IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, KIAGE & SICHALE, JJ. A)

CIVIL APPEAL NO. 64 OF 2016

BETWEEN

LEMITA OLE LEMEIN.....APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

LAND REGISTRAR, NAROK COUNTY.....2ND RESPONDENT

LEKINYOT OLE LANKE.....3RD RESPONDENT

(Being an Appeal against the Judgment and Decree of the Environment

and Land Court of Kenya at Nakuru (Munyao Sila, J.)

dated and delivered on 11th June 2015

in

E.L.C Petition No. 35 of 2014)

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JUDGMENT OF W. KARANJA, JA.

1. This appeal arises from the judgment of the Environment and Land Court (ELC) sitting in Nakuru (Munyao Sila, J.) which was delivered on the 20th July 2016, following a constitutional petition filed by Lekinyot Ole Lanke (the 3rd respondent) on 19th May, 2014 in which he sought orders as follows:-

> **"(a) A declaration that the proceedings both before the Land Disputes Tribunal and the Narok Senior Principal Magistrate's Court contravened the Petitioner's rights under Articles 40, 47 and 50 of the Constitution.**
>
> **(b) A declaration that the proceedings before both the Land Disputes Tribunal and the Narok Senior Principal Magistrate's Court contravened rules of natural justice.**
>
> **(c) A declaration that the rule of law doctrine prohibits taking away of a citizen's property or liberty without being given a chance to be heard.**
>
> **(d) A declaration that the proceedings both before the Land Disputes Tribunal and the Narok Senior Principal Magistrate's Court are null and void.**
>
> **(e) An order that the judgment entered in terms of the Award by the Narok Senior Principal Magistrate's Court on 26th January, 2010, be set aside.**
>
> **(f) An order that the cancellation of the registration of the Petitioner as the registered proprietor of CIS-Mara/ Oldonyo**

Rasha/377 be reversed.

(g) In the alternative, an order of mandamus do issue to the 2nd respondent to restore the name of the petitioner as the registered proprietor of the property.

(h) Costs of this suit."

2. It was the 3rd respondent's case that on 4th November, 2009 he bought the parcel of land known as CIS-Mara/Oldonyo-Rasha/377, hereinafter referred to as ("*the suit property*") measuring 20.23 hectares, from the initial owner, one Oloishuro Ole Sipiyiai, for a consideration of Kshs. 550,000 and was duly issued with a title deed as the registered owner. Further, that the suit property was a portion of a sub-division of the whole of the parcel of land known as CIS-Mara/Oldonyo-Rasha/71.

3. Sometime in September 2010, upon doing a search at the Narok Land registry, the 3rd respondent discovered that on 20th September, 2010, his name had been cancelled from the register and in its place, Lemita ole Lemien (the appellant) had been registered as the proprietor of the suit property. This was done pursuant to an award granted in favour of the appellant by the Ololunga Land Dispute Tribunal (hereafter "*the tribunal*"), vide Case No. 6 of 2010, which award was adopted by the Narok Senior Principal Magistrate's Court, on 26th January, 2010 as a judgment of the court. The award related to a land dispute lodged by the appellant against the initial owner of the suit property. According to the 3rd respondent, the said transfer was fraudulent as he was not party to the transactions that culminated in the impugned transfer.

4. While pleading the particulars of fraud, the 3rd respondent asserted that the aforementioned dispute before the tribunal was filed only as against the initial owner and he was neither joined as a party to the suit nor served with the pleadings despite there being both documentary and sworn evidence tendered before the tribunal revealing that he had an interest in the suit property. He contended that such evidence was tendered in his absence despite being a critical party to the proceedings.

5. Further, that the appellant procured the award of the tribunal and moved the Magistrate Court to enforce it and subsequently obtained a decree which he sought to execute as against him despite never having served him with the application for execution. He contended that the appellant herein ultimately sought to have the Executive Officer of the court sign the transfer of the suit property to his name, the effect of which was to cancel the 3rd respondent as the registered proprietor thereof. According to the 3rd respondent, that was a violation of his right to property and right to fair hearing as enshrined under the Constitution. He maintained, that the tribunal lacked jurisdiction to determine the matter and its decision to divest him of his proprietary rights to the suit property was null and void.

6. It was also the 3rd respondent's case that on learning about of the order and decree of the Magistrate's Court, he instituted a suit before the High Court, **Lekinyot Ole Lanke v. Lemita Ole Lemein, Nakuru H.C.C.C No. 245 of 2010**, which he later withdrew before filing the subject petition before the ELC. Further, that he also subsequently filed **Republic v. Commissioner of Lands & Registrar of Lands, Narok Nakuru High Court Judicial Review Case No. 12 of 2011** which was dismissed for want of prosecution. That subsequently, the 3rd respondent filed a Notice of appeal with an intention to challenge the Judicial Review proceedings but withdrew the same.

7. The 1st and 2nd respondents opposed the petition through a replying affidavit sworn by N.N. Mutiso, the District Land Registrar, Narok North and South Districts. In a nutshell, the 1st and 2nd respondents stated the history regarding the status and ownership of the said property. It was deposed that the suit property was transferred to the 3rd respondent on 10th November, 2009. However, following a successful case before Narok SPM court in Land Case No. 2 of 2010, the property was later transferred to the appellant herein pursuant to the decree aforementioned as issued by the Magistrates Court.

8. In further opposition to the petition, the appellant (the 3rd respondent in the petition) filed a replying affidavit sworn by himself, denying all allegations of fraud levelled against him. He maintained that he purchased a total of 50 acres including the suit property, which was a sub-division of the whole of the parcel of land known as CIS-MARA/OLDONYO-RASHA/71 from the initial owner, Oloishuro Ole Sipiyiai.

9. He deponed that he took possession of the suit property sometime in 2002 and had since been in possession but when he sought to get the Title Deed for it, he discovered that the 3rd respondent had registered the same in his own name. That inevitably, he filed a claim before the tribunal whereupon an award was granted in his favour and adopted by the Narok Senior Principal Magistrate's Court on 26th January, 2010 as a judgment of the Court. He urged that the 3rd respondent had filed a multiplicity of cases over the same subject, which amounted to abuse of the court process.

10. The petition was canvassed through written submissions. In the submissions in support of the petition, counsel for the 3rd respondent contended that the 3rd respondent had been denied a right to property, fair administrative action and a right to be heard. He submitted that a cursory perusal of the proceedings both before the tribunal and the magistrate's court revealed that the 3rd respondent was not included as a party to the said proceedings in blatant violation of the law and rules of natural justice, hence the reliefs sought in the petition as outlined earlier.

11. In opposing submissions, the 1st and 2nd respondents maintained that the suit property was transferred to the appellant on 10th November, 2009 vide a competent transfer and Consent from the Land Control Board. Further, that all the dealings in the suit property by the appellant were proper in law hence the 1st and 2nd respondents were not at fault and that it was upon the 3rd respondent to prove any illegalities.

12. The appellant on the other hand in his submissions adopted the contents of his affidavit and reiterated the same. It was submitted that the issues before the Court were *res judicata* having already been determined with finality in Nakuru High Court Judicial Review No. 12 of 2011.

13. In response, counsel for the 3rd respondent contended that the issue of *res judicata* did not arise as the issue of ownership of the suit

property could not be have been determined and disposed of through judicial review proceedings. He submitted that judicial review does not delve into the merits of the decision of a public body therefore, the principle of *res judicata* could not be invoked in the circumstances.

14. Having considered the evidence placed before him along with the submissions of both parties and the respondent's list of authorities, the learned Judge found that the issues that fell for the court's determination were: whether the petition was an abuse of the court process; whether there was a violation of the 3rd respondent's constitutional right to fair trial in the manner in which the tribunal conducted its proceedings and whether the tribunal acted in violation of the 3rd respondent's right to own property as provided for under the Constitution.

15. Ultimately, the learned Judge found that: the petition was not an abuse of the court process; that the tribunal had no jurisdiction to either determine the issue of ownership of the suit property or issue declaratory orders on the ownership of the suit property and; that the tribunal violated the 3rd respondents right to a fair trial and right to own property. It is on the basis of the said findings that the learned judge held as follows: -

> **"33. I allow this petition. I quash the award of the Land Disputes Tribunal and the subsequent decree of the Narok Magistrates Court for the reason that the proceedings violated the petitioners right to a fair hearing and the net effect was to violate his right to own property contrary to the provisions of Sections 75 and 77 of the former constitution and the provisions of Articles 40 of the current constitution. The petitioner must be reinstated as proprietor of the suit property.**
>
> **34. I therefore order the registration of the 3rd respondent as proprietor of the suit property to be cancelled and the petitioner be reinstated as proprietor thereof. The petitioner will also have costs of this petition."**

16. Aggrieved, the appellants proffered the instant appeal challenging the aforementioned decision of the trial Court. The appeal is premised on 13 grounds, *inter alia*, that the learned Judge erred in law and fact: by finding that the 3rd respondent had proved a violation of his constitutional rights to the required threshold; by considering issues he ought not have considered hence arriving at an erroneous decision; by disregarding the appellant's evidence of ownership of the suit property and the sanctity of protecting property rights; by failing to find that the petition was *res judicata* and; by granting reliefs in favour of the 3rd respondent as it did.

17. The appeal was canvassed through written and oral submissions. During the plenary hearing of the appeal, parties were represented by their respective counsel. Mr. Kahiga Waitindi learned counsel appeared for the appellant, M/s Linus Ndungu, learned counsel holding brief for Dr. Kamau Kuria S.C, appeared for the 3rd respondent while there was no appearance for the 1st respondent despite service. From the record, the 1st respondent did not file their submissions despite directions having been issued in that respect.

18. Urging the Court to allow the appeal, Mr. Waitindi submitted that where one is seeking redress from the High Court for alleged violation of the Constitution, he must prove the same to the required threshold. (See: **Anarita Karimi Njeru v. Republic, No.7 of 1979 1 KLR 154** and **Trusted Society of Human Rights v. Mumo Matemu & Another, Petition No. 279 of 2012**). Further, citing **Papinder Kaur Atwal v. Manjit Singh Amrit, Nairobi Petition No. 236 of 2011** he submitted that the mere allegation of the violation of a constitutional right is not in itself enough to invoke the jurisdiction of the Court.

19. Counsel maintained that not every violation of the law must be raised before a court as a constitutional issue and that where there exists an alternative remedy through statutory law, then such a statutory remedy ought to be pursued first. (See: **Harrikinson v. Attorney General of Trinidad and Tobago (1980) AC 265**).

20. Citing **Isaac Ngugi v. Nairobi Hospital Nairobi Petition No. 407 of 2012**, he maintained that the dispute before the trial court was not one involving the violation of constitutional rights but involved a dispute between private citizens. Further, that the 3rd respondent failed to demonstrate how his rights had been violated in contravention of **section 75** of the Old Constitution as alleged in his petition.

21. Mr. Waitindi further submitted that the 3rd respondent failed to adduce evidence that the matter before the tribunal was determined in his absence terming his claim to that effect speculative.

22. He contended further, that the petition before the trial court was *res judicata* as **Lekinyot Ole Lanke v. Lemita Ole Lemein, Nakuru H.C.C.C No. 245 of 2010** raised similar issues as those raised in the petition. He faulted the learned Judge's decision to the contrary contending that such finding was perverse and based on no evidence or was based on a misapprehension of the evidence before him. He further faulted the learned Judge for determining that the tribunal had no jurisdiction yet the same was not an issue before the trial court as it was not pleaded.

23. Placing reliance on among others the case of **Chemei Investments Limited v. The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)**, Mr. Watindi submitted faulting the learned Judge for failing to find that the petitioner was seeking justice with unclean hands as his acquisition and ownership of the suit property was unclear and not proved. He urged the Court to allow the appeal.

24. Opposing the appeal, Mr. Ndung'u for the 3rd respondent submitted that the allegations that the 3rd respondent had failed to prove an infringement of his constitutional rights to the threshold required by law was not an issue before the trial court hence not an issue before this Court (See: **Teachers Service Commission v. Simon P. Kamau & 19 Others (2015) eKLR**).Further, citing Independent **Electoral & Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014) eKLR**, he contended that since parties are bound by their pleadings as by law, it would be a violation of the 3rd respondent's right to a fair trial if this court were to delve into the issue.

25. Counsel submitted that the petition was not *res judicata* as **Lekinyot Ole Lanke v. Lemita Ole Lemein Nakuru H.C.C.C No. 245 of 2010** was withdrawn before it proceeded for hearing, and there was therefore no merit determination on the issues raised therein.

26. He contended that the appellant's allegation, that the learned Judge's findings that the tribunal lacked jurisdiction and that the 3rd respondent's title deed was proper were unfounded, as there was irrebuttable documentary evidence on record of the proceedings both before

the tribunal and the Magistrate's Court proving otherwise.

27. On the appellant's allegations that the learned Judge delved into the issue of the jurisdiction of the tribunal, notwithstanding the fact that it was not pleaded, counsel submitted that as held in **Justice Kalpana H. Rawal v. Judicial Service Commission & 3 Others (2016) eKLR**, courts have a discretion to decide on unpleaded issues where such are canvassed in the course of the hearing and evidence is led seeking a determination of such issues.

28. Relying on **Kimani v. Attorney General (1969) EA 29**, counsel further submitted that the 3rd respondent had a right to vindicate his constitutional rights and to a remedy where it is found that such right has been infringed. He maintained that in determining the petition before it the trial court was exercising its supervisory jurisdiction over the tribunal and the Magistrate's Court as envisaged under **Article 165(6)** and **(7)** of the Constitution. He maintained that the Environment and Land Court had equal status as the High Court.

29. He maintained that pursuant to **Article 40(6)** of the Constitution, the enforcement of the right to property extends to a suit establishing allegations of property acquired unlawfully through a legally established process. (See: **Evelyn College of Design Ltd. v. Director of Children's Department & Another (2013) eKLR**).

30. According to counsel, the petition before the trial court sought the enforcement of property rights under **Article 40** of the Constitution, the right to fair administrative action under **Article 47** and the right to a fair trial which were contravened by the tribunal and the Magistrate's Court hence the ELC was right in awarding orders as it did as provided under **Article 23** and **Article 162** of the Constitution and **section 13(7)** of the Environment and Land Court Act. (See: **Kenya Bankers Association v. Minister of Finance & Another (2002) 1KAR 61** and **Gathigia v. Kenyatta University (2008) KLR 587**).

31. Citing **Ramanpoo v. Attorney General of Trinidad and Tobago (2004) Law Reports of the Commonwealth** counsel submitted that where a person's rights are infringed the remedies available under the Constitution and the Environment and Land Court Act are similar to those in private law like the declaration of rights, injunction, conservatory orders, an order for compensation and judicial review remedies. He ultimately urged the Court to dismiss the appeal.

32. This being a first appeal this Court's mandate is circumscribed by **Rule 29(1)(a)** of the Rules of this Court and the principles set therein have been followed religiously by this Court as is evident from a myriad of cases determined on first appeal. For instance, this Court in **PIL Kenya Ltd Vs. Oppong [2009] KLR 442** the Court restated that position as follows: -

> **"It is the duty of the Court of Appeal, as a first appellate court, to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that."**

33. With the above in mind and with due consideration of the totality of the record, in the light of the rival submissions by parties, it is apparent that the issues that fall for our determination are:-

> ***a) Whether the Petition filed before the trial Court was res judicata and/or an abuse of the Court process;***
>
> ***b) Whether the 3rd respondent established a case of infringement of his fundamental rights to property and a fair hearing to the required threshold and whether the orders of the tribunal on which the appellant's claim is anchored were valid and enforceable in law.***

34. On the first issue, it was the appellant's submission that the petition filed before the trial court was *res judicata* as it raised similar issues as those raised in **Lekinyot Ole Lanke v. Lemita Ole Lemein, Nakuru H.C.C.C No. 245 of 2010.** The appellant further submitted that the 3rd respondent had abused the court process by first instituting **Judicial Review No. 21 of 2010** which was dismissed for want of prosecution on the 6thJune, 2014. That subsequently, he filed **Nakuru HCCC No. 245 of 2010** which was withdrawn on the 7th May, 2014 and later another suit being **Judicial Review No. 12 of 2011**. In opposition, it was the 3rd respondent's argument that the principle of *res judicata* did not apply as **Nakuru HCCC No. 245 of 2010** was withdrawn before it could proceed for hearing. Further, that the issue of the ownership of the suit property could not have been determined in **Judicial Review No. 21 of 2010**, as in judicial review the Court doesn't delve into the merits of the case.

35. The doctrine of *res judicata* was aptly discussed in the case of **Maithene Malindi Enterprises Limited v. Kaniki Karisa Kaniki & 2 Others (2018) eKLR** where this Court pronounced itself thus:-

> **"30. The essence of the doctrine of res judicata was aptly set out by this Court in William Koross vs. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR -**
>
> **"The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.**
>
> **…**
>
> **The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a**

jurisdictional injunction, from entertaining such suit.

See also Ngugi vs. Kinyanjui & 3 Others [1989] KLR 146.

31. Therefore, for the bar of res judicata to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

36. From his submissions, it is evident that the appellant claims the application is *res judicata* on grounds that the issues raised in the petition had already been raised in **Nakuru H.C.C.C No. 245 of 2010** but 3rd respondent abandoned that suit and moved to the High Court by way of a Constitutional petition.

37. A close perusal of the record reveals that the 3rd respondent in his petition at paragraph 21 and in his supporting affidavit at paragraph 25 expressly pleaded that the said suit had been withdrawn prior to the filing of the Petition before the ELC on 19th May, 2014. It is therefore not in dispute that the 3rd respondent disclosed to the Court that the said suit indeed existed and that the same had been withdrawn which fact is not contested.

38. It goes without saying therefore, that the issues raised in the petition had not been canvassed and determined on merit in any of the cited cases and the same cannot be said to be *res judicata.* The ground on *res judicata* therefore fails.

39. On the second issue, the appellant faults the trial Judge for finding that the 3rd respondent's fundamental rights had been violated yet the 3rd respondent failed to prove the same to the required threshold. Further, that the remedies granted to the 3rd respondent were not in the nature of those ordinarily awardable in a constitutional petition. It was submitted that the 3rd respondent in seeking redress for the infringement of his fundamental rights failed to set out the reasonable degree of precision of that which he complained of, the provisions of the law said to have been breached and the manner in which his rights had been infringed. The appellant submitted that the dispute before the court was a land dispute between private citizens and that none of the constitutional rights of the 3rd respondent had been violated. The 3rd respondent on the other hand submits that these were issues not raised before the trial court and do not therefore fall for consideration before this Court.

40. This Court in **Political Parties Forum Coalition & 3 Others v. Registrar of Political Parties & 8 Others, Nairobi Civil Appeal No. 80 of 2014** expressed itself as follows: -

"37. …. A party is bound by its pleadings; likewise the court itself is also bound by pleadings as filed by the parties. Lord Denning in Jones -v- National Coal Board [1957]2 QB55 expressed that in the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties and not to conduct an investigation or examination on behalf of society at large. In the Nigerian case of Adetoun Oladeji (Nig) Ltd -v- Nigeria Breweries Plc S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows:

'….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'

38. In this case, the appellants are bound by their pleadings. As was stated by Lord Normond app 238 – 239 in Esso Petroleum Co. Ltd -vs- South Port Corporation (7) [1956] Ac 218 which was cited with approval in Puspa - vs- Fleet Transport Company [1960] Ea 1025: and Court of Appeal in Nyabicha -vs-Kenya Tea Development Authority & Others [2010] eKLR that:

'The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.'"

41. Having perused the 3rd respondent's petition, although on the face of it the proceedings appear to have been a land ownership dispute between private citizens, the same had fundamental implications on constitutionally protected rights as was urged before the Court. It was evident that the issues raised in the petition raised weighty constitutional issues on the right to own property as well as the right to be heard as provided for under the Constitution. Further, it is evident on the face of the petition that the 3rd respondent provided sufficient particulars of the infringements and the manner in which the alleged constitutional rights had been violated. I am persuaded that the 3rd respondent's claims met the threshold set out in the **Anarita Karimi Njeru -v- Republic** (supra).

42. On whether the 3rd respondent established a case for violation of constitutional rights in respect of the right to property, it was not

disputed that the 3rd respondent was the registered proprietor of the suit property. It is not in doubt that his rights as a registered proprietor enjoyed constitutional protection and anchorage. He moved the court protesting deprivation of his proprietary interest as a result of the manner in which a dispute was lodged and determined before a tribunal without jurisdiction, and without being accorded an opportunity to be heard, his land was taken away from him. It is clear from this that his right to own property, and his right to fair hearing were violated.

43. Lastly, the appellant faults the trial Judge for delving into the issue of the jurisdiction of the tribunal yet the same was not pleaded. It was his argument that parties are bound by their pleadings hence this was not an issue for the court's determination. The 3rd respondent on the other hand argues that courts have a discretion to decide on unpleaded issues where evidence is led seeking a determination of such unpleaded issues.

44. In **Joseph Amisi Omukanda v Independent Elections & Boundaries Commission & 2 Others Nairobi Civil Application No. Nai 14 of 2014 (UR 5/2014)** this Court stated as follows: -

> **"It is a well settled principle of law that parties are not allowed to raise matters that are not in their pleadings. The basis of this eminently sensible rule is that each party must know the cases they have to meet, and that cases must be decided only on the issues that the parties have placed before the court. Any desire to introduce new issues is catered for through the device of amendment of pleadings. (See GANDY VS CASPAIR (1956) 23 EACA 139).**
>
> **There is however a well-known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an unpleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. (See ODD JOBS VS MUBIA (1970) EA 476)."**

45. In determining whether the learned Judge by making findings that the tribunal lacked jurisdiction raised issues not pleaded, it is paramount to interrogate the findings *vis-a-vis* the above-mentioned authority as well as the pleadings filed in the trial court.

46. Indeed, a close reading of the pleadings and the rival submissions before the trial Court reveals that jurisdiction of the tribunal was indeed an issue raised in the body of the pleadings. In paragraph 18 of the petition, the 3rd respondent pleads; "*the assumption of jurisdiction by the Land Dispute Tribunal to adjudicate on Title to CIS -Mara /OlDonyo Rasha /377 was illegal"*.

47. It is therefore evident that the issue of jurisdiction of the tribunal was expressly pleaded by the petitioner. There can therefore be no reason to fault the trial Judge's decision as it was evident that he was fully aware of the issues before him having stated as follows before delving into the merits of the case. The learned Judge observed thus; -

> **"25. This petition is hinged on two grounds. First, is that there was a violation of the constitutional rights of the petitioner in the manner in which the tribunal conducted its proceedings which denied him a right to a fair hearing. Secondly, is that the award of the tribunal was a violation of the petitioner's right to own property."**

48. As to the issue of the tribunal's jurisdiction the learned Judge in his decision, expressed himself as follows:-

> **"27. I agree. It is inconceivable that the tribunal could proceed to order the property of the petitioner to be transferred to the 3rd respondent without the petitioner being a party to the proceedings. In essence, the petitioner was condemned unheard. The tribunal clearly caused the taking away of the property of the petitioner without him being in a position to defend himself, forget for a moment that the tribunal did not even have jurisdiction to determine such a dispute. The jurisdiction of the Land Disputes Tribunal (now defunct owing to the repeal of the Land Disputes Tribunal Act by the Environment and Land Court, Act No. 19 of 2011) was set down in Section 3 of the Land Disputes Tribunal Act which provided as follows:-**
>
> **3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—**
>
> **(a) the division of, or the determination of boundaries to land, including land held in common;**
>
> **(b) a claim to occupy or work land; or**
>
> **(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.**
>
> **28. It will be seen from the above, that the jurisdiction of the Tribunal, was only on matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land. The Land Disputes Tribunal did not have jurisdiction to issue declaratory orders on the ownership of land and neither did it have jurisdiction to determine disputes revolving around ownership of land. It could not issue orders compelling the cancellation of title as it did in this case.**
>
> **29. To make it worse, the tribunal proceeded to cancel the title of the petitioner where he was not a party. The rule of natural justice, audi alteram partem, require a party not to be condemned unheard. How could the petitioner be heard if he was not a party to the proceedings? Obviously, he was never heard. In my view there was a clear breach of the constitutional right of the petitioner to a fair hearing."**

49. In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi judicial tribunal or court to

satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can *suo motu* determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal.

50. The learned Judge was therefore in order to address the issue and in my view, his finding on the jurisdiction of the tribunal reflects the correct position in law. It bears repeating that the defunct Land Disputes Tribunal had no jurisdiction to hear and determine issues related to registered land. It could not divest anybody of his/her right to property nor order cancellation of a Title Deed. The cancellation of the 3rd respondent's title deed to the suit property was therefore a nullity. It is axiomatic that any action predicated on a nullity is itself void. As Lord Denning pronounced in the *locus classicus* case of **Macfoy v. United Africa Company Limited (West Africa) [1962] A.C 152;**

> **"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

51. Having found want of jurisdiction on the part of the tribunal, was the learned Judge supposed to fold his hands and proclaim "*here is a gross injustice committed against the petitioner as he was deprived of his land unjustly and without being heard, by a tribunal without jurisdiction, but wait a minute, the petitioner cannot get redress because he ought not to have moved the court by way of constitutional petition, yet there is no other avenue open for him to get justice"*. In my view, such a position would amount to serious abdication of the Court's duty to dispense justice.

52. The time honoured maxim of equity "*ubi Jus Ibi Remedium"* pronounces that there cannot be a wrong without a remedy, or in other words, where there is a right there is a remedy. The 3rd respondent established that his land was taken away from him illegally. All other avenues he could have used to recover it save through the constitutional petition appeared blocked or less expedient and inefficacious. I cannot fault the learned Judge for arriving at the decision appealed from.

53. From the foregoing, I have no hesitation in arriving at the conclusion that this appeal is devoid of merit. I would dismiss it with costs to the 3rd respondent and uphold the decision of the learned Judge.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, KIAGE & SICHALE, JJ. A)

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JUDGMENT OF F. SICHALE, JA

I have had the benefit of reading the judgment of the **Hon. Lady Justice Karanja, J.A.** in draft. I entirely concur with her findings and I have nothing useful to add.

Dated and delivered at Nairobi this 9th day of October, 2020.

F. SICHALE

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & SICHALE, JJ.A)

NAKURU CIVIL APPEAL NO. 64 OF 2016

BETWEEN

LEMITA OLE LEMEIN .....APPELLANT

AND

THE ATTORNEY GENERAL..... 1ST RESPONDENT

LAND REGISTRAR, NAROK COUNTY ..... 2ND RESPONDENT

LEKINYOT OLE LANKE..... 3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Munyao, J.) dated 11th June, 2015

In

Petition No. 35 of 2014)

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JUDGMENT OF KIAGE, JA.

I find myself in the unhappy position of holding a view divergent from that held by my two learned colleagues who uphold the decision of the High Court challenged in this appeal. The background, litigation history as well as the arguments made in the appeal have been set out in the lead judgment of my learned sister Karanja, JA and I need not rehash the same.

At issue in this appeal, and the crucial point on which I part ways with the majority, is the propriety, indeed competency, of the constitutional petition filed, not at the High Court as ought, but before the Land and Environment Court at Nakuru on 19th May 2014 by the 3rd respondent, and the correctness Munyao Sila, J's decision granting it. The petition sought declarations that proceedings filed by the appellant herein before the Olelunga Land Disputes Tribunal and the Senior Principal Magistrate's Court at Narok contravened his rights under **Articles 40, 47** and **50** of the Constitution, contravened rules of natural justice, deprived him of his property without being heard, and were null and void. He also prayed that the award of the Magistrate's court made on 26th January, 2010 be set aside, the cancellation of his registration as proprietor of CIs-Mara/Oldonyo Rasha/377 be reversed, and for an order of mandamus compelling the Land Registrar, Narok, to restore his name as proprietor of the disputed property.

The main basis for the 3rd respondent's petition was that orders had been made by the tribunal, adapted by the subordinate court and effected by the Land Registrar, that were adverse and prejudicial to him but without his being joined in the proceedings giving rise thereto. He presented those omissions as violative of his rights under the **2010 Constitution**.

A number of factors cause me unease regarding the manner in which the 3rd respondent chose to remedy his complaints. First, which I have alluded to, he filed a petition for redress of constitutional violations or breach of fundamental rights before the **Land and Environment Court**. I have serious reservations about the competency of the forum chosen. Granted that the Land and Environment Court may properly address and redress complaints about violation of rights that emerge in the course of determining matters that lie within its jurisdiction, it is to my mind improper for that court to arrogate to itself a general and wide mandate for the enforcement of the Bill of Rights. That mandate properly and primarily belongs to the **High Court** as expressly provided in the **Articles 23(1)** and **165(3)(b)** of the Constitution**.** Those twin provisions firmly appoint and declare the High Court as the true locus for determination of questions of whether rights or fundamental freedoms have been denied, violated, infringed or threatened, and to grant appropriate relief.

My view, therefore, is that the learned Judge ought not to have entertained the 3rd respondent's petition as was framed as it lay, if at all, at the High Court. The 3rd respondent must have laboured under the misconception, expressed even in his learned counsel's arguments before us, that the Land and Environment Court is possessed of general supervisory jurisdiction over subordinate courts and inferior bodies. With respect, I do not consider that court to have such powers, which properly belong to the High Court under **Article 165(6)** of the Constitution.

The other concerning aspect of the petition filed before that court and the orders ultimately made by the learned Judge relate to the retrospective application of the 2010 Constitution. The matters that the 3rd respondent complained of largely occurred, as is evident from the record, *before* the Constitution came into force. **Tribunal Case No. 6 of 2010** was concluded and the award made therein was adopted by the Magistrate's Court on 26th January, 2010, before promulgation. That being the case, I entertain the gravest doubts that it was proper for the learned Judge to deal with the petition before him on the basis of the expanded provisions and protections of the 2010 Constitution.

Moreover, one of the main complaints in the petition and which the learned Judge granted a declaration on, does not seem to me to have been established if we are to have fidelity to the proper interpretation of the constitutional provision with regard to the right to own property. The learned Judge's decision was at paragraph 33 of the judgment;

> ***"I allow the petition. I quash the award of the Land Disputes Tribunal and the subsequent decree of the Narok Magistrate's Court for reason that the proceedings violated the petitioner's right to a fair hearing and the net effect was to violate his right to own property contrary to the provisions of sections 75 and 77 of the former constitution and the provisions of Article 40 of the current Constitution. The petition must be reinstated as proprietor of the suit property."***

Apart from incongruity of referring to the provisions of both the retired and the current constitution as if they were of concurrent application, which they could not be, my own thinking is that a conscious delineation of the right to private property as provided for in the retired Constitution would show that the facts of this case do not establish any violation of the same. It is instructive that the section was titled *"Protection from Deprivation of Property"* and had rather expansive provisions against compulsory acquisition of property unless listed conditions were satisfied; providing for direct access to the High Court for the determination of right and the legality of its acquisition, as well as for prompt compensation therefor; and immunizing or exempting actions take or done under the authority of any law from being held to be inconsistent with or in contravention of the protection afforded by the section.

It seems clear to me that before disposing of the petition in the manner he did, the learned Judge should have examined the 3rd respondent's claims in light of the detailed provisions of **section 75** of the retired Constitution. The record does not reveal any serious attempt to do so yet, to my mind, it was absolutely necessary that the claims be subjected to the test of rigorous analysis. It is not lost to me that among the matters or actions exempted from the tag of contravention or inconsistency in **section 75(6)(iv)** was listed those taken *"in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations."* It seems to me to be a serious non-direction for the learned Judge, having decided to treat the complaints on the petition as falling within **section 75**, to have failed to interrogate whether the Framers' prescription of what amounted to violation or infringement of the right had been satisfied. On that basis alone, I would allow the appeal.

But that is not all.

I am of the firm persuasion that the circumstances of this case did not at all warrant the presentation of the 3rd respondent's grievances as constitutional complaints. That adverse orders may have been made without his being joined as a party to the proceedings thus violating the natural justice principle of ***audi alteram partem***, or that the tribunal assumed a jurisdiction it did not have to purport to pronounce on title to the disputed property and to order cancellation of his registration, were not enough, in my estimation, to justify the constitutional jurisdiction, even were the Land and Environment Court possessed of it, which is doubtful.

The complaints the 3rd respondent had are common place, and courts routinely address and redress them in the ordinary course of business in their usual civil jurisdiction. **The Civil Procedure Act** and the **Rules** thereunder has sufficient provisions for a person aggrieved by orders made in his absence and without notice to him to apply for joinder, review and setting aside of such orders or decrees. Indeed, it cannot be much doubted that if a person affected by an order or decree of a court was not joined to the proceedings and was thus not heard, the proceedings are a nullity and liable to be set aside *ex debito justiciae*, as has been stated by this Court and others time beyond reckoning. See for instance, ***ONYANGO vs. ATTORNEY GENERAL [1986-89] EA 456***; ***MICHAEL MAINA & ANOR vs. STANLEY KIGARA KAGOMBE [1996] eKLR*** and ***SAULO KANDIE vs. JAMES KWAMBAI CHERUIYOT [2019] eKLR.*** One need not file a constitutional petition to obtain so self-evident a result.

I am fortified in my view by the fact that the record shows that the 3rd respondent did, in fact, file or have filed proceedings to that very effect, only to have them dismissed, abandoned or withdrawn. He first filed a suit, being **HCCC No. 255 of 2020** on 30th September 2010, but withdrew it nearly *four years* later on 6th May 2014. While that suit was still pending, he filed **Judicial Review Application Number 12 of 2011** on 24th February 2011, seeking cancellation and/or rectification of the register on account of the same reasons he was later to cite in

the petition. That application was on 27th January 2012 dismissed by Wendoh, J., which explains the appellant's contention that the petition was ***res judicata***.

Whether ***res judicata*** applies or not, what appears to me indisputable is that the filing of the petition after those other proceedings he filed, raising the same grievances emerging from the same facts, the 3rd respondent was clearly engaging in an abuse of the process of the court. Moreover, it is conduct such as this, the hopping from proceeding to proceeding over the same complaints, that leaves the troubling impression that a litigant is engaging in hedge-betting and forum-shopping. And courts must not appear to condone, much less aid and abet such legal adventurism, but must instead set their face firmly against it.

This is a more urgent desideratum where it is evident that a litigant is attempting to avoid the strictures of ordinary law by clothing his claims in some ill-fitting constitutional garb. I think it is impermissible that courts should lightly endorse and even reward the constitutionalization of ordinary legal disputes that are amenable to settlement through ordinary civil processes. Nor is it justification enough that the particular litigant may have exhausted or stumbled in the appointed avenues, yet remained apparently without remedy. Such missteps cannot confer upon a court a jurisdiction it lacks, or sanitize the overly solicitous stance of entertaining in the guise of a constitutional petition, complaints that are daily fare in civil court. I apprehend, with respect, that it is in this respect that the learned Judge erred when he delivered himself in the following plaintive terms;

> ***"What was the petition supposed to do? He was not a party to the tribunal proceedings and could not avail himself of the avenue of appeal. True, he could have filed a judicial review action, but one had already been filed and abandoned by Ole Sipiyiai. Again I pose, what was he supposed to do?"***

With the greatest respect, it was not for the learned Judge to agonize over the question. It was not his remit to go flat out of over-empathise with the 3rd respondent. Whatever the 3rd respondent was to do, the court should not have entertained, let alone granted, a contrived constitutional petition. Far from so enthusiastically embracing as properly constitutional what was an ordinary dispute, the learned Judge ought to have advisedly upheld the principle of *constitutional avoidance*, and rejected the petition. That principle calls for caution and circumspection before engaging the constitutional jurisdiction. The United States Supreme Court in ***ASHWANDER vs. TENNESSEE VALLEY AUTHORITY 297 US 288, 347*** expressed it thus;

> **"The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."**

I think that in the present case the constitutional questions were not properly presented before the Court below and that the matters complained of were more than amply solvable by way of review, setting aside, judicial review and enough other procedural and substantive legal mechanisms apart from the constitutional jurisdiction.

I need only add that the constitutional avoidance principle is neither alien to nor novel in our jurisdiction. Our Apex Court in ***COMMUNICATIONS COMMISSION OF KENYA & 5 OTHERS vs. ROYAL MEDIA SERVICES LIMITED & 5 OTHERS [2014] eKLR*** defined the principle of avoidance as entailing a court's refusal to determine a constitutional issue when a matter may properly be decided on another basis. And this Court in ***BAOBAB BEACH RESORT & SPA LIMITED vs. DUNCAN MURIUKI KAGURU & ANOR [2017] eKLR*** reiterated it thus;

> **"We are in entire agreement with the sentiments expressed by this Court and would add that if a civil or criminal matter can be decided on the basis of existing legislation or an alternative remedy without invoking the constitutional provisions as the foundation of the suit, then such alternative course of action should in such cases be adopted instead."**

I could not agree more, and I would allow the appeal and set aside the impugned judgment as prayed.

As I am alone in this view, however, the appeal shall be disposed of along the lines proposed by W. Karanja. J.A.

Dated and delivered at Nairobi this 9th day of October, 2020.

P.O. KIAGE

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JUDGE OF APPEAL