



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. PETITION NO. 7 OF 2017**

**KIMEU MUSYOKA** (*Suing as the Legal Representative of the*

*Estate of the late Johnson Musyoka Lavu - deceased*).....**PETITIONER**

**VERSUS**

**THE DISTRICT COMMISSIONER,**

**KATHIANI DISTRICT.....1<sup>ST</sup> RESPONDENT**

**THE LAND ADJUDICATION OFFICER.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY SURVEYOR, MACHAKOS.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**MBOLE KAVOO.....1<sup>ST</sup> INTERESTED PARTY**

**SOLOMON KAVOO.....2<sup>ND</sup> INTERESTED PARTY**

**MUNGUTI KAVOO.....3<sup>RD</sup> INTERESTED PARTY**

**MULI KAVOO.....4<sup>TH</sup> INTERESTED PARTY**

**MWIKYA NZILI NGANGA.....5<sup>TH</sup> INTERESTED PARTY**

**PATRICK MUTUKU KIKUVI.....6<sup>TH</sup> INTERESTED PARTY**

**PATRICK MUSAU KIKUVI.....7<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1. In his Petition dated 3<sup>rd</sup> April, 2017, the Petitioner averred that the deceased, Tumbo Lavu, died on 3<sup>rd</sup> August, 1979; that before his death, the deceased was involved in several cases with the 1<sup>st</sup> Interested Party over the ownership of parcels of land known as 1950 and 2685, Mitaboni Registration Section in Appeal Case Numbers 34 of 1998 and 477 of 1996 and that the proceedings of the Appeal Case No. 477 of 1996 and 34 of 1998 are irregular because by the time of filing the Appeal cases, the deceased had already died.

2. It is the Petitioner’s case that it is not true, as held by the 1<sup>st</sup> Respondent, that the parties were in agreement about the Committee’s decision; that the proceedings before the Minister did not follow the correct format on how a Judgment or Ruling ought to be; that this long and continuous breach of the Petitioner’s fundamental rights to own property has been caused by the actions of the Respondents and that the Respondents have also breached the Petitioner’s right of a fair and public hearing.

3. The Petitioner is seeking for a declaration that Appeal Case Nos. 477 of 1996 and 34 of 1998 were conducted irregularly and unfairly; a declaration that the intention of the County Surveyor to implement the findings of the Minister is unlawful and a permanent injunction restraining the Respondents and Interested Parties from trespassing on parcel numbers 1950 and 2685 Mitaboni Registration Section.

4. In reply, the 6<sup>th</sup> Interested Party deponed that both parties were parties in Appeal Case No. 35 of 1998, 34 of 1998 and 477 of 1996; that the Minister ruled that the decision of the Land Adjudication Committee be implemented and that the Minister's decision is final.

5. In his Further Affidavit, the Petitioner deponed that he 1<sup>st</sup> Appellant declined to proceed with the Appeal; that the 2<sup>nd</sup> Appellant was deceased at the time of the alleged hearing of the Appeal and that the Respondent, Musyoka Lavu died on 7<sup>th</sup> October, 2010 and could not have participated in the appeal before the Minister.

6. The Petitioner finally deponed that: it is not true as captured in the Minister's Ruling that parties were in agreement with the decision that was made on 9<sup>th</sup> December, 1975 and that the proceedings of 29<sup>th</sup> March, 2012 were conducted against the rules of natural justice because the Respondent did not participate in the Appeal.

7. The Petitioner's advocate submitted that the District Commissioner lied in his proceedings and Ruling when he indicated that Musyoka Lavu participated in the proceedings before him; that the Petitioner came to learn about the said proceedings and Ruling in November, 2016 and that the Petition should be allowed. Counsel relied on several authorities which I have considered.

8. The Interested Parties' advocate submitted that both the Petitioners and the Interested Parties (*or persons under whom they claim*) were parties to the Minister's Appeal Nos. 34 of 1998, 35 of 1998 and 477 of 1996; that on 27<sup>th</sup> April, 2012, the Minister made a final decision in the said Appeal and that an Appeal must have been filed within sixty (60) days of the decision of the Minister.

9. Counsel submitted that the Minister's decision has never been quashed; that the Petitioner has not sought the quashing of the said decision and that the allegations of irregularity and unfairness are hollow.

10. This Petition is challenging the decision of the 1<sup>st</sup> Respondent. Although the proceedings that were conducted by the 1<sup>st</sup> Respondent shows that the case was heard on 29<sup>th</sup> March, 2012, it is not clear the date that the 1<sup>st</sup> Respondent delivered his decision.

11. The main complaint by the Petitioner, who is the legal representative of the Estate of the late Johnson Musyoka Lavu, is that by the time Appeal Cases Nos. 477 of 1996 and 34 of 1998 in respect of parcel number 1950 and 2685 was heard, some of the parties had already died and therefore the parties could not have entered into any form of agreement as held by the 1<sup>st</sup> Respondent; that the Estate of Johnson Musyoka was not heard in the Appeal and that the Petitioner's fundamental right to a fair hearing has been violated.

12. The proceedings annexed on the Petition shows that on 9<sup>th</sup> December, 1975, the members of the Land Adjudication Committee heard a dispute in respect of parcel of land number 1950 between Nzili Nganga and Kavoo Mbole on the one hand and Tumbo Lavu and Kitavi Mutheu on the other hand. The Petitioner in this matter is representing the Estate of Tumbo Lavu who died on 3<sup>rd</sup> August, 1979.

13. The Plaintiffs who appeared before the Land Adjudication Committee informed the Committee that the suit land belonged to their grandfather, Ngao Mbuu, who had four (4) wives, and that the land should be divided amongst the said four (4) wives. On the other hand, the Defendants informed the Committee that the entire land belonged to the Lavu family.

14. In their decisions, the Committee found that the land belonged to the Ngao family, although the said family had sold a portion thereof to the Lavu family. The committee ordered for the sub-division of the land amongst the four (4) houses of Ngao, with a portion being given to the Lavus.

15. The family of Ngao (*the Interested Parties*) was not satisfied with the decision of the Committee in which a portion of the suit land was allocated to the Lavu family (*the Petitioner herein*). The said family lodged an Appeal with the Land Arbitration Board. The Board allowed the Appeal.

16. The Interested Parties family filed a second Appeal with the Minister in Appeal Case No. 477 of 1996 and 34 of 1998. The proceedings before the Minister shows the Respondents as Kitavi Mutheu, Tumbo Lavu, Kavoo Mbole and Nzili Nganga. The Respondents were represented by one Musyoka Lavu. In his Ruling, the Minister's representative (*1<sup>st</sup> Respondent*) stated as follows:

***“Both parties are in agreement about the committee decision. Thus, the Land Adjudication Officer endorsed the decision of the committee. I rule that the decision made at committee stage on 9<sup>th</sup> December, 1975 be implemented.”***

17. Although the proceedings shows that the Lavu family was represented by a Mr. Musyoka Lavu, the evidence before me shows that the said Johnson Musyoka Lavu alias Musyoka Lavu (*the Petitioner's father*) died on 7<sup>th</sup> October, 2010. Indeed, there is no evidence to show that any of the Lavu family members were heard by the Minister before he made his decision.

18. Considering that most of the Respondents before the Minister were deceased, and none of the living members of the Lavu family, including the Petitioner herein, were notified of the proceeding before the Minister, there could not have been an agreement between the parties as alluded to in the decision of the 1<sup>st</sup> Respondent. The Petitioner's right to have the dispute concerning the suit land decided in a fair and public hearing before an independent and impartial tribunal or body was therefore violated (*See Article 50(1) of the Constitution*).

19. The 1<sup>st</sup> Respondent having not heard the Petitioner or any other living representative of the Respondents, and considering that the right to be heard is a valued right, I find that the Petition herein is meritorious. Indeed, it matters not that the Petitioner herein did not file an Appeal against the decision of the 1<sup>st</sup> Respondent within the requisite time or that he has not challenged the decision of the Minister by way of Judicial Review. Once the Petitioner shows, which he has done, that the decision of the Minister is null and void, and that his right to a fair hearing has been violated, this court is under a constitutional obligation to declare the decision null and void.

20. For those reasons, I allow the Petition dated 3<sup>rd</sup> April, 2017 as follows:

*a. A declaration be and is hereby issued that the decision of the 1<sup>st</sup> Respondent in Appeal Case No. 477 of 1996 and 34 of 1998 be and is hereby set aside.*

*b. Each party to bear his own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**