



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC PETITION NO. 2 OF 2017

(FORMALLY NKU HIGH COURT PETITION No. 26/2013)

IN THE MATTER OF ARTICLES 35(1), 40, 44(i), 48,

258 and 259(b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE SUPREMACY OF THE CONSTITUTION

OF KENYA PURSUANT TO ARTICLE 2 OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE LAND CONTROL ACT (CAP 302)

AND

IN THE MATTER OF UNLAWFUL POSSESSION AND DISPOSITION OF

NYANDARUA/PASSENGA/46 SITUATED IN OL KALOU, NYANDARUA COUNTY

BETWEEN

PETER MUCHERU NJUGUNA

SAMUEL WAINAINA NJUGUNA

MARY MWIHAKI NYORO

PAUL NJUGUNA WAITHERA

BEATRICE MUKUHE NJUGUNA

MARY WANJIKU KABUGI

HANNAH KAHAKI MUCHERU

DAVID KARIUKI..... PETITIONERS

AND

THE ATTORNEY GENERAL.....^s RESPONDENT

CHAIRMAN LAND CONTROL BOARD,

OL KALOU NYANDARUA COUNTY.....2nd RESPONDENT

DISTRICT LAND REGISTRAR,

NYANDARUA COUNTY.....3rd RESPONDENT

EUNICE MUTHONI NJUGUNA.....4th RESPONDENT

DANIEL MWANGI MARIGI.....5th RESPONDENT

JUDGEMENT

1. On the 18th June 2013, the Petitioners filed their Petition dated 17th June 2013, at the Nakuru High Court seeking for the following;
 - i. A Declaratory order to the effect that the Petitioners' right to property has been violated contrary to Article 40 of the Constitution.
 - ii. A Declaratory order to the effect that the Petitioners right to inherit their father's property has been infringed.
 - iii. A Declaratory order to the effect that the Petitioners' right to fair administrative action has been violated contrary to Article 47(1) of the Constitution.
 - iv. A Declaratory order to the effect that the Petitioners' right to information has been violated Contrary to Article 35(1) (b) of the Constitution.
 - v. A Conservatory Order to be issued by this Honorable Court restraining the 4th and 5th Respondent from demarcating, alienating, sub-dividing, wasting or dealing in any other way with Nyandarua/Passenga/46 or any of the subdivisions thereof.
 - vi. A Conservatory Order be issued by this Honorable Court restraining the 2nd and 3rd Respondents from authorizing the demarcation, alienation, sub-dividing wasting or dealing in any other way with Nyandarua/Passenga/46 or any of the sub-divisions thereof.
 - vii. An order of declaration be issued in terms that the documents of title to the subject land issued in the names of Eunice Muthoni Njuguna and Daniel Mwangi Marigi to the exclusion of the Petitioner are null and void and are hereby cancelled.
 - viii. Orders do issue in appropriate terms, affirming in favour of the fundamental rights of the Petitioners.
- ix. The cost of these proceedings be borne by the Respondents.
2. Alongside the said Petition, the Petitioners filed an application seeking conservatory orders pending the hearing of the same interparty. That on the 12th July 2013, interim orders were issued restraining the Respondents from demarcating, disposing of or dealing in any other way with the subject parcel of land Nyandarua/Passenga/46 or in any of the sub-divisions thereof situate in Ol Kalou Nyandarua County.
3. After the interim orders were issued, the Application was not set down for hearing interparty. Instead the interim orders were extended on numerous occasions the last extension being on the 8th November 2016. Thereafter the matter was transferred to the Environment and Land Court sitting in Nyahururu wherein on the 5th February 2018, the court issued directions that the Petition be disposed of by way of written submissions, the interim injunction having lapsed on the 8th October 2017, pursuant to Order 40 Rule 6 of the Civil Procedure Rules. Parties were directed to file and serve their written submissions within 21 days and the matter scheduled for mention on the 16th April 2018 for confirmation of compliance and to take a date for highlighting.
4. On the 16th April 2018 despite service, there was no appearance for the 1st, 2nd and 3rd Respondents and neither had they filed their written submissions. The matter was fixed for highlighting on the 18th June 2018 on which day the 1st, 2nd and 3rd Respondents were absent yet again despite service having been effected upon the Hon the Attorney General on the 28th February 2018.
5. Counsel for both the Petitioners and the 4th and 5th Respondents proceeded to highlight on their submissions.

The Petitioners' case.

6. The Petitioner's case is set out in the Petition dated 17th June 2013, and the supporting affidavit of Peter Mucheru Njuguna sworn on the

14th June 2013, and a supplementary affidavit sworn on 18th February 2014.

7. The Petition is based on the infringement of the Petitioners' right within Article 40 of the Constitution, that is a right to property, Article 47(1) of the Constitution being the right to fair Administrative Action, and Article 45(1)(b) of the Constitution, the right to information.

8. The Petitioners are children of Paul and Joyce both deceased. The 4th Respondent is the surviving wife of Paul Njuguna.

9. That the deceased Paul was the proprietor of parcel of land Nyandarua/Passenga/46 which is an ancestral home of the family the said property having had been purchased after receiving a loan from AFC.

10. That the 1st Petitioner contributed to the repayment of the loan wherein there was a discharge thereafter.

11. That prior to the passing away of Paul Njuguna, it came to the attention of the Petitioners that the said parcel of land had been sub-divided into parcels of land No. Nyandarua/Passenga/226 and 227 wherein Nyandarua/Passenga/226 had been registered in the name of the 4th Respondent whereas No. Nyandarua/Passenga/227 had been registered in the name of an unknown person.

12. That following this revelation, the Petitioners had placed a caution on the parcel of land which caution were subsequently removed and the subdivision registered in the names of the 4th and 5th Respondents respectively.

13. That the suit land had been their ancestral home and that after the sub-division they no longer have access to the same.

14. That the Petitioners had sought information from the 3rd Respondent on how the caution had been removed and further on transactions affecting the said land to no avail. It was the Petitioners contention that the 3rd Respondent had infringed both on their right to information and their right to fair administrative action by lifting the caution they had placed on the suit land wherein they now faced the risk of being evicted. That the denial by the 3rd Respondent to have the 8th Petitioner lodge a caution against the suit land after the discovery of the transactions therein had denied them a chance to stop any dealings in regard to the properties.

15. That despite numerous letters written to the 3rd Respondent herein, they had not given the Petitioners any satisfactory explanation as to how the suit land came to land in the hands of the 4th and 5th Respondents herein.

16. The Petitioners relied on the decided case of

i. **Nairobi High Court Constitutional Petition No. 468 of 2017 between Katiba Institute vs Presidents Delivery Unit & 3 Others**

ii. **Nairobi High Court Constitutional Petition No. 248 of 2013 between Arnacherry Limited vs. Attorney General**

Respondents' case

17. The Petition was opposed by counsel for the 4th and 5th Respondent who highlighted on her submissions while relying on the replying affidavit filed on the 25th September 2013. That the two parcels of land being No. Nyandarua/Passenga/226 and Nyandarua/Passenga/227 emanated from parcel No. Nyandarua/Passenga/46 which had been registered in the joint names of Paul Njuguna Mucheru(deceased) and Eunice Muthoni Njuguna.

18. That Paul Njuguna Mucheru the deceased had two parcels of land being No. Nyandarua/Passenga/46 and No. Nyandarua/Passenga/41 wherein parcel No. 41 was registered in the names of the Petitioners' mother and the deceased Paul Njuguna Mucheru, which property was subsequently inherited by the Petitioners vide a grant of confirmation.

19. Counsel submitted that the matter before court was Res judicata by virtue of the Nakuru High Court Petition No. 6 of 2011 wherein the relief sought therein were substantially the same as the relief sought in the present Petition. That in Petition No. 6 of 2011, the issues of the entitlement of the Petitioners had been decided and determined and what the Petitioner in the present Petition had done was cosmetic surgery wherein he has added more parties to the Petition. Counsel relied on Section 7 of the Civil Procedure Act and the decided case of **John Florence Maritime Services Ltd & another vs. Cabinet Secretary for transport and Infrastructure & 3 Others [2015] eKLR** to support her submission.

20. Counsel further submitted that the Petitioners Petition was through a back door to claim their deceased parent's property yet they had no locus standi as they had no letters of Administration. That notwithstanding, the suit property had been registered jointly in the name of the Petitioners' deceased father and the 4th Respondent. Further that although the 1st Petitioner claimed to have contributed in the repayment of the loan pertaining the said property, yet there was no evidence adduced in court to support that allegation.

21. That Section 91 of the Land Registration Act is clear to the effect that the rights of a joint tenant is not distinguishable.

22. In rejoinder, Counsel for the Petitioners submitted that the reliefs sought in Petition No 6 of 2011 were not identical to the present Petition and that the Petitioners in the present Petition only sought to enjoy their rights as children of the deceased.

23. That in regard to the issue on locus standi, the property had already changed hands which was the issue at hand.

24. They sought for orders as prayed in their Petition.

Issues for Determination

25. It is worth noting that in this matter neither the 1st, 2nd or 3rd Respondents entered appearance nor filed documents despite the numerous notices served upon them, save for the 3rd Respondent who only filed his relying affidavit dated the 14th November 2014. Further neither of these Respondents appeared in court.

26. I have considered the highlighted submissions on the written submissions by counsel for the Petitioners as well from Counsel for the 4th and 5th Respondents. I have also considered the annexures, the law and the authorities herein attached by counsel for the parties.

27. From the title and/or heading of the Petition, the Petitioners' grievance is that their rights under Articles 35(1), 40, 44 (i), 48, 258 and 259(b) of the Constitution have been infringed by Respondents.

28. Briefly, the Petitioners' case was that they were the children of the late Joyce Wanjiru Mucheru and Paul Njuguna Mucheru. That their father Paul Njuguna Mucheru, whom we shall refer to as the deceased in this case, was the proprietor of parcel of land Nyandarua/Passenga/46, the suit land herein, which was a matrimonial home to both him, his wives, as well as his children.

29. That the said parcel of land was bought by the deceased through a loan advanced by the Agriculture Finance Co-operation(AFC) and which loan, the Petitioners helped to offset.

30. That in the year 1993 the deceased registered the suit land jointly in his name and that of his wife the 4th Respondent herein an action which drove the Petitioners to place a caution on the said suit land. That after deliberations both before the District land Registrar Nyandarua, the caution was lifted, their Appeal to the chief land Registrar against that decision was also disallowed.

31. It was after the lifting of the caution that the deceased sub-divided the suit land giving rise to two parcels of land being Nyandarua/Passenga/226 which was registered in the name of the 4th Respondent and Nyandarua/Passenga/227 which was registered in the name of the 5th Respondent.

32. The Petitioners' assertion is that despite writing numerous letters to the 3rd Respondent seeking information as to how the caution they had placed on the suit land had been lifted, and further seeking to know the current status of the suit land, their queries fell on deaf ears. Thus their decision to file the present Petition.

33. Their quarrel was that the decision by the deceased to register the suit land upon sub-division, in the names of the 4th and 5th Respondents, to the exclusion of the rest of the family amounted to infringement of their right to property contrary to Article 40 of the Constitution.

Article 40 of the Constitution which provides a follows:-

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

34. Secondly that the 3rd Respondent's move to lift the caution placed on the suit land was in contravention of their right to fair and just administrative action contrary to Article 47(1) of the Constitution which provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

35. Lastly, that the refusal by the 3rd Respondent herein to provide them with information on the dealings on the suit land amounted to infringement of their right to public information held by another person in contravention to Article 35(1)(b) of the Constitution which provides that:

(1) Every citizen has the right of access to—

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

36. The 4th and 5th Respondents in their replying affidavit filed on the 25th September 2013 deponed that indeed the deceased married the 4th Respondent under the marriage Act in 1984 wherein in the year 1993 the deceased, who was the proprietor of the suit land Nyandarua/Passenga/46 registered it jointly in both his name and the 4th Respondent's name.

37. The Respondent's contention was that the deceased had two other wives, Eunice and Joyce who are now deceased. That Eunice Wangari was the mother to the 2nd 3rd and 4th Petitioners and to whom the deceased gave parcel No. Nyandarua/Passenga/54 measuring approximately 36 acres whereas the 1st, 5th, 6th, 7th, and 8th Petitioners' mother Joyce Wanjiru Njuguna was given land parcel No. Nyandarua/Passenga/41 measuring approximately 41 acres and to which a confirmation of grant was issued on the 6th October 1993 to the 1st Petitioner.

38. That the registration of parcel No. Nyandarua/Passenga/46 in both the 4th Respondent and the deceased's name vested in them absolute proprietorship pursuant to the provisions of Section 27 of the then applicable Registered Land Act. That being the case, an attempt by the Petitioners to register a caution on the same was thwarted by the 3rd Respondent and rightly so.

39. That subsequently the deceased and the 4th Respondent entered into a sale agreement dated the 24th March 1993 with the 5th Respondent to sell him 5 acres of land. After obtaining the necessary consent from the land Control Board, they had the suit land sub-divided into two resulting into Nyandarua/Passenga/226 which was registered in the name of the 4th Respondent and Nyandarua/Passenga/227 which was registered in the name of the 5th Respondent. This terminated the deceased's interest in Nyandarua/Passenga/46 and the subsequent resultant parcels of land being No. Nyandarua/Passenga/ 226 and Nyandarua/Passenga/ 227 were therefore not available for distribution to the Petitioners. That the deceased's stand on the distribution of his properties was not challenged by the Petitioners while he was alive, but they waited until he had passed away before filing suits.

40. It was further the Respondents' contention that Petitioners had no locus standi to their perceived right of inheritance as none of them had taken out the letters of administration in respect the deceased's estate and that the present forum was inappropriate for entertainment of succession claims.

41. The Respondent further deponed that this matter was Res judicata in view of Nakuru High Court Constitutional Petition No. 6 of 2011 where the court dismissed the Petitioners' Petition where they had alleged that Constitutional rights had been breached.

Analyses and determination.

42. Following the above brief position of the matter, I have framed the issues for determination as being;

- i. Whether the Constitutional Petition herein is Res judicata.
- ii. Whether the Petitioners' right to property has been violated contrary to Article 40 of the Constitution.
- iii. Whether the Petitioners' right to inherit their father's property has been infringed.

43. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

44. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

- i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
- ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

45. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. what issues were really determined in the previous case;
- ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

46. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

47. Indeed the court was informed that there was a Constitutional Petition filed by the 1st Petitioner in the Nakuru High Court being Constitutional Petition No. 6 of 2011. I have since gained sight of the Judgment delivered by Hon R.V.P Wendoh J on the 25th July 2012 in the said Petition and wish to make the following observations in order to appreciate whether or not the present Petition is *res judicata*;

48. The Petition was filed by the 1st Petitioner herein whereas the Respondents were the Ol kalou Land Control Board as the 1st Respondent, The Land Registrar Nyandarua County as the 2nd Respondent while the Hon the Attorney General was the 3rd Respondent.

49. The said Petition was framed as follows:

‘Alleged infringement of Articles 35 as read with Article 22, 40,47,48, 262 and 19 of the 6th schedule of the Constitution’ where the Petitioner sought for orders that;

(a) The Respondents are compelled to produce and make available to the Petitioner within 7 days of service of this court’s order on them, certified copies or documentation kept by their respective offices with regard to:

- i. All applications made to Ol Kalou Land Control Board for letters of consent to deal in any manner with parcels Nyandarua/Passenga/46, 226 and 227
- ii. Letters of consent issued by Ol Kalou Land Control Board in respect of any transactions affecting parcels Nyandarua/Passenga/46, 226 and 227 or any other sub-divisions created therefrom.
- iii. Letters of consent used at the lands office, Nyahururu in registration or applications for registration of all transactions affecting parcels Nyandarua/Passenga/46, 226 and 227.
- iv. Rulings of Ol Kalou Land Control Board on all applications made to the said board in 1993 and 1997 with regard to parcels Nyandarua/Passenga/46, 226 and 227.
- v. Rulings or any other decision(s) of the Land Registrar , Nyandarua on all applications for registration of transfer, lease or any other instruments or transactions capable or registration under the applicable law mad or presented to the said office in 1993 and 1997 with regard to parcels Nyandarua/Passenga/46, 226 and 227.

(b) If for any reason the 1st or the 2nd Respondents are unable to supply the information sought by the Petitioner, or any part thereof, they shall give to the Petitioner within seven days from the date of service if this order upon them their certified reasons in writing why they are unable to supply the information and documentation sought by the Petitioner.

(c) Further, an order for discovery against the Respondents of all information prayed for in prayer (1) above.

(d) an order for compensation in damages be made

(e) Cost of this Petition shall be borne by the Respondents.

50. The courts finding at page 6 of the judgment was as follows:

“It is the duty of the Petitioner to show that his right have been breached...it is not clear what interest the Petitioner has in the suit land in respect which he seeks to obtain documents from the lands office in Nyahururuthe fact that it was the Petitioner’s father land does not automatically give him the right to the said land.”

51. At page 7 of the said judgment the Hon Judge had this to say;

“In this case the Petitioner has told the court that he did the searches on 29th June 2009 and 30th June 2009 in respect to the suit land. The certificates of search were issued by the lands office meaning that information was given to the Petitioner as to the status of the land. He is also privy to the ruling of the Chief Land Registrar confirming the decision of the Land Registrar to remove the caution for the land...”

52. At page 8 the court went on to say.

“There are procedures to compel public officers to perform their duties if they have failed to do so. That is by way of mandamus in a Judicial Review. It is my view that not every breach amounts to a breach of a fundamental right. Where a statute of the Constitution provides a manner in which a party should approach the court, that process should be followed.”

53. The court found that the Petition lacked merit and dismissed the same.

54. From the summary of the judgment in Nakuru High Court Constitutional Petition No. 6 of 2011, it is clear that the matter in issue, being the alleged infringement of the Petitioners’ Constitutional rights to Property under Article 40, Right to information under Article 35(1) and Right to fair administrative action under article 47(i) were basically identical to the matter in issue in the present Petition.

55. I also find that the parties in both Petitions were the same. Explanation.(6) of Section 7 of the Civil Procedure Code is clear to the effect that;

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

56. What this means in essence is that the interests of the 2nd to 7th Petitioners in the present Petition were litigated by the 1st Petitioner in the Nakuru High Court Constitutional Petition No. 6 of 2011.

57. Finally, I find that the previous Petition was determined by a court of competent jurisdiction, being the High Court sitting in Nakuru.

58. The Petitioners did not challenge that decision on Appeal and therefore the trial of the present Petition would amount to sitting on appeal. This court has no jurisdiction to overturn the decision of Justice R.V.P Wendoh.

59. Succinctly put, the High Court has no jurisdiction to overturn its own decision except on reviewing its own decision, a procedure that the Petitioners have not pursued. Reliance is put on the case of **E.T vs Attorney General & Another (2012) eKLR** where it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

60. The upshot of the foregoing is that matters in this case were conclusively decided vide Nakuru High Court Constitutional Petition No. 6 of 2011 and therefore the present Petition is res judicata and an abuse of the court process.

61. However I wish to add that even if I was wrong on the issue of this Petition being res judicata, the Petitioners would still not succeed on the merits of the Petition for reasons that I find that the Petitioners’ right to property under Article 40 of the Constitution has not been violated.

62. Article 40(1) sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the Petitioners have been denied the right, either individually or in association with others to acquire or own property of any description ion

Kenya.

63. The case is clear that before Petitioners' father died, he had distributed his properties to his house hold which comprised of three wives, wherein the 3rd wife, the 4th Respondent herein, got the suit land herein No. Nyandarua/Passenga/46 which was subsequently registered jointly in her name and the deceased's name. That subsequently the said land had been subdivided during the lifetime of the deceased, wherein as part of it was sold to the 5th Respondent, the 4th Respondent retained the rest of it.

64. The resultant parcels of the suit land after sub-division were registered in the name of the 4th and 5th Respondents respectively and this was during the lifetime of the deceased.

65. The law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge...”

66. I find that the 4th and 5th Respondents, in light of the above, to be the duly registered proprietors of parcels No. Nyandarua/Passenga/226 and 227 respectively and are entitled to all the rights appurtenant thereto.

67. Article 40(2) of the Constitution limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of the Constitution. The Petitioners did not complain of any such breach.

68. Article 40(3) and (4) of the Constitution deals with the deprivation of property by the state on the terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. The Petitioners have not made out any case that their property was acquired in the manner contemplated by Article 40 of the Constitution to trigger an application of Article 40(3) and (4) of the Constitution. In total therefore I find that there has been no breach of the provisions of Article 40, of the Constitution.

69. The parcel register to No. Nyandarua/Passenga/46, ceased to exist and or to form part of the estate of the deceased when he caused it to be subdivided resulting into parcels No. Nyandarua/Passenga/ 226 and 227 which parcels of land were subsequently registered in the 4th and 5th Respondents' names respectively.

70. The Petitioners herein do not have any legal or proprietary interest in the suit properties capable of protection or enforcement under the provisions of **Article 40** of the Constitution. In essence therefore these resultant parcels of land did not form part of the deceased's estate therefore the Petitioners' right to inherit them as their father's property does not arise and no constitutional rights were infringed in any way.

71. In the end, the Petition herein is dismissed with costs to the 4th and 5th Respondents.

Dated and delivered at Nyahururu this 23rd day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE