



No. 226

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND PETITION NO. 9 OF 2010

JOSEPH KETAMA ROSWE.....PETITIONER

VERSUS

NTIMARU LAND DISPUTES TRIBUNAL -NTIMARU DIVISION.....1ST RESPONDENT

THE RESIDENT MAGISTRATE'S COURT AT KEHANCHA.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

PETER MAROA MWITA.....4TH RESPONDENT

JUDGMENT

1. Joseph Ketama Roswe (hereinafter referred to only as “**the petitioner**”) brought this petition on 29th November 2010 against the respondents seeking the following reliefs:-

- a. Declaration be issued to the effect that the petitioner is entitled to protection under the Constitution.
- b. Declaration that the 1st respondent has no right and/or jurisdiction to entertain and adjudicate upon proceedings touching and/or concerning ownership of and/or title to the suit land, that is, LR No. Bwiregi/Bukihenche/990, contrary to the provisions of the parent statute.
- c. Declaration that the proceedings and decisions of the 1st and 2nd respondents touching and/or concerning the suit land, that is, LR No. Bwiregi/Bukihenche/990, were annulity ab initio and hence unconstitutional.
- d. Declaration that the petitioner herein has been arbitrarily deprived of his rights and/or interests over the suit land. Consequently, the petitioner's constitutional rights have been infringed upon and/or violated.
- e. Declaration that LR No. Bwiregi/Bukihenche/990 lawfully belongs to the petitioner and restoration of same in favour of the petitioner.
- f. An order of judicial review, bringing forth the proceedings and decisions of the 1st and 2nd respondents, unto this honourable and same be quashed, vide an order of certiorari.
- g. An order of permanent injunction restraining the 4th respondent either by himself, agents, servants and/or anyone claiming under the said respondent from entering upon, trespassing

onto, taking possession, cultivating, building and/or in any other way whatsoever, interfering with the petitioner's rights over the suit land, that is, LR No. Bwiregi/Bukihenche/990.

h. An order for damages.

i. Costs of the petition be borne by the respondents jointly and/or severally.

j. The honourable court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.

2. The facts that gave rise to the petition herein are to a large extent not in dispute. At all material times, the petitioner was the registered proprietor of all that parcel of land known as **LR. No. Bwiregi/Bukihenche/227** (hereinafter referred to as "**Plot No. 227**"). The petitioner was registered as the proprietor of Plot No. 227 on first registration. On 17th March 2005, the petitioner subdivided Plot No. 227 into two (2) portions namely, **LR. Nos. Bwiregi/Bukihenche/ 990** (hereinafter referred to as "**the suit property**") and **LR. No. Bwiregi/Bukihenche/991** (hereinafter referred to as "**Plot No. 991**"). The petitioner sold and transferred Plot No. 991 to a third party and retained the suit property in his name. Sometimes in January 2005, the 4th respondent herein lodged a complaint with the 1st respondent against the petitioner in relation to Plot No. 227 in which complaint; the 4th respondent claimed that the petitioner had acquired Plot No. 227 (which had now been subdivided) fraudulently. The 1st respondent entertained the 4th respondent's complaint, heard the parties on the same and rendered its decision on 18th May 2005. In its decision, the 1st respondent ordered the petitioner to transfer a portion of the suit property measuring 8 acres to the 4th respondent. The 1st respondent's decision aforesaid was filed with the 2nd respondent for adoption as a judgment of the court pursuant to section 7 of the Land Disputes Tribunals Act No. 18 of 1990 (now repealed)(hereinafter referred to only as "**the Act**") and the same was adopted accordingly as a judgment of the court. The petitioner was aggrieved by the said decision of the 1st respondent and preferred an appeal against the same to the Provincial Land Disputes Appeals Committee, Nyanza. The petitioner's appeal was rejected on 5th October, 2010 by the said committee which upheld the decision of the 1st respondent.

3. In this petition, the petitioner has contended that the 1st respondent was not seized of the jurisdiction to determine the issue of ownership of the suit property. The petitioner has contended further that the decision of the 1st respondent aforesaid was arrived at without jurisdiction and as such the same was illegal and unconstitutional. The petitioner has contended further that, the proceedings and decisions of the 1st and 2nd respondents aforesaid were fraught with illegalities and caused the petitioner to be deprived of the suit property arbitrarily contrary to the provisions of Articles 22 and 40 of the Constitution of Kenya 2010. The petition was served upon all the respondents but only the 4th respondent opposed the same. The Attorney General filed a notice of appointment of advocates on behalf of the 1st, 2nd and 3rd respondents but did not file any affidavit in reply to the petition. The 4th respondent swore an affidavit on 14th April 2011 in reply to the application. In his response to the petition, the 4th respondent contended that the petitioner had acquired Plot No. 227 which belonged to his (4th respondent's) grandfather fraudulently. The 4th respondent contended that the petitioner had used his position as a member of the land adjudication committee to acquire the said parcel of land which did not belong to him. The 4th respondent contended that the petitioner was accorded a fair hearing by the 1st respondent and the Provincial Land Disputes Appeals Committee, Nyanza (hereinafter referred to as "**the Appeals Committee**") before the order requiring the petitioner to transfer 8 acres of the suit property to the 4th respondent was made. The 4th respondent contended further that the petitioner did not at any one time contest the jurisdiction of the 1st respondent and the Appeals Committee. The 4th respondent contended that the petitioner had moved the High Court with an application for an order of judicial review to quash the said decisions of the 1st and 2nd respondents but the petitioner's application was dismissed. The 4th respondent contended that this petition is an abuse of the process of the court and termed it, a back door attempt to appeal against the decision of the Appeals Committee.

4. The petition was listed for hearing on 22nd October 2013 when only the advocate for the petitioner and the advocate for the 1st, 2nd and 3rd respondents appeared. Neither the 4th respondent nor his advocate

appeared for the hearing. After satisfying myself that the 4th respondent's advocates were duly served with a hearing notice, I allowed the petition to proceed to hearing in the absence of the 4th respondent notwithstanding. The petitioner gave evidence and did not call any witness. On the part of the 1st, 2nd and 3rd respondents, Miss Ochwal, learned state counsel who appeared on behalf of the Attorney General for the 1st, 2nd, and 3rd respondents did not call any witness. In his evidence in chief, the petitioner testified that; he acquired Plot No. 227 in the year 1971 during the land adjudication process in the area where the said parcel of land was situated and the said plot was registered in his name after the completion of the said process. Subsequently, he subdivided Plot No. 227 in the year 2005 into two portions which subdivision gave rise to the suit property and Plot No. 991 which he transferred to a third party, one, Fredrick Maroa. After the said subdivision, the 4th respondent who had no interest at all in the suit property lodged a complaint against him with the 1st respondent contending that the suit property belonged to the 4th respondent. The 1st respondent heard the complaint and made a finding in the 4th respondent's favour. He was dissatisfied with the 1st respondent's said decision and decided to appeal against the same to the Appeals Committee. His appeal to the Appeals Committee was dismissed. He was dissatisfied with the decision of the Appeals Committee and decided to institute these proceedings. He stated that the decision of the 1st respondent in favour of the 4th respondent was invalid because the 1st respondent had no jurisdiction to cancel a title to land. He stated further that the said decision by the 1st respondent was adopted by the 2nd respondent as a judgment of the court. He stated that the suit property is still registered in his name since this court had made an order on 3rd February 2011 stopping the transfer of the same to the 4th respondent.

5. The petitioner produced a copy of the register for Plot No. 227, a copy of certificate of official search for the suit property, a copy of certificate of official search for Plot No. 991, copies of the proceedings and decisions of the 1st and 2nd respondents and a copy of the proceedings and decision of the Appeals Committee as exhibits in support of his case. In cross-examination by the advocate for the 1st, 2nd and 3rd respondents, the petitioner stated that he is still in occupation of the suit property as he has not been asked to vacate the same. He stated further that his constitutional rights have been infringed because the decisions by the 1st and 2nd respondents which deprived him of the suit property were wrong. After the close of the petitioner's case, Miss Ochwal advocate who appeared for the 1st, 2nd and 3rd respondents informed the court that the 1st, 2nd and 3rd respondents did not intend to call any witness. In his submission in support of the petition, Mr. Oguttu advocate for the petitioner argued that the 1st and 2nd respondents did not have jurisdiction to determine the 4th respondent's complaint against the petitioner which concerned ownership and/or title to the suit property. The petitioner's advocate submitted that a decision arrived at without jurisdiction is null and void. He submitted that right to own property is a fundamental right guaranteed under Article 40 of the Constitution of Kenya, 2010. He submitted that the decisions of the 1st and 2nd respondents complained of herein took away the petitioner's right to own the suit property without any regard to the due process. Counsel submitted that the petitioner's application for judicial review was not determined on merit but was terminated at the leave stage. He submitted therefore that the issue of *res judicata* raised by the 4th respondent does not arise. The petitioner's advocate cited the Court of Appeal case of **Johana Nyakwoyo Buti –vs- Walter Rasugu Omariba & 2 others, Court of Appeal at Kisumu, Civil Appeal No. 182 of 2006 (unreported)** and submitted that this court has jurisdiction to grant the reliefs sought herein. He submitted that a null and void decision can be challenged through a separate suit filed for that purpose. The advocate for the 1st, 2nd and 3rd respondents as I have stated above, left the matter to the court.

6. I have considered the petition herein, the affidavit filed in support thereof and the evidence tendered by the petitioner. I have also considered the affidavit that was filed by the 4th respondent in opposition to the petition. The parties did not frame and agree on the issues for determination by the court. In my view, the issues that arise for determination in this petition are as follows:-

- i. Whether the 1st and 2nd respondents had jurisdiction to entertain the 4th respondent's complaint against the petitioner and to make the decisions complained of?

- ii. Whether the petitioner's property rights were infringed and/or violated by the respondents and if so whether the petition herein is maintainable?
- iii. Whether the petitioner is entitled to the reliefs sought?

7. Issue No. I:

As I stated at the beginning of this judgment, the facts that gave rise to this petition are straight forward. The petitioner was the registered proprietor of the suit property. The 4th respondent claimed that the suit property belonged to his late grandfather and that the petitioner had acquired the same fraudulently during the land adjudication process in the area where the suit property is situated using his position as a member of the land adjudication committee. The 4th respondent lodged a complaint against the petitioner with the 1st respondent over the ownership of suit property. The petitioner was notified of the complaint that had been lodged by the 4th respondent against him before the 1st respondent. The petitioner appeared before the 1st respondent and was heard on the complaint before the 1st respondent made a decision that the petitioner should transfer to the 4th respondent a portion of the suit property measuring 8 acres. The petitioner was aggrieved with the said decision of the 1st respondent and in exercise of his rights under section 8 (1) of the Act preferred an appeal to the Appeals Committee. The petitioner's appeal to the Appeals Committee was heard and dismissed on 5th October, 2010. Before that, the 1st respondent's said decision had been filed before the 2nd respondent for adoption as a judgment of the court pursuant to the provisions of section 7 of the Act and the 2nd respondent had proceeded to adopt the same as a judgment of the court on 4th April, 2006. I am satisfied on the material before me that the 1st respondent exceeded its jurisdiction when it entertained the 4th respondent's complaint against the petitioner which touched on title and/or ownership of land. The 1st respondent was a creature of statute and its jurisdiction was clearly set out in the statute that established it. Section 3(1) of the Act limited the 1st respondent's jurisdiction to determining all cases of a civil nature involving a dispute as to the division of or the determination of boundaries to land, a claim to occupy or work land or trespass to land. The 1st respondent had no jurisdiction to determine disputes over title to and/or ownership of land. It is therefore my finding that the 1st respondent acted outside its jurisdiction when it entertained the 4th respondents claim against the petitioner and proceeded to determine the same. Similarly, the 2nd respondent acted in excess of its jurisdiction in adopting the 1st respondent's decision that was made without jurisdiction. A decision made without jurisdiction is null and void and as such the same could not be adopted by the 2nd defendant as a judgment of the court.

8. Issue No. II:

The petitioner's contention in this petition is that his rights to acquire and own property which are guaranteed under Article 40 of the Constitution of Kenya, 2010 were violated by the respondents through the decisions aforesaid. The petitioner has claimed that the decisions referred to herein above deprived him of the suit property thereby violating his constitutional rights as aforesaid. Article 40 (1) of the Constitution of Kenya provides that every person has the right to acquire and own property of any description in any part of Kenya. The question that begs for an answer here is whether the petitioner's rights to acquire and own property were violated by the respondents. I am of the opinion that the 4th respondent had a right guaranteed under section 77(9) of the repealed constitution of Kenya and Article 50(1) of the Constitution of Kenya, 2010 to lodge a complaint with the 1st respondent. Whether the 4th respondent's complaint had any basis or merit was for the 1st respondent to determine. The 1st respondent also had power once a complaint was presented to it to determine the same. Whether the 1st respondent had jurisdiction or power to entertain the complaint that was presented to it by the 4th respondent was one of the issues that it had the power to determine. In the whole process that I have outlined hereinabove starting from the time the 4th respondent lodged a complaint against the petitioner with the 1st respondent upto the time the petitioner's appeal to the Appeals Committee was dismissed, I have not come across an instance where it can be said that the petitioner's rights to property were arbitrarily taken away. In my view, what the petitioner was taken through by the 4th respondent was a legal process which was provided

for in law. I am unable to hold in the absence of fraud that the decisions that were made herein by the 1st and 2nd respondents violated the petitioner's property rights guaranteed under the Constitution of Kenya. While it is true that the said decisions had the effect of depriving the petitioner of his rights over the suit property the same were however not made arbitrarily. The petitioner was not left without a remedy. The petitioner had a statutory right of appeal against the decision of the 1st respondent to the Appeals Committee which right he exercised. In addition, Section 8 (9) of the Act gave the petitioner a right to a second appeal to the High Court on points of law from the decision of the Appeals Committee. Over and above the said remedies, the petitioner had a right to move to the High Court for judicial review of the said decisions. The petitioner's application for leave to apply for judicial review in the nature of certiorari to quash the decision of the 1st respondent and an order of prohibition to prohibit the execution thereof was dismissed by the court on 1st March 2006 on account of time bar before the petitioner's appeal to the Appeals Committee was determined. When the petitioner's appeal to the Appeals Committee was dismissed on 5th October 2010 the petitioner did not appeal to the High Court against that decision. Instead, the petitioner decided to bring this petition. Failure by the petitioner to appeal against the said decision of the Appeals Committee means that the decision of the 1st respondent which was adopted by the 2nd respondent and confirmed by the Appeals Committee remains in force. The decisions by the 1st and 2nd respondents aforesaid were in my view made through a process which was fair in that, the rules of natural justice were observed and an aggrieved party had a right of appeal. Due to the foregoing, it is my finding that the petitioner has failed to prove that his rights to property were violated by the respondents. That said, I am also of the view that in the circumstances of this case, it was not open to the petitioner to file fresh proceedings to challenge the said decisions of the 1st and 2nd respondents having failed to lodge an appeal against the same. The 1st respondent's decision challenged herein was made on 18th May, 2005 while the 2nd respondent's decision was made on 4th April, 2006. These decisions were made several years before the promulgation of the Constitution of Kenya, 2010 pursuant to which the present petition has been lodged. The case of, **Johana Nyakwoyo Buti vs. Walter Rasugu Omariba & 2 others (supra)** that was cited by the petitioner in support of his submission that the reliefs sought herein are available to him is distinguishable. First, the said case was not brought by way of a constitutional petition but through a declaratory suit and the Court of Appeal observed that a judgment obtained by fraud or mistake can be challenged through a fresh suit. Secondly, in that case, the Land Disputes Tribunal concerned had made a decision in breach of the rules of natural justice having failed to give the plaintiff a hearing before it made the decision that was the subject of the suit and the plaintiff was left with no other remedy but to file a fresh suit to challenge the decision of the said tribunal. In the case before me, the petitioner participated fully in the proceedings that were before the 1st and 2nd respondents and the Appeals Committee and had the opportunity to challenge the said decisions. The decisions aforesaid cannot therefore be said to have been obtained by fraud or through mistake so as to call for challenge through fresh proceedings. As I have already held herein above, I am in agreement with the contention by the petitioner that the 1st respondent did not have jurisdiction to determine the dispute that was brought before it by the 4th respondent and that the 2nd respondent had no jurisdiction to adopt the said decision as a judgment of the court. That however is an issue which the petitioner should have taken up on appeal to the High Court or through an application for judicial review to that court.

9. I would wish to observe that if petitions of this nature were to be entertained, they will go against public policy which leans in favour of the doctrine of finality of suits and there will be no end to litigation. A decision in favour of the petitioner herein has the potential of opening flood gates of constitutional petitions. Nothing would stop parties whose cases had been determined several years ago by the defunct Land Disputes Tribunals and who lost on appeal to the Provincial Appeal Committees from re-opening such cases through constitutional petitions under the Constitution of Kenya, 2010 on the basis that their rights to property had been violated by the said tribunals because they lacked jurisdiction to determine disputes over title to land. That is a situation which this court would be hesitant to create.

10. Issue No. III:

I am of the opinion that a constitutional petition brought under Article 22 of the Constitution of Kenya, 2010 is not the same as an ordinary civil suit. Constitutional petitions under this article of the constitution

are only brought to enforce human rights and fundamental freedoms. For a petitioner to be entitled to a remedy, he must first establish that his human rights and/or fundamental freedoms have been violated or are threatened. In the instant petition, the petitioner has not convinced me that any of his rights have been violated or are threatened. I do not think that the findings that I have made hereinabove that the 1st and 2nd respondents had no jurisdiction to entertain the 4th respondent's claim against the petitioner would justify the granting of the declaratory reliefs sought by the petitioner herein in the absence of proof that the said decisions violated the petitioner's constitutional rights as aforesaid. I am unable therefore to grant to the petitioner any of the reliefs sought. In conclusion, I find no merit in the petition before me. The same is dismissed accordingly with costs to the 4th respondent.

Delivered, dated and signed at Kisii this 28th day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Petitioner

N/A for the 1st, 2nd, and 3rd Respondents

N/A for the 4th Respondent

Mr. Mobisa Court clerk

S. OKONG'O

JUDGE