



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 77 OF 2014

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA SUPERVISING

AND JURISDICTION

AND

IN THE MATTER OF: THE LAND ADJUDICATION ACT (CAP 284)

LAWS OF KENYA

AND

IN THE MATTER OF: PLOT NOs KILIFI/KALIANG'OMBE/JIMBA/672

AND 680.

DAVID MTAWALI KAZUNGU YAA.....PETITIONER

-VERSUS-

- 1. THE NATIONAL LAND COMMISSION**
- 2. THE DISTRICT LAND ADJUDICATION OFFICER, KILIFI**
- 3. TAVEZ CONNECTION LIMITED**
- 4. ATHUMAN MOHAMDED BORA.....RESPONDENTS**

RULING

1. This petition dated 9th September, 2014 and filed in court the same date.
2. The petition states;

PETITION OF THE HIGH COURT OF KENYA

MOMBASA.

The Humble petition of

DAVID MTAWALI KAZUNGU YAA of Rabai, Buni Kisimani

C/O Khatib And Company Advocates,

Ralli House, 2nd Floor,

Nyerere Avenue,

P.O. Box 80118, Mombasa as follows;

1) That at all material times herein the petitioner and his family have been the proprietors of the parcels of land now surveyed and known as Plot Numbers Kilifi/Kaliang'ombe/Jimba/672 and Kilifi/Kaliang'ombe/Jimba/680.

2) That the petitioner and his family have had several cases with Kenya Tabia, Athman Mohammed Bora, Kalamba Rimba and Zuwa Bora over the said parcels of land.

(i) Kaloleni Civil Case No. 5 of 2002. The court issued warrants of eviction of Kalama Rimba from the two parcels of land.

(ii) Mombasa CMCC No. 339 of 2004. Athman Mohammed Bora -versus- Kenya Rimba, Charo Baya.

The case is pending before the Chief Magistrate's Court Mombasa.

(iii) Mariakani SRMCC No. 73 of 2009

1. Kenya Tabia

2. Ndundi Nyao

-versus-

1. Athman Zuwa Mueni

2. Joseph Njoka

3. David Mtawala

The case was dismissed on 9th August, 2011.

3) That while the Adjudication was in the process the 3rd and 4th respondents laid claims to the parcel Nos. 672 and 680 respectively and the same were registered in their names.

4) That the petitioner filed objections to the adjudication register and the said objections were read on 18th December, 2013.

5) However the petitioner was never informed of the decisions on the said objections until 27th June, 2014.

6) That as a result of the failure of the 2nd respondent to inform the petitioner in time, the petitioner has been denied the right of appeal to the Minister.

7) That the petitioner has thus been denied a right to a fair administrative process. The petitioner has further been deprived of their property.

8) The petitioner has never dealt with the 3rd respondent over the parcel of land and the petitioner knew the said respondent on 18th December 2013 during the hearing of the objection as the person who bought the parcel of land from Ndundi Ngao Bengao and James Kenya Tabia who has filed the case in Mariakani SRMCC NO. 29 of 2009.

9) That the 4th respondent also bought a portion of plot number 680 from Kenya Rumba whom he had sued in Mombasa SRMCC No. 3390 of 2004 which suit he has to date failed to prosecute.

10) That the court at Kaloleni Civil Suit No.6 of 2003 ordered eviction of the 4th respondent and Kenya Rimba from the aforesaid

parcels of land and the 2nd respondent erred in law in allocating the two parcels of land to the 3rd and 4th respondents.

3. Your petitioner therefore humbly prays:-

1) That the Decision by the 2nd respondent to declare parcel number Kilifi/Kaliang'ombe/Jumba 672 and Kilifi/Kaliang'ombe/Jumba/680 as belonging to the 3rd and 4th respondents respectively is null and void and that it violates the petitioner's fundamental rights.

2) That the petitioner be declared the rightful owner of the said parcels of land and title deeds be issued.

3) That such other and further orders as the court may deem fit to grant.

4. There is a replying affidavit sworn by Athuman Mohammed Bora the 4th respondent, on the 24.9.2015. There is also a replying affidavit sworn by Abel Makau, a Director of the 3rd respondent, Travez Connection Limited, on the 24.9.2015.

The Director of the 3rd respondent avers that they bought land parcel number Kilifi/Kaliang'ombe/Jimba/672 from one Kenya Tabia for a consideration of ksh 2 million.

The 4th respondent's contention is that the petitioner's claim is one of seeking a determination of ownership rights in respect of land parcel numbers Kilifi/Kaliang'ombe/Jumba/680.

5. The 1st and 2nd respondent did not file any submissions.

6. The petitioner's submissions

It is the petitioner's case that he and his family have been on occupation of the two parcels of land and have never disposed the same to anyone.

That the 3rd and 4th respondents have no right over the property having purchased from people who had no authority to sell. Therefore have no good title. Further that the 2nd respondent went ahead and registered the 3rd and 4th respondents as owners of the said parcels of land.

The petitioner objected to Kilifi Land Adjudication officer judgement was to be delivered on notice. He did not receive any notice of judgement only to find out later that judgement was entered. The same was not dated thus frustrating the appeal process.

7. That by registering the 3rd and 4th respondents as proprietors of the parcels of land, the petitioner has been deprived his fundamental right to own property contrary to Article 40 of the Constitution. That this honourable court should not allow such a violation of thrive.

Further that the 2nd respondent's failure to inform the petitioner of the determination derived the petitioner the right of appeal provided for under section 29 of the Land Adjudication Act (Cap 284) Laws of Kenya.

8. The petitioner relied on the case of Said Mbarak Awadh –versus- Commissioner of Lands Mombasa High Court Miscellaneous Case No.128 of 2010.

9. The 3rd and 4th respondent's submissions

It is these respondent's case that the petitioner only filed an objection to the adjudication in 2013. That he fully participated in the proceedings and cannot explain what steps he took to find out the outcome of the objection proceedings.

10. Further that he has failed to utilize the appeal mechanism provided for under the Land Adjudication Act Cap 284 Laws of Kenya by failing to file appeal.

That he has filed this petition without exhausting the local remedies hence it is frivolous and an abuse of the court process. They have relied on the case of

1) Fredrick Mworja –versus District Land Adjudication Officer/Tigania West/East And 3 Others Meru High Court Petition No.129 of 2011.

2) Speaker of the National Assembly – versus- Karume [1992] KLR 425.

3) Ditozon Koikai-versus- Lialo Karbolo And 2 Others (sued as trustees of Oderkesi Community Wildlife Conservation Trust) Nairobi Constitutional & Human Rights Division Petition No. 170 of 2014.

11. The issues for determination is whether this petition discloses any constitutional issues worth of consideration by this court setting in Constitutional capacity.

I have analysed the petitioner's case and find that the issues raised are not Constitutional issues. I rely on the case of

Stephen Saitoti Kapauku -versus- Cocacola Sabco Nairobi Bottlers Limited And 2 Others Nairobi High Court Petition No. 338 of 2012 where it was quoted with approval the case of Honourable Uhuru Kenyatta –versus- The Nairobi Star Limited High Court Petition No.184 of 2012 where it was held,

“It is an established practice that where a matter can be disposed of without recourse to the Constitution the Constitution should not be invoked at all. The court will pronounce on the Constitutionality of a statute only where it is necessary for the decision of the court to do so”.

Wahid Munwar Khan –versus- The state of AIR [1956]Hyd 22... court's will not normally consider a constitution unless the existence of a remedy depends on it. If a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or actual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights”.

12. Also in Revital Health Care (EPZ) Limited And Another – versus- Ministry of Health And 5 Others Mombasa Constitutional Petition No. 63 of 2013 where Anyara Emukule J referred to the case of S. –versus- Eklungu [1995](3) 5A 867 CC where Kenbridge J articulated the principle of avoidance in his minority judgment as follows at pg 59,

“I would lay down as a general principle that where it is possible to decide any case, Civil, or Criminal without reaching a constitutional issue that is the course which should be followed”.

13. From the foregoing authorities, I am guided to find that the petition herein does not raise any Constitutional issues.

A look at the prayers by the petitioner;

1. That the decision by the 2nd respondent to declare parcel number Kilifi/Kaliang'ombe/Jimba/680 as belonging to the 3rd and 4th respondent respectively is null and void and that it violated the petitioner's fundamental rights.
2. That the petitioner be declared the rightful owner of the said parcels and title deeds be issued”.

This court is not able to grant these declarations without the benefit of taking evidence.

14. The petitioner fully participated in the objection proceedings before the 2nd respondent and was heard.

The claim that he was not made aware of the finding cannot vitiate its validity. He filed the objection before the 2nd respondent. He ought to have followed upon the finding. He should have acted diligently.

15. Once he became aware of the finding by the land adjudication officer he ought to have sought for enlargement of time with which to file an appeal.

16. The petitioner has failed to demonstrate that he sought leave to extend time within which to file an appeal.

Section 9(2) of the Fair Administrative Action Act 2015 states that,

“The High Court or Subordinate Court shall not review and administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal on review and all remedies available under any other written law are first exhausted”.

I find that the petitioner ought to have exhausted all the mechanisms provided for under section 29 of the Land Adjudication Act (Cap 284) before coming to this court in this manner.

17. I find that the petitioner has failed to demonstrate that he deserves the orders sought.

I find no merit in this petition and the same is dismissed. I make no orders as to costs.

It is so ordered.

Dated, signed and delivered at Mombasa this 21st September 2017.

L. KOMINGOI

JUDGE