



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**PETITION NO. 26 OF 2019**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS & FREEDOM OF THE INDIVIDUAL UNDER ARTICLES 21, 40,  
47, 50 AND 64 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: LAND DISPUTE NO. 88 OF 2007  
JOYCE LENGA –VS- WILSON EZEKIEL TSUMA & 2 OTHERS**

**AND**

**IN THE MATTER OF: LAND DISPUTE NO. 43 OF 2007  
JOYCE LENGA –VS- WILSON EZEKIEL TSUMA & 2 OTHERS**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA  
(SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL  
RIGHTS & FEEDOMS OF INDIVIDUAL) RIGHT HIGH COURT PRACTICE RULES 2013**

**AND**

**IN THE MATTER OF: PLOT NO. KILIFI/NGERENYA/731 ADJUDICATION SECTION.**

**AND**

**IN THE MATTER OF: ARTICLES 20, 21, 22 & 23 OF THE CONSTITUTION OF KENYA,  
THE ENVIRONMENT & LAND COURT ACT NO. 19 OF THE 2011 SECTION 9,  
10 AND 11 OF THE LAND ADJUDICATION ACT CAP 284**

**LAWS OF KENYA & THE LAND ACT NO. 6 OF 2012**

**BETWEEN**

**LENNOX MWADZOYA MWASIRYA.....PETITIONER**

**VERSUS**

1. JOYCE LENGA

2. DEPUTY COUNTY COMMISSIONER-KILIFI

3. THE LAND DISTRICT ADJUDICATION OFFICER

4. THE LAND REGISTRAR-KILIFI

5. THE ATTORNEY GENERAL.....RESPONDENTS

### RULING

1. This Ruling relates to the Petitioner's Notice of Motion dated 21<sup>st</sup> August 2019 and the 1<sup>st</sup> Respondent's Preliminary Objection dated 2<sup>nd</sup> December 2019.

2. By the said Notice of Motion, Lennox Mwadzoya Mwasirya (the Petitioner) prays for orders: -

***4. That pending the hearing and determination of this application inter-partes, a conservatory order be issued staying the implementation of the decision and order of the 2<sup>nd</sup> Respondent made in Land Dispute No. 88 of 2007 Joyce Lenga –vs- Wilson Ezekiel Tsuma & 2 Others that the 1<sup>st</sup> Respondent be registered as the owner of three acres within Plot No. Kilifi/Ngerenyi/731 and staying the issuance of any Title Deed to the 1<sup>st</sup> Respondent as owner of the said Plot and staying the issuance of any Title Deed to the 1<sup>st</sup> Respondent as owner of the said Plot pending the hearing and determination of this Petition.***

***6. That the Conservatory order issued herein be registered at the Land Registry against Plot No. Kilifi/Ngerenyi/731.***

3. The application which is supported by an affidavit sworn by the Petitioner is premised on the ground that the 1<sup>st</sup> Respondent is currently in the process of registering a title for Plot No. Kilifi/Ngerenyi/731 pursuant to an order of the 2<sup>nd</sup> Respondent made in the said Land Dispute Case to the effect that the 1<sup>st</sup> Respondent be registered as the owner of three acres within the said parcel of land.

4. In a Replying Affidavit sworn and filed herein on 3<sup>rd</sup> December 2019, Joyce Lenga (the 1<sup>st</sup> Defendant) avers that the Petitioner has not met the threshold for the grant of orders sought. She avers that the sub-division of the suit property took place in 2009 and the transfer is to be executed by an officer of the Court pursuant to a Court order.

5. The 1<sup>st</sup> Defendant concedes that the Petitioner was not a party to the Land Disputes Tribunal case but asserts that he was aware of the same as the Respondents in the dispute before the Tribunal are his blood brothers. She further avers that the Respondents in the Land Disputes case were served and that the fact that they failed to attend the proceedings does not invalidate the proceedings and the award which was endorsed in the Kilifi Magistrates Court.

6. The 1<sup>st</sup> Defendant further avers that this Petition is filed in abuse of the Court process as the Respondents in the Land Disputes case and the Petitioner herein did not appeal against the Tribunal's award.

7. Similarly by their Joint Grounds of Opposition dated 7<sup>th</sup> November 2019 as filed herein on 18<sup>th</sup> November 2019, the Deputy County Commissioner-Kilifi North, the Land District Adjudication Officer, the County Land Registrar, Kilifi and the Honourable the Attorney General (the 2<sup>nd</sup> to 5<sup>th</sup> Respondents) object to the application on the grounds:-

***1. That the Petition is misconceived and an abuse of the Court process;***

***2. That the entire suit is non-starter and incompetent;***

***3. That the 2<sup>nd</sup> Respondent acted in due compliance of law and the laid down procedure;***

***4. That the Petitioner's right to fair administrative action enshrined in Article 47 of the Constitution has not been violated in view of the fact that he obtained Letters of Administration to the Estate of Mwasiria Konde Tuva on 13<sup>th</sup> July 2018 and Judgment in Land Disputes Tribunal Claim No. 88 of 2007 was delivered on 30<sup>th</sup> October 2007;***

***5. That the Petitioner's rights under Article 47 and 50 has not been violated. The Land Dispute Tribunal in their Judgment delivered on 30<sup>th</sup> October 2007 state that the Defendants in the dispute despite being served with hearing notices ignored or decided not to appear before the Tribunal to defend their claim;***

***6. That the Petitioner/Respondent was not a party to the proceedings in Land Disputes Tribunal Claim No. 88 of 2007 and lacks the requisite locus standi to institute and/or prosecute this suit against the 2<sup>nd</sup> to 5<sup>th</sup> Respondents;***

***7. That the present Petition is a camouflage to relitigate a fresh issues that were determined in Land Disputes Tribunal Claim No. 88 of 2007;***

**8. That no appeal was preferred against the decision of the Land Disputes Tribunal in Land Disputes Tribunal Claim No. 88 of 2007 delivered on 30<sup>th</sup> October 2007 and adopted as an order of the Court by the Senior Resident Magistrate on the 11<sup>th</sup> November 2008;**

**9. That grant of the orders sought herein would totally prejudice the Respondents;**

**10. That the Petitioner is guilty of laches and not deserving of the orders sought;**

**11. That the Petition is otherwise an afterthought and ought to be dismissed with costs.**

8. In addition to her Replying Affidavit filed herein on 3<sup>rd</sup> December 2019, the 1<sup>st</sup> Respondent also filed a Preliminary Objection stating that the Petition herein is bad in law and an abuse of the Court process pursuant to Order 53 of the Civil Procedure Rules, Section 29 of the Land Adjudication Act, Articles 27, 40, 47, 50, 68, 159 to 162 of the Constitution of Kenya, 2010 and provisions of the Land Act, Land Registration Act and the Environment and Land Court Act.

9. I have perused and considered both the Petitioner's application and the objection by the 1<sup>st</sup> Respondent. I have similarly perused and considered the rival submissions filed by the Learned Counsels for the respective parties.

10. In support of her Preliminary Objections, the 1<sup>st</sup> Respondent submits that the orders sought in the Petition are matters of Judicial Review and that the same ought to have been filed within six months from 30<sup>th</sup> October 2007 when the Land Disputes Tribunal delivered its decision. It is further the 1<sup>st</sup> Respondent's case that the orders of mandamus sought by the Petitioner cannot lie as the suit property is not presently under adjudication.

11. The 1<sup>st</sup> Respondent further faults the Petitioner for claiming that the 3<sup>rd</sup> Respondent has refused to issue a Discharge of Charge and asserts that that is not the responsibility of the 3<sup>rd</sup> Respondent. She also submits that the Petitioner has failed to state how any of the Respondent have failed to implement his rights and fundamental freedoms as provided under Articles 22, 40, 47, 50, 68, 159 and 162 of the Constitution.

12. In response to those issues, the Petitioner submits that the issues raised are not pure points of law but are issues which require proof through the tendering of evidence. The Petitioner further submits that the matter before the Tribunal proceeded ex-parte and that he only came to know about the same in 2018 when he was trying to get the Settlement Fund Trustee Charge thereon discharged. By then the stipulated time for filing Judicial review applications under Order 53 of the Civil Procedure Rules had passed.

13. The Petitioner submits that following the promulgation of the Constitution of Kenya, 2010, the provisions of Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules must conform to the Constitution or be contrived with such adaptations, alternations and modifications so as to conform to the Constitution. He asserts that the entrenchment of the power of Judicial Review as a Constitutional principle should of necessity expand the scope thereof and the requirements of leave to institute such proceedings is hence unnecessary.

14. In regard to the requirements of Section 29 of the Land Adjudication Act, the Petitioner submits that the 3<sup>rd</sup> Respondent acted ultra vires its powers by holding onto the charge and working in cahoots with the 1<sup>st</sup> Respondent in attempt to dispossess the Petitioner and the other beneficiaries of the Estate of Mwasirya Kende Tuwa of three acres of its land.

15. The Petitioner herein has come to Court in his capacity as the lawful administrator of the Estate of the late Mwasirya Konde Tuwa who he states was the lawful allottee of all that parcel of land known as Kilifi/Ngerenyi/731 comprising of some 12 acres. In his Petition dated and filed herein on 21<sup>st</sup> August 2019, he prays for the following reliefs: -

**1) A declaration that the issuance of a Title Deed to the 1<sup>st</sup> Respondent for the suit property acquired pursuant to a flawed decision threatens to further violate the Petitioner's right to fair administrative action as enshrined under Article 47 of the Constitution of Kenya;**

**2) An order of certiorari quashing the decision of the 2<sup>nd</sup> Respondent that allowed the 1<sup>st</sup> Respondent (to) be registered as the owner of the three acres of land within (the) parcel of land known as Plot No. Kilifi/Ngerenyi/731;**

**3) An order of mandamus compelling the District Land Adjudication Officer Kilifi to release the Discharge of Charge to the Petitioner to enable him to transfer the land to his name as the Administrator of the Estate of his late father Mwasirya Konde Tuwa or in the alternative this Court to determine the dispute of ownership of Plot No. Kilifi/Ngerenyi/731 on the available evidence adduced in the Petition; and**

**4) Costs of this Petition.**

16. At Paragraph 8 of the Petition, the Petitioner avers as follows: -

**8. That this Petition is in respect of (a) Land Dispute filed by the 1<sup>st</sup> Respondent being Land Tribunal Dispute No. 88 of 2007- Joyce Lenga –vs- Wilson Ezekiel Tsuma (hereinafter called the dispute) which concerned a parcel of land measuring three acres or thereabouts within a parcel of land situated at Ngerenyi Village within Kilifi County and known as Plot No. Kilifi/Ngerenyi/731 (hereinafter called the suit property).**

17. Those averments are repeated and amplified at Paragraphs 6 to 10 of the Supporting Affidavit to the Motion before me as follows: -

**6. That the 1<sup>st</sup> Respondent filed a Land Dispute at Bahari Land Dispute Tribunal in Land Dispute No. 88 of 2007- Joyce Lenga – vs- Wilson Ezekiel Tsuma & 2 Others which pleadings were abuse of the Court (sic) since the Defendants in that case were persona non grata having not obtained Grant (of) Letters of Administration in relation to the Estate of my late father Mwasirya Konde Tuva to defend the suit. I attach the proceedings of the Land Dispute Tribunal 88 of 2007 as exhibit No. 2:**

**7. That neither I nor the Defendants were served with the Land Dispute Pleadings the Chairman heard the dispute ex-parte notwithstanding service on the Defendants and gave a Judgment in favour of the Plaintiff in the Land Dispute and also made an order for the Court at Kilifi being Land Dispute No. 13 of 2007- Joyce Lenga –vs- Wilson Ezekiel Tsuma to enforce the Order and issue a Vesting Order against the Defendants. I attach hereto a copy of the Court Order as exhibit No. 3;**

**8. That in both the Land Tribunal and the Court proceedings the Defendants were never served with any documents nor participated in defending the suits since they were not the owners of the suit property and could not obtain Grant (of) Letters of Administration in relation to the Estate of the late Mwasirya Konde Tuva;**

**9. That the Petitioner obtained Grant of Letters of Administration for the Estate of the late Mwasirya Konde Tuva on the 13<sup>th</sup> July 2018 and were in the process of transferring the same into the Petitioner's names when they learnt of the vesting order pursuant to the proceedings in Land Dispute 88 and 43 of 2007. I attach hereto a copy of the Grant of Letters of Administration as exhibit No. 4; and**

**10. That the Petitioner filed an application in Land Dispute No. 43 of 2007 Joyce Lenga –vs- Wilson Ezekiel Tsuma and Others dated 2<sup>nd</sup> April 2019 (to) be enjoined to the suit however the application was dismissed by the Court which declared itself functus officio. I attach hereto a copy of the said Ruling dated 22<sup>nd</sup> July, 2019 as exhibit No. 5.**

18. As can be seen from the Petitioners averments above, the 1<sup>st</sup> Respondent herein had sued three people said to be sons of the Petitioners father Wilson Ezekiel Tsuma claiming three acre portion of land which the Petitioner's father is said to have sold to the 1<sup>st</sup> Respondent. While the Petitioner avers that the suit was brought against people who were "persona non grata", and those who had not obtained Letters of Administration, I did not think that that was prejudicial to the Petitioner.

19. Those sued in the Tribunal Case were named as Wilson Ezekiel Tsuma, Michael Mwangome and Franklin Tsuma. A perusal of the Certificate of Confirmation of Grant issued to the Petitioner at the Senior Principal Magistrate's Court Kilifi on 20<sup>th</sup> July 2018 reveals that amongst the beneficiaries to which the estate was to be distributed are people named therein as Wilson Tsuma Ezekiel, Mwangome Ezekiel and Salimu Mwasirya among others.

20. While the Petitioner claims that those sued in the Tribunal case were not served with the suit papers, he does not say how he came across the information. The only conclusion that one can derive from his protestations of non-service is that those who were sued were known to him. The Petitioner's claim that the Defendants in the Tribunal Case were not served is indeed answered by the Tribunal itself at paragraph 1 of its Judgment delivered on 30<sup>th</sup> October 2007 as follows: -

**"This land dispute was brought by the Plaintiff, Joyce Lenga against three Defendants, Wilson Ezekiel Tsuma, Michael Mwangome and Franklin Salim Tsuma. The dispute is over a portion of land within Plot No. Kilifi/Ngerenyi/731 measuring three acres or thereabouts. The Defendants having been served with hearing notices ignored or decided not to appear before the Land Tribunal to defend their claim. The Land Tribunal made its decision to proceed with the case in their absence under Section 13(9) of the Land Disputes Tribunal Act No. 18 of 1990."**

21. As it turned out, the Tribunal awarded the three acres portion of the land to the 1<sup>st</sup> Respondent and their decision was subsequently endorsed as an order of the Court on 11<sup>th</sup> November 2008 in **Kilifi Land Disputes Case No. 43 of 2007**. That decision has neither been appealed nor set aside.

22. By an application dated 2<sup>nd</sup> April 2019, the Petitioner herein sought to be enjoined in the **said Land Dispute Case No. 43 of 2007**. In a Ruling delivered on 22<sup>nd</sup> July 2019, the Honourable LN Juma SRM dismissed the application stating at the penultimate paragraph as follows: -

**"I note from the Court record that the vesting order herein was granted on 11<sup>th</sup> November 2008. The applicant in his application has not stated why it took him so long almost eleven years to bring the application herein. In my view the applicant is guilty of laches. Further I agree with the Respondent that once the award was adopted as a Judgment by this Court, then the Honourable Court became functus officio and cannot purport at this point to re-open the case for purpose of enjoining an Interested Party. It appears that the applicant is seeking for an appeal or review through the backdoor."**

23. That decision is what prompted the Petitioner to move to this Court and to lodge the Petition herein on 21<sup>st</sup> August 2019. I find and hold that the Petitioner is guilty of laches and that the Petition herein is filed in abuse of the Court process. Having failed to appeal and or set aside the adoption of the award in **Kilifi Land Disputes Case No. 43 of 2007**, it was not open for the Petitioner to come to this Court and institute a fresh claim alleging violation of his Constitutional rights. This Petition is nothing but a camouflage meant to re-litigate afresh issues that were long determined between the parties.

24. In the premises, I find merit in the Preliminary Objection and strike out both the Petition and the Notice of Motion dated 21<sup>st</sup> August

2019 with costs.

**Dated, signed and delivered at Malindi this 29<sup>th</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**