REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Miscellaneous Application 88 of 2006

KATEE KIITI …….. PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL …… 1ST RESPONDENT

EDWARD KIEMA NDOLO …… 2ND RESPONDENT

RULING

1. The Petition dated 27/6/2006 is premised on Section 70 (a) and (c), Section 75, Section 76 (1), Section 77 (9) and (10) of the Constitution.

2. The Petitioner's prayers are the following:-

a. "A declaration be issued declaring that the proceedings and rulings of the Kaveta Land Adjudication Committee given on 27th November 1973, the Arbitration Board given on a date unknown, the objection committee given on 13th June 1977 and the proceedings and judgment of the Minister (District Commissioner Kitui) for lands respecting L.R. No. Kyangwithya/Kaveta/355 given in or about 2004 or 2005 contravened sections 70 (a) and (c) 75, 76 (1), 77 (9) and (10) of the constitution and is therefore null and void.

b. An order be and is hereby given quashing the proceedings and Rulings of Kaveta land Adjudication Committee given on 27th November 1973, the Arbitration Board given on a date unknown and the proceedings and judgment of the Minister for lands (District Commissioner Kitui) given in or about 2004 or 2005 or thereabouts respecting L.R. No. Kyangwithya/Kaveta/355.

c. A declaration be issued declaring that the proceedings and rulings of the Kaveta land Adjudication Committee given on 27th November 1973, the Arbitration Board given on a date unknown, the objection committee given on 13th June 1977 and the judgment of the Minister (District Commissioner Kitui) for lands respecting L.R. No. Kyangwithya/Kaveta/355 given in or about 2004 or 2005 are unconstitutional for infringing upon the petitioners right to protection from deprivation of property under section 75 of the constitution.

d. A declaration that the petitioner is entitled to removal of a restriction placed on L.R. No. Kyangwithya/Kaveta/355 by the chief land registrar.

e. Or such other order(s) as this Honourable court shall deem just."

3. In his Affidavit in support, the Petitioner, Katee Kiiti depones as follows:-

That in 1971, land parcel No. Kiangwithya/Kaveta/355 was allocated to him during the process of land demarcation. That on 17/7/1984, he was registered as proprietor of the land and I note that from the extract of the register, on the same day, a restriction was registered on the title, subject to the determination of an appeal before the Minister in-charge of lands. That the Appeal referred to was **Appeal No. 41 of 1977** in respect of Kaveta Adjudication Section and to his knowledge, one Syombua Kiiti named in the Appeal had no interest in the land at all. That the Appellant in that case was one Edward Kiema Ndolo son of Ndolo Ngundo who was claiming the land from the said Syombua Kiiti. The Applicant also insists that at no point was he involved in the dispute until the restriction was placed and so he appeared before the District Commissioner, Kitui when the Appeal was heard. Prior to that he knew nothing of proceedings before the Kaveta Land Adjudication Committee and the Arbitration Board and to his mind all the decisions were unlawful as they failed to involve him as the proprietor of the suit land.

4. In any event, it is the Petitioner's case that the dispute between Syombua and Ndolo related to parcel No. 352 and it was unlawful for the Land Adjudication Committee to purport to share out parcel No. 355 to strangers and that the Interested Party, Edward Kiema Ndolo, is using the District Commissioner's decision to interfere with the applicant's right to the suit land. That the actions of all parties are a breach of the law and specifically the Applicant's constitutional rights.

5. Edward Kiema Ndolo in response to the issues raised by the Petitioner filed what is called a "**Statement of Defence"** as well as a Replying Affidavit sworn on 16/8/2006. Of specific interest is paragraph 5 of the statement where he pleads as follows:-

"**5. The Petitioner has not disclosed the following facts, and instead he is hiding behind a thin membrane of a legal fallacy and imagines that the same cannot be disentangled to its bare position: that is;**

i. That **none of the original disputants were claiming the aforesaid of land known as Kyangwithya/Kaveta/355 as of rights.**

ii. That **the disputants were claiming the aforesaid as inheritants from either the father in relation to the second Respondents father and from husband in the cases of Syombua Kiiti the Petitioner's mother.**

iii. That **the Petitioner had only been adjudicated (sic) as proprietor but for the benefit of other family members that is, his mother and brothers.**

iv. That **when the dispute started at the adjudication committee, the Petitioner's mother known as Syombua Kiiti stood over to fight for the same land by virtue of having inherited the same from her late husband, the Petitioner's father.**

v. That **both disputants as they were during the adjudication process and even now thy all share a common grandfather and hence the land is ancestral rather than individual as the Petitioner would like to purport.**

vi. That **in such scenario where the land in dispute emunates from a common ancestors, it is only the parents who can fight for the land and hence the Petitioner kept aside as the mother pursued the disputed land with the adjudicating authorities for the benefits of the sons the Petitioner included.**

vii. That **the Petitioner is only hiding behind the fact that he was allowed to be adjudicated over the parcel of land in dispute when the adjudication process started.**

viii. That **the initial registration at the onset of the adjudication process was not final and hence the various disputes as evidenced by the cases filed in each stage to the last in which the Petitioner was all aware about the process.**

ix. At the adjudication committee stage, the petitioner had been sued as a party but he never appeared to testify and his mother pursued the claim and succeed (sic) to have the parcel subdivided into two portions. The Petitioner never appealed nor did he raise any complaints about that outcome as subdivision is a question of some visible physical features being put on or affixed to the land.

x. That**, from the profile given by the Petitioner, it is obvious from his chronology of events that he was all along aversed (sic) to the happenings and proceedings being taken in relation to the disputed parcel yet, he kept quiet all along.**

xi. That **it is obvious from the facts emerging that this petition is none other than a legal plug being used as the only left legal straw to clutch on after the family of the petitioner failed to exercise the only option available after the determination by the Minister as constituted for the purposes of the Land Adjudication Act Cap 284 Laws of Kenya.**

xii. Indeed, during the hearing of the appeal before the Minister (The DC), the Petitioner testified as follows, quote, "The land in dispute was inherited by the late Syombua from her deceased husband Kiiti"….. When land adjudication started the partition was registered under Katee Kiiti name. Ndolo sued at committee stage and won the case. I appealed to arbitration board and lost. Then I appealed to objection board and won the case. Ndolo appealed to the Minister".

6. The same issues are repeated in the Replying Affidavit and I see no reason to repeat the same.

7. I have read the submissions by the advocate for the Petitioner and Interested Party. I have also perused the authorities submitted and what cannot be contested are the following facts;-

The Petitioner and the 2nd Respondent have a common ancestry. There is also no doubt that the

Petitioner's mother, Syombua Kiiti and the 2nd Respondent's father, Ndolo Ndungo were the original disputants as regards the suit land. Syombua Kiiti was claiming the land as her husband, Kiiti Mutulu, had died. In its decision, the Land Adjudication Committee found as follows on 27/11/1973;

"**The Plaintiff and Defendant belong to one grandfather"**

and

The committee then concluded as follows:-

"**As both parties had no boundary visibly seen on the ground, a boundary is necessary."**

8. The Committee then decided to divide the disputed parcel of land into two parts – "**the lower part to remain with the defendant (Syombua Kiiti) and the upper part to remain with the plaintiff (Ndolo Ngundo)."** A sketch map was drawn to indicate where the boundaries would pass. An Appeal by Syombua Kiiti to the Arbitration Board was dismissed. In his award the District Commissioner stated thus;-

"**Appeal No. 41 of 1987 by Ndolo Ngundo annexation of part of parcel No. 352 allowed. The ruling delivered by the arbitration board against parcel No. 355 (shaded in map) upheld. The same was never challenged and is now time-barred. Accordingly Mr Ndolo is awarded the shaded part of parcel No. 355."**

9. It is important at this stage to reproduce the District Commissioner's findings verbatim. He stated as follows:

"**The case started at the adjudication committee being case No. 29/73-74 for parcel No.355 filed by Ndolo Ngundo against Syombua Kiiti. The ruling was that the parcel be divided into two parts. The subdivision was done. Syombua Kiiti appealed to Arbitration Board for recovery of the part. She lost to Ndolo Ndundo. She lost the appeal again in the board as it adopted the decision of land adjudication committee. Syombua never appealed to objection board over parcel No. 355 which was in dispute. This in essence meant that she was satisfied with the ruling of the arbitration board, which awarded part of parcel No.355 (shaded in the map) to Ndolo Ngundo.**

However, instead of Syombua Kiiti appealing to the objection board over parcel No. 355 which was in dispute, she started a new case and filed her objection against parcel No. 352 which had no case. The objection board went ahead and allowed the objection without showing the extent to which Syombua Kiiti was claiming part of parcel No. 352. No sketch map was drawn hence rendering the decision by the objection board difficult to implement.

Mr Ndolo Ngundo's appeal to the Minister was consistent, strictly claiming part of parcel No. 355 which is shaded. Since the same has never been challenged by Syombua Kiiti, this court too has no grounds for not allowing Mr Ndolo Ngundo the right to it."

10. That decision is the subject of these proceedings but it is quite clear to me that the Petitioner was in fact a party to only part of the proceedings touching on parcel No. 355. However how then did he get

himself registered as the proprietor thereof? I cannot tell from the evidence before me, how he came to be registered over that land on 17/7/1984. However I am certain that on that date, the proceedings between his mother and Ngundo Ndolo were not finalized, hence the restriction entered on the same day. It is important to note also that in proceedings before the District Commissioner, Ngungo Ndolo was recorded as deceased as was Syombua Kiiti and it was the Petitioner who appeared on Syombua's behalf and testified as such. Similarly, the 2nd Respondent testified on behalf of his deceased father, Ngundo Ndolo, and therefore the decision affected each one of them directly. In answer to my question above, one can only surmise that the Petitioner inherited the land from his mother, continued the Appeal on her behalf and for his benefit because he had been registered over the parcel of land subject to the restriction which was dependent upon the outcome of the Appeal.

11. Turning to the restriction, Section 136 – Section 138 of the Registered Land Act, Cap 300 provides as follows:-

"**136. (1) For the prevention of any fraud or improper dealing or** for any other sufficient cause**, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

(2) A restriction may be expressed to endure-

(a) for a particular period; or

(b) until the occurrence of a particular event; **or**

(c) until the making of a further order,

and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The Registrar shall make a restriction in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.

137. (1) The Registrar shall give notice in writing of a restriction to the proprietor affected thereby.

(2) So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the Registrar.

138. (1) The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and ma make an order as to costs." *(Emphasis added)*

12. The import of all the above provisions is that a restriction may be placed against a title after due process and it can also be removed after due process. In the instant case, I have seen no evidence that the Petitioner did not know of the restriction and the fact that he exhibited an extract of title with the restriction clearly indicated convinces me that he was aware of it. In any event and with respect, the Petitioner completely misunderstands the proceedings leading to the Appeal before the Minister. The proceedings were entirely lawful and procedural. It is trite law that the Minister is not bound to follow strictly the Civil Procedure Rules and is flexible in the way he handles the matter, even on appeal. In **Makenge vs Ngochi C.A. 25/1978 (U.R)** it was held as follows:-

"**But no such duty (as under section 12 of the Act) to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, by section 29 of the Act, is to "determine the appeal and make such order thereon as he thinks just."**

Further in **Mahaja vs Khutwalo** it was held as follows:-

"**6. Having embarked on hearing one side, it was the duty of the tribunal to hear the other. A failure to do so would amount to an error on the face of the record requiring correction by way of** certiorari**."**

13. The complaint that the Minister took evidence on appeal is wholly misguided because the procedure used was used in favour of both parties and so none suffered any form of prejudice.

14. Regarding Section 27 and Section 28 of the Registered Land Act, Cap 300, again a casual reading of the sections would tell why the Petitioner is misguided. The sections provide as follows:-

"**27.** Subject to this Act-

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired

subsequently for a valuable consideration or by an order of court, shall not be liable to the defeated except as provided in this Act, **and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register;

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee." *(Emphasis added)*

15. The words "**subject to this Act"** are often times ignored in the glorification of absolute title. I have elsewhere above reproduced Section 136 – Section 138 regarding the powers of the Registrar regarding restrictions and so, Section 27 and Section 28 must be read with those sections to explain the importance of restrictions. The one in this case was neither improperly placed nor was it an impeachment of title. The title was granted on a condition and so it remains so, inspite of Section 27 which in no way was breached.

16. I should now turn to the constitutional issues raised. The Petitioner has invoked Section 7 (9) – the right to an expeditious trial. Granted, the section provides a right to a "**fair hearing within a reasonable time".** Sadly, the Petitioner has failed to show the breach in that regard. On one hand he claims that he did not know of the proceedings relating to the land and on the other hand, evidence points to the fact that he knew of them and only joined the proceedings when his mother died. He cannot therefore deny knowledge of prior proceedings and then claim delay. He has not complained that there was any delay since he became personally seized the dispute.

17. He also protests that the Minister in his decision took away his land contrary to Section 75 of the Constitution. I have said that the Minister through the District Commissioner was properly seized of the dispute under the Land Adjudication Act. Section 29 (1) of that Act provides as follows:-

"**29. (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-**

a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b. sending a copy of the appeal to the Director of Land Adjudication,

and the Minister shall determine the appeal and make such order thereon as he thinks just and the

order shall be final."

This is what happened in this case and the Minister was properly seized of it.

18. The Petitioner's title was held subject to those proceedings and I see nothing unlawful or unconstitutional about that fact. The Petitioner may not be happy with the final decision made but Section 29 is clear and if he was not happy with the process leading to it, the remedy would have been in judicial review proceedings to challenge the efficacy and legality of that process. I am aware of course that under Section 84 (1) of the Constitution, a party can seek a remedy where there is breach of his fundamental rights. I see none in this case.

19. I should end by saying this;

This court expected the Petitioner to raise serious issues of a Constitutional nature. In the end however, what came out was a disgruntled litigant merely unhappy with the outcome of his case. The Petitioner also failed to disclose a number of pertinent facts which were well brought out by the 2nd Respondent in his response elsewhere reproduced above. A party approaching the Constitutional Court in such a fashion cannot get the benefit of a liberal interpretation of the spirit of the constitution.

20. The Petition before me is incompetent, lacking in substance and must and is hereby dismissed with costs to the 2nd Respondent.

21. Orders accordingly.

Dated and delivered at Machakos this **29th** day of **October** 200**9**.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau h/b for Mr Wati for Applicant**

Miss Katunga h/b for Mr Kilonzi for Respondent

ISAAC LENAOLA

JUDGE