



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CHUKA ELC CASE NO 84 OF 2017

FORMERLY MERU PETITON CASE NO.20 OF 2013

VICTOR MBAE MUGAMBI.....PETITIONER

VERSUS

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER MARIANI

ADJUDICATION SECTION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

M'NTHAKA MUGWIKA.....INTERESTED PARTY

JUDGMENT

1. This petition which is undated but was filed on 1st October, 2013 reads as follows:

TO THE HIGH COURT OF MERU,

P. O. BOX 118,

MERU.

PETITION

The humble petition of VICTOR MBAE MUGAMBI c/o Mithega & KARIUKI ADVOCATES, ELECTRICAL HOUSE, OPPOSITE UCHUMI SUPERMARKET, NEXT TO KENSILVER BOOKING OFFICE, P. O. BOX 612, MERU in the Republic of Kenya is as follows:

1. That the petitioner is an adult male of sound mind being a beneficial owner and the legal representative and administrator of the estate of ROMANO MUGAMBI M'ANAIBA comprising all that parcel of land NO.746 Mariani adjudication section (hereinafter called the suit land) out of which P/NO.337 was illegally excised.

2. THAT the 1st respondent is a Government of Kenya Officer in charge of land adjudication and settlement in MARIANI SECTION.

3. THAT the 2nd respondent is the Chief legal advisor of the government of Kenya and is sued in his capacity as such.
4. THAT the interested party is an adult of sound mind resident of Chuka service of all court process shall be through the Advocate's office only.
5. THAT suit land is within the MARIANI ADJUDICATION SECTION.
6. THAT the suit land is ancestral land belonging to the family of the petitioner who have been in actual occupation, use and development of the same since time immemorial.
7. THAT the petitioner asserts that his deceased father was the exclusive, registered, equitable, and beneficial owner of all that land parcel No. 746 measuring 6.0 acres or thereabout situated in MARIANI ADJUDICATION SECTION since some time in 1973 in which he lived with his family until he met his death in 1997.
8. THAT the petitioner and family have extensively developed the suit land since in the nature of:-
 - a) Two (2) semi – permanent houses;
 - b) Two (2) time and iron sheet houses
 - c) Planting various indigenous and exotic trees;
 - d) Crop farming;
 - e) Rearing different domestic animals and birds;
9. THAT after the deceased passed on, the petition (sic) and the rest of the deceased's family members continued living on, enjoying and peacefully utilizing and developing the whole of the suit land without interference from anyone.
10. THAT on perusing the land register of the MARIANI ADJUDICATION SECTION, I found out that the said suit land was sub-divided into two (2) portions numbered 746 and 337 with the latter registered in the name of MUGWIKI THUNGUTHA (long deceased), the interested party's father.
11. THAT neither the said MUGWIKI THUNGUTHA (deceased) nor his family has ever lived on the suit land or carried out any developments thereon.
12. THAT the 1st respondent unlawfully and without consent carved out parcel No. 337 from the petitioner's suit land and purported to give it to one MUGWIKI THUNGUTHA (deceased) without following the due procedure laid down in law.
13. The 1st respondent's actions are illegal, arbitrary and done in bad faith tailored to unlawfully unprocedurally and without any colour of right deprive the petitioner and his family of part of the suit land in flagrant contravention of their constitutional right to acquire and own property by dint of Article 40 of the Constitution of Kenya.
14. Further, the 1st respondent (sic) actions amounts (sic) to infringement of the petitioner's Constitutional right to property and fundamental freedom from deprivation of property without any reason.
15. There is no suit pending before another court touching on the matter in question.

16. This honourable court has jurisdiction to hear and determine this petition.

Your humble petitioner's (sic) pray for judgment against the respondent for:-

a) A declaration that the respondent's act of curving from the petitioner's suit land 2.51 Acres and giving it to MUGWIKI THUNGUTHA (deceased) is unjustified, unlawful, unconstitutional and void ab initio.

b) A declaration that the whole of the land No. 746 MARIANI ADJUDICATION SECTION, measuring 6.0 Acres or thereabout wholly belongs to the petitioner and family.

c) A permanent injunction restraining the respondents their employees, assigns, servants, agents or whomsoever acting for, on behalf of or through them from curving out the petitioner's parcel No. 746 MARIANI ADJUDICATION SECTION and giving it to MUGWIKI THUNGUTHA or any other person in that regard.

d) Costs of this suit.

DATED AT MERU THISDAY OF2013

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FOR. MITHEGA & KARIUKI

ADVOCATES FOR THE PETITIONER

2. The petitioner and the respondents canvassed the petition by way of written submissions. The Interested Party did not file his written submissions even after being granted many chances to do so. The respondents did not file a replying affidavit to answer the issues raised by the petitioner in his petition.

3. In his written submissions, the petitioner submits as shown in the following paragraphs which are reproduced herebelow verbatim as paragraphs (a) to (h)

(a)Your lordship, we wish to guide this Honourable court in facilitating the just, expeditious, proportionate, judicious and affordable resolution of the matter before it. The petition is founded under article 40 of the Constitution of Kenya, 2010 on the right to protection of property. The petitioner has instituted the instant petition in his capacity as the legal representative of his late father's estate. The interested party is a son to the late MUGWIKI THUNGUTHA. The instant petition is supported by the supporting affidavit of VICTOR MBAE MUGAMBI sworn on 30.09.2013. On the other hand the petition is opposed by the replying affidavit by the interested party sworn on 30.10.2013. The respondents never filed any pleadings/documents in opposition or in support of the instant petition despite having been duly served with the petition. Evidence of return of service on several instances is on record before this court.

(b)The petitioner has stated in his petition and the supporting affidavit thereto that the suit land is located at MARIANI ADJUDICATION SECTION. That the suit land is ancestral land belonging to the petitioner's family who have been in actual occupation, use and development of the same since time immemorial. The petitioner (sic) assertion is that his deceased father was the exclusive, registered, equitable and beneficial owner of the suit land. That the 1st respondent unlawfully, arbitrarily and unlawfully curved out a portion of the said land measuring 2.51 acres from land parcel No.746 and named the resulting portion as No. 337 with the latter registered in the name of MUGWIKI THUNGUTHA (LONG DECEASED), the interested party's father. That the said sub division of the suit land was done on the basis of an objection No. 165 which was undertaken by the 1st respondent long after the death of ROMANO MUGAMBI (deceased) who was the father to the petitioner. In fact even the said M'NTHAKA MUGWIKI (DECEASED) who was allocated the land was long dead when the objection was carried out and the 1st respondent went ahead to hear the objection and awarded the land to a deceased person when the objection had been filed by the interested person herein.

(c)Through the replying affidavit sworn by the interested party on 30.10.2013, he has denied that there was no sub-division of the suit land No. 745 belonging to the petitioner's family. The interested party in opposition to the instant petition depones matters that he cannot verify or prove as he alleges that parcel No. 337 was a distinct parcel of land that was demarcated where it is right now and the petitioner's father (deceased) influenced the adjudication committee to have it moved to another place since he was a committee member during the adjudication process. The baseless assertions that the petitioner's father caused parcel No. 337 to be displaced are all lies as the petitioner's father (deceased) was not a committee member at all as alleged in the sworn affidavit by the interested party. In fact the interested party is guilty for lying on oath. The interested party's father (deceased) was alive during the adjudication process and if at all his land parcel No. 337 had been displaced, he would have filed an objection. Since there was no displacement at all, the interested party's father did not file any objection at all. The objection No. 65 filed by the interested party herein was just an afterthought with collusion with the 1st respondent to deprive the petitioner's family their land. That is the reason why the 1st respondent has never bothered to file his response in opposition of this petition at all since he is aware that his actions were arbitrary, unlawful and in total contravention of article 40 of the constitution (supra)

(d) ON WHETHER THE PETITIONER'S CLAIM CAN BE DECIDED BY WAY OF A PETITION

It is our humble submission that this instant petition has precision and particularity pursuant to the provisions of Rule 4 of The Constitution of Kenya (Protection of rights and fundamental freedoms) practice and procedure Rules, 2013. As it was cited in the famous case of Annarita Karimi Njeru vs Republic 1979 KLR 154 pg 156 where it was held that,

“if a person is seeking redress from the High Court or an order which invokes a reference to the constitution, it is important, if only to ensure that justice is done in his case, that he should set out with reasonable degree of precision that which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

My Lord, to this head, the petition has precision on the infringed article and the manner in which it has been infringed. This instant petition raises constitutional issues hence is meritorious as filed herein.

(e)On whether the prayers sought can be granted

It is our humble submission that declaratory orders should and can only be issued when the matter claimed for has specifically been pleaded, are (sic) real and not theoretical. The petitioner in his pleadings has a specific claim over a defined parcel of land and he has tangibly illustrated so before this court through his sworn affidavit filed before this court.

(f) On whether the petitioner's constitutional rights to land were infringed.

It is our submission that the petitioner's rights were infringed as follows, excising and/or curving out parcel No. 337 from the original parcel NO. 746 that belongs to the petitioner's family and awarding the same to the interested party's father (deceased) without following any due procedure. The 1st respondent exceeded the statutory jurisdiction and powers conferred to him.

(g) We rely on the decision of Mumbi Ngugi. J in the case of Multiple Hauliers East Africa Limited vs Attorney General & others Petition No. 88 of 2010 as cited in the case of Re Estate of Wiliam Kimngeny Arap Letting (deceased) 2016 EKLR where the learned Judge said,

“...High Court on several Occasions emphasized the need for administrative actions to be carried procedurally and that where a public authority's actions are likely to deprive individuals of their fundamental rights and freedoms, it is crucial that such actions be carried out with due process and in respect to the rules of natural justice.”

(h)Your Lordship it is our humble submission on behalf of the petitioner that his constitutional

rights in respect of article 40 of the Constitution (supra) were infringed /violated by the 1st respondent and as such the petitioner deserves the declaratory orders as prayed in his petition. We so humbly pray.

DATED AT MERU THIS 6TH DAY OF MARCH 2015

FOR: MITHEGA & KARIUKI

ADVOCATES FOR THE PETITIONER

4. In their written submissions, the respondents reproduce in full the orders sought by the petitioner. I do not see the need to reproduce them once again as they are already reproduced in the petitioner's written submissions and in the petition. The operative paragraphs are reproduced verbatim herebelow.

(a)The petitioner asserts that the suit parcel was sub-divided on the strength of objection No. 165 long after the death of one Romano Mugambi thus unlawfully and unprocedurally depriving his estate's interest in the suit parcel.

(b) Your Lordship, on the strength of these issues, the respondents, submit that the petition lacks merit and is outrightly mischievous. We so submit based on the following reasons in paragraph 5 of the supporting affidavit, the petitioner depones that sub-division to the suit land was done on the basis of an objection No. 165 which was undertaken by the 1st respondent long after the death of Romano Mugambi (deceased). This paragraph contains half truths and is calculated to mislead the honourable court. The portion is thin on facts and evidence that would offer useful guidance to the court. The said objection proceedings are not attached to show their existence or what transpired then. This annexure is critical in testing the averments of the petitioner on the irregularity of the proceedings before the respondents. The court is only left to speculate and second guess the decision of the respondent. It's settled law that the respondent in acting as quasi-judiciary body considers and procures the rights and interests of a deceased person. Further the fact that someone is deceased does not mean that objection proceedings cannot be heard by the respondent. The absence of evidence and existence of mischief perhaps shows why the supporting affidavit consists merely 6 paragraphs.

(c)Your Lordship, the petitioner has further failed to establish why the decision of the respondents was never challenged by way of judicial review. The avenue pursued of seeking a declaratory order is a collateral attack on an existing valid decision of the respondent for the benefit of the interested party. The petitioner is only desirous of re-litigating issues that are put to rest by the statutory prescribed procedure of adjudication. The court should not annex its time and resources to the aid of such persons. In the absence of conclusive evidence on what transpired before the respondent, the court would be opening a Pandora's Box of adjudicating on disputes that fall with (sic) the exclusive jurisdiction of the respondent. That defeats the purpose of the adjudication and consolidation process which is to conclusively and exhaustively ascertain interest in land. Re-opening such issues is mischievous.

(d) Further your Lordship, the constitutional petition in its current form cannot conclusively determine the issues. Affected parties are not in a position to adduce viva voce evidence and at the same time challenge documentary evidence produced. The petition would only be determined in abstract.

(e) In view of the foregoing, we urge the court to dismiss the petition with cost to the respondents.

Much obliged.

DATED AT MERU THIS 31ST DAY OF MARCH, 2017

E.M. KIETI,

LITIGATION COUNSEL

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE

5. The issue for determination in this matter is one. It is whether or not the petitioner's constitutional rights have been infringed upon through the decision of the 1st Respondent to carve out 2.51 acres from what the Petitioner claims to be his land and to give it to Mugwika Thungutha (deceased). If this question is answered in the affirmative, the Petitioner will be entitled to prayers (b) and (c) sought in the petition. If not, the Petition will be dismissed.

6. The court notes that this petition was filed on 1st October, 2013. The Petitioner's submissions were filed on 8th March, 2017. The Respondents' submissions were filed on 5th April, 2017. The Interested Party, however, despite having been granted several chances did not file his submissions.

7. The fact that it took the Petitioner over 4 years after the suit was filed before he filed his submissions and that the respondents filed their submissions also over 4 years after the suit was filed, is indicative that there was inordinate delay in the prosecution of this petition. It is noted that the Petitioner's submissions purport to be dated 2 years before they were filed.

8. I do not agree with the respondents assertion in their submissions that this suit lacks merit. The mere fact that the petition did not attack the impugned decision by way of Judicial Review proceedings, by that fact alone, cannot vitiate constitutional petitions. Nor does it defeat the purpose of adjudication and consolidation processes. The respondents should have put their cases strongly by filing opposite affidavits in opposition to the Petition.

9. I need not reinvent wheel. The Federal High Court of Nigeria in *Punch Nigeria Ltd & Another Versus Attorney General & Others* [1996] 1 Commonwealth Human Rights Division opined as follows:

“Where facts have been proven which prima facie showed an infringement, it was for the person alleged to have infringed that right to justify such infringement and in the absence of a counter affidavit, the averments contained in the supporting affidavit must be taken as true”.

10. Hon. Justice Lenaola, J, as he then was, and now a Judge of the Supreme Court of Kenya embraced the above position in the case of *Kariuki Gathitu Versus Attorney General*, Petition No. 1188 of 2003 O.S (2013)eKLR. The respondents in this case did not oppose the assertions put forward by the Petitioner in his supporting affidavit. This leaves those assertions veritably uncontroverted.

11. The Interested Party, as I have already pointed out never filed submissions even after being veritably indulged. The Respondents, for whatever reasons, did not oppose by way of affidavit, the assertions put forward by the Petitioner in his affidavit supporting the petition sworn on 30th October, 2013. It is the 1st Respondent whose conduct spawned the filing of this suit. By not opposing the assertions proffered by the Petitioner, constructively the 1st Respondent accepts the evidence proffered by the petitioner. It is not controverted. The failure by the Interested Party to file submissions, exacerbates the situation as this failure does not help his case and the Respondents' case. In my view the Interested Party's replying affidavit sworn on 30th October, 2013 does not change my finding that on a balance of probabilities the Petitioner's evidence debunks the Respondents' and the Interested party's evidence.

12. In the circumstances, I give judgment for the Petitioner against the Respondents and the Interested Party in the following terms:

(a) It is declared that the 1st Respondent's act of curving out from the Petitioner's suit land 2.51

acres and giving it to MUGWIKI THUNGUTHA (deceased) is unjustified, unlawful, unconstitutional and void ab initio.

(b) I issue a declaration that the whole of Land Parcel No. 746 MARIANI ADJUDICATION SECTION measuring 6.0 Acres or thereabout wholly belongs to the Petitioner and family.

(c) A permanent injunction is hereby issued restraining the Respondents, their employees, assigns, servants, agents or whomsoever acting for, on behalf of or through them from curving out the petitioner's parcel No. 746 MARIANI ADJUDICATION SECTION and giving it to MUGWIKI THUNGUTHA (deceased) or any other person in that regard.

(d) Costs are awarded to the Petitioner.

Delivered in open court at Chuka this **21st day of November, 2017** in the presence of:

CA: Ndegwa

Carlpeters Mbaabu h/b M. Kariuki for Petitioner

A.G. absent for 1st and 2nd Respondents

Menye & Kirima advocates absent for 3rd Respondent

P. M. NJOROGE,

JUDGE