



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KITALE

ELC PETITION NO. 3 OF 2021

JOHN WAMALWA WAMARE.....PETITIONER

VERSUS

SABOTI LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

CHIEF MAGISTRATE KITALE LAW COURT.....2ND RESPONDENT

ALBERT WAMALWA ANDREA.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petition for hearing and determination before me is dated **08/06/2021**. It was filed on **09/06/2021**. It sought the following reliefs:
 - (a) **An order of certiorari be issued quashing the decision of the 1st Respondent, Saboti Lands Dispute Tribunal, delivered on 12th January 2002;**
 - (b) **A declaration that the adoption of the decision of the Saboti Lands Disputes Tribunal by the 2nd Respondent, Chief Magistrate Kitale, Land Case No. 18 of 2002 was null and void *ab initio*;**
 - (c) **Costs of the Petition be provided for.**

THE PETITION

2. The gist of the Petition was that the **3rd** Respondent instituted a claim against the Petitioner before the **1st** Respondent. In it, the **3rd** Respondent sought legal ownership of some **two (2)** acres from the Petitioner's parcel of land namely **TRANS NZOIA/CHEMI CHEMI/102**. The Petitioner alleged that the **3rd** Respondent was a stranger to him. He maintained that they had never entered into any contractual relationship. He thus submitted that the **3rd** Respondent had no *locus standi* to institute proceedings of that nature against the Petitioner.
3. Annexed to the Petition and referenced **JWN 1** was a copy of contract between himself and one **Vincent Kusasia**, the vendor. He maintained that he only sold $\frac{1}{2}$ acre of his parcel to the vendor (one **Vincent Kusasia** who in turn sold it to the **3rd** Respondent). He maintained that the **3rd** Respondent purchased a portion of the subject parcel of land from **Vincent Kusasia** to whom he had sold it to.
4. On **09/01/2002**, the Petitioner appeared before the **1st** Respondent. In the proceedings before the **1st** Respondent which were annexed to the Petition as **JWN 2**, the Petitioner's wife testified that the vendor sold **two (2)** acres of land to the **3rd** Respondent. She stated that she attested to the sale of **1 $\frac{1}{2}$** acres of land and was not aware of any sale of $\frac{1}{2}$ acre to the vendor. Consequently, she emphasized that the **3rd** Respondent was entitled to **1 $\frac{1}{2}$** acres of land from the Petitioner.
5. The **3rd** Respondent, in the proceedings before the **1st** Respondent, testified that he purchased **two (2) acres** of land from the vendor for the sum of **Kshs. 80,000.00**. His evidence was that the vendor showed him the agreements he entered into with the Petitioner for the sale of the **two (2)** acres that were subsequently sold to him. He stated that although he purchased the parcel from the vendor, the Petitioner continually frustrated the transfer process before the Land Control Board as he refused to surrender the title documents to effect the

necessary transactions. It is for those said reasons that he sued the Petitioner and not the vendor. He revealed that he had been in possession of the purchased property for **seven (7)** years.

6. The Petitioner in his evidence, testified that he sold a combined total of **two (2)** acres to **Vincent Kusasia**, the vendor. He confirmed that he was in receipt of the full purchase price. He never entered into any contractual relationship with the **3rd** Respondent.

7. When the **1st** Respondent retired to consider the dispute and did so, it observed that there was no contractual relationship between the Petitioner and the **3rd** Respondent. However, it found that the Petitioner was obligated to transfer the sold portion of land to the favor of the **3rd** Respondent. It further observed that the **3rd** Respondent held a title deed for **1 ½** acres and that the remaining portion of **½** acre was yet to be transferred to his favor. Consequently, on **18/02/2002**, the **1st** Respondent pronounced itself as follows which pronouncement was adopted before the Chief Magistrate's Court at Kitale per decree dated **14/11/2002**:

(i) **The Plaintiff is to get his two (2) acres land;**

(ii) **½ acre to be taken to the Land Control Board to sanction the processing of the land Title Deed;**

(iii) **Government surveyor to visit the site and ensure the survey of two (2) acres.**

8. In the present Petition, the Petitioner lamented that he was not aware that the decision by the **1st** Respondent had been rendered. He submitted that the **1st** Respondent failed to notify him of the date of delivery of its decision. He posited that he was only aware of the decision in **May 2021** when the **3rd** Respondent's Counsel served him with a demand letter requiring him to surrender the titles to effect the necessary subdivision, transfer and issuance of new titles.

9. He annexed the **1st** Respondent's decision, a decree by the **2nd** Respondent adopting the **1st** Respondent's decision and the vesting order by the **2nd** Respondent as **JWN 4 (a), (b) and (c)** respectively.

10. The Petitioner impugned the decision of the Tribunal for the reason that his evidence was taken out of context. He insisted that he was never informed of the **1st** and **2nd** Respondent's decisions.

11. In regard to his allegation of infringement of his constitutional rights, he cited that **Articles 47 and 73** of the **Constitution** which govern the right to fair administrative action which he alleged were violated. He propositioned that **Article 40** of the **Constitution** was infringed in the following ways, in summary:

(a) **The 1st Respondent acted *ultra vires* by determining that two (2) acres ought to be awarded to the 3rd Respondent contrary to Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 (repealed);**

(b) **Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 (repealed) did not confer jurisdiction to the 1st Respondent to determine ownership on matters espoused in the Registered Land Act Cap 300 (repealed). Its jurisdiction was limited to boundary ascertainment;**

(c) **The award of two (2) acres to the 3rd Respondent offended his constitutional right to ownership of property;**

(d) **He was not made aware of the decision of the 1st Respondent as well as the proceedings and orders obtained before the 2nd Respondent;**

(e) **There was imminent threat of subdivision of the subject parcel of land;**

(f) **The subdivision would cause irreparable harm to the Petitioner.**

THE RESPONSE

12. The Petition was opposed. On **24/09/2021** the **1st, 2nd** and **4th** Respondents filed a joint response dated **24/09/2021**. The **3rd** Respondent did not file any pleadings as at the time of writing this judgment. The Respondents contended that the Petition was a façade of a judicial review to wit prerogative writs which cannot be granted. They cited that the remedies sought are only available in judicial review and not by way of a constitutional petition. They observed that the Petition is a guised appeal contrary to **Section 8** of the **Land Disputes Tribunal Act** (repealed). They stated that the Petitioner was guilty of laches. Again, that the Petition was offensive, incompetent and an abuse of the process of the Court. They urged this Court to dismiss it with costs to them.

SUBMISSIONS

13. Pursuant to the Court's directions issued on **07/12/2021**, the parties were directed to canvass the Petition by way of written submissions. The Petitioner filed his on **11/01/2022**. The **1st, 2nd** and **4th** Respondents filed their joint ones on **01/02/2022**.

14. According to the Petitioner, the decision of the **1st** Respondent to award the **3rd** Respondent an additional **½** acre from the subject parcel of land was illegal and amounted to unjust enrichment. He submitted that the **1st** Respondent exceeded the powers limited by statute. He

cited that the 1st Respondent acted outside its limited powers enshrined to it under **Section 3 (1)** of the **Land Disputes Tribunal Act No. 18 of 1990** (repealed) and the **Registered Land Act, Chapter 300** (repealed). He fortified his submissions by relying on the decision of the Court of Appeal in *M'Marete -vs- Republic & 3 others (2004) eKLR*. He maintained that the 1st Respondent acted beyond its mandate. He further added that the 3rd Respondent ought to have instituted a suit in court rather than a claim before the 1st Respondent.

15. The 1st, 2nd and 4th Respondents submitted that the Petitioner was guilty of laches. Their submissions were that the Petitioner, having instituted the present proceedings **nineteen (19)** years later, demonstrated a dilatory conduct and inordinate delay. They added that the Petitioner participated in the proceedings before the 1st Respondent and was afforded a fair hearing and it was incumbent upon the Petitioner to establish the status of the proceedings therein. They concluded that the Petitioner was guilty of coming to Court with unclean hands. He relied on the Court of Appeal decision of *Wellington Nzioka Kioko -vs- Attorney General [2018] eKLR* for the presupposition that the Petition ought to be struck out for inordinate delay.

16. The Respondents further stated that the Petition failed to meet the principles set out in *Anarita Karimi Njeru -vs- Republic (1979) eKLR*. They submitted that the Petitioner failed to establish the alleged violations of the Constitution vis-à-vis the actions complained of. The Respondents further submitted that the actions complained of invited this court to sit on appeal and/or judicial review and the Petition is a red herring. They suggested that the Petitioner's remedy lay in judicial review proceedings or appeal against a legal decree. They were of the considered view that the Petitioner lamented on the award of the **two (2)** acres and added that had the 1st Respondent arrived at a different decision, the present Petition would not have been filed. Noting further inconsistencies in his presented facts, the 1st, 2nd and 4th Respondents submitted that the Petitioner was not deserving of the reliefs sought. They urged this Court to dismiss the Petition with costs.

ANALYSIS AND DETERMINATION

17. I have considered the Petition and respective response. I have also considered the respective rival submissions by parties. I postulate that the following issues are for determination:

- (a) *Whether a Court can grant prerogative writs in a constitutional petition;*
- (b) *Whether the Petition raises any constitutional violations;*
- (c) *What orders to issue and who to bear costs.*

16. I begin the analysis of the issues sequentially, starting with the first one.

- (a) **Whether a Court can grant prerogative writs in a Constitutional Petition**

17. One of the prayers in the Petition is for an order of *certiorari* to quash the decision of the 1st Respondent delivered on **18/02/2002**. The 1st, 2nd and 4th Respondents objected to it. Of particular focus was the submission that a constitutional petition is not by law capable of yielding orders of such a nature and is therefore an improper forum.

18. The answer to this question lies in the provisions of **Article 23** of the **2010 Constitution**. The provision vests courts with authority to uphold and enforce the Bill of Rights. In so doing, the courts are given power to grant a number of reliefs. The **Article 23 (3) (f)** provides that:

“In any proceedings brought under Article 22, a court may grant appropriate relief including - (f) an order for judicial review.”

19. Thus, the contention and submission this Court is a wrong forum in respect of the reliefs sought in the instant Petition is misplaced. The grant of prerogative writs is within the purview of a court sitting as a constitutional one. Where a party raises issues about the violation, threat, infringement or denial of a constitutional right or freedom in relation to land and environment, this Court becomes properly seized of the jurisdiction which empowers it to grant the prerogative writ in the nature of Judicial Review. Consequently, this court is within its mandate to grant judicial review orders sought if the Petitioner succeeds.

- (b) **Whether the Petition raises any constitutional violations**

20. The case of *Anarita Karimi Njeru v R [1976 - 80] KLR 1272* which was also affirmed in *Mumo Matemu v Trusted Society of Human Rights Alliance & others [2013] eKLR* held that a party seeking redress by way of Constitutional Petition must set out with a reasonable degree of precision the constitutional provisions which he alleges to have been infringed and the manner of the alleged infringement.

21. The Petitioner cited **Articles 40, 47 and 73** of the **Constitution** for the proposition that his right to fair administrative action and protection of his property were violated. In order to establish whether that happened, it is important to analyze the content and import of each of the Articles.

22. **Article 73** which is under **Chapter 6** of the **Constitution** is on responsibilities of leadership. It provides that a state officer holds the office he/she give as public trust and, as a leader, he ought to serve the people rather than rule them, must conduct himself in a manner provided in the **Constitution** and follow the guiding principles of leadership and integrity provided in the Article. Not only did the Petitioner fail to demonstrate how this Article was violated against his rights but I also do not find its relevance to the present Petition. I therefore find

no violation of the Petitioner's constitutional rights enshrined in **Article 73**.

23. Article 47 of the **Constitution** provides for the right to fair administrative action to which everybody is entitled to when one's right or fundamental freedom has been or is likely to be adversely affected by such action. In such a case he or she is supposed to be given a fair hearing. This upholds the principles of the administrative action which is supposed to be expeditious, efficient, lawful, reasonable and procedurally fair.

24. In the instant case, the Petitioner stated that the **1st** Respondent heard him and made a decision which was later adopted by the **2nd** Respondent. I have perused the annexure **JWN 2**. It gives reasons for the determination that the **1st** Respondent made. I note further that the adoption of the award was in accordance with the law. The Petitioner has failed to demonstrate specifically or in any manner how his right under **Article 47** was Article was violated in light of the conduct and decision of the **1st** Respondent. He simply stated that his rights were violated.

25. Regarding **Article 40**, the Petitioner stated that the **1st** Respondent acted *ultra vires* by determining that **two (2)** acres out of the land he owned ought to be awarded to the **3rd** Respondent, contrary to **Section 3 (1)** of the **Land Disputes Tribunal Act, No. 18 of 1990** (repealed). He then argued that consequently the action by the **1st** Respondent offended his constitutional right to property ownership and that consequently, the intended subdivision of the subject parcel of land that would cause him irreparable harm.

26. An analysis of the content and import of **Article 40** and what amounts to a threat to, denial, infringement or violation thereunder would shed more light over the contention by the Petitioner. **Article 40 (1)** guarantees every citizen the right to own property within the Republic of Kenya. **Article 40 (2)** provides that Parliament enacts a statute ensure that no one is arbitrarily deprived of use of his property or limit or restrict its use. **Articles 40 (3)** and **(4)** governs compulsory acquisition. **Article 40 (5)** protects intellectual property while **Article 40 (6)** dictates that unlawfully acquisition of property will not be protected.

27. From the summary of the Article as given above in comparison with the dispute between the Petitioner and the **3rd** Respondent, the relevant **Sub-Articles** are **40 (1)** and **40 (2)**. The former is to the effect that in its terms, the Petitioner being a citizen had the right to own property. Neither the **1st** nor the **2nd** Respondents and indeed the **3rd** or **4th** by their actions stated or showed that the Petitioner was denied such a right. What the Petitioner failed to appreciate is that the right to ownership of property is not one of the rights entrenched as being absolute or incapable of limitation as provided for under **Article 25** of the **2010 Constitution**. It may be limited, as provided for under **Article 24**. I will address the limitation when I look at the latter **Sub-Article - 40 (2)**.

28. The provisions of **Article 40 (1)** of the **Constitution** protect the right to property governed under any law. Depending on the type of the property in question, the law governing ownership thereunder is supposed to be assured of effectiveness under the **Article** except as the law will provide. For instance, the instant case being in respect of land registered under the **Registered Land Act**, Chapter **300** of the Laws of Kenya (repealed), the **Land Registration Act, Act No. 3 of 2012** should assure the right to ownership of the parcel of land by the Petitioner, without hindrance except as provided by the law. It means that the Petitioner acquired an indefeasible title which could not be taken away except in accordance with the Constitution and the law. It is not in dispute that the Petitioner was regarded by the **1st**, **2nd** and even **4th** Respondents as the lawful owner of the parcel of land in question. The only issue is whether or not the **two (2)** acres thereof which the **3rd** Respondent was awarded was being taken away from him in accordance with the law and constitution.

29. Article 40 (2) of the **2010 Constitution** prohibits Parliament from enacting a law that would arbitrarily deprived a person of the use of his property or limit or restrict him on its use. The issue the Petitioner complained of was under the auspices of the **Land Disputes Tribunal Act, Act No. 10 of 1990** (repealed) Laws of Kenya. The said statute does not go against the provisions of the **2010 Constitution** in so far as it provides for a procedure and manner of determining the issues between the parties. These include, but is not limited to, the division of property.

30. The Petitioner alleged infringement of his rights under **Article 40** of the **Constitution**. If at all there was any violation, which I did not see, then he neither particularized it nor pointed it out with precision. In fact, the Petitioner simply challenged the jurisdiction of the **1st** Respondent. His lamentations go to the root of procedure adopted by the **3rd** and **1st** Respondent and not an infringement of a constitutional right. This being the case, the Petitioner ought to have filed for a judicial review, and not a Petition.

31. A cursory perusal of the proceedings at trial shed light on the reason why the **3rd** Respondent sued the **1st** Respondent. The Petitioner fears imminent threat of subdivision. As shall be deciphered below herein, the Petitioner asks this court to sit on appeal on the decision of the **1st** Respondent. The Petitioner challenges the merits of the decision by the **1st** Respondent. He was dissatisfied with the pronouncement made by the **1st** Respondent and adopted by the **2nd** Respondent.

32. In **Mumo Matemu v Trusted Society of Human Rights Alliance & Others** (Supra) the Court of Appeal held as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are the tenet of substantive justice, as they give fair

notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of the issues in constitutional petitions is an extension of this principle. What Jessel, M.R. said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

33. The Petitioner invited this court to speculate on how his constitutional rights were violated. As stated above he did not demonstrate a violation at all. In terms of **Article 40** of the **Constitution**, I also find that no constitutional violations were infringed as alleged by the Petitioner.

(c) What orders to issue and who to bear costs

34. In view of the foregoing, I find that the Petition dated **08/06/2021** lacks merit. Resultantly, it fails and is hereby dismissed with costs to the **1st**, **2nd** and **4th** Respondents.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 6TH DAY OF APRIL, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE