



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC MISC. APPLICATION NO. 3 OF 2020

IN THE MATTER OF ARTICLE 20(2), 21(1) AND (2), 23(1), 40(2) AND 165 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PROPERTY RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF LAND REGISTRATION ACT. NO. 3 OF 2012

AND

IN THE MATTER OF L.R. NO. KABARE/GACHIGI/1178

AND

IN THE MATTER OF LAND DISPUTE TRIBUNAL NO. 14 OF 2003

BETWEEN

JANET WAWIRA MUGO.....PETITIONER/APPLICANT

AND

THE DISTRICT LAND REGISTRAR,

KIRINYAGA COUNTY.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JOYCE WAWIRA MUGO.....3RD RESPONDENT

JUDGMENT

Background

In a Petition dated 28th January 2020, the Petitioner sought the following orders:-

(a) Declaration that the transfer of the land vide the alleged order of the land Disputes Tribunal Number 14 of 2003 was illegal and void ab initio.

(b) Declaration that the subsequent transfer of Title No. KABARE/GACHIGI/1178 in favour of the 3rd Respondent was anchored on fictitious illegal and void process hence it be nullified/cancelled and the title be restored to the Petitioner's name.

(c) Costs.

Only the 3rd Respondent through the firm of Maina Kagio & Co. Advocates filed a replying affidavit in response to the Petition sworn on 3rd

June 2020. The Petitioner by way of a rejoinder filed a Further affidavit on 6th July 2020.

When the matter came up for directions on 1st February 2021, the parties agreed to have this petition canvassed by affidavit evidence and written submissions.

Petitioner's summary of Facts

The Petitioner in the supporting affidavit stated that she is a widow and that her husband was one Mugo Mbogo (deceased) who died on 11th January 2018 and that the 3rd Respondent is her co-wife being the 2nd wife of the later Mugo Mbogo. She stated that she jointly owned various properties as a joint tenant with her late husband among them land parcel No. KABARE/GACHIGI/1180 and KABARE/GACHIGI/1178. The Petitioner further stated that upon the demise of her husband (Mugo Mbogo), she embarked on the process of registering the above mentioned properties in her name but only one title for land parcel No. KABARE/GACHIGI/1180 which was successfully issued in her name. According to the Petitioner, the title to L.R. No. KABARE/GACHIGI/1178 was issued to the 3rd Respondent pursuant to an alleged Land Dispute Tribunal Order Number 14 of 2003 which was fraudulently done after the title had already reverted to her name. She stated that the purported transfer is a ploy by the 3rd Respondent to use under hand means to acquire the title which had already reverted to her vide an Entry dated 19th March 2018. The Petitioner further stated that her family is engaged in a Succession Cause No. 22 of 2018 whereby she is the sole administrator of the Estate of the late Mugo Mbogo after the 3rd Respondent was cited for non-cooperation. In her further affidavit, the Petitioner stated that she has been advised by her advocates on record which advice she verily believes to be true that, this matter is right before this Honourable Court and that this Petition is to challenge the illegitimate transfer of suit property from her name to that of the 3rd Respondent vide an entry dated 9th August 2018. The Petitioner further stated that this is a typical scenario where the right of *Survivorship/Jus accrescendi* applies.

3rd Respondent's summary of Facts

The 3rd Respondent on her part stated that this matter is a civil claim disguised as Constitutional Petition so as to evade the strict procedures in the Civil Procedure Rules and also the rigours of Cross-Examination. The 3rd Respondent also stated that her husband was known as Mugo Mbogo (deceased) who had two wives and her co-wife is the Petitioner herein. She further stated that the suit property is an ancestral land which is a sub-division of land parcel No. MWERUA/GACHIGI/376 which was sub-divided into four portions namely:- MWERUA/GACHIGI/1177, 1178, 1179 and 1180. Upon sub-division, her late husband gave land parcel No. MWERUA/KABIRIRI/1177 to the Petitioner's son, Evan Mbogo Mugo while land parcel No. MWERUA/GACHIGI/1179 was given to the other son of the Petitioner Jeremiah Wachira Mbogo. However, none of her three (3) sons got any of the portions of the ancestral land. She said that the remaining two portions of land being L.R. No. MWERUA/GACHIGI/1178 measuring 1 $\frac{3}{4}$ and 1180 measuring one (1) acre were meant for her and her three sons. She averred that during his sunset years, her late husband seemed biased against her and to favour the first wife who is the Petitioner herein and in mysterious manner and without her knowledge, the other two portions namely KABARE/GACHIGI/1178 and 1180 were jointly registered in his name and that of the 1st wife who is the Petitioner herein. In a Bizarre turn of events, the Petitioner filed a reference before the Land Disputes Tribunal seeking to have those two portions of land to go to her. However, the Gichugu Land Disputes Tribunal gave an award to the effect that their late husband and his two co-wives to stay in a portion of 0.60 acres, and that her sons who were not included in the case to stay in the portion of 2 acres. The Petitioner was dissatisfied and appealed to the Provincial Land Disputes Appeals Committee who agreed with the decision by the Land Disputes Tribunal to the effect that the two parcels of land No. KABARE/GACHIGI/1178 and 1180 be shared by the two wives. The 3rd Respondent further stated that the Provincial Land Dispute Appeals Committee observed that their husband was the owner of the two pieces of land and should be made a joint owner with the 1st wife after sharing the two parcels. The 3rd Respondent further stated that the Appeal Committee directed that the caution registered against the title of land parcel No. MWERUA/KABIRIRI/529 be lifted so that it can be sub-divided with her husband (deceased) getting 5 acres, the Petitioner 2 $\frac{1}{2}$ acres and her getting 2 $\frac{1}{2}$ acres. No appeal was filed against that decree or any judicial review proceedings filed. The 3rd Respondent contends that she has lived with her children in what became land parcel No. KABARE/GACHIGI/1178 measuring approximately 1 $\frac{3}{4}$ acres while her co-wife who is the Petitioner herein lived with her family on land parcel No. KABARE/GACHIGI/1180. She said that her registration of land parcel No. KABARE/GACHIGI/1178 was pursuant to a decree emanating from a reference which the Petitioner herself had initiated and filed before the Gichugu Land Disputes Tribunal which the Petitioner was dissatisfied and appealed to the Provincial Land Disputes Appeals Committee but lost the same.

She stated that her co-wife wants to get her portion of land parcel No. KABARE/GACHIGI/1178 on allegations of breach of her Constitutional right to property yet she appears to ignore *Article 27* of the same Constitution on equality and freedom from discrimination. The 3rd Respondent further contends that the Petitioner has gone ahead to file succession proceedings at Kerugoya High Court being Succession Cause No. 20 of 2018 then again complain that the two parcels do not form part of the Estate of the deceased. She stated that the issue of joint registration which the Petitioner seems to be clutching on was dealt with in the award which became a decree and has not been challenged to date. She stated that the Petitioner has cited the doctrine of *jus accrescendi* and the doctrine of *suivoship* envisaged under *Section 102 (g) of the Registered Land Act Cap. 300* (now repealed) which are not Constitutional issues and that the orders sought are not therefore anchored on any Constitutional provisions and none is cited to have been violated as per the prayers.

Petitioner's Submissions

The Petitioner through the firm of Gichuki Karuga & Co. Advocates filed their submissions on the following three issues-

(1) Whether this Court has jurisdiction.

(2) Whether the Petitioner's rights and guarantees as provided for under the Constitution, and as specifically referenced in the Petition were violated.

(3) Whether this Court can make the orders sought in the Petition.

(4) Costs.

On the first issue the learned counsels argued that the actions of the 1st and 3rd Respondents have directly infringed on the Petitioner's right to property. He submitted that the reason why the Petitioner lodged this Petition is to challenge and seek this Court's intervention in reversing the illegal/arbitrary decision of the 1st Respondent in connivance with 3rd Respondent whose effect disinherited the Petitioner of her property. He cited *Petition No. 22 of 2014 between Mary Kerubo Ogoti Vs Chief Magistrate's Court Kisii (2019) e K.L.R.*

As regards the 2nd issue, the learned counsel submitted that the actions of the Respondents have infringed on the Petitioner's fundamental right to property as enshrined under *Article 21 of the Constitution*. He argued that the fraudulent/illegal actions of the 1st and 3rd Respondents have clearly infringed on the Petitioner's right to property. He further submitted that the suit property was jointly owned by the Petitioner and her late husband and that being the case, such property does not form part of the Estate of the late Mugo Mbogo and any mention of the same. (By inadvertent error) in the succession cause cannot in any way wish away the obvious fact that the property in question was jointly owned. He cited the case of *Re-Estate of Josephine Mumbua Mehlaflaff – Deceased (2015) e K.L.R.*

On the issue whether this Court can make the orders sought, the

learned counsel answered in the affirmative. The counsel also submitted that the 1st and 3rd Respondents should be condemned to pay the costs of this petition.

Legal Analysis

I have considered the affidavit evidence and the submissions by the counsels appearing for both the Petitioner and the 3rd Respondent. I have also considered the applicable law. Before delving into the issues, the following are undisputed facts:-

(1) The Petitioner and the 3rd Respondent are co-wives.

(2) Their husband was one Mugo Mbogo (now deceased).

(3) Prior to his demise, the suit property which is an ancestral land was registered in the joint names.

(4) The suit land which is an ancestral land parcel No. KABARE/GACHIGI/529 measuring 4.5 acres was sub-divided into 4 portions namely KABARE/GACHIGI/1177, 1178, 1179, and 1180 respectively.

(5) The Petitioner's sons namely Evan Mbogo and Jeremiah Wachira Mugo received resultant parcels Number KABARE/GACHIGI/1177 and 1179 while the 3rd Respondent's children did not receive anything.

(6) The 3rd Respondent's title in respect of land parcel No. KABARE/GACHIGI/1178 was issued pursuant to a valid judgment where the Court adopted an award by Baricho District Land Disputes Tribunal which the Petitioner appealed to the Provincial Land disputes Appeals Committee but lost fairly and squarely.

Following the above undisputed facts, the following are therefore issues for determination:-

(1) Whether this Court is properly invoked?

(2) Whether the Petitioner's rights and guarantees as provided for under the Constitution were violated?

(3) Whether the orders sought can be granted?

(4) Who will bear the costs of this Petition?

(1) Whether this Court has jurisdiction to hear and determine this Petition?

Jurisdiction can be defined as the authority or power of a Court to hear and determine disputes presented before it. Jurisdiction flows from either a statute or the Constitution. The Environment and Land Court derives its jurisdiction from the *Environment and Land Court Act No. 19 of 2011. Section 13* of the said Act provides that the *Environment and Land Court* has both original and appellate jurisdiction to hear and determine all disputes in accordance with *Article 162 (2) of the Constitution* and with the provisions of the *Environment and Land Act* or any other law applicable in Kenya relating to environment and land. Whereas the statute law gives the *Environment and Land Court* general jurisdiction under *Section 13 (1) & (2), Section 13 (3)* of the same Act is very emphatic that nothing was to preclude the jurisdiction of the Environment and Land Court to hear and determine a dispute relating to a denial, violation or infringement of or threat to, rights and fundamental freedoms relating to a clean and healthy environment under *Articles 42, 69 and 70 of the Constitution*. The Constitution only donated specific jurisdiction to the *Environment and Land Court* to determine complaints as regards denial, violation or infringement of or threat to rights and fundamental freedoms only to a clean and healthy environment under the three Articles of the Constitution.

The Petitioner in this Petition has invoked *Articles 20 (2), 21 (1) and 23 (1), 40 (2) and 165* of the Constitution. The main complain by the

Petitioner is that the transfer of title to land parcel Number KABARE/GACHIGI/1178 in favour of the 3rd Respondent vide an award by the District Land Disputes Tribunal was fictitious, illegal, null and void. The Petitioner did not supply the proceedings and the award by the Baricho District Land Disputes Tribunal to determine the ground under which the said tribunal based its decision. It is only by looking at the materials used by the tribunal to arrive at their decision that this Court can determine whether the said tribunal was seized with the requisite jurisdiction or not.

Be that as it may, the 3rd Respondent in her replying affidavit at paragraph **17 or 18** thereof stated thus:-

“17. That the Gichugu Land Disputes Tribunal gave an award, which was adopted as Court’s judgment, that my husband and his two wives to stay in a portion of 0.60 acres and that my sons who were not included in the case to stay in the portion of 2 acres.

**. That the Petitioner was dissatisfied and she appealed to the Provincial Land Disputes Appeals Committee whose award was adopted as an order of the Court. The award was to the effect that the two pieces of land parcel No. KABARE/GACHIGI/1178 and 1180 be shared by us the two wives. It was declared that our husband was the owner of the two pieces of land and should be made a joint owner with the 1st wife after sharing the two parcels. It was also directed that the caution registered against the title of land parcel No. MWERUA/KABIRIRI/529 be lifted so that it can be subdivided with my husband getting 5 acres, the Petitioner 2 ½ acres and me getting 2 ½ acres”.*

From the depositions by the 3rd Respondent above, it is clear that the transfer and registration of the 3rd defendant as proprietor of the suit land parcel No. KABARE/GACHIGI/1178 was an award by the Baricho Land Disputes Tribunal which the Petitioner was dissatisfied and appealed to the Provincial Land Disputes Appeals Committee but lost it. The Land Disputes Tribunal (now repealed) under **Section 8** provided for a statutory mechanism to an aggrieved party to lodge an appeal to the High Court on points of law and facts within 60 days from the date of the award. There is no evidence that the Petitioner exercised her undoubted right of Appeal as stipulated within the statutory timelines. The Petitioner in my view did not exhaust the statutory mechanism provided under the law before seeking alternative mechanism by this Petition.

In the case of **Speaker of National Assembly Vs Karume (2008) 1 K.L.R 425**, the Court of Appeal held as follows:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure”.

Again in the case of **Bernard Murage Vs Fine Serve Africa Limited & Others (2015) e K.L.R**, the Court observed as follows:-

“Not each of every violation of the law must be raised before the High Court as a Constitutional issue. Where there exists an alternative remedy through statutory law, then it is desire that such a statutory remedy should be pursued first”.

I agree with the above decision and find them applicable to the instant case.

(2) Whether the Petitioner’s right and guarantees as provided for under the Constitution have been violated?

The Petitioner in this Petition is seeking for a declaration inter alia that the transfer of the title pursuant to an order of the tribunal Number 14 of 2003 was illegal and void ab initio. The Land Disputes Tribunal No. 18 of 1990 (now repealed) provided an elaborate mechanism of appeal to a party aggrieved with the decision by the District Land Disputes to the Minister. **Section 7 of the Land Disputes Tribunal Act** (now repealed) provided as follows:-

7(1) The Chairman of the Tribunal shall cause the decision of the tribunal to be filed in the Magistrate’s Court together with any depositions or documents which have been taken or proved before the tribunal. The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act”.

The law further provides that any party aggrieved with the decision of the tribunal which is adopted by the Magistrate’s Court may Appeal to the Appeals Committee under **Section 8(1) of the Act**. The said Act provides as follows:-

8(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the tribunal may, within thirty days of the decision appeal to the Appeals Committee for the Province in which the land which is the subject matter of the dispute is situated.

8(9) Either party to the Appeal may appeal from the decision of the Appeals Committee to the High Court or a point of land within sixty days from the date of the decision complained of:-

Provided that no Appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved”.

The Petitioner in this Petition is belatedly, albeit, seeking to challenge a decision of a tribunal filed in 2003 without supplying a copy of the proceedings and award of the tribunal. The Petitioner did not also give reasons why she did not challenge the impugned decision through the internal mechanism provided under the Land Disputes Tribunal (now repealed).

In his testimony, the 3rd Respondent testified that after hearing the complaint before the Gichugu Land Disputes Tribunal, the tribunal gave an award in her favour in respect of land parcel No. KABARE/GACHIGI/1178 and the Petitioner who was dissatisfied appealed to the Provincial Appeals Committee where she also lost squarely. The said award by the Provincial Appeals Committee was subsequently adopted as the judgment of the tribunal and a decree issued. These averments given on oath have not been controverted and/or challenged. I also agree with the counsel for the 3rd Respondent that this case is disguised as a Petition to defeat and avoid the statutory internal mechanism provided **under Section 8 of the Land Disputes Tribunal Act No. 18 of 1990** (now repealed). The Petitioner has argued that her claim is based on the common law doctrine of jus accrescendi which is applicable under our laws. If that be the case, then this Petition clearly qualifies to have been filed as an ordinary suit and not a Petition.

In **Petition No. 3 of 2018 between Ibrahim Mohamud Ibrahim & Another and Kenya Wildlife Service & 4 Others reported in (2020) eK.L.R, this Court cited with approval the case of Narok County Council Vs Trans-mara County Council (2000) 1 E.A. 161** where the Court of Appeal held as follows:-

“Though Section 6 of the Constitution gave the High Court unlimited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty

I am accordingly satisfied that the learned Judge wrongly rejected the objection raised by counsel for Narok. The Court had no jurisdiction to deal with matters at that stage and the Preliminary Objection have been upheld and the suit struck out as it was clearly incompetent. The proceedings were a nullity as the Court acted without jurisdiction”.

I agree with the decision by the Superior Court. The decision which is the basis of this Petition is an order issued by the Land Disputes Tribunal in a tribunal case given as No. 14 of 2003. The **Land Disputes Tribunal Act No. 18 of 1990** provided a clear internal mechanism for resolving disputes under **Section 8 of the said Act**. The Petitioner deliberately failed to disclose what steps she took thereafter and why she did not exhaust the statutory dispute resolution mechanism provided under the repealed Act. The principles of pleading Constitutional infringement was set out and restated in a number of decisions. In the case of **S.W.M Vs G.M.N (2012) e K.L.R, Justice Majanja cited the case of John Kimani Mwangi Vs Town Clerk Kangema, Petition No. 1039 of 2007 (Nairobi) (UR)** where it was held:-

“Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement..... The reason for this requirement is two fold; First the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the Bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged”.

I entirely agree with the above decision which I apply to the instant petition Mutatis mutandis.

Decision

In view of the matters aforementioned, I find this Petition lacking merit and the same is hereby dismissed with costs to the Respondent. It is so ordered.

READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Asiimwe holding brief for Gachoki
2. Respondent/Advocate – absent
3. Kabuta – absent.