



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

CONSTITUTIONAL PETITION NO. 731 OF 2017

STANLEY THUO MURUNYU.....PETITIONER

VERSUS

ALICE WARUGURU NGUGI

BETH WAMBUI MUTUMA (sued as the representatives of the estate of

Beatrice Mukuhi Mwangi(Deceased).....1st RESPONDENTS

THE LAND REGISTRAR, THIKA SUB COUNTY LAND REGISTRY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

By a Petition dated 21st August 2017, the Petitioner has sought for the following reliefs from the Respondent:-

A. A declaration that the award by the tribunal transferring land parcel No. Ruiru East Block 1/302 back to Beatrice Mukuhi Mwangi and ordering refund of consideration of Kshs. 450,00/= to the Petitioner is a nullity as the tribunal lacked requisite jurisdiction to;

i. Reopen, nullify and / or set aside an otherwise valid and legally binding contract of sale of land parcel No. Ruiru East Block 1/302 between the Petitioner and Beatrice Mukuhi Mwangi.

ii. Interfere with title land parcel No. Ruiru East Block 1/302 by ordering the same be transferred back to Beatrice Mukuhi Mwangi.

iii. Enjoin Eunice Ng'ang'a a third party at the Judgment stage , and ordering her to refund the consideration money to the Petitioner yet Eunice Ng'ang'a was not a party to the contract between the Petitioner and Beatrice Mukuhi Mwangi.

B. A declaration that the Respondents, and their agents, representative or any other parties claiming through them, have no legal or Constitutional right to possession , use or title of land parcel No. Ruiru East Block 1/302 and the transfer of the said parcel of land back to Beatrice Mukuhi Mwangi by the 2nd Respondent was unlawful, unprocedural, illegal and therefore invalid.

C. A mandatory order to the 2nd Respondent directing it to revoke the title issued to Beatrice Mukuhi Mwangi of Land Parcel No. Ruiru East Block 1/302 or portions thereof in violation of the Petitioner's right to the same and to reinstate the Petitioner as the registered owner of the said land.

D. An order of injunction restraining the Respondents by themselves, or through their agents or representatives, or any person claiming through them, from interfering in any manner howsoever with the Petitioner's peaceful possession and use of parcel No. Ruiru east Block 1/302, or in any manner howsoever issuing certificate of title to third parties, transferring, disposing, of or alienating the said parcel of land, save through free grant of title, possession and use to the Petitioner as aforesaid.

E. An order of full compensation including restitution to the Petitioner for the losses suffered due to the unconstitutional acts of the Respondents including the following;

i. THAT the Respondents be held jointly and severally liable for Kshs.26,400,000/= being the loss of earnings and mesne profits by the Petitioner

ii. That the Respondents be held jointly and severally liable for general damages for the violation of the constitutional rights of the Petitioner as aforesaid.

F. That costs of this Petition be borne jointly and severally by the Respondents.

In his Petition, the Petitioner averred that on **1st September 2004**, he was introduced to **Beatrice** who was the registered owner of the suit property by **Eunice Njeri Ng'ang'a**. That after visiting the t property, he agreed to purchase it for a consideration of **Kshs. 450,000/=** and on **3rd of September, 2004**, an agreement was drawn by the Law Firm of **Waithira Mwangi & Co Advocates**. That the highlights of the agreement was that the consideration would be **Kshs. 450,000/=** to be settled in three installments with **Kshs. 200,000/=** being paid on the execution of the agreement, **Kshs.50,000/=** to be pay on or before **30th September 2004**, and a final instalment of **Kshs. 200,000/=** to be paid on or before **9th November 2004**, . Further that the vender was to obtain all the requisite consents prescribed by statute and the Petitioner was to obtain vacant possession free from any encumbrance immediately after execution of the agreement.

He averred that he paid the **1st** installment and the agreement was executed and he was shown the beacons. That he immediately took possession and on **30th September 2004**, he settled the **2nd** instalment and on **8th October 2004**, he paid **Beatrice** the remaining and final instalment of **Kshs. 200,000/=**. That they made an Application for consent dated **7th October 2004**, and it was issued on the same day and **Beatrice** then signed the transfer form dated **17th November 2004**; Further that he was issued with a title deed dated **19th November 2004**. It was his contention that he intended to custom and rent the space on the disputed land at a minimum monthly rent of **Ksh. 2000,000/=** after which he would develop it . However, on **25th April 2005**, **Beatrice** filed a complaint letter with the Ruiru Division Land Disputes Tribunal alleging that the disputed land was sold illegally without her knowledge and he was summoned to the tribunal for a hearing of the claim. That through his Advocates, he objected to the competence of the tribunal based on the fact that it lacked requisite jurisdiction to entertain the claim. However, the tribunal proceeded to hear the matter and so **14th August 2006**, it issued orders that **Mrs Eunice Njeri**, Beatrice's daughter do refund the consideration and the petitioner was ordered to transfer the suit property back to Beatrice.

It was his contention that the tribunal's decision was a nullity in law. Further that on **17th August 2006**, the tribunals award was filed at the Chief Magistrates Court at Thika and was adopted as the order of the court. That a Decree dated **21st November 2006**, was also issued but the said Decree was **irregular, null and void** since it sought to breathe life into a nullity. That he filed Judicial Review Proceedings but that the same was dismissed on the ground that it was filed out of time. However, he further filed a Notice of Appeal with the intention of filing an Appeal challenging the dismissal of the Judicial Review Application, but that High Court file went missing making it difficult to prosecute the Appeal. That he had since abandoned the said appeal. He further averred that **Beatrice** filed an Application seeking to compel the **2nd** Respondent to dispense with the production of the original title deed and the orders were issued despite his opposition. That he applied for a restriction, but that the **2nd** Respondent effected the transfer nevertheless and be obtained an order on **27th July 2005** stopping any further transactions relating to the suit property. It was his contention that he has always been in possession and has never been evicted. However, owing to the prolonged legal dispute, he has been unable to economically exploit the suit property and that the Respondents have neglected to refrain from the violations despite all the remedies he sought. He also contended that he faced an imminent danger of losing both his property and monies advanced as consideration.

It was his further contention that in arrogating itself jurisdiction, the tribunal and by the **2nd** Respondent fraudulently transferring the suit property to **Beatrice**, they violated **Article 27, article 40 , 47 and 50** of the Constitution. Further that the Estate of Deceased has continued in wrongful occupation of his land, despite having no legitimate interest and thus violated Articles, **2, 3, 10,64,73,75 and 232** of the Constitution.

The Petition is supported by the Affidavit of **Stanley Thuo Muruny**, who reiterated the contents of the Petition and further averred that when he was in the process of renting out the suit property, he received a letter from the Chairman of **Ruiru Division Lands Disputes Tribunal** to appear before it for the hearing of a claim by **Beatrice**. He contended that it is when he became aware of the complaint claiming that he bought the suit property illegally without Beatrice's knowledge . He averred that he dealt with the said Beatrice throughout the transaction and made all payments to her. He averred that the sought legal advice and his Advocates advised him that the tribunal lacked the requisite jurisdiction to entertain the said claim and despite his objections, the tribunal proceeded to hear the matter.

That the tribunal proceeded to hear the matter and ordered **Mrs Eunice Nganga**, Beatrice's daughter to refund him the consideration that he had paid. It was his contention that the tribunals decision was a nullity as it had no jurisdiction and further the decision requiring a third party to pay him the money was irregular and therefore the adoption of the said order was also irregular. It was his further contention that he thereafter filed a Judicial Review Application but the Court held that his application was out of time. That the said time had lapsed by virtue of the delay caused by the Thika Lands Registry in supplying him with the award and the proceedings. That when he sought to appeal against the said order the High Court's file went missing and he applied for a restriction on **19th June 2013**. However Beatrice sought for orders to compel the Land Registrar to dispense with the production of the original title deed. That he has not gotten justice despite seeking legal redress though he still is in occupation of the suit property

The Petition is contested and the **1st** Respondents filed a Replying Affidavit sworn by **Alice Waruguru Ngugi** on **17th May 2018**, and averred that the Petition is **res judicata** as the Petitioner had filed a similar challenge to the award by the **Ruiru Lands Dispute Tribunal** by way of Judicial Review in Nairobi **HCC Application No. 588 of 2007**, wherein he sought an order of **Certiorari** to quash the award, ruling and proceedings and prohibition restraining the Chief Magistrate's Thika Law Courts from hearing and determining matters over the said award. She averred that the Judicial Review Application was heard substantively and on merit by way of written submissions and a

ruling thereon made on **3rd November 2010**, dismissing the entire Application. Further that the Petitioner appealed to the Court of Appeal and the appeal abated and was marked as such by the Court of Appeal. She averred that the instant Petition seeks the same determination as the ones heard and determined by the High Court to the extent that the principal issue is the validity or otherwise of the award of the **Ruiru Land Disputes Tribunal**, with respect to the ownership of the suit property and thus the suit is **res judicata** and thereby incompetent.

The 2nd and 3rd Respondents filed grounds of opposition and stated grounds that the Petitioner ought to have filed a Civil suit in which the Court would have an opportunity to hear witnesses and examine documents in support of the ownership of the suit property. Further that the Petitioner has not demonstrated how the said Articles of the **Constitution** relied on in the Petition have been infringed upon. Further that the Petition will not solve the question of ownership and that it is **misconceived, mischievous**, and an abuse of the Court process.

The parties to the Petition filed written submissions which the Court has now carefully read and considered. The Court finds that the issues for determination are;

1. *Whether the suit is Res Judicata*
2. *Whether there was inordinate delay in filing the Constitutional Petition.*
3. *Whether the Petitioner's rights were violated*
5. *whether the Petitioner is entitled to the orders sought*

1. Whether the suit is Res Judicata

The Principle of *res judicata* is found in **Section 7** of the **Civil Procedure Act** which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Further in the case of **Independent Electoral and Boundaries Commission ...Vs... Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) *The suit or issue was directly and substantially in issue in the former suit.*
- b) *That former suit was between the same parties or parties under whom they or any of them claim.*
- c) *Those parties were litigating under the same title.*
- d) *The issue was heard and finally determined in the former suit.*
- e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

The Court would like to point out that while the Petitioner has averred that the Court dismissed the issue of **Res Judicata** in its Ruling dated **10th December 2018**, it is this Court's considered view that the Ruling dealt with whether or not the issue of Res Judicata can be brought as a Preliminary Objection. The Court in finding that the issue of Res Judicata could not be brought up as a Preliminary Objection dismissed the said Preliminary Objection. However, the issue as to whether or not the matter was a res judicata was not resolved.

The Court must therefore determine whether the matter is Res Judicata bearing in mind the set out principles above. It is not in doubt that for matter to be **res judicata** the issues in the instant suit must have been heard and determined in the former suit. The issue that this Court must then determine is whether the issues raised in this Petition were heard and determined in the Judicial Review Proceedings.

The Court has gone through the Ruling delivered by **Hon. Justice A. Mbogholi Msagha** on **3rd November 2010**, and note that on his Ruling the Honorable Judge stated;

“.....The provision cited above is coached in mandatory terms. Non Compliance therewith is fatal and having said so, I cannot address the issues before me.”

As per the above Ruling delivered, by a court of competent jurisdiction, it is clear that the issues raised in the Judicial Review were never heard and determined as they were never dealt with. Consequently, the Court finds and holds that the instant Constitutional Petition is not **res judicata**.

2. Whether there was inordinate delay in filing the Constitutional Petition.

It is the 1st Respondent's contention that the Petitioner is guilty of laches in filing the petition as the Judicial Review was filed by the Petitioner was determined in **November 2010** and the Petitioner waited seven years to file the current petition in **2017**. However the Petitioner has averred that the property in question being land, the applicable limitation period is **12 years** which period he submitted did not lapse before he instituted the present suit. Further that he has detailed an explanation of all his efforts to have his rights to the suit property vindicated.

In the High Court Petition No. 306 of 2012 Ochieng' Kenneth K'Ogutu ...Vs... Kenyatta University and 2 Others, the Court held that

"[36]There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): "Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years."

Smith vs Clay [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743, Lord Camden LC stated that:

'A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.' Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: "Expedit reipublicae ut sit finis litium", is a maxim that has prevailed in this court at all times, without the help of parliament.'

The Court finds that in the instant matter what is to be determined is whether or not the Petitioner has been able to explain the delay and or whether or not he was sitting on his rights. It is not in doubt that the Constitution did not set a time limit within which enforcement of fundamental rights should be brought. However, the said Application should be brought without inordinate delay. Is the delay herein unreasonable? The Petitioner has in his affidavit detailed the process he undertook in trying to safeguard his rights. The Court notes that though the Judicial Review Proceedings were dismissed in **2010**, the Petitioner did file an Appeal. Further as per the annexures produced before the Court, it is not in doubt that as late as 2015, the parties were still litigating over the instant issue and that there were orders barring the issuing of another title deed.

The court has also perused the order dated **7th August 2015**, granting temporary injunction. As already noted above the Court needs to be satisfied with the explanation given for the delay in bringing the Constitutional Petition. In this instant case, it is very clear that the Petitioner was not sitting on his rights as he was exploring other legal avenues. Therefore, the Court is satisfied that his explanation for failing to bring the Petition earlier is satisfactory.

3. Whether the Petitioners rights were violated

The Petitioner has alleged that the actions of the Respondents constituted violation of his Constitutional rights. Under Article 40 of the Constitution though every person has a right to acquire and own property the said protection does not extend to where the land was unlawfully acquired.

Article 47 (1) of the Constitution provides that

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

It is not in doubt that any public body carrying out any **administrative** duty must ensure that the same is procedurally fair and lawful. It is also not in doubt that the Land Disputes Tribunal now abolished was a public body. The Court must therefore determine. Therefore, the court must now determine whether the said tribunal made a decision that was procedurally fair and lawfully. The Petitioner has averred that he was invited by the tribunal for the hearing of the claim lodged by Beatrice. Further he has also acknowledged that he attended the hearing and was allowed to put forth his case. It is therefore clear that in this instant matter the Tribunal accorded the Petitioner a procedural **fair administrative** action.

The next question then is whether the administrative action was lawful. **Section 3 (1) of the Land disputes Tribunal Act No. 18 of 1990** (repealed) provided for the jurisdiction of the Land Disputes Tribunals. The Courts have on various occasions held that the land disputes tribunal did not have jurisdiction to arbitrate on matter involving title to land or give orders to rectify the register. See the case of Wamwea ...Vs... Catholic Diocese of Murang'a Registered Trustees [2003] KLR 389 the Court held that;

"..... disputes over title to land are not within the jurisdiction of tribunal and Lands Disputes appeals Committee. It can also be said that disputes over contracts are not under that jurisdiction"

Although this is a decision of the High Court which is not hiding on me I am nonetheless in agreement with the reasoning. It would appear therefore that in compelling the appellants to transfer to the respondent an acre out of the suit premises, the tribunal was in effect enforcing a contract for the sale of land which jurisdiction it does not have. In so ordering therefore the tribunal acted ultra vires.

Further in the Nyeri Court of Appeal in M'Marete ...Vs... Republic & 3 others [2004] eKLR the Court held that

..... We have already set out at the commencement of this judgment the final decision of the tribunal. It was to the effect that the panel of elders awarded the parcels of land Nos. Nyaki/Mulathankari/1680 and 1681 to the claimant (Beatrice) who is the appellant before us. These pieces of land were registered under Registered Land Act (Cap 300 Laws of Kenya). Awarding land to the claimant meant she acquired an interest in it by virtue of that award. In order to put that ruling into effect, the appellant would have to effect it by rectifying or cancelling the titles. The issue is whether the tribunal had jurisdiction to do so.

In our view, the dispute before the tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the tribunal acted in excess of its jurisdiction. In view of the foregoing, we are in agreement with the ruling of the learned judge to the effect that the tribunal went beyond its jurisdiction. It therefore follows that the superior court cannot be faulted for having allowed the application and granting the reliefs sought by that application.

In this instant case, it is also not in doubt that the claim before the tribunal related to ownership of land and therefore the tribunal did not have jurisdiction to deal with the matter. Jurisdiction is everything and without it, the court has no option but to down its tools. In this case also the tribunal with no jurisdiction had to down its tools. See the case of Owners of the Motor Vessel "Lilians" ...Vs... Caltex Oil (Kenya) Ltd. [1989] KLR where the Court held that

"Jurisdiction is everything, without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of Law downs in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

By acting without jurisdiction was their decision then lawful? This Court finds that a decision made without jurisdiction is unlawful and therefore it is this Court's considered view that the tribunal did not accord the Petitioner administrative action that was lawful and it therefore violated his rights to Lawful Administrative Action under **Article 47 of the Constitution**.

4. Whether the Petitioner is entitled to the orders sought

The Court has already held that the decision made by the tribunal was in excess of its jurisdiction and it then follows that the same is a nullity in law. Therefore, it follows that the order restoring the title back to **Beatrice Mukuhi Mwangi**, is invalid and the Petitioner is entitled to the orders sought of revocation of the said title and orders of injunction

The Petitioner has further sought for compensation. However, he has not proved the losses suffered and the Court is not satisfied that he is entitled to the same. **Section 27** of the Civil Procedure Act gives the Court discretion to grant costs. However costs usually follow the events unless there are special circumstances. In this instant case, the Court finds that the Petitioner being the successful litigant is entitled to the costs of the petition.

Having now carefully considered the pleadings herein, the annexures thereto and the written submissions, the court finds that the Petitioner has proved his case on the required standard of balance of probabilities. For the above reasons the Petition dated **21st August 2017** is **partially merited** and is consequently is allowed in terms of prayers number **A,B,C,D and F**.

It is so ordered.

Dated, signed and Delivered at Thika this 16th day of July 2020

L. GACHERU

JUDGE

16/7/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open

Court.

With Consent of and virtual appearance via zoom

No consent for the Petitioner

M/s Mwangi holding brief for Mr. Njenga for the 1st Respondents

No consent for the 2nd Respondent

No consent for the 3rd Respondent

L. GACHERU

JUDGE

16/7/2020