Njuguna & 6 others v Attorney General & 5 others (Civil Appeal 66, 67, 68, 69, 70, 71 & 72 of 2019 (Consolidated)) [2024] KECA 539 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 539 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 66, 67, 68, 69, 70, 71 & 72 OF 2019 (CONSOLIDATED)

FA OCHIENG, PM GACHOKA & WK KORIR, JJA

MAY 9, 2024

BETWEEN

SAMUEL WAINAINA NJUGUNA ..... 1ST APPELLANT

MARY MWIHAKI NYORO ..... 2ND APPELLANT

PAUL NJUGUNA WAITHERA ..... 3RD APPELLANT

BEATRICE MUKUHE NJUGUNA ..... 4TH APPELLANT

MARY WANJIKU KABUGI ..... 5TH APPELLANT

HANNAH KAHAKI MUCHERU ..... 6TH APPELLANT

DAVID KARIUKI ..... 7TH APPELLANT

AND

THE HON ATTORNEY GENERAL ..... 1ST RESPONDENT

THE CHAIRMAN OF THE LAND CONTROL BOARD, OL KALOU ..... 2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, NYANDARUA COUNTY .... 3RD RESPONDENT

EUNICE MUTHONI NJUGUNA ..... 4TH RESPONDENT

DANIEL MWANGI MARIGI ..... 5TH RESPONDENT

PETER MUCHERU NJUGUNA ..... 6TH RESPONDENT

(An appeal arising from the Judgment of the Employment and Land Court of Kenya at Nyahururu (M. Oundo, J.) delivered and dated 23rd October 2018 in E&LC Petition No. 2 of 2017 (Formerly Nakuru HC Pet. No. 26 of 2013))

JUDGMENT

1. The appellants herein have individually and separately lodged their independent appeals against the judgment of the Environment and Land Court (E&LC) in Nyahururu Constitutional Petition No. 2 of 2017. The appeals numbers 66, 67, 68, 69, 70, 71, and 72 all of 2019 have hereby been consolidated. The appellants' memoranda of appeal appear to be by the same pen as they all raise the following grounds of appeal:

    i. The learned judge erred in law and fact in finding the 4th and 5th respondents to be properly, or lawfully, registered proprietors of the subject properties and in failing to consider the evidential materials opposing the same.

    ii. The learned judge erred in law and misdirected herself in finding that the interests of the appellants were litigated by the 6th respondent in Nakuru High Court Constitutional Petition No. 6 of 2011, without a legal foundation of such determination.

    iii. The learned judge erred in law and misdirected herself in condemning the appellants unheard.

    iv. The learned judge erred in law and misdirected herself in failing to appreciate the appellant's beneficial rights and/or interest in the subject parcels of land and that she could not be deprived of the same, without her property rights being violated.

    v. That the learned judge erred in law and fact in failing to consider the issues raised in the submissions filed on behalf of the appellant.

    vi. That the learned judge erred in law and misdirected herself in failing to decide on the issues raised in the petition by the appellants but only concentrated on determining the issues raised by the 1st to 5th respondents.

    vii. The learned judge erred in law and fact in failing to find that the subject parcels formed part of the appellant's deceased father's estate, and consequently, in failing to find that the appellants had the right to inherit their father's property.

    viii. The learned judge erred in law and fact in failing to consider all the rights of the appellant that were violated, by only concentrating on one of the rights.

    ix. The learned judge erred in law and fact; and misdirected herself in dismissing the appellants' case despite the appellants tendering all materials to support their grievances.

    x. The learned judge erred in law in determining that the appellants' petition was res judicata without considering the ingredients in relation to the matter.

    xi. That the decision arrived at on consideration, to the extent that this was done, of wrong principle of law.

2. The suit herein was initiated vide a petition filed by Samuel Wainaina Njuguna, Mary Mwihaki Nyoro, Paul Njuguna Waithera, Beatrice Mukuhe Njuguna, Mary Wanjiku Kabugi, Hannah Kahaki Mucheru and David Kariuki the respective 1st to 7th appellants and Peter Mucheru Njuguna, the 6th respondent, on one hand against the Hon. Attorney General; the Chairman of the Land Control Board, Ol Kalou; the District Land Registrar, Nyandarua County; Eunice Muthoni Njuguna and Daniel Mwangi Marigi, the respective 1st to 5th respondents. In their petition, the 1st to 7th appellants and the 6th respondent laid a claim for infringement of their right to property under Article 40(1), the

right to fair administrative action under Article 47(1), and the right to access to information under Article 35(1)(b) of the *Constitution*. The gist of their petition was that one Paul Njuguna Mucheru (hereinafter referred to as the deceased) had three wives, one of them being the 4th respondent. Their averment was that the appellants and the 6th respondent were the children of the other two wives of the deceased. They deposed that the deceased was the proprietor of Nyandarua/Passenga/46 (the suit property) and that the said parcel was purchased through a loan facility obtained from the Agricultural Finance Co-operation (AFC) and which loan, they contributed to its repayment.

3. It was their case that in 1993, while the deceased was still alive, they learned that the suit property had been registered in the names of the deceased and the 4th respondent. The petitioners then lodged a caution but the same was removed after a hearing by the District Land Registrar and their appeal against the decision did not yield any fruit as it was dismissed. Later, upon conducting an official search, they learnt that the caution had been removed on 14th July 1997 and the register for the suit parcel was closed giving way to two new parcels of land namely Nyandarua/Passenga/226 and Nyandarua/Passenga/227 which were then registered in the names of the 4th and 5th respondents, respectively. It was therefore their case that the actions of the deceased and those of the 3rd respondent in lifting the caution infringed on their right to property. They also accused the 3rd respondent of failure to give any explanation as to how the suit land was subdivided and transferred which actions they assert led to infringement of their rights of access to information and fair administrative action under Articles 35 and 47 of the *Constitution*.

4. The appellants and the 6th respondent also asserted that the deceased and his other two wives were interred in the said parcel of land and that the 4th respondent had since denied them access to their graves. They consequently sought declaratory orders that their rights under Articles 35, 40 and 47 of the *Constitution* were infringed upon by the 2nd, 3rd, 4th, and 5th respondents. They also prayed for conservatory orders against them from demarcating and alienating the property.

5. The 1st, 2nd, and 3rd respondents did not participate in the suit before the Environment and Land Court. The 4th and 5th respondents filed a replying affidavit in opposition to the petition. The affidavit was sworn by the 4th respondent on 24th September 2013. She averred that she married the deceased in 1984 and that the original parcel Nyandarua/Passenga/46 was registered in her name and that of the deceased on 15th April 1993 and that the registration was the first registration of the subject land. She also deposed that they enjoyed joint proprietorship of that property and upon the deceased's death, the property would vest in her and not comprise of the deceased's estate. She also averred that the appellants and the 6th respondent knew of the registration of the property in their names before the demise of the deceased and did not take any action. Further, that they did not reside on the land. According to the 4th respondent, the deceased's other wives who sired the appellants and the 6th respondent had their separate parcels of land, to wit, Nyandarua/Passenga/41 and Nyandarua/Passenga/54 which they had developed and continued to occupy.

6. She also disputed the assertion by the appellants and the 6th respondent that they contributed to the purchase of the said land. She deposed that the subdivision resulting into Nyandarua/Passenga/226 and Nyandarua/Passenga/227 and the sale of one of the parcels to the 5th respondent was proper and the titles were acquired on 14th July 1997 but the appellants and the 6th respondent only waited until after the demise of the deceased before challenging the process. She averred that the rights of the appellants and the 6th respondent had not been infringed and that the suit was barred by the doctrine of res judicata as it was similar to the claim brought under Nakuru Constitutional Petition No. 6 of 2011 which had been dismissed.

7. In the judgment delivered on 23rd October 2018, Oundo, J found that the case was barred by the doctrine of *res judicata*. She, nevertheless, went ahead and considered the petition on merit before finding that the alleged infringement of constitutional rights had not been proved. The petition was subsequently dismissed with costs to the 4th and 5th respondents.

8. This appeal came up for hearing on the Court's virtual platform on 22nd November 2023. Learned counsel Ms Njoki appeared for the appellants in the consolidated appeal while learned State Counsel Mr. Rotich was present for the 1st, 2nd, and 3rd respondents. Learned counsel Ms Wangare represented the 4th and 5th respondents. Each counsel had filed written submissions and sought to wholly rely on them.

9. Through her submissions dated 21st November 2023, Ms Njoki argued that the trial Court erred in finding that the petition was barred by the doctrine of *res judicata*. According to her, the 6th respondent's claim in Nakuru High Court Petition No. 6 of 2011 was with regard to the infringement of the right to fair administrative action and the right to information while the present petition revolves around the appellants' right to inherit their father's property and to have access to their family's ancestral land and grave sites and which rights have been infringed by the transfer and sale of their ancestral land. Counsel submitted that Petition No. 6 of 2011 was filed by the 6th respondent as a sole petitioner while the present petition was lodged by the appellants hence the parties could not be said to be same. Counsel also asserted that the doctrine of *res judicata* was inapplicable since the 4th and 5th respondents were not parties to 6th respondent's petition.

10. Turning to another issue, counsel submitted that the trial Court failed to appreciate the appellants' beneficial rights and/or interest in the subject parcels of land. According to counsel, there was no dispute that the appellants were the children of the deceased and had been raised on the suit parcel of land, and their respective mothers were buried on the suit property. To this extent, counsel urged that the property in question qualified as the appellants' ancestral home. Counsel also argued that evidence was adduced establishing that the 6th respondent participated in the purchase of the suit property hence he had a beneficial interest in the suit property. It was counsel's position that the evidence on record established that the appellants had possessory and occupational rights that qualified as overriding interests deserving of the trial Court's protection. Reliance was placed on the case of *Isack M'inanga v. Isaaya Theuri' lintari & Another* [2018] eKLR in support of this argument.

11. On a different point, Ms Njoki submitted that the trial Court erred in finding that the 4th and 5th respondents were the rightful owners of Nyandarua/Passenga/226 and 227. Counsel contended that the evidence put forth by the appellants and their version of events as to how the subdivision of the suit property came about proved that there was a gross infringement of the appellants' rights to fair administration action, information, and property. Counsel urged that the chain of events led to the conclusion that the transaction was null and void. Counsel also submitted that the 6th respondent's beneficial interest as a contributor in the purchase of the suit property was disregarded. She consequently urged the Court to allow the appeal with costs.

12. In opposition to the appeal, Mr. Rotich relying on the written submissions dated 3rd November 2023 asserted that the suit land was never part of the deceased's estate as the deceased had before his death subdivided it and transferred the subdivisions to the 4th and 5th respondents. According to counsel, the 6th respondent did not prove that he had co-purchased the property alongside the deceased as the cheques produced as exhibits were dated 1978 to 1984 while the property was acquired and registered in the name of the deceased in 1974. Counsel also argued that the 4th and 5th respondents were legally and procedurally registered as the beneficial owners of the suit properties and that no irregularity had

been alleged or proved by the appellants. Counsel placed reliance on the cases of *In re Estate of Peter Gathogo (Deceased)* [2020] eKLR and *Oganga & Another v. Orangi & 3 others* [2023] KEELC 16348 (KLR) to buttress his submissions.

13. Turning to the substance of the petition, Mr. Rotich submitted that the appellants had not proved the allegation of infringement of rights. He asserted that the appellants had not demonstrated that they had sought information regarding the subdivision to no avail. Counsel referred to section 8 of the Access to Information Act in support of the proposition that a request for information must be formally made. As for the allegation that the appellants and the 6th respondent's property rights were violated, counsel submitted that the appellants were never beneficial owners of the suit property hence no right was infringed. Counsel also argued that the suit was based on events that took place before the promulgation of the current *Constitution* in 2010 hence its provisions were inapplicable to the petition. Counsel finally submitted that the petition was barred by res judicata provided in section 7 of the *Civil Procedure Act*. In the end, counsel urged that we dismiss the appeal with costs.

14. On her part, Ms Wangare opposed the appeal through the written submissions dated 15th November 2023. She pointed to various sections of the record of appeal and submitted that all the issues raised in the appeal were heard, considered, and determined on merit by the trial Court. Counsel asserted that based on the evidence on record, the trial Court properly dismissed the appellants' petition. Turning to the question of res judicata, counsel referred to section 7 of the *Civil Procedure Act* and the decision in *Independent Electoral and Boundaries Commission v. Maina Kiai & 5 others* [2017] eKLR to urge that the subject matter and the parties in the two petitions were the same, save for the addition of the 4th and 5th respondents in the latter petition. Counsel also contended that there was no new issue that was raised in the latter petition that could not have been pleaded in the former petition. Counsel further relied on the case of *John Florence Maritime Services Limited & Another v. Cabinet Secretary for Transport and Infrastructure & 3 others* [2021] eKLR in support of the proposition that the doctrine of *res judicata* is applicable to constitutional petitions and courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action seeking remedies in respect of disputes already litigated upon.

15. Still on another jurisdictional issue, Ms. Wangare submitted that the appellants lacked the locus standi to bring a constitutional petition on behalf of the deceased's estate. Counsel argued that despite the appellants moving the trial Court on behalf of the estate of the deceased, they failed to attach letters of administration. According to counsel the petition also failed to comply with the requirements under Article 22(1)(b) as read with Article 260 of the *Constitution*.

16. As for the merits of the petition, counsel argued that the trial Court did not err in finding that the 4th and 5th respondents were the legally registered proprietors of the suit property. In support of this argument she stated that the suit property being jointly owned by the deceased and the 4th respondent, then the appellants did not have any rights over the suit property. Counsel pointed to sections 91(1) & (4) and 60 of the *Land Registration Act* and asserted that when one of the joint tenants of any land dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate. Counsel further buttressed her argument by referring to the case of *Peter Mburu Echaria v. Priscilla Njeri Echaria* [2007] eKLR. Ultimately, counsel urged for the dismissal of the appeal with costs.

17. This being a first appeal, it is a requirement of Rule 31(1)(a) of the *Court of Appeal Rules*, 2022 that we should independently re-appraise the evidence and draw our own inferences and conclusions. This

power of retrial was explained in the case of *Abok James Odera T/A A.J Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

18. We have given due consideration to the grounds of appeal, the record of appeal as well as the submissions and the authorities cited by all the parties. In our view, the issues arising for our determination are whether the petition from which this appeal originates was *res judicata*; whether the appellants had a beneficial interest in the suit property; whether the rights of the appellants were infringed; and who should bear the costs of this appeal.

19. The first issue relates to the application of the doctrine of re judicata by the trial Court. The doctrine of res judicata is enacted under section 7 of the *Civil Procedure Act*, Cap. 21 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, litigating 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."

20. The doctrine of *res judicata* has been interpreted in several decisions in this country. Thus, in *Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & Another* [2016] eKLR the Supreme Court rendered itself as follows:

> "(52) *res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. ...
>
> (54) The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

21. The Supreme Court was at it again in *John Florence Maritime Services Limited & another v. Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) when it stated that:

> "For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:
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> a. There is a former Judgment or order which was final;
>
> b. The Judgment or order was on merit;

c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There must be between the first and the second action identical parties, subject matter and cause of action."

22. In the present case, the question that confronted the trial Judge was whether the 2017 petition was *res judicata* in light of the petition filed by the 6th respondent in 2011. The appellants' contention that the dispute was not *res judicata* is hinged upon the fact that they and the 4th and 5th respondents were not parties to the first petition. The question therefore is whether the parties in the two petitions were identical. The answer to that question is found in the sixth explanation under section 7 of the *Civil Procedure Act* which states that:

> "Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

23. The nexus between the appellants and the previous petition is that the 6th respondent was a party in both petitions. The petitioners in the petitions had the same interests and raised complaints surrounding the subdivision of land parcel number Nyandarua/Passenga/46 and the transfer of the subdivisions arising therefrom to the 4th and 5th respondents. The 1st, 2nd and 3rd respondents were parties in both petitions. We therefore find that the parties in Nakuru Constitutional Petition No. 6 of 2011 and Nyahururu E&LC Petition No. 2 of 2017 were identical. The addition or subtraction of parties to a new suit does not take away the defence of res judicata so long as the subject matter is the same and has been determined with finality by a competent court. No amount of camouflage in an attempt to revive a determined dispute by a court of competent jurisdiction can assist the appellants.

24. The other consideration is whether the subject matter was identical. Explanation No. 4 of section 7 of the *Civil Procedure Act* addresses this issue thus:

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

25. On this, the record is absolutely clear that the subject matter in the two petitions concerned the process of subdivision of land parcel Nyandarua/Passenga/46 into Nyandarua/Passenga/226 and Nyandarua/Passenga/227. The other question is whether the issues were directly and substantially in issue in the two petitions. Here, the guidance of the Supreme Court as to what a court should do when confronted with a defence of res judicata comes into play. In *John Florence Maritime Services Limited & another v. Cabinet Secretary Transport & Infrastructure & 3 others* (*supra*) it was held that:

> "Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction...."

26. A perusal of the pleadings will answer the question as to whether the appellants' petition was indeed res judicata. In Nakuru HC Constitutional Petition No. 6 of 2011, the 6th respondent claimed that his

rights under Articles 22, 35, 40, 47, 48 and 262 of the *Constitution* had been breached. In Nyahururu E&LC Petition No. 2 of 2017, the petitioners lodged a claim for infringement of rights under Articles 35, 40 and 47(1) of the *Constitution*. There is no doubt in our minds that the complaints of the appellants and the 6th respondent in both petitions revolved around alleged violation of constitutional rights and the issues that were being raised by the appellants in the second petition ought to have been litigated in the first petition. Afterall, the 6th respondent was one of their own in the dispute that was being presented to the courts. The move by the petitioners to file the second petition correctly raised the trial Court's antenna to the caution by the Supreme Court in *John Florence Maritime Services Limited & another v. Cabinet Secretary Transport & Infrastructure & 3 others* (*supra*) that:

> " That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus:
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> > 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 v National Bank of Kenya Limited 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."
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> > In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported) where he stated,
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> > > " 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*...."""

27. As a result of the foregoing analysis, we find no error on the part of the learned Judge of the E&LC in holding that Petition No. 2 of 2017 violated the doctrine of res judicata which requires that finalized litigation between the same parties before a competent court over the same subject matter should not be reopened through fresh proceedings. Having agreed with the trial Judge on her determination on the issue of *res judicata*, it should follow as a matter of course that the appeal is for dismissal. However, owing to the protracted litigation between the parties, we find it necessary to briefly consider the other issues in this appeal.

28. The second issue for our consideration therefore is whether the appellants and the 6th respondent had an interest in the suit property so that it can be said that their constitutional rights were violated. What emanates from the evidence on record is that whereas the deceased was the father of the appellants and the 6th respondent, he was also the husband of the 4th respondent. The deceased married the 4th respondent as his third wife in 1984 and in 1993 he caused the title to the disputed property, Nyandarua/Passenga/46, to be registered in his name and that of the 4th respondent. Further, in 1997, he subdivided the suit parcel of land into two portions; Nyandarua/Passenga/226 and Nyandarua/Passenga/227, and caused the same to be registered in the names of the 4th and 5th respondents. Upon

his death, the other two wives inherited other parcels of land, being Nyandarua/Passenga/41 and Nyandarua/Passenga/54, which they had been allocated to them by the deceased.

29. From the foregoing factual position, it appears that, first, the suit property was not subject to distribution as part of the deceased's estate. Second, that the deceased, prior to his death, had planned his estate and allocated all his wives their respective portions of land and which their respective children would inherit from. The appellants and the 6th respondent therefore had no right or interest whatsoever in the suit property. This finding therefore invalidates their claim that their right to property was trampled upon. We therefore find no merit in this claim and concur with the learned Judge's finding that there was no violation of the right to property under Article 40 of the *Constitution*.

30. The other complaint by the appellants is that the learned Judge erred by failing to find that their right to access to information under Article 35 of the *Constitution* was infringed. From the supporting affidavit of the 6th respondent, he states that in 1997, he realized that the suit land had been subdivided and transferred. He avers that he conducted a search and a report was issued to him which he annexed to the petition. Furthermore, from that same affidavit, the 6th respondent annexed a copy of the green card and a copy of the proceedings before the Chief Lands Registrar. The 6th respondent, however, fails to explain to the Court how he came into the possession of these documents that ordinarily would be in the custody of the 3rd respondent. Further, at paragraph 16, it appears that the 6th respondent sought an explanation from the 3rd respondent as to why the deceased's name was missing from the register. In our respectful view, this information was already within the knowledge of the 6th respondent as he had the green card detailing the process of transfer. Therefore, we find that the appellants' right under Article 35 of the *Constitution* was not infringed.

31. Still on the issue of constitutional violations, the appellants faulted the trial Judge for failing to find that their right to fair administrative action was infringed. Similarly, on this, the record is clear. The procedure adopted by the Land Registrar in removing the caution was within the borders of his mandate. In fact, on the 6th respondent's concession, he appealed against the decision to remove the caution and the same was dismissed. If he was dissatisfied with that decision, he ought to have pursued other procedures for challenging the decision as provided by the law. We do not see any arbitrary action or omission on the part of the 3rd respondent to warrant a finding that the appellants' right to fair administrative action was infringed.

32. The result of the foregoing analysis is that this appeal is without merit and is for dismissal.

33. The final issue concerns the costs of this appeal. Ordinarily, costs follow the event unless for good reasons the court directs otherwise. In exercising our discretion on costs, we are called upon to take into consideration other relevant factors so as not to limit the right to access to justice. Even after doing so, we find no peculiar circumstances in this appeal to warrant our departure from the principle that costs should follow the event. In the circumstances, the appeal having been found to lack merit, the appellants are bound to pay the costs to the 4th and 5th respondents who have been dragged through unnecessary litigation by the appellants. In our view, the Attorney General having not participated in the proceedings at the trial level should meet his own costs of the appeal.

34. The upshot of the foregoing is that this appeal is without merit and is hereby dismissed with costs to the 4th and 5th respondents.

35. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024

F. OCHIENG

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR