



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI

CONSTITUTIONAL PETITION NO.4 OF 2018

IN THE MATTER OF: ARTICLES 10, 22,23,40,47 & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT CHAPTER 284 LAWS OF KENYA (REPEALED), THE LAND ACT, 2012, THE LAND REGISTRATION ACT, 2012, THE ENVIRONMENT & LAND COURT ACT, 2011 AND THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE TITLE NUMBER MBOONI/MUTITU/4083, MUTITU ADJUDICATION SECTION

AND

IN THE MATTER OF AN APPLICATION FOR FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

JOHNSTONE MUTISYA KIAMBA.....PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF LANDS & HOUSING....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

BATHOLOMEW NGUTHI MAKAU.....INTERESTED PARTY

JUDGMENT

1. The Petitioner's case is that Mbooni/Mutitu/4083 (*suit land*) was bought by his late father, Harrison Kiamba Mwanja and he (*Petitioner*) has been in quiet occupation since 1984. On 25th April, 2018, the Interested Party in the company of police officers from Mbooni police station sought to evict him and claimed to be in possession of Court documents. The Petitioner investigated and discovered that the interested party has been secretly pursuing an appeal against a decision which his (*interested party's*) deceased father, Antanas Makau Mueke, lost before the Mutitu Adjudication.

2. From the documents obtained from the land adjudication offices, the Petitioner discovered that the interested party filed an appeal before the Deputy County Commissioner Mbooni, proceeded *ex-parte* against the late Harrison Kiamba Mwanja and obtained final orders. According to the Petitioner, the interested party has proceeded to obtain title deed of the suit land and is using it to evict him.

3. The amended petition is dated 07th May, 2018 and seeks the following reliefs;

a) A declaration be and is hereby issued that the proceedings conducted by the Deputy County Commissioner, Mbooni West District in Appeal No. 2 of 2001 were conducted in total violation of Article 10 and 47 of the Constitution and that the same are null and void for all purposes.

b) An order to the extent that the said proceedings were conducted *ex parte* and against a deceased person, the same are null and void and the decision rendered on 30th October 2017 is null and void for all purposes.

- c) **An order that the said proceedings were conducted through concealment of material facts hence void for all purposes.**
- d) **An order that the said proceedings are null and void as the interested party lacked the legal capacity to proceed with the same having no letters of administration to represent his deceased father.**
- e) **A certiorari order quashing the decision of the cabinet secretary for the Ministry of Lands and Housing through the Deputy County Commissioner Mbooni West delivered on 30th October 2017 in appeal to the Minister of Lands Case No. 2 of 2001 relating to title No. Mbooni/Mutitu/4083.**
- f) **An order of prohibition to stop further steps in enforcing the judgment of the District Commissioner Mbooni West District delivered on 30th October 2017 in appeal to the Minister of Lands Case No. 2 of 2001 relating to title No. Mbooni/Mutitu/4083.**
- g) **An order cancelling the title issued to the interested party for title No. Mbooni/Mutitu/4083 on grounds that the said title was obtained illegally and or fraudulently.**
- h) **A permanent injunction restraining the interested party from selling, disposing, alienating or in any manner disposing the said title No. Mbooni/Mutitu/4083.**
- i) **A permanent injunction restraining the interested party or his servants or agents from evicting the Petitioner from Mbooni/Mutitu/4083 or in any manner interfering with the Petitioner's peaceful and quiet use of the said land.**
- j) **Any other relief(s) and /or directions as this honorable Court may deem necessary to serve the ends of justice.**
- k) **An order that the respondent pay the ex –parte applicant the cost of this application.**

4. The petition is supported by the Petitioner's affidavit sworn on the same date. He has exhibited his father's death certificate as annexure JMK-1 and a grant of letters of administration *ad litem* as annexure annexure JMK-2 to show that he as capacity to bring the petition. He has deposed that his deceased father was sued by one Makau Mueke in Mutitu Adjudication Section Case No. MTU/82/86 alleging that he did not sell the entire land to the deceased. The dispute was determined in favor of the deceased and no appeal was filled. The proceedings are exhibited as annexure JMK-3.

5. He has also deposed that the interested party's deceased father filed a fresh dispute before the same arbitration board being Arb/31/86 but it was dismissed on 13th May, 1990. The proceedings are exhibited as annexure JMK-4.

6. Further, he deposed that on 30th March, 2000, long after the period prescribed for appeal, the interested party filed an objection, against the Petitioner's deceased father, at Mutitu Adjudication section being objection No. 148 but it was dismissed on 11th April, 2000. The proceedings are exhibited as annexure JMK-5. He deposed that the appeal against the dismissal-Appeal No. 2 of 2001- was filed long after the prescribed period of appeal hence making the entire proceedings a nullity. The appeal proceedings are exhibited as annexure JMK-6.

7. It's his deposition that the deceased was never served with the appeal and the decision was delivered on 30th October, 2017, more than 4 years after his death. Further, he deposed that he only learnt of the decision on 25th April, 2018 and obtained the annexures to support his affidavit hence could not file an appeal.

8. The search certificate for the suit land and title deed are exhibited as annexures JMK-7 and JMK-8 are some photographs to show his (Petitioner) occupation of the suit land.

9. The petition was opposed through the interested party's replying affidavit filed on 29th May, 2019. He deposed that his deceased father never sold the property to the Petitioner's father and that the Petitioner and his father were trespassers. He also deposed that the Petitioner's father had been cautioned by the land adjudication office against interfering with the suit land until a resolution on ownership was made. He exhibited a letter dated 27th August, 1993 as annexure BNM-1.

10. He deposed that after the death of Atanas Mueke, grant of letters of administration were issued to Monica Mbithe Makau and Ernest Kivaa on 14th June, 2012 in Machakos HC P&A No. 75 of 2012 and it enabled them to pursue Appeal No. 2 of 2001. He deposed that although the appeal was file within sixty days on 08th June, 2000, it was allocated a number indicating 2001 instead of 2000. He exhibited a copy of the grant as annexure BNM-2.

11. He deposed that for all the times that the matter was fixed for hearing, the Government representatives would serve them with summons to appear. He exhibited a copy of summons dated 11th September, 2017 as annexure BNM-4.

12. He deposed that they were not aware of Harrison Kiamba's death and that it was incumbent upon his family to take action which they failed to do and cannot therefore be heard saying that they were not aware of the proceedings. It is also his deposition that due process was followed in obtaining the title deed after procedural conclusion of the appeal.

13. Upon perusal of the replying affidavit, I realized that the cited annexures were not attached thereto.

14. A witness statement of John Kibe Maguta dated 04th June, 2019 was filed by the office of the Attorney General (AG). He states that he is the Deputy County Commissioner Mbooni West Sub County and that Appeal No. 2 of 2001 was heard on 30th October, 2017. The appeal was lodged by the interested party representing his deceased father Anthanas Makau Mueke. The Petitioner was the respondent and he was representing his deceased father Harrison Kiamba.

15. Further, he stated that the appeal arose from an objection lodged against the decision of the arbitration board by Anthanas Makau Mueke which was determined in favor of Harrison Kiamba. The objection was dismissed with costs and an order given by the land adjudication officer that the name of Harrison Kiamba should remain within the records.

16. He stated that prior to the appeal hearing, several summonses were issued to both parties but the respondent failed to appear at all times. The hearing proceeded in his absence and was determined in favor of Bartholomew Nguthi Makau. The appellant testified and presented two witnesses to demonstrate that the suit property belonged to him.

17. He ruled in favor of the appellant and awarded the suit property to him. According to him, the allegations of not being served are totally false.

18. Directions were given that the petition be canvassed through written submissions. The parties complied and filed their respective submissions.

19. The Petitioner identified the following as the issues for determination;

a) Whether the title for the suit land was obtained fraudulently and illegally by the interested party.

b) Whether the transfer and registration of the suit land in favor of the interested party's deceased father on 23rd March, 2018 was illegal, null and void and should be cancelled.

20. The Petitioner submitted that he is seeking protection of his right to own property under Article 40 of the Constitution. He has also relied on Article 47 to submit that a person who is likely to be adversely affected by an administrative action should be given prior adequate notice and an opportunity to be heard.

21. He has relied *inter alia* on the case of **Elijah Makeri Nyangwara vs. Stephen Mungai Njuguna & Anor (2013) eKLR** where the Court held that;

“First, it needs to be appreciated that for section 26 (1)(b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) is to protect the real title holders from being deprived their titles by subsequent transactions.”

22. He identified the following as the issues for determination;

a) Whether the Petitioner's right to own property was violated?

b) Whether the Petitioner's right of fair administrative action was infringed upon?

c) Whether the public officers in question adhered to national values and principles of governance?

23. On the first issue, he has relied on Article 24 of the Constitution to submit that rights are not always absolute as that would result to chaos in regard to the privity and priority over those same rights. He contends that the suit property belonged to his father who had a right to enjoy it and pass it on to his children.

24. He submitted that developing a parcel of land does not make one the owner. It's also his submission that the Petitioner did not at any point own the suit property and cannot therefore proceed to invoke protection of the Constitution.

25. On the second issue, he submitted that the family of Harrison Kiamba failed to take action despite being served with summons. He submitted that due process was followed and the Petitioner was accorded the right to be heard but he ignored the summons. He submitted that they cannot be allowed to reap from their indolence and relies on **Fran Investment Ltd –vs G4S Security Services Ltd (2015) eKLR** where the Court stated as follows;

“It is well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act. But that reality should be checked against yet another equally important Constitutional demand that cases should be disposed expeditiously, which is founded upon the old adage and now an express Constitutional principle under Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff.”

26. On the third issue, he submitted that the Petitioner has not clearly demonstrated how the National values and Principles of Governance have been violated. Relying on section 107 of the Evidence Act, he submits that whoever alleges must prove.

27. Having looked at the petition, responses and the rival submissions, it is my considered view the following issues arise for determination;

a) Whether the proceedings conducted by the Deputy County Commissioner, Mbooni West District in Appeal No. 2 of 2001 were proper.

b) Whether the registration of Atanas Makau Mueke as the proprietor of Mbooni/Mutitu/4083 was proper.

c) Which orders should the Court issue?

28. Makau Mueke sued Harrison Kiamba Mwanja before the Mutitu Adjudication in case No. MTU/82/86. The Committee held that the land originally belonged to the plaintiff's father but he sold it to the defendant in 1953 for a consideration of KShs 700.00/=.

29. The proceedings exhibited as annexure JMK-4 describe Atanas Makau Mueke as the appellant and Harrison Kiamba Makau as the respondent. The forum was the Arbitration Board sitting in Kikima in Case No. Arb/31/86. In the judgment delivered on 13th March, 1990, the Arbitration Board dismissed the appeal and the disputed land 4083 remained the property of Harrison Kiamba Mwanja.

30. Makau Mueke proceeded to Mutitu Adjudication Section and filed objection No. 148 but it was dismissed on 11th April, 2000. The order given was that the name of Harrison Kiamba Mwanja should remain within the records i.e. the AR and Demarcation book. The record shows that the right to appeal within 60 days was explained to the objector.

31. Appeal 2 of 2001 proceeded on 30th October, 2017 and was presided over by the Deputy County Commissioner (DCC), J.K Maguta. The record shows that the interested party represented his deceased father Atanas Makau Mueke. Apart from the interested party, statements were also taken from another son of Atanas known as Ambrose Muoki Makau and a nephew to Atanas known as Geoffrey Mutunga Kiio. They all complained that the Petitioner never appeared despite being summoned. In his ruling, the DCC stated as follows;

“Since the respondent has a habit of not appearing, I rule in favor of the appellant. The appellant should be given the land which he has demonstrated to be his without any objection. Land parcel No. 4083 should go to the appellant.”

32. From the proceedings of this appeal, there are illegalities which are quite obvious. First, the interested party was representing his deceased father but his capacity to so act is not disclosed. The fact that he did not exhibit a grant of representation (if any) which he relied on in the appeal gives the inference that indeed he did not have capacity.

33. Secondly, the objection having been dismissed on 11th April, 2000 any appeal against it should have been filed by 11th June, 2000 but from the appeal number, the inference is that it was filed in 2001. This was way out of time and nothing was exhibited to show that an extension was granted. Although the Interested Party explained that there was an error in the numbering, there is really nothing to convince this Court otherwise.

34. The proceedings do not capture the date of filing and I do not see what the difficulty was in obtaining the information from the relevant office. The DCC filed a statement but did not say anything about the date of filing. If he could write a statement, he could also swear an affidavit about the date of filing. The irresistible conclusion is that the appeal was filed out of time.

35. Thirdly, it is evident that proceedings were conducted in the absence of Harrison Kiamba Mwanja the respondent. He died in 2013 and the appeal was filed in 2001. The appeal was active for more than 10 years before his death but nothing was exhibited to show that he was ever notified. On the day that it proceeded, he had been dead for more than 4 years and on that ground alone, the proceedings are a nullity. Further, the DCC made an adverse decision against a party without satisfying himself that the party or his representative was indeed aware of the appeal.

36. Saying that “..the respondent has a habit of not appearing” does not in any way prove that he was aware and deliberately failed to appear. Considering the consequences of his decision, the DCC had an obligation to do more than frown about the non appearance. It is therefore my considered view that the decision is an affront to Article 47 of the Constitution.

37. At this juncture, it is imperative to reproduce the statement of the interested party in the appeal;

“The land dispute started a long time ago. Harrison (respondent) gave out grandfather (Isaiah Mueke) money to do some work. Harrison entered the land with agreements that he had bought out land. Harrison could not produce any document to ascertain that. Cases started with elders, the chief and even up to Court level. It went upto appeal level. Johnstone Mutisya Kiamba (son to Harrison Kiamba) took over after his father's death. He cut down out grandfather's trees and sold them. Johnstone has been judging and failing to appear whenever we are summoned. His father also used to fail in honoring summons. They respondents have no documentary proof that the land is theirs.

The respondents and their witnesses have adamantly refused to take an oath when called upon to do the same. We have incurred heavy costs while the respondent has been benefiting from the land. I doubt them. They know the land is not theirs and this is why they always dishonor summons. I beg that we get back our land.”

38. Looking at the above statement vis-à-vis the proceedings and reasoned findings of the three previous forums which dismissed his father's case, I am convinced that it was hardly sufficient to overturn the verdicts. The DCC did not even highlight how the committees and Arbitration Board had erred but solely relied on the statement by the interested party.

39. The upshot of the foregoing is that the proceedings were unprocedural, unconstitutional, null and void.

40. In 2017 when Appeal 2 of 2001 proceeded, it was indicated that Atanas Makau Mueke was deceased. It automatically follows that his registration as the proprietor of the suit land in 2018 was fraudulent or achieved through a corrupt scheme.

41. Having found that the proceedings in Appeal 2 of 2001 are null and void, the same cannot be a basis for transferring the suit land to the estate of Atanas Makau Mueke. As correctly submitted by the Petitioner, the title is impeachable pursuant to the provisions of **section 26 (1) (b)** of the **Land Registration Act, 2012**.

42. From the totality of the evidence, the Petitioner has proved that he is entitled to all the prayers sought. In the circumstances, I hereby proceed to enter judgement for the Petitioner and against the Respondents as hereunder: -

a) A declaration is hereby issued that the proceedings conducted by the Deputy County Commissioner, Mbooni West District in Appeal No.2 of 2001 were conducted in total violation of Article 10 and 47 of the Constitution and that the same are null and void for all purposes.

b) An order is hereby issued to the extent that the said proceedings were conducted ex parte and against a deceased person, the same are null and void that the decision rendered on 30th October, 2017 is null and void for all purposes.

c) An order is hereby issued that the said proceedings were conducted through concealment of material facts hence the same void for all purposes.

d) An order is hereby issued that the said proceedings are null and void as the Interested Party lacked the legal capacity to proceed with the same having no letters of administration to represent his deceased father.

Signed, dated and delivered at Makueni via email this 29th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi