



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 66 OF 2018

PRISCILLA NANIA MBILA.....1ST PETITIONER

EDWARD NTHEI MBILA.....2ND PETITIONER

*(Suing as the legal representatives of the Estate of **DAVID MBILA LOLE (deceased)**)*

VERSUS

THE DISTRICT COMMISSIONER

KATHIANI DISTRICT.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

WAMBUA LOLE.....4TH RESPONDENT

MATHEW MUMO TATIA.....5TH RESPONDENT

KIOKO TATIA.....6TH RESPONDENT

HARRISON MULWA MUSANGA.....7TH RESPONDENT

PETER KAMWILU.....8TH RESPONDENT

JUDGMENT

1. In the Petition dated 27th December, 2018, the Petitioners averred that the deceased herein, David Mbila Lole, whose Estate is represented by the Petitioners herein, died on 18th July, 2000 and that before the deceased herein met his demise, he was involved in several disputes and particularly, Committee Case No. LA/MB/COM/101 against the 4th Respondent and the fathers of the 5th, 6th, 7th & 8th Respondents over ownership of P/No. 1894 Mbee Adjudication Section.

2. It was averred that on 20th December, 1982, the Land Adjudication Committee sitting at Lita heard the aforementioned dispute and that on 22nd December, 1982, the Committee made a finding to the effect that the deceased herein should be given a new number for the area he had bought while the remainder of the land should be registered in favour of the previous five names of David Mbila Lole (*the deceased herein*), Kiilu Lole, Joseph Tatia Lole, Wambua Lole and Kamwilu Lole.

3. It was averred by the Petitioners that from the aforesaid decision by the committee, the deceased herein partly won and partly lost the case because he had solely acquired the remainder of P/No. 1894 Mbee Adjudication section; that both the deceased herein and his son Jeremiah Maingi Mbila did not lodge appeals on time owing to indisposition and that the deceased herein passed away on 18th July, 2000 and his son Jeremiah Maingi Mbila raised an objection vide objection no. 82 MK AW 86 2841.

4. It is the Petitioners' case that on 19th June, 2002, the Land Adjudication Board sitting in Lita heard the dispute and thereafter made a

finding dismissing the Objection with costs and that the Objector being dissatisfied by the decision of the Land Adjudication Officer lodged an Appeal to the Minister vide Appeal Case No. 182 of 2002 in which the 1st Respondent dismissed the appeal and thus upheld the decision of the Land Adjudication Officer dated 19th June, 2002.

5. It was averred by the Petitioners that although the Ministerial Award is dated 18th March, 2013, the same was delivered on 25th March, 2015; that the 1st and 2nd Respondents did not give the hitherto Appellant the opportunity to produce all the documents he had regarding ownership of P/No. 1894 Mbee Adjudication Section and that the proceedings of the above mentioned Appeal Case No. 182 of 2002 were irregular because the 1st Respondent relied on a doctored-family-sub-division document contained in an exercise book.

6. According to the Petitioners, the 1st Respondent ignored the facts and misdirected himself in failing to appreciate that the deceased acquired and took possession of P/No. 1894 Mbee Adjudication section in 1934 and developed the same and that the 1st and 2nd Respondents misdirected themselves by failing to appreciate the fact that the 4th - 8th Respondents only started laying claim over the subject matter herein in 1982.

7. The Petitioners finally averred that the deceased's Estate was not accorded a fair hearing which is a non derogable right embedded under Article 50 (1) of the Constitution; that the 4th, 5th, 6th, 7th, & 8th Respondents are intending to facilitate the process of surveying P/No. 1894 Mbee Adjudication section and that the 5th and 6th Respondents have started cultivating and/or farming on the said parcel of land with impunity. The Petitioners have prayed for the following prayers to issue:

a) A declaration that the Appeal to the Minister No. 182 of 2002 was conducted irregularly and unfairly and for having not followed the laid down procedure on conducting an Appeal.

b) A declaration that the Estate of David Mbila Lole (deceased) and by extension the Petitioners are the bona fide and rightful owners of the remainder P/No. 1894 Mbee Adjudication section.

c) A permanent Injunction Order do issue against the 4th, 5th, 6th, 7th & 8th Respondents by themselves, their Servants and/or agents restraining them from trespassing, cultivating, farming and dealing in any way with P/No. 1894 Mbee Adjudication section.

d) A declaration that any intended Survey geared towards implementing the Award of the Minister in Appeal to the Minister NO. 182 OF 2002 is unlawful.

e) An order of certiorari to issue to bring to this Honourable Court for purpose of being quashed or to forthwith quash the Award of the Minister dated 18/03/13.

f) An order of mandamus to issue to compel the 2nd Respondent to delete the names of Kiilu Lole, Joseph Tatia Lole, Wambua Lole and Kamwilu Lole from the Register and issue the Petitioners with registration documents.

g) An award of compensation and/or exemplary damages.

h) Any other relief this Honourable Court deems fit and just to grant.

8. The 4th, 5th, 6th, 7th, and 8th Respondents filed Grounds of Opposition in which they averred that the Petition is general, speculative, and academic and is based on unsubstantiated fears of the violation of Article 40(1) & 40(2)(a) & (b) & Article 50 (1) of the Constitution of Kenya, 2010.

9. It was averred by the Respondents that the Petitioners should have challenged the decision of the Minister by way of Judicial Review; that Constitutional Petitions of the nature before the Court must be specific, based on tangible and cogent evidence and factual in nature and that the 5th, 6th, 7th and 8th Respondents are improperly sued or enjoined in the Petition as the legal representatives of their deceased's fathers, and that the Petition is hence fatally defective and incompetent.

10. The Respondents averred that this court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution and that this Petition is made in bad faith.

11. It was averred by the Respondents that the deceased, David Mbila Lole, having died on 18th July, 2000, the Petitioners should have obtained a full Grant of Letters of Administration to his Estate, if they were serious in administering his Estate.

12. It was averred that it is true there were previous proceedings regarding the subject matter of the Petition, one of them being, Committee Case No. LA/MB/COM/101 against the 4th Respondent in person and not the 5th, 6th, 7th and 8th Respondents and that the 5th, 6th, 7th and 8th Respondents do not understand how they have been dragged into this matter and yet they are not the personal representatives of their fathers who were the parties in the Committee Case No. LA/MB/COM/101.

13. According to the Respondents, the Committee Case No. LA/MB/COM/101 was concluded on merit and a sound decision made thereof by the Land Adjudication Committee; that no appeal was filed on time against the decision of the Committee Case No. LA/MB/COM/101 and that notwithstanding that no appeal had been preferred on time, the Land Adjudication Board, Lita, entertained the objection lodged by Jeremiah Maingi Mbila and dismissed it with costs.

14. It is the Respondents' case that the objector appealed to the Minister vide Appeal Case No. 182 of 2002 that was also heard and dismissed on merit and that the true and correct position regarding the subject matter herein is that before adjudication, the big family, that is, Sana Nthei family and Lole Nthei family deliberated on the division of its land that comprised of farm-land and grazing land.

15. The Respondents averred that in respect of the farm-land, the family decided that Lole Nthei family should continue using the part it had already occupied while the Sana Nthei family should continue occupying the part it had also been using.

16. It was deponed that when it came to the grazing- land, a dispute arose when David Mbila Lole claimed that the entire grazing- land belongs to him alone and not the family. That, according to the Respondents, is when the dispute was escalated to the Land Adjudication Committee.

17. The Respondents have averred that the Petitioners have not shown how the Appeal to the Minister Case No. 182 of 2002 was conducted irregularly and unfairly and what procedure was breached and that the Petitioners have not applied for Judicial Review of the Award of the Minister.

18. In the Further Affidavit, the 2nd Petitioner deponed that his late father, Jeremiah Maingi Mbila, solely acquired the subject matter herein being parcel number 1894 Mbee Adjudication Section in 1934; that during the hearing of the Appeal to the Minister vide Appeal Case Number 182 of 2002, they were not granted an opportunity to produce the ownership documents and that the family handwritten notes were doctored by the 7th Respondent.

19. In his submission, the Petitioners' advocate submitted that the deceased herein, David Mbila Lole, is the sole owner of the suit property herein being P/No. 1894 Mbee Adjudication Section; that the Petitioners are entitled to protection of the right to property as embedded under Article 40 of the Constitution and that the Petitioners were not granted the opportunity to produce the ownership documents and the Map for Mbee registration section. Counsel relied on the case of ***Kimeu Musyoka vs. District Commissioner Kathiani District & 10 Others [2019] eKLR*** in which this court held as follows:

“The Petitioner’s right to have the dispute concerning the suit Land decided in a Fair and Public Hearing before an Independent and Impartial Tribunal or body was therefore violated (See Article 50(1) of The Constitution). The 1st Respondent having not heard the Petitioner or any other living representative of the Respondents, and considering that the right to be heard is a valued right, I find that the Petition herein is meritorious. In deed it matters not that the Petitioner herein did not file an Appeal to the decision of the 1st respondent within the requisite time or that he has not challenged the decision of the Minister by way of Judicial Review. Once the Petitioner shows, which he has done, that the decision of the Minister is null and void and that the right to a fair hearing has been violated, this court is under a constitutional obligation to declare the decision null and void...”

20. The Petitioners' counsel also placed reliance on the case of ***Macfoy vs. United Africa Co. Ltd [1961] 3 ALLER, 1169*** where Lord Denning MR held as follows:

“If an act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an Order of the Court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse.”

21. On his part, the Respondents' advocate submitted that the two Petitioners are pursuing the Petition in their capacity as the legal representatives of the Estate of one David Mbila Lole (*deceased*); that Land Adjudication Appeal Case No. 182 of 2002 was instituted and prosecuted by one Jeremiah Maingi Mbila who is not one and the same person as David Mbila Lole (*deceased*) and that the Petitioners have no *locus standi* to prosecute a case on behalf of the said Jeremiah Maingi Mbila.

22. Counsel submitted that even assuming that the Petitioners had the requisite *locus standi* to institute the Petition, there would still be unanswerable challenge of the capacity to institute it against the 5th-8th Respondents; that each of the 5th -8th Respondents are sued in their capacities as sons and/or beneficiaries of: Joseph Tatia Lole (*in the case of the 5th and 6th Respondents*); Kiilu Lole (*in the case of the 7th Respondent*) and Kamwilu Lole (*in the case of the 8th Respondent*).

23. It was submitted that it is not possible to discern from the Petition whether any of the named Joseph Tatia Lole, Kiilu Lole and Kamwilu Lole are living or dead; that if the three are alive, then they should have been the ones to be sued and that if the three are deceased, then it is only those holding Grant of Probate or Letters of Administration to their respective Estates that could have been proper parties in this suit.

24. Counsel submitted that the Petitioners did not present a trace of evidence to substantiate their claim that the alleged Appellant in the Appeal was not allowed to produce all the documents he had and that the Petition should be dismissed. Counsel relied on numerous authorities which I have considered.

25. In the Petition before this court, the Petitioners have described themselves as the wife and son of the late David Mbila Lole. The Petitioners have described the 1st Respondent as *“the representative of the 2nd Respondent in hearing and determining the Appeal to the Minister No. 182 of 2002 (sic).”*

26. The 5th and 6th Respondents on the other hand have been described as the sons and or beneficiaries of the Estate of the late Joseph Tatia Lole, while the 7th Respondent is sued as the son and or beneficiary of the Estate of Kamwilu Lole.

27. According to the Petitioners, before David Mbila Lole died on 18th July, 2000, he was involved in several disputes against the 4th Respondent and the fathers of the 5th, 6th, 7th and 8th Respondents. It is the Petitioners' case that the said dispute was heard by the Committee, the Land Adjudication Officer and finally by the Minister pursuant to the provisions of the Land Adjudication Act.

28. The Petitioners' complaint is that the Minister, who was represented by the 1st Respondent, while dismissing the Appeal that was filed by Jeremiah Maingi Mbila, the son of the late Lole, on 18th March, 2013, did not give the Appellant an opportunity to produce all the documents in respect to P/No. 1894 Mbee Adjudication Section, thus infringing on his right to a fair hearing contrary to the provisions of Article 50 of the Constitution.

29. The two Petitioners are clear in their pleadings that they are pursuing the Petition in their capacity as the legal representatives of the Estate of one David Mbila Lole (*deceased*). Indeed, they have annexed on their Affidavit the Limited Grant of Letters of Administration Ad Litem in respect to the Estate of the late David Mbila Lole and Jeremiah Maingi Mbila.

30. The constitutional violations alleged in the Petition relate to the manner in which Land Adjudication Appeal Case No. 182 of 2002 was handled by the 1st-3rd Respondents. It is clear from paragraphs 14, 15 and 16 of the Petition and the annexed proceedings that Appeal Case No. 182 of 2002 was instituted and prosecuted by one Jeremiah Maingi Mbila who is not one and the same person as David Mbila Lole (*deceased*).

31. That being the case, the Petitioners herein have no *locus standi* to prosecute a case on behalf of the said Jeremiah Maingi Mbila because their complaint in this Petition is that the rights of Jeremiah Maingi Mbila were violated during the hearing of Appeal Case No. 182 of 2002.

32. Even assuming that the Petitioners had the requisite *locus standi* to institute this Petition, which they don't, the Petition shows that each of the 5th-8th Respondents are sued in their capacities as sons and/or beneficiaries of Joseph Tatia Lole (*in the case of the 5th and 6th Respondents*) Kiilu Lole (*in the case of the 7th Respondent*) and Kamwilu Lole (*in the case of the 8th Respondent*).

33. Indeed, from the Petition and the Supporting Affidavit, it is not possible to discern whether any of the named Joseph Tatia Lole, Kiilu Lole and Kamwilu Lole are living or dead. If the said three persons are deceased, then it is only those holding Grant of Probate or Letters of Administration to their respective Estates that could have been proper parties to this Petition and not their sons and/or beneficiaries as pleaded in the Petition.

34. That being the case, it is my finding that the Petition against the 5th-8th Respondents is a nullity because they are nonsuited. This, coupled with the fact that the Petitioners do not have the requisite *locus standi* to institute the Petition on behalf of Jeremiah Maingi Mbila, whose rights are alleged to have been violated in Appeal Number 182 of 2002, a nullity.

35. Having found the Petition to be incompetent, I will not delve into the merits of the Petition. For those reasons, I strike out the Petition with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE