



**Nthiani (Suing as the legal representative of the Estate of Stephen Kisangai Nthiani) v Kalumba & 4 others (Environment & Land Petition 1 of 2022) [2023] KEELC 18282 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18282 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ENVIRONMENT & LAND PETITION 1 OF 2022**

**CA OCHIENG, J**

**JUNE 19, 2023**

**IN THE MATTER OF ARTICLES 22, 23, 24, 27, 40, 47 & 50 OF THE**

**CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE BILL OF RIGHTS**

**AND**

**IN THE MATTER OF THE FUNDAMENTAL RIGHT TO PROPERTY**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND**

**ENFORCEMENT OF THE CONSTITUTION (PRACTICE &**

**PROCEDURE RULES, 2012)**

**AND**

**IN THE MATTER OF INFRINGEMENT OF THE RIGHT TO FAIR**

**ADMINISTRATIVE ACTION ENSHRINED IN ARTICLE 47 OF THE**

**CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT**

**NO. 19 OF 2011 LAWS OF KENYA**

**BETWEEN**

**GEORGE KISANGAI NTHIANI (SUING AS THE LEGAL REPRESENTATIVE**

**OF THE ESTATE OF STEPHEN KISANGAI NTHIANI) ..... PETITIONER**



## AND

LIMA KALUMBA ..... 1<sup>ST</sup> RESPONDENT  
PETER KALUU KALUMBA ..... 2<sup>ND</sup> RESPONDENT  
LAND ADJUDICATION OFFICER, MACHAKOS COUNTY 3<sup>RD</sup> RESPONDENT  
LAND REGISTRAR, MACHAKOS COUNTY ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT

## RULING

1. What is before Court for determination is the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' Notice of Preliminary Objection dated the February 10, 2022 seeking for the Petition to be dismissed with costs. It is premised on the following grounds:-
  1. That the Petitioner's suit is statute barred by operation of Section 7 and 17 of the Limitation of Actions Act Cap 22 of the Laws of Kenya.
  2. That this Court has no jurisdiction to hear and determine this suit.
  3. That the suit is bad in law and amounts to an abuse of the Court process and should be struck out with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

### Analysis and Determination

3. I have considered the instant Notice of Preliminary Objection including the rivaling submissions and the only issue for determination is whether the Petition should be struck out with costs.
4. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents in their submissions contend that the Land Appeals Committee did not act ultra vires as claimed by the Petition as it had the jurisdiction to hear and determine the Appeal arising from the decision of the Land Disputes Tribunal as the matter dealt with claims to the land in dispute within the purview of the Tribunal as well as Appeals Committee. They argue that pursuant to Section 8(8) of the Land Disputes Tribunals Act (repealed), the decision of the Appeals Committee was final on any issue of fact and no Appeal was allowed thereof to any Court. Further, that an aggrieved party could under Section 8(9) of the Land Disputes Tribunal Act (repealed) Appeal to the High Court on points of law within sixty (60) days of the said decision. It avers that the Dispute at the Tribunal was determined in 2001 and the Award adopted in 2002. Further, the 1<sup>st</sup> Respondent's husband's Appeal to the Eastern Provincial Appeals Committee was determined in 2006 and the Award adopted as Judgment in 2013. It explains that the Petitioner initiated this Petition a decade later in 2016 and claims the Court file went missing after Judgment but has not provided proof that he applied for proceedings. They insist that the Petitioner had a chance to Appeal the decision of the aforementioned Appeals Committee but failed to do so. Further, that the Petitioner is not entitled to the orders sought in the Petition as he seeks to reopen an issue already determined to a conclusion in contravention with the doctrine of res judicata. They argue that the ownership of the suit property is substantially the same issue that was determined in the Land Adjudication Board and in the Eastern Provincial Land Appeals Committee. To support their averments, they relied on the following decisions: Republic v Land Disputes Tribunal Bahati & Another: Peter Karani Nduku (Interested Party) Ex parte Jacob



Kipkurui Konga & Another [2020] eKLR; Republic v Chairman, Land Disputes Tribunal Mutomo Sub District Ex parte Titus Kiyili Kinyumu: Mutua Kavunduu (Interested Party) [2021] eKLR cited with approval in the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR and Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR.

5. The Petitioner in his submissions argue that this suit being *prima facie* a Constitutional Petition is not subject to the limitation periods set by statute and more particularly the limitations set out in Sections 7 and 17 of the Limitation of Actions Act. Further, that the right of the Petitioner to seek redress for violation of his rights cannot be limited by any statute of limitation and neither can the Respondent attempt to do so. He insists that there has been no inordinate delay in bringing this Petition as he was unable to access the Judgment of the Court which adopted the decision of the Appeals Committee since the file went missing after delivery of the Judgment. He contends that this Court has jurisdiction to handle the Petition as it seeks redress of what seems to be a historical injustice (on unjust adjudication processes). He avers that this suit does not amount to an abuse of the court process. To buttress his averments, he relied on the following decisions: Safepak Limited V Henry Wambega & 11 Others [2019] eKLR and Monica Munira Kibuchi & 6 Others v Mount Kenya University, Attorney General (Interested Party) [2021] eKLR.
7. In the Petition filed on January 11, 2022, the Petitioner sought for orders that:-
  - i) A declaration that the Land Appeals Committee award made on May 26, 2006 is null and void for being *ultra vires*.
  - ii) An order of Certiorari to quash Land Appeals Committee award made on May 26, 2006 and adopted on September 30, 2013.
  - iii) An order do issue to uphold the decision made in District Land Disputes Tribunal Case No 81 of 1997 (Machakos) and adopted as a Decree of the court in Misc Civil Case No 43 of 2002.
  - iv) That Costs of this Petition.
  - v) Any other relief this Honourable Court deems fit to grant in the circumstances.
8. The Petitioner claims his father enjoyed quiet possession of land parcel number Kibauni/Itumbule/281 as a Purchaser. Further, that the said land was altered to read Kibauni/Itumbule/450 and registered in the name of Kalumba Mbulu. He explains that his father lodged a case at the Land Adjudication Board Yathu Land District Tribunal Case No 81/97 which found that Land parcel number Kibauni/Itumbule/450 did not exist in the Adjudication Survey Map. Further, the Tribunal's decision was adopted on February 24, 2002. He explains that Kalumba Mulu Kyai appealed to the Eastern Provincial Appeals Committee to determine ownership of the aforementioned parcel of land. He argues that the Provincial Appeals Committee acted *ultra vires* in setting aside the decision of the District Land Disputes Tribunal. He seeks the decision of the Provincial Appeals Committee which was adopted as an Order of the court on September 30, 2013 to be set aside but for the court to uphold the decision of the Land Disputes Tribunal.
9. Section 3 of the repealed Land Disputes Tribunal Act provides that:-
  - (1) Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land.”



While Section 8(1) stipulates that:-

“8(1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.”

Further, Section 8(8) and (9) states that:-

“(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court. (9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.”

10. From a reading of the aforementioned legal provisions, since the subject Appeal emanated from the District Land Disputes Tribunal, I find that the Provincial Appeals Committee had jurisdiction to deal with the said dispute contrary to the Petitioners’ averments. I note the Petitioner explains that he took long to file this Petition since he was waiting for proceedings from the Court, after the Judgment but the Court file had been missing.

11. In *Republic v Land Disputes Tribunal Babati & Another: Peter Karani Nduku (Interested Party) Ex parte Jacob Kipkurui Konga & Another* [2020] eKLR, the Court held that:-

“It is evident that the Tribunal heard and determined the dispute in 2006 and that the Magistrates Court adopted the award as judgment in 2008 while the Appeals Committee dismissed the applicants Appeal in 2009. Upto the time the appeal was dismissed the Land Disputes Tribunals Act, had not been repealed and was in force. Hence the procedure that ought to have been followed in resolving the dispute was the one laid out under the Act which the applicant had undoubtedly chosen. The applicant as is evident adhered to the procedures set out under the Act, when he filed the appeal to the Provincial Dispute Appeals Committee. If he was not satisfied with the decision of the Appeals Committee, he ought to have filed an appeal against the committee’s decision if a point of Law was involved in the High Court. He did not and although the decision in the appeal was given on November 17, 2009 the applicant only initiated these proceedings on March 27, 2019 when he filed the application for leave. It was not explained why it took the applicant over 9 years from the date the appeal to the Provincial Appeals Committee was dismissed to seek to bring these proceedings. The delay was inordinate and could only have been an afterthought. I view these proceedings as a fishing expedition on the part of the applicant in the hope that he could somehow make a catch. The Courts do not work in that manner as their solemn duty is to interpret and apply the law the quest of doing justice to the parties who come before them.”

12. From the averments in the Supporting Affidavit, where the Petitioner alleges the Court file was missing, I note he has not annexed any document to prove he was following up on the missing file for a decade. I opine that the Petitioner after adhering to the legal processes set out in the *Land Disputes Tribunal Act (repealed)*, was comfortable so long as there was a favourable decision from the District Land Disputes Tribunal. However, when the said decision was set aside on Appeal by the Provincial Appeals



Committee, he took a decade to reopen a determined dispute and lodged the instant Petition to hide behind a constitutional violation. I opine that the delay was inordinate and no amount of cosmetic uplift would validate the reasons provided herein.

13. Based on the facts before me while associating myself with the cited decisions, I find the instant Notice of Preliminary Objection merited. I further find that no order of certiorari can issue since the order sought to be quashed was issued on May 26, 2006 by which time a Certificate of Title had already been issued in the name of Kalumba Mbulu Kyai.
14. In the foregoing, I hold that the Petition amounts to an abuse of the process of this court and will proceed to strike out with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF JUNE, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

