



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 579 of 2008

GEORGE WAITHAKA GITURU.....APPLICANT

Versus

THE HON. THE ATTORNEY GENERAL & ANOTHER.....RESPONDENT

JUDGMENT

The Originating Summons dated 10th May 2004 is expressed to be brought under S.65, 84 and 123(8) of the Constitution and S. 3 A Civil Procedure Act and the Rules made under S.84 (6) of the Constitution.

The applicant George Waithaka Gituru seeks orders and declarations against the Hon. the Attorney General and John Nderi Gaturu (1st and 2nd Respondents).

The orders sought are as follows:

- 1) That a declaration be issued declaring that the award of the Githunguri Land Disputes Tribunal in Tribunal Case No. 5/02 made on 4th April 2002 respecting LR No. Githunguri/Githunguri/T 343 contravenes Section 75 of the Constitution and is therefore null and void;
- 2) That an order be issued quashing the decree of the Senior Resident Magistrate Githunguri dated 24th April 2002;
- 3) A declaration be issued declaring that the proceedings and decree made in favour of the 2nd Respondent in Tribunal Case No. 5 of 2002 by the Githunguri Land Disputes Tribunal and the Senior Resident Magistrate Githunguri are unconstitutional for infringing upon the Applicants right to protection from deprivation of property contrary to Section 75 of the Constitution.

The Originating Summons is supported by grounds found on the face of the application, an affidavit sworn by the Applicant on 10th May 2004, skeleton arguments dated 29th August 2006 and lists of authorities dated 25th September 2008.

The Applicant was represented by Kibe Mungai Advocate. The Originating Summons was opposed and the 1st Respondent filed grounds of opposition dated 9th May 2007 filed in court on 10th June 2007, skeleton arguments on 25th September 2008 and list of authorities dated 1st November 2007. Ms Mureithia urged the 1st Respondent's case. The 2nd Respondent filed a

replying affidavit dated 14th September 2007, skeleton arguments on 16th April 2007. Mr. Wati urged the 2nd Respondent's case.

The facts of this case are as follows;

The applicant claims to be the registered owner of LR Githuguri/Githunguri/T 343 in respect of which a title was issued on 3rd December 1980 under the Registered Land Act, Cap 300 Laws of Kenya. On 2nd April 2002, the 2nd Respondent applied to the Githuguri Land Disputes Tribunal seeking a share of the said land and the said Land Disputes Tribunal heard the claim and gave its award on 4th April 2002 and purported to subdivide the said land and share it out. That the 2nd Respondent is the Applicant's brother. The said award was read and confirmed by the Senior Resident Magistrate's Court Githunguri and a decree issued on 24th April 2002. It is the Applicant's contention that the tribunal and Senior Resident Magistrate's Court had no jurisdiction to give the said orders.

The Applicant being dissatisfied with the said decision appealed in Nairobi HMisc 229/03 in which he sought the two decisions of the Land Disputes Tribunal and Senior Resident Magistrate to be quashed (GWG 3). The 2nd Respondent opposed the Notice of Motion (GWG 4) and when it came up for hearing on 19th May 2003, the Interested Party raised a Preliminary Objection that the application had been brought outside the six months allowed by Order 53 Rule 2, Civil Procedure Rules which objection was upheld and his application was dismissed. The ruling of the court is exhibited as GWG 5. The Applicant is challenging the said decisions on the following grounds;

- a) That the Githunguri Land Disputes Tribunal had no jurisdiction to give the award dated 4th April 2002 and consequently the Senior Resident Magistrate's Court had no jurisdiction to give the decree on 29th April 2002;
- b) That the High Court in CM 229/03 found that the Tribunal had no jurisdiction to dish out the Applicant's Land;
- c) That the court or tribunal cannot constitutionally take away, derogate or otherwise take away a person's property;
- d) The duty of the court to uphold the Constitution and protect the Applicant's fundamental rights demands that the award and decree of the Githunguri Land Disputes Tribunal and Senior Resident Magistrate's Court be declared null and void.

Before the proceedings at the Land Disputes Tribunal were lodged, the 2nd Respondent had put a caution on the land and there was litigation by the Applicant seeking to remove it. The case was heard in Kiambu Court. The court held against the Applicant and the Applicant filed an appeal; C.A. 195/2000. The said appeal was heard by Justice Waki and by a judgment of 25th February 2002, the court upheld the decision of the Lower Court and dismissed the appeal and that judgment suggested that the matter could be adjudicated before a Land Disputes Tribunal, (at page 8 of the judgment).

Mr. Kibe submitted that the dispute between the Applicant and the 2nd Respondent was actually one of ownership of land and the ruling of Justice Waki could not confer any jurisdiction on the lower court and cannot be a justification for the claim at the tribunal.

It was also Counsel's submission that once the Applicant is able to establish that the decision of the Land Disputes Tribunal and Senior Resident Magistrate's Court are illegal, this court has jurisdiction under Ss. 65 and 84 of the Constitution to quash them. He urged that judgment is an outcome of proceedings and a Constitutional Court can unravel proceedings as it falls within

an action envisaged under S.84 of the Constitution. That the decision of the Court touches on the Applicant's property rights and a constitutional cause of action is available under S. 84 (1) of the Constitution. That the Applicant could have filed the proceedings in the Judicial Review Court and under S. 84 of the Constitution because his rights under S. 75 were infringed since there is a taking away of his property compulsorily. That the effect of the two decisions is the taking away of ½ of his property. That Justice Waki's decision seemed to suggest that there was a trust relationship but that it was merely obiter. That there has been no appeal against the 2 decisions of Waki and Ojwang JJ.

Counsel further urged that Justice Onjwang's decision is not a bar to the Applicant coming to court for redress. That the courts are bound under S. 3 of the Judicature Act, to exercise their jurisdiction in conformity with the Constitution. That the courts are the guarantors of fundamental rights and if there are violations the courts are obligated to give redress.

It was also contended that in the exercise of the Tribunal and Senior Resident Magistrate's court jurisdiction, there was violation of the Applicant's rights because the decision they made should not have been made. That the High Court has supervisory powers over the said court and Tribunal under Order 53 Civil Procedure Rules (Ss.8 and 9 of the Law Reform Act) and Ss. 65 and 84 of the Constitution.

That whereas Justice Ojwang restricted himself to Judicial Review jurisdiction, S.65 of the Constitution is wider, in its review and supervisory jurisdiction. That a court of appeal cannot deal with applications on infringement of rights but such an application has to be originated in the High Court.

In reply to the objection made by the Respondent and Interested Party that this matter is res judicata, Counsel submitted that this dispute has never been heard. That the case before Justice Ojwang was one of Judicial Review and this case falls within the scope of an alternative remedy. Reliance was made on the case of **FLORENCE KIOGORA & 3 OTHERS V THE BOARD OF TRUSTEES, TELEPOSTA PENSION SCHEME NRB HCC 1430/05** where the court in considering S. 84 (1) of the Constitution said that an application under the section can lie notwithstanding another alternative remedy. Counsel also relied the case of **APOLONARY KENDUIYWA V SOY DIVISION LTD. HMISC 302/03 (ELD)** where the court held that the Land Disputes Tribunal does not deal with issues of title to land or ownership and cannot confer any interest of a proprietary nature.

In **R V JACKSON MWALULU HMISC 1279/04** the court quashed the decision made outside the 6 months requirement by an order of certiorari. That since the decision of the Tribunal was a nullity for want of jurisdiction, it should be struck out on that basis as there is no limit of time for quashing nullities. In **AMBALE V MASIOLA (1986) KLR 241**, the court held that the jurisdiction to challenge title can only be done under S. 143 of the Registered Land Act. Counsel urged that extra ordinary wrongs call for extraordinary remedies and relied on the case of **KBS LTD V AG MISC 413/05**. That in this case there have been extraordinary wrongs that call for extraordinary remedies.

Ms Mureithia opposed the Originating Summons based on the grounds that it is res judicata and is misconceived and bad in law. She argued that the issues of jurisdiction were not raised before Justice Ojwang and that the Applicant is estopped from coming to court now. That the judge ruled that there were no provisions for extension of time. That the same issue was dealt with in HCC 195/00 by Justice Waki as he then was and Justice Waki upheld the decision of the lower court and the same issue cannot be raised again. Counsel submitted that in the **KBS Case (supra)**, the court held that res judicata applies to constitutional applications. That that judgment cannot be quashed on the basis of its unconstitutionality unless the judge acted outside his mandate. That the Applicant having failed to appeal against the decision of the judge, cannot raise the issue now, as this court is being asked to act as an appellate court. That the Applicant has not shown what fundamental rights were breached. According to Ms

Mureithia, this application amounts to an abuse of the court process. That there is nothing exceptional about these proceedings. Mr. Wati in opposing the Originating Summons on behalf of the 2nd Respondent associated himself with the submissions of the 1st Respondent that the matter is res judicata. Counsel explained further what had happened in the cases before the other courts, that CA 195/00 emanated from RMCC Court 771/1998 (Kiambu). That the Applicant had applied for removal of caution in RMCC 771/98, the 2nd Respondent counter claimed for a declaration of trust and subdivision of the land. The claim for removal of caution was dismissed and the court referred the counterclaim to the Land Disputes Tribunal for resolution. The Petitioner appealed and Justice Waki agreed with the Lower Court. That Justice Waki evaluated the evidence of the Lower Court and found the Applicant to be a trustee and found that there may be an issue of division of land by the tribunal and that it fell under the ambit of the Land Disputes Tribunal and he dismissed the appeal. The matter was sent back to the tribunal whose decision was confirmed by the Senior Resident Magistrate's Court. That the issue of jurisdiction was canvassed before the High Court (Justice Waki) and the judgment has never been faulted and therefore this application is misplaced as there is no evidence of violation of any rights under S. 75 of the Constitution and that in any case S. 75 (6)(a) of the Constitution gives exception to anything done within the law, that it is execution of court's order or judgments. That the court having declared that a trust existed, giving effect to the trust was not violation of the Applicant's rights.

It was also Mr. Wati's submission that the Applicant has exhausted the fora for redress in that when he was referred back by Justice Waki to the tribunal, he lodged a notice of appeal to the Court of Appeal and asked for stay and the matter went back to Justice Waki who heard it and dismissed it. Thereafter, the Applicant filed 229/03 before Justice Ojwang who dismissed the application on a preliminary objection. It is Counsel's view that Justice Ojwang's views were obiter as he was not seized of the full facts. Counsel relied on the case of **ANARITA KARIMI NJERU V THE REP 1979 1 KLR 154** where the issue of this court's jurisdiction in such matters was considered. That Justice Waki having determined the issue of jurisdiction, this court cannot possibly reconsider it as there would be need to call for evidence under Ss 28 and 126 of the Registered Land Act as the same raises issues of fact. That under S. 143 of the Registered Land Act, title can only be challenged under S. 28 and 126 of that Act and that the Interested Party (2nd Respondent) was not challenging title but asserting title, that he was a co-owner and that there existed a trust without registration.

The court has considered the affidavits filed in support and in opposition to the Application including written submissions and the bundle of authorities filed on behalf of all the parties.

The Applicant brought this originating summons under S. 84 of the Constitution which is the enforcement section of the Bill of Rights. One of the declarations sought is that the award of the Land Disputes Tribunal Githunguri in Case No. 5 of 2002, on 4th April 2002 contravenes S. 75 of the Constitution. That Section offers protection against compulsory acquisition or deprivation of property. It reads as follows:

“S 75 (1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-

- (a) the taking of possession or acquisition is necessary in the interests of defence, public safety or utilization of property so as to promote the public benefit;**
- (b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and**
- (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.**

(2)

(3)

Like all other rights under the Bill of Rights Chapter V of the Constitution, the protection under S.75 is not absolute but has limitations under S. 75 (6).

It reads;

“75 (6) nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) –

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property;

(i) in satisfaction of any tax, duty, rate, cess or other impost;

(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;

(iii) as an incident of lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants.”

Apart from a mere allegation that his property was compulsorily acquired, the applicant has not demonstrated how he has been aggrieved. This court has repeatedly said that an Applicant alleging breach or threatened breach of his fundamental rights must demonstrate the actual existence of the said injury. It is not enough to allege infringement without particularizing the manner of that infringement. The court considered that it is in **ANARITA KARIMI NJERU V R (No.1) (1979) KLR 154** where Trevelyan and Hancox JJ said

“we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

In the present case the Applicant has not even attempted to show that his land was compulsorily acquired.

The Applicant also invoked S. 123 (8) of the Constitution. That provision reads,

“123 (8) No provision of this constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.”

Again, we find that the Applicant has not even attempted to demonstrate that the courts whose decisions are impugned acted outside their mandate, acted capriciously as were biased in their

decisions. The said courts may have erred in their decisions but that does not avail the Applicant a cause of action under the above provision because the Applicant could have appealed which he opted not to. We find no basis for invoking that section of the Constitution.

It is clear to the court that the principle issue raised is that of the jurisdiction of the tribunal and by extension that of the Senior Resident Magistrate Court at Githunguri – Kiambu District. However, Hon. Justice Waki as he then was, in a judgment dated 25th February 2002 gave a judgment on the issue of jurisdiction and the existence of a trust. Under the relevant law regulating the land in question, a trust is recognized even where it is not registered. The learned judge having held that the Applicant held it in trust after evaluating the evidence in the lower court the second Respondent though not registered is an owner of the property in question for the purposes of S.75 of the Constitution. Any intended subdivision or registration following a subdivision, would not in our view violate S. 75 of the Constitution. What is being done is an extension of judgment or orders of a court in proceedings for determination of civil rights or obligations see S 75(6) (a)(iv). In addition S 75 (6) (b)(iv) clearly recognizes a law that creates a trust or recognizes trusts such as the Registered Land Act. It reads:-

“property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.”

With respect, Justice Waki’s judgment falls squarely under S 75 (6)(b)(iv) and has the recognition of the Constitution. Whether the judge was right or wrong is beside the point since no appeal was filed and there is no deprivation or taking away of property compulsorily.

The additional reason why this application must fail is that the matter is res judicata because the issue of jurisdiction of the tribunal has already been determined by a competent court and we repeat that there was no appeal. This court sitting as a constitutional court has no appellate jurisdiction over those orders.

As Justice Nyamu held in the **KENYA BUS SERVICE LTD & OTHERS V ATTORNEY GENERAL & OTHERS HC MISC CIVIL APPLICATION NO. 413 OF 2005** (since reported), our Constitution does recognize the existence of all fundamental principles of law including res judicata. In addition the 2nd Respondent is not capable of securing and guaranteeing fundamental rights. This is the responsibility of the Government. The orders sought cannot lie against the 2nd Respondent.

Lastly, we are of the view that the Applicant is guilty of material non disclosure in that nowhere in his affidavit does he refer to the judgment CA 195/00 in which Justice Waki considered the question of jurisdiction which was really the main issue before this court. He merely exhibited the ruling by Justice Waki in which he applied to stay the proceedings before the Land Disputes Tribunal pending determination of an appeal in CA 195/00 and which application was dismissed. It is not until the Respondent exhibited Justice Waki’s judgment in CA 195/00 that this court was able to appreciate all the facts underlying this dispute. Failure to plead that judgment was done in bad faith as crucial facts were withheld from the court and that failure to disclose disentitles the Applicant to the prayers sought.

For the above reasons, the motion is dismissed with costs.

Dated and delivered at Nairobi this 5th day of December 2008.

J.G. NYAMU

JUDGE

R.P.V. WENDOH

JUDGE

Present:

Mr. Kibe Mungai for the Applicant

Ms Mureithia for the 1st Respondent and holding brief for Mr. Wati for the 2nd Respondent

Njoroge: Court Clerk

Daniel: Court Clerk