REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO. 7 OF 2016

BEATRICE WANJIRU, MARY MUMBI GATIMU, AND

NICHODEMUS KARANJA(Suing on their own behalf and on behalf of all interested persons who established, worked at and evicted from tea farms in Ragati, Hombe and Chehe parts of Mt. Kenya Forest).....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

NYAYO TEA ZONES DEVELOPMENT CORPORATION.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 10th November, 2017)

JUDGMENT

The petitioners filed the petition on 03.10.2017 through C.M. King'ori & Company Advocates. The petitioners prayed for judgement against the respondents for:

a) A declaration that the petitioners were subjected to slavery, practices similar to slavery, servitude, serfdom, forced or compulsory labour and exploitation by the respondents.

b) A declaration that the petitioners were subjected to, and continue to be subjected to inhuman and degrading treatment by respondents.

c) A declaration that the petitioners' rights and freedoms were thus contravened and grossly violated by respondents.

d) A declaration that the 2nd respondent, Nyayo Tea Zones Development Corporation is an institution practicing slavery or acts similar to slavery and should be abolished.

e) A declaration that the petitioners are entitled to an award of damages, compensation, restitution and reparation, and such an award be based on the gravity of the violation of petitioners' rights and freedoms as well as the unjust enrichment by respondents as a result thereof.

f) General damages, exemplary damages and aggravated damages.

g) Costs of the petition.

The petition is said to have been filed pursuant to leave granted to Beatrice Wanjiru, Mary Mumbi Gatimu and Nichodemus Karanja to file and prosecute the intended suit for and on behalf of all the interested persons intending to claim against Nyayo Tea Zones Development Corporation in respect of Mathira area and who identify themselves as Mathira Forest Squatters. The order for leave directed the applicants to publish the suit within 60 days in the daily newspaper (but which was not shown to have been complied with). The order for leave was given on 08.09.2016 in Miscellaneous Application No. 19 of 2016 in the Chief Magistrates' Court at Nyeri. The petitioners are therefore said to be 5728 persons as per the lists filed together with the petition. They are said to be the persons who in the period between 1985 and 1987 were contracted by the then Provincial Administration and the Ministry of Agriculture to prepare land and to establish tea farms in Ragati, Hombe, and Chehe parts of Mount Kenya. The petitioners' case is that under that contract, the consideration for the petitioners' undertaking the desired exercise was that each petitioner was allocated a half-acre of the subject land to prepare, plant, and tend to tea bushes. The petitioners pleaded that they undertook the exercise with the menace of eviction from the land if they failed to do so. The petitioners' stated in the petition that it was represented to them that the respective portions of the tea farms would be for their use and benefit.

The petitioners' further case is that upon completing the said exercise of establishing the subject tea estates, and upon their intention to pick the then matured tea leaves for their own use and benefit, they were brutally and without notice evicted from the land in 1987 by the then Provincial Administration. The petitioners' further case is that they were, in the alternative, promised that their labour would be remunerated accordingly and in spite of concerted efforts by the petitioners to pursue the promise, the respondents have to date, failed, refused, or ignored to remunerate the petitioners. The petitioners' case is that the 2nd respondent has since taken over and appropriated the subject tea estates for use and benefit by the 2nd respondent to date. The petitioners claim that upon the said eviction, their abodes in colonial villages were abolished and they became destitute, with some of them putting up on road reserves and others being integrated with relatives where they have invariably lived a life of deprivation and as squatters to date. The petitioners allege being subjected to servitude; exploitation; compulsory labour; and serfdom, particulars of which are set out in the petition.

The petitioners' case is that the Government of Kenya is liable for the acts complained of and the Government having established the 2nd respondent as a state corporation, both respondents violated the petitioners' rights and freedoms, both under domestic law and international treaties which bind the respondents. In particular, the petitioners allege that the following provisions were contravened:

a) Section 73 of the former Constitution of Kenya.

b) Articles 1 and 2 of the I.L.O Forced Labour Convention, 1930 (Geneva Convention No. 29).

c) Article 4(3) of the Universal Declaration of Human Rights.

d) Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, 1956.

e) Article 8 of the International Covenant on Civil and Political Rights.

f) Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights.

g) Article 1(b) of the Forced Labour Convention (NO.105).

h) Article 5 of the African Charter on Human and Peoples' Rights.

i) Article 5 of the Slavery Convention, 1926.

j) Articles 28, 30, 41, and 47 of the Constitution of Kenya, 2010.

The petition was based on the attached joint supporting affidavit of Beatrice Wanjiru, Mary Mumbi Gatimu, and Nichodemus Karanja and their further joint affidavit filed on 15.03.2017.

The 2nd respondent opposed the petition by filing on 02.03.2017 the replying affidavit of Peter K. Korir, the 2nd respondent's Managing Director. The affidavit was filed through the 2nd respondent's advocates on record, Kimondo Mubea & Company Advocates. The 2nd respondent further filed on 15.06.2017 the further replying affidavit of its Legal Officer one Yvonne Achisa. The 2nd respondent's grounds opposing the petition are summed up as follows:

a) The 2nd respondent is an absolute stranger to the petitioners' claims.

b) It is disputed that the claim is filed for and on behalf of 5728 petitioners taking into account the list of the petitioners attached on the petition.

c) The 2nd respondent was established in 1986 by Legal Gazette Notice No. 265 of 1986 as a state corporation and later amended by Legal Gazette Notice No. 30 of 2002. The 2nd respondent's mandate was to create as part of the forest tea growing zones known as Nyayo Tea Zones in gazetted forests within Kenya so as to prevent human encroachment upon such forests. It is therefore untrue that the petitioners were evicted from the forest land.

d) The 2nd respondent did not hire or engage the petitioners in a contractual relationship and there were no agreed wages to be settled in favour of the petitioners as prayed for.

e) The 2nd respondent had the mandate to create a buffer zone in gazetted forests so as to prevent any human encroachment into the forests and therefore the allegation by the petitioners that they were evicted from their settlement area is untrue.

f) At the time the 2nd respondent was established in 1986, its activities were being undertaken by the Office of the President through Provincial Administration which carried out the recruitment of casuals, supervision and payment of wages.

g) Sometimes in 1989 the 2nd respondent took full charge of the functions and management from the Provincial Administration and during the transition, no outstanding liabilities were reported until sometimes in 2005 when the petitioners raised their alleged claim.

h) At the time of establishment of the Nyayo Tea Zones there were no human settlement or colonial villages as claimed by the petitioners as the zone was within gazetted forest and therefore unavailable for human settlement.

i) That the issue of the petitioners' compensation had been subject of proceedings of the relevant parliamentary departmental committee sometimes in 2012 and the committee had recommended that the claims be investigated and settled by the Office of the President and with respect to only 702 claimants. The petition is misleading in referring to 5728 claimants.

j) The list of petitioners does not state the identification card numbers for some of the names in the lists and though the date of birth is not stated, from stated numbers of identification cards, some of the alleged petitioners would be minors as at the time of the cause of action between 1985 and 1987.

k) The suit is time barred as petitioners are guilty of inordinate and unexplained delay of over 20 years.

The court has considered the material on record. The court makes the following findings on the issues in dispute.

First, the court returns that the petitioners while alleging breach of rights and freedoms as pleaded in the petition, at the same time, they urge and allege there was a contract of service. Did a contract of employment exist between the parties? The claimants at paragraph 4 of the petition stated that all petitioners were contracted by the then Provincial Administration and the Ministry of Agriculture to prepare land and at paragraph 5 thereof, that the consideration in favour of the petitioners was allocation of half-acre of the subject land to cultivate and plant tea bushes and as per paragraph 6 thereof, for their respective benefit. The court returns that the alleged arrangement was that the petitioners render the labour and in return they receive allocation of half –acre plot to cultivate tea bushes for their individual benefit. The court finds that the alleged initial arrangement had no element of payment of money or wage. The court considers that an employee, per section 2 of the Employment Act, 2007, is one paid a salary or wage (and not in kind). To that extent, the court returns that parties were not in a contract of service. At paragraph 8 of the petition, the petitioners state that in alternative, it was promised that they would be remunerated for their labour. The particulars of that remuneration and promise have not been established or been pleaded. The computed wages that were allegedly withheld have not been specifically pleaded as special or liquidated damages. In such circumstances, the court returns that employer- employee relationship between the parties has not been established. The court further returns that even if such employer – employee relationship had existed, the terms of service thereof have not been established and more particular, the tenure of the relationship was not established as provided and envisaged in section 2 of the Act defining "**contract of service**" to mean an agreement, whether oral or in writing, and whether express or implied, to employ or to serve as an employee for a period of time.

Second, the petitioners have failed to specifically establish their full identification. The copies of the petitioners' identification documents were not filed and as submitted for the 2nd respondent, the identification card numbers for some of those listed were not stated at all. It remains open to doubt the true existence of the petitioners or those for whose benefit the representative suit was filed. The 2nd respondent has lamented that looking at the identification card numbers it could be that some of the petitioners were minors at the time of the alleged cause of action. The court returns that the lamentation was well founded and in absence of any further material on record, the court returns that the petitioners have failed to discharge the duty to properly identify the 5728 persons for whose benefit the petition was said to have been filed. As submitted for the 2nd respondent and as was held in **Geoffrey Asanyo & Another –Versus- John Ngunyi & 13 Others [2015]eKLR** (Aburili J), a proper party must be before the court for a court to exercise its jurisdiction and the question of a proper party is a very important issue going to the jurisdiction of the court – the court lacks jurisdiction to embark if there is no proper party before the court.

Third, the court has considered the propriety of the leave to file a representative suit as was granted in Miscellaneous Application No. 19 of 2016 in the Chief Magistrates' Court at Nyeri. A litigant desirous of filing a representative suit before this court is bound by rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 on suits by several persons. The said rule 9 provides, thus:

> **1) A suit may be instituted by one party on behalf of other parties with a similar cause of action.**
>
> **2) Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:**

Provided that in appropriate circumstances, the Court may dispense with this requirement.

> **3) The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their addresses, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.**

The court returns that it is clear that the petitioners did not seek to comply with that provision and the leave as granted by the lower court did not serve any purpose in the circumstances of the present petition.

The court further returns that the persons who may move the court in a constitutional petition for alleged

contravention or threatened contravention of rights or fundamental freedoms are provided for in rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The said rule 4 states as follows:

> **1. Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected may make an application to the High Court (which under the rules includes this Court) in accordance with these rules.**
>
> **2. In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by –**
>
> > **i. a person acting on behalf of another person who cannot act in their own name;**
> >
> > **ii. a person acting as a member of, or in the interest of, a group or class of persons;**
> >
> > **iii. a person acting in the public interest; or**
> >
> > **iv. an association acting in the interest of one or more of its members.**

The cited rule essentially repeats the provisions of Article 22(2) and Article 258(2) on enforcement of the Bill of Rights and the enforcement of the Constitution respectively. In that regard the court follows its opinion in the judgment in **Trusted Society of Human Rights Alliance –Versus- Nakuru Water and Sanitation Services Company and Another [2013]eKLR** thus, **"It is the opinion of the court that the foregoing analysis of Article 258 applies to Article 22 of the Constitution which is worded in exactly similar language save that, as already found, Article 22 proceedings would strictly and exclusively relate to enforcement of the Bill of Rights.**

Thus, the court holds that Articles 22 and 258 of the Constitution codify the traditional standing rules based on sufficient interest while at the same time expanding and liberalizing standing rules by conferring standing upon those without sufficient interest within an objective sieving system. The provisions do not therefore demolish all the walls of navigating access to courts and which sieving regime, in the opinion of the court, is a necessary safe-guard to fortify due process of the court that insulates proper parties to proceedings and removes persons who invariably would be improper parties in court proceedings. In the opinion of the court, the sieving regime enhances access to the courts and therefore justice by prescribing a simple objective criteria or standard for measuring presence or absence of standing." The court has further considered and followed **Mumo Matemu –Versus- Trusted Society of Human Rights Alliance & 5 others [2013]eKLR**, where the Court of Appeal stated, thus **"Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in public interest."**

In the present petition the court returns that the petitioners appear to have desired to act in terms of the quoted sub rule 4 (2) (ii) and in which event, the court returns that it was necessary that the members in the group or class of persons are fully identified say as envisaged in rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 but which was not done. Thus the court returns that the leave for a representative suit as obtained from the court below was irregular or unnecessary and the prescribed procedure under the applicable and cited rules had not been complied with and irreparably or fatally so.

Fourth, the court considers that the petitioners pleaded and urged that there had been a contract whose consideration was for each worker to benefit from half –acre land allocated to the worker to grow tea bushes for own benefit or, in alternative, a remuneration in that regard for the labour that was supplied. In such circumstances, the court returns that the allegations for servitude, exploitation, compulsory or forced labour, or serfdom as was claimed were unfounded. Under section 2 of the Employment Act, 2007, **"forced or compulsory labour"** means any work or service which is extracted from any person under

the threat of a penalty, including the threat of loss of rights or privileges, which is not offered voluntarily by the person doing the work or performing the service. The petitioners purported to allege in the petition that they undertook the exercise (rendering of labour) with the menace of eviction from the land if they failed to do so. The alleged menace was not established by way of evidence and the court has further considered the petitioners' further supporting affidavit of 15.03.2017. Paragraph 8 thereof states that it was hypocritical for the 2nd respondent to feign ignorance of unpaid wages while acknowledging that it took over the subject tea estates from the Office of the President who had engaged the petitioners as admitted in paragraph 11 of the replying affidavit. In view of that paragraph, the court returns that the petitioners' claim is clearly for unpaid wages under voluntary arrangements and the court returns that the claims and allegations of servitude, exploitation, compulsory or forced labour, or serfdom as was claimed were unfounded as unjustified. In particular, the court returns that the petitioners have failed to establish their claims namely - their labour was obtained by coercion; that if they failed to provide the labour they would be evicted (as there is no evidence that they were tenants or housed by the respondents or they were allocated or they owned or occupied the alleged land from which evictions would follow); that they were denied a choice not to work on the tea bushes or land preparation as alleged; that they provided labour and which was not remunerated; that they were landless upon which status they were exploited to provide the labour; that their labour was obtained by deceit and false pretences; or that they were forced to live on the respondent's land and to provide labour thereto without their will or consent and without remuneration.

The court has revisited the petitioners' pleadings and affidavits. Serious allegations have been made about violation of rights and fundamental freedoms but the court finds that the allegations have not been established or demonstrated to have taken place as was alleged. Thus there was no evidence that the government allocated each petitioner half-acre of the forest land and the allocation would be revoked if the petitioner failed to provide labour on the tea bushes. There is no evidence of the particulars of forced or compulsory labour. There were no allegations of specific acts of coercion perpetrated by named or specific government officials. In the circumstances, it was impossible for the court to return a finding that the rights and fundamental freedoms had been violated as was alleged, claimed, and prayed for by the petitioners.

Fifth, and in view of the fourth findings above, the court returns that the petitioners have failed to establish the contravention of the provisions of the treaties, conventions and the Constitutions as enumerated in the petition and the submissions filed for the petitioners. While making that finding, the court has considered the considerable submissions on the part of the petitioners and 2nd respondent on whether the cited international treaties and conventions applied to the case. Considerable submissions were made as to dualist approach prevailing as at time of the cause of action so that the treaties and conventions would only apply if domesticated or incorporated by way of enactment of relevant domestic laws. It was submitted for the petitioners that the cited treaties and conventions clearly outlawed the pleaded transgressions and the treaties and conventions had acquired the status of peremptory norms of general international law besides the partial provision in section 73 of Kenya's former Constitution and full adoption in Article 2 of the Constitution of Kenya, 2010. Accordingly, it was submitted for the petitioners that there would be no need to have domesticated the treaties and conventions as at the time of the cause of action to apply their provisions to the petitioners' present case. The court returns that as submitted for the petitioners, treaties or conventions which have acquired peremptory norms of public international law (***jus cogens***) cannot be derogated from, even without domestication by a relevant domestic enactment, because, such treaties or conventions having acquired the status of international customary law cannot be transgressed. The court further returns that the cited treaties and conventions that prohibit or outlaw slavery, and, forced or compulsory labour indeed constitute peremptory norms of public international law (***jus cogens***). Nevertheless, that will not help the petitioners case in the present circumstances because, the court has already found that the allegations for servitude, exploitation, compulsory or forced labour, or serfdom as was claimed were unfounded in view of the alleged contractual relationship and for want of the relevant evidence. Further, the court has found that the petitioners have failed, by way of evidence, to establish that alleged violations took place. Thus, whereas the protection was available as provided in the treaties or conventions as cited for the petitioners, the court finds that the alleged violations were not established at all.

Sixth, as submitted for the 2nd respondent, the petition suffered inordinate delay that was not explained in what the court has found to have been a clear case of an alleged claim for unpaid wages. The court has already found that the petitioners have failed to establish violation of the fundamental freedoms and rights as was alleged. For the residual and true claim for alleged unpaid wages for a cause of action said to have accrued between 1985 and 1987, the court returns that the action was then guided by section 4 of the Limitation of Actions Act and for a suit based on the contract of employment, the same was limited to 6 years generally, or 3 years for a suit against the government under the relevant statutory provisions prevailing at the time of the alleged cause of action. Accordingly, the court returns that there being no established violation of constitutional rights and freedoms, the suit being one for a claim of allegedly unpaid wages and the rate of the claimed wages not having been established or the quantum not specifically pleaded as required for liquidated damages, the suit was clearly time barred. As submitted for the 2nd respondent and as held in **Peter Ngari Kagume & Others –Versus- Attorney General [2016]eKLR** (Okwengu, Kariuki, and Azangalala JJ.A), the petitioners slept on their rights and in absence of a plausible explanation for delay, the suit amounted to abuse of court process.

While making that finding the court has considered the submissions for the petitioners that as held in **McKerr (Northern Ireland), Re [2004]UKHLR 12**, Per Lord Nicholls of Birkenhead, past events have continuing effects. However, in the instant case, the court returns that there was no established continuing injury or "**past event having continuing effect**" because once the petitioners were evicted in 1987 as was alleged, the contract of employment or the relationship between the parties lapsed accordingly. The court has considered the petitioners' case that after the alleged eviction in 1987, the respondents continued to enjoy the benefit from the tea bushes. The court returns that the petitioners did not establish their contribution to the subsequent benefits to the respondents after the eviction and it was not their allegation that after the eviction, they nevertheless continued to provide their labour. In the court's opinion, an employee's contribution to an employer's productivity is time bound and in absence of contrary evidence, the employee's benefit from provision of labour is limited to the tenure of the contract of service, and, nothing more and nothing less. In absence of an express provision in the contract of employment for the employee to benefit beyond the tenure of the contract, the employee cannot be heard to say thus, **"I was here when the foundation of my employer's enterprise was laid and must continue benefiting beyond the termination of the contract of employment."** In any event, the court returns that it is sufficient that the law of employment has provided for service pay or pension benefits or such other separation benefits paid to the employee in recognition of service so far rendered as at time of separation with an employer. Thus, the court returns that even if the petitioners established that they had performed the work of cultivating the land and caring for the tea bushes as was alleged, after the alleged eviction or termination of the arrangement, there would be no valid continuing claims founded upon the respondents' continued benefit from the tea bushes as the legitimate owners of the land, the tea bushes and as the owners of the ensuing enterprise as a whole.

The court has further considered the petitioners' submissions that in **Mutua & Others –Versus- The Foreign and Commonwealth Office [2012]EWHC 2678 (QB),** victims of Mau Mau war atrocities found favour with the Queen's Bench court (McCombe J) in their claim for compensation for the torture visited on them in 1950s, despite of having filed their claim about 60 years later. It was submitted that in that case the preliminary objection based upon lapsing of the time of limitation was overruled in the court's discretion so that the provisions of section 11 of the English Limitation of Actions Act, 1980 on limitation of actions would not apply to the case. In exercising the discretion not to apply the period of limitation, the court in that case was acting in accordance with section 33 of the English Limitation Act, 1980 which provided for discretionary exclusion of time limit for actions in respect of personal injuries or death. The court returns that no similar statutory provisions existed or were cited with respect to the present petition as applying to our jurisdiction and the circumstances of that case did not apply.

The court has also considered the judgment in **Njuguna Githiru –Versus- Attorney General [2016]eKLR** (Lenaola J, as he then was). The holding in that case was that each case must be considered on its own merits in the court's exercise of the discretion that the time of limitation shall not apply to cases of enforcement of the Bill of Rights. The essence of a time of limitation was upheld by the court in that case as preventing a plaintiff from prosecuting stale claims on the one hand, and on the other hand, protecting the defendant after he had lost evidence for his defence, from being disturbed after a long lapse

of time; but it was not to extinguish the claims. The law as set out in that case appears to be that in cases for enforcement of rights and fundamental freedoms, time of limitation may not apply provided it is established that the petitioner did not ignore the enforcement of his rights or freedoms under the general principles of law (say common law or equity or statutory law) with a calculation to convert his claims or grievance into a "**constitutional issue**" after the expiry of the time of limitation; and, the petitioner must offer an acceptable explanation or demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. Thus a claim may not be bound by the prescribed period of limitation if, there exist a genuine constitutional issue (meaning an issue not properly enforceable by ordinary action under prevailing laws); and, the petitioner explains the delay or belated filing of the claim as per the circumstances of the case.

In the present case, the court has found that the alleged violations of rights or fundamental freedoms have not been established thereby crushing any alleged "**constitutional issue**" in the case. Even if the "**constitutional issue**" was established, the court returns that the petitioners have not offered any explanation of the delay of over 20 years. In any event, the court has found that the only residual claim after the demise of the "**constitutional issue**" in the case is an alleged claim for unpaid wages in circumstances whereby - no evidence was provided as to the work that was performed by each alleged worker; the rate of the alleged pay was not pleaded or evidence provided; the computed special damages were not pleaded or evidence provided; and the cause of action was clearly time barred by statute, for suits based on the contract of employment, because the contractual claim suffered massive delays that were not explained.

The court has also followed its opinion in **Johnstone Ogechi –Versus- The National Police Service [2017]eKLR**, thus, "**While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution."**

The court has considered whether it was appropriate to take up the issue of limitation of time as a substantive issue rather than a preliminary issue in the suit. As a preliminary issue, the court would be restricted to examining the pleadings without having to go into the merits of the case and the possible evidence that would be available only at the full hearing. In that event, looking at the pleadings, a case for **"no constitutional issue"** would not have been successfully urged for the 2nd respondent because, the petitioners had clearly pleaded allegations and claims of violation of rights and fundamental freedoms. The court has returned that there was no constitutional issue after examining the evidence and taking into account the full merits of the case. The court therefore holds that in a case in which the petitioner has on the face of the pleadings clearly alleged and claimed violation of rights and fundamental freedoms, a challenge based on the limitation period will invariably be best argued at the full hearing of the petition where and when the evidence and full merits of the case are evaluated. Thus, in such cases, the court returns that the issue of limitation period for filing the petition becomes a substantive rather than a preliminary issue. Accordingly, the court returns that the issue of limitation period for filing the present petition was properly urged as a substantive issue in the petition.

Seventh, the court has considered that the 1st respondent, the primary respondent in the petition, did not file a replying affidavit or submissions but relied upon the 2nd respondent's replying affidavits and submissions. The court has also found favour in the 2nd respondent's submissions that the beneficiaries for whose behalf the petition was filed were not properly identified. The court has further considered that the issue of there being no proper party would have conveniently been taken up at the earliest possible time in the proceedings as a preliminary point and thereby substantially cut down on the costs of the

petition. In such circumstances, the court returns that the petition will fail with no orders as to costs.

In conclusion, judgment is hereby entered for the respondents against the petitioners for dismissal of the petition with no orders as to costs.

Signed, dated and **delivered** in court at **Nyeri** this **Friday, 10th November, 2017.**

BYRAM ONGAYA

JUDGE