



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 3 OF 2015

JAPHET KINYUA NAAMAN

(suing as the Legal representative to the

Estate of **NAAMAN M'TUERA** alias

NORMAN M'TUERA, deceased).....**PETITIONER**

VS

SILAS KIMANTHI.....**1ST RESPONDENT**

BERNARD KIMATHI..... **2ND RESPONDENT**

DISTRICT LAND ADJUDICATION

OFFICER, TIGANIA EAST DISTRICT.....**3RD RESPONDENT**

HON. ATTORNEY GENERAL.....**4TH RESPONDENT**

JUDGMENT

1. The Petitioner herein claims a beneficial interest over all that parcel of land known as Parcel Number No. 1123 Antuamburi adjudication section.

2. The Petitioner through a petition dated 15.01.2015 sued the 1st - 4th Respondent for the following prayers:

a. A declaration that the 1st, 2nd and 3rd Respondents' actions of dealing with and alienating parcel of land No. 1123, 1657 and 3045 Antuamburi Adjudication Section and transferring Plot Nos.1657 and 3045 into the 1st and 2nd Respondents are illegal, wrongful, unlawful and contrary to the Petitioner's rights under Articles 40 and 47 of the Constitution of Kenya.

b. An order rectifying the land records and retransferring Plots Nos 1657 and 3045 Antuamburi Adjudication Section to the estate of the deceased.

c. Any other relief that this Honourable Court may deem fit and just to grant.

d. Costs of this petition.

3. The Petitioner is the legal representative to the estate of Naaman M'Tuera alias Norman M'Tuera (Deceased).

4. The Petitioner's claim is that the deceased was the initial recorded owner of parcel Number 1123 Antuamburi adjudication section (herein referred to as the suit land) and after his death the 1st 2nd and 3rd Respondents colluded and dealt with the suit land without consent and alienated the suit land causing it to be split into three parcels namely Parcel No.1123, 1657 and 3045 Antuamburi Adjudication Section. That the said alienation was not supported with documents as required in law and no execution was done on the scanty documents found in respect to that alienation. That the estate of the deceased was only allocated 4.70 Acres out of the initial over 150 Acres and the parcel No. for the estate remained No.1123. That the deceased was survived by 22 children and 2 widows. The Petitioner contends that the estate of the deceased has suffered loss and the beneficiary's rights to property have been infringed upon. That the 1st – 3rd Respondents have in collusion with each other limited the right to property of the deceased's estate. That the 3rd Respondent has acted in an administrative manner that is

unlawful, unreasonable and procedurally unfair. That the acts of the Respondents are in breach of the fundamental rights and freedoms of the Petitioner s as guaranteed under Article 40 and 47 of the Constitution.

5. The 1st Respondent in his replying affidavit deposes that he met the late Norman M'Tuera at Mikinduri town while sourcing for cereals for his business and they became friends. That later the late Norman M'Tuera approached him with a proposal to sell to him 50 acres of his land in 1973 in order to salvage his property from foreclosure by Agricultural Finance Corporation (AFC). Additionally, he also required money for medicare and school fees. The first 50 acres was purchased @ Kshs.2,000/- for acre. Thereafter in 1980 the late Norman M'Tuera sold to him a further 30 acres @5,000/- per acre which were consolidated with other parcels he had bought from other third parties into parcel No.3045 Antuamburi Adjudication Section measuring 84.70 acres. That he also owned a different parcel of land namely Parcel No.1657 Antuamburi Adjudication Section measuring 1.5 acres which he sold to one Stephen Kubai who later transferred to his son Benard Kimathi the 2nd Respondent. That the children of Norman M'tuera lodged a complaint against the sale of the 80 acres to him before the Minister which dispute was adjudicated upon by the District Officer, Tigania Central one Sankei T.K. whose verdict was that the sale was proper. That they later lodged a complaint against him at the Adjudication committee which was heard and dismissed. He averred that he has been in possession and use of the 80 acres since the time of purchase and that he has extensively developed the same.

6. The 2nd Respondent in his replying affidavit claim that his father the late Stephen Kubai Mutuamwari bought the suit land from the 1st Respondent (Silas Kimathi) in the year 2001, thereafter transferred it to him as a gift. That he immediately took possession of the suit land and has extensively developed it.

7. The Petitioner in his supplementary affidavit dated 3/3/15 claimed that the averments in the Respondent's reply in respect to the sale of the suit land in 1973 and 1980 are untrue, that the deceased was never involved in any accident and was not diabetic in 1973 and that none of the children of the deceased were in need of school fees at that time. He disputes that Norman ever took any loan from AFC. He also challenged the documents produced in respect to proceedings before the Minister and before the adjudication committee and alleges that they are forgeries and are not dated/signed. He also claims that Stephen M'twela (deceased) would not have attended the said proceedings as a family representative and not informed the family particularly the wives of the deceased. He claims that the children of the deceased were not involved in those proceedings. He claims that before his death Norman had openly declared to the family that the entire suit land was open for the family and no one was claiming an interest from it.

8. Long'ole Godfrey, the Demarcation Officer of Antuamburi Adjudication Section on behalf of 3rd and 4th Respondents swore a replying affidavit in which he explains that Parcel No.1123 was gathered by the late Norman M'tuera with an acreage of 88.73 acres which he later transferred 50 acres to Parcel No.1657 of Silas Kimanthi vide objection No.1231 and later he transferred an additional 30 acres through objection No.2313 to the 1st Respondent, another 3 acres were deducted for public utilities thus leaving 4.70 acres for parcel No.1123 under the name of Rael Mukira M'rwera. And goes on to explain how Silas Kimanthi acquired several other parcels including Nos.1657, 3045, 6489 and 6488. He claims that the Petitioner never lodged any complaint before the Arbitration Board prior to demarcation but that he lodged an objection before the Adjudication officer which was dismissed and later there was a dispute before the District Officer which was ruled in favour of Silas Kamathi. He avers that the petition is bereft of merit and ought to be dismissed.

9. The Petitioner together with one Rael Mukira filed the Witness Statements dated 08.10.2018. They are not clear on the exact acreage of the deceased's estate, the year when the deceased died is not disclosed and does not also state the year when the Respondents took possession of the suit land. They have not stated in whose name the suit land is currently registered in. They claim that the suit land was ancestral land and fault the 3rd and 4th Respondents for failing to avail documentation to show how the suit land changed hands.

10. The application was prosecuted through written submissions.

11. The Applicant submitted that he is properly before this Court as a petition is a generally allowed mode of Institution of claims before a Court of law. That the Court should be involved to do substantive justice other than focus on technicalities. That the Respondents failed to raise issues contained in their submissions in their pleadings. He faults the Respondents for failing to produce documents to show how the suit land changed hands. He claims that the Respondents did not acquire good title to the land as it was ancestral land. That the petition cannot be summarily dismissed for reasons of technicalities and the Respondents should have instead filed a Preliminary objection. That the evidence of the Respondents is marred with inconsistencies. That the right to protection of property ought to be upheld by this Court.

12. The 1st and 2nd Respondents submit that the petition is an abuse of Court process to attempting to re-litigate over a matter that was already deliberated upon by the District Officer Tigania Central and later by the District Land Adjudication and Settlement Officer from which verdicts were delivered and that the Petitioner never appealed against. That both the children and wives of the deceased were present at the arbitration tribunals and the deceased clearly confirmed he sold the disputed land to the 1st Respondent. He faults the Petitioner for failing to exhaust other avenues of dispute resolution provided for in the Adjudication Act. They are of the view that since the petition relates to acts committed in 1970's and 1980's they cannot be ventilated through the current Constitution since it does not operate retrospectively. That the Respondent has chronologically explained how the suit land changed hands. They take issue with the fact that the deceased never raised any complaint over the suit land. That no criminal proceedings have been preferred against the Respondents for the alleged forgeries. And for failing to discharge the requisite burden of proof against the allegations and on the Respondents, they urged the Court to dismiss the petition.

13. The 3rd and 4th Respondents submits that the petition failed to meet the threshold set out in **Annarita Karimi Njeru VS Republic {1979} KPL 154** and **Mumo Matemu VS Trusted Society of Human Right Alliance and 5 Others [2013] eKLR** where the Court held that the Petitioners have to demonstrate in their pleadings that their rights have been violated and proceed to set out with a reasonable degree of precision that which they complain as well as the provisions said to be infringed and in the manner which they are alleged to be infringed. Further that the applicants failed to utilize all other avenues of dispute resolution as provided for under the Adjudication Act before filing the instant petition. They are of the view that the petition is an afterthought and an abuse of Court process.

Analysis and determination

14. The Petitioner filed the petition on the 16/1/2015. Simultaneously, he filed a Notice of Motion on even date seeking discovery of all documents in the possession of the 3rd Defendant in relation to Land Numbers 1123, 1657 and 3045 at Antuamburi adjudication scheme. The Petitioner averred that the discovery of the documents was necessary for the fair disposal of the petition.

15. On the 22/6/15 the Petitioner filed another Notice of Motion seeking conservatory orders to restrain the 1st and 2nd Respondents from interfering with the family of Naaman M'Tuera's family lands parcel Nos. 1123, 1657 and 3045 at Antuamburi adjudication Section pending the hearing and determination of the petition.

16. On the 4/4/17 the parties recorded a consent in Court which consent was adopted as an order of the Court as follows;

“Application dated 22/6/15 is settled via status quo as follows;

- a. The Petitioner and his family to continue utilizing parcel No 1123
- b. The 1st and 2nd Respondent to continue utilizing parcel No 1657 and 3045
- c. The Court to have the application of 15/1/15 to be put on hold for the Hon Attorney General to avail the documents requested for.
- d. Mention before the Deputy Registrar on 6/8/17 to confirm that the documents have been availed.

17. Parties came before the Hon Deputy Registrar on the 27/7/17 whereby the Counsel for the Petitioner Mr E. Kimathi informed the Court that the Attorney General had not supplied them with the documents sought on discovery and as directed by the Court. He sought witness summons be issued against the DLASO. The Deputy Registrar directed the parties to appear before the Judge for directions on 28/9/17.

18. Come the 28/9/17 the Court was informed by Mr. B Kimathi for the 3rd and 4th Respondents that they needed more time to comply with the orders of the Court to avail documents requested by the Petitioner.

19. On the 9/10/17 Mr. E Kimathi for the Petitioner informed the Court that the Attorney General availed the documents needed. He sought a date for hearing of the petition. The matter of discovery of documents seems to have rested with this confirmation.

20. On the 14/11/17 the parties sought directions to be heard by viva voce evidence to which the Court directed as prayed.

21. On the 16/10/18 the matter coming up for hearing in the presence of the counsels for the Petitioner , the 1st and 2nd Respondents they agreed by consent to have the matter canvassed by way of written submissions. The Court directed the parties on the manner to file the written submissions.

22. I have noted from the record that although the Petitioner informed the Court that the 3rd and 4th Respondents had availed the documents they required under discovery to them, the said documents were not filed on record so that the Court would have the benefit of them in determining the matter. It would appear that from that position that the parties decided to change their mode of prosecuting the petition from viva voce evidence to Written Submissions. Parties are the masters of their Pleadings which they are bound at all times to their peril or pleasure.

23. The Court shall proceed to determine the petition based on the evidence of the parties as presented in their affidavits.

24. The key question for determination in this petition is whether the Petitioner has identified a Constitutional right which existed in his favour in 1973 and 1980 which may have been breached by reason of alienation, sale and or transfer of land out of the original parcel No 1123.

25. According to the evidence on record it is commonly acknowledged that the Petitioner's father gathered parcel No. 1123 during the demarcation and consolidation of land in the Antuamburi adjudication section. The land was slightly below 100 acres or thereabouts. It is not in dispute that the late Naaman M'Tuera had a large family comprised of 3 wives and 22 children. According to the limited grant letters of administration ad litem dated the 9/10/14, the Naaman M'Tuera died on the 20/8/2002.

26. According to the orders of the Court dated the 4/4/17, it is also not in dispute that the Petitioner and his family occupy parcel 1123; the 1st Respondent occupies 1657 and the 2nd Respondent occupies 3045 respectively.

27. This petition has been brought by the Petitioner as the legal administrator of the estate of Naaman M'Tuera.

28. The gist of the Petitioner's claim is that parcel No 1123 measuring about 150 acres belonged to his father having gathered the land during demarcation and consolidation. He avers that the suit land was family and or ancestral land. He accuses the Respondents of colluding to subdivide the original 1123 into three parcels to wit; 1123, 1657 and 3045 and transferring it to the 1st and 2nd Respondent after the demise of his father and without the consent of the administrators of the estate of his father. That as a result of the actions of the Respondents the estate of his father's right to property as enshrined under Art 40 and 47 of the Constitution have infringed.

29. According to the evidence of the 1st Respondent, Naaman was his friend. That he initially purchased 50 acres of the land from Naaman in

1970 at the total costs of Kshs 100,000/-. In 1980 Naaman sold to him another 30 acres at the total costs of Kshs 150,000/-. That he paid for the two parcels and took possession of the same. That the two parcels of land are comprised part of parcel No 3045 measuring 84.70 acres. Parcel No 1657 was part of his land which he sold to the 2nd Respondent's father Stephen Kubai who transferred it to his son the second Respondent. Out of the parcel 1123 belonging to Naaman, the balance of the land measuring 4.70 was registered in the name of Naaman's wife Rael Mukira M'Tuera.

30. The 2nd Respondent's evidence is consistent with that of the 1st Respondent. He averred that the land measuring 1.5 acres was bought by his father from the 1st Respondent. His father transferred the land to him as a gift.

31. The evidence of the 1st Respondent is consistent with the evidence tendered in the Arbitration proceedings before the District Officer on record. In those proceedings the sons of Naaman had written to the former President His Excellency D T Moi complaining that their land had been illegally taken by the 1st Respondent. The District Officer of the area was directed to arbitrate on the matter. In attendance of this meeting was the District Officer Tigania East namely Mr Sanket, Naaman, his 3 wives, the Petitioner, his 4 brothers, a clan member and the Land committee chairman. In the proceedings Naaman informed the meeting that he sold 50 acres of his land to the 1st Respondent and later another 30 acres making it 80 acres. That he needed money to service a loan with AFC, school fees and medicare. He stated that the lands were sold before most of his sons had been born and some of the wives had not been married. He stated that he has settled his 3 wives giving each 6 acres of land. His wives confirmed that they were aware that Naaman sold the land. The complaint was dismissed and the sons of Naaman were advised to respect their father's wishes and commitments.

32. After the death of Naaman, the family filed an objection before the DLASO. This objection was dismissed as it transpired that Naaman sold the land in his lifetime and there was nothing untoward against the transaction. The Petitioner has challenged the said proceedings but did not dispute that the objector Stephen Mtwela, who is recorded as the representative of Naamans' family is not their brother.

33. The evidence of DLASO is consistent with that of the 1st Respondent's evidence. He avers under oath that parcel 1123 was gathered by Naaman with an acreage of 88.73 acres. He confirmed Naaman sold 50 acres to the 1st Respondent vide objection No 121 of 1973 and 30 acres vide objection No 2313 of 1980 leaving 1123 measuring 7.70 acres. That the 1st Respondent bought additional lands which were consolidated in the name of the 1st Respondent. That parcel 1657 was consolidated under Stephen Kubai through objection No 1965. This evidence is consistent with the evidence of the 1st and 2nd Respondent.

34. The evidence of the DLASO is believable and taken on a balance of probabilities explains how parcel 1123 was dealt with. This evidence was not challenged by the Petitioner.

35. Coming back to the claim of the Petitioner, it is to be noted that the said Petitioner is claiming that the family's land was tampered with by the Respondents after the demise of his father. It is on record that his father died in 2002. According to the affidavit evidence the transactions complained of took place in 1973 and 1980 during the lifetime of his father. The Petitioner has not disclosed the Constitutional rights that were breached in 1973, 1980 and or continuous. The onus that his Constitutional rights have been infringed rested on his shoulders. This burden cannot be shifted to the Respondents.

36. In the case of **Annarita Karimi Njeru VS Republic {1979} KPL 154** and **Mumo Matemu VS Trusted Society of Human Right Alliance and 5 others [2013] eKLR**, the Court held that the Petitioner s have to demonstrate in their pleadings that their rights have been violated and proceed to set out with reasonable degree of precision that of which they complain as well as the provisions said to have been infringed.

37. There is no evidence that the land was ancestral and or family land. If there indeed was a breach of trust then it would be against Naaman as a trustee and not the Respondents in this case. No evidence of forgeries were adduced either.

38. The place of the Land adjudication process is central in the resolution of land disputes arising from demarcation, consolidation and registration. There is no evidence that the Petitioner and his family exhausted the appeal mechanism in law against the decision of the DLASO.

39. In the absence of a right having been identified under the old and or the current Constitution, the Petitioner cannot find any favour with the petition.

40. The petition is dismissed with costs payable by the Petitioner.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

In presence of;

C/A Mutwiri

Maheli holding brief for Ndubi for Petitioner

Muriirra holding brief for 1st and 2nd Respondents