



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
PETITION NO. 105 OF 2010

SARAH NASEL LETEIPAN.....PETITIONER

AND

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

KAJIADO LAND DISPUTES TRIBUNAL.....2ND RESPONDENT

SENIOR RESIDENT MAGISTRATE’S COURT KAJIADO.....3RD RESPONDENT

THE DISTRICT LAND REGISTRAR KAJIADO DISTRICT.....4TH RESPONDENT

TAYIAI MUTAMPERRIA.....5TH RESPONDENT

JUDGMENT

Introduction

1. The subject matter of these proceedings are two decisions rendered by the Kajiado Land Disputes Tribunal. The Land Disputes Tribunals were established under the provisions of *Land Disputes Tribunal Act*. The jurisdiction of the Tribunal is set out in **section 3(1)** which provides 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.

2. The Act has now been repealed by the provisions of the *Environment and Land Court Act, 2011*.

Petitioner’s Case

3. The petitioner is the registered owner of the property known as KAJIADO/KISAJU/504 (hereinafter “the suit property”) having purchased it from the 5th respondent in 1985 for the sum of Kshs. 700,000.00 of 1985. She avers that she has invested in the property and the current value of the property is over

Kshs.100,000,000.00.

4. The petitioner's grievance is that without her knowledge, the 5th respondent commenced proceedings against her at the Kajiado Land Dispute Tribunal being **Case No. TC 529/10/109 Taiyai Mutemperria v Sarah Leiteipan**. On 5th December 2009, the Tribunal delivered its decision and made the following orders in respect of the suit property;

(i) The objectors to be permanently restrained from selling and transferring the aforesaid parcels/parts of the said land.

(ii) The District Land Registrar to revert back ownership of the said parcel to the original owner.

(iii) The objectors to be restrained from interfering with the land in question and its apportions.

(iv) The Claimants to refund the amount of money owed to the objectors for the sale agreement is now ineffective.

(v) The District Land Registrar to revert back ownership of the said land to the original registration/owner.

5. The petitioner contends that these proceedings were carried out in her absence as she was not notified of the proceedings. She also contends that the orders made were made without jurisdiction.

6. During the pendency of these proceedings, the 4th respondent proceeded to make a further decision in which it purported to set aside its earlier decision. In its ruling dated 18th March 2010 it stated as follows;

RULING

Given the above facts, the question to be considered by this Tribunal is whether it has jurisdiction to hear and determine this matter according to section 3 of Land Disputes Tribunal Act Cap 19 of 1990 which established and governs this tribunal. The Tribunal has powers to adjudicate on matters involving ownership of land, trespass to land, division and determination of boundaries to land and claim to occupy or work on land. The Tribunal therefore has the mandate to determine this case for it concerns ownership of land.

The Honourable Senior Resident Magistrate's Court in Kajiado to order the District Land Registrar to revert back ownership of the above Title Deeds KAJ/KISAJU/4616 and KAJ/KISAJU/4617 respectively, to the original owner Sarah N. Leiteipan for the same were obtained illegally and fraudulently.

The criminal element involved to be investigated by the district criminal investigation officer.

7. The petitioner complains that though the decision was in her favour, she was once again denied the opportunity to present her case. She was not served and could not therefore attend proceedings. Moreover, that decision was made without jurisdiction.

8. Apart from the petition dated 20th December 2010, the petitioner filed an amended petition dated 16th December 2011 where she seeks the following orders;

(a) A declaration that the hearing and determination before the 2nd Respondent leading to the finding issued on 5th December 2009 and 18th March 2011 are inconsistent with Articles 48 and 50 of the Constitution of the Republic of Kenya in that the petitioner herein was denied an opportunity to be heard and or present her case and is therefore void, invalid, inapplicable or enforcement and or of no legal effect to the circumstances hereof as against the petitioner to the extent of the said inconsistency.

(b) A declaration that the adoption of the 2nd respondent's decision by the 3rd respondent and issuance

of the Decree issued on 23rd February 2010 purporting to restrain the petitioner from using her parcel of land, ordering the 4th respondent to revert the petitioner's parcel of land to the 5th respondent and the process leading thereto are unconstitutional and contravenes the petitioner's Fundamental Rights and Freedoms as recognised by the Constitution of Kenya and are therefore void, illegal invalid and/or inapplicable of enforcement and or of no legal effect.

(c) A declaration that the cancellation of the petitioner's title to her parcel of land known as Kajiado/Kisaju/504 and the process leading thereto are unconstitutional and contravenes the petitioner's fundamental rights and freedoms as recognised by the Constitution of Kenya and are therefore void illegal, invalid and or inapplicable to enforcement and or of no legal effect.

(d) Consequently, an order prohibiting the respondents whether by themselves, their officers, agents and/or servants or employees from further registration of transfers, further dealing, registering transfers and or interference with all that parcel of land known as Kajiado/Kisaju/4616 and Kajiado/Kisaju/4617 and Kajiado/Kisaju/4733 and Kajiado/Kisaju/4734.

(e) Consequently, an order prohibiting the respondents whether by themselves, their officers, agents and/or servants or employees from restricting or otherwise limiting the petitioner's peaceful enjoyment of and access to her parcel of land known as Kajiado/Kisaju/4616 and Kajiado/Kisaju/4617 and Kajiado/Kisaju/4733 and Kajiado/Kisaju/4734.

(f) Consequently, an order for restoration fo the register by the 4th Respondent restoring the petitioner as the registered owner of all that parcel of land known as Kajiado/Kissaju/504 and its subdivisions numbers Kajiado/Kisaju/4616 and Kajiado/Kisaju/4617 and Kajiado/Kisaju/4733 and Kajiado/Kisaju/4734.

(g) An order for general and exemplary damages to the petitioner for violation of her fundamental rights and freedoms under the constitution of Kenya.

(h) An order that the costs consequent upon this petition be borne by the respondents.

(i) All such other orders as this honourable Court shall deem just in the circumstances.

9. In addition, the petitioner filed a supporting affidavit sworn on 20th September 2010, a further affidavit sworn on 6th June 2011 which were all relied upon. Mr. Ibrahim who prosecuted the petition on the petitioner's behalf also adopted the written submissions filed on 22nd February 2012. He urged the Court to allow the petition as the petitioner's right to be heard enshrined in both **Articles 47** and **50** of the Constitution were infringed. He also asserted that his client's rights to property were threatened in breach of **Article 40**.

1st – 4th Respondent's Case

10. The 1st, 2nd 3rd and 4th respondents were represented by the Attorney General. Despite being given an opportunity to file an appropriate response to the petitioner's allegations, non was forthcoming. When the matter came up for hearing, Mr Ojwang for these parties, elected to rely on the grounds of opposition dated 27th January 2011 which were filed in opposition to the interlocutory application for conservatory orders.

11. The grounds set out in so far as they are relevant to the petition are that the petitioner is guilty of laches and that the petition is an abuse of the court process. Mr Ojwang' submitted that there was an alternative remedy and the **Land Disputes Tribunal Act** provided for an appeal and that procedure ought to have been followed. He relied on the case of **Hon. Njenga Karume v Speaker of the National Assembly Nairobi CA Civil Appeal No. NAI 92 of 1992(Unreported)**. He urged me to dismiss the petition.

5th Respondent's Case

12. The 5th respondent is the person from whom the petitioner purchased the suit property. She filed two affidavits, the first one sworn on 23rd March 2011 and the second one sworn on 21st February 2012.

13. From both depositions, it appears that the 5th respondent's grievance relates to the sale of the property. She asserts that she was not paid the sum of Kshs.700,000.00 as the purchase price but only received the sum of Kshs. 338,000.00. She avers that the applicant took advantage of her illiteracy, respect, customary belief and faith in procuring the transfer prior to making payments.

14. As regards the proceedings at the tribunal she avers that she believes that at all material times the petitioner was served and summoned to appear at the tribunal.

15. The 5th respondent also avers that it is her rights that were violated and she would be extremely prejudiced. She avers that the petitioner's rights have not been violated and that granting the orders sought will infringe the 5th respondent's rights.

16. When the matter came up for hearing, I declined to grant an adjournment and the advocate holding brief for Mr Nyandieka, Mr Makunya declined to proceed with the matter. I therefore ordered the matter to proceed.

Issues for determination

17. The facts giving rise to these proceedings are judicial proceedings conducted by the Land Disputes Tribunal. Such a tribunal is bound by the provisions of **Article 50(1)** which provides;

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

18. The petitioner also relied on **Article 47** of the Constitution to impugn the decisions of the Tribunal. I do not think **Article 47** is applicable to this case as it deals with fair administrative action. In the case of ***Dry Associates Limited v Capital Markets Authority & Another Nairobi Petition No. 328 of 2011 (Unreported)*** the court stated, ***'[62] Article 47 and 50(1) protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, impartial tribunal or a body established to resolve a dispute while Article 47 applies administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the Article deals with criminal trials.'***

19. **Article 50(1)** incorporates the elements of natural justice and which includes the right to be given an opportunity to present one's case.

20. In this case the petitioner has asserted that she was denied such a right, she was not served with notices nor informed of the proceedings. This allegation was not traversed by the Tribunal in any manner. Nothing would have been easier than to show the proceedings of the case and evidence of such service. A bland averment by the 5th respondent that the petitioner was served with process does not assist the 5th respondent.

21. In the circumstances, I find that on the material before the court, that the petitioner was not served with the tribunal process. This offends the provisions of **Article 50(1)** as the petitioner was denied an opportunity to be heard.

22. Implicit in **Article 50(1)** is that the court tribunal or such body constituted to hear a matter must be properly constituted and have jurisdiction. This is an element of the rule of law which is one of the values of our Constitution sets out in **Article 10**. The facts as disclosed are clear that the Kajiado Land

Disputes Tribunal dealt with matters outside its lawful authority.

23. The jurisdiction of the Land Disputes Tribunal is limited and does not include dividing the property of any person or ordering any person to transfer land to another person nor does it include the determination of the validity of a sale agreement. 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)*.

24. The second ruling of the tribunal which is set out at paragraph 6 above, is even more troubling. Having issued the first decision, the Tribunal lacked jurisdiction to rehear the matter. Once it delivered its judgment, it became *functus officio* and could not re-open it as it purported to do. Furthermore, the Tribunal could not purport to direct Senior Resident Magistrate's Court to reverse its previous decisions.

25. It is abundantly clear that the Tribunal acted without jurisdiction in the manner it did. Its decisions and proceedings lack legal foundation and they must be set aside. In view of this finding, it is unnecessary for me to consider breach of Article 40 of the Constitution.

26. Counsel for the Attorney General argued that there was an alternative procedure either by way of appeal or judicial review. This argument lacks merit as these proceedings are commenced under **Article 22** of the Constitution to enforce fundamental rights and freedoms. This remedy is a complete remedy and as it is without prejudice to any other action. I am also satisfied on the facts of this case that the action does not constitute an abuse of the court process.

Relief and Disposition

27. I have found that **Article 50(1)** has been infringed by the Land Disputes Tribunal proceeding with giving the petitioner an opportunity to be heard and also proceeding without jurisdiction. In effect therefore those proceedings are null and void and a declaration to that effect is issued.

28. It also follows that all acts that have been done consequent to the decision of the Land Disputes Tribunal decision must also be set aside. In the circumstances, I grant the following reliefs;

(a) I declare that the hearing and determination of the Kajiado Land Disputes Tribunal Case No. TC 529/10/09 in relation to Kajiado/Kisaju/504 and in particular the decisions made on 5th December 2009 and 18th March 2011 are in breach of the petitioner's right protected under Article 50(1) of the Constitution and those proceedings and decisions are consequently declared null and void.

(b) I declare that the petitioner is the absolute and legal proprietor of Kajiado/Kasaju/504 and all its subdivisions more particularly Kajiado/Kisaju/4616, Kajiado/Kisaju/4617, Kajiado Kisaju 4733 and Kajiado/Kisaju/4734.

(c) The petitioner shall have the costs of the petition as against the 1st, 2nd and 4th respondent.

DELIVERED and DATED at NAIROBI this 9th March 2012.

D.S. MAJANJA

JUDGE

Mr Ibrahim instructed by Nyiha, Muoma and Company Advocates for the petitioner

Mr Ojwang', Litigation Counsel, instructed by the State Law Office for the 1st, 2nd, 3rd and 4th respondents.