



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

PETITION NO. 2 OF 2019

IN THE MATTER OF THE ALLEGED INFRINGEMENT AND VIOLATION OF RIGHTS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES 2,

3, 10, 19, 20, 21, 22, 23, 28, 40, 47, 48, 50, 60, 159, 258 AND 259

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

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

BETWEEN

GEORGE CHRISTOPHER ODONDO (suing as the Donee of ALOYS ODONDO).....PETITIONER

VERSUS

FRANCIS TOBIAS AKELLO.....1ST RESPONDENT

LAND REGISTRAR BUSIA.....2ND RESPONDENT

J U D G M E N T

1. By a Petition dated 3rd May 2019, the Petitioner in his capacity as the donee of ALOYS ODONDO under a power of attorney instituted this action against the respondents. This case concerns land parcel number SAMIA/LUANDA/MUDOMA/693 which the Petitioner's father, Norbetus Oloo co-owned together with his brother Matayos Okello. It is pleaded that the two died in 1979 and 1974 respectively. That the said Matayos was the father of the 1st Respondent herein. Consequently, succession proceedings were taken out by the Petitioner in NAIROBI HCC P&A NO. 1112 of 1991 whereby it was decided that the suit land be equally shared between the estates of the two deceased persons, each getting ½ a share.

2. The Petitioner pleaded further that pursuant to the aforementioned decision, the suit land was subdivided into four portions namely Samia/Luanda Mudoma/2203, 2204, 2205 and 2290; with 2203 and 2290 designated for the estate of Norbetus Oloo and got registered in Aloys Odondo's name in trust for his brothers. 2204 was registered in the name of Matayos Okello; the 1st Respondent's father while parcel no. 2205 was registered in the name of a purchaser, Gilbert Ambale Akatsa. The Petitioner avers that without their knowledge, the 1st Respondent filed Tribunal Case No. 33 of 2008 at the Land Disputes Tribunal at Funyula against one Gabriel Onyanchi Sundia claiming land parcel No. Samia/Luanda Mudoma/1369 which was adjacent to the suit land, 693.

3. That the Tribunal in consideration of facts misrepresented by the 1st Respondent and in total disregard of due process allowed the claim ordering that the two parcels be amalgamated. The titles to the subdivided parcels Samia/Luanda Mudoma/2203, 2204, 2205 and 2290 were then cancelled to the detriment of the Petitioner and the tribunal's decision upheld by the appeals tribunal. The original 693 amalgamated to 1369 gave rise to Samia/Luanda Mudoma/ 3752 now registered in the name of the 1st Respondent. That the 1st Respondent has now filed

succession proceedings in respect of his late father with a view to inherit parcel no. 3752 vide Busia HCC P&A No.120 of 2014.

4. The Petitioner deems that his constitutional rights were infringed thus:

- i. *The Land Disputes Tribunal had no jurisdiction to hear the matter*
- ii. *Title No. Samia/Luanda Mudoma/693 was subdivided on 28th April 1999 and was no longer in existence at the time of the tribunal's decision*
- iii. *The registered owners of Samia/Luanda Mudoma/1369 were all deceased as at the time of the tribunal hearing*
- iv. *The 1st Respondent lacked capacity to sue as he was not an administrator of the estates of the original deceased co-owners and Gabriel Onyanchi similarly lacked capacity to be sued as he was not an administrator of the estate of his late father.*
- v. *The 2nd Respondent cancelled the Petitioner Title Nos. Samia/Luanda Mudoma/2203 and 2290 without notice or according him a right to be heard*
- vi. *The Land Disputes Tribunal disregarded basic principles of judicial decision making such as capacity to sue and decision making based on evidence*
- vii. *The 2nd Respondent acted without impartiality and the principles of fair hearing, proper application of the law, the rule of law, equity and social justice*
- viii. *The 1st Respondent abused judicial process and fraudulently got himself registered as the proprietor of the suit land by concealing material facts*
- ix. *The Respondents arbitrarily deprived the Petitioner of his title without following due process*

5. Consequently, the Petitioner seeks the following reliefs against the respondents:

- i. A declaration that the award/orders made by the Funyula Land Disputes Tribunal in case No. 33 of 2008 upheld by the Appeals Tribunal vide Appeal Case No. 14 of 2009 and adopted by the Court in Busia PMCC Land Disputes Case No. 106 of 2008 are unconstitutional, unlawful, null and void**
- ii. An order nullifying the award/orders made by the Funyula Land Disputes Tribunal in case no. 33 of 2008 upheld by the Appeals Tribunal vide Appeal Case No. 14 of 2009 and adopted by the Court in Busia PMCC Land Disputes Case No. 106 of 2008**
- iii. An order cancelling entry Nos. 6, 7, 8 and 9 in the register of title No. Samia/Luanda Mudoma/693**
- iv. An order cancelling the amalgamation of title Nos. Samia/Luanda Mudoma/693 and/or 2203, 2204, 2205, 2290 and 1369 and cancellation of title No. Samia/Luanda Mudoma/3752**
- v. An order declaring that the Petitioner's title Nos. Samia/Luanda Mudoma/2203 and 2290 are lawful and valid titles**
- vi. Costs of the Petition**

6. The Petition is opposed vide the 1st Respondent's Replying Affidavit sworn on 28th May 2019. He deposes that in as much as clan elders shared the suit land between Norbetus Oloo and Matayos Okello, the Petitioner colluded with one Gabriel Onyanchi Sundia to deprive him of his father's land. That the Petitioner used judicial process to distribute the suit property that belonged to the 1st Respondent's grandfather to influence the acreage of their entitlement. He continued that Nairobi HCC P&A 1112 of 1991 was filed in Nairobi yet the property is located within the territorial jurisdiction of Busia High Court.

7. It is the 1st Respondent's case that contrary to the Petitioner's averments that the two families were supposed to share the property equally which as per the green card would have amounted to 18.25ha each, the annexed copies of the register demonstrate that his family was only allocated 7.11ha while the Petitioner allocated himself 29.39ha. Moreover, it is the Petitioner who sold their 1.6ha portion to the purchaser, Gilbert Ambale Akatsa. He continued that issues concerning the suit property in the tribunal and attendant court process cannot be raised herein because Gabriel Onyanchi Sundia is not a party to this case and the same were already adjudicated upon and judgment pronounced in the judicial review ELC Case No. 44 of 2015.

8. The 1st Respondent avers that the Petitioner and his kin have all along been aware of the said cases. That he is only ensuring that his grandfather's estate is not wasted by evicting trespassers; and holding the same in trust for all rightful beneficiaries who will get their shares in due course. The 1st Respondent opines that the Petition is premature as pursuant to the reversion to the original title, he is now in the process of dividing the land into two portions for the families of Matayos Akello and Norbetus Oloo in the manner initially intended.

9. Parties canvassed the Petition by way of written submissions. The Petitioner's submissions were filed on 13th March 2020. After

rehashing the version of facts as stated in the Petition, counsel for the Petitioner cited myriad constitutional provisions laying a jurisdictional basis for this Court to determine the issues raised in the Petition and to grant remedies sought as well as the rights she deemed to have been infringed. Particularly, article 40 on the protection of the right to property. That the Land Disputes Tribunal's orders arbitrarily deprived the Petitioner of land parcels Samia/Luanda Mudoma/2203 and 2290. Further, the Tribunal's decisions amounted to perpetuating an illegality as they lacked jurisdiction to determine the matter thus condemning the Petitioner unheard.

10. The Petitioner disputed the 1st Respondent's assertions that the validity or otherwise of the original and appellate tribunals' decisions were subject of a judicial review proceeding in ELC No. 44 of 2015 which proceedings are not on record hence unsubstantiated. That the case no 44/2015 was instituted by the 1st Respondent vide a plaint against Gabriel Onyanchi Sundia seeking orders of injunction, eviction and damages. As per the judgment of the court in that case, the Defendant's counterclaim failed because it only sought declaration that the impugned consolidation order by the tribunal was illegal without seeking that the said order be set aside. Being a decision based on a technicality, the consolidation issue was not determined with finality on merit; hence it is evident that the tribunal's orders have never been conclusively challenged before a Court of competent jurisdiction before.

11. Counsel further submitted that the Land Registrar's action of cancelling entry 1 in the register consequently depriving him of his property amounted to an infringement of the Petitioner's rights to fair administrative action under article 47 of the Constitution. It ought to have been based on reasons served upon the Petitioner. On procedural fairness, counsel cited the cases of **Judicial Service Commission vs Mbalu Mutava & Another (2015) eKLR** and **Republic vs National Police Service ex parte Daniel Chacha (2016) eKLR**.

12. Finally, it was submitted that the orders made by the Funyula Land Disputes Tribunal were illegal and unconstitutional orders that should be set aside. That public policy dictates that courts should not aid in the perpetuation of illegalities as decided in various court pronouncements. Counsel submitted that in adopting the said orders, the magistrate legitimised an illegality further perpetuated by the Land Registrar.

13. The 1st and 2nd Respondent's submissions were filed on 2nd April and 24th September 2020 respectively. It is noted that the 2nd Respondent did not file any document in opposition to the Petition. The 1st Respondent maintains that the Petitioner is not entitled to the orders sought as he lacks *locus standi* to agitate the same. That all along, the cases referred to were between the 1st Respondent and Gabriel Onyanchi Sundia involving land parcel No. Samia/Luanda Mudoma/1369 not 693.

14. Further, the 1st Respondent states that this case is *sub judice* the appeal filed before the Court of Appeal in Civil Appeal no. 96 of 2019 hence this court lacks jurisdiction to determine this case. With regard to the Land Registrar's involvement, the 1st Respondent submits that he only carried out his functions to rectify the register pursuant to court orders in accordance with section 79(2) of the Land Registration Act.

15. The Attorney General on the other hand submitted that the case against the 2nd Respondent had no basis in law and did not disclose any cause of action. He reiterated the 1st Respondent's stance that the 2nd Respondent was only following court orders. It is further submitted that the Petition is not competent before the Court as it has not demonstrated any triable issue for the Court to make a finding on. That the impugned orders cannot be challenged by way of constitutional Petitions unless it is shown that they acted outside their constitutional or statutory mandate. He cited the case of **HCC Misc. 1052 of 2004 Booth Irrigation vs Mombasa Water Products Ltd** quoted in the case of **Kenya Bus Company Vs The Attorney General & Other (2005) eKLR** to buttress their position that the Petitioner cannot use a constitutional court to unseat or set aside valid and unchallenged court orders.

16. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

- i. *Whether there was a violation of the Petitioner's rights as alleged*
- ii. *Whether remedies sought are available to the Petitioner*
- iii. *Whether the Petition is competent before Court*

17. The history of the suit parcel Samia/Luanda-Mudoma/693 measuring 36.5ha is that it was registered in the joint names of Norbetus Oloo and Matayos Akelo (both deceased) holding $\frac{1}{2}$ share each. The Petitioner is the grandson of Norbetus while the 1st Respondent is the son of Matayos. The Petitioner pleaded that his donee of power of attorney took out letters of administration in respect of the estate of Norbetus Oloo vide NBI HC Suc. Cause No. 1112 of 1991. In the certificate of confirmation of Grant, the property listed is Samia/Luanda-Mudoma/693 which was to be subdivided among all the beneficiaries of the deceased in equal shares.

18. As exhibited in the search (annex GCOO-4) and copy of the register (annex GCOO-2), the shares of the beneficiaries of the estate of Norbetus Oloo was comprised in the share size $\frac{1}{2}$ of L.R No. 693 and not the whole land. Similarly, the share due to the 1st Respondent and his family was the remainder half of L.R No. 693. The Petitioner cited case law that took the view that courts should not close their eyes when there are glaring illegalities. These were the holdings in the two cases of **Peter Nguchi Kaburi Vs Joseph Thuku Kaburu Civil Appeal No. 18 of 2015** and **National Bank Vs Wilson Ndolo Aya (2009) eKLR**.

19. Using the grant issued in No. 1112 of 1991, Aloys Odongo who has since donated his power of attorney to the Petitioner herein proceeded to subdivide the parcel No. 693 into 4 portions i.e. Samia/Luanda-Mudoma/2203, 2204, 2205 and 2290 about the year 1999. L.R Nos. 2203 measuring 23.40ha and 2290 measuring 1.85ha was registered in name of Aloys Odongo. L.R No. 2204 measuring 7.11ha got registered in name of Matayos Akelo while 2205 measuring 1.60ha was registered in name of Gilbert Ambale Akatsa who the Petitioner described as a purchaser. The 1st Respondent in his replying affidavit deposed that they were not involved in the subdivision process. He added that Gilbert (the purchaser) ought to have got his share from Norbetus Oloo's share as it is the Petitioner's family who had sold the portion of land to him. From the resultant numbers registered in Aloys Odongo's name, it shows Norbetus Oloo and his beneficiaries got

more than half share of the suit land.

20. While this sharing of 693 is contested by the 1st Respondent, he then proceeded to file a case before the Funyula Land Disputes Tribunal against Gabriel Onyanchi Sundia claiming L.R No. Samia/Luanda-Mudoma/1369. The 1st Respondent's case before the tribunal was successful and the Tribunal made a raft of orders which were subsequently adopted in court in Busia PMCC Land Case No. 106 of 2008 on 3/02/2009. The orders given by the Land Disputes Tribunal and adopted in court were as follows;

(a) That the prayer of the plaintiff is accepted by this court.

(b) That the court request District Land Registrar Busia to cancel Land Registration No. Samia/Luanda-Mudoma/1369 measuring 19.5ha which was fraudulently registered in the names of Lucas Sundia Odunga Muga and Okochi Muga dated 23/5/1979 and have parcel Samia/Luanda-Mudoma/693 measuring 36.5ha remaining as it was at the time of land adjudication.

(c) That the court orders the plaintiff and family members of the late Norbetus Odondo and Matayos Akelo to give the defendant one hectare, the family of Odunga Muga one hectare and the family of Okochi Muga one hectare after carrying out succession.

(d) The court orders members of families of Norbetus Odondo and Matayo Akelo to share the remaining 33.5ha on the basis of ½ share. That is to say, the family members of the late Norbetus Odondo to get 16.75ha and members of the family of Matayos Akelo to get 16.75ha after having jointly carried out succession of the original number Samia/Luanda-Mudoma/693 and invite District Surveyor from Busia Land's office to carry out survey work of the respective portions of Land.

(e) That any aggrieved party is free to appeal to a higher court of law within 30 days from the date these proceedings will be endorsed by Senior Resident Magistrate Busia.

21. The Petitioner has pleaded that the orders given by the Land Disputes Tribunal and subsequently adopted by the court were made in excess of jurisdiction and also violated his rights as he was not a party to the case before the tribunal. He was thus condemned unheard contrary to the provisions contained in the bill of rights in the Constitution. I am alive to the right to a fair hearing provided for under section 77(9) of the repealed Constitution stating thus **"A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time"**.

22. It is discernible from the copies of the searches/registers annexed that at the time the 1st Respondent commenced the proceedings before the Land Disputes Tribunal in the year 2008 regarding L.R No. 693, the title had been subdivided and some of the resultant numbers registered in the name of Aloys Odondo. The orders given by the Land Disputes Tribunal thus affected the said Aloys Odondo and all persons claiming through him without being afforded an opportunity of being heard. To this extent, I do agree with the Petitioner that their right to a fair hearing as provided for in section 77(9) of the repealed Constitution and now article 50(1) of the 2010 Constitution was violated.

23. The Petitioner also pleaded that the orders given by the Tribunal were made in excess of jurisdiction. The Land Disputes Tribunal was conferred with jurisdiction under section 3(1) of the repealed Land Disputes Tribunal Act No. 18 of 1990 (now repealed) which provided thus; **"Subject to this Act, all cases of a civil nature involving a dispute as to –**

(a) the division of or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land shall be heard and determined by a Tribunal established under section 4."

24. It has been held severally by our courts that the Land Disputes Tribunal had no jurisdiction to deal with an interest in land that had been registered; see the Court of Appeal decision in *Asman Maloba Wepukhulu Vs Francis Biketi, Court of Appeal at Kisumu case No. 157 of 2001*. Neither did the Tribunal have power to issue orders leading to cancellation of a registered title as such jurisdiction was vested exclusively in the High Court; see the holding in the persuasive finding of Mutungi J in the case of *R Vs Homabay Land Disputes Tribunal and 3 others (2017) eKLR*.

25. To the extent that the Land Disputes at Funyula made orders outside of their jurisdiction and which orders affected the rights of the Petitioner, the Petitioner had a right to challenge those orders under article 22(1) of the Constitution which provides thus **"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened"**.

26. Further the court is vested with powers under article 23(1) and (3) to give declaratory orders and or make an order for judicial review. It is therefore a misinterpretation of the law for the 1st Respondent to submit that this court lacks jurisdiction to deal with a matter pending hearing before the Court of Appeal and brought by a litigant who was not a party to the suit nor a party to the pending appeal. In the case of *Robert Entwistle Vs Nairobi Baptist Church NBI Civil Application No. 312 of 1999 (CA)* stated that **"the mere fact that a decision can be challenged by way of judicial review does not prevent a party from taking proceedings for a declaratory trust"**. In any event the 1st Respondent had the liberty to stay these proceedings which right he did not exercise.

27. In view of the observations and the analysis made herein above, I am satisfied that there is merit in the Petition filed. The next question is whether the remedies sought are available to the Petitioner. I have taken note that the 2nd Respondent merely executed the orders issued by the Tribunal and adopted by the court. I do not find any reason to assign any blame against the 2nd Respondent.

28. Consequently, it is my considered opinion and I so hold that the Petitioner is entitled to the reliefs sought in **prayer (a), (b)**. I further allow **prayer (c)** to the extent that the entries cancelled to be in the register of title No. 693 are Nos 4, 5, 6, 7, 8 & 9. This will allow for sub-division of the suit title L.R No. 693 into two equal shares between the Petitioner's family and the 1st Respondent's family. Once that is done, the Petitioner shall have liberty to distribute their share in accordance with the order of equal sharing issued in the grant in the estate of Norbetus Oloo – deceased. It follows that **prayer (d)** is also granted cancelling the amalgamation of title Nos L.R 693 and or 2203, 2204, 2205 and 2290 with L.R 1369 and cancellation of the resultant title No. Samia/Luanda-Mudoma/3572 which is in the 1st Respondent's name. **Prayer (e)** of the Petition for an order declaring the Petitioner's Title Nos. 2203 and 2290 as lawful and valid titles is declined/dismissed.

29. Given the irregularities committed by both the Petitioner and the 1st Respondent, I order that they each meet their respective costs of the Petition.

Dated, signed and delivered at BUSIA this 19th day of November, 2020.

A. OMOLLO

JUDGE