



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT CHUKA

CONSTITUTIONAL PETITION NO. 03 OF 2019

IN THE MATTER OF CONTRAVENTION OF CONSTITUTIONAL RIGHTS UNDER ARTICLES 23(3), 27(1) & (2), 40 & 47 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 25, 26, 27, 28 & 29 OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF SECTIONS 26 & 110 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

BETWEEN

SERAPHIN NDAGARA M'MWAMBA.....PETITIONER

AND

DAVID N. KANAMPIU.....1ST RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICE

MERU SOUTH2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....3RD RESPONDENT

LAND REGISTRAR, MERU SOUTH.....4TH RESPONDENT

CHIEF LAND REGISTRAR.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT

1. The Judgment in this matter was to be delivered on **24th March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Judgment will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Judgment electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. This petition reads as follows:

TO:-

THE ENVIRONMENT AND LAND COURT AT CHUKA

The petition of SERAPHIN NDAGARA M'MWAMBA of P.O. BOX 69, MARIMANTI in the Republic of Kenya is as follows:-

a. The facts of the Case.

- i. The 1st Respondent lodged objection number 29 against the Petitioner claiming a portion in land parcel number 361 Kathwana Adjudication Section.
- ii. Land parcel number 361 Kathwana Adjudication Section was in its entirety recorded in the sole name of the Petitioner.
- iii. Objection number 29 was heard before the Land Adjudication and Settlement officer Kathwana Adjudication Section and a decision rendered on 08/04/2005.
- iv. The decision of the Land Adjudication and Settlement officer delivered on 08/04/2005 was in favour of the 1st Respondent and was to the effect that a portion of unspecified acreage or size be excised from land parcel number 361 Kathwana Adjudication Section and be awarded to the 1st Respondent.
- v. The Petitioner being dissatisfied with the decision of the Land Adjudication and Settlement officer made on 08/04/2005 lodged an appeal to the Minister on 20/04/2005.
- vi. The Appeal to the minister is yet to be heard and hence no determination has been made.
- vii. In the meantime, and while the Appeal to the Minister was pending the Respondents caused the implementation of the decision of the Land Adjudication and Settlement officer and a portion measuring 7.34 HA (18.14 Acres) was excised from land parcel number 361 and registered as L.R. NO. KATHWANA/1215 on 04/07/2011 in favour of the 1st Respondent.
- viii. Thereafter, on 21/01/2013 a title deed was issued to the 1st Respondent for the portion now registered as Kathwana/1215.
- ix. As at the time of instituting this petition, the Appeal to the minister is still pending.

b. Nature of injury caused to the petitioner.

- i. The Petitioner's constitutional right to the equal protection and benefit of the law has been infringed by the Respondents in that he was not accorded the opportunity to fully enjoy the rights provided to him by statute prior to excision of a portion of land from his parcel.
- ii. The Respondents have violated the petitioner's constitutional right to the protection of property in that a significant portion of his parcel of land was hived off in an irregular and unlawful manner and contrary to the provisions of statute.
- iii. The Petitioner's right to a procedurally fair, lawful, reasonable and legal administrative action has been contravened by the actions of the 2nd, 3rd, 4th and 5th Respondents in proceeding to excise a portion from the Petitioner's land, register it in the name of the 1st Respondent and issue him with a title deed without adhering to the statutory procedures provided in law.

c. Details of previous litigation

- i. There is Objection no. 29 instituted by the 1st Respondent against the Petitioner which was concluded in favour of the 1st Respondent in a decision made by the District Land Adjudication and Settlement officer, Kathwana Adjudication Section on 08/04/2005.
- ii. The Petitioner lodged an Appeal to the Minister against the decision of the District Land Adjudication and Settlement officer and the Appeal is still pending before the Deputy County Commissioner Meru South Sub-County.
- iii. The Petitioner commenced proceedings in CHUKA CMCC NO. 13 OF 2014 against the 1st Respondent premised on the legal doctrine of trust which suit was dismissed upon a full trial.

Your petitioner therefore prays that:-

- a. A declaration that the Petitioner's rights as enshrined in articles 27(1)&(2), 40(1) and 47(1) & (2) of the Constitution have been violated by the actions of the Respondents.
- b. A declaration that the excision and registration of parcel number Kathwana/1215 from parcel number Kathwana/361 in favour of the 1st Respondent prior to the determination of the Appeal to the Minister is illegal, unlawful and unprocedural.
- c. An order directing the 4th & 5th Respondents to forthwith cancel the registration of land parcel No. Kathwana/1215 in the name of the 1st Respondent and revert the portion thereof to land parcel No. Kathwana/361.

d. Costs of the petition be borne by the 1st Respondent.

DATED AT CHUKA THIS21ST DAY OF ...MAY,.....2019

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FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE PETITIONER

3. The petition was canvassed by way of written submissions.
4. The petitioner's written submissions are reproduced in full herebelow:

PETITIONER'S SUBMISSIONS

Your Lordship the following comprises of the Petitioner's submissions on the petition dated 21/05/2019.

Introduction

Your Lordship, the Petitioner moved the court seeking four (4) orders against the Respondents.

The genesis of the dispute emanates from Objection No. 29 between the Petitioner and the 1st Respondent which was determined in favour of the latter through a decision rendered by the 2nd Respondent.

The Petitioner was dissatisfied with the finding of the 2nd Respondent and preferred an Appeal which is still pending before the Minister.

The Petitioner's grievance is that prior to the determination of the Appeal, the 1st Respondent caused the decision of the 2nd Respondent to be implemented with the result that a significant portion was hived off the Petitioner's land.

The 1st Respondent is opposed to the Petition with the main grounds being that there is no legal provision for Appeals to the Minister and that the Petitioner was given adequate hearing by both the 2nd Respondent and the lower court in CHUKA CMCC NO. 13 OF 2014.

The other Respondents have not put in any response to the petition despite being properly served.

The issues for determination

Your Lordship, the following issues arise for determination.

- a. Whether in the circumstances of this case, a constitutional issue arises.
- b. Whether the Petitioner's constitutional rights have been infringed by the actions of the Respondents.
- c. Whether there is a legal provision allowing a party aggrieved by the decision of the Land Adjudication and Settlement Officer to lodge an Appeal to the Minister.
- d. Whether Chuka Cmcc No. 13 OF 2014 was a challenge against the decision of the Land Adjudication and Settlement Officer.

Your Lordship, we shall make representation on each of the issues outlined above.

a. Chuka Cmcc No. 13 OF 2014

Your Lordship, the Petitioner has in his petition attached the pleadings and proceedings of the suit that was heard by the lower court.

It can be deduced that the suit before the lower court was premised on allegations of fraud and existence of trust. It was not a challenge against the decision of the 2nd Respondent.

Ideally, if the Petitioner was intent on reversing that decision, the Land Adjudication and Settlement Officer would have been a necessary party in those proceedings.

b. Appeals to the Minister.

Your Lordship, the contention that there is no procedure for preferring Appeals to the Minister under the Land Consolidation Act is baseless for the reason that the Land Adjudication Act lays down an elaborate procedure for handling disputes which include an Appeal to the Minister.

The claim that no such procedure exists under the Land Consolidation Act, though factual, is of no assistance as the Petitioner has not cited the provisions of that Act anywhere. The form of Appeal shows clearly that the Appellant therein has invoked Section 29 of the Land Adjudication Act.

It is noteworthy however that the 1st Respondent does not dispute that indeed there is an Appeal between him and the Petitioner that is yet to be determined by the Minister.

(c) Whether a constitutional issue arises

Your lordship, Article 47 of our Constitution provides that every citizen has a right to an administrative process that is fair and Article 40 thereof, the unlawful deprivation of property is discouraged.

In the instant case, the Petitioner's complaint is that the Respondents proceeded to implement the decision of the 2nd Respondent prior to the exhaustion of the Appeal process as provided in law. That action was purely administrative for which due process is the hallmark.

The proviso to Section 28 of the Land Adjudication Act provides that:-

“Provided that where the land is affected by an Appeal under Section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination”.

Clearly, the 2nd, 3rd and 4th Respondents had an administrative duty to ensure that a restriction was registered on the suit land to await the determination of the Appeal before the Minister.

Such a restriction is for purposes of preserving the suit property so that the decision appealed from is not implemented.

In **DANIEL MWANGOMBE SHUMAA & 3 OTHERS Vs NYAMAWI CHIMENGA NJUNGA & 14 OTHERS [MALINDI ELC CONST. PET. NO. 9 OF 2014] eKLR** it was held:

“The Land Adjudication Act provides that the chief Land Registrar can only cause registration to be effected when all objections have been determined and the time for appeal has expired.

In view of the pending Appeal to the Minister by the Petitioners', I am satisfied that the Petitioners have a prima facie case with a likelihood of success”.

Further, the Court of Appeal in **EUTON NJUKI MAKUNGO Vs REPUBLIC & 2 OTHERS [NYERI C.A.C.A. NO. 35 OF 2013] eKLR**, the court held **“..... it is not the duty of the registrar of lands to determine adjudication disputes; the evidence on record is clear that an Appeal to the Minister was pending and the registrar had no jurisdiction to issue the title deed in favour of Mwaniki Mwigie while the appeal was pending. The disputed property was still subject to the adjudication process and the action by the registrar was null and void”.**

We submit that the irregular manner in which the decision of the 2nd Respondent was implemented has a remedy within the constitutional framework.

(d) Infringement of rights

Your Lordship considering the foregoing, it is crystal clear that a result of a flawed administrative action, the Petitioner was irregularly deprived of a portion of land measuring approximately 18.13 acres.

It is our submission therefore that the Petitioner's rights to own property and to be subjected to fair administrative action as provided under articles 40 and 47 of the Constitution respectively were severally compromised by the actions of the Respondents for which a remedy lies.

In any case the 2nd, 3rd, 4th, 5th and 6th Respondents did not oppose the petition though properly served.

In conclusion we urge the court to find for the Petitioner as prayed in the petition.

We so humbly pray.

DATED AT CHUKA THIS23RD DAY OFSEPTEMBER.....2019

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FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE PETITIONER

5. The 1st Respondent's written submissions are reproduced in full herebelow:

1ST RESPONDENT'S SUB-MISSIONS ON THE PETITION

Your Lordship, the 1st Respondent opposes the petition and relies on his REPLY and RESPONSE to the petition.

We fully agreed and submit that the petition herein does not show any contravention of the constitution by any of the Respondents.

In the contrary what is shown clearly is that parties were before the Adjudication Officer and were all heard and a DECISION made.

The decision was not pleasing to the Petitioner who appealed to the Minister. The appeal was a nullity as no Appeal is provided to the Minister under the Land Consolidation Act Cap 283 Laws of Kenya.

It is only Cap. 284 which provides appeal to the minister. Be it as it may when he wanted to appeal to the wrong forum nobody stopped him. The Petitioner, saw an Advocate who advised him to file a case in court.

Case NO. CMCC NO. 13 of 2014 was filed in Chuka. The Proceedings show that the parties were fully heard and a Judgment delivered by the Learned Chief Magistrate Chuka.

He dismissed the petitioner's case.

We humbly submit and ask the court to look at the exhibits.

There is clearly nothing constitutional in this dispute. The petition is not an appeal against the decisions made so far. The Petitioner was given a hearing whenever he sought to be heard.

The petition is an abuse of the process of the court.

We pray that the same be dismissed with costs.

We have attached the following for court's perusal and consideration: -

- a. The Land Consolidation Act Cap. 283 Laws of Kenya
- b. The Land Adjudication Act Cap. 284 Laws of Kenya

DATED AT MERU THIS.....29THDAY OF ...JULY,....2019

MAITAI RIMITA & CO.

ADVOCATES FOR THE 1ST RESPONDENT

6. The 2nd, 3rd, 4th, 5th and 6th respondents did not file written submissions.

7. I have considered the pleadings, the submissions and the authorities cited by the parties in support of their diametrically incongruent assertions. I will not regurgitate the principles enunciated in those authorities as the principles they espouse have been fully elaborated upon in the parties written submissions which have been reproduced in full in the parties' written submissions which have been reproduced in full in an earlier part of this judgment.

8. I have perused the proceedings in Chuka CMCC 13 of 2014. This suit had been filed by the plaintiff, who is the petitioner in this case. As demonstrated by the proceedings in Chuka CMCC 13 of 2014, on 18th April, 2018, the appellant gave his oral evidence and was cross-examined. It is therefore, veritably pellucid that the appellant fully and robustly participated in the apposite proceedings.

9. As the petitioner fully participated in the proceedings in the lower court, he knew that he had filed an appeal to the minister. It would seem to me that the appellant wanted to use the appeal to the minister as a fallback position just in case he lost Chuka CMCC 13 of 2014. This is clearly forum shopping which should be deprecated by courts of law. It is only after losing Chuka CMCC 13 of 2014 that he filed this

petition. There is no evidence that he filed an appeal against the judgment in CMCC 13 of 2014.

10. I find that the respondent was registered as owner of the disputed land in accordance with established law. I do find that no constitutional rights of the appellant were violated by the registration of the respondent as owner of the suit land. The required adjudication and other legal processes had been faithfully followed.

11. In the circumstances, judgment is entered for the respondent against the Petitioner in the following terms:

a. This petition is dismissed.

b. Costs shall follow the event and are awarded to the respondent.

Delivered in open Court at Chuka this **5th day of May, 2020** in the presence of:

CA: Ndegwa

Mark Muriithi for the Petitioner

Ayub Anampiu h/b Rimita for 1st Respondent

No appearance for 2nd to 6th Respondents

P. M. NJORGE,

JUDGE.