



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 45 OF 2012

THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006 ARTICLE 262 (19) OF THE TRANSITIONAL CONSEQUENTIAL PROVISIONS

AND

IN THE MATTER OF ARTICLE 21(1), 22(3)(C), 23(1&3), 24(1) D, E, 25(C), 27(1&2), 28, 29(A), 39, 40(2) AND & B, 47 OF THE CONSTITUTION OF KENYA

BETWEEN

MELEN KERUBO GITOGO PETITIONER

VERSUS

ATTORNEY GENERAL 1ST RESPONDENT

KISII MUNICIPALITY LAND TRIBUNAL 2ND RESPONDENT

OKENYE ONSONGO 3RD RESPONDENT

CHIEF MAGISTRATE KISII LAW COURTS 4TH RESPONDENT

J U D G M E N T

1. The petitioner filed the instant petition dated 6th December 2012 claiming that his constitutional rights have been violated. The gist of the petition is that the 2nd respondent, Kisii Municipality Land Disputes Tribunal entertained a dispute which it had no jurisdiction to hear and determine and made a decision which was prejudicial to the petitioner. The petitioner claims that the 2nd respondent made a decision which in effect awarded the petitioner's land to the 3rd respondent. The petitioner contends that the 2nd respondent had no jurisdiction to award his land to the 3rd respondent. The petitioner urges this court to hold that the acts of the 2nd respondent violated articles 21(1), 24(1), 25(c) and 27(2) of the Constitution. The petitioner contends that his constitutional right to protection of his property have been violated and further that his right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as enshrined under the Constitution have been violated.

2. The petitioner seeks for orders that:-

i. The honourable court be pleased to declare null and void and set aside the Kisii Municipality Land Disputes Tribunal's award dated 15th May 2007 and also strike out CMCC No. 504 of 2000 with costs to the petitioner.

ii. That the costs of the petition be awarded to the petitioner.

3. The 3rd respondent, Okenye Onsongo filed grounds of opposition to the petition dated 24th September 2013 and also swore a replying affidavit in opposition to the petition on the same date. The 3rd respondent averred that the petition was incompetent and was an abuse of the due process of the court. The 3rd respondent further averred that the award the subject of the petition resulted from an order of reference made by the court with the consent of the parties and thus the same could only have been challenged in the manner provided under the Civil Procedure Rules. The 3rd respondent denied that there was any, violation of the petitioner's constitutional rights as alleged by the petitioner.

4. The 1st, 2nd and 4th respondents did not file any response to the petition. The petitioner and the 3rd respondent agreed to have the petition determined on the basis of the affidavit evidence and written submissions. Consequently, the court on 30th September 2013 directed the petitioner and the 3rd respondent to argue the petition by way of written submissions. As the 1st, 2nd and 4th respondents had conceded the petition and had indicated they did not wish to file any response, they were excused from further participation in the matter.

5. The record shows that the 3rd respondent filed a suit vide Kisii CMCC No. 504 of 2000 where the 3rd respondent's claim was that he had purchased land parcel **Nyaribari Chache/B/B/Boburia/2679** the suit property herein from one, Sabina Kwamboka Ongaki who duly effected the transfer of the suit property to him. The 3rd respondent in the Chief Magistrate's suit avers that he was registered as the legal owner of the suit property on 30th June 2000 and contended that as such registered owner he was entitled to occupation and possession of the suit property. The 3rd respondent claimed that the petitioner in or about July 2000, unlawfully entered onto the suit property and had despite repeated demands refused and/or failed to vacate and/or deliver vacant possession.

6. In the suit, the 3rd respondent inter alia sought orders that:-

i. An order of eviction and a declaration that the defendant (petitioner) is not entitled to enter, use, occupy and/or possess the suit land title number Nyaribari Chacha/B/B/Boburia/2679.

ii. Removal/raising of the restriction and damages for the restriction imposed on the suit land.

By consent of the parties the suit before the Chief Magistrate was on 2nd May 2006 referred by an order of the court to Bosongo Land Disputes Tribunal for hearing and determination. The tribunal after hearing the matter made an award where it directed the Kisii District Surveyor to fix the boundary between land parcels **Nyaribari Chache/B/B/Boburia/2679** and **1398** and that if the petitioner was in occupation of any portion of parcel number **2679** to vacate within six (6) months. The award was filed in court and the 3rd respondent's application for adoption of the award as a judgment of the court was allowed on 7th November 2012. It is that award the petitioner has petitioned this court to have declared null and void.

7. From the material and documentary evidence furnished by the parties in support and in opposition of the petition, it is clear that at the time the dispute was referred by the court for arbitration by the Bosongo Land Disputes Tribunal in May 2006, the matter was pending before the Kisii Chief Magistrate's Court. The order of reference to arbitration was made by consent of the parties meaning that it was a reference by the court and that any resultant award had to be filed in court and that the same could only be challenged under the provisions of Order 46 of the Civil Procedure Rules. The proceedings show that

both the petitioner and the 3rd respondent participated in the hearing before the Tribunal and at the conclusion of the hearing before the Tribunal, the Tribunal made the award dated 15th May 2007 which the chairman transmitted to the court vide the letter dated 14th August 2007 annexed by the petitioner and marked “MKI”.

8. In my view, the reference to arbitration having been made pursuant to an order of the court did not constitute this matter as a dispute under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed). The court merely agreed to the appointment of the Bosongo Land Disputes Tribunal as an arbitrator and never ceded jurisdiction. The arbitration in other words was court supervised and that explains why in the order of reference made on 2nd May 2006 the court directed the matter to be mentioned before it on 2nd August 2006. Under the Land Disputes Tribunals Act, a dispute was required to be initiated under Section 3(2) of the Act which provided as follows:-

3(2) Every dispute referred to in subsection (1) shall be instituted by presenting a claim to the Tribunal for the area in which the land is situated and shall contain, and contain only, a summary of the material facts on which the claimant intends to rely.

The Chief Magistrate’s Court was seized of the matter and only made an order for arbitration of the dispute by the Tribunal. The only way the dispute could be one under the Land Disputes Tribunals Act was if the suit before the chief magistrate was withdrawn and instituted afresh at the Land Disputes Tribunal.

9. The petitioner has further predicated his petition on the ground that the Tribunal lacked the jurisdiction to deal with the matter. The petitioner has argued that the 2nd respondent did not have jurisdiction to deal with title to land and particularly could not have jurisdiction to order cancellation of title to registered land. The jurisdiction of the Tribunals established under the Land Disputes Tribunal Act was conferred by Section 3(1) of the Act which provided as follows:

3(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, Shall be heard and determined by a Tribunal established under Section 4.

10. Earlier in this judgment I set out the 3rd respondent’s claim in Kisii CMCC No. 504 of 2000 where he is the plaintiff against the petitioner who is the defendant therein. The claim clearly was one of trespass. The 3rd respondent in the case is seeking an order of eviction of the petitioner who he claims to have unlawfully entered onto his land and has refused to vacate. The Tribunal upon hearing the dispute established there was a boundary dispute as between land parcels **Nyaribari Chache/B/Boburia/2679** and **1398** and directed the same to be established and fixed by the District Surveyor at the cost of the 3rd respondent. After the boundaries were fixed the petitioner was required (if any of her house/s or crops were on the 3rd respondent’s land parcel 2679) to remove them within 6 months failure to which eviction was to issue.

11. I am persuaded that even if this was a dispute instituted under the repealed Land Disputes Tribunals Act, the Tribunal had the jurisdiction to hear and determine issues relating to boundary disputes and trespass under Section 3(1) of the Act. The Tribunal did not exceed its jurisdiction as submitted by the petitioner. Indeed the instant petition was not the appropriate procedure through which the petitioner would have challenged the award returned by the Tribunal. Order 46 of the Civil Procedure Rules 2010 sets out clearly the grounds on which an arbitration award may be challenged. The petitioner did not choose that route. The other alternative the petitioner may have had was to challenge the award and the court’s ruling by way of a judicial review application if she considered that the award was made in excess

of jurisdiction. I have however held that the Tribunal had jurisdiction to deal with the matter even if the matter was one instituted pursuant to the repealed Land Disputes Tribunals Act and hence the judicial review would have been an exercise in futility.

12. Having considered all the issues raised in this petition and the responses thereto and the submissions by the parties, it is my determination that the petitioner's petition is misconceived and amounts to an abuse of the due process of the court. I accordingly order the same to be dismissed with costs to the 3rd respondent.

13. Orders accordingly.

Judgment dated, signed and delivered at Kisii this 23rd day of June, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Magara for Mokuu for the petitioner

Ms. Opiyo for Ochwal for 1st, 2nd and 4th respondents

N/A for 3rd respondent

Milcent court assistant

J. M. MUTUNGI

JUDGE