



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 93 OF 2014

CATHERINE WAIGUMO KIRATU..... 1ST PLAINTIFF

LUCY MUMBI WARUI 2ND PLAINTIFF

- VERSUS -

**EPHRAIM K. WAMBUGU
DEFENDANT**

RULING

Background

1. By a plaint dated **29th April, 2014** and amended on or about **25th July, 2014** the plaintiffs seek to restrain the defendant from surveying, partitioning, and/or sub-dividing the parcel of land known as Aguthi/Gatitu/3446 (hereinafter referred to as the suit property) without taking into consideration or first excising the 5 acres awarded to each of them in land award cases No. 1 and 2 of 2005 respectively.

2. In the plaint filed herein, the plaintiffs contend that they are beneficial owners of 5 acres each from the suit property pursuant to orders issued in Nyeri CMCCC Land Case Nos.1 and 2 of 2005. Explaining that they have learnt that the defendant, who holds the suit property as a trustee for 27 others is in the process of commencing/undertaking survey and partitioning/sub-dividing the suit property without taking into account their interest therein and terming the actions of the defendant an infringement of their right to property granted by the court and an affront on the rights granted to them vide the judgments herein, the plaintiffs pray for judgment against the defendant for:-

a)An order that any survey and/or partitioning and/or sub-division of the said Aguthi/Gatitu/3446 without taking into consideration or first excising the 5 acres awarded to each of them vide Nyeri CMCCC Land award cases No.1 and 2 of 2005 is unlawful/illegal. The plaintiffs also seek a permanent injunction to restrain the defendant his agents, servants and or anyone claiming under him from surveying with a view of partitioning and/or sub-dividing the said Aguthi/Gatitu/3446 without considering or taking into account their respective entitlements therein.

b) An order that the plaintiffs do excise from a place of their choice within the said Aguthi/Gatitu/3446 each of their 5 acres awarded in Nyeri CMCCC land award case Nos. 1 and 2 of 2005.

c)Costs of the suit.

3. Through his statement of defence dated **11th June 2014** and amended on **7th April, 2015** the defendant contends that the processes through which the plaintiffs gained their rights was legally flawed and as such incapable of conferring legally enforceable rights to the plaintiffs; that the defendant being merely a trustee of the suit land, he has no power or control over the suit property and that given the fact that the other beneficiaries are not parties to the suit property, the orders sought cannot issue in favour of the plaintiffs.
4. Simultaneously with the plaint, the plaintiffs filed the notice of motion of even date seeking to restrain the defendant from carrying out the activities cited herein above pending the hearing and determination of the application and the suit.
5. Explaining that the orders sought are necessary for purposes of preserving their interest in the suit property, the plaintiffs (applicants) contend that unless the orders are granted, the defendant may frustrate their interest in the suit property and deny them enjoyment of the judgments hereto.
6. In reply and opposition to the application, the respondent filed grounds of opposition dated **11th June, 2014** in which he contends that the suit and the application is bad in law as it is not brought under any particular rule of the court; that the 2nd applicant is not a legal representative of the estate of Gladys Waigumo Warui (deceased); that the order issued in favour of the applicants in the land cases hereto cannot be enforced against him since he was not a party thereto and that the judgments issued in favour of the applicants are of no legal effect as they were obtained through a legally flawed process.
7. The respondent further contends that the Land Disputes Tribunal acted outside its powers, was not properly constituted and that it entertained the plaintiffs' claim when it was *res judicata* and time barred. The respondent further contends that the award in respect of L.R. No. Aguthi/Gatitu 3447 had been overtaken by events and that the procedure used to bring the awards to the attention of the Magistrate's court for adoption was flawed as it is the applicants' as opposed to the Chairman of the Land Disputes Tribunal who brought the award to the attention of the Magistrate's court.
8. When the application came up for hearing, counsel for the applicants **Mr. Muhoho**, submitted that on account of the awards of the Land Disputes Tribunal which were later adopted as orders of the court, the applicants are entitled to five (5) acres each from the suit property. He points out that the awards and the subsequent judgments in respect thereof were not challenged or appealed from.
9. Mr. Muhoho explained that at the time of filing the instant application, the applicants were apprehensive that the respondent would sub-divide the suit property without taking into account their interest therein.
10. Counsel for the respondent, **Mr. Wanyiri**, reiterated the grounds of opposition listed herein above and submitted that the application is incurably defective on account of the said omissions and/or procedural flaws.
11. In a rejoinder, Mr. Muhoho maintained that the application is proper and contrary to the respondent's contention that the 2nd applicant was not the legal representative of Gladys Waigumo Warui pointed out that the 2nd respondent was substituted for Gladys Warui in award case No. 14 of 2004.
12. Concerning the contention that the Tribunal had no jurisdiction to hear and determine the dispute brought before it, he submitted that the proper forum of challenging the award ought to have been a judicial review application. Maintaining that the awards and judgments in favour of the applicants are valid, counsel for the applicants urges the court to allow the application as prayed.

Analysis and determination

13. The following facts of this case are not in dispute:-

a) That vide Nyeri CMCCC Award case No.1 of 2005; Catherine Waigumo Kiratu v. Ephraim K. Wambugu & 3 others, the defendants in that suit, who included the respondent herein, were ordered to, *inter alia*, transfer to the 1st applicant herein, Catherine Waigumo Kiratu, Five (5) acres of land out of the suit property to wit, Title No. Aguthi/Gatitu/3446;

b) That vide Nyeri CMCCC Award case No. 2 of 2005; Gladys Waigumo Warui vs. Ephraim K. Wambugu & 3 others, the court ordered the defendants in that suit, who included the respondent herein, to transfer to Lucy Mumbi Warui, the 2nd applicant herein (who was substituted for Gladys Waigumo Warui) Five (5) acres out of the suit property to wit, Title No. Aguthi/Gatitu/3446.

c) That the orders of the court referred to in (a) and (b) herein above were never reviewed, set aside or appealed from.

Submissions

14. Despite the fact that the awards of the Land Disputes Tribunal which culminated in the judgment and the orders herein in favour of the applicants were not set aside, reviewed and or appealed from, based on the decision in the case of **Jotham Amunavi v. The Chairman Sabatia Division Land Disputes Tribunal & Another Kisumu Court of Appeal Civil Appeal No.256 of 2002** where it was observed:-

“it is clear that the proceedings before the tribunal related both to title to land and to beneficial interest in the suit land. such dispute is not, in our view, within the provisions of section 3(1) of the Land Disputes Tribunal Act. By section 159 of the RLA such a dispute can only be tried by the High Court or by the Resident Magistrates’ court in cases where such latter court has jurisdiction”, on behalf of the respondent, it is submitted that the Land Disputes Tribunal had no power to make the impugned awards.

15. Whilst I totally agree with the observation of the Court of Appeal concerning the jurisdiction of the Land Disputes Tribunals established under the Land Disputes Tribunals Act (now repealed), I am unable to agree with the respondent that a party who failed to use the appellate procedures provided for under that statute or to apply for judicial review of the wrong decision of the tribunal can succeed to impugn those orders in any other forum. In this regard see the case of **Peter Ouma Mitai vs. John Nyarara Kisii HCCA No. 297 of 2005**, where Musinga, J (as he then was) expressed himself as follows:

“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate’s court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal’s award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise.” (Emphasis supplied).

16. Also see the case of **Peterson Nguchi Kaburi v. Joseph Thuku Kaburi (2015) eKLR** where, concerning the decision of Musinga J., in the case of **Peter Ouma mitai supra**, the Court of Appeal stated:-

“...Musinga J, was of course right in expressing that view. It is also quite clear that he was referring to a valid award, made by a Tribunal properly constituted, regularly forwarded to a magistrates’ court as a decision of that tribunal together with any depositions or documents that were taken or proved before such tribunal. Musinga J, cannot possibly have been referring to a

pseudo award or anything not an award, that was purporting to be one. There are many other decisions of the High Court and the Court of Appeal which speak to a magistrates' limited role in simply adopting the award of a tribunal but they all deal with valid awards even where the correctness on the awards themselves may be questionable. But there has to be an award."

17. Although the validity or otherwise of the award which is the subject matter of this application has been challenged, no evidence whatsoever has been adduced to prove the said allegations. In any event, those are matters that can only be canvassed during the hearing of the main suit.

18. Concerning the contention that the 2nd applicant is not a legal representative of Gladys Waigumo Warui, having read the order issued in her favour and the award of the Land Disputes Tribunal on which the order is premised, I agree with Mr. Muhoho that she had been substituted for the deceased.

19. On whether the orders can issue in favour of the applicant against the respondent who merely holds the title in trust for the beneficiaries, I hold the view that as a trustee of the beneficiaries, the respondent was fully able to represent the interest of the beneficiaries so that it was not necessary to enjoin the beneficiaries to the suit. In this regard see the sentiments of **Ombwayo J.**, which I totally agree with, in the case of **Lawrence Gachau Kihu v. Mary Wangui Maina & Another (2014) eKLR** where the judge stated:-

"...From the two positions in the common law jurisdiction which is persuasive, the court has seen that a beneficiary has no better standing and priority in an action than a trustee and they can only take action if the trustee has grossly failed in his duties to the trust estate. It has also been stated when the beneficiary has shown good cause and taken action he stands on the position of a good trustee taking his responsibilities properly."

20. In view of what I have stated herein above, I am satisfied that the applicants have established a *prima facie* case with a high probability of success. The subject matter being land, I am also satisfied that if the property is sub-divided and transferred to its beneficiaries without factoring in the applicants' interest therein, the applicants may suffer irreparable injury.

21. The balance of convenience in this matter tilts in favour of the applicants whose claim is backed by orders of court that have not been set aside or found to be invalid.

22. For the foregoing reasons, I find the application herein to be merited and allow it as prayed.

Dated, Signed and Delivered at Nyeri this 23rd day of December, 2015.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the applicant

N/A for the respondent

Court assistant Lydia