



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PET NO. 57 OF 2014

PARKIRE STEPHEN MUNKASIO.....	1 ST
PETITIONER	
RIPOI OLE NKORIR.....	2 ND
PETITIONER	
TOBIKO OLE MUNTET.....	3 RD
PETITIONER	
MUNYIRI OLE NTAIMPUT.....	4 TH
PETITIONER	
SADERA OLE NJIRI.....	5 TH
PETITIONER	
MURUNYA OLE KARATINA MUTUTUA.....	6 TH PETITIONER
THOMAS OLE TERERE MALOI	7 TH
PETITIONER	
JOHNSON OLE KASALE.....	8 TH
PETITIONER	
KOIPATON OLE MONYIS	9 TH
PETITIONER	
MACKINNON TINKOI	10 TH PETITIONER
LELETO OLE MURASMI RESON	11 TH PETITIONER
NYAAMANI OLE KOISAMOU.....	12 TH PETITIONER
NKARU OLE TORIS.....	13 TH PETITIONER
LESILEF OLE MOLO.....	14 TH PETITIONER
PEMBA OLE KARATINA.....	15 TH PETITIONER

(Suing on their own behalf and behalf of their families and all the members of the Maasai Community living on Land Reference No.8396(I.R 11977) situated in Kedong)

VERSUS

KEDONG RANCH LIMITED.....1st
RESPONDENT

KENYA ELECTRICITY GENERATING CO. LTD (KENGEN).....2ND
RESPONDENT

AKIIRA ONE GEOTHERMAL CO.LTD.....3RD
RESPONDENT

THE CABINET SECRETARY,MINISTRY OF

ENERGY AND PETROLEUM.....4TH
DEFENDANT

THE CABINET SECRETARY, MINISTRY

OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....5TH
DEFENDANT

THE NATONAL POLICE SERVICE.....6TH
RESPONDENT

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....7TH
RESPONDENT

THE CHIEF LAND REGISTRAR.....8TH
RESPONDENT

THE HON ATTONERY GENERAL.....9TH
RESPONDENT

JUDGMENT

(Constitutional petition alleging violation of various constitutional provisions; basis of claim being that suit property is the ancestral land of the petitioners; land being private land as defined by constitution; no violation of right to property; no proof of violation of rights to dignity, torture, education, housing or health; no proof of violation of right to clean and

healthy environment; petition dismissed).

A. INTRODUCTION

1. This is a constitutional petition filed on 19 August 2014 by 15 petitioners who have described themselves inter alia as residents of the land parcel No. 8396 (I.R No. 111977) situated in Kedong in Naivasha, Nakuru County. The land measures approximately 75,769 acres.

2. I had earlier in a ruling dated 19 February 2015, set out the pleadings in the petition and the responses thereof. Since the reference is to the same pleadings, and nothing significant has changed, I hope that no party will take offence if I repeat my summary of the pleadings as given in the said ruling, with only minor modifications.

B. THE PETITIONER'S PLEADINGS

3. The petitioners have stated that they present this petition on their own behalf and on behalf of their families and all other over 30,000 members of the Maasai Community residing on the land parcel No. 8396 (I.R No. 111977) (hereinafter also referred to as the suit land or simply Kedong Ranch). The petitioners have invoked the jurisdiction of this court under Articles 10, 20, 27, 28, 29, 40, 53 (c) , and 63 of the Constitution of Kenya, 2010. They have further averred that they are members of the Maasai Community, which they have described as a minority and/or marginalized community, and hence a vulnerable group within the meaning of Article 21(3) of the Constitution. They have stated that they are empowered by Article 22 of the Constitution to institute court proceedings for the grant of the reliefs set out in Article 23 of the Constitution.

4. It is further pleaded in the petition, that the petitioners and the persons they represent, have a personal stake in the suit land, which is said to be their ancestral land, having been in actual occupation of it since birth. It is pleaded that subsequent post-independence government driven initiatives have continued to alienate land from the Maasai community at large, and that private entities have also done likewise. It is averred that the 1st and 2nd respondents are currently in the process of resettling people from Olkaria and Narasha on the suit land, a process which it is claimed to violate the rights of the petitioners, and the Maasai community that resides on the suit land, since the process is being undertaken without involvement of the Maasai community living in Kedong Ranch nor are there any plans to compensate them.

5. It is pleaded that the 1st respondent is currently subdividing and selling the land to the 2nd respondent and to other third parties, and ultimately, they will be dispossessed of their ancestral land upon which their livelihoods entirely depend, particularly for grazing their animals and extraction of sand for sale. It is pleaded that the suit land sits on top of a potential geothermal power basin, and that geothermal projects have been initiated by the Government, and the 2nd and 3rd respondents. Owing to this, the petitioners aver, that them and persons they represent, have continually and intermittently been forced to move from portion to portion of the suit land, and to be moved again every time a new project phase is initiated. This, it is said, reduces their grazing land. It is also pleaded that from time to time, the petitioners and the persons they represent have been evicted from the land, yet this land is very important to the petitioners and their families, as it is their means of livelihood, culture, religious and traditional practices.

6. It is pleaded that the 2nd respondent has asked the petitioners and the persons they represent, to leave the suit land by 21st August 2014, which is said to be an arbitrary forced eviction. It is stated that the 2nd respondent has already built 154 houses, schools, 3 churches and a police cell, at Olosinyat

area of the suit land, to settle the persons from Olkaria and Narasha, and have burnt currently unoccupied manyattas, belonging to the Maasai community. It is averred that the resettlement of these persons will infringe on the petitioners' rights to property.

7. It is also averred that the geothermal developments are rapidly degrading the environment, and that they have noted a sharp increase in nascent fumes, noise pollution, increased dust, gastronomic and skin diseases, stillbirths in cattle, premature death of livestock, and an increased risk of premature delivery in pregnant women, which are said to be clear signs of pollution. This it is pleaded, is in violation of the petitioners' rights to life, human dignity and property, and a clean and healthy environment. They have however admitted not conducting an independent study on these harmful effects.

8. The petition is said to be grounded on the following :-

(a) *Article 63 of the Constitution which recognizes community land;*

(b) *The right to housing under Article 43 of the Constitution;*

(c) *That in carrying out evictions, the State must ensure that all feasible alternatives are explored in consultation with the affected persons.*

(d) *That resettlement measures must be consistent with constitutional guidelines and internationally recognized human rights standards especially the right to life and security and the human rights of children.*

9. It is pleaded that the respondents have participated in one way or another in violating the constitutional rights of the petitioners and that they should be held accountable for their acts and omissions.

10. The petitioners have sought the following prayers in the petition :-

(a) *A declaration that the petitioners, their families and all the members of the Maasai Community residing on LR No. 8396 (I.R No. 11977) are in lawful occupation of the said land on account of it being their ancestral land and communal land.*

(b) *A declaration that the petitioners, their families and all the members of the Maasai Community residing on the suit land have acquired title to the suit land by adverse possession and/or prescription.*

(c) *A declaration that the acts and omissions of the 1st to 7th respondents violated the fundamental rights and freedoms of the Petitioners, their families and all the Members of the Maasai Community residing on the suit land, under Articles 27(1), (2), (4), (5) and (6); 28; 29 (c) (d) (e) and (f); 40 (3) and (4); 42; 43 (a) (b) (c) and (f); 44; 47 (1) and (2); 57 (c) and 63 of the Constitution of Kenya.*

(d) *A declaration that the 2nd, 3rd and 4th respondents either by themselves, their agents, servants or otherwise howsoever cannot drill any geothermal well on the suit land or undertake any related project without consulting and seeking the participation of the petitioners, their families and the people they represent.*

(e) *An order of permanent injunction restraining the respondents either by themselves, their agents, servants or otherwise howsoever from evicting the petitioners, their families, and all other members of the Maasai Community residing on the suit land.*

(f) *An order of permanent injunction restraining the respondents, either by themselves, their agents, servants or otherwise howsoever from occupying, selling, charging, leasing or in any way alienating and/or disposing the suit land.*

(g) *An order directing the Chief Land Registrar to cancel any subdivision, titles and transfers made in respect of the suit land.*

(h) *Without prejudice to the foregoing, and in the alternative, a declaration that in the event that it is necessary for the Government and/or through the 2nd and 4th respondents to compulsorily acquire the suit land, such acquisition and/or settlement programme must comply with the requisite constitutional and legal requirements.*

(i) *Damages.*

(j) *Costs of the Petition.*

(k) *Any other and/or further relief that this Honorable Court may deem fit.*

11. The petition is supported by the Affidavit of Parkire Stephen Munkasio, the 1st petitioner. He has more or less reiterated the averments in the petition, which I have already set out above, and I see no need of repeating the same. To the petition, was annexed an authority to act, plead and swear affidavit, signed by the other petitioners, save for three, for which I have not seen signatures against their names. There is also annexed a list of persons who are said to be residing within the suit land. The list, from my count, is signed by 814 persons, (assuming that there are no repetition of names, for this is contested by the respondents). There are also several photographs said to be of the suit land which demonstrate various activities.

C. THE RESPONDENT'S RESPONSE AND PETIONERS' REPLY

12. The 1st respondent, entered appearance through the law firm of M/s Kadima & Company Advocates, and filed a replying affidavit to the petition. The affidavit is sworn by Paschal Babu Wood, who has described himself as the managing director of Kedong Ranch Limited. It is inter alia stated that there is another suit filed in the Environment and Land Court over the same subject matter and by the same community, the Maasai, who are the petitioners herein. It is further averred that the Constitution gives sanctity to title; that the suit land has always belonged to the 1st respondent which has held it for the last 41 years having bought it from the previous owners, Magogo Estates Ltd who held a grant issued in the year 1950; that there are no ancestral shrines or graves on the land; that the petitioners do not reside on the suit land; that there is in existence the Geothermal Resources Act (Act NO. 12 of 1982) and the Geothermal Resources Regulations of 19990 which have guidelines to be followed; that the petitioners have all along had a conflict with the 1st respondent and numerous instances of strained relationship and thus prescriptive rights cannot apply; that the 1st respondent has no role to play in allocation of geothermal energy; and that it is actually the petitioners who always violate the rights of the 1st respondent. They asked that the petition be dismissed.

12. The 1st respondent also filed a Notice of Preliminary Objection seeking the striking out of this suit on various grounds, an issue that I will address a little later, since I made a ruling on it.

14. The 2nd respondent entered appearance through the law firm of M/s Mohamed Muigai Advocates . They filed Grounds of Opposition and a Replying Affidavit to oppose the petition. Inter alia, they set out that the petitioners have invoked an improper procedure to ventilate their claim for adverse possession;

that the petition does not raise any question meriting a claim of human rights and fundamental freedoms; that the petition is overtaken by events; and that the property in issue does not fall within the definition of Community Land as envisaged under Article 63 of the Constitution.

15. The Replying Affidavit is sworn by Jennifer Oduor, the property manager of the 2nd respondent. It is inter alia averred that the 1st respondent is the registered owner of the suit property; that the 2nd respondent (Kengen) entered into an agreement to purchase a portion of it and paid the full purchase price on 27 August 2012; that the transaction was approved by the Land Control Board of the area; that the property is not Community Land; that the petitioners have not been in occupation of the property and if so, then they have been occupying it as squatters; that a constitutional petition is not the proper forum to agitate claims for adverse possession; that the list of names attached is less than 500 yet they purport to represent over 30,000 individuals; that it is not stated how this random number of individuals represented was arrived at; that most of the persons supposedly represented in the petition are not shown to be aware of these proceeding or to support it; that the petitioners have no *locus standi* as the process of instituting a representative suit has not been followed, and that the identity of the persons represented has not been sufficiently identified; that it is not true to allege that Kengen is undertaking geothermal development without regard to the environment; that they have conducted Environment and Social Impact Assessments of the geothermal projects; that some persons needed to be moved and a resettlement action plan was put in place leading to the purchase of 1700 acres from the 1st respondent; that pursuant to the resettlement action plan, Kengen developed schools, housing units, churches and other social amenities; that the persons affected were moved into the area; that the time it took to develop the area was long enough to put anyone into notice; that the petitioners could not have resided in the area where several persons have been resettled; that the petition has no merit.

16. The law firm of LJA & Associates entered appearance for the 3rd respondent. They filed a Notice of Preliminary Objection to the petition (which I ruled on) and later a replying affidavit. The replying affidavit is sworn by Mr. Robert Bunyi, the Chief Executive Officer of the 3rd respondent. He has pointed out that despite this petition being said to have been filed on behalf of 30,000 persons, the list of names attached has only about 500 names and that several names have been repeated. He has averred that the identities of the individuals said to be represented in this suit has not been sufficiently revealed, and without proper identification, the petition is incompetent. He has also stated inter alia that the suit land is not community land but is privately owned by the 1st respondent; that the issue of occupation by the petitioners of the land has been conclusively decided in Nakuru ELC No. 21 of 2010; that the 1st respondent holds good title which should be protected without unnecessary interference from 3rd parties; that there is no nexus between the actions of the respondents and the alleged infringement of the petitioner's rights; that the 3rd respondent is on the land pursuant to a contract with the 1st respondent allowing it to develop and exploit geothermal resources for power generation which is fundamental in unlocking the country's economic potential. He has asked that the petition be dismissed.

17. The State Law Office, for the 4th to 11th respondents, did not file any response to the petition.

18. The petitioners sought leave to file a further affidavit, which was allowed, and one was filed on 30 April 2015. In it, the petitioners stated that there was no irregularity in failing to list all the 30,000 persons. On the averment that some of the names are repeated, it was deposed that there is a similarity of names and that this does not change the representative nature of the petition.

D. PRELIMINARY MATTERS

19. In the course of the proceedings, an application was filed by the law firm of M/s V.A Nyamodi & Company Advocates, on behalf of the Geothermal Development Corporation (GDC), seeking that GDC

be enjoined to these proceedings as interested party. That application was not opposed and I allowed it. On their part, GDC filed Grounds of Opposition to oppose the petition. They raised the following two grounds :-

(i) That the suit property is not community land within the meaning of Article 63 of the Constitution, the Land Registration Act, 2012, and the Land Act, 2012. Accordingly, the rights purported to have been violated and/or threatened with violation by the respondents are not open for enjoyment by the petitioners since they have no right to the suit property.

(ii) That the petition is incompetent, bad in law and an abuse of the Court process.

20. Preliminary objections were raised by the respondents on the veracity of the petition. It was claimed inter alia that this court has no jurisdiction to hear the matter; that the petition is not a true constitutional petition but seeks the ventilation of private rights; that a constitutional petition is not the proper procedure for pursuing a claim for adverse possession; and that in any event the claim for adverse possession was *res judicata*, there having been another suit for adverse possession, being the suit Nakuru ELC No. 21 of 2010 (O.S).

21. I heard the preliminary objections and in my ruling of 19 February 2015, I held as follows:-

(i) That this court has jurisdiction to hear this petition and the petition may proceed before this court.

(ii) That the aspects of the petition that attempt to agitate a claim for adverse possession are incompetent, for being res judicata, and/or for being wrongfully pursued under a Constitutional Petition, and are hereby struck out.

(iii) That apart from the claim for adverse possession, which has been struck out, the petition be argued on merits.

(iv) That there be no order as to costs on the preliminary objections.

22. It follows that the claim for adverse possession was struck out and is therefore not open for determination in these proceedings. On the other aspects of the petition, I asked counsels to file written submissions and also allowed them time to make oral submissions to highlight their key points. The written submissions were filed, and I took in oral submissions on 11 May 2015. Mr. Biko held brief for Prof. Ojienda for the petitioners; Ms. Mwera held brief for Mr. Kadima for the 1st respondent; Mr. Imende appeared for the 2nd respondent; Mr. Mukite Musangi for the 3rd respondent; and Mr. Saluny for the interested party. There was no appearance on the part of the State Law Office for the 4th to 9th respondents. I thereafter reserved judgment for 11 June 2015. I will shortly come back to the submissions, for before I could deliver judgment as scheduled, an application under certificate of urgency was filed on 2 June 2015 by counsel for the petitioners.

23. In the application, the petitioners sought to stay the delivery of the judgment and asked that the court do pay a site visit to the suit property in order to establish and confirm the position on actual occupation and the alleged violations against the petitioners. In the alternative, they asked that they be granted leave to file by way of a supplementary affidavit and submissions, further evidence on the current status of actual occupation of the suit land. They also asked for orders that they be allowed to file further affidavits and/or submissions in response to the filed submissions of the 1st respondent and of the Interested party. The main ground for the application was that the hearing of the petition on 11 May 2015, was conducted in the absence of Prof. Tom Ojienda S.C, who was said to be in personal conduct

of the matter. It was stated that counsel holding brief for Prof. Ojienda, failed to request the court to conduct a site visit. It was said that this was mistake of counsel which should not be visited upon the petitioners. It was also said that the written submissions of the 1st respondent, and the interested party's list of authorities, was served on the same day of the hearing, which denied the petitioners a chance to have adequate time to respond, yet the same raised novel issues of occupation on the ground and an allegation of fraud against the 1st petitioner.

24. I held the judgment in abeyance pending hearing of that application, which was heard on 2 July 2015. I heard Prof. Ojienda S.C who urged me to reopen the case, pay a site visit to establish the fact of occupation, or alternatively, allow the petitioners to file a further affidavit. Mr. Kadima, Mr. Imende, Mr. Tombe holding brief for Mr. Musangi, and Mr. Nguyo of the State Law Office opposed the application. I dismissed that application and stated that I would give the reasons in this judgment. I now wish to give reasons for the dismissal of that application.

25. At the outset, I need to emphasis that it is the duty of litigants to place material in support of their case. It is not the mandate of the court to go on a fact finding mission. If the petitioners wanted to press the fact of occupation through additional evidence, they had avenues to do so, right from the time the petition was filed, or even after receiving the responses of the respondents, who questioned whether the petitioners were actually in occupation of the suit land, especially given that in Nakuru ELC No. 21 of 2010, the court held that the petitioners, or the persons that they represent, were not in occupation. The petitioners had therefore been alerted in good time that the issue of occupation would be contested. They had time to get a land economist or surveyor to go to the ground and file a report. They did not do so. I also note that in the course of these proceedings, the petitioners sought leave to file further affidavits, which leave was granted. They should have taken advantage of this leave to put their house in order. Neither was I impressed by the ground that counsel who held brief for Prof. Ojienda, forgot to apply for a site visit or for leave to file a further affidavit.

26. There was no proof of such instructions, and neither was there any affidavit coming from Mr. Biko (who held brief for Prof. Ojienda at the hearing of the petition), that he had overlooked some instructions. It is a serious issue for a party to apply to call in further evidence after a matter has been heard. The greatest risk, of course, is that the other parties to the suit stand to be prejudiced, for they have already presented their case and have revealed all their cards. It will need to be an extremely exceptional case to allow a party to call additional evidence after a hearing has been closed. I can probably only fathom a situation where the applicant has come across evidence which it could not have come across, despite adequate due diligence, such as where the other party has deliberately concealed it, and which evidence is critical for the determination of the issues in the case. This court would not wish to make precedent that a party is free to apply to reopen his case merely to seal loopholes revealed at the hearing of the suit or after the submissions of the other party. It is for the above reasons that I declined to exercise my discretion and declined to allow the application by the petitioners to reopen the case.

27. Back to the matter at hand, I mentioned that counsels did make their submissions. Let me now address these:-

E. SUBMISSIONS OF COUNSEL

28. Prof. Ojienda SC for the petitioners in his written submissions, submitted that the dispute herein is between the Maasai Community and Kedong Ranch Limited, Kengen, and Akiira One Geothermal Company over the ownership of the suit property. He submitted that though the land is registered in the name of the 1st respondent, the petitioners and members of the Maasai community have lived on the land since time immemorial and aver that it is their ancestral land and that they use it for livestock

keeping and sand harvesting. He submitted that the petitioners have homes in the land, schools, churches, cattle dips, dams and water tanks. He submitted that these activities have been interfered with by the respondents because the land sits on top of a potential geothermal power basin where exploration of geothermal power has began. He submitted that these geothermal activities have rapidly degraded the environment and the source of red ochre used by the Maasai.

29. He submitted that though not being the registered owners, the petitioners are the legal owners of the land by virtue of it being ancestral and communal land. He submitted that the same is held in trust for the petitioners by virtue of Sections 25 and 28 of the Land Registration Act, 2012, and that their occupation constitutes an overriding interest. He relied on the case of **Lawrence Maoni Okeyo vs Barongo Okeyo & 6 Others (2015) eKLR**. He submitted that by evicting them or sub-dividing it, the respondents have infringed on the petitioner's rights to own property. He submitted that their eviction violates their rights against torture, or being treated in a cruel, inhuman or degrading manner. He also submitted that relocating members of the Narasha community into the land without consulting the leaders of the Kedong community violated the rights of the petitioners to fair administrative action and violated the principles of public participation.

30. He submitted that under Article 259, the Constitution needs to be interpreted in a purposive manner. He referred me to various cases on the interpretation of the constitution including the cases of **Kigula & Others vs The Attorney General (2005) AHRLR 197 (Uganda); Timothy Njoya & 6 Others vs Attorney General & Others (2004); Rangal Lemeiguran & Others vs Attorney General & Others (2006) eKLR**.

31. He further submitted that the Constitution protects minority groups and that the Maasai are one of the minority groups, in Kenya. He referred me to the definition of minority groups in the case of **Joseph Letuya & 21 Others vs Attorney General & 5 Others (2014) eKLR**. He submitted that the Constitution recognizes, respects and protects the various ethnic groups in Kenya including the minority groups. He referred me to Article 56 of the Constitution. He submitted that the distinct cultures of minority groups need protection and that the geothermal activities have interfered adversely with the red ochre that is the cultural identity of the petitioners. He submitted that by not protecting them, the respondents have violated the Constitution.

32. On the violation to the right to a healthy environment, it was submitted that the Constitution does protect this right at Article 42. He submitted that the geothermal activities have rapidly degraded the environment in various ways.

33. Counsel also submitted that there has also been violation of the petitioner's right to dignity through forceful evictions of the petitioners. He further submitted that there has been a violation of the right to compensation contrary to Article 40 of the Constitution, which provides for compensation for any compulsory acquisition of land. He submitted that the petitioners stand to lose their land yet no compensation has been offered.

34. Prof. Ojienda further submitted that there has been violation of the right against torture and degrading treatment in the manner of carrying out evictions; that there has been violation of the right to housing and equality before the law. He relied on various cases, on this point including the case of **Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others**. He also submitted that there has been violation of the right to education as the schools that the children of the petitioners go to have been destroyed coupled with continuous forceful evictions.

35. Counsel submitted that there has been violation of the right to participate in the cultures of the community contrary to Article 44 of the Constitution. He averred that forceful evictions disrupt the petitioners' cultural rights. He also submitted that there has been violation of the right to work, social security and protection of the family, and violation of the right to fair administrative action, and fair hearing. He stated that other persons have been relocated to the suit property without the involvement of the Kedong community.

36. He concluded that the petitioners are entitled to the reliefs sought.

37. In his oral submissions, Mr. Biko who held brief for Prof. Ojienda, emphasized that the petitioners' case is based on history and ancestry and communal land rights derived from Article 63 of the Constitution. He pointed out that the title to the suit land was first issued in 1955 and submitted that the question is who owned the land before that. He submitted that it was the petitioners in occupation and the name "Kedong" from where the suit land derives its name, is a Maasai name, thus lending credence that the land was Maasai land. He stated that there had been intention that the land should be a Maasai group ranch.

38. Mr. Kadima for the 1st respondent, posed the question whether the petitioners have proved historical rights to the land. He submitted that the court in the case Nakuru ELC No. 21 of 2010 (OS) found that the petitioners do not reside on the suit property, and that they were born elsewhere, in Narok and Kajiado. He also submitted that the first prayer for ancestral rights is res judicata, as the same was decided in the case Nakuru ELC No. 21 of 2010. He further submitted that the suit land does not fall within the definition of community land as defined by Article 63(2) of the Constitution. He submitted that the claims for compensation are hinged on proof of ownership which the petitioners do not have. He submitted that the title shows that it is the 1st respondent who is owner, and there is nothing in the title, which shows that the land is held in trust. He submitted that the title was issued under the Registration of Titles Act (CAP 281) (repealed), and Section 23 of the Act, protected the said title. Counsel also raised issue as to the identity of the petitioners and further observed, that three petitioners, have not signed any authority. He submitted that the signatures are forgeries as several appear to be the same and submitted that the same should be expunged and submitted to investigation. He concluded by submitting that no violation of the petitioner's rights has been disclosed.

39. Mr. Imende for the 2nd respondent, submitted that the petition is incompetent first because the petitioners have not followed the requisite procedure for filing a representative suit, and secondly, the petition is defective for not complying with mandatory legal requirements. Counsel submitted that the petitioners have not established any basis for acting on behalf of the alleged 30,000 individuals, as it has not been shown that the 30,000 people, cannot act in their own names. He submitted that the petition does not fall in the gamut of public interest and referred to the case of **Randu Nzai Ruwa & 2 Others vs The Secretary, Independent Electoral and Boundaries Commission & 9 Others (2012) eKLR**. It was also pointed out that although the petitioners allege to represent about 30,000 individuals, only a list of 500 persons has been attached and that many of the names are repeated. He submitted that the petition does not therefore identify the persons supposedly represented in the petition contrary to Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Counsel submitted that the petition does not set out the precise provisions of the Constitution said to have been violated and establish how they have been violated. He relied on the case of **Anarita Karimi Njeru vs Republic (1979) KLR 154 and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**. It was submitted that the suit property does not belong to the petitioners and their claim that it is ancestral land has no basis in law. It was submitted that there were no particulars tendered on the allegation of forced evictions, when they took place, who was affected, and how. He submitted that an Environment and Social impact Assessment was carried out by

the 2nd respondent before the projects were undertaken and remedial action is still being undertaken. It was submitted that the communities were consulted and some resettled as a result of the anticipated effects of noise, hydrogen and sulphide emissions. He also submitted that there was no proof of breach of the right of housing owing to a resettlement. Counsel submitted that the suit property is not communal land. He submitted that the portion of land being used by the 2nd respondent was purchased from the 1st respondent and that the transaction was above board.

40. Mr. Mukite Musangi for the 3rd respondent submitted that there is a comprehensive judgment in Nakuru ELC No. 21 of 2010, which dealt with the factual position on the ground. He submitted that it is untrue for the petitioners to allege that they are on the ground. He submitted that the petitioners want to take the issues back to 1955 before the land was titled, which to him, would be a dangerous expedition as there are various places which could pass for ancestral land.

41. Mr. Saluny for the interested parties inter alia submitted that the petition is not precise on the alleged violations. He submitted that the land is private land and it cannot be argued that a community has an interest in it. He relied on the case of ***Bahola Mkalindi vs Michael Seth Kasembe***.

F. DECISION.

42. This suit alleges various violations of the Constitution. It will be noted that the respondents have raised several preliminary issues on the veracity of this petition. I think that these first need to be addressed. The petitioners have hinged this petition on the argument that the suit property is ancestral land and I feel that it is important for the status of the land ought to be identified and/or defined. It is only then that I can go into whether or not there have been any violations of the Constitution by the respondents. Following the above, I am of the view that this petition may be determined if the following issues are addressed, being:-

(i) *Is the petition before this court a proper constitutional petition and has it been properly filed as a representative action "*

(ii) *What is the status of the land in issue "*

(iii) *Can the petitioners claim rights over the suit land given its status "*

(iv) *Were there any violations of the constitution by the respondents towards the petitioners "*

Issue 1 : Veracity of the petition as a representative action

43. The named petitioners are fifteen in number. It is discernible from the petition itself, that the 15 persons assert that they present this petition on their own behalf and on behalf of their families and "all the other over 30,000 members of the Maasai community residing on the suit property." It is further stated in the petition, at paragraph 21, that the petitioners, their families and the people they represent, are all members of a minority and/or marginalized community, that is, the Maasai Community, which the petitioners claim to be a vulnerable group within the meaning of Article 21 (3) of the Constitution.

44. The supporting affidavit is sworn by Parkire Ole Munkasio, who I will refer to as the lead petitioner. He has annexed what he deems to be an authority to plead and swear the affidavit. A look at it will show that at least three persons out of the 15 petitioners have not signed that authority. Also annexed was a list of persons who were said to be resident in the suit land. I take it, that it is these persons, among others, that this petition is said to be brought on behalf of.

45. Since three person have not signed the letter of authority, authorizing the lead petitioner to file the petition on their behalf, I can only take it that this petition has been filed by 12 persons and not 15. But this holding is really not material, considering that the 12 persons are not suing on their own behalf but on behalf of many others. It therefore matters not whether I hold that the petition has been filed by 15 or 12 persons. At the end of the day, it is brought on behalf of a large group of persons. What I need to determine is whether it is proper for the now 12 petitioners to file such a petition on behalf of the many persons.

46. The starting point has to be Article 22 of the Constitution which is drawn as follows :-

Article 22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause

(3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

47. The above provisions are repeated in Rule 4 (2) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

48. It would appear to me that the petitioners can bring themselves under the umbrella of Article 22 (2)

(b), and Rule 4 (2) of the Rules, that is, that they are acting as members of, or in the interest of a group or class of persons. The petitioners are members of the Maasai community, and they bring this action in the interest of that group, i.e the Maasai community, who allege to be residing within the suit land. I know that there are risks to having any person allege to be a representative of a group of people, or to allow any person claim to be representing a whole tribe or community of persons. It could very well be that such person has no mandate to act for such community, or indeed, the community has no interest in the matter that the litigant claims to be pursuing on their behalf. But I guess that this is an issue that has to be determined on a case by case basis. On my part, I will take it that the petitioners are representing, the Maasai community who allege to be resident on the suit land and no more.

49. On the first issue, I do hold that they are properly before court in that capacity.

Issue 2 : What is the status of the land in issue "

50. The case of the petitioners is anchored on the argument that the land in issue is the ancestral land of the Maasai, and that the petitioners, through ancestry, are entitled to it. It is their argument that this is land owned by the Maasai Community and that the registered proprietor is merely holding it in trust, a matter that I will address in the next issue.

51. The arguments of the petitioners demand an interrogation into the status of the land in issue. Is the land public land, private land or community land" The answer to this question will be found in the definitions of public, private and community land as provided for in the Constitution. The definitions are respectively found in Articles 62 (1), 63 (2) and 64 of the Constitution which provide as follows :-

Article 62. (1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any Classification of land.

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63 (2)(d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

- (k) the continental shelf;*
- (l) all land between the high and low water marks;*
- (m) any land not classified as private or community land under this Constitution; and*
- (n) any other land declared to be public land by an Act of Parliament—*
 - (i) in force at the effective date; or*
 - (ii) enacted after the effective date.*

Article 63 (2) Community land consists of—

- (a) land lawfully registered in the name of group representatives under the provisions of any law;*
- (b) land lawfully transferred to a specific community by any process of law;*
- (c) any other land declared to be community land by an Act of Parliament; and*
- (d) land that is—*
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;*
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or*
 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).*

Article 64. Private land consists of —

- (a) registered land held by any person under any freehold tenure;*
- (b) land held by any person under leasehold tenure; and*
- (c) any other land declared private land under an Act of Parliament.*

52. The land in issue is registered in the name of Kedong Ranch. It is a leasehold interest for a term of 999 years from 1 May 1950. It cannot be argued that the land is public land and neither can it constitute community land. Looking at the definitions of public land, community land and private land, the land is definitely private land in favour of the 1st respondent.

53. The petitioners made arguments that this land forms part of the Maasai community land. I am afraid that it does not. The land is private land in the hands of Kedong Ranch. In fact it became private land way back in 1950 and has remained so all along. It matters not that the petitioners believe that the land was their ancestral land. In fact it is immaterial whether the land was at one point or another, the ancestral land of the Maasai, or the ancestral land of the petitioners. The land is now private land, as provided by our Constitution which is the supreme law of this country.

Issue 3: Can the petitioners claim rights over the suit land given its status "

54. The petitioners claim that the registered proprietor merely holds the land in trust on behalf of the Maasai community. Heavy reliance was made upon the provisions of Section 25 and 28 of the Land Registration Act which provide as follows :-

Rights of a proprietor.

25. (1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

(a) *to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

(b) *to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

(2) *Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

Overriding interests.

28. *Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—*

(a) *spousal rights over matrimonial property;*

(b) *trusts including customary trusts;**(emphasis is mine)*

(c) *rights of way, rights of water and profits subsisting at the time of first registration under this Act;*

(d) *natural rights of light, air, water and support;*

(e) *rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;*

(f) *leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;*

(g) *charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;*

(h) *rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;*

(i) *electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and*

(j) *any other rights provided under any written law.*

55. It will be seen from the above provisions, that the proprietor of private land has exclusive rights over his/her land, but subject to the overriding interests noted in Section 28 of the Land Registration Act, and subject to any obligations that he may have as trustee. The position of the petitioners is that the land is held by the 1st respondent in trust for them. Despite being loud in the argument that the land is held in trust, the nature and extent of this trust has not been given to me. Is it a trust based on customary law " or exactly what kind of trust is envisaged " That is not clear to me. It is obvious that it cannot be a trust based on customary law, for I doubt, and of course it has not been established, that the 1st respondent shares the same custom as the petitioners. The case of **Lawrence Maoni Okeyo vs Barongo Okeyo & 6 Others**, cited by counsel for the petitioners is therefore distinguishable from the facts of this petition, since in that case, the land in issue was registered in the name of the brother for the plaintiff, and the court thought, while considering an application for injunction, that the plaintiff had an arguable case based on trust as the land was initially owned by their father.

56. There is of course no allegation of a sale or lease or other right over the land which the 1st respondent donated, or promised to the petitioners, for which they can hinge any other sort of trust. I also note that the persons who the petitioners say have brought this suit for the benefit of, had in the year 2010 filed a suit for adverse possession, the suit Nakuru ELC No. 21 of 2010 which failed. I am unable to find any other overriding interest which the petitioners can cling on. The petitioners are strangers in so far as it concerns the suit property and the respondents do not need to consult them before they can deal with the property or before they can exploit it. I therefore find that the petitioners and the persons they represent have not demonstrated any proprietary rights over the suit property that may be protected , and they cannot be heard to complain, that their constitutional right to property has been violated by the respondents.

57. A lot was said about the petitioners being in occupation of the suit property. To me it matters not whether they are in occupation of it, or they are outside it, at least in so far as the right to property is concerned. If they are in occupation, they are in occupation as trespassers since they have not demonstrated any right over the property which may be protected. If their occupation was enough to entitle them to the property, then they would have succeeded in the case Nakuru ELC No. 21 of 2010, but they failed.

58. It also matters not, that the petitioners are of Maasai descent. I am not sure if they fall within the category of a minority or vulnerable group, but it doesn't matter. Even assuming, without holding, that the Maasai are a minority or vulnerable group, the fact that one is a member of a vulnerable group or a minority, does not give him licence to trespass upon privately owned land, and assert title to it, merely because he is a member of a minority or vulnerable group. I see no analogy between this case and that of **Joseph Letuya & 21 Others vs Attorney General & 5 Others (2014) eKLR**. The said case was a case filed by the Ogiek community living in East Mau Forest. They claimed that they had been living on the said forest from time immemorial and that their eviction from the forest was unconstitutional. The court held in their favour and directed that they be granted land for resettlement. In the said case, the Ogiek were not asserting rights over privately owned land. In this case, the petitioners are asserting that they have rights over private land, which they clearly do not.

59. My conclusion therefore is that the petitioners have not demonstrated any right over the suit property

which may be protected and there has been no infringement of their proprietary rights. There being no infringement of any proprietary rights, I do not see how the issue of compensation can come in. One cannot say that he is entitled to be compensated for land which he has no rights over. I therefore, in addition to finding that there has been no violation of the Constitutional right to property, find that there has been no violation of the right to compensation.

Issue 4: Were there any violations of the constitution by the respondents towards the petitioners
"

60. I have already dealt with the alleged violation of the constitutional right to property and compensation which I find unsupported. But the petitioners have alleged various other constitutional violations. I can group these violations into two categories. The first is violations against them as individuals (such as the right to dignity, right against torture, right to education and housing) and the second is the alleged violations touching on the right to a clean and healthy environment.

61. On the first category of rights, it is the case of the petitioners that the respondents have violated their right to dignity; right against torture and degrading treatment; right to housing; right to equality before the law; right to education; right to participate in their culture; right to to work social security and protection of the family; and right to fair administrative action and a fair hearing.

62. The facts which have been alleged as demonstrating these violations include the averments that there has been evictions and burning of the manyattas of the petitioners and the persons they represent. I am afraid that I have no evidence of any burning of manyattas or of any forced evictions. I do not even have a simple photograph to demonstrate any forced eviction or any burning of property, and I am afraid that without proof, I cannot assume that there has been any. The right to housing has therefore not been shown to have been violated. Neither has there been any proof of any torture or inhuman treatment against the petitioners or the persons they seek to represent. On the right to education and health, the 2nd respondent has shown that they have developed schools and dispensaries. If indeed the petitioners are resident in the vicinity of the suit property, then they are free to access these facilities. On the contrary, the putting up of these schools and dispensaries improve the petitioners' access to education and health.

63. It was said that the petitioners have been treated without dignity, but again I have no evidence of this. What exactly was done to them so that they may say that they have been treated without dignity " It was said that they have been intimidated by the setting up of police posts. I have not been given any specific evidence of intimidation and I am unable to conclude that the setting up of a police post is intimidation by itself. I would imagine that people would be happy if a police post is set up for this improves security.

64. On the second category of rights, the right to a clean and healthy environment, it was stated that the geothermal projects have led to pollution, that there has been an increase in nascent fumes, noise pollution, increased dust, gastronomic and skin diseases, stillbirths in cattle, premature deaths of livestock, and increased premature delivery in pregnant women. These are serious allegations. However there was no proof of any of them that was tendered. This was indeed admitted by the petitioners who stated that they have not been able to conduct a study. But even without a study, I was given no specifics of any of the alleged facts, such as the number of women who delivered prematurely, or such number of livestock which died prematurely, or such a number of persons who have suffered gastronomic and skin diseases. I am afraid I cannot speculate without there being tangible evidence tabled that the matters complained of are happening. But if indeed they are, all is not lost for the petitioners for they can present a report or complaint to the National Environmental Management Agency

(NEMA) which can then follow up with an environmental audit and these claims can be verified, so that if they are true, mitigation measures may be taken. But before me there is no proof of such and I am afraid that without proof, I cannot say that there has been any violation of the right to a clean and healthy environment.

Conclusion and final orders

65. I think I have dealt exhaustively with all issues. The long and short of it is that I find that the factual allegations of the petitioners have not been proved. The petitioners have therefore failed to demonstrate any infringement of their constitutional rights by the respondents.

66. Having found so, I have no option but to dismiss this petition. It is hereby dismissed. In my discretion, I make no orders as to costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 24th day of September 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr Aim Yoni for petitioners

Mr Tombe holding brief for Mr. Kadima for 1st respondent and present for 3rd respondent

Ms. Mugweru holding brief for Mr Imende for 2nd respondent

Mr. Mbaka of State Law Office for Attorney General

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU



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