



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
IN BUSIA
LAND & ENVIRONMENTAL DIVISION
PETITION NO. 3 OF 2015

NOAH JUMA OGAYA.....PETITIONER

VERSUS

DIRECTOR LAND ADJUDICATION.....1ST RESPONDENT

LAND ADJUDICATION OFFICER SIAYA...2ND RESPONDENT

BISHOP DAVID OKUMU.....3RD RESPONDENT

T/A WOKOVU WA ROHO ISRAEL CHURCH

JUDGEMENT

1. By a petition dated 10/6/2015 filed here on the same date, the Petitioner - **NOAH JUMA OGAYA** - is seeking redress against the three (3) Respondents - **DIRECTOR OF LAND ADJUDICATION, LAND ADJUDICATION OFFICER, SIAYA** and **BISHOP OKUMU t/a WOKOVU WA ROHO ISRAEL CHURCH** – because of the manner in which they handled his complaints or grievances concerning land parcel No. BUNYALA/LUGARE/1998 at the time of land adjudication. The Petitioner claims the land as his own because it belonged to his father. The 3rd Defendant is said to have colluded with the other two Respondents to register the land for his church – **WOKOVU WA ROHO ISRAEL CHURCH**.

2. According to the petitioner the 3rd Respondent perpetrated fraud. He complained to the Land Adjudication Committee chaired by the 2nd Respondent. The 3rd Respondent was allegedly a member of that committee and he participated in the deliberations that handled his complaint, yet the complaint was against him. The Petitioner therefore accuses the 3rd Respondent of being a judge in his own case. And as could be predicted, the decision was in favour of the 3rd Respondent.

33. The Petitioner says he was not satisfied with the decision made and he appealed. Other people also appealed against the decisions made in their cases. Their appeals were allegedly heard and determined; the Petitioner's appeal was not. He therefore says he was discriminated against contrary to Article 27 (1) of the Constitution of Kenya, 2010. And when the 3rd Respondent sat in the judgement of his own case, Articles 47 (1) and 50 of the Constitution which provides for fair administrative action and access to justice were breached.

4. The petitioner said he enquired about the hearing of his appeal and was told that his case was in Court at Busia in CMC No. 135 of 2011. According to him, the case at Busia had been brought illegally as the area was under adjudication and the 3rd Respondent had not obtained the requisite consent to bring it. Later on the petitioner was evicted from the land pursuant to orders made in Busia Case.

5. The prayers sought by the Petitioner are as follows:

a. A declaration that the Petitioner's rights under Articles 47 (1) and (2), 50, and 27 (1) have been breached and violated.

b. An order that registration of the 3rd Respondent as the proprietor of land parcel N. BUNYALA/LUGARE/1998 be cancelled and the Petitioner's name be entered as the proprietor, alternatively, the Petitioner be compensated by the 3rd Respondent for the value of the land.

6. The 3rd Respondent responded to the petition vide ANSWER to petition dated 30/10/2015 filed in court on the same date. He said his Church owns the land. The Petitioner had trespassed into the land sometimes in 1998 and constructed some kiosks. That same year, the Petitioner filed a complaint before the area adjudication committee claiming the land. The complaint was registered as Land Case 48 of 1998. The Case was dismissed and no appeal was preferred.

7. The Petitioner continued with his illegal activities on the land and the Respondent enlisted the help of the area local administration. The area District Officer (D.O.) tried to intervene but the Petitioner persisted in his activities. The 3rd Respondent then decided to come to court and he obtained consent from the area Land Adjudication Officer to come to Court. All else having failed, the 3rd Respondent filed BUSIA CMCC No. 135 of 2011. The case was determined in his favour and the Petitioner was evicted from the land. According to the 3rd Respondent, the Petitioner should have raised the issue he is raising here in CMCC No. 135 of 2011. He did not and this case is said to be incompetent, bad in law, and an abuse of the Court process.

8. The other two Respondents did not respond to the petition. It is clear however that the dispute is essentially against the Petitioner and the 3rd Respondent. It is infact from the 3rd Respondent that the petitioner is seeking to wrestle ownership. The Court heard the matter on two days – 28/9/2016 and 27/2/2017.

9. The Petitioner testified as PW1. He said he was given that land by his father in 1990. He put up a house and some rental premises on it. He was also doing his carpentry work there. Before the onset of adjudication in the area, he had a dispute with 3rd Respondent's Church which was handled before the area chief. The Church had been given a portion of the land. According to the Petitioner, he won the dispute.

10. Then in 1997, adjudication started in the area and the land was adjudicated in favour of the Church. He contested that before the Land Adjudication Committee but the owner of the Church – 3rd Respondent – was a member of the committee and the matter was decided in his favour.

11. The Petitioner testified as DW1. He adopted what he said in his answer to the petition. During cross-examination he denied being a member of the adjudication committee when it presided over the case referred to by the Petitioner. He also said he had consent to file his case in Court.

12. Both sides filed written submissions. The Petitioner's submissions were filed on 4/4/2017 and the Petitioner reiterated that his rights under the 2010, Constitution were violated. It was also submitted that fair hearing was denied to the petitioner in the case filed in the Lower Court here by the 3rd Respondent.

13. The 3rd Respondent's submissions were filed on 10/4/2017. It was submitted, *interalia*, that the land belongs to the 3rd Respondent but the Petitioner is intent on owning a portion onto which he had

trespassed in the past. The decided case of **KAMAU MUCHUA vs RIPPLES LIMITED: Civil Appeal No. 106 of 1992** was cited to persuade the Court that a party ought not to be allowed to gain advantage obtained through planned and blatant unlawful acts.

14. It was pointed out that the Petitioner was evicted from the land in execution of a lawful Court order. He should not be allowed back, it was submitted. The case of **ALBERT KIPRUTO METTO & Another vs WILLIAM AYABEI CHEMETEI & 4 Others 2016 eKLR** was cited to persuade the Court not to allow the Petitioner back to the land as that would be an infringement of the Respondent's rights given that the Petitioner was evicted by a valid Court order.

15. Due regard is given to the pleadings, evidence, and rival submissions. I need to state right from the start that the case of the Petitioner is a misconceived endeavor. And here is why: The Petitioner is complaining about acts that took place during the adjudication period. By his own account, adjudication started in the area in 1997. Everything alleged by him seems to have taken place before the year 2010 when the Constitution he says was violated was promulgated.

16. The law does not operate retrospectively. To be more specific; the Constitution of Kenya, 2010, is not meant to apply retrospectively. Except for a few instances, the Constitution is law for the Post-2010 period. The few instances where the Constitution is allowed retrospective application are in Articles 67 (2) (e) where the National Land Commission is allowed to investigate, *inter alia*, historical land injustices and Section 23 of the 6th Schedule where past conduct of serving Judges and Magistrates serving during pre-2010 period was allowed to be investigated.

17. The Petitioner then was duty bound to demonstrate that Articles 27 (1), 47 (1) and 50 which he alleges to have been violated had retrospective application. The fact of the matter is that they did not. The 2010 Constitution is not a panacea for everything. The Petitioner cannot be heard to assert that a law that did not exist at the time he was allegedly wronged was violated. It is clear therefore that the petitioner was laboring under a serious misdirection.

18. But even assuming that the Constitution was applicable, there are serious doubts as to whether the required standard of proof was attained in this case. The Petitioner alleged that the Respondent was a member of adjudication committee that handled his complaint. The Respondent is accused of failing to recuse himself. He therefore became a judge in his own case. But the Respondent denied all this. It is trite that when one side alleges a fact and the other side denies it, that fact is not proved. If one looks at Sections 107 and 108 of the evidence Act (Cap 80), the burden of proof is placed on the person alleging the fact to demonstrate its existence.

19. In this particular case, I expected that the Petitioner would avail documentary or oral evidence to show that the Respondent was a member of the adjudication committee and that he participated in the proceedings. This was never done. The allegations therefore remained unproved.

20. The upshot of all this is that the petition has no merits. It suffers from proof-deficit and its conceptual foundation is wrong in law. The case is therefore hereby dismissed.

Dated, signed and delivered at Busia this 27th day of September, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Petitioner:

1st Respondent:

2nd Respondent:

3rd Respondent:

Counsel: