



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 11 OF 2017

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

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

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

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

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**

RULING

1. By this application dated 11th July 2017, Peter Mulwa (the Petitioner) prays for a conservatory order to issue against the registration of the decision and order of the 2nd Respondent in regard to Plot No. 54 Mitangoni/Madzimbani Adjudication Section. The Petitioner is also seeking an order of inhibition to issue in the alternative inhibiting the registration of any dealings on Title No. Mitangoni/Madzimbani/54 pending the hearing and determination of this Petition.

2. The said application is based on a number of grounds but which may be summarized as follows:-

i) That on 4th April 2017, the Deputy County Commissioner Kaloleni Sub-County (the 2nd Respondent) dismissed the Petitioner's Appeal to the Minister and ordered that Muriuki Mburu (the 1st Respondent) be registered as the owner of the said Plot of land;

ii) That the 2nd Respondent violated the Petitioner's right to be heard and to access justice as enshrined under Article 47, 48 and 50 of the Constitution;

iii) That if the said decision is implemented before this Petition is heard, the same will further violate and infringe the

Petitioner's Constitutional rights and the 1st Respondent may proceed to dispose of the suit property to a third party leading to irreparable loss and injustice to the Petitioner.

3. In response to the said application, the Land Registrar Kilifi (the 3rd Respondent) has through the Registrar of Titles Kilifi-Daisy Hadima Mwaruka filed a Replying Affidavit herein on 15th February 2018 disputing the Petitioner's narrative.
4. According to the 3rd Defendant, the Adjudication Records in their possession reflect that the said parcel of land belongs to one Abdusalim Abdullahi Gedi. It is their case that the history of the concerned parcel of land can properly be obtained from the office of Adjudication and Settlement who have all the records of the proceedings including an appeal between the current owner and one Muriuki Mburu which was decided in favour of the said Abdusalim Abdullahi Gedi.
5. The 3rd Respondent further avers that Title Deeds for the said area were generally issued massively in the year 2017 and that all documents were registered as received without any alterations from their office.
6. I have considered the application and the response thereto by the Office of the Honourable the Attorney General on behalf of the 2nd, 3rd and 4th Respondents. The 1st Respondent did not file any response to the application.
7. From the Petitioner's Supporting Affidavit sworn and filed herein on 11th July 2017, it is his case that when the concerned area was declared an adjudication section, both himself and the 1st Respondent were documented jointly as owners of the suit property pending the determination of the dispute between them on the ownership.
8. It is the Petitioner's case that he filed an Arbitration Board Case pursuant to Sections 21 and 22 of the Land Adjudication Act and that despite the case being heard and decided in his favour on 28th May 2014, the Executive Officer who was recording the same fraudulently reflected on the record that the 1st Respondent had won.
9. Aggrieved by the outcome, the Petitioner filed Objection Case No. 6 of 2014 which Objection was heard on 9th October 2014 and a decision made thereon in favour of the 1st Respondent on 19th March 2015. It is the Petitioner's case that he again filed an Appeal to the Minister but when the Appeal came up for hearing before the 2nd Respondent on 4th April 2017, the 2nd Respondent dismissed the Appeal without hearing the Petition on the ground that it had been filed out of time.
10. It is the Petitioner's case that the Appeal had been filed within 60 days which is the period allowed under the Act and that the 2nd Respondent's decision was erroneous and amounted to a violation of his rights to a fair hearing, to access justice and to own property.
11. From a perusal of the record placed before me, it is evident that Objection Case No. 6 of 2014 was heard on 9th October 2014 and that a decision was rendered thereon on an undisclosed date.
12. According to the Petitioner that decision was rendered on 19th March 2015 and he was so aggrieved by the same that he filed an Appeal against the decision and paid for it on the very date the decision was delivered even though he was issued with a receipt a couple of days later.
13. That Appeal came for hearing before Mr. FAO Ndunga, the Panel Chairman and the Deputy County Commissioner, Kaloleni Sub-County on 4th April 2017. A perusal of the proceedings of what transpired on the said date show 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 13th 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 to remain registered in the name of the Respondent."

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

15. At the same time, the Petitioner has attached a copy of a receipt issued to him on 24th March 2015 indicating 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 doubt the Petitioner's position that even though the hearing took place on 9th October 2014, a decision was not rendered until 19th March 2015.

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

17. In the circumstances, I find merit in the application dated and filed herein on 11th July 2017. The same is allowed in terms of Prayers 6 and 7 thereof.

18. The Petitioner will also have the costs of that application.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE