



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC PETITION NO 20 OF 2017

SAMUEL WAIYA GITHUKURIO.....PETITIONER

VERSUS

STEPHEN MUNGAI WAITA.....1ST RESPONDENT

LAND REGISTRAR NYANDARUA DISTRICT.....2ND RESPONDENT

DISTRICT SURVEYOR NYANDARUA.....3RD RESPONDENT

HON THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The present petition was filed on the 12th May 2017 wherein in response, a preliminary objection was filed on the 11th October 2017 by the 1st Respondent. The matter remained unprosecuted up to the 8th March 2018 where counsel for the 1st Respondent informed that court that his client was deceased. He thus sought for more time to avail the death certificate and to take further instructions from the deceased's family.

2. The Court directed that the matter be mentioned on a further date for counsel for the 1st Respondent to file the necessary documents and/or applications.

3. On the 22nd May 2018 the court was informed that the deceased's death certificate had now been filed wherein the court noted that the deceased had died on the 5th February 2018 Counsel now sought for time to await instructions for substitution.

4. On the 12th July 2018, the court was informed yet again that a formal application for substitution for the 1st Respondent had been filed on the 11th June 2018 and served wherein they sought that by consent the said application be allowed on the following terms.

i. that Naomi Njoki Mungai be allowed to substitute Stephen Mungai Waita as the 1st Respondent

ii. cost of the application be cost in the cause

5. The 1st Respondent's Counsel also sought that he be granted leave to file a replying affidavit to the petition dated 2nd March 2017 within 21 days wherein by consent, the court allowed Naomi Njoki Mungai to be substituted in place of the deceased Stephen Mungai Waita the 1st Respondent, with costs in cause. Leave was also granted to the 1st Respondent herein to file and serve her replying affidavit to the Petition within 21 days as prayed.

6. The matter was then listed for mention to confirm compliance on 19th November 2018 wherein on the said date, parties agreed to dispose of the preliminary objection by way of written submissions.

7. The 1st Respondent filed their submissions on 15th February 2019, whereas the Petitioner filed theirs on the 18th February 2019. The 2nd, 3rd and 4th Respondents did not file their submissions.

8. Parties subsequently filed their written submissions.

1st Respondents' Submission.

9. The 1st Respondent's submission in support of their preliminary objection was to the effect that the Petition revolved around the decision of Olkalou Division Land Dispute Tribunal case No. 28 of 2004 dated the 24th October 2005, the award of the Nyeri Provincial Land Dispute Tribunal in Appeal No. 31 of 2005 dated the 23rd June 2009 and the subsequent decree issued in Nyahururu Land disputes Case No 45 of 2009 delivered on the 28th October 2009.

10. It was the Respondent's submission that the tribunal's award was read on the 24th October 2015 wherein the Petitioner filed an appeal to the Appeal's committee and a decision was arrived at on the 23rd June 2009 wherein parties were given 60 days to Appeal. The Petitioner did not appeal and the Award was adopted as judgment of the court on the 23rd June 2009 as provided by the law wherein the decree was executed.

11. That although the Petitioner in his Petition seems to complain that he was not party to the proceedings and only came to know about them after he was served with the pleadings in Nyahururu CMCC No.228 of 2015, yet he had the option of applying to be enjoined in the suit or to file an application for judicial review to quash the proceedings and decision which option he did not take. He failed to exhaust all legal avenues.

12. The 1st Respondent relied on the decided case of **Speaker of The National Assembly vs James Njenga Karume (COA at Nairobi CA No. 92 of 1992)** to submit that the petitioner herein failed to follow the procedures laid down to redress his grievance.

13. Further, that the Petitioner did not set out with precision the provisions of the repealed constitution he considered to have been infringed and the manner in which he believes that they were infringed. That the Petition did not rise any Constitutional issues.

14. To buttress their case, the Respondent relied on the decided case of **Maggie Mwauki Mtalaki vs The Housing Finance Co. of Kenya at Mombasa Constitution Petition No.70 of 2013**

15. That although the Petitioner had quoted Sections 75 and 77(9) of the repealed Constitution, which deal with issues of compulsory acquisition of property and duty of the Petitioner to safe guard his interests respectively, the said sections were not applicable in the instant case. They sought for the Petition to be struck out.

Petitioner's Submission.

16. The Petitioner's contention was that in his petition of 2nd March 2017 he had sought for several declarations wherein the Respondents had not filed their responses meaning that the facts in the Petition were unchallenged or uncontroverted.

17. That he was not party to the proceedings in the tribunals wherein his failure to institute Judicial Review against the award after he become aware of the pleadings in Nyahururu CMCC No.228 of 2015, was due to the fact that time had lapsed.

18. That the award affected the Petitioner's parcel of land adversely to the effect that it led to the amendment of the RIM thereby reducing his acreage land and that was why he had instituted the present Petition.

19. The Petitioner relied on the decided case of **Lekinyot Ole Lanke vs Attorney General & 2 Others [2015] eKLR** to submit that they had established a violation of the petitioner's right to own land.

20. It was the Petitioner's further submission and while relying on the decided case of **JMK vs MWM & Another [2015] eKLR** that he had been condemned unheard in violation of his Constitutional rights.

21. That he had raised issues on the violation of his Constitutional rights to own property and fair hearing and had rightfully filed suit to seek redress in a Constitution Petition. That the 1st Respondent was a beneficiary of unfair administrative action and as such he should not be allowed to benefit from such an exercise at the advantage of the Petitioner's right to own property and fair trial. He further relied on the decided case of **Multiple Haulers East Africa Ltd vs Attorney General & 10 Others [2013] eKLR**

22. That the 1st Respondent, despite knowing that third parties who were not privy to the Tribunal proceedings, would be affected by the award proceeded to implement the same thus violating the Petitioner's right to property.

23. That it was misleading for the 1st Respondent to have submitted that issues raised in the Petition ought to have been raised as a counterclaim in Nyahururu CMCC No. 228 of 2015 as the same would have amounted to Res Judicata hence offending the provisions of Section 7 of the Civil Procedure Act.

24. It was the Petitioner's submission that the Preliminary Objection should be dismissed.

Analyses and Determination.

25. The genesis of the Petitioner's Petition is as illustrated above to the effect that a land dispute had been lodged at the Olkalou Division Land Dispute Tribunal in case No. 28 of 2004 wherein the said Tribunal passed its decision on the 24th October 2005. being dissatisfied with this decision, an appeal was lodged at the Nyeri Provincial Land Dispute Tribunal in Appeal No. 31 of 2005 wherein the Appeal's committee

passed its award on the 23rd June 2009. The award was filed in the Nyahururu Land Disputes Case No 45 of 2009 wherein it was adopted as a decree of the court on the 28th October 2009.

26. That it was upon the said adoption and execution of decree, that the RIM was amended which in turn resulted into the reduction in size of the Petitioner's Parcels of land No. LR Nyandarua/Kaimbaga/1339 and 1340. That the Petitioner was not part to the proceedings before the Tribunal and the Nyahururu Magistrates court and therefore his interest on the said parcels of land were affected without giving him a chance of being heard.

27. The Petitioner explained that he could not challenge the decision of the Tribunals or the decree because by the time he came to know of the proceedings he was time barred. He thus filed the present Petition wherein he sought for the following reliefs:

i. A declaration that the proceedings before the said Ol Kalou Division Land Disputes Tribunals, the Provincial Land Disputes Tribunal and Nyahururu Land Disputes Case No. 45 of 2009, Kiaire Githikurio Wangaruro –v- Stephen Mungai Waita contravened the Petitioner's rights under Articles 75 and 77 of the former Constitution of Kenya.

ii. A declaration that the award of Ol Kalou Division Land Disputes Tribunal No. 28 of 2004 and the award of Nyeri Provincial Land Disputes Tribunal in Appeal No. 31 of 2005, and the decree given on 28th October, 2009 in Nyahururu Land Disputes Case No. 45 of 2009 are null and void and of no effect.

iii. Nullification of all the orders issued pursuant to the decree given on 28th October 2009, in Nyahururu Land Disputes Case No. 45 of 2009 and all other proceedings instituted in furtherance thereof, and for reinstatement of the 11th edition of the R.I.M.

iv. Nullification of all the proceedings and actions taken pursuant to the decree given on 28th October 2009 in Nyahururu Land Disputes Case No. 45 of 2009 that affected the acreage and boundaries of LR Nyandarua/Kaimbaga/1339 and L.R. Nyandarua/Kaimbaga/1340.

v. Costs of the petition.

vi. Any other or further relief that the court may deem fit and just to grant.

28. It was pursuant to the filing of this petition that the 1st Respondent raised a preliminary objection, to the effect that once the Petitioner came to know of the proceedings before the tribunal after he had been served with the pleadings in Nyahururu CMCC No.228 of 2015, he failed to exhaust all legal avenues and procedure to upset the said Award and or decree so as to address his grievance.

29. Upon consideration of the Petitioner's Petition and the Preliminary objection raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. was stated to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case Sir Charles Newbold, P. stated:

‘...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

30. From the submissions and pleadings filed in this Petition, it is clear that the 1st Respondent herein is challenging the Petitioner's Petition dated the 2nd March 2017 and filed on the 12th May 2017 to the effect that the issues therein were heard and determined both in the Olkalou Division Land Dispute Tribunal, the Nyeri Provincial Land Dispute Tribunal and in the Nyahururu Magistrate's Land Disputes Case No 45 of 2009 respectively.

31. Looking at the Preliminary Objection raised, the Respondents have attacked the Petitioner's Petition for failing to exhaust all legal avenues pursuant to the decree issued by the Magistrate's Land Disputes Case No 45 of 2009.

32. It will be seen from the Tribunal's award that what was adopted was the following:

‘The Nyandarua District Land registrar and District Surveyor do conceal the 11th edition of RIM and the portion bordering land parcel No Nyandarua/Kaimbaga/480 to be combined with the land parcel no. Nyandarua/Kaimbaga 315’

33. Section 3 of the Land Disputes Tribunal Act (now repealed) provided as follows on the jurisdiction of the Land Disputes Tribunal :-

3. (1) 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.(2).

34. It is clear from the above provisions of the law that the Tribunal exceeded its mandate and further that this court has jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction. However this jurisdiction is only exercisable where such decision of the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the Court as in the present circumstance.

35. In the decided case of case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR**, the Court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case No. 139 of 2009 where Makhandia, J held as follows;

“It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

36. The award of the Nyeri Provincial Land Dispute Tribunal having been adopted by the Principal Magistrate's Court at Nyahururu ceased to exist on its own, and thus, could not be the subject of a declaration but could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.

37. The Preliminary Objection is herein allowed. The Petition is struck out with costs to the 1st Respondent.

Dated and delivered at Nyahururu this 25th day of June 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE