



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL PETITION NO. 2 OF 2010

NGAMBI MBAU.....PETITIONER

VERSUS

STEPHEN MUTHAMI MBAU.....1ST RESPONDENT
WILLIAM WABANDI MBAU.....2ND RESPONDENT
COMMISSIONER OF LANDS.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT
WILLIAM GITURU MUGI.....5TH RESPONDENT
JOHN T. NDAHI.....6TH RESPONDENT

RULING

NGAMBI MABU, the Petitioner herein, took out the Petition dated 8th April 2010 pursuant to the provisions of Sections 70, 71, 74, 75,77 and 84 of the Constitution of Kenya (the old constitution) in which he sought for the following orders:

- A. *A declaration that the proceedings and ruling of the elders in TETU LAND DISPUTES TRIBUNAL CASE NUMBER 4 OF 2006 in respect to land parcel No. TERU/UNJIRU/179 signed on the 11th of May 2007 and all order made therein be made null and void for violating the petitioners right to the rule and protection of law as enshrined in section 77 of the Constitution of Kenya.*
- B. (i) *That the proceedings and Order in TETU LAND DISPUTE TRIBUNALCASE NUMBER 4 OF 2006 in respect to Land Parcel L.R. TETU/UNJIRU/179 are null and void for violating the petitioners right to property enshrined in section 75 of the Constitution of Kenya.*

(ii) *that the said proceedings and award be declared null and void for violating the petitioners right to land and his means of raising food and livestock in violation to the right of self preservation enshrined in SECTION 77 and the right to humane treatment enshrined in section 74 of the Constitution of Kenya.*

- C. *An order forbidding the 4th and 5th Respondents, their servants, agents either by themselves or any other person from alienating, transferring and or in any way dealing with land parcel NO. LR TETU/UNJIRU/179 or any resultant sub-divisions thereof or any part thereof without further orders of this court.*
- D.

i. *All such orders as this court shall deem just and fit to grant.*

ii. ***A declaration that the Respondents are liable to pay the costs of this petition.***

iii. ***Any other orders which this Honourable Court shall deem fit.***

The Petitioner named **Stephen Muthami Mbau, William Wabandi Mbau, Commissioner of Lands, The Attorney General, William Gituru Mugi and John T. Ndahi** as the 1st, 2nd, 3rd, 4th, 5th and 6th respondents respectively. The 1st and 2nd Respondents filed grounds of opposition to resist the Petition. The 3rd and 4th Respondents filed a notice of preliminary objection and the replying affidavit of Christopher Wairoma to oppose the Petition. It would appear the 5th and 6th Respondents never filed any responses to the petition.

When the Petition came up for hearing, the 3rd and 4th Respondents argued a preliminary point of law set out in their notice of preliminary objection dated 22nd June 2010. It is the submission of Mr. Wairoma learned litigation counsel, that the Petition is incurably defective in that there are no affidavit evidence filed to support it as envisaged under rules 13 and 14 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and procedure rules, 2006, popularly known as the “Gicheru Rules”. Mr. Wairoma urged this court to strike out the Petition also on the ground that the same do not raise any constitutional issues. Mr. Karweru, learned advocate for the 1st and 2nd Respondents, adopted the submissions of Mr. Wairoma. The learned advocate pointed out that the issues raised in the Petition related to execution proceedings which cannot be defeated by a constitutional reference. Mr. Ombongi, learned advocate for the Petitioner, beseeched this court to spare the Petition. Mr. Ombongi was of the view that it was not mandatory to file an affidavit since the Petition was comprehensive in itself hence self explanatory. Mr. Ombongi further claimed that the Petitioner’s rights were violated by the Land Disputes Tribunal and the Court.

I have considered the rival submissions over the preliminary objection. A careful reading of the Petition will give the background of this dispute. In the year 2006, Stephen Mutami Mbau and William Wabandi Mbau, being the 1st and 2nd Respondents, filed a complaint before the Tetu Land disputes Tribunal, claiming to be entitled to a portion of the parcel of land known as L.R. NO. TETU/UNJIRU/179. It would appear the aforesaid parcel was registered in the name of the 1st and 2nd Respondents’ brother, Ngambi Mbau, the Petitioner herein. The Land Disputes Tribunal heard and determined the dispute in favour of the 1st and 2nd Respondents. The tribunal made an award which was to the effect that the three brothers should share the aforesaid land in equal measure i.e. each to receive 11.1 acres. The Petitioner was ordered to facilitate the sub-division of **L.R. NO. TETU/UNJIRU/179** and in default the executive officer of the court was authorised to step in his place. The Petitioner was unhappy hence he proceeded to file an appeal before the Provincial Land Disputes Appeals Committee. The Appeals Committee heard and dismissed the appeal by affirming the decision of the Tetu Land Disputes Tribunal with a few alterations. Being aggrieved by the Appeals Committee’s decision, the Petitioner moved to this Court to seek for the decision to be quashed by an order of certiorari, vide the Motion dated 18th March 2009 vide **Nyeri H.C. MISC. APPLICATION NO. 58 OF 2009**. A preliminary objection against the Motion was raised by the 5th and 6th Respondents. When the Motion came up for hearing before the Hon. Mr. Justice Makhandia, it would appear, that the Petitioner’s advocate was prevailed upon to withdraw the Motion in the light of the preliminary objection. The Petitioner avers that his advocate was coerced to withdraw the Motion. In the Petition, the Petitioner avers that the tribunal’s award was adopted as the decision of the Chief Magistrate’s Court Nyeri vide **Nyeri C.M.C. Award No. 14 of 2007**. The Petitioner further avers that the decision has been executed. It is the submission of the Petitioner that his rights to protection of property under *Section 75* of the Constitution, were violated when his land was arbitrarily taken away. The Petitioner filed this Petition after his advocate withdrew **Nyeri H.C. MISC. APPLICATION NO. 58 OF 2009**.

Having set out the background of the Petition, let me now go back to the preliminary issue raised by Mr. Wairoma. It is his submission that the Petition contravenes *rules 13 and 14* of the Gicheru Rules. Mr. Ombongi is of the view that it was not mandatory to file affidavits to support the Petition. I have carefully looked at the rules. In order to appreciate their importance, it is necessary to reproduce them here:

“12. An application under rule 11 shall be made by way of Petition as set out in form D in the schedule to these Rules.

13. The Petition under rule 12 shall be supported by an affidavit.

14. If a party wishes to rely on any document, the document, shall be annexed to the supporting affidavit.”

It is obvious from the above rules that it is a mandatory requirement that the Petition must be supported by an affidavit. With respect, I agree with the submissions of Mr. Wairoma, that the Petition lacks the necessary foundation envisaged under rule 13 of the Gicheru rules. I think those rules intended to forestall the element of surprise and unwarranted claims not supported by evidence. I expected Mr. Ombongi, the Petitioner’s advocate, having realized his mistake to promptly seek for leave to file a supporting affidavit in compliance with rules 13 and 14 of the Gicheru Rules. Instead, Mr. Ombongi openly stated that it was not necessary to do so since the Petition was comprehensive. Surely, the Court will require copies of the proceedings and decisions complained of to be annexed to the supporting affidavit. This will enable this Court to discover whether the Petitioner’s constitutional rights were breached or not. As of now, the Court has no evidence to prove those allegations. I find the preliminary objection to be well founded it is upheld. The petition is ordered struck out with costs to the 1st, 2nd 3rd and 4th Respondents.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Wahome for the 3rd and 4th Respondents. Ombongi for the Applicant. No appearance Waweru for the 1st and 2nd Respondent.