Mwai v Nyaga (Environment & Land Case E018 of 2022)
[2023] KEELC 21912 (KLR) (6 June 2023) (Judgment)

Neutral citation: [2023] KEELC 21912 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE E018 OF 2022

A KANIARU, J

JUNE 6, 2023

BETWEEN

BERNARD WACHIRA MWAI ..... PLAINTIFF

AND

JUSTA NGAI NYAGA ..... DEFENDANT

JUDGMENT

1. The disputants in this matter are Bernard Wachira Mwai and Justus Ngai Nyaga. Both are in the suit as plaintiff and defendants respectively and the dispute between them relates to land parcel No. Nthawa/ Riandu/2662. The plaintiff is the aggrieved party and his complaint is that the defendant has gotten himself as owner of the disputed land through an unlawful process. According to him, he is the lawful owner of the land and still retains the title deed issued to him long before the alleged unlawful process through which the defendant displaced him as the registered owner.

2. The plaintiff instituted his suit via a plaint dated 9/5/2022 and filed in court on 12/5/2022. He pleaded, interalia, that he went to the lands office on 28/4/2022 and procured a green card for the disputed land only to discover, to his consternation, that the disputed land was registered in the name of the defendant. He decided to find out what had happened and got to know that some proceedings had been conducted before the area land Disputes Tribunal which used to be in existence then. The defendant had instituted the proceedings against one Teresia Ita Muriuki claiming the then larger parcel – Nthawa/ Riandu/1941. That larger parcel had been subdivided several times and the disputed land was one of the resultant land parcels. The tribunal found for the defendant and in the result, the disputed land herein together with others became his own. The tribunal's decision was adopted as court judgement by Principal Magistrate's court at Siakago on 15/3/2007.

3. The plaintiff pleaded that he was not made aware of the proceedings, was not heard, and was unlawfully deprived of his property. He further pleaded that the tribunal acted without jurisdiction, or in excess

of it, and, to the extent that he was not given opportunity to be heard, then the rule of natural justice was violated.

4. The following prayers were made:

    a. A declaration that the decision of the members of the Mbeere District Land Dispute Tribunal case No. 213 of 2001 which was entered as an order of the court by the Principal Magistrate court at Siakago in LDT Case No. 4 of 2007 to wit that all parcels of land originating from Nthawa/ Riandu/1941 be awarded to Justa Ngai Nyaga, is unlawful, null and void and the said award and subsequent orders be set aside.

    b. An order that the order emanating from LDT Case No. 4 of 2007 vide court order dated 29/7/2015 registered against land parcel No. Nthawa/ Riandu/2662 be removed by Mbeere Land Registrar and the plaintiff's name as the registered owner thereof be reinstated.

    c. Costs of this suit.

5. The defendant filed his defence on 31/8/2022. He averred, interalia, that the plaintiff had obtained the title to the disputed land fraudulently, illegally, and secretly and that it is him, not the plaintiff, who is the rightful owner of the land. According to the defendant, the land originally belonged to his clan and the clan gave the land to one Juliano Muriuki to hold in trust for himself and the defendant. Juliano however failed or refused to give the defendant his share. The defendant sued Juliano before the area Land Disputes Tribunal. Juliano later died and was substituted with his wife – Teresia Ita Muriuki. The tribunal ultimately made a decision that the entire land parcel NO. 1941 belonged to the defendant. The land in dispute is a resultant sub-division of this larger parcel.

6. Further, the defendant pleaded that the plaintiff could not be informed of the tribunal's proceedings as he was a stranger. The plaintiff's actions are said to be malicious and intended to make the defendant suffer loss and damage. This court was urged to dismiss the plaintiffs case and award costs to the defendant.

7. The court started hearing the case on 24/1/2022. The plaintiff gave his evidence as PW1. He said he is the owner of the land, having become registered as such in 1998. At the time of testifying the plaintiff still had his title deed. He then talked of having gone to the lands office in April 2022 where he found that the land had become registered in the name of the defendant. And in order to know better what had happened, he bought a copy of green card and was able to establish that the defendant became registered owner by dint of a court order that emanated from case No. 4 of 2007. At this point, the plaintiff engaged services of counsel. The counsel followed up on the issue and even traced the court order used to register the defendant as owner. It was established that there was a dispute before the now defunct Land District Tribunal No. 213 of 2001 – which related to the then larger parcel No. 1941 from which the land parcel now in dispute was derived. The plaintiff was not part of that dispute despite being the registered owner of Land parcel No. 2662 when the dispute was going on.

8. During hearing, the plaintiff produced the following exhibits.

    1. His title deed for parcel No. Nthawa/ Riandu/2662 – (PEX No. 1).

    2. Copy of search showing defendant as registered owner – (PEX No. 2).

    3. Copy of Green card for parcel No. 2662 – (PEX No. 2).

    4. The court order used to register defendant as owner of the disputed land – (PEX No. 4).

    5. Green card for parcel No. 1941 – (PEX No. 5).

6. Land Dispute Tribunal proceedings which led to change of ownership of the disputed land – (PEX. No. 6).

9. The plaintiff was cross-examined by the defendant and he said, interalia, that he bought the land and he did so after confirming that the land belonged to the seller. He further said that there was no home on the land when he bought it; that he was un-aware that the seller was a fraudster; that he didn't know the defendant had been married there in 1955; that the seller never informed him about the land having been earlier allocated to some other people; and that he went with a surveyor to the land in 1997 together with the seller.

10. The defendant gave her evidence on 27/2/2023. She said that the plaintiff is a stranger to her and that this suit is also strange. She talked of plaintiff having bought the land from the late Juliano Muriuki with whom she had a dispute over the same land. She said further that she lives on the land. The defendant was cross-examined and she confirmed having heard what the plaintiff had told the court in his evidence-in-chief. She also said she had a dispute with the late Juliano Muriuki and that the plaintiff was not part of the proceedings.

11. Hearing over, written submissions were filed. The plaintiffs submissions were filed on 15/3/2023. The first part of the submissions essentially contains a narrative that captures the plaintiffs perspective of the history and antecedents surrounding the case. Then it was submitted that the issues to be addressed concerned whether the Land Disputes Tribunal had jurisdiction, whether the rules of natural justice were violated due to the omission to hear the plaintiff, whether the decision made by the tribunal was ultra vires, null and void, and whether the plaintiff is entitled to the reliefs he is seeking. On all these issues, the court was urged to follow the decision of Angima J in *Njeru Kirumbi vs Justus Ngai Nyaga & another*: ELC No. 51 of 2018, EMBU. This was a case with broad similarities to the one under consideration and the court decided all these issues in the affirmative. In the case, the defendant in this case was actually the 1st defendant. In that case too, the tribunal had made a decision on ownership of land without hearing the registered owner. The decision made by the court was in favour of the plaintiff.

12. The defendants submissions were filed on 13/4/2023. The defendant reiterated what her pleadings and evidence contained. More specifically, she submitted that the plaintiff obtained title to the land fraudulently, that the then larger parcel of land – Nthawa/ Riandu/1941 – was allocated to her late husband by a clan committee, that the late Juliano Muriuki became chairman of Kere clan at some point and corruptly changed ownership of parcel No. 1941 to his name, and that due to this, the defendant sued him before the area Land Disputes Tribunal, and that the tribunal decided in her favour.

13. The tribunal was said to have jurisdiction to do what it did at the time. The fact that the plaintiff was not called to participate in the tribunal proceedings, should not, according to the defendant, be seriously considered because the plaintiff "would only have claimed to have been sold this land by one Juliano Muriuki Joseph who had unlawfully, corruptly, fraudulently, and illegally acquired the original parcel Nthawa/ Riandu/1941 from which parcel No. Nthawa/ Riandu/2662 now being the subject of this case originated". It stood to commonsense, the defendant further submitted, that if a persons buys land from a seller who looses the land by virtue of not being the true legal owner, then the buyer also looses what he had purchased. The court was ultimately asked to dismiss the plaintiffs case.

14. I have considered the pleadings, evidence, and the rival submissions. It appears clear to me that the issues to be considered are as follows:-

1. Whether the Land Disputes Tribunal had jurisdiction to make the decision that it did.

2. Whether the plaintiff deserved to be given an opportunity to be heard.

3. Whether the plaintiffs case should be dismissed or allowed

4. Who is entitled to costs?

15. I will start with the issue of jurisdiction. I have looked at the decision of the Land Disputes Tribunal. I have also generally read the tribunal's proceedings. The decision of the tribunal was as follows:

> " This court having considered the available facts, awards all the parcels which originated from Nthawa/ Riandu/1941 to "Justus Ngai Nyaga" with costs."

It is this decision which the court at Siakago adopted as follows on 15/3/2007:

> " The findings and judgement of the Land Disputes Tribunal read out and adopted accordingly."

It is this decision too that led to cancellation of the plaintiff's title, among others.

16. It is plain to me that the dispute taken to the tribunal by the defendant was about the ownership of Land parcel NO. Nthawa/ Riandu/1941 from which the land in dispute herein – parcel No. Nthawa/ Riandu/2662 – was derived. By the time the tribunal proceedings were taking place, the plaintiff was already the owner of parcel No. 2662, having become registered as such on 19/6/1998. From the record of the tribunal proceedings, it is clear that the plaintiff was not a party and did not therefore participate in the proceedings.

17. The Land Disputes Tribunal was a creature of the statute. Specifically, the tribunal was created by *Land Disputes Tribunal's Act*, 1990, and Section 4 of that Act is the legal provision that established it. Section 3(1) of the same Act succinctly spelt out its jurisdiction as follows:

> " Subject to this Act, all cases of Civil nature involving a dispute as to:
>
> a. The division of, or the determination of boundaries to land, including land held in common;
>
> b. be a claim to occupy or work land; or
>
> c. trespass to land,
>
> Shall be heard and determined by a tribunal established under Section 4.

18. It is clear that the jurisdiction of the tribunal was stated in clear and unambiguous terms. Its scope related to division of land or determination of boundaries, claim to work or occupy land, or trespass. Ownership of land was clearly outside the scope of what the tribunal could handle. When the tribunal therefore set out to determine who owned Land parcel No. Nthawa/ Riandu/1941, it was doing so without jurisdiction. When it interfered with the plaintiffs title in the process, it again did so without jurisdiction.

19. Something done without jurisdiction is obviously null and void. It is also ultra-vires. In *Benjamin Leornard Macfoy Vs United Africa Limited (West Africa)* [1961] 3 ALL ER 1169, Lord Denning expressed himself as follows while delivering the opinion of the privy council (see page 1172 (1)):

> " 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 it 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 can not put something on nothing and expect it to stay there. It will collapse."

20. There is no need of belabouring this point further. It is obvious that the tribunal had no jurisdiction to do what it did. I am therefore in agreement with the plaintiff on this issue.

21. The other issue is whether the plaintiff in this case deserved to be heard. It is common ground that he was not heard. The defendant does not think that it was necessary to hear the plaintiff because

> "... whether he was summoned and allowed to defend his interest as he claims, he would only have claimed to have been sold this land by one Juliano Muriuki Joseph who had unlawfully, corruptly, fraudulently and illegally acquired the original parcel Nthawa/ Riandu/1941 from which parcel No. Nthawa/ Riandu/2662 now being the subject of this case originated."

22. In any civilized legal order, the right to be heard is sacrosanct. It is the lifeblood of fair play and the rule of law can never function optimally without it. In *Halsbury Laws of England*, 5th Edition 2010 Vol. 61 at para 639, the importance of the right is captured as follows:

> " The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

23. This right finds constitutional anchor in Article 47 of our constitution but its importance and use in our legal system pre-dates even the current constitution itself. It is therefore difficult to agree with the defendant when he seems to suggest that there was no need to inform or involve the plaintiff in the tribunal proceedings yet it is these proceedings that lead to the cancellation of his title. The cancellation of the plaintiffs title without giving him an opportunity to be heard was tantamount to condemning him unheard. I therefore agree with the plaintiff that his right of hearing was interfered with or even entirely disregarded.

24. The third issue is whether the plaintiff's case should be allowed or dismissed. In actual fact, the plaintiff's case was based on the issue of jurisdiction of the tribunal and the violation of his right to be heard. It has already been found that the tribunal had no jurisdiction and the plaintiffs right to be heard was also violated. It follows therefore that the plaintiffs case should be allowed and I hereby allow it.

25. The last issue is about costs. It is trite that costs follow the event unless there is good reason to take a different position. This is clear from the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). (See also *Hussein JanMohammed & Sons Vs Twentsche Overseas Trading Co. Ltd*: [1967] EA 287). No good reasons has been proffered to justify departure from this general rule. Costs of this suit are therefore awarded to the plaintiff.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 6TH day of JUNE, 2023.

In the presence of Muraguri for plaintiff and defendant present in person.

Interpretation: English/Kiswahili

Court Assistant: Esterina

A.K. KANIARU

JUDGE