REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO. 8 OF 2010

IN THE MATTER OF ARTICLES 22, 23 (3) AND 40 OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF REGISTERED LAND ACT, CHAPTER 300, LAWS OF KENYA

AND

IN THE MATTER OF LR NO. WANJARE/BOMORENDA/3108

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, 2010

BETWEEN

CALLEN MAGOMA OMARI.....PETITIONER

AND

SUNEKA LAND DISPUTES TRIBUNAL.....1ST RESPONDENT
THE CHIEF MAGISTRATE'S COURT AT KISII.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT
IRINE KWAMBOKA.....4TH RESPONDENT
JOHN OROO OYIOKA.....5TH RESPONDENT

JUDGMENT

By a petition dated 24th November, 2010 and filed in this court the following day, **Callen Magoma Omari**, hereinafter ***"the petitioner"*** sought the following prayers as against **Suneka Lands Disputes Tribunal, The Chief Magistrate's court at Kisii, The Attorney General**, **Irine Kwamboka** and **John Oroo Oyioka**, hereinafter the ***"1st, 2nd, 3rd, 4th and 5th respondents"*** respectively:-

"a. Declaration be issued to the effect that the petitioner is entitled to protection under the constitution.

b. Declaration that the 1st respondent had no right and/or jurisdiction to entertain and adjudicate upon proceedings touching and/or concerning ownership of and/or title to the suit land, that is, LR No. Wanjare/Bomorenda/3108, contrary to the provisions of the parent statute.

c. Declaration that the proceedings and decisions of the 1st and 2nd respondents touching and/or concerning the suit land, that is LR No. Wanjare/Bomorenda/3108, were annulity ab initio and hence unconstitutional.

d. Declaration that the petitioner herein has been arbitrarily deprived of her rights and/or interests over the suit land. Consequently, the petitioner's constitutional rights have been infringed upon and/or violated.

e. Declaration that LR No. Wanjare/Bomorenda/3108 lawfully belongs to the petitioner and restoration of same in favour of the petitioner.

f. An order of Judicial Review, bringing forth the proceedings and decisions of the 1st and 2nd respondents, unto this honourable and same be quashed, vide and order of certiorari.

g. An order of permanent injunction restraining the 4th and 5th respondents either by themselves, agents, servants and/or in any other way, whatsoever, interfering with the petitioner's rights over the suit land, that is, LR No. Wanjare/Bomorenda/3108.

h. An order for compensation for loss of the suit land.

i. Costs of the petition be borne by the respondents jointly and/or severally.

j. The honourable court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient…".

Apparently, the petition was anchored on Articles 22, 23 (3) and 40 of the constitution. The petition was informed by the following undisputed facts; the petitioner was the registered proprietor of all that piece or parcel of land known as **Wanjare/Bomorenda/3108** hereinafter ***"the suit premises"*** upto and including the 29th October, 2009. On that date, however, the same was irregularly and illegally transferred and registered in the name of the 4th respondent. The petitioner initially bought the suit premises from the original owner, **Prisika Bisieri Ochwangi** and immediately took possession and developed the same by constructing a permanent building thereon. Subsequent thereto, the 4th respondent mounted a complaint with the 1st respondent questioning the transfer of the suit premises to the petitioner as aforesaid on the grounds that it was fraudulent. The 1st respondent entertained the claim and found for the 4th respondent holding this ***"…As per the above evidence, the Land Disputes Tribunal declared the nullification of plot Wanjare/Bomorenda/No. 3108 since it was fraudulently acquired and that proper legal procedure be effected so as to return the land to its rightful owner – Irene Kwamboka. Any party feeling not satisfied to launch an appeal to the Land Disputes Tribunal before a period of thirty days…".*** Upon such determination, the 2nd respondent proceeded to adopt the award as its judgment which according to the petitioner was unconstitutional. It is the petitioner's contention that the proceedings before the 1st and 2nd respondents were wrought or fraught with illegalities. Consequently, the said proceedings had contributed to arbitrary deprivation of property from her. The 3rd respondent on the other hand had failed to vindicate the petitioner's constitutional rights by ensuring that the provisions of the constitution were upheld by all persons or bodies such as the respondents. The actions of the respondents had therefore deprived the petitioner of her interest over the suit premises, contrary to the provisions of Articles 22 and 40 of the constitution without due regard to the process of law.

Going by the affidavit of service on record, all the respondents were served with the petition, but only the 4th and 5th respondents reacted. They did so by filing appearances. Thereafter only the 5th respondent filed an answer to the petition. He stated that he was not involved and could not therefore reply to the allegations or events prior to his acquisition of the suit premises contained in the petition. Otherwise as far as he was concerned the proceedings and decisions of the 1st and 2nd respondents were informed by due process of law. The same were never challenged by the petitioner or any other party. The proceedings were thus proper and or lawful. Accordingly, the petitioner was not arbitrarily deprived of her property nor did the 5th respondent in any way benefit or accrue any rights or undue mileage over the petitioner. She had acquired title in respect of the suit premises as a bonafide purchaser for value and had ever since enjoyed quiet and or peaceful possession of the same.

When the petition came up for directions before me on 20th May, 2011, **Mr. Ochwangi** and **Mr. Soire**, learned counsel for the petitioner and 5th respondent respectively consented to canvassing the petition by way of written submissions. They all subsequently filed and exchanged written submissions which I have carefully read and considered.

As I have had occasion to say in the past, I do not think that this constitution is the panacea of all manner of ills imagined or not of the past. It is not the solution of the alleged or imagined past historical injustices. It was not meant to resurrect cases which had been dealt with and buried. It was not meant to violate or breach the well known maxim of law that there must be an end to litigation nor was it meant to assist an indolent litigant where, as here, she had other remedies provided by statute and which she did not take advantage of. In other words, the constitution was not meant to take place of or cause conflict to statutory provisions governing appeals or even judicial review proceedings. Finally, I do not think that this constitution was meant to provide another frontier or planc for a litigant who had lost a case in the past or exhausted remedies then available to him to resuscitate it under the guise of violation of constitutional rights. I think that the constitution applies to Kenyans equally. That is the essence of articles 2, 3 and 20 of the constitution. It cannot be unconstitutional conduct merely because a party has lost a case to a successful party. In this case, the 4th respondent lodged a claim with the 1st respondent under provisions of the **Land Disputes Tribunals Act**. That **Act** is still part of the law of this land. It was never repealed with the coming into force of our current constitution. Under the said act, jurisdiction is conferred to the 1st respondent to hear and determine certain disputes touching on land. This is how the 1st respondent was seized of the matter that has given birth to this petition. It may or may not have had the necessary jurisdiction. However, this is neither here or there. It cannot be unconstitutional or a breach, violation and or infringement of the petitioner's bill of rights merely because a tribunal or a court duly constituted in accordance with law errors in its decision or acts in excess or want of jurisdiction. This is a daily occurrence and that is what informs the appellate process in judicial or quasi judicial proceedings. That appellate jurisdiction was provided for in the **Land Disputes Tribunals Act**.

The 1st respondent considering that it was well seized of the matter proceeded to adjudicate on the dispute. From the proceedings before the 1st respondent, it appears that the petitioner though served ignored to attend the 1st respondent over the claim 3 times unreasonably and even sent abusive letters to the members of the 1st respondent calling them unfit to handle such a matter and that she could only meet the 4th respondent in the High Court. Had the petitioner attended the 1st respondent when summoned, she would have been able to up the concerns she has raised in this petition. No doubt, they would have been addressed. She missed the opportunity and the 1st respondent proceeded as it knew how best. Having deliberately and sarcastically missed the boat, she cannot turn around and blame the captain for the decision to award her seat in the boat to someone else under the guise of infringement of her constitutional rights. The 1st respondent cannot have violated her rights by acting within its statutory mandate.

After the award was made, it was filed with the 2nd respondent for adoption as a judgment. Again this was in accordance with statutory provisions of the land disputes tribunal. The adoption was pursuant to the application by the 4th respondent. That application was indeed served on the petitioner. From the decree annexed to the petition, it clearly shows that on the day the application came up for hearing, the petitioner was represented by counsel one, **Nyabera**. The petitioner again had opportunity to raise the concerns she is raising in this petition at that stage. She did not. Alternatively she may have raised them and were dismissed. It cannot therefore be a violation of the petitioner's property rights merely because the 2nd respondent entered judgment as required by the provisions of the **Land Disputes Tribunal Act.** In any event, the 2nd respondent was bound to enter the judgment as long as it was properly moved. It had no jurisdiction to question the validity or otherwise of the award or any proceedings before the 1st respondent.

Under the provisions of the Land Disputes Tribunal, the petitioner still had a right to appeal to the Provincial Land Disputes appeals committee. There is no evidence that she took advantage of these provisions of the statute. Again, she had a remedy in the nature of judicial review proceedings. Indeed looking at the submissions of the petitioner, there is no doubt at all that the petitioner is treating these

proceedings as judicial review proceedings. She talks of **Land Disputes Tribunal Act** which by dint of section 3(1) grants tribunals such as the 1st respondent to address issues or matters which relate to trespass, boundary disputes or claim to work and occupy land. Tribunals are not conferred with jurisdiction to entertain issues of acquisition and ownership of land. In acting on the complaint in those circumstances, the 1st respondent acted in excess of jurisdiction and the award was thus anullity according to the petitioner. This is all fine. However, the arguments are being advanced when the horse has already bolted from the stable. Of course I am aware that under the current constitution, one of the remedies available for enforcement of bill of rights is an order of judicial review. I am also aware that the petitioner has sought for the same in the nature of certiorari in her petition. However I do not think that such remedy is available to the petitioner now for the simple reason of time lapse. Under order 53 rule 2 of the **Civil Procedure Rules**, an order of certiorari can only be sought within six months of the making of the decision sought to be quashed. That requirement did not change with the coming into force of the current constitution. The award, the subject of this petition was made on 11th April, 2009. This petition was however, filed on 20th November, 2011, almost 1 ½ years after the award was made. Clearly the prayer for an order of certiorari is time barred and or misplaced.

In this case, the entire proceedings and subsequent orders issued were legal. They were neither set aside, varied, reviewed nor rescinded as provided for under the statutes creating the legal regime. How then can enforcement of such orders amount to or cause violation of the petitioner's constitutional rights to property. To my mind, the petitioner was indolent. The law, be it the constitution, does not aid the indolent. Again the law protects all. In this case the suit premises have since been transferred and registered in the name of the 5th respondent. He was an innocent purchaser for value without notice of any dispute between the 4th respondent and the petitioner. He is also entitled to constitutional protection just like the petitioner of his proprietary rights. It will be punitive of the 5th respondent to hold him to account for any misdeeds, mischief and or fraud, if at all, that was committed by the original owner of the suit premises unknown to him.

Finally, the petitioner is complaining of misdeeds committed against her sometimes in 2009. The constitution upon which the petition is anchored came into force on 27th August, 2010. Much as the petitioner has cited section 19(sixth schedule) of the constitution, it cannot apply or operate retrospectively. Whether a law can operate retrospectively has been the subject of many decisions of court in the past. Suffice to quote what **Sir Clement De Lestang V.P** said in the case of **Jivraj –vs- Jivraj (1968) E.A 263.** He stated thus ***"…My reasons for arriving at this conclusion are briefly the following. It is well known principle of law that … in general, when the law is altered during pendency of an action, the rights of parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights…".*** This principle is embodied in our written law, namely section 23(3) of the **Interpretation and General Provisions Act** (Cap 2 of Laws of Kenya). More recently, the issue was revisited by the Court of Appeal in the case of **David Njoroge Macharia –vs- Republic eKLR**, and which is apt in this case. The case concerned the interpretation of article 50(1) of the current constitution which provides that an accused person shall have an advocate assigned to him by the state at the state's expense, ***"if substantial injustice would otherwise result"***. Although the court held that in terms of article 50 aforesaid, the state must provide an advocate for an accused at her expense, nonetheless the court dismissed the appeal on the grounds that the trial of the case had taken place before the promulgation of the constitution. The court poignantly stated ***"…The reasons for this are that, firstly, the provisions of the new constitution were not to be applied retroactively…".*** To the extent therefore that the complaints of the petitioner relate to the period prior to the promulgation of the constitution, they are unsustainable if they are hinged on the current provisions of the constitution as indeed they are.

For all the foregoing reasons, I deem that the petition is unproved. Accordingly it is dismissed with costs to the 5th respondent.

Judgment dated, signed and delivered at Kisii this 23rd day of September, 2011.

ASIKE-MAKHANDIA
JUDGE