



Loontubu & another v County Land Registrar Narok & another; Lilau (Sued as the Legal Representative of the Estate of The Late Riro Enole Lilau) (Interested Party) (Constitutional Petition E006 of 2022) [2024] KEELC 5587 (KLR) (1 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5587 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
CONSTITUTIONAL PETITION E006 OF 2022
CG MBOGO, J
AUGUST 1, 2024
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF AN ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 & 47
IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015
AND
IN THE MATTER OF THE PIECE OF LAND KNOWN AS CISMARA/SIAPEI/37 & 48

BETWEEN

MEISEYEKI LOONTUBU 1ST PETITIONER

JANE NJERI LOONTUBU 2ND PETITIONER

AND

THE COUNTY LAND REGISTRAR NAROK 1ST RESPONDENT

THE COUNTY SURVEYOR, NAROK 2ND RESPONDENT

AND

EDWARD PARIKEN LILAU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE RIRO ENOLE LILAU) INTERESTED PARTY

JUDGMENT

1. The petitioners filed the amended petition dated 19th April, 2024 seeking the following prayers: -



1. A declaration that the 1st respondent violated the provisions of the *Land Registration Act*, the *Fair Administrative Action Act* Section 4; and *the Constitution* of Kenya Articles 10,20, 21(1),40 (1), 40 (3), 40 (4), 47,50,60,64,68,232(1) and 232 (2).
 2. A declaration that the proceedings and notice dated the 23rd November, 2016, and the decision of the 1st respondent to amend the RIM of Siapei is in contravention of the petitioners' rights to be heard as guaranteed under *the Constitution* and that the 1st respondent acted ultra vires.
 3. An order of Certiorari to bring into this court and quash the decision of the 1st respondent made on 23rd November, 2016 as contained in the notice of 23rd November, 2016 with respect to the Siapei Registry Index Map.
 4. An order of prohibition prohibiting the 1st and 2nd respondents from acting on the notice dated 23rd November, 2016.
 5. An order of Mandamus against the 1st and 2nd respondents to restore Siapei Registry Index Map of 1974.
 6. A declaration that the Oloontubu Ole Nkuraiya (Deceased) is the registered owner with interest over land parcel CisMara/Siapei/37 based on the RIM made in 1974.
 7. Costs.
2. The petition is premised on the grounds that the petitioners are the legal representatives of the estate of Oloontubu Ole Nkuraiya who is the registered proprietor of the suit property known as CisMara/ Siapei/37. The petitioners averred that in 1974, Siapei area was declared an adjudication section which notice contained the descriptive boundaries as against Oloombokishi Adjudication Section, and that the suit property falls within Siapei Adjudication Section, and shares a common boundary with CisMara/ Siapei/48.
 3. The petitioners further averred that vide a notice dated 23rd November, 2016, the 1st respondent ordered for an amendment to the RIM, without prior notice which has the effect of depriving the estate of the deceased approximately 16 acres of the suit property. Further, they averred that the 1st respondent ignored the boundaries established by the declaration notices of 1974, by making a fundamental error that Cis-Mara/Oloombokishi/9 & 8 share a common border with Cis-Mara/Siapei/37 and 38, and that beacon 34 separates all of them yet parcel Cis-Mara/ Siapei/38 is not along beacon 16, 34 and 37.
 4. The petitioners contended that the 1st respondent in contravention of Article 47 of *the Constitution* deprived the estate of the deceased the right to property, and did not consider that parcel no. 48 extends to both sides of the access road. They averred that the purported amendment to the RIM is an illegal deprivation, and dispossession of the deceased property and that is a denial, violation, and infringement of the deceased constitutional rights to property. They contended that the 1st respondent's decision contradicts the RIM drawn in 1974 which has distinct boundaries well marked on the ground.
 5. The petitioners further averred that the late interested party filed a suit in Narok CMCC ELC No. 22 of 2021, and that the petitioners' risk being evicted as well as the other beneficiaries from the portion awarded to the interested party through the purported amendment. Further, they averred that the 1st respondent's decision, and amendment was in blatant disregard of Articles 40, 47 (1), 50, 60, 64, 232 (1) and 232 (2) of *the Constitution*, as it failed to accord the petitioners the right to be heard before a determination was reached. They went on to aver that as a result, the 1st respondent violated the right to access justice, and the right to a fair administrative action despite the deceased being the registered owner of the suit property.



6. The petitioners averred that the 1st respondent violated Sections 16 and 17 of the [Land Registration Act](#) and Section 4 of the Fair Administrative Act, in as far as it proceeded to determine the matter in the absence of the legal representatives of the estate of the deceased. That taken as a whole, the decision of the 1st respondent offends the rules of natural justice, and is tainted with illegality, irrationality and procedural impropriety.
7. The amended petition was supported by the affidavit of the 1st petitioner sworn on even date. The averments contained in the supporting affidavit are a replica of the facts contained in the amended petition and there would be no need of rehashing the same.
8. The interested party relied on the replying affidavit of Riro Enole Lilau (deceased) sworn on 2nd May, 2023. The interested party deposed that she is the registered proprietor of Cis-Mara/ Siyapei/ 48 measuring approximately 20.45 hectares which was transferred to her by her late husband, and that she is aware that there was a long-standing boundary dispute between her parcel of land and Cis-Mara/ Siyapei/37.
9. The interested party deposed that she applied to the 1st respondent to ascertain the boundaries of her land in the year 2011, so as to have the petitioners evicted. It was further deposed that the 1st respondent visited the suit properties in the company of the 2nd respondent as well as the parties, and that the visits included identifying the boundary features, and having the measurements of the parcels ascertained and confirmed. She deposed that after collecting ground data and information, the respondents determined the dispute, and confirmed that the petitioners had encroached into a sizeable portion of her suit property, and determined the precise position of the boundaries of the parcels. That in consultation with the 2nd respondent, the 1st respondent ordered the amendment of Siyapei Registry Index Map to reflect the true position of her land on the ground.
10. The interested party further deposed that the 1st respondent in reaching the decision recorded statements from the parties herein, and their witnesses, and sought the parties views on location of vital boundary features, and among them was beacon 34 that separates the suit property. She also deposed that the petitioners were in agreement that their parcel was marked by beacon 37 in addition to 34 and that it was also agreed that her boundaries were identified by beacons 16. She deposed that beacons 16, 34, and 37 are fixed on a separate line that separates the two adjudication sections, and these findings were the basis of the registrar's findings and decision.
11. Further, it was deposed that it is not true that the respondents illegally marked the boundaries since the boundaries of the suit parcels were fixed by the demarcation committee, and that the alignment of the suit properties and subsequent amendment of Siyapei Registry Index Map did not in any way interfere with the ownership, and the area of land belonging to the petitioners as alleged. She deposed that the petitioners did file an appeal dated 7th December, 2016 challenging the decision which they have not prosecuted to date. It was further deposed that she did not move the court immediately to pursue eviction of the petitioners owing to the pending appeal before the 1st respondent, however, when Joshua Loontubu died on 25th March, 2021, she got wind of the plans to bury him on the land in dispute vide ELC No. 22 of 2021, and obtained a court order stopping the burial but unfortunately, they hurriedly buried him before they could execute the order.
12. The interested party further deposed that the petitioners have not demonstrated that any portion of their land has been hived off, as their land remains intact after the alignment of the boundaries. She also deposed that merely interring the remains of a deceased person on the disputed land does not confer outright rights to the petitioners to own the land, and the same should not be used as a scheme to delaying the matter before the magistrates' court. She went on to depose that the petitioners have



- failed to disclose the existence of an appeal before the 1st respondent, and they are not suitable to be granted the orders herein.
13. The interested party deposed that the petitioners have not demonstrated that the suit filed before the magistrates' court will prejudice them in any way, and that should they be dissatisfied with the judgment, they have a right to appeal to this court.
 14. The petition was opposed vide the replying affidavit of the Mary Njonjo, the Land Registrar, Narok sworn on 4th March, 2024. The 1st respondent deposed that the Land Registrar at the time visited the suit parcels to determine a long-standing boundary dispute between Siapei Adjudication Section and Oloombokishi Adjudication Section, and that during the course of the exercise, it was noted that adjudication had already been carried out, and beacons placed between the boundaries between the sections in 1971.
 15. The 1st respondent further deposed that the land adjudication committee showed the Land Registrar the beacons already existing on the ground at the time between the two sections, and that the Land Registrar deemed it fit to adopt the said beacons as marking boundary between the two sections, she went on to depose that beacon 34 forms a boundary between parcel no. 9 & 8 and parcels 37 and 48. She deposed that this exercise was conducted by the then Land Registrar in the presence of the parties from both Siapei and Oloombokishi, the area administration and in the presence of the Narok Chief Magistrate.
 16. It was further deposed that pursuant to Section 18 and 19 of the *Land Registration Act*, the respondents have the powers and mandate to establish and fix boundaries, and deal with boundary disputes. It was also deposed that the petitioners have not demonstrated with precision how their fundamental rights and freedoms have been violated, or are threatened. Further, it was deposed that the petitioners have not produced any evidence to prove the alleged violations. It was also deposed that the petitioners have not satisfied the threshold for granting judicial review orders as elaborated in the case of *Pastoli versus Kabale District Local Government Canal & Others* (2008) 2EA 300 at pages 300-304.
 17. The 1st petitioner filed a further affidavit in response to the replying affidavits of the respondents and the interested party sworn on 9th July, 2024. The 1st petitioner deposed that there is no court order directing the amendment of the RIM by the 1st respondent, and that the 1st respondent's decision was tainted with lack of objectivity, and was in favour of the interested party. He deposed that on 7th February, 2017, he lodged an appeal against the ruling of the 1st respondent which was forwarded to the Chief Land Registrar, and on 27th February, 2017, the firm of Nancy W. Njoroge & Company Advocates wrote to the 1st respondent expressing their frustration in the matter which the 1st respondent was frustrating his efforts to appeal against his ruling dated 16th November, 2016.
 18. The 1st petitioner further deposed that the 1st respondent frustrated their efforts to appeal as evidenced by the letter from the Chief Land Registrar dated 17th September, 2019 directing the 1st respondent to furnish the said report. That from the said letters, the 1st respondent has obstructed the processing of their appeal, and that on 26th January, 2017, the interested party threatened them with eviction from the portion of the land that has been awarded by the 1st respondent. Further, that he deposed that the boundary verification was not between Siabei and Oloombokishi adjudication sections, and further that there were no adjudication committee members from the two adjudication sections.
 19. The 1st petitioner further deposed that Oloombokishi was declared and adjudication section in 1971 and contains parcels 9 and 8, and Siabei was declared an adjudication section in 1974 where parcels 37 and 48 falls under, hence the correlation of beacon no. 34 as against parcels nos. 9 and 8. He deposed that the Narok Chief Magistrate has never been on the site for reason that they have never had a suit in



- court over parcels no. 37 and 48. He deposed that as per the green card for parcel no. 48, it shows that on 25th June, 2019, the 1st respondent made an amendment to the register and increased the acreage from parcel no. 37 where they reside.
20. With regard to the sketch map, the 1st petitioner deposed that the 1st respondent failed to indicate through brace that parcel no. 48 belonging to the interested party stretches to both sides of the road as indicated in the RIM of October, 1974, and which are missing in the map annexed to the ruling of 16th November, 2016. He went on to depose that as the testimony of Joshua Oloontubu, beacon 34 was intentionally removed by the interested party so as to frustrate the verification of the boundaries.
 21. The amended petition was canvassed by way of written submissions. The petitioners filed their written submissions dated 15th July, 2024, where they raised one issue for determination which is whether the petitioners are entitled to the prayers sought. On this issue, the petitioners submitted that in the petition before this court, it is clear that the petitioners have cited the relevant violations of *the Constitution* and the orders sought fall squarely within the orders that may be granted by this court. The petitioners relied on the cases of Minister of Health & Others versus Treatment Action Campaign & Others (2002) 5 LRC 216, and Council of Governors & 6 Others versus Senate [2015] eKLR.
 22. The petitioners further submitted that the petition has a constitutional underpinning as the constitutional rights of the estate of the late Oloontubu Ole Nkuraiya as the registered proprietor have been violated, and property rights deprived by the respondents. They submitted that they are aggrieved by the ruling of the 1st respondent delivered on 16th November, 2016 in determining a boundary dispute between parcels no. 37 and 48 within Siabei registration section. That in the enlarged hard copy of the RIM annexed to the further affidavit of the 1st respondent, the 1st respondent has not indicated that the amendment was occasioned by a court order. They submitted that the 1st respondent was dishonest in making reference to a court order, which was not availed.
 23. The petitioners submitted that they lodged an appeal against the 1st respondent's decision, and the deliberate failure to act expeditiously on the Chief Land Registrar's communication violated their rights as enshrined under Article 47 of *the Constitution* and Sections 4, 5 (2), (b) and (c) and 6 of the Fair Administrative Actions Act. They submitted that the 1st respondent's failure to indicate that parcel no. 48 occupies both sides of the access road as per the RIM of 1974 is in violation and contravention of their fundamental rights and freedoms guaranteed under Articles 27 (1) & (2), 40, 47, 48 & 50 of *the Constitution*. They relied on the case of Anarita Karimi Njeru versus Republic [1979] eKLR and submitted that they have pleaded with a reasonable degree of precision the constitutional rights that have been violated, and how they were infringed by the respondents.
 24. The petitioners further submitted that a portion of parcel 37 has arbitrarily been excised by the respondents, and awarded to the interested party, who has exclusively occupied and developed the said land and especially the portion that the respondents excised and ceded to parcel no. 48. Further, they submitted that parcel 37 has clear delineations, and boundaries as shown in the RIM of 1974 which the respondents refused to rely on in the determination of the boundaries, and which is in violation or contravention of their fundamental rights and freedoms under Articles 27(1) & (2), 40, 47, 48 and 50 of *the Constitution*. Reliance was placed in the cases of National Credit Regulator versus Opperman & Others (CCT 34/12) (2012) ZACC 29;3013 and Joseph N.K Arap Ngo'k versus Moiyo Ole Keiwua & 4 Others [1997] eKLR.
 25. The petitioners further submitted that the net effect of the action or omission by the respondents is that the estate of Oloontubu Ole Nkuraiya lost 16 acres which the respondents have failed to account for. They also submitted that the petitioners did not give consent at any given instance to the respondents' act of violation of their rights and entitlements. That even though they filed this petition as the legal



- representatives of the estate of the late Oloontubu Ole Nkuraiya, Article 22 does not envision the taking out of the letters of administration as long as one can demonstrate that he has come under the provision to sub-article 2 of Article 22. To buttress on this submission, the petitioners relied on the case of *Trusted Society of Human Rights Alliance versus AG. & 2 Others* [2012] eKLR.
26. The petitioner submitted that under *the Constitution*, the court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, the court is bound to determine such matter even when the particulars of breach had not been specifically pleaded. They went on to submit that pursuant to Sections 26, 106, and 107 of the *Land Registration Act*, the petitioners' rights and interests are protected and that the Land Registrar never had the legal mandate to re-adjust the boundary lines of the parcels in question or alter the same. They submitted that the action of the Land Registrar on matters of the rectification of the RIM was totally illegal, unprocedural and wrongful, and none of the legal powers founded under the provisions of Sections 76 to 78 of the *Land Registration Act* mandates the Land Registrar to cause the alteration of the RIM as he purported to do in the instant case. The petitioners relied on the cases of *Mubiddin & Another versus Karama & Another (Environment & Land Case 190 of 2016)* [2023] KEELC 951 (KLR) (14 February 2023) (Ruling), *Pius Kibet Tott versus Uasin Gishu County Government & 9 Others* [2018] eKLR and *Vekariya Investments Limited versus Kenya Airports Authority & 2 Others* [2014] eKLR.
27. On 5th March, 2024, the respondents filed their written submissions dated 4th March, 2024, where they raised one issue for determination which is whether the petitioners are entitled to the prayers sought in the application and petition.
28. On this issue, the respondents submitted that the petition does not meet the threshold espoused in *Mumo Matemu versus Trusted Society of Human Rights Alliance* [2013] eKLR and *Annarita Karimi Njeru versus Republic (1979) KLR 154*, which set the threshold to be met in a petition. They submitted that the petition and submissions are merely a reproduction of the constitutional provisions allegedly violated according to the petitioners without any evidence to prove the alleged violations. They relied on the cases of *Kiambu county Tenants Welfare Association versus Attorney General & Another* [2017] eKLR and *Pastoli versus Kabale District Local Government Canal & Others* [2008] 2EA 300.
29. I have considered the amended petition, the replies thereof, and the written submissions filed the petitioners and the respondents. In my view, the issues for determination are as follows: -
- i. Whether there was violation and/or contravention of the cited provisions of *the constitution*.
 - ii. Whether the petitioners are entitled to the orders sought.
 - iii. Who is to bear the costs.
30. At the centre of the dispute is the determination of boundary dispute between the parcels of land known as Cis-Mara/Siapei 48, and 37 by the 1st respondent dated 23rd November, 2016. The ruling as contained in the report is said to have been given on 16th November, 2016, and issued on 25th November, 2016. The petitioners in this case are challenging the 1st respondent's ruling which ordered for an amendment to the RIM, without prior notice, and which has the effect of depriving the estate of the deceased approximately 16 acres of the suit property, being Cis-Mara/Siyapei/ 48. Further, that the 1st respondent ignored the boundaries established by the declaration notices of 1974, by making a fundamental error that Cis-Mara/ Oloombokishi/ 9 & 8 share a common border with Cis-Mara/ Siapei/ 37 and 38 and that beacon 34 separates all of them yet parcel CisMara/ Siapei/ 38 is not along beacon 16, 34 and 37.



31. A careful reading of the report indicates the parties in this case were present i.e. Nicco N. Mutiso, the District Land Registrar, Lawrence Mwenje, the Land Surveyor, Edward Lilau, Joshua Ole Oloontubu, Meseiyeki Oloontubu and Grace Oloontubu. In this case, the petitioners argued that there was no prior notice of the amendment to the RIM which had the effect of depriving the estate of the deceased 16 acres. As a result, the petitioners contended that the estate of the deceased has been deprived the right to property envisaged under Article 40 and 47 of *the Constitution*. They also contended that the 1st respondent's decision, and amendment of the RIM was in blatant disregard of Articles 40,47 (1), 50, 60, 64, 232 (1) and 232 (2) of *the Constitution*. In addition, the petitioners averred that the 1st respondent violated Sections 16 and 17 of the *Land Registration Act* and Section 4 of the Fair Administrative Act, in as far as it proceeded to determine the matter in the absence of the legal representatives of the estate of the deceased.
32. On the other hand, the respondents argued that the 1st respondent visited the suit properties in the company of the 2nd respondent as well as the parties, and the visits included identifying the boundary features, and having the measurements of the parcels ascertained and confirmed. They further argued that after collecting ground data and information, the respondents determined the dispute, and confirmed that the petitioners had encroached into a sizeable portion of her suit property, and determined the precise position of the boundaries of the parcels. That in consultation with the 2nd respondent, the 1st respondent ordered the amendment of Siyapei Registry Index Map to reflect the true position of her land on the ground.
33. The interested party as well stated that she applied to the 1st respondent to ascertain the boundaries of her land in the year 2011, and that the 1st respondent visited the suit properties in the company of the 2nd respondent as well as the parties, and that the visits included identifying the boundary features, and having the measurements of the parcels ascertained and confirmed. The interested party further stated that after collecting ground data and information, the respondents determined the dispute, and confirmed that the petitioners had encroached into a sizeable portion of her suit property, and that they proceeded to determine the precise position of the boundaries of the two parcels of land, and in consultation with the 2nd respondent, the 1st respondent ordered the amendment of Siyapei Registry Index Map to reflect the true position of her land on the ground.
34. The role of the respondents in this case when it comes to the ascertainment of boundaries and settlement of boundary disputes is set out under Sections 18 and 19 of the *Land Registration Act*, Cap 300 . Section 18 of the said Act provides as follows:
- “(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where it is noted in the register that the boundaries of a parcel have been fixed, the registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination



of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (cap 299).”

35. Section 19 provides that:

- “(1) If the registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the registrar, the registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”

36. The procedure for ascertaining a boundary dispute under Sections 18 and 19 of the Land Registration Act is provided for under the Land Registration (General) Regulations, 2017. Regulation 40 states as follows;

- “(1) An interested person may apply to the registrar for the ascertaining of a missing boundary or a boundary in dispute under section 18 (3) of the Act in Form LRA 23 set out in the sixth schedule.
- (2) The registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the registrar may deem necessary for the resolution of the dispute if a person has complied with paragraph (1).
- (3) The registrar shall notify the office responsible for the survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
- (4) In determining a boundary dispute lodged in accordance with paragraph (1), the registrar shall be guided by the recommendation of the office responsible for survey of land.
- (5) The registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
- (6) Any party aggrieved by the decision of the registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the court.



- (7) Upon expiry of thirty days, the registrar shall-
- a. cause to be defined by survey the precise position of the boundaries in question;
 - b. file a plan approved by the authority responsible for survey of land containing the necessary particulars; and
 - c. make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.
- (8) A dispute for determination of a boundary and or parcel shall unless in the case of special circumstances, be completed within a period not exceeding six months from the date of filing the application.”

37. From the above cited regulation, the petitioners herein upon being dissatisfied with the ruling of the 1st respondent, had a right of appeal as clearly stated in the report. However, from the record, the petitioners sought to appeal against the said decision before the 1st respondent and later the Chief Registrar. There is no evidence that they filed any appeal to this court challenging the said decision. Instead, the petitioners moved this court vide the petition. Whereas the petitioners have a right to move the court as they so wish, I find it improper to do so through a constitutional petition especially with a view to obtaining the orders sought, where there exists a procedure for doing so.
38. In that case, I find that the petitioners ought to properly move the court vide an appeal as provided under Regulation 40 of The Land Registration (General) Regulations, 2017. The amended petition dated 19th April, 2024 is hereby dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 1ST day of AUGUST, 2024.

HON. MBOGO C.G.

JUDGE

01/08/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

