Nderi (Deceased) & 4 others (On Their Own Behalf and on Behalf of 32 Members of the Family of the Late Senior Chief Nderi Wang'ombe) v Services & another (Civil Appeal 21 of 2019) [2025] KECA 962 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 962 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 21 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

APRIL 11, 2025

BETWEEN

SILVESTER WANG'OMBE NDERI (DECEASED) ..... 1ST APPELLANT

ANDREW GICHOHI NDERI ..... 2ND APPELLANT

PETER WANG'OMBE NDERI ..... 3RD APPELLANT

ELIZABETH WAMBUI NDERI ..... 4TH APPELLANT

SEBASTIAN WACHIRA NDIRANGU ..... 5TH APPELLANT

ON THEIR OWN BEHALF AND ON BEHALF OF 32 MEMBERS OF THE FAMILY OF THE LATE SENIOR CHIEF NDERI WANG'OMBE

AND

MINISTRY OF MEDICAL SERVICES ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an Appeal from the judgment of the Environment and Land Court of Kenya at Nyeri (L.N. Waithaka, J.) dated 1st March 2018 in ELC Petition No. 3 of 2014 (Formerly Nairobi HC Petition No. 310 of 2011)

JUDGMENT

1. Senior Chief Nderi Wang'ombe was one of the powerful chiefs in Central Kenya in the pre-independence era. Like many powerful chiefs of that era, he had many wives (said to be 28 of them) and many children. His stature also came with prime parcels of land which were occupied by members of his clan. It is worthy to note that before the colonial era land was not registered as we know it today and it was held by clans in trust for all its members.

2. Subsequently, however, following the consolidation and adjudication process, the land was registered in the names of the senior family members to hold in trust for the other members of the clan.

3. The Nderi Family say they were registered as owners of a prime parcel of land known as Aguthi/Gatitu/582 which was near the provincial headquarters of Central Province. There were, nonetheless, no documents availed to the court in support of that assertion. Sometime in 1955, the colonial government realizing the need to expand the Provincial General Hospital and approached the Senior Chief and requested him to donate some land for that purpose. The Chief agreed and he, on behalf of the Family, donated 8.3 acres out of the 17.3 acres leaving 9 acres for the Family.

4. There doesn't seem to have been a problem then, but later in 1959, the Government appears to have decided to take the remainder of the said parcel for further expansion of the Hospital, this time without consultation or permission from the Nderi Family. 50 years later, the Family wrote to the relevant government ministries seeking either the return of the nine acres or compensation in terms of cash or by allocation of an alternative parcel of equivalent value. Negotiations commenced, valuations of the property was done; offers and counter offers were made, but unfortunately, no agreement was reached and the matter was escalated to court.

5. The appellants who described themselves as trustees of the entire family of the late Senior Chief Nderi Wang'ombe moved to the Environment and Land Court (ELC) in Nyeri by way of Petition No. 3 of 2014, formerly Nairobi HC Petition No. 310 of 2011 dated 13th December 2011, seeking orders as follows:

    a. A declaration that alienation of part of their land reference Aguthi/Gatitu/582 measuring 9 acres is a violation of their Constitutional rights to property under Article 40 of *the Constitution* of Kenya and/or protection from deprivation of property contrary to law;

    b. A declaration that they are entitled to compensation by the respondents on account of the unconstitutional deprivation of their property as follows:

        i. Current open value of the land Kshs.

            101,146,320.00

        ii. Add 15% of (i) above in accordance with the Compulsory Acquisition Act, Cap 295 Laws of Kenya... Kshs.15,171,948.00

        (iii) Loss of use.....Kshs.98,512,302.00 Total.....Kshs.214,830,570.00.

    c. An order directing the respondents to pay the petitioners a sum of Kshs.15,000,000 by way of punitive and/or aggravated damages;

    d. Interest on (b) and (c) above at court rates;

    e. Costs of the petition;

    f. Such other order or orders as the court may deem just.

6. The petition was supported by the affidavit of the 1st appellant, Silvester Wang'ombe Nderi sworn on 1st February 2012 and filed on 3rd February 2012 in which it was deponed that before independence, the Chief donated 8.3 acres out of Aguthi/Gatitu/582 to the Government of Kenya for extension of the Nyeri Provincial General Hospital (the hospital); that when the actual extension took place, the Government acquired the whole 17.3 acres of Aguthi/Gatitu/582 thereby compulsorily acquiring the extra 9 acres thereof; that the family of the Chief has been seeking from the Government of Kenya,

Ministry of Health and lately, Medical Services, return of the excess 9 acres acquired over and above the 8.3 acres; that over time, there has been consensus on the following as a way of compensation:

i. Acquisition of land of the same value and acreage elsewhere within Nyeri Municipality; and

ii. Payment of fair price for the entire 9 acres including the loss of user for the entire period.

7. It was further deponed that through further negotiations between the Government of Kenya, the Ministry of Health, the Ministry of Medical Services and the family of the Chief, it was resolved that the Family be compensated by a fair price for the 9 acres as alternative efforts by the Government of Kenya and the Ministry of Health to obtain alternative land within Nyeri Municipality had failed. It was indicated that the 9 acres were valued at Kshs.214,830,570.00.

8. The petition was also supported by the affidavit of one Magdaline Nyakiine Nderi, who deposed that she was the only surviving wife of the Chief and reiterated that the Government illegally or irregularly acquired 9 acres out of their land. She reiterated that their family engaged the Government to compensate them to no avail.

9. The petition was opposed on the grounds that the hospital had been in occupation of the suit property even before 1959; that the suit land was reserved for the hospital on 21st January, 1959 and that the Hospital's possession of the suit property has been pursuant to a 1st registration effected in favour of the Chief Secretary Corporations. It was urged that there was no evidence or official record to show that the suit land was compulsorily acquired from the appellants either as alleged or at all.

10. PW2, James Githang'a, a valuer trading in the name Camp Valuers carried out the valuation and added the 15% statutory interest for compulsory acquisition. He stated that after taking into account all factors, he found the market price of the property to have been Ksh.214,830,570.00. He produced the valuation report as exhibit. He stated that in 2014, he received instructions to make a further valuation in consideration of the changing market values and that in using the criteria he used in making the earlier valuation, he found the current market value of the property to be Kshs.402,521,010.00

11. After hearing the parties and considering their submissions, the learned Judge observed that despite having reiterated their offer to settle the suit out of court, the respondents maintained that the petitioners' claim is devoid of any legal basis and merit. The Judge posed the question whether the petitioner's claim can be said to have been admitted and referred to the case of Abok James Odera T/A A.J Odera & Associates -vs- John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR where the issue of what amounts to an admission was enunciated. The court found that the appellants relied on a letter from the Attorney General, dated 3rd April 2013, in which they believe the Government admitted liability for compensating them for the extra 9 acres of land.

12. According to the learned Judge, although the said letter was admitted in evidence, its admission does not, ipso facto, amount to proof of its contents. Reliance was placed of Kenneth Nyaga Mwige -vs- Austin Kiguta & 2 others (2015) eKLR.

13. The Judge stated that whilst at some point the respondents appeared to have had the intention of conceding the petitioners' claim, it was clear from the subsequent correspondence that the intention did not ultimately materialize and/or was not formalized. The Judge found there was no admission on the part of the respondents and it was incumbent on the appellants to prove their claim to the required standard.

14. As to whether the petitioners proved that the 9 acres allegedly irregularly taken from them belonged to them, the learned Judge noted that the evidence on record showed that the suit property was not at any time registered in the name of the Chief and/or any of the petitioners. That according to the evidence

produced in court, the suit property was registered in 1959 in favour of the Native Land Trust Board and reserved for the Hospital. That the registration of the suit property was done under the Native Lands Trust Ordinance and the Rules made thereunder which, inter alia, provided for ascertainment of rights to land, registration of the land in the name of persons found to be entitled to the land, and the procedure of challenging that registration.

15. The Judge held that whilst there is no dispute that the Chief donated his land measuring 8.3 acres for extension of the Hospital, there was no evidence whatsoever that the Government took more than what the Chief's family donated. Further, that the evidence on record showed that the land the Chief's family gave was for expansion of the Hospital meaning that the hospital was in existence and with its own land. The Judge stated that it is noteworthy that the law provided a procedure for dealing with claims such as the petitioners under Rules 10, 11 and 12 of the Native Lands Trust Ordinance.

16. The Judge stated that there was no evidence that the petitioners or their predecessors in claim, raised any objection to the setting a part of the land for the hospital and/or registration of the land in favour of the Native Lands Trust Board, and that there was no evidence that the petitioners raised any complaint against use and occupation of the portion they now claim until sometime in 1999 when, through their advocate Lucy Mwai, they issued the State with a notice to sue.

17. Ultimately, the Judge concluded that the petitioners had not discharged the burden imposed on them by law of proving that the 9 acres allegedly comprised in the suit property belong to them and were compulsorily acquired by the 2nd respondent. The claim was found to be unmerited and it was dismissed with no orders to costs.

18. Aggrieved, the appellants filed the instant appeal and in the Memorandum of Appeal dated 6th February 2019, raised fourteen (14) grounds of appeal which they later compacted to seven (7) grounds in the appellants submissions dated 29th November 2022.

19. When the appeal came up for hearing on 21st May 2024, learned counsel, Mr. E.W. Nderitu, appeared for the appellants, while Mr. Karweru appeared for Boniface Kamutu Nderi and Mr. Paul Gisemba, learned counsel from the Attorney General appeared for the 1st and 2nd respondents. Counsel relied on their respective written submissions.

20. The appellant in their submissions dated 29th November 2022 identified seven (7) issues for resolution. By way of summary, counsel for the appellants submitted that the evidence adduced by the appellants was consistent, unchallenged, uncontroverted, credible and sufficient as none of the documents produced nor their contents were objected to by the respondents. Reliance was placed on a High Court case in Patrick Kalava Kulamba & another -vs Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR.

21. Counsel reiterated that the respondents' officers had admitted the claim through the correspondence produced in court as exhibit. We were referred to a letter dated 3rd April 2013 written by the Hon. Attorney General. It was submitted that from the said letter the 1st respondent gave an accurate and detailed historical background of the appellants' claim. It was submitted that the learned Judge erred in law and in fact in holding that the appellants had not discharged the burden imposed in law in proving that the nine (9) acres allegedly comprised in the suit property belong to them and were compulsorily acquired.

22. It was submitted that the issues of donation of land by the Nderi family, the extent of the donation and the subsequent illegal and unlawful alienation of nine (9) acres were not specifically denied and that the contents of the letter were not challenged by any party when produced in evidence. Reliance was placed on Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority [2009] eKLR for the justification

that the trial court's pronouncement that the appellants ought to have called the author of the letter dated 3rd April 2013, the Attorney General to vouch for the contents thereof was a misapprehension of both law and fact.

23. As to whether the trial court erred in fact and in law in canvasing its own matters in the judgment and relying on evidence not canvassed before it by the parties, it was submitted that the trial Judge assumed that the trial dispute pertained to the existence of a trust when the subject dispute pertained to a claim of compensation of land illegally alienated.

24. It was submitted that the trial court raised extrenious issues that had not been pleaded and contained in the pleadings and as such that the appellants were not accorded an opportunity to either prove, disprove or rebut the same. Reliance was placed on Great Lakes Transport Co. (U) Ltd -vs- Kenya Revenue Authority (supra) for the proposition that it is settled law that it is dangerous for a court to canvass its own matters in its judgement and to rely on evidence not canvassed before it by parties.

25. We are urged to allow the appeal as prayed.

26. In support of the appellants submissions Boniface Kamutu Nderi filed written submissions and focused heavily on the letter dated 3rd April 2014. He urged us to allow the appeal.

27. In opposing the appeal, learned counsel for the respondents' position was that the appellants presented before the court a grossly exaggerated valuation report prepared by a private valuer. It was stated that it was untenable for the appellants to present in court a report by a valuer engaged by them and expect the court to go by his valuation. Counsel asserted that the valuation report filed in court by the appellants was not only exaggerated but solely meant to mislead the court in awarding an exaggerated and exorbitant amount that is unsustainable and a huge burden on the Kenya taxpayers that is totally unaffordable to the Exchequer.

28. It was also submitted that by dint of the Compulsory Acquisition Act (Cap 295 Laws of Kenya), the Government only ought to compensate a person or persons whose land it acquires compulsorily only to the extent of the current market value of the parcel of land acquired. Further, that the market rates applying at the time of the compulsory acquisition are the ones that should apply and not the rates as at when the matter will be determined.

29. Further it was submitted that the respondent was willing to settle the matter with the relevant persons within a reasonable time but they became uncooperative and led the matter to drag in court for several years. Counsel reiterated that no consent has ever been entered into by the respondents in this matter and that as such it is wrong for the appellants to heavily rely on the recommendation of the Attorney General to the Ministry as a consent.

30. Finally, it was submitted that the appellants have not demonstrated before this Honourable Court any breach of fundamental rights and freedoms as stipulated under *the Constitution* and neither have they brought forth or proved any unprocedural acquisition as they purport.

31. We are urged to dismiss the appeal.

32. This being a first appeal, it behoves this Court to re-evaluate, re-assess and reanalyze the evidence on record and determine whether the conclusions reached by the learned trial Judge should hold. This mandate is prescribed under rule 31(1)(a) of the Court of Appeal Rules and enunciated in a plethora

of decisions of this Court, among them Kenya Ports Authority -vs- Kustron (Kenya) Limited (2005) 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

33. We have carefully considered the contents of the record of appeal, the submissions of learned counsel and the law. Although the matter has spanned several legal regimes, our view is that the fulcrum of this appeal is whether the land which is at the centre of this dispute belonged to the late Senior Chief Nderi Wangombe. That is the fundamental issue that will lay this matter to rest.

34. The cause of action pre-dates the Land tenure and ownership in Kenya as we know it today. It is not necessary to delve into the details on the land tenure and ownership of land in Kenya in the colonial era as that is a very broad topic. However, it is apposite to note that the Native Lands Trust Ordinance (Cap 100 Laws of Kenya) which later became the Trust Lands Act was enacted in 1930 to provide for the establishment of the Native Lands Trust Board. This Board was meant to hold in trust land that was meant to be alienated for public use.

35. From the conduct of the parties when the land to expand the Hospital was requested from the Chief, it would appear that the parties believed the land was owned by Chief Nderi, BUT did he? The learned Judge noted that the evidence on record showed that the suit property was not at any time registered in the name of the Chief and/or any of the petitioners. That according to the evidence produced in court, the suit property was registered in 1959 in favour of the Native Land Trust Board and reserved for the hospital. In absence of any other evidence to the contrary, we have no basis to fault that finding by the learned Judge.

36. The learned Judge also observed that the registration effected in respect of the suit property was done under the Native Lands Trust Ordinance and the Rules made thereunder which, inter alia, provided for ascertainment of rights to land, registration of the land in the name of persons found to be entitled to the land and the procedure of challenging that registration. There was no evidence presented to the court to demonstrate that the land said to be donated to the Government was ever registered in the name of the Senior Chief. This issue is further compounded by the fact that the Senior Chief never complained or pursued the matter in his lifetime.

37. With respect, the appellants having not been privy to the transaction, and in the absence of any documentary evidence to support ownership of the suit land, have no leg to stand on. The appellants seem to rely on the letter dated 3/4/2013 from the Attorney General, the 1st respondent addressed to the Principal Secretary Ministry of Medical Services, which we reproduce hereunder verbatim.

> " LAND PARCEL L.R NO. AGUTHI/GATITU 582 CLAIM FOR NINE (9) ACRES OF NYERI PROVINCIAL HOSPITAL LAND BY THE FAMILY OF THE LATE SENIOR CHIEF NDERI
>
> Please refer to the above matter and your letter dated 9th February 2011 in which your Ministry sought the above advise and guidance of the Attorney General in resolving a claim by the family of the late Senior Chief Nderi for 9 acres of the land where Nyeri Provincial Hospital is situate. According to your letter, the family's claim is for land to be returned back or they be compensated.

After several correspondences as regards the background of the land dispute, we have noted that, indeed the Nderi family in 1955 donated 8.3 acres of their land as an extension to the land currently occupied by Nyeri Provincial Hospital. In acknowledgement, the Government was to honour the late Senior Chief Nderi with a statue and to have a newly constructed Tuberculosis ward named in his memory. From the various correspondences, it appears this was not done.

Following donation of 8.3 acres, the Government in 1959 took 17.3 acres of the Nderi's land. This position is confirmed by the green card supplied by the District Land Registrar Nyeri which shows the acreage of land parcel Aguthi/Gatitu 582 as 17.3 acres. The land is registered in the name of the Chief Secretary (Incorporation) established under the Chief Secretary (Incorporation) Ordinance, 1958 and the predecessor to the current Permanent Secretary to the Treasury (Incorporation). This means that land parcel Aguthi/Gatitu 582 is the property of the Government and that the Government took an additional 9 acres of the Nderi family's land.

We have noted from your letter under reference that a meeting to resolve the dispute was held on 13th May, 2010 under the Chairmanship of the Provincial Commissioner, Central Province. The meeting resolved vide min/6/5/2010 that the Government will pay ex- gratia for the 8.3 acres given freely by the family and full compensation for the extra 9 acres of land already taken and vested in the Government. The meeting also resolved to have the District Valuer engaged to value the land. The District Valuer did the valuation and gave the estimated value at Kshs. 6,000,000/= per acre. This makes a total of Kshs. 54,000,000/ = for 9 acres.

In this regard, it is our advise:

1. No payment, either ex-gratia or of whatever nature can be made by the Government for the 8.3 acres donated by the family of the late Senior Chief Nderi since it was a gift.

2. The claim by the family of the late Senior Chief Nderi for the extra 9 acres taken by the Government and now a part of the land held by the Nyeri Provincial Hospital is valid. Your Ministry is therefore advised to offer compensation for the 9 acres as assessed by the District Valuer.

3. Since the land is already registered in the name of the Permanent Secretary to the Treasury (Incorporation), and thus vested in the Government as per the green card, an agreement between the Permanent Secretary to the Treasury (Incorporation) and family representatives of the beneficiaries of the late Senior Chief Nderi ought to be executed in order to have the land dispute settled."

38. From the record it is clear that the suit property was not at any time registered in the name of the Chief and/or any of the appellants. From the evidence produced in court, at the time the Government took the suit property, in 1959, the entire plot was registered in favour of the Native Land Trust Board and reserved for the Hospital.

39. It is worth noting that the said Act (Ordinance) was still in force when the Chief is said to have donated the land to the Government. The question that begs an answer is when was the said plot registered in the name of the Chief Secretary (Incorporation), and whether it was ever registered in the Chief's name. Be that as it may, nothing was placed before the court to show that the land in question was

ever registered in the name of Chief Nderi. Could the Chief donate what did not belong to him in the first place?

40. From the record there was evidence that the suit property was, in accordance with the Native Lands Trust Ordinance, set apart for the Hospital and registration in respect thereof subsequently effected in favour of the Chief Secretary (Incorporation). There is no indication in the register that the Native Lands Trust Board in whose favour the suit property was first registered held the land or any part thereof in trust for the appellants.

41. We find that there was no evidence in support of ownership of the suit property by Chief Nderi. Conversely, the evidence on record disclosed that the entire 17 acres comprising the suit property was registered under the Native Lands Trust Ordinance and the only registration of the suit land availed to court was in the name of the Chief Secretary (Incorporation), for public use. In taking the suit land for purposes of expanding the Hospital, the Government did so within the law and did not compulsorily acquire the land from the late Chief. The letter relied on by the appellants did not confer any proprietary rights to the appellants for which they could claim compensation.

42. In sum, we find the appeal devoid of merit and dismiss it with no order to costs.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF APRIL 2025

W. KARANJA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

This is a true copy of the original.

Signed

DEPUTY REGISTRAR