



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CONSTITUTIONAL PETITIONNO. 22 OF 2013

IN THE MATTER OF SABAERI MAGAGA (DECEASED)

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT, CAP. 160, LAWS OF KENYA

AND

IN THE MATTER OF TITLE NOS. WEST MUGIRANGO/SIAMANI/1005 AND 1076

AND

IN THE MATTER OF ARTICLES 3, 19, 21,22,23,40 AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 25, 26 AND 86 OF THE LAND REGISTRATION ACT, 2012

BETWEEN

MECHA MAGAGA Alias JOSEPH MAGAGA.....PETITIONER

AND

JACKSON OBIERO MAGAGA.....RESPONDENT

RULING

1. This petitioner, Mecha Magaga alias Joseph Magaga (hereinafter referred to only as “**the petitioner**”) brought this petition against the respondent on 22nd July, 2013 seeking; a declaration that the District Land Registrar Nyamira has no power to cancel a validly issued title and that the said registrar be stopped from doing so, a declaration that the petitioner is the valid and indefeasible owner of all that parcel of land known as **LR No. West Mugirango/Siamani/1005** (hereinafter referred to only as “**the suit property**”) and a conservatory order with respect to **LR NO. West Mugirango/ Siamani/1076** (hereinafter referred to as “**Plot No. 1076**”). The Petition was brought on the grounds that the petitioner and the respondent are step brothers. They are the sons of one, **Sabaeri Magaga** (hereinafter referred to only as “**the deceased**”). The petitioner claimed that he is the registered proprietor of the suit

property while the deceased who died in 1986 is registered as the proprietor of Plot No. 1076. The petitioner claimed that the deceased had three wives and that before he died; he sub-divided his land into three portions for his three wives and retained a portion for himself known as “*Embonga*” in Ekegusii which upon his demise was supposed to be shared out among his family. The petitioner claimed that the deceased purchased for the respondent’s mother a parcel of land in Kipkelion in Nandi County when the respondent’s mother rejected the parcel of land that had been given to her in Nyamira County and the respondent and his mother moved and occupied the said parcel of land at Kipkelion until the year 2002 during the tribal clashes when the respondent came back to Nyamira long after the death of the deceased and occupied Plot No. 1076 without any reference to other members of the deceased’s family. As soon as he arrived, the respondent also started laying a claim to the suit property. In pursuance of his claim over the suit property and Plot No. 1076 aforesaid, the respondent lodged a complaint against among others the petitioner with the Nyamira Land Disputes Tribunal (hereinafter referred to as “**the tribunal**”) in the year 2004 seeking the assistance of the said tribunal to obtain title to the suit property and the said Plot No. 1076. The tribunal assumed jurisdiction over the respondent’s complaint, heard the same and made a decision in favour of the respondent in which it ordered the suit property and Plot No. 1076 to be transferred to the respondent. The petitioner claims that he never participated in the tribunal’s proceedings and that he only came to know of the same after the same had been adopted by the magistrate’s court as a judgment of the court and a decree issued for execution on 4th February, 2013. The petitioner claimed that reference to his testimony in the proceedings of the tribunal is a forgery and a make-up as he never appeared before the tribunal during the hearing of the respondent’s complaint. The petitioner claimed that, in execution of the said tribunal’s decision, the respondent caused the Land Registrar, Nyamira to write to the petitioner on 22nd May, 2013 to surrender his title to the suit property for cancellation so that a new title may be issued in favour of the respondent. It is on account of the foregoing that the petitioner decided to file the petition herein.

2. Together with the petition, the petitioner filed an application by way of Notice of Motion dated 24th July, 2013 seeking a “preservatory” order of temporary injunction to restrain the defendant from trespassing upon, building on, alienating or in any other way interfering with the petitioner’s quiet enjoyment and usage of the suit property. This is the application which is the subject of this ruling. The application was supported by the affidavit of the petitioner sworn on 24th July, 2013 in which the petitioner reiterated the contents of the petition which I have already highlighted above. The petitioner deposed further that the Land Registrar, Nyamira District wrote to him demanding that he surrenders his title deed for the suit property for cancellation following which letter the respondent has been threatening to move into the suit property forcefully. The petitioner deposed further that the respondent has damaged the boundary for the suit property and some of the petitioner’s crops grown on the suit property. The petitioner has contended that if the order sought is not granted the respondent and the Land Registrar Nyamira District will proceed and interfere with the petitioner’s title over the suit property. The petitioner annexed to his affidavit in support of the application; a copy of the Certificate of Official Search dated 25th February, 2013 in respect of Plot No. 1076, a copy of a Certificate of Official Search dated 25th February, 2013 in respect of the suit property, a copy of Land Certificate for the suit property, a copy of the order issued by the Senior Resident Magistrate’s Court at Nyamira on 22nd December, 2004, a copy of the proceedings and decision of the tribunal dated 13th October, 2004 and copies of letters dated 22nd May, 2013 and 11th July, 2013 by the District Land Registrar, Nyamira. The petitioner’s application was opposed by the respondent. In his replying affidavit sworn on 20th September, 2013, the respondent contended that the petition herein is *res judicata* because the issue raised in it had been heard and determined. The respondent contended further that the petitioner participated in the tribunal proceedings until the end and had a right to appeal against the tribunal’s decision within 30 days from the date of its delivery which right the petitioner failed to exercise. The respondent has admitted that he has approached the District Land Registrar Nyamira to have the suit property transferred to him in accordance with the tribunal’s decision. The respondent denied the contents of the petition and contended that the petitioner had acquired title to the suit property fraudulently. The respondent contended that he is entitled as of right to the suit property and urged the court to dismiss the petitioner’s application.

3. When the petitioner's application came up for hearing on 24th September, 2013, the petitioner and the respondent who are both in person relied on their affidavits in support of and in opposition to the application respectively. The petitioner urged the court to allow the application while the respondent prayed that the application be dismissed. I have considered the petitioner's application and the affidavit filed in support thereof. I have also considered the affidavit filed by the respondent in opposition thereof. The petitioner's application although brought under the provisions of the Civil Procedure Rules is actually seeking a conservatory order under the provisions of Rule 23 of the Constitution of Kenya (Protection of rights and Fundamental freedoms) Practice and Procedure Rules, 2013. An applicant for a conservatory order or interim relief under the said rule must demonstrate that he has a prima facie case against the respondent. The petitioner has claimed that the Land Registrar, Nyamira District has on the prompting of the respondent threatened to cancel his title over the suit property. The petitioner has also claimed that the respondent has threatened him with eviction from the suit property. The petitioner has not joined the Land Registrar as a party to these proceedings. The petitioner has also not pointed in what manner his constitutional rights have been infringed by the respondent or the Land Registrar which he has not even made a party to this petition although a relief is sought against him. What I have gathered from the petition and the affidavit in support of the present application is that the respondent lodged a claim against the petitioner at the tribunal with respect to the suit property and Plot No. 1076, the tribunal made a decision in favour of the respondent against the petitioner on 13th October, 2004 and ordered the petitioner to surrender the suit property and Plot No. 1076 to the respondent. The tribunal's said decision was filed at the Resident Magistrate's court at Nyamira for adoption as a judgment of the Court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, 1990 (now repealed). The said decision was adopted by the said court as a judgment of the court on 22nd December, 2004. What the respondent has been trying to do through the District Land Registrar, Nyamira is to enforce the said judgment. This fact is very clear from the letter dated 11th July, 2013 that was addressed to the petitioner by the said Land Registrar. There is no evidence on record that the petitioner challenged the decision of the tribunal or its adoption as a judgment of the court. That means that the decision of the tribunal and the judgment that was passed by the Senior Resident Magistrate's Court at Nyamira on 22nd December, 2004 when the same was adopted have neither been varied nor set aside. In the circumstances, I don't see how the respondent and the District Land Registrar, Nyamira District can be said to be violating the petitioner's rights when all that they are doing is to execute a court order which has not been set aside or varied. I am aware that the decision of the tribunal was illegal, null and void because the tribunal had no jurisdiction to cancel the petitioner's title and to order that the suit property be transferred to the respondent. The validity or otherwise of the tribunal's decision is however not the subject of this petition. That in my view, is a civil matter which the petitioner should have raised in a normal civil suit. It would not be possible for this court to determine the validity or otherwise of the said decision of the tribunal which has been adopted as a judgment of the court in these proceedings which have been brought by way of a constitutional petition and in which neither the Attorney General nor the Senior Resident Magistrate's Court whose judgment the respondent and the District Land Registrar are in the process of enforcing have been enjoined as parties. If the petitioner wanted to challenge the decision of the tribunal and its adoption as a judgment of the court, he could have done so through an appeal to the Provincial Land Disputes Appeals Board pursuant to the provisions of the Land Disputes Tribunals Act, 1990 aforesaid or through judicial review. In a case such as this where the petitioner claims that he was not aware of the proceedings of the tribunal, the petitioner could still challenge the decision of the tribunal and its adoption as a judgment of the court through a normal civil suit. As things stand now, the merit of the petition herein is doubtful. It would be difficult for this court to make a declaration that the District Land Registrar Nyamira has no power to cancel the petitioner's title while there is an existing court order authorizing him to do so. The same applies to the declaration sought that the petitioner is the valid and indefeasible owner of the suit property. Such a declaration would be inconsistent with the existing court order that cancelled the petitioner's title. The petitioner must deal with the existing decision of the tribunal and the Senior Resident Magistrate's Court judgment that adopted it before he can be entitled to the reliefs sought in the petition herein.
4. The upshot of the foregoing is that I am not satisfied that the petitioner has established a prima

facie case against the respondent to justify the issuance of the conservatory order sought. It is my finding that the petitioner's application dated 24th July, 2013 has no merit. The same is accordingly dismissed with costs to the respondent. I have noted from the material on record that the petitioner is in occupation of the suit property. There is a risk therefore that the petitioner may be evicted from the suit property following the dismissal of this application while the petition herein is still pending. I would therefore in the interest of justice, make a further order that pending the hearing and determination of this petition, the status quo prevailing as of the date hereof as relates to use and occupation of the suit property, namely, **LR. No. West Mugirango/Siamani/1005** shall be maintained.

Delivered, dated and signed at Kisii this 7th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:-

Petitioner present in person

Respondent present in person

Mobisa Court Clerk

S. OKONG'O

JUDGE