IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 179 OF 2014

BETWEEN

JOSEPH MAREN ……..…….1ST APPELLANT

DAVID LEBOO ……2ND APPELLANT

BEN SINEI …… 3RD APPELLANT

PETER TENGET …….. 4TH APPELLANT

AND

CHAIRMAN OLOLULUNGA DIVISION LAND DISPUTES TRIBUNAL……. 1ST RESPONDENT

PRINCIPAL MAGISTRATE, LAW COURTS NAROK....2ND RESPONDENT

DISTRICT REGISTRAR, NAROK ……..……3RD RESPONDENT

DISTRICT SURVEYOR, NAROK ……..…… 4TH RESPONDENT

MBOKISHI GROUP RANCH ……..…….5TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nakuru (Omondi, J.) dated 15th November, 2012

in

High Court Petition No. 8 of 2011

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JUDGMENT OF THE COURT

The appellants namely: - Joseph Maren (hereinafter 'the 1st appellant'), David Leboo (hereinafter 'the 2nd

appellant'), Ben Sinei (hereinafter 'the 3rd appellant') and Peter Tenget (hereinafter 'the 4th appellant') filed a constitutional petition dated 4th May, 2011 and sought the following orders:-

> "**1. A declaration that the Petitioners fundamental right to own property and to protection from deprivation of property has been and/or is likely to be infringed by the Respondents**.
>
> **2. A declaration that the 1st and 2nd Respondent's decisions/orders are illegal, unconstitutional and in breach of the Petitioners rights and interests over their individual parcels which they hold separate Title Deeds.**
>
> **3. A declaration that the 1st and 2nd respondents proceedings and all consequential orders arising from Tribunal Case No. 14 of 2006 and Narok Principal Magistrates Court Misc. Land Case No. 17 of 2006 are null and void.**
>
> **4. A permanent injunction restraining the 3rd and 4th Respondents from implementing and/or from further implementing the decision of the 1st Respondent made on 15th November, 2006 and the decree issued by the 2nd Respondent on 6th February, 2009.**
>
> **5. An order that the beacons placed by the 3rd and 4th Respondents on the Applicants parcels of land in purported execution of the orders of the 1st and 2nd Respondents be removed.**
>
> **6. In the alternative an Order of Certiorari to bring to this court and quash the 1st Respondent's decision made on the 15th November, 2006 and the subsequent decree issued by the 2nd Respondent on 6th February, 2009.**
>
> **7. Costs of this Petition.**
>
> **8. Any other and/or further orders this Honourable Court may deem just and fit to grant."**

The Chairman, Ololulunga Division Land Disputes Tribunal; the Principal Magistrate, Law Courts Narok, The District Registrar, Narok, The District Surveyor, Narok (the 1st, 2nd and 3rd and 4th respondents herein) were named as the 1st, 2nd 3rd and 4th respondents respectively. Mbokishi Group Ranch (the 5th respondent herein) was the then interested party.

Ancillary to the Petition was a Notice of Motion dated 4th May, 2011 brought under a Certificate of Urgency pursuant to **Articles 23, 165 (6), (7)** and **Article 169 (1)** of the Constitution. On 15th November, 2012 the said application and the petition were dismissed with costs in one stroke giving rise to the present appeal. The appellants filed a memorandum of appeal dated 27th June, 2014 listing 13 grounds of appeal wherein they complain that the learned judge erred in law and fact. The appellants faulted the trial judge in:-

- Failing to find that the Appellant's Petition raised constitutional issues of immense public importance and misdirected herself in dismissing the said Petition.
- Finding that the deprivation of the Appellants from the suit properties was as a result of a legal litigation and adjudication process.
- Failing to find that the Petition raised an ownership dispute as opposed to a boundary dispute over the suit properties No.Cis Mara/ Ololulunga/111 and Cis Mara/Ololulunga/112.
- Failing to find that the 3rd and 4th Respondents were trespassing on the Petitioner's land in implementing the decisions of the 1st and 2nd Respondent.
- Failing to find that the decision of the 1st and 2nd Respondents contravened the rules of natural justice.
- Failing to find that the decision and decree issue (sic) by the 1st and 2nd Respondents respectively were made in excess of the powers of the Land Dispute Tribunal as it purported to order

cancellation of Title Deeds and adjudicate ownership of land.

- Not finding that the decision to review the 1st decree issued on 14th December, 2006 was unprocedural.
- Failing to find that there was evidence on record that the Appellants proprietory (sic) interest were being curtailed by the Respondent.
- Disregarding the Appellants evidence and submissions.
- Dismissing the appellants Petition when the same had not been argued.
- Dismissing the Appellants Petition without considering/taking into account that the Appellants were not party to the 1st and 2nd Respondents proceedings which had an adverse effect on their proprietory (sic) interests. This was tantamount to denying the Appellants the right to be heard.
- Dismissing the Appellants Petition when the same raised weighty constitutional issues.

The appeal came before us for plenary hearing on 30th May, 2017. Miss Njoroge appeared for the appellants whilst Mr. Harrison Kinyanjui appeared for the 5th Respondent. The Attorney General for the 1st, 2nd, 3rd and 4th respondents, though served, did not appear for the hearing of the appeal. Miss Njoroge in urging the appeal relied on their written submissions dated 29th May, 2017. Learned Counsel contended that the appellants who are former members of Ololoipange Group Ranch and Oloisuisho Group Ranch were not parties in Ololulunga Division Land Disputes Tribunal; that they did not take part in the hearing of the dispute lodged by the 5th respondent; that the award of the Land Disputes Tribunal was adopted by the Principal Magistrate's Court and a decree issued on 20th March, 2007; that subsequently the 2nd respondent rendered its decree, the essence of which it canceled titles allegedly inside the 5th respondent's parcel No. CIS-Mara/ Ololulunga /113**.**

In opposing the appeal, Mr. Kinyanjui for the 5th respondent contended that the appellants did not challenge Narok PMCC NO. 17 of 2006 and that to date the decree issued therein still subsists; further that the appellants have not pointed out how the learned High Court judge erred in her judgment.

We have considered the record, the oral and written submissions of the appellant, the oral submissions of the respondent, the authorities cited and the law. As this is a first appeal we remind ourselves of our primary role of re-analyzing and re-evaluating the evidence tendered in the trial court. In so doing we should never lose sight of the fact that we never had the benefit of hearing and observing the demeanour of the witnesses. In the celebrated case of **SELLE VS ASSOCIATED MOTOR BOAT CO.** [1968] EA 123 it was held:

> "**An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Mohamed Sholan (1955), 22 E.A.C.A 270".**

The background to this appeal is that the appellants are former members of the Ololoipange and Oloisuisho Group Ranches (hereinafter 'the Ololoipange Ranch' and 'the Oloisuisho Ranch' respectively) and representatives of all former members of the said ranches. The Ololoipange Ranch was the former proprietor of land parcel No.CIS-Mara/Ololulunga/111 measuring 1177.5 hectares, while Oloisuisho Ranch was the former proprietor of land parcel No.CIS-Mara/ Ololulunga /112 measuring approximately 1155 hectares. At the tail end of the list of lands central to the ensuing dispute was land parcel No.CIS-Mara/ Ololulunga/113 measuring approximately 607 hectares, owned by the 5th Respondent, and assigned the name Mbokishi Group Ranch (hereinafter 'Mbokishi Ranch').

The areas where all the said ranches are situate were declared adjudication sections in the year 1970 and

demarcation of their respective boundaries was completed in the year 1974. In the year 1991 both Ololoipange and Oloisuisho ranches ceased to be group ranches following their lawful dissolution. Consequently, Title Deeds were issued to individual members after the sub-division of the 'mother parcels' of land which formed the defunct ranches namely: -CIS-Mara/Ololulunga/111 and CIS-Mara/Ololulunga/112. It would be worthwhile to add that the appellants have always been in occupation of their respective land parcels.

In or about the year 2000, the 5th Respondent whose land neighbours the appellants lodged a claim at the District Registrar claiming that there existed a boundary dispute between its parcel and those of the former Ololoipange and Oloisuisho ranches. The District Registrar duly considered the complaint and arrived at a conclusion that the dispute was a land claim, and not a boundary claim. Come the year 2006, the 5th Respondent again submitted a claim to the Ololulunga Division Land Disputes Tribunal naming the dissolved Group ranches as Objectors/Respondents. The 5th Respondent's intention on this occasion was for the boundaries of its land parcel to be established. Regrettably, the appellants were never made party to the said claim nor did they participate in the subsequent proceedings. The Land Disputes Tribunal heard the interested party's representative and directed that the boundary be established on the ground by the District Land Registrar (hereinafter 'the 3rd Respondent') and the District Surveyor (hereinafter 'the 4th Respondent). In keeping with the law, the resultant award was adopted by the Narok Principal Magistrate's Court, in Civil Case No. 17 of 2006 and a decree issued on 20th March, 2007.

Vide a letter (Ref: NRK/LAW/COURT/67) dated 5th November, 2008, the 3rd Respondent wrote a letter to the Principal Magistrate at Narok (the 2nd Respondent herein) intimating that his office was unable to implement the court's decree of 20th March, 2007 for reasons outlined in a covering report dated 7th November, 2008 enclosed therewith. In conclusion, the 3rd Respondent sought advice on the way forward from the 2nd Respondent. Copied in the said letter were: - The Chief Land Registrar, District Land Adjudication and Settlement Officer, Chairman-Land Disputes Tribunal Ololulunga, the 5th Respondent and the Ololoipangi and Ololoisuisho ranches. Perusal of the record in its entirety reveals that neither the letter nor the covering report elicited a response from the offices and or persons to whom it was directed.

Be that as it may, the 5th Respondent returned to court and sought a review of the decree mentioned hereinabove and re-filed the award, which application was entertained by the Magistrate's court leading to the issuance of a fresh decree. The 5th Respondent adopted the foregoing course of action on two occasions causing the original decree to be reviewed and/or amended. On 6th February, 2009, the Narok Principal Magistrate's Court issued a reviewed decree which sought to cancel Title Deeds alleged to fall inside the 5th Respondent's land parcel No. CIS Mara/Ololulunga/113. The said decree directed the 3rd Respondent and the 4th Respondent to put down beacons around the 5th Respondent's ranch which process was allegedly undertaken without the involvement of the appellants.

Cancellation of the Title Deeds allegedly falling inside the 5th Respondent's land and the erection of beacons around the said parcel of land was the catalyst which spurred the appellants into lodging a constitutional petition at the High Court at Nakuru contending inter alia that:- the appellant's fundamental right to own property and to protection from deprivation of property had been or was likely to be infringed by the Respondents; and that the 1st and 2nd Respondents decisions and or orders were illegal, unconstitutional and in breach of the appellant's rights and interests over their individual parcels for which they held separate title deeds.

Flowing from the following set of facts, it is clear that in the year 2006 the 5th respondent whose land neighbours the appellants lodged a claim against the appellants at Ololulunga Division Land Disputes Tribunal in Narok. The Tribunal albeit in absence of the dissolved Group Ranches who had been cited as the objectors/respondents proceeded to determine the dispute their absence notwithstanding. The award of the Tribunal was adopted as the judgment of the court and a decree issued on 20th March, 2007. The decree was subsequently reviewed and a fresh decree issued on 6th February, 2009 the decree stated thus:-

"1. That the award of the tribunal dated 15th November, 2006 and filed on the 21st January, 2009 is hereby confirmed as the judgment of the court.

2. That the District Registrar and his Surveyor to go and resurvey Imbokishi Group Ranch No. CIS Mara/ Narok113/Ololulunga comprising of 607 Ha wholesomely.

3. That the District Registrar and District Surveyor to put down all beacons in all corners surrounding Imbokishi Group.

4. That the same exercise be carried out to the groups bouldering (sic) Imbokishi Group to avoid future boundary disputes between them. That is Chepchampas Farmers Co-operative Society Ltd. Mambo Leo Women Group, John Karunye, Sarune Ole Sena, Letian Leboo Group Ranch and others.

5. That any title deeds obtained fraudulently within and inside of Imbokishi Group Ranch should be cancelled.

6. That anyone aggrieved by this decision should appeal to appeal committee under section 7 sub section 1 & 2 within 30 days".

Suffice to state that the appellants' cause of action would have been to have the proceedings before the Land Disputes Tribunal quashed and/or setting aside the orders of the 2nd respondent. As of today, the decree issued on 6th February, 2009 pursuant to the Award of the Land Disputes Tribunal still stands. No amount of litigation outside Narok PMCC No.17 of 2006 will set aside the decree issued on 6th February, 2009, not even a constitutional petition. It may be true that the orders issued in Narok PMCC No. 17 of 2006 were in contravention of the rules of natural justice as the appellants may not have been heard in the Land Disputes Tribunal but their recourse was not in filing a constitutional petition but to challenge the award of the Land Disputes Tribunal and its subsequent confirmation in court. As stated above even if the constitutional petition were to succeed, the orders of Narok PMCC No. 17 of 2006 would still remain intact, hence the futility of the constitutional petition, the subject of this appeal.

It is in view of the above that we find no merit in this appeal. It is hereby dismissed with costs.

Dated and delivered at Nakuru this 27th day of September, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR