
**KENYA ELECTRICITY GENERATING CO**  
**LIMITED (KENGEN).....2<sup>ND</sup> RESPONDENT**  
**THE CABINET SECRETARY**  
**MINISTRY OF ENERGY & PETROLEUM.....3<sup>RD</sup> RESPONDENT**  
**THE CABINET SECRETARY, MINISTRY OF INTERIOR &**  
**COORDINATION OF NATIONAL**  
**GOVERNMENT.....4<sup>TH</sup> RESPONDENT**  
**THE NATIONAL POLICE SERVICE.....5<sup>TH</sup> RESPONDENT**  
**THE INSPECTOR GENERAL**  
**OF THE NATIONAL POLICE SERVICE.....6<sup>TH</sup> RESPONDENT**

THE CHIEF LAND REGISTRAR.....7<sup>TH</sup> RESPONDENT

THE HON. ATTORNEY GENERAL .....8<sup>TH</sup> RESPONDENT

### RULING

*(Constitutional petition; petition inter alia seeking orders of adverse possession and compensation over land; land said to be Maasai Community land; application to strike out on basis that the issue of adverse possession had previously been determined; controversy over judgment in the previous suit and whether it gave the whole land or only part of it to the petitioners; whether petition should be struck out; petition stayed pending clarification of the effect of the judgment in previous suit)*

1. This suit is a Constitutional Petition, filed through Prof. Tom Ojienda Senior Counsel, by the 6 petitioners. The petition is said to be filed by the six persons on behalf of themselves, their families and all members of the Maasai Community residing on L.R Narok/Maiella Estate No. 1380, 2662 and 8398/2 (the suit properties). In the petition, it is stated that there are over 5,000 members of the Maasai community who are resident on the land. The 1st respondent is a Cooperative Society; the 2nd respondent is a limited liability company engaged in electricity power generation; and the 3rd to 8th respondents are public officers and State institutions of the Government of Kenya.

2. It is averred in the Petition, that the three suit properties are the ancestral land of the petitioners and the Maasai community. It is averred that the Maasai have suffered massive land dispossession dating back to the colonial days. It is stated that subsequent post-independence government driven initiatives have continued to alienate land from the Maasai community and that private entities have also not been left behind. It is averred that the suit properties sit on a lucrative geothermal power basin and that the respondents together with some government functionaries are keen to make a killing by displacing the petitioners and the people they represent. It is averred that the petitioners and the persons they represent have at all times lived on the suit properties. It is pleaded that during the colonial period, the suit properties were owned by a white settler who obtained title documents and later sold the same to the 1st respondent despite the fact that the petitioners and the persons they represent were in occupation of the suit properties. It is pleaded that the petitioners and the persons they represent have constructed at least 1,100 permanent and semi-permanent homes and that the properties also have communal houses, social amenities such as schools, water reservoirs, churches and shrines in occupation and use by the petitioners and the persons they represent. It is pleaded that about a year to the filing of the petition, an Administration Police post was erected and Administration Police Officers deployed and that these police officers have barred the petitioners and the people they represent, from tilling the land which has caused food shortages.

3. It is pleaded that on 14th February 1996, the 1st respondent, filed the suit Nakuru HCCC No. 89 of 1996 (OS) against 17 representatives of the petitioners, seeking to have them evicted from the suit properties. It is pleaded that the defendants in the case, filed a defence and counterclaim based on adverse possession. It is stated that the suit was heard by Rimita J, and by a judgment delivered on 12 May 2000, the plaintiff's suit was dismissed and the counterclaim was allowed. An appeal was filed and through a judgment delivered on 23rd July 2009, the judgment was upheld. It is averred that through these judgments, the 1st respondent lost any entitlement to the suit properties.

4. Subsequently in the year 2005, the petitioners' representatives filed another suit, being Nakuru HCCC No. 267 of 2005 (OS) claiming title by way of adverse possession. The suit was heard by Koome J (as she then was) and by a judgment delivered on 17th November 2006, the suit was dismissed as being res judicata. An appeal was filed, being appeal No. 330 of 2009, which appeal was dismissed and the judgment of Koome J, affirmed.

5. It is contended that despite this, the respondents have continued to intimidate the petitioners and the persons they represent to have them evicted from the suit properties; that the 1st respondent has been negotiating a sale of the properties to the 2nd respondent; that the 2nd respondent has trespassed into the suit properties and started excavating and digging trenches; that the 2nd respondent has not sought

participation of the petitioners to present their comments on the geothermal projects undertaken by the 2nd respondent on the suit properties; that the 2nd respondent has commenced drilling of geothermal wells thus displacing the petitioners and environmental pollution.

6. It is pleaded that sometimes in the year 2009, the 2nd respondent (Kengen), approached the petitioners to have them vacate the land parcel Narok Maiella LR No. 8392/2, so that Kengen may expand its geothermal activities, but their compensation proposal was too low. They abandoned the issue when it became apparent that the venture would be too costly. It is stated that subsequently, the 1st respondent purported to file an application for eviction in the suit Nakuru HCCC No. 267 of 2005 (OS) which application was allowed by Hon. J. Mwaniki, the Deputy Registrar, who on 3rd July 2013, issued eviction orders of the petitioners and the people they represent. It is contended that this order was illegal, but nevertheless in July 2013, the respondents together with over 300 youth descended on the land parcels No. 8398/2 and L.R No. 2662 and indiscriminately attacked the petitioners and the people they represent, burnt their houses and some persons were killed. It is said that this action violated the petitioners' right to property and was a violation of their human rights. It is averred that the Government formed a committee to look into the matter with a view to compensation but nothing tangible has been forthcoming. It is averred that there is credible information that the 1st and 2nd respondents intend to evict the petitioners from the suit properties reminiscent of the situation of July 2013.

7. In the Petition, the petitioners have asked for the following orders :-

1. *A declaration that the petitioners, their families and all the members of the Maasai Community residing on the land parcels Narok/ Maiella Estate No. 2662, 1380 and 8398/2 are in lawful occupation of the said properties on account of it being their ancestral and communal land.*

2. *A declaration that the petitioners, their families and all the members of the Maasai Community residing on the suit properties have acquired title to the said properties by adverse possession and/or prescription.*

3. *A declaration the acts and omissions of the 1st-6th respondents violated the fundamental rights and freedoms of the petitioners, their families and all the members of the Maasai community residing on the suit properties under Articles, 21 (1) (2) (4) (5) and 6; 28, 29 (c) (d) and (e) and (f); 31 (b); 40 (1) (a) and (b); 4(3) and (4); 43(b) (c) and (f); 47 (1) and (2); 50 (1); 53(1) (c) and (d); 57 (c) and 63 of the Constitution of Kenya.*

4. *An order of permanent injunction restraining the respondents either by themselves, their agents, servants or otherwise howsoever from evicting the petitioners, their families, and all the members of the Maasai community from the suit properties.*

5. *An order of permanent injunction restraining the respondents from destroying the houses of the petitioners, their families and all the members of the Maasai Community on the suit properties.*

6. *An order of permanent injunction restraining the respondents from interfering with the petitioners and the persons they represent from tilling the suit properties.*

7. *An order directing the Chief Land Registrar to cancel any sub-divisions, titles and transfers made in respect of the suit properties.*

8. *Without prejudice to the foregoing, and in the alternative, a declaration that in the event that it is necessary to compulsorily acquire the suit properties the same must comply with the requisite constitutional requirements.*

9. *An order for compensation for breach of fundamental rights and freedoms compelling the respondents to compensate the petitioners and all other members of the Maasai community who suffered harm on account of the evictions carried out by the respondents on 26 July 2013.*

10. *Costs of the petition.*

11. *Any other and/or further relief that this Honourable Court may deem fit.*

8. The 1st respondent (also described herein as Ngati Farmers) filed appearance through the law firm of M/s Mirugi Kariuki & Company Advocates. It also filed a replying affidavit sworn by Patrick Karanja Mwahuki, the Chairman of Ngati Farmers Co-operative Society. It is inter alia averred that the issues in the Petition are *res judicata* having been dealt with in Nakuru HCCC No. 89 of 1996, Civil Appeal No. 64 of 2004, Nakuru HCCC No. 267 of 2005 and Civil Appeal No. 330 of 2009. It is explained that in the suit Nakuru HCCC No. 89 of 1996, Ngati Farmers sued some persons over the ownership of the suit properties. A counterclaim for adverse possession was made. It is averred that the court visited the land and declared that the defendants in the suit had acquired title by way of adverse possession to 2581 acres of parcel No. 2662 and 1626 acres in parcel No. 1380. Ngati Farmers was then ordered to transfer 2581 acres of the land parcel No. 2662 and 1626 acres of the land parcel No. 1380 to the defendants therein (who are the petitioners in this suit) and it religiously followed the decree. A decree is annexed to the said affidavit. It is averred that the court held that the defendants or the Maasai community had not acquired by way of adverse possession any acre of the land parcel LR No. 8398/2. It is averred that Ngati Farmers appealed the judgment in Nakuru Civil Appeal No. 64 of 2004 but the appeal was dismissed. It is stated that in contravention of the *res judicata* rule, the petitioners filed the suit Nakuru HCCC No. 267 of 2005 (OS) which was dismissed as being *res judicata*. Their appeal in Nakuru Civil Appeal No. 330 of 2009 was dismissed, the Court of Appeal maintaining that the suit was *res judicata*. It is averred that another Constitutional Petition, being Nakuru Constitutional Petition No. 2 of 2012 was also filed over the land parcels LR No. 8398/1 and 8398/2. It is contended that this petition does not raise any new issues and should be dismissed with costs.

9. The 2nd respondent entered appearance through the law firm of M/s Mohammed Muigai Advocates. They immediately filed a Notice of Preliminary Objection dated 29 September 2014. Though six points were cited, they all boil down to the contention that this suit is *res judicata*. On 27 October 2014, the 2nd respondent filed a Replying Affidavit sworn by Jennifer Oduor, its property manager. It is reiterated that the claims of adverse possession are *res judicata*; that the interest being pursued herein is the same interest pursued in the previous suits; that any action to enforce the judgment can only be done in the case Nakuru HCCC No. 89 of 1996 (OS); that a constitutional petition is not the correct forum; that the 1st respondent had a right to sell land not falling within the 2581 acres of Narok/ Maiella Estate No. 2662 and 1626 acres of the parcel No. 1380; that the petitioners lack locus standi as they have inter alia not identified with any degree of specificity who they purport to represent; that the process of instituting a representative suit has not been followed; that Kengen properly transacted with Ngati Farmers in respect of the suit properties; that an EIA was conducted; and that there has not been any forceful evictions.

10. When the matter first came before me on 17 November 2014, I directed that the issues in the Preliminary Objections be codified into an application to strike out the Petition and gave liberty to the petitioners to reply to such application. The 2nd respondent filed an application dated 24 November 2014 whereas the 1st respondent filed an application dated 25 November 2014. The gist of both applications is that the matters in this suit are *res judicata*. To the applications were annexed the various past judgments and orders in Nakuru HCCC No. 89 of 1996, Nakuru Civil Appeal No. 64 of 2004, Nakuru HCCC No. 267 of 2005 and Nakuru Civil Appeal No. 330 of 2009.

11. The petitioners filed a replying affidavit sworn by Karino Ole Nakuro. Mr. Nakuro has referred to the judgment of Rimita J in Nakuru HCCC No. 89 of 1996 and to the paragraph stating that "**... the plaintiff's claim fails. The defendants' counterclaim succeeds and it is allowed...**". It is averred that the final judgment did not qualify the portions which the defendants (Maasai community) were entitled to, but that their counterclaim for the three parcels was allowed. It is pointed out that subsequent proceedings did not reverse the judgment of Rimita J. It is contended that a proper analysis and interpretation of the judgment renders the petitioners the lawful owners of the suit properties. It is averred that despite the judgment, the respondents have been threatening the petitioners with eviction and that Kengen has entered into agreements with Ngati Farmers over the suit properties in respect of portions of approximately 3092 acres. It is argued that the petition seeks orders in respect of occupation and title to

land; violations of fundamental rights and freedoms; protection from arbitrary evictions; protection from arbitrary demolition or destruction of houses; enforcement of their right to till the land; lawful compulsory acquisition of land; compensation on account of harm, injury and loss of property occasioned by the eviction of 23 July 2013. It is contended that it would not be fair to require the petitioners file separate actions for vindication of their rights.

12. The applications to strike out were canvassed on 5 February 2015. Mr. Lawrence Karanja for the 1st respondent argued that it cannot be said that the petitioners herein were not represented in the previous suits and that the issues in this petition have already been litigated before. It was his position that the judgment of Rimita J, did not award the petitioners the three parcels of land in issue, and if that is the case, they should move to enforce the decree in the said suit. He submitted that if they have been threatened with eviction yet the court awarded them the suit properties, they should file for contempt and seek to set aside the order for eviction. Mr. Imende for the 2nd respondent, was of the view that there cannot be any contest that the matters have been determined and that in fact there had been a finding in the case Nakuru HCCC No. 64 of 2004 that the said matter was *res judicata*. He argued that the issue of ownership cannot be relitigated by way of a constitutional petition. He submitted that any claims for compensation may be filed in the previous suits.

13. Prof. Ojienda submitted that the petition seeks to affirm rights that were granted in the judgment of Rimita J; that the petition seeks to protect a violation of those rights; that eviction cannot be issued unless there is a resettlement plan; and that this petition does not seek an interpretation of the previous judgments.

14. All counsels referred me to various authorities all of which I have read and considered in this ruling. I take the following view of the matter.

15. The issue before me is whether or not the petition should be struck out, and the basic theme is that this petition is *res judicata*. It is not in contention that there have been previous suits. The first suit was Nakuru HCCC No. 89 of 1996. It is a suit filed by Ngati Farmers against 17 persons, namely, Councillor John Ledidi, Kelesi ole Pushati, Kariwo ole Kamasia, Ipote ole Kiloku, Lemei ole Punyua, Pushati ole Kipashi, Masii ole Siriai, Chief Hassan, John ole Siriai, Cheringot ole Siriai, Lemon ole Punyua, Kosev ole Maloi, Namesi ole Mosheshi, Ole Nkuku, Madero, and Moshoga ole Kashikwa. The 17 defendants filed defence and counterclaim in which they sought orders that they are entitled to the suit properties by way of adverse possession. The matter was heard by Rimita J, who delivered judgment on 12 May 2000. It appears to me that the court did not consider the 17 defendants as the only defendants and claimants in the counterclaim, for there are various paragraphs in the judgment that allude to the defendants generally as "the Masai". It looks as if the court considered the 17 defendants as representing the interests of the Maasai community who were in occupation of the suit parcels of land. The judge made the conclusion that "*the plaintiff's claim fails. The defendant's (sic) counterclaim succeeds and is allowed. The plaintiff will pay the costs of the suit and the counter-claim...*". This provoked an appeal by Ngati Farmers, registered as Nakuru Civil Appeal No. 64 of 2004. The appeal was heard and judgment read on 23 July 2009. The appeal was dismissed.

16. Another suit, being Nakuru Civil Suit No. 267 of 2005 (OS) was filed by Joseph Kashau Olokhua & Others suing on behalf of all members of the Maasai Community residing on LR No. 2662, 1380 and 8398/2. The matter was heard by Koome J. The learned judge found that the suit Nakuru HCCC No. 64 of 1996 was a representative suit, just as the case No. 267 of 2005 was. She found that the plaintiffs were relitigating on behalf of the same claimants, the Maasai community, just as the defendants in the suit No. 267 of 2005. She found that the matter had been litigated before and she dismissed the suit. This judgment was affirmed by the Court of Appeal in Nakuru Civil Appeal No. 330 of 2009 through a judgment delivered on 11 November 2011. The Court of Appeal held that the appellants were not pursuing a different cause of action to what had been decided before.

17. This petition appears to have been instituted by persons who appear to have different names from the principal litigants in the previous suits. But to me, it makes no difference. They are attempting to institute a suit on behalf of the Maasai community who are resident in the three suit properties. That is exactly

what the plaintiffs in the suit Nakuru HCCC No. 267 of 2004 had described themselves. The petitioners herein, in the guise of being different people, cannot relitigate the same issue, that has been litigated before. The previous litigants, even if they did not explicitly name the petitioners herein, did litigate on their behalf as well. I am persuaded that in so far as the issue touches on the ownership of the three suit properties, whether by adverse possession or otherwise, that issue has already been litigated and cannot be the subject of subsequent litigation.

18. Prof Ojienda, argued that the judgment of Rimita J, gave the petitioners the whole of the three suit properties. He based his argument on the conclusion in the judgment which "*dismissed the plaintiff's case and allowed the defendants' counterclaim*". Mr. Karanja and Mr. Imende did not agree. Their view was that only portions of two of the suit properties, L.R Nos. 1380 and 2662, were granted to the "Maasai Community", that is, 1626 acres of the parcel No. 1380, and 2581 acres of the parcel No. 2662. Their position was that not an inch of the parcel No. 8398/2 was given to the Maasai. They buttressed this argument by referring to the decree that was issued pursuant to the judgment. It should be noted at this juncture that the parcel No. 1380 measures 8,245 acres; parcel No. 2662 measures 5000 acres; and parcel No. 8398/2 measures 3463 acres.

19. I can see where both Prof. Ojienda on one side, and Mr. Karanja and Mr. Imende on the other side, derive their respective positions. The judgment did not particularly specify that judgment was entered for the Maasai in respect of certain specified portions, but the decree did, and it is open to conjecture whether the decree as extracted agrees with the judgment. There is of course controversy as to how the judgment of Rimita J ought to be interpreted. But I do not think that the proper way of resolving that controversy is by filing a Constitutional Petition seeking, especially, declarations of adverse possession over the same suit properties that were subject to litigation before. The avenue is to file an appropriate application for interpretation of the judgment and/or decree before the court that issued that judgment and/or decree. The question is in fact well answered by the provisions of Section 34 of the Civil Procedure Act, CAP 21, which is drawn as follows :-

20. It will be seen from Section 34 (1) above, that questions relating to the decree or satisfaction of the decree, are to be determined by the court executing the decree ***and not by a separate suit*** (emphasis mine). What the petitioners have done is precisely that which is barred by Section 34 of the Civil Procedure Act. It may be argued, as was argued by Prof Ojienda, that this suit does not seek to interpret the judgment in the previous suits, but to affirm rights that the said judgments conferred upon the petitioners. That may be so, but the controversy of what the judgment entailed is in question, a question which I am not qualified to determine, as that can only be determined by the court which issued the decree. Before that controversy is settled, we cannot say for sure, whether or not the petitioners have any rights over the suit properties that deserve to be protected or which have been violated. None of the parties have given me any order which has clarified the issue herein. If the matter had been broached and settled in the said suit, I have no idea, for no party annexed any order that clarified the point.

21. In my view, the only way that this Court can determine whether or not this petition is well grounded, is by first being clear on what interpretation is to be given to the judgment in Nakuru HCCC No. 89 of 1996. It is apparent to me that there is ambiguity as to the import of that judgment. It is only after the ambiguity is dispelled, that we can be clear on a critical fact, that is, whether or not the suit properties are owned by the petitioners, or whether, it is only some and/or portions of some, which are owned by the petitioners. A determination of whether or not this petition is competent or incompetent, and whether or not the petition should proceed as drawn, can only be made after this critical fact is made clear. There are questions in this petition, such as who is to be paid any compensation over a compulsory acquisition, or who is to give permission for use of the suit properties, or who is competent to transact over the suit properties, that I will not be able to determine until the issue of how the judgment in Nakuru HCCC No. 89 of 1996 is to be interpreted is sorted out. I therefore hesitate to strike out this petition or order that it is a competent petition before that question is determined.

22. Having heard the preliminary objections and the applications to strike out the petition, I am of the view that a critical fact, touching on the interpretation of the judgment in Nakuru HCCC No. 89 of 1996, first needs to be made clear before I can make any determination in this matter. I therefore make the

following orders :-

*1. That the parties herein or either of them, or the parties in the said suit Nakuru HCCC No. 89 of 1996, or either of them, do file an appropriate application in the suit Nakuru HCCC No. 89 of 1996, seeking the interpretation of the judgment and decree issued therein, specifically, whether the decree issued agrees with the judgment or not, and if not, what interpretation is to be given to the judgment in respect to the ownership of the properties LR Nos. 1380, 8398 and 2662.*

*2. That pending a determination of the above question this matter is hereby held in abeyance and directions will be given after either party tables a determination of 1 above.*

*3. That either party be at liberty to apply.*

23. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> day of February 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**In presence of :-**

Mr Biko holding brief for Prof Ojienda for petitioners

Mr D M Gatonye for 1<sup>st</sup> respondent

Mr Mugambi Nguthari holding brief for Imende for 2<sup>nd</sup> respondent

Ms Khatambi for 3<sup>rd</sup>- 8<sup>th</sup> respondents

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**