



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION 290 OF 2009

BETWEEN

DANIEL MIGICHI NJOROGE.....APPLICANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT
THE LAND DISPUTES TRIBUNAL GITHUNGURI DIVISION.....2ND RESPONDENT
THE SENIOR RESIDENT MAGISTRATE'S COURT
GITHUNGURI.....3RD RESPONDENT

AND

RUTH WAMBUI NJOROGE.....INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner Daniel Migichi Njoroge is the proprietor of the property known as GITHUNGURI/GATHANGARI/3050 (hereinafter 'the suit property') measuring about 9.50 Acres. The facts surrounding the petition relate to the proceedings commenced in the Githunguri Land Disputes Tribunal by the interested party, Ruth Wambui.

2. Ruth Wambui claims to be the wife of Philip Gitau Migichi, the petitioner's deceased son and her claim is founded on what she considers her deceased's husband share of the petitioner's property. The petitioner denies this claim.

3. Ruth commenced her claim against the petitioner in the tribunal being **Case No. LND:16/20/52 of 2005** claiming 1.5 acres of the suit property. A hearing took place and an award was pronounced on 13th January 2006. The award, at the material part, stated was as follows:-

(1) Land Parcel No. Githunguri/Gathangari/3050 should be subdivided into two portions 8.10 Acres and 1.40 Acres.

(2) ***The 1.40 acres should be transferred to Ruth Wambui Njoroge as trustee of her two children.***

(3) ***The objector to retain 8.10 Acres for the other children.***

4. Unfortunately, the petitioner did not lodge his appeal to the Nyeri Provincial Appeal Committee within the statutory period of 30 days provided for appealing. Ruth then moved the Senior Resident Magistrate's Court in Githunguri to adopt the award in terms of **section 7** of the ***Land Disputes Tribunal Act (Act No. 19 of 1990)***. The award of the tribunal was adopted by the subordinate court on 21st June 2006. It is instructive to note that even though the court entered judgment in accordance with the award, the magistrate noted that the tribunal had no jurisdiction to order the cancellation of the petitioner's title and excise a portion thereof.

5. Dissatisfied with the judgment of the subordinate court adopting the award, the petitioner moved the High Court by way of an application for order of judicial review to quash the tribunal award and the consequent judgment. By a ruling dated 26th April 2006, in ***Daniel Migichi Njoroge v The Land Disputes Tribunal High Court Misc. 386 of 2006***, the court struck out the motion primarily on the ground that the motion was filed outside the time permitted by the court and that the motion was not properly titled.

6. The petitioner was once again not deterred by this loss, lodged another application under **section 65** of the Constitution namely, ***Daniel Migichi Njoroge v The Land Disputes Tribunal Githunguri Division & 2 Others Nairobi High Court Constitution Application No. 680 of 2007***. This suit sought to quash the tribunal proceedings on the ground of want of jurisdiction. The court considered the matter and dismissed the case on the ground that **section 65** of the Constitution was not applicable in the circumstances and that the applicant was trying to pursue enforcement of fundamental rights through the wrong procedure. The court also noted that the applicant should have filed a fresh application for judicial review which the court should have considered on merit.

Petitioner's Case

7. The petitioner has now filed this petition dated 14th May 2009. The petition is supported by the petitioner's affidavit sworn on 14th May 2009 and a further affidavit sworn on 23rd September 2010. The petition claim is that the award of the tribunal is an infringement of the petitioner's rights under **sections 70, 75, 77 and 82** of the Constitution.

8. Mr K. Mungai, who argued the petitioner's case, relied on skeleton submissions filed in court on 22nd June 2011. He submitted that his client's right to approach this court under **section 84** of the Constitution was without prejudice to any other action. In his view the previous proceeding in the High Court did not determine his client's rights and therefore the present proceedings are not covered by the doctrine of *res-judicata*. It is an independent application to enforce fundamental rights and freedoms.

9. Counsel submitted that the previous decisions of the court have not addressed the issue of the taking of the petitioner's land under **section 75** of the Constitution. He stated that such an encroachment is not to take place through judicial action and if it does, then it must be by a court of competent jurisdiction. He argued that on the facts of this case there was breach of **section 75** as the decree permitting the taking did not meet the test of constitutionality.

10. Counsel also alluded to the provisions of **section 77(9)** of the Constitution. In his view, a court or tribunal must be properly constituted and have jurisdiction to hear a matter fairly. In this case he submitted that the tribunal had no jurisdiction to distribute the land registered under the ***Registered Land Act (Chapter 300 of the Laws of Kenya)*** inter vivos. He urged me to allow the application.

11. Mr K Mungai drew the court's attention to an order issued by the Principal Magistrates Court, Githunguri dated 26th March 2010 where the court ordered the Executive Officer of the said court to

execute all transfer documents in relation to the suit property to the interested party. This order he asserted had the effect of dispossessing the petitioner of his whole property.

Respondent's Case

12. The Attorney General on behalf of the respondents did not file any response but Ms. Chelaka for the petitioner submitted that this case is an abuse of the court process as the petitioner did not invoke its right of appeal. Moreover, she submitted no constitutional issues were invoked in the matter.

Interested Party's Case

13. The interested party filed a replying affidavit sworn on 18th August 2010 where she stated that all the matters subject of this petition have been decided by the court. In her view, these proceedings were a delaying tactic intended to deprive her of the fruits of her judgment.

14. The interested party also filed submissions dated 7th December 2011 which Mr. Nyangena, her counsel, adopted in his oral submissions. He submitted that if the Land Disputes Tribunal erred, which he did not concede, the proper procedure for challenging its decision ought to have been followed.

15. Mr. Nyangena also submitted that the matters in issue were *res-judicata* as they have been dealt with by two decisions. The parties were the same and the same reliefs were sought as such the doctrine of *res judicata* applies fully and this court cannot sit as if it were an appellate court from the two decisions.

16. As regards any violation of the petitioner's rights, Counsel contended that the enforcement of a court decree cannot amount to a breach of constitutional rights and in any case at all stages of all the proceedings, the petitioner was fully heard. Counsel urged me to dismiss the petition.

Issue Estoppel

17. I have studied the pleadings and read the submissions by the parties and in my view the central question for determination is whether in view of the previous decisions of the court, these proceedings are barred by issue estoppel.

18. In the judgment delivered in **HC Misc. 680 of 2007** the court considered whether the applicant had been deprived of property contrary to **section 75** of the Constitution. In the court's view, there was no breach of **section 75** of the Constitution because what was being enforced was a decree of the court following an award of the Land Disputes Tribunal and this was covered by the exception to **section 75** that is **section 75(6)(a)(iv)**.

19. The court also held that the case for breach of **section 77** was vague and could not be allowed. The court held that in the circumstances the petitioner had not demonstrated how his rights had been infringed by the court or tribunal and as such the claim lacked merit.

20. This petitioner now seeks the intervention of this court on the basis that his fundamental rights under **sections 70, 75, 77 and 82** have been infringed.

21. I am cognisant of the fact that these proceedings are brought to enforce fundamental rights and freedoms. The court's obligation in considering such an application is to decide whether the facts disclosed in the petition disclose a breach of the bill of rights entitling a party to relief. The purpose of **section 84** of the Constitution is to ensure that the access provided to the court is unhindered and devoid of obstacles that diminish those rights.

22. But this is a case where the court has already made a determination on the matters in issue. The issues that have been subject to determination are now covered by issue estoppel. In ***Booth Irrigation v Mombasa Water Products Limited (Booth Irrigation No.1) Nairobi HCMisc. App. No. 1052 of 2004(Supra)*** the court held that, '***Although Constitutional Applications should be heard on merit, I***

find that there is nothing that would prevent a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example the matter raised was res judicata. Res judicata is in turn based on the principle grounded on public policy that litigation at some point must come to an end. Res judicata is a fundamental principle of our law.'

23. Similarly, in the case of *Edwin Thuo v Attorney General and Another Nairobi Petition No. 212 of 2011 (Unreported)* the court held that, *'whether the issue before me approached as an attack on a consent judgment, issue estoppel, res judicata or an abuse of process of court, the principles upon which the court acts in such circumstances are clearly within the limitations to fundamental rights and freedoms envisaged under section 70 of the Constitution.'*

24. The facts and parties in the previous case and this case are the same. Nothing has changed. I find and hold that such claims have been adjudicated upon and I am now barred from considering the same by the doctrine of issue estoppel (see the case of *George Waithaka Gituru v Attorney General Nairobi HC Misc App. 579 of 2008 (Unreported)*). But that is not the end of the matter.

Supervisory Jurisdiction

25. This matter has had a long and protracted history originating from the Githunguri Land Disputes Tribunal. I have read the proceedings before the tribunal and it is clear to me that the tribunal was called upon to adjudicate a dispute concerning the status of Ruth Wambui as the wife of the deceased's son, Philip Gitau Migichi. What was essentially a family dispute which ought to have been resolved within the law of succession morphed into a land dispute.

26. The original award issued by that tribunal was made without jurisdiction in so far as the tribunal purported to subdivide the petitioner's land. The members of the tribunal meandered outside the borders of what the *Land Disputes Tribunal Act* allowed them to do.

27. The jurisdiction of the Land Disputes Tribunal under **section 3(1)** of *the Land Disputes Tribunal Act* is as follows;

3(1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) the division of, or determination of boundaries to land, including land held in common;

(b) a claim to occupy land

(c) trespass to land

shall be heard and determined by a Tribunal established under section 4.

28. The jurisdiction of the Land Disputes Tribunal is limited and it does not include dividing the property of any person or ordering any person to transfer land to another person. Its jurisdiction does not permit it to determine what essentially is a succession dispute. The jurisdiction of the Land Disputes Tribunal has been the subject of various decided cases among them *Jotham Amunavi v The Chairman Land Disputes Sabatia Land Disputes Tribunal and Another Civil Appeal No. 256 of 2002 (Unreported)*, *Republic v Meru Central District Land Disputes Tribunal ex parte Rael Gachoga Meru HC Misc. App. No. 512 of 2005 (Unreported)*, *Ronald Wanakacha & Another v Ayub Job Okutoyi Kakamega HC Civil Appeal No. 61 of 2006 (Unreported)* and *Joseph Mikeya Khatonji v The Chairman, Shinyalu Land Disputes Tribunal Kakamega HC Misc. App. 4 of 2008 (Unreported)*.

29. In this case the tribunal in coming to the determination it did, purported to determine an inchoate right, that is, the right of the deceased's son alleged wife to inherit the father in law's land. In fact, there is a dispute as to whether the interested party, Ruth Wambui, is a wife of the deceased's son. These were matters clearly outside the jurisdiction of the Land Disputes Tribunal and the subsequent proceedings have only perpetuated the decision which the tribunal could not in law make.

30. The result of the tribunal award and subsequent court order enforcing the tribunal award will result in the petitioner losing his land. It is in these circumstances that I am now constrained to exercise this court's supervisory jurisdiction under **Article 165 (6) and (7)** of the Constitution to forestall the perpetuation of a gross injustice.

31. The Courts supervisory jurisdiction is intended to ensure that there is fair administration of justice. I must hasten to add that the jurisdiction is exceptional and is not intended to interfere with the normal working of subordinate courts or tribunal and correct mere errors of judgment. What I am called upon to do is to correct an error that is so fundamental to the working of a lawful tribunal. In all the cases that have been determined by the court, no determination had been made on the important and basic issue of whether the Land Disputes Tribunal had jurisdiction to deal with the matter.

32. I have also considered the circumstances of the interested party. I am satisfied that she has a remedy under the law. If she claims she is the wife of the petitioner's deceased son and is entitled to his property then the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** provides a proper remedy for determination of that issue.

33. The circumstances of this case call for this court to act to ensure fair administration of justice and in exercise of this court's supervisory jurisdiction under **Article 165 (6) and (7)** of the Constitution, I therefore make the following orders;

(a) I set aside the award of the **Githunguri Land Disputes Tribunal in Case No. LND:16/20/52 of 2005** in respect of **Githunguri/Gathangari/3050** made on 13th January 2006 and the consequent judgment and orders.

(b) I shall not award costs of these proceedings.

DATED and DELIVERED at NAIROBI this 6th day of February 2012.

D.S. MAJANJA
JUDGE

Mr K Muigai instructed by Kinoti and Kibe Advocates for the Petitioner.

Ms Chelaka, Litigation Counsel, instructed by the State Law Office for the respondent.

Mr Nyabena instructed by Nyabena Nyakundi and Company Advocates for the interested party.