



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 14 OF 2018

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLE 40, 47 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: AN APPEAL TO THE MINISTER FOR LANDS IN APPEAL CASE NO. 161 OF 2016-KALIYE KIMWELI MWADUNDU V MURIUKI MBURU

AND

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

AND

IN THE MATTER OF: PLOT NO. 945 KAWALA 'B' 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 2011, SECTION 13, THE LAND ADJUDICATION ACT CHAPTER 284 LAWS OF KENYA SECTION 19, 20, 21, 22, 26, 27, 28, 29 & THE LAND ACT NO. 6 OF 2012

BETWEEN

KARISA KAZUNGU KATANA.....PETITIONER

VERSUS

KALIYE KIMWELI MWADUNDU

DEPUTY COUNTY COMMISSIONER –KALOLENI SUBCOUNTY

THE LAND REGISTRAR-KILIFI

THE ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

Background

1. By his Petition dated and filed herein on 25th September 2018, Karisa Kazungu Katana (the Petitioner) prays for the following reliefs: -

1) A declaration that the decision of the 2nd Respondent to allow the 1st Respondent's Appeal to the Minister for Lands based on extraneous evidence not adduced by either party is against the just expectation of the Petitioner and amounts to a denial of the Petitioner's rights to a fair hearing and to a reasonable and procedurally fair administrative action as enshrined in Articles 47

and 50 of the Constitution of Kenya;

2) A declaration that the action of the 2nd Respondent in not recording all the evidence tendered by the Petitioner is an infringement of the Petitioner's right to a fair hearing and to a reasonable and procedurally fair administrative action as enshrined in Articles 47 and 50 of the Constitution of Kenya;

3) A declaration that the issuance of a Title Deed to the 1st Respondent for the suit property pursuant to a flawed decision will further violate the Petitioner's right to a fair hearing and a fair administrative action as well as to the Petitioner's right to property as enshrined under Articles 40, 47 and 50 of the Constitution of Kenya;

4) An order of Certiorari quashing the decision of the 2nd Respondent made on 8th August 2018 that allowed the 1st Respondent's appeal to the Minister for Lands and also quashing the Order of even date that Plot No. 945 Kawala 'B' Adjudication Section be registered in the name of the 1st Respondent;

5) An order substituting the decision of the 2nd Respondent with a Judgment of this Court in favour of the Petitioner and against the Respondents with an order directing the 3rd Respondent to register the Petitioner as the proprietor of Parcel No. Kawala 'B' 954;

6) Costs of this Petition; and

7) Any other relief that this Honourable Court may deem just to grant so as to meet the ends of justice and the protection of the Petitioner's Constitutional rights.

2. Those prayers arise from the Petitioner's contention that at all times material herein, he was the beneficial owner entitled to possession of the suit property having acquired the same from the original owner pursuant to a sale agreement dated 9th July 2008. The Petitioner avers that he had since erected his residence on the property and that when the area was declared an adjudication section, he was documented as the owner thereof pending an objection filed by Kaliye Kimweli Mwandundu (the 1st Respondent).

3. The Petitioner avers that the Objection proceedings were determined in favour of the 1st Respondent subsequent to which he lodged an appeal with the Arbitration Board which then made a determination in his favour. Aggrieved by the determination of the Arbitration Board, the 1st Respondent lodged an Appeal with the Minister for Lands pursuant to Section 29 of the Land Adjudication Act, Cap 284 of the Laws of Kenya. That Appeal was heard on 1st February 2018 and Judgment was subsequently delivered on 8th August 2018 in favour of the 1st Respondent.

4. It is the Petitioner's case that prior to the declaration of the area as an adjudication section, the 1st Respondent had been sued over the suit property in Kaloleni District Magistrates Court **Land Case No. 3 of 1970; Mwandoro Iha –vs- Kimweli Mwandundu** and that the case was determined in favour of the said Mwandoro Iha who subsequently sold the land to the Petitioner.

5. The Petitioner avers that in the course of the hearing of the Appeal to the Minister, he had adduced all evidence in support of his case including the said Court Judgment delivered on 11th July 1970 but unknown to himself, that evidence was neither recorded nor considered by the Deputy County Commissioner Kaloleni Sub-County (the 2nd Respondent) in the course of the Appeal proceedings.

6. The Petitioner thus avers that the 2nd Respondent's decision in awarding the suit property to the 1st Respondent was based on extraneous considerations and that it hence violated the Petitioner's right to a fair hearing and to reasonable and procedurally fair administrative action as enshrined in the Constitution.

7. The Petition is however opposed. In a Replying Affidavit sworn on 11th October 2018 and filed herein on 12th October 2018, Kaliye Kimweli Mwandundu (the 1st Respondent) denies that the Petitioner herein acquired the suit property from the original owner on 7th July 2008. On the contrary, the 1st Respondent asserts that the person who allegedly sold the property to the Petitioner was not the owner and had no proprietary interests therein which could be passed to the Petitioner.

8. The 1st Respondent further avers that the alleged sale and purchase of the property was not done in accordance with the law in that the necessary consents were not applied for and or obtained by both the Petitioner and the seller. The 1st Respondent further avers that the developments carried out in the property by the Petitioner were done at his own risk as the same were done during the pendency of the dispute herein and in spite of the 1st Respondent's protests and objections thereto.

9. The 1st Respondent asserts that **Land Case No. 3 of 1970** was not in respect of the suit property as stated by the Petitioner and that the dispute involving the suit property was **Land Case No. 12 of 1968; Kimweli Mwandundu –vs- Kajefwa Chai** wherein the 1st Respondent's father the late Kimweli Mwandundu was awarded land comprising what is now the suit property.

10. The 1st Respondent further denies that the evidence presented by the Petitioner was not recorded in the course of the Appeal proceedings and or that the decision by the Minister was based on extraneous evidence and or considerations.

11. The 1st Respondent avers that the decision by the Minister did not in any manner contravene and or violate the Petitioner's rights and asserts that this Petition is nothing but an attempt to appeal through the back door, the decision of the Minister which ought to be final.

12. The Deputy County Commissioner- Kaloleni Sub-County, the Land Registrar-Kilifi and the Honourable the Attorney General (sued herein as the 2nd, 3rd and 4th Respondents) are equally opposed to the Petition. By Grounds of Opposition dated 22nd October 2018 in response to the Petitioner's Notice of Motion dated 25th September 2018, filed on behalf of the trio by the 4th Respondent, they assert: -

- 1. That the application lacks merit since the Appeal to the Minister was heard and determined in strict compliance with Section 29(1) of the Land Adjudication Act;**
- 2. That the Application and reliefs sought therein are fundamentally flawed since the procedure followed in arriving at the decision was in accordance with the Land Adjudication Act and did not violate any Constitutional provisions;**
- 3. The application is premature and an abuse of the Court process in that the applicant has neither exhibited proof of any violation of Articles 40, 47 and 50 of the Constitution by the 2nd Respondent and the same does not meet the threshold for grant of the orders sought herein;**
- 4. That no allegation of irregularity, ultra vires or irrationality can be contrived from the pleadings and evidence adduced against the 2nd Respondent;**
- 5. That the application is fatally defective and the orders sought therein untenable for lack of material disclosure; and**
- 6. That the application is otherwise an abuse of the process of this Honourable Court.**

Analysis and Determination

13. On 21st January 2020, the parties agreed by consent to dispose off the Petition by way of affidavit evidence as well as written submissions. I have perused and considered the evidence placed before the Court, the rival submissions filed herein by the Learned Counsels for the parties as well as the authorities to which they referred the Court.

14. From the material presented before me, it is apparent that when the Kawala 'B' Area was declared an Adjudication Section, Plot No. 945 was allocated to the Petitioner herein. The 1st Respondent was not happy with the decision and he subsequently filed a case before the Area Land Committee pursuant to Section 19 and 20 of the Land Adjudication Act. That complaint was heard and determined by the Land Committee in favour of the 1st Respondent.

15. Aggrieved by the Committee's decision, the Petitioner moved to the Arbitration Board pursuant to the provisions of Sections 21 and 22 of the said Act. On or about 16th December 2011, the Board rendered a determination which this time round went in favour of the Petitioner.

16. Unhappy with the said determination, the 1st Respondent in turn lodged **Objection Case No. 6 of 2014** against the Petitioner. As it turned out, that Objection was also dismissed on 26th November 2012 and the 1st Respondent then lodged an Appeal to the Minister pursuant to Section 29 of the Act. The Minister thereafter constituted a Ministerial Panel Chaired by the 2nd Respondent as the Deputy County Commissioner, Kaloleni Sub-County. In a decision rendered on 8th August 2018, the Panel allowed the 1st Respondent's Appeal and directed that the suit property be registered in the name of the 1st Respondent in trust for other family members.

17. By this Petition, the Petitioner contends that the Ministerial Panel neither recorded nor considered his evidence in full and that its decision was based on extraneous evidence that had not been tendered by either party during the hearing of the Appeal and that as a result, the Panel had infringed on his right to a fair trial and to a procedurally fair administrative action as provided under the Constitution.

18. In particular, the Petitioner submits that the 2nd Respondent had made a finding that evidence had been tendered to the effect that the suit property had been sub-divided into two portions and that the same had been sold to different persons. The Petitioner further faults the 2nd Respondent for the finding that the 1st Respondent had previously buried one member of his family on the suit property when no such evidence had been adduced before the Panel. He further accuses the 2nd Respondent of arriving at the determination that the Petitioner could not have bought the suit property from one Mwandoro Iha in 1999 as the said Mwandoro Iha had passed away in 1998. It is the Petitioner's case that no such evidence was placed before the Panel.

19. The 2nd Respondent's impugned decision lies at pages 58 to 64 of the Petitioner's bundle of documents. At page 59 of the bundle, the Panel records the 1st Respondent's statement as the Appellant in the relevant portion as follows: -

"I am Kaliye Kimweli from Kilifi County in Rabai Constituency. I was born in 1960 in Rabai-Mtandikeni area.

We/I have been living peacefully and cultivating on this ancestral land since then. In 1968, there was a dispute between Kimweli Mwandundu -vs- Kajefwa Chai. The case was heard at Kaloleni Law Courts and the ruling was that the Plot in dispute to be sub-divided into two equal portions.

My father was allocated the Southern part and Kajefwa Chai the northern part. We have been cultivating in that area since then till adjudication time when disputes started again as some people had been sold some portions secretly in 2011 and during adjudication, the plots were registered in the names of the buyers. The adjudication officer informed people that whoever had a complaint to lodge it at Committee Stage."

20. At page 60 of the bundle, the Panel engaged in cross-examination of the 1st Respondent and the record reveals in the first portion of page 61 that the Question and Answer session proceeded as follows: -

21. Q- Since 1968, are there graves of your family members on Plot 945?

A- Yes, we buried one family member.

Q- Do you know the boundary of Plot 945?

A- I know the boundary of the whole large plot.

Q- Where was the case of 1968 heard?

A- At Kaloleni Law Courts.”

22. Arising from the foregoing, it was evident to me that the issue of the sub-division of the property and the burial of a member of the 1st Respondent’s family had been raised before the Panel and that the Petitioner was therefore being less than candid in his assertion that the Panel made a finding based on evidence which was not tendered.

23. It was further evident to me that the Panel in sitting on Appeal of the previous decisions was bound to look at the proceedings that had been recorded by the Lower Committees that had dealt with the dispute. While the Petitioner only attached to his Petition the proceedings before the Ministerial Panel, the 1st Respondent has attached as Annexure “KKM2” to his Replying Affidavit the proceedings before the Arbitration Board culminating with their decision made on 6th April 2011. A perusal thereof reveals not only that the 1st Respondent represented to the Board that the suitland was sub-divided but that he also produced in evidence the Judgment of the Court rendered in **Kaloleni District Magistrates Land Case No.12 of 1968** between one Kimweli Mwadundu and Kajefwa Chai.

24. A perusal of the Judgment of Honourable J.K Mwangome, DM III rendered on 13th February 1969 reveals that the land in contention was indeed sub-divided between the parties as the Learned Magistrates concludes as follows: -

“I award the land in the “North” from the mango tree just north of the Kawala Nursery School going Westward by straight line to the baobab tree then to the Western boundary which portion held the defendant’s trees and home to the defendant and the rest of this portion to the Plaintiff as long as they make use of the land.”

25. At page 17 of the Petitioner’s own bundle of documents, the 1st Respondents Witness was questioned on the following lines by the Arbitration Board:

Q- When did Mwandoro Iha die?

A- 7/3/1998

Q- If Mwandoro died in 1998, who is the other Mwandoro who sold the land in 2008?

A - The son sold the Plot belonging to his father.”

26. That being the case, I did not find any basis for the Petitioner’s contention that the 2nd Respondents findings did not arise from the material and evidence placed before it. In these proceedings the Minister sat as a quasi-judicial tribunal and I did not find any basis for the claim that the Panel had ignored the basic principles of natural justice in determining the Appeal and making the orders that it did make.

27. The mere fact that the outcome of the Appeal was not in favour of the Petitioner does not in my view render the whole process unreasonable and procedurally unfair and I am not therefore persuaded that the Petitioner’s Constitutional rights were violated as alleged in this Petition or at all.

28. As it were, Section 29 (1) of the Land Adjudication Act provides that the Minister’s determination of the Appeal shall be final. Absent any evidence of impropriety on the part of the Panel, it was apparent to me that the Petition herein was nothing but an attempt, as submitted by the 1st Respondent, to appeal the decision of the Minister through the back door. That door is unfortunately for them equally locked.

29. In my mind, as the Panel was sitting in a quasi-judicial capacity, if indeed the Petitioner had any evidence that any of the evidence he adduced before the Panel had been left uncaptured and/or unconsidered, his option lay in applying for a review of the Minister’s decision on the ground of discovery of an error or mistake apparent on the face of the record. As it were, he has not tendered any evidence that his full testimony was not captured and there is no evidence that he was denied fair administrative action as enshrined under Article 47 of the Constitution.,

30. In the premises, I am not persuaded that there is any merit in the Petition. The same is dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 30th day of April, 2021.

J.O. OLOLA

JUDGE