



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.18 OF 2013

JOHN ALOO OMINO.....PETITIONER

VERSUS

THE PRINCIPAL MAGISTRATE NYANDO LAW COURTS.....1ST RESPONDENT

GEORGE ATITO FWAYE.....2ND RESPONDENT

THE ATTORNEY GENERAL GOVERNMENT OF KENYA3RD RESPONDENT

J U D G E M E N T

1. The petitioner herein – **JOHN ALOO OMINO** – is the registered owner of Land parcel No.**KISUMU/BORDER/978** (Suit Land). But the 2nd respondent – **GEORGE ATITO FWAYE** – has been claiming the land, alleging purchase from the petitioner many years ago. Two other respondents are sued. They are the **Principal Magistrates Court at Nyando (1st RESPONDENT)** and **The Attorney General (3rd Respondent)**. They are sued for the role that they, or public bodies under them, played in the dispute between the petitioner and 2nd Respondent.
2. In a bid to realise his claim to the suit land, the 2nd respondent filed a dispute at the now defunct Nyando Land Dispute Tribunal. The tribunal heard the dispute and found for him. The decision of the tribunal was then taken to Nyando Principal Court for adoption as judgment. Records show that the court adopted the decision as its judgement on 24/11/2011.
3. To effect the decision of the tribunal, and the judgement of the court adopting it, the petitioner then moved the court vide a Notice of Motion filed on 3/9/2013 and dated the same but before the Motion could be heard and determined, this petition was filed.
4. In essence, the decision of the tribunal was to the effect that the suit land belonged to 2nd Respondent. There was therefore a directive that the relevant law be invoked and followed to vest the ownership of the suit Land in the 2nd Respondent. Indeed, the 2nd Respondents Notice of Motion was precisely meant to gain this result.
5. But the petitioner would have none of this and this petition is aimed, inter alia, at stopping implementation of the tribunal's decision.
6. The tribunal's decision was said to be unlawful, improper and unprocedural as the tribunal lacked jurisdiction to make it. The Nyando court was faulted for not properly appreciating the applicable law. And because of lack of such proper appreciation of law, the court is said to have adopted an

unlawful decision. It is further alleged that the court exhibited bias and lack of impartiality.

7. The petitioner is asking for the following orders:

(a) A declaration that the actions and omissions of the respondents are arbitrary un-procedural and irregular for reasons that:

(i) The tribunal had no jurisdiction entertain the claim as it related to ownership.

ii. The court at Nyando failed to appreciate the provisions of Land Disputes Tribunal's Act and ended up adopting an un-procedural decision.

iii. The court at Nyando acted outside the law and erred by giving orders that were against the law.

b. The decision of the tribunal and the order of the court including any decree be quashed.

c. A declaration that the petitioner is the owner and proprietor of the suit land to the exclusion of the 2nd respondent.

d. Costs of the petition.

8. Its not clear whether the 2nd Respondent made a response to the petition. True, a replying affidavit was filed here on 3/2/2014. In it, the 2nd respondent talks of having read the contents of application, not petition. There was an interlocutory application filed by the petitioner seeking various temporary orders. One gets the impression that the 2nd respondent is talking about the application. But matters become more confusing when, at paragraph 19, the 2nd Respondent talks of “an application by way of petition”, seemingly implying that by application he means petition.

9. Whatever the position, the response is a merit – focused approach to the issues raised, the background and history is provided and the merits and justification of the decision made are asserted. This contrasts with the petitioner's approach, which largely focus on the legality of the decision made and the mandate of the decision makers.

10. The 1st and 3rd respondents conceded to the petition on 8/4/2014. That left the petitioner and the 2nd respondent to square it out.

11. On 6/10/2014, the petitioner and 2nd respondent agreed to file written submissions in lieu of oral arguments or hearing. And towards that end, the petitioners submissions were filed on 7/10/2014 while 2nd respondents submissions were filed on 21/10/2014.

12. The submissions of the petitioner emphasised that the Land Disputes Tribunal had no jurisdiction. Jurisdiction, or its lack thereof, is approached from two fronts Viz:

a. The tribunal had no power to make decisions on ownership.

b. The 2nd respondents claim was caught up by Section 4 of the Limitation of Actions Act (cap 22), which forbid lodging of claim to recover land after expiry of 12 years.

13. On ownership, the submissions are that the jurisdiction of Land Dispute's Tribunal was set out in Section 3(1) of the Land Disputes Tribunal's Act, No.18 of 1990, which stated as follows: **Section 3(1)** “ Subject to this Act, all cases of 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. It is obvious even from a cursory glance that ownership is not covered by Section 3(1). Yet it is that section and no other that conferred jurisdiction.

14. On the issue of limitation of period, the dispute was said to be one to recover land. The 2nd respondent's claim was said to be based on an alleged Sale agreement entered into in 1984. The dispute at the tribunal was filed in 2011. Section 4 of Limitation of Actions Act, cap 22, states:

“ An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”. The 2nd defendant's dispute was said to have been brought after 27 years.

15. The decided cases of **Esther Gachambi Mwangi Vs Samuel Mwangi Mbiri (2013)** eKLR and **NEKESA V Wanjala, Civil Appeal No.23/1985** were cited to illustrate the position on the issue of jurisdiction and limitation period.

16. And because of the shortcomings aforesaid, the orders issued were said not to be enforceable and the decided case of **MARTHA MWONJARU & Another VS M'ataya M'akwalu Akwalu [2010]** was cited to drive the point home.

17. The 2nd Respondents submitted, inter alia, that he bought the suit land way back in 1984. It was agreed at the time that parties had to await registration of the suit land and the petitioner would then transfer the land to 2nd respondent. The Respondent is said to have gone into possession of the land and has been cultivating it to date.

18. The petitioner demanded back his land in 1990 and this forced the 2nd respondent to file a dispute at the Nyando Land Disputes Tribunal. The tribunal found for the 2nd respondent.

19. According to 2nd respondent, the tribunal acted within its powers as the suit land required subdivision and the petitioner has been interfering with use and occupation. All these are things the tribunal had jurisdiction to handle.

20. On the issue of limitation period, the 2nd respondent said the petitioner acquired title in year 2009. He filed his suit at the tribunal in year 2011. He was, he averred, within the time frame required to file his claim. The allegation by the petitioner therefore that the cause of action arose 27 years before the dispute was instituted was termed as false, the parties having not disagreed before title was issued.

21. The petitioner is also said to have participated in the proceedings before the tribunal. He is said not to have raised the issue of jurisdiction. He is faulted for not appealing before Provincial Appeals Committee or filing for a judicial review at High Court.

22. I have considered the material laid before me. Much as the 2nd respondent would like to assert that the tribunal acted within its powers, it is clear that it did not. Its decision was effectively meant to shift the ownership of the suit land from the petitioner to the 2nd respondent. The tribunal directed that the relevant law be invoked and followed to achieve that. Yet a reading of Section 3(1) of the Land Disputes Tribunal's Act does not confer on the tribunal the jurisdiction to make such a decision. I therefore agree with the petitioner on this point.

23. Then there is the issue of Limitation period. According to the petitioner, the cause of action arose in 1984 when the agreement for sale was made. According to the 2nd respondent however, there was an understanding that the ownership of the land was to pass to 2nd respondent after registration. The petitioner was issued with title in year 2009 and thereafter the 2nd respondent asked to have the land transferred to him. This was met with refusal. And this according to the 2nd Respondent, is when the

cause of action arose.

24.The petitioner availed Esther Gachambi's case (Supra) for his position that the time began to run when the agreement was entered into. I have read that case. The circumstances of that case are different from this one. In that case the party alleged to have trespassed or illegally occupied the land was shown to have done so right from day one. The court therefore had no difficulty tracing the time when the cause of action arose to day one.

25.But here, the situation is different. According to 2nd respondent, there was understanding that parties had to await registration. It is only after registration that the 2nd respondent asked to be made the registered owner. In **Muchendu Vs Wita (2003) KLR 419, Sergon J.** held, inter alia, that the cause of action accrues when breach takes place. In **Muigai V Housing Finance Company (K) LTD and 2 others (2003) KLR 618, Ombija J.** held, inter alia, that the time for the cause of action arises when knowledge of the facts constituting it is gained by the affected party.

26.In this case, the 2nd respondent seems to have come to the realisation that he wouldn't get the suit land when his request to get it was turned down by the petitioner. I am not persuaded by the arguments of the petitioner that the cause of action arose when the agreement was made. Rather, it arose when the breach became known to the 2nd respondent.

27.There was the argument by the 2nd respondent that the petitioner should have filed an appeal or come to superior court for review of the tribunal decision. According to respondent, failure to do so precludes him from belatedly coming to court by way of petition.

28.The petitioner may have squandered the chances for appeal or review but that does not preclude him from coming to court. The chances may have gone but the petitioner still had the option of filing an ordinary declaratory suit or coming by way of petition as he did. I therefore do not agree with the 2nd Respondent on this issue.

29.I note that when the tribunal made its decision, it did so on the basis of the evidence availed to it. It analysed and appreciated the evidence before coming up with the decision. The petitioner's case as availed here is not concerned with appreciation of evidence. It is concerned with the legality of the decisions made. Ownership is almost always a matter of both law and evidence. I have the disadvantage of not having been addressed on evidence. Prayer (c) asks that the petitioner be declared the owner. That is not the proper thing to do, given the material laid before me.

30.In my view, the proper thing to do is to let things remain the way they were before the tribunal made its decision. And I think that the petitioner was the registered owner while the 2nd defendant still retained his right to sue.

31.In **Asman Maluba Wepukhulu & Another Vs Francis Wakwabubi Biketi: C.A.No.157 of 2001, Kisumu**, the court of appeal quashed the decision of the tribunal but still gave the parties a chance to go back to a competent court for proper hearing of their dispute.

32.In **R V The Provincial land Disputes Tribunal & others EXPARTE JAMES Oginga Ochiel: HCC Misc. Application No.22/09, Kisumu** (unreported), **Lady Justice Abida Aroni** quashed a decision made without jurisdiction but observed that parties were at liberty to move to High Court to ventilate their dispute there.

33.This is the proper thing to do here. Parties need to go to a forum where, all law allowing, their dispute can be urged for determination on both evidence and law. If I grant prayer C in the petition, I would be depriving the 2nd Respondent of such an opportunity.

34.But all the other prayers are for granting. Accordingly, I grant the petitioner prayers (a)

(b) and (d).

A.K. KANIARU

ENVIRONMENT & LAND - JUDGE

20/8/2015