



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 11 OF 2017**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS & FREEDOMS OF THE INDIVIDUAL UNDER ARTICLE  
40, 47, 48 & 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: AN APPEAL TO THE MINISTER FOR LANDS IN  
APPEAL CASE NO. 88 OF 2016- PETER MULWA –VS- MURIUKI MBURU**

**AND**

**IN THE MATTER OF: THE CONSTITUTION (SUPERVISORY JURISDICTION & PROTECTION OF  
FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULE 2013**

**AND**

**IN THE MATTER OF: PLOT NO. 54 MITANGONI/MADZIMBANI ADJUDICATION SECTION.**

**AND**

**IN THE MATTER OF: ARTICLE 20, 21, 22 & 23 OF THE CONSTITUTION OF KENYA,  
THE ENVIRONMENT & LAND COURT ACT NO. 19 OF 2011, SECTION 13,  
THE LAND ADJUDICATION ACT CHAPTER 284 LAWS OF KENYA  
SECTION 19, 20, 21, 22, 26, 27, 28 & 29 THE LAND ACT NO. 6 OF 2012**

**BETWEEN**

**PETER MULWA.....PETITIONER**

**AND**

- 1. MURIUKI MBURU**
- 2. DEPUTY COUNTY COMMISSIONER-KALOLENI SUB-COUNTY**
- 3. THE LAND REGISTRAR- KILIFI**
- 4. THE ATTORNEY GENERAL.....RESPONDENTS**

## JUDGMENT

### Background

1. by this Petition dated and filed herein on 11<sup>th</sup> July 2017, Peter Mulwa (the Petitioner) prays for the following reliefs: -

**i. A declaration that the decision by the 2<sup>nd</sup> Respondent to dismiss the Petitioner's Appeal to the Minister for Lands without it being heard based on the wrong premise that it was filed out of time is against the just expectation of the Petitioner and amounts to a denial of the Petitioner's right to a fair hearing and to a reasonable and procedurally fair administrative action as enshrined in Articles 47 and 50 of the Constitution of Kenya;**

**ii. A declaration that the issuance of a Title Deed to the 1<sup>st</sup> Respondent for the suit property acquired pursuant to a flawed decision threatens to further violate the Petitioner's right to fair administrative action as enshrined under Articles 47 of the Constitution of Kenya;**

**iii. A declaration that the continued existence of the decision by the 2<sup>nd</sup> Respondent dismissing the Petitioner's appeal without it being heard violates the Petitioner's right to access justice as enshrined in Article 48 of the Constitution of Kenya;**

**iv. An order of certiorari quashing the decision of the 2<sup>nd</sup> Respondent that dismissed the Petitioner's appeal to the Minister for Lands and also quashing the Order that Plot No. 54 Mitangoni/Madzimbani Adjudication Section be registered in the name of the 1<sup>st</sup> Respondent;**

**v. An order that the Petitioner's appeal to the Minister was filed within the prescribed time and that this Court do determine the dispute of ownership of Plot No. 54 Mitangoni/Madzimbani Adjudication Section on the available evidence adduced in this Petition;**

**vi. Costs of this Petition;**

**vii. Any other relief that this Honourable Court may deem just to grant so as to meet the ends of justice and the protection of the Petitioner's Constitutional rights.**

2. Those prayers arise from the Petitioner's contention that at all times material, the Petitioner and his family were the beneficial owners entitled to possession of all that parcel of land known as Plot No. 54 Mitsangoni/Madzimbani Adjudication Section. It is the Petitioner's case that when the concerned area was declared an adjudication section, both himself and Muriuki Mburu (the 1<sup>st</sup> Respondent) were documented jointly as the owners of the suit property, pending the determination of a dispute between them on the ownership thereof.

3. The Petitioner avers in the affidavit filed in support of the Petition that he then proceeded to file an Arbitration Board Case pursuant to Sections 21 and 22 of the Land Adjudication Act but despite the case being heard and decided in his favour on 28<sup>th</sup> May 2014, the Executive Officer who was recording the same fraudulently reflected on the record that the 1<sup>st</sup> Respondent had won.

4. Aggrieved by this turn of events, the Petitioner avers that he filed **Objection Case No. 6 of 2014**. That Objection was heard on 9<sup>th</sup> October 2014 and the decision made thereon on 19<sup>th</sup> March 2015 again favoured the 1<sup>st</sup> Respondent. The Petitioner then filed an Appeal to the Minister but it is his case that when the Appeal came up for hearing before the Deputy County Commissioner-Kaloleni Sub-County (the 2<sup>nd</sup> Respondent) on 4<sup>th</sup> April 2017, the 2<sup>nd</sup> Respondent dismissed it on the ground that it had been filed out of time.

5. According to the Petitioner, his Appeal had been filed within 60 days which is the period allowed under the Act and the 2<sup>nd</sup> Respondent's decision was erroneous and amounted to a violation of his rights to a fair hearing, to access justice and to own property and hence the orders sought herein.

6. As it turned out, despite service, the 1<sup>st</sup> Respondent neither entered appearance nor filed any response to the Petition.

7. But in a Replying Affidavit sworn and filed herein on their behalf on 15<sup>th</sup> February 2018 by the Registrar of Titles Kilifi- Daisy Hadima Mwaruka, the Deputy County Commissioner-Kaloleni Sub-County, the Land Registrar Kilifi and the Honourable the Attorney General (sued herein as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents) deny that the Petitioner is entitled to the orders sought.

8. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents aver that by virtue of the Adjudication Records from the Department of Adjudication and Settlement, the suitland measuring 1.75 Ha belongs to one Abdusalim Abdullahi Gedi and not the Petitioner. The Respondents aver that the said Office has all the records in regard to the suit property including those of an appeal between the current owner and one Muriuki Mburu which was decided in favour of the said Abdusalim Abdullahi Gedi.

9. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents further aver that title deed for the said area were "generally issued massively in the year 2007" and that all documents were registered as received without any alterations from their office.

### Analysis and Determination

10. By a consent of the parties as recorded herein on 17<sup>th</sup> October 2019, it was agreed that the Petition be disposed of by way of Affidavit evidence on record and by written submissions. I have accordingly looked at the pleadings filed by the parties before me as well as the written submissions and authorities placed before me by the Learned Counsels for the parties-Mr. Shujaa for the Petitioner and Mr. Munga for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

11. This Petition arises from an Appeal to the Minister filed by the Petitioner against the 1<sup>st</sup> Respondent from a decision of the Land Adjudication & Settlement Officer. The appeal in respect of the suit Property-Plot No. 54 Mitsangoni/Madzimbani Adjudication was filed pursuant to the provisions of Section 29 of the Land Adjudication Act, Cap 284 of the Laws of Kenya.

12. The Petitioner's case is that his said Appeal to the Minister was not heard by the Ministerial Panel and that instead it was dismissed on the erroneous ground that it had been filed out of time.

13. A casual reading of the material placed before me reveals that **Objection Case No. 6 of 2014** was heard on 9<sup>th</sup> October 2014 and that a decision was rendered thereon on a date that is not clear from the record. However, from the averments of the Petitioner as contained in his Supporting Affidavit to the Petition, that decision was rendered on 19<sup>th</sup> March 2015.

14. It was difficult to fault the Petitioner on the said date given that none of the Respondents addressed the Court on the same. According to the Petitioner, he was so aggrieved by the decision rendered on 19<sup>th</sup> March 2015 that he filed an Appeal against the same and paid for it on that very day even though he was issued with a receipt for that payment a couple of days later.

15. From the material placed before me, that Appeal came up for hearing before one F.A.O Ndunga, the Panel Chairman and the Deputy County Commissioner, Kaloleni Sub-County on 4<sup>th</sup> April 2017. A further perusal of what transpired on the said date reveals that the Panel Chairman himself asked the Petitioner a number of questions regarding the date when he filed the Appeal. The said Panel Chairman then proceeded to record his findings and decision as follows: -

#### **FINDINGS**

**1. From the Director Land Adjudication and Settlement Department's Letter ref. No. APP/4/1/Vol. 27/11 dated 13<sup>th</sup> September 2016, addressed to the Deputy County Commissioner, it shows the appeal was filed out of time and therefore the appellant was to give substantive reason to this effect.**

**2. The appellant never gave any good reason to the panel as to why this appeal should be heard and further insisted that as per his knowledge, the appeal is within time.**

**3. The Panel, having allowed a witness to the appellant to give any reason as to why this case should be heard, was not convinced as to why the case should be heard.**

**4. The Panel practically calculated the dates of the Appeal and the dates when the Objection Judgment were given, it was confirmed that he appealed after a period of five months and 15 days instead of two months as required by law as stipulated in Cap 284 of the Land Adjudication Act.**

#### **DECISION**

**In view of the above findings and other information and testimonies produced before this Court, the appeal is hereby dismissed since it was appealed out of time. The disputed Parcel No. 54 remain registered in the name of the Respondent."**

16. While it is evident that the hearing of the Objection Case filed by the Petitioner took place on 9<sup>th</sup> October 2014, the date on which the decision was rendered was not provided by those who heard the Objection. It was however clear that the Petitioner wrote a letter expressing his intention to appeal against the same on 19<sup>th</sup> March 2015. That letter clearly stated that the determination was made on that very date when the letter was written.

17. At the same time, the Petitioner has attached a copy of a receipt issued to him on 24<sup>th</sup> March 2015 indicating that he paid a sum of Kshs 650/- for the Appeal. In the absence of evidence of any contrary date when the decision was rendered, I did not find any reason to fault the Petitioner's position that even though the hearing of the Objection had taken place on 9<sup>th</sup> October 2014, a decision was not rendered thereon until 19<sup>th</sup> March 2015.

18. Having found that the decision was rendered on 19<sup>th</sup> March 2015 and given that the receipt for payment for the Appeal to the Minister was issued five days later, the Petitioner was certainly well within the time allowed for such an Appeal under Section 29 of the Land Adjudication Act.

19. Accordingly, the determination by the 2<sup>nd</sup> Respondent to the effect that the Appeal had been filed outside the stipulated time was rendered without any supporting evidence. It was therefore as submitted by the Petitioner unreasonable, procedurally unfair and violated the Petitioner's right to appeal as provided under the law.

20. While the Petitioner has urged this Court in light of the foregoing to go ahead and determine the ownership of the parcel of land in dispute in his favour, I am of the view that this Court should not do so given the circumstances and that the dispute resolution process as

provided under the Land Adjudication Act ought to be exhausted.

21. Accordingly, the Petition succeeds and I grant all the orders sought therein with the direction that a fresh Ministerial Panel other than that which heard the dispute on 4<sup>th</sup> April 2017 be constituted to hear and determine the Appeal.

22. The Petitioner shall have the costs of this Petition.

**Dated, signed and delivered at Malindi this 2<sup>nd</sup> day of October, 2020.**

**J.O. OLOLA**

**JUDGE**