



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CONSTITUTIONAL PETITION NO. 1 OF 2017

DAMIANUS PIUS MASINDE.....PETITIONER

VERSUS

JACINTA PAPA.....1ST RESPONDENT

PAUL MAFWABI2ND RESPONDENT

THE HON. ATTORNEY GENERAL ON BEHALF

OF CHIEF MAGISTRATE BUSIA LAW COURTS.....3RD RESPONDENT

J U D G M E N T

1. The Petitioner approached this court by way of his petition dated 26th January 2017 seeking a determination of whether his rights to a fair trial were infringed. He prayed for the following;

- a) Conservatory order be and are hereby issued against implementation of any and or arbitrary order granted by Amagoro Land Dispute Tribunal case No. 15 of 2007 as adopted by Busia Chief Magistrates Court case No.89 of 2009 where eviction orders against Petitioner has been sought and is imminent.**
- b) A declaratory order that the intended cancellation of title to land North Teso/Kocholia/122 whose title is registered in the name of the petitioner with another is unconstitutional and a violation of his rights to property ownership.**
- c) A declaratory order that the Petitioner right to due process of law and particularly right to be heard was violated.**
- d) An order be issued that due process be followed in conformity with the constitution in attempt to alienate land parcel No. North Teso/Kocholia/122 or any part thereof to which the Petitioner must be involved, in all stages.**
- e) Costs of this petition be provided for.**

2. The petitioner's case is that he is the co-owner of all that parcel of land known as North Teso/Kocholia/122 with the 2nd Respondent. By an administrative action of a quasi-judicial body known as Amagoro Land Dispute Tribunal (defunct) it was purported to be decided that the Petitioner's title to that parcel as co-owner was cancelled through a process that the Petitioner was not involved and thus his rights to be heard was violated and his ownership is threatened with alienation. The decision of the Amagoro Land Dispute Tribunal was adopted by Chief Magistrate Court Busia vide Busia Principal Magistrate's court land dispute no. 89 of 2008 and formed judgment of the court, now open to execution with the results that the Petitioner's right to property ownership is threatened with violation without due process that he was involved being implemented. He further avers that the decision making process whereby his property was subject of alienation was not only illegal since Land Dispute Tribunal lacked powers to preside over registered titles nor had the powers to order for cancellation of the registered land and he was not involved in the decision-making process and his right to a fair trial was infringed. He annexed a copy of the tribunal proceedings and findings and court order, copy of title and certificate of service.

3. The 1st Respondent entered appearance and filed Grounds of Opposition and Replying Affidavit both dated 14th July 2017. He deposed that the petitioner does not have a genuine and arguable case and the conservatory orders cannot issue as the decision over title no. North Teso/Kocholia/122 was already implemented and title closed for subdivision in 2016 and new numbers issued before the filing of this petition. He admitted that it was true that he filed a case no. 15 of 2007 before the then Amagoro Land Disputes Tribunal to have the trespass committed by the Petitioner and his father, 2nd Respondent, abated and a boundary marked to give them a portion equivalent to the purchase

price paid.

4. The award of the Tribunal was adopted by the Principal Magistrate's court Busia as a judgment of the court in Land case no. 89 of 2008. The trespass has now been abated, parcel no. North Teso/Kocholia/122 partitioned, a boundary marked and he had reserved title no. North Teso/Kocholia/4776 as representing the portion sold to the 2nd Respondent and to which the Petitioner will remain a joint tenant. He stated that the petitioner is guilty of inexplicable delay and while every other citizen has their rights to property protected by the constitution, that protection nevertheless does not extend to any property found to have been unlawfully acquired. He stated that the petitioner suffered no prejudice as he was adequately represented by his father who was the other joint tenant and it was not true that the Petitioner's title to the suit land was sacrosanct and therefore statutorily protected. She annexed to the affidavit a copy of certificate of official search to. L.R. 4775, copy of court proceedings.

5. On 19th July 2017, the 1st Respondent filed a cross petition against the Petitioner where he prayed for the following reliefs against the cross respondents jointly and severally;

a) A declaration that land parcel registered as North Teso/Kocholia/122 was and is the cross petitioner's ancestral land.

b) A declaration that the occupation by the cross respondents of the cross petitioner's ancestral land North Teso/Kocholia/122 and their registration as proprietors thereof was unlawful and did not create any rights in their favour capable of being protected.

c) A declaration that the cross petitioner's fundamental right to inherit and own the ancestral land left by her deceased father as enshrined in Articles 20, 27, 40 and 60 of the Constitution was jointly and severally and arbitrarily denied, violated and infringed by the cross respondents who also discriminated against her by because of being a woman.

d) A declaration that the cross petitioner's fundamental rights to property were under Articles 20, 21, 22, 23, 40, 47 and 50 of the Constitution lawfully restored through the decisions of the then Amagoro Land Disputes Tribunal, the Principal Magistrate's court and of the High Court and that the same are now protected.

e) A declaration that the cross respondents are entitled to 2.5 acres of land reserved to them by the cross petitioner under title No. North Teso/Kocholia/4776.

f) Costs of and incidental to this cross petition.

6. The facts of the cross petition are that the 2nd cross respondent is the father of the 1st cross respondent and while at Kocholia, the 2nd cross respondent who was not a native of the area, became friends with the father of the cross petitioner and sought to buy a plot of land in the area. The cross petitioner's father who had more than 20 acres of ancestral land obliged and sold a plot measuring 162 paces by 64 paces wide to his new-found friend, the 2nd cross respondent at a price of two heads of cattle and Kshs. 300/=. The 2nd cross respondent paid one cow and Kshs.240/= leaving a balance of one cow and Kshs.60/= and to date there is no evidence that the balance was paid.

7. The cross-petition pleaded that possession was given and the 2nd cross Respondent built a home for himself. When the father of the cross petitioner passed on in December 1977, the 2nd cross respondent took advantage of the vacuum (as the daughters had were away) by encroaching and using the rest of the land which had not been sold to him. When the cross petitioner wanted to use the ancestral land left by her father, the 2nd cross respondent claimed to have bought the entire land thereby denying her inheritance.

8. The Petitioner filed a reply to the Cross Petition dated 31st October 2017 and deposed that it has been admitted by the cross-petitioner that he was a joint owner of L.R. North Teso/Kocholia/122 together with his father Paul Mafwabi in his own right as a registered owner protected by law and constitution and that she filed a case before the Land Dispute Tribunal Amagoro seeking that the title to L.R North Teso/Kocholia/122 be cancelled, a legal mandate the said Tribunal did not have and has never had to date. That he was not made a party to the said cases despite that he was a co-owner of the said parcel. Further, that the Tribunal did not have jurisdiction to hear and determine issues of registered land and adverse orders were made affecting his entitlement to the land parcel North Teso/Kocholia/122 which affected him. He concluded that the cross-petition is not merited.

9. The parties agreed to dispense with the hearing of the Petition by way of written submissions. The Petitioner filed his submissions on 10th October 2021 and submitted that he is the legal co-owner of L.R. 122 which he acquired by way of purchase and cited Section 24 and Section 91 of the Land Registration Act and he was never at any point informed and/or involved in the quasi-judicial proceedings carried out by the defunct Amagoro Land Disputes Tribunal. He only came to realise about the developments on his parcel of land when a third party informed him that he had acquired a portion of the land by way of purchase from the 1st Respondent. He cited Article 47(1) and 50(1) of the Constitution on his right to fair administrative action and fair hearing respectively and urged the Honourable Court to not only look at the decision of the tribunal but also the process and procedure adopted in arriving at the decision as per the dictates of the principal of natural justice.

10. On the cross petition, he submitted that it is clear that facts upon which the cross petition is premised and all the prayers contained therein do not meet the legal threshold of what constitutes a constitutional petition. The issues raised by the cross petitioner is on ownership of the disputed parcel of land which ought to be addressed in a different forum and is abusing the court process by filing a cross petition instead of using the alternative remedy provided to her by statute. He further submitted that he has demonstrated on a balance of probabilities that his constitutional rights were violated and the reliefs sought in the petition should be allowed and the cross petition should be dismissed in its entirety. He relied on the following authorities; **KENYA HUMAN RIGHTS COMMISSION V NON-GOVERNMENT ORGANISATIONS CO-ORDINATION BOARD (2016) eKLR, MOSES BII V KERICHO LAND REGISTRAR & ANOTHER (2015) eKLR.**

11. The 1st Respondent filed their written submissions on 30th November 2021 and submitted that the petition is frivolous, an abuse of court process and engineered to cause unnecessary anxiety, and expenses to the cross petitioner and does not warrant conservatory orders. She submitted that denial of the conservatory order will enhance constitutional values and deter fraudster from approaching courts to sanitize their unclean hands. She submitted that the matter herein started at the Amagoro Land Disputes Tribunal which was a competent body to resolve land disputes at the time and adopted by the magistrate's court at Busia.

12. That a review was sought of the two decisions was sought via High Court Judicial Review no. 10 of 2010 which was dismissed on 11th June 2015 and the court of appeal via a judgment dated 18th December 2014 overturned the high court decision that allowed the applicant Paul Mafwabi to apply for judicial review out of time. The matters were handled by courts with competent jurisdiction to hear and determine land disputes and the issue of ownership was at the centre of the former suits and therefore the same cannot be raised in the present suit. She averred that the rights of the petitioner were not infringed or violated and prayed that the petition be dismissed with costs and the cross petition be allowed as prayed. She relied on the following authorities; **COUNTY ASSEMBLY OF MACHAKOS V GOVERNOR, MACHAKOS COUNTY & 4 OTHERS (2018) eKLR, ACCREDO AG & 3 OTHERS V STEFFANO UCCELLI & ANOTHER (2019) eKLR.**

13. Having looked at the petition, cross petition and their various rival responses and submissions, the issues that come up for determination by this court are;

- i) *Whether the petitioner is entitled to the reliefs sought in the petition;*
- ii) *Whether the petition is res judicata;*
- iii) *Whether the cross petition constitutes a proper constitutional petition;*
- iv) *Who should bear the costs of the petition?*

14. The petition as framed is challenging the decision of the Amagoro Land Disputes Tribunal in two maternal respects; first that he was not given an opportunity of being heard before the decision made being a co-owner thus breaching his rights under article 47 of the Constitution. The second basis was that the Tribunal did not have jurisdiction to determine the dispute. The Petitioner annexed copies of the proceedings wherein the 1st Respondent Jacinta pap had sued only Paul Mafwabi Wanyama (The 2nd Respondent).

15. The title deed annexed as *DPM1* shows that the Petitioner was jointly registered with the 2nd Respondent as owners of the suit land N. Teso/Kocholia/122 as at 29th April 1994. The 1st Respondent pleaded that the Petitioner is the son of the 2nd respondent. On the face of the proceedings, the Petitioner was indeed condemned unheard. The Tribunal awarded the 1st Respondent all the land that was not purchased by the 2nd Respondent i.e. the 2nd Respondent was found to be entitled to the 162 yards by 64 yards which he had purchased.

16. This brings the question raised by the 1st Respondent on the evidence that shows he had also purchased a portion of Kocholia/122. I have converted the size of land purchased by the 2nd respondent being 162 yards by 64 yards into acres. 162 yards – (148.13metres) by 64 yards (58.52 metres) is equivalent to approximately 2.14 acres (0.9ha). The entire land is measuring 8.2 ha. The Petitioner has submitted on his right to a fair hearing by virtue of the doctrine of tenancy in common. He cited the Case of **Moses Bii Vs Kericho District Land Registrar & Ano, (2015) eKLR** where Munyao J held thus *“If the register does not reflect whether the land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship, where the same has not been explicitly indicated, should only be presumed in the clearest of circumstances, where there can be no shred of doubt that the contemplation of the parties was to have the property held jointly. I for myself cannot think of such a state of affairs other than where the proprietors are spouses, though I cannot rule out other situations, but they really must be so clear as to obviate debate on it. The current law, which is contained in the Land Registration Act, Act No. 3 of 2012 (which repealed the RLA and which came into effect on 2 May 2012) in fact frowns deeply on joint proprietorship. It effectively bans them unless the proprietors are spouses or unless by order of court”. ... In our situation, the proprietors are four brothers. They became registered as proprietors on 16th February 1970. As I pointed out, the registered does not show whether they are proprietors in common or whether they are joint proprietors. My presumption is that they were registered as proprietors in common”.*

17. The Petitioner's argument that as a co-owner of the suit land held the land in equal share with the 2nd Respondent. On account of the documents annexed by the Petitioner, the ownership cannot be said to have been in equal shares as the evidence before the tribunal and the sale agreement annexed cleared indicated the size of land purchased by the 2nd Respondent. On the other hand, proceeding on the argument that the Petitioner is entitled to his own share not the one acquired by his father (2nd Respondent) who was duly heard before the Tribunal, then he had a duty to demonstrate when and how he acquired the half share comprised in the 8.2ha of Kocholia/122.

18. In the affidavit in support of the petition, the petitioner deposed that he is bound to lose his property through a decision made by an organ of the state without being subjected to a fair hearing. He deposed also that he has a constitutional right to be protected against arbitrary taking away of his land. The law has since changed to state that dangling a title deed is not conclusive ownership of land as per the provisions of section 26(1)(b) of Land Registration Act. See also the decision of the Court of Appeal in *Chemey Investments Ltd Vs Attorney General & 2 others (2018) eKLR* and *Joseph N. K. Arap Ngok Vs Moijo Ole Keiwua & 4 others (1992) eKLR* where the Court of Appeal stated thus *“It is trite law that such a title to landed property can only come into existence after issuance of letter of attorney, meeting the conditions stated therein and actual issuance thereafter of the title document pursuant to the provisions of the Act under which the property is held”.*

19. In my opinion and I so hold, the Petitioner can only claim breach of right that is founded on proof of legal acquisition of the suit property. In this instance, there was no evidence of a written sale agreement, no evidence of a copy of executed transfer between the previous owner and the Petitioner, no evidence of Land Control Board consent to transact. It can be safely concluded that the Petitioner's right over the land

was through the 2nd Respondent but not distinctly on his own behalf. Therefore, the 2nd Respondent having fully participated in the proceedings before the Tribunal, the Petitioner's claim of breach to a fair administrative action of the right to be heard does not lie.

20. The 2nd issue that comes for determination is whether or not the Tribunal had jurisdiction to entertain the claim. The Petitioner appreciated in paragraph 11 of the supporting affidavit that all the avenues opened to him by way of Judicial Review was closed due to time lapse. The Petitioner pleaded that the decision-making process undertaken by the Amagoro Land Disputes Tribunal alienating the suit property was illegal since the Tribunal lacked powers to preside over Registered titles. The powers of the Tribunal were set out in section 3(1) of the Land Disputes Tribunal Act No. 18 of 1999 (*repealed*).

21. In paragraph 7 of the Petitioner's submissions, the Petitioner stated that they acquired the suit land with his late father who is joined in these proceedings as the 2nd Respondent. The 2nd Respondent had challenged the Tribunal's decision vide Busia HC JR No. 10 of 2010 which motion was struck out and dismissed for having been filed out of time. The request for extension of time to take out judicial review proceedings was determined by the Court of Appeal in case number 41 of 2013.

22. The title was jointly and or commonly held between the Petitioner and the 2nd Respondent. The order of cancellation challenged by the 2nd Respondent in my view could not be severed to apply to the 2nd Respondent title and not the Petitioner. So that the Petitioner filing this petition was going through the back door to circumvent the res judicata barrier as the Petitioner is barred by law from applying for extension of time (see the Court of Appeal decision in **Republic Vs Chairman Amagoro Land Disputes Tribunal & Anor. Ex parte Paul Mafwabi Wanyama (2014) eKLR**). Section 7 of the Civil Procedure rules explains that a matter is res judicata when the former suit is brought by a person through whom the current applicant could have brought the suit. In this case, the interest of the 2nd Respondent and the Petitioner over the suit title was the same which is the 1st Respondent challenging whether the whole land was sold to them or not. Thus, the Petitioner could have presented his defence through the 2nd Respondent.

23. Further, the doctrines of equity which are common law principles have been adopted under article 2 of the Constitution thus forming part of our laws. One such equitable doctrine is that equity does not aid the indolent. The decision sought to be reviewed was made in the year 2008 as has been pleaded by the Petitioner. The Court of Appeal made a determination in the same matter December 2104. The Petitioner does not disclose when he learnt of the existence of the order he is now challenging. He only pleaded that he was working outside the country and did not annex evidence of such residence outside the country and when he returned.

24. From 2008 the Petitioner did not move the Court until 2017 after the said order had been executed. The execution is proven by a copy of certificate of official search annexed by 1st Respondent marked JP2 which shows the suit title has been sub-divided and one of the resulting numbers is N. Teso/Kocholia/4775; issued on 15/4/2016. Thirdly, on the jurisdiction of the Tribunal, the Petitioner has not provided facts and law to support this allegation. It is a duty placed on whoever alleges a fact to prove the existence of that fact. Similarly, the Petitioner ought to have substantiated the law which ousted the jurisdiction of the Tribunal and not leave it to this Court to do guess work.

25. In light of the foregoing, I am not persuaded by the Petitioner that he has made out a case to merit the granting of the orders sought. As a consequence, to my findings regarding the lack-merit of the petition, I will not delve into making any orders with respect to the cross-petition. Consequently, the Petition is dismissed with costs to the 1st Respondent.

Dated, signed & delivered at BUSIA this 28th day of April 2022.

A. OMOLLO

JUDGE