



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Petition 31 of 2011

IN THE MATTER OF ARTICLES 20, 22,23 (1) AND (3), 25 ©, 27 (1), 29 (D), 40, 43 (e), 50 (1), 159 (2) (e) and 165 (b) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF VIOLATION AND OR INFRINGEMENT OF CONSTITUTION RIGHTS TO FAIR TRIAL, PROTECTION AND EQUAL BENEFIT OF LAW, SECURITY, PROPERTY AND FAIR HEARING OF THE PETITIONER

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

SABINA MORA WANDA.....PETITIONER

VERSUS

**SUNEKA LAND DISPUTES TRIBUNAL
THE CHIEF MAGISTRATE, KISII
THE ATTORNEY GENERAL**

JULIUS OMAMBIA RESPONDENTS

RULING

The subject matter of these proceedings is a decision rendered by Suneka Land Disputes Tribunal hereinafter The Tribunal dated the 11th September, 2010. The Land Disputes Tribunals were established under the provisions of **Land Disputes Tribunal Act (now repealed)**. The jurisdiction of the Tribunal is set out in section 3(1) of the Act which provides:

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.

The petition relates to a parcel of land namely **Wanjare/Bomorenda/1229**. According to the material before court, the 4th Respondent lodged a claim against the plaintiff with the Tribunal claiming ownership to the suit property from the petitioner's husband, one **Oanda Ombeta (now deceased)**. The 4th Respondent claimed he had bought the piece of land in the year 1996. In the Petition dated 22nd March, 2011 and the Supporting Affidavit sworn by the petitioner, the petitioner avers that she was not given an opportunity to be heard at the proceedings conducted by the 1st respondent contrary to Article 50 of the Constitution.

It is the petitioner's further submission that she was not notified of the award until the time for appeal had expired and until the award was filed in court and that the suit land did not in fact belong to her but one Robert **Makori Ombeta**. It is the petitioner's contention that therefore the award given by the Tribunal was null and void for want of jurisdiction as it sought to determine the ownership of a registered parcel of land known as **Wanjare/Bomorenda/1229**.

It is the Petitioner's claim that the impugned award, was signed on 9th March, 2010 but dated the 11th September 2010 and filed in the Chief Magistrate's Court on 14th February, 2011. The petitioner avers that the respondent's conduct was meant to defeat her right of appeal.

In the reply to the Petition dated the 20th July 2011, and submissions dated 27th September, 2011, the 4th respondent opposes the petition contending that this court is not the appropriate forum to deal with the petitioner's claim. An application for judicial review or an appeal in the Provincial Appeals Committee would have been the appropriate mechanism to channel the grievances. The respondent has further contended that the Constitution of Kenya, 2010 did not apply retrospectively but prospectively.

Article 165(6) of the Constitution vests in this court supervisory jurisdiction over subordinate courts and other bodies exercising judicial functions. It provides thus:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

Equivalent provisions may however be found in Section 84 of the old Constitution. In **Kenya National Examinations Council v Republic, Civil Appeal No. 266 of 1996**, the Appellate court stated *inter alia*:

“As a creature of statute, the council can only do that which its creator(the Act) and the Rules made thereunder permit it to do. If it were to purport to do anything outside that which the Act and the Rules permit it to do, then like all public bodies created by parliament, it would become amenable to the supervisory jurisdiction of the High court...”

Article 22 provides a right for any person to access this court alleging violation of the Bill of Rights. Even under the former Constitution, such right to approach this Court was provided under Section 84 in the following terms:-

“Without prejudice to any other action with respect to the same matter which is lawfully available”. As per **Justice Waweru** in the case of **Church Road Development Company Ltd v. Barclays Bank of Kenya Limited [2007] 1 EA** , the court stated:

“It is then immediately clear that the Plaintiff's right to lodge the petition under section 84(1) of the

Constitution is without prejudice to any other cause of action available to him. It is therefore not a sufficient answer, as far as this present application is concerned, that the plaintiff ought to have lodged an appeal against the two orders complained of. It was entitled to bring the petition (and the application within the petition) notwithstanding its right of Appeal”.

The decision and award of the Tribunal and the subsequent decree issued by the Magistrate's court are therefore amenable for review by this Court. For these reasons, I find that this court has jurisdiction to entertain the petition and that this matter is properly before the court.

Having disposed of the issue of jurisdiction, the other key issue for determination regards the validity or otherwise of the impugned award. It is not in contention that the decision rendered by the Tribunal had the effect of determining ownership of the suit land. The Tribunal's decision was not annexed as part of the material before this court. However, the award, whose substance is in any case uncontested, is deducible from the decree from the Magistrate's Court which read in part:

“IT IS HEREBY ORDERED AS FOLLOWS:

1. THAT the decision of KISII SOUTH LAND DISPUTE TRIBUNAL No. 6 of 2010 be and is hereby made the Judgment of this court i.e

a. Julius Omambia genuinely bought the land in question from Oanda Ombeta in the year 1996 as the Respondent Oanda Ombete had a loan problem.

b. Therefore the tribunal in good faith declared Julius Omambia to be given the land in question as he genuinely bought it.

2. Right of appeal within 30 days.”

“Therefore the tribunal in good faith declared Julius Omambia to be given the land in question as he genuinely bought it.” It is thus clear that the Tribunal exceeded its mandate under section 3 of the Land Disputes Tribunals Act.”

As was rightly observed by the court in **Sarah Nasel Leteipan v the Hon. Attorney General & 4 Others, Constitutional Petition No. 105 of 2010** at para. 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.”

I therefore find that the decision of Kisii South Dispute Tribunal No. 6 of 2010 dated 11th September, 2010 to be *ultra vires* hence null and void. Consequently, the attendant decree in the Magistrate's court is also null and void.

Taking all facts into account, as I have done, I make the following specific orders:-

a. That the proceedings and award dated 11th September, 2010 made by Suneka Land Disputes Tribunal are null and void to the extent that the Tribunal exceeded its mandate under Section 3 of the Land Disputes Tribunals Act.

b. Parties are restored to the position they were in prior to the decision of the Tribunal and are at liberty to seek further reliefs from this Honourable court.

c. I award costs of this petition to the petitioner to be met by the 4th respondent.

Ruling dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE