



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 12 OF 2017

ABDILLAHI KILYUNGI NDUNGA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LAND

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

AND

MUTEMI NGONYI MUNYOKI.....INTERESTED PARTY

JUDGMENT

1. In his Petition dated 6th June, 2017, the Petitioner has averred that he inherited a parcel of land bordering the land of Kivau Ngandi and Kovya Ngandi in 1976; that the boundary in respect of the suit land was fixed by the elders on 5th September, 1978 and on 22nd September, 1978 and that during demarcation in 1993, a dispute arose with the Interested Party in respect of the suit land.
2. According to the Petitioner, the Adjudication Committee ruled in his favour in Land Case No. 53 of 1995; that in the year 2001, he was taken aback when he discovered the land had been registered in favour of the Interested Party and that on investigations, he discovered that the Arbitration Board had overturned the decision of the Committee on 25th September, 2000.
3. The Petitioner's case is that at no point was he made aware of the proceedings before the Arbitration Board; that the proceedings of 25th September, 2000 are tainted with procedural impropriety and that the Petitioner had filed Mwingi SRMCC No. 31 of 2004 against the Interested Party which suit was struck out and Machakos HCCC No. 104 of 2007 which was dismissed for want of prosecution.
4. The Petitioner is seeking for a declaration that the proceedings and decision of Kiomo Arbitration Board in Land Case No. 20 of 1996 is in violation of his constitutional rights under Articles 40, 47, 50 (1), 60, 64 and 159 of the Constitution; that an order of certiorari should issue to remove into the court for purposes of quashing the proceedings of the Arbitration Board and that an order of mandamus should issue directing the 3rd Respondent to cancel the Title Deed issued to the Interested Party in respect of land known as Mwingi/Kiomo/447.
5. The Petition was opposed on the grounds that the Petitioner has not demonstrated any proprietary rights over the suit property capable of protection; that the Petitioner's claim is statute barred; that the Petition is *res judicata* and that the issues raised in the Petition should be adjudicated by way of a Complaint.
6. In his submissions, the Petitioner's advocate submitted that the right to be heard is a cardinal rule of natural justice; that there is no known law that limits the powers of the High Court to grant declaratory orders and that the Petitioner has a genuine interest in the suit land.
7. The Petitioner's advocate submitted that the doctrine of limitation of time does not apply to Constitutional Petitions; that the Petitioner was away when the offending decision was made and that having filed two cases, the dispute was active in courts.
8. The Petitioner's advocate finally submitted that the doctrine of *res judicata* does not apply where there has been no decision on merits.
9. The Respondents' advocate submitted that if the Petitioner was dissatisfied with the decision of the Arbitration Board, he should have filed

an Appeal and that the Petitioner does not have proprietary right over the suit land.

10. The evidence annexed on the Petitioner's Affidavit shows that during the adjudication process in respect of the suit land, a dispute between the Petitioner and the Interested Party arose. The said dispute was filed before the Land Committee in Land Case No. 53/95. The said dispute was decided in favour of the Petitioner on 19th March, 1996.

11. The Petitioner has averred that he later on discovered that the Land Arbitration Board had overturned the decision of the Committee and awarded the land to the Interested Party. The proceedings of the Board dated 25th September, 2000 have been annexed on the Petitioner's Affidavit.

12. The Petitioner's case is that he was not in the country when the proceedings of the Board were undertaken. According to the Petitioner, he only came to be aware of the decision of the Board in the year 2001.

13. The Petitioner has admitted that he filed Mwingi SRMCC No. 31 of 2004. According to the proceedings annexed on the Petitioner's Affidavit, the trial Magistrate struck out the suit on the basis of the Preliminary Objection that was raised by the Interested Party. In the said Ruling, the court found as follows:

“When the case came up for hearing on 14th March, 2007, Mr. Okello, advocate for the Defendant raised a Preliminary Objection on grounds inter-alia that the Plaintiff lacked any legal or equitable right on the land. The Plaintiff failed to address himself to the issues raised. Accordingly, I do find that the Preliminary Objection has merit and order that the Plaintiff's suit be and is hereby struck out with costs to the Defendants.”

14. The Petitioner never filed an Appeal in respect to the above Ruling. Indeed, the Petitioner never responded to the Defendants' Preliminary Objection in which the Defendant had argued that the Plaintiff did not have proprietary interest in the suit land.

15. To the extent that the court agreed with the Defendant (*the Interested Party herein*) that the Plaintiff (*the Petitioner herein*) did not have proprietary interest in the suit land, the issue of proprietorship was decided by the court with finality. Indeed, the court having allowed the Defendant's Preliminary Objection on 18th April, 2007, the Petition herein is not only *res judicata* but also an abuse of the court process.

16. After the lower court held that the Petitioner did not have proprietary interest in the suit land, the Petitioner filed a Plaint in Machakos HCCC No. 104 of 2007. In the Plaint, the Petitioner averred that he is the one entitled to the suit land.

17. Just like in the current Petition, the Petitioner averred in the Plaint that the Arbitration Board proceeded to hear the Appeal filed by the Interested Party (*the Defendant*) without serving him with any summons.

18. In the said suit, the Petitioner prayed for a declaration that he is the proper person to be recorded as the proprietor of parcel No. 477 in Kiomo Adjudication Section.

19. As I have stated above, the Plaint in Machakos HCCC No. 104 of 2007 was based on the ground that the Petitioner was never given an opportunity to be heard by the Land Arbitration Board. That is the same ground that the Petitioner is relying on to have the register of parcel number Mwingi/Kiomo/477 rectified in his favour.

20. The Petitioner has admitted that Machakos HCCC No. 104 of 2007 was dismissed by the court for want of prosecution. The Petitioner did not bother to file an Application to revive the said suit, or to Appeal against the order dismissing the suit. Instead, he has filed a Petition raising the same issues that he had raised in the two previous matters.

21. The conduct of the Petitioner in filing suits in different courts raising the same issue cannot be allowed. Indeed, the conduct of the Petitioner amounts to an abuse of the court process which cannot be countenanced by this court.

22. Having raised the same issues in the two suits which were struck out and dismissed respectively, the Petitioner cannot hide behind a Constitutional Petition with a view of circumventing due process, and taking the various courts for a ride. That is unacceptable.

23. For the reasons I have given above, I find and hold that the Petition dated 6th June, 2017 is not only *res judicata*, but is also an abuse of the court process. The Petition is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE