



**REPUBLIC OF KENYA**

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

**ELC. PETITION NO. 293 OF 2012**

**JOHN MWANZIA KYAL.....PETITIONER**

**AND**

**KALATA KITONYO.....1<sup>ST</sup> RESPONDENT**

**MARGRETE MUTAVE MULEI.....2<sup>ND</sup> RESPONDENT**

**KILONZI MUSILI.....3<sup>RD</sup> RESPONDENT**

**SYLVESTER JOSEPH MWEU.....4<sup>TH</sup> RESPONDENT**

**WILFRED MBOYA MUSYOKI.....5<sup>TH</sup> RESPONDENT**

**REGINA SYOMITI RAPHAEL.....6<sup>TH</sup> RESPONDENT**

**MUTOMO DISTRICT COMMISSIONER.....7<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....8<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. In the Petition filed on 6<sup>th</sup> August, 2012, the Petitioner averred that Mutomo District Commissioner, the 7<sup>th</sup> Respondent, acted as the Minister of Lands for purposes of hearing Appeals under the provisions of Section 29 of the Land Adjudication Act and that the Petitioner exercised his right and lodged six (6) Appeals to the Minister of Lands namely Appeal Nos. 14, 51, 16, 12, 13 and 21 all of 2003.

2. The Petitioner averred that the Appeals were heard and determined on 9<sup>th</sup> December, 2010, which was seven (7) years after the filing of the Appeals and that this delay occasioned a violation of his constitutional right to a fair trial within a reasonable time. According to the Petitioner, the decision was made against him; that the six (6) parcels of land in dispute were awarded to the 1<sup>st</sup> to 6<sup>th</sup> Respondents after a period of seven (7) years and that he lost all the six (6) pieces of land which he purchased for value.

3. The Petitioner averred that there was no justification for the violation of his guaranteed rights to a fair trial and that the delay in the trial and hearing of the Appeals amounted to delayed justice. The Petitioner has prayed for a declaration that the proceedings and the trial before the Mutomo District Commissioner violated his guaranteed right to a fair hearing within a reasonable time; a declaration that the said trial and proceedings were unconstitutional and that the proceedings be quashed and the Appeals be heard afresh by a different District Commissioner.

4. The 7<sup>th</sup> and 8<sup>th</sup> Respondents responded to the Petition by filing Grounds of Opposition on 11<sup>th</sup> September, 2012. The Respondents averred that the Petition was incompetent and an abuse of the court process; that the rights claimed by the Petitioner were not absolute; that there was no violation of the constitutional rights of the Petitioner hence no justifiable cause and that there was no constitutional issue before the court for determination.

5. The 3<sup>rd</sup> Respondent, vide Replying Affidavit filed on 26<sup>th</sup> April, 2017, averred that the seven (7) years delay in hearing the Appeal was attributable to the Petitioner because he did nothing to prosecute his Appeal and that the delay did not affect the merit of the Appeal. The Respondent averred that the reopening of the Appeal will not serve any useful purpose because the merit of the decision in the Appeal is has not been challenged.

6. The 4<sup>th</sup> Respondent, vide Replying Affidavit filed on 6<sup>th</sup> June, 2017, averred that the Petitioner was invited for the hearing of the Appeal

No. 16 of 2003; that he attended the proceedings and lost the Appeal and that the suit land was awarded to him. The 4<sup>th</sup> Respondent averred that the Petitioner is the author of the delay because he delayed prosecuting his Appeal for almost seven (7) years despite filing it; that the Appeal was heard on merit and that reopening the Appeal will not serve any useful purpose because the merit of the decision has not been challenged. The 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents did not respond to the Petition.

7. The Petition was canvassed by way of written submissions. The Petitioner filed submissions on 20<sup>th</sup> June, 2018 and the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed theirs on 6<sup>th</sup> November, 2018. Learned counsel for the Petitioner submitted that the failure to conduct a trial within a reasonable time affects the rights of an individual and is reason enough to declare the trial null and void. Counsel cited the cases of *Shameen v State (2008) 2 LRC*, *Spiers v Ruddy (2008) 3LRC* and *Re Mlambo (1993) 2 LRC*. Learned counsel submitted that the High Court is vested with jurisdiction to determine whether or not a right or fundamental freedom in the bill of rights has been violated or infringed under Article 165(1) of the Constitution and urged the court to declare the impugned decisions null and void for violation of the Petitioner's constitutional rights.

8. The learned counsel for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents submitted that the Petitioner slept on his rights to prosecute the Appeal and therefore the court could do nothing. Counsel submitted that the Petitioner had not demonstrated the efforts he made to follow up on the Appeal by attaching documentation indicating correspondence with the special Minister requesting for dates for hearing. According to counsel, Appeal Nos. 14 of 2003 and 13 of 2003 were finalized ten (10) months after the filing of the same; that the Petitioner did not afford the court with the information on the dates when Appeals Nos. 12 and 16 of 2003 were determined and that the Appeals were heard on merit and reopening will not serve any useful purpose.

9. I have considered the pleadings and the submissions proffered by the parties and find that the issue for determination is whether a constitutional cause of action has been set out against the Respondents; whether the Petitioner has met the threshold for grant of the orders sought; and what orders the court may grant.

10. The Petitioner's case is that the 7<sup>th</sup> Respondent delayed the hearing and determination of his Appeals Nos. 14, 51, 16, 12, 13 and 21 all of 2003. The 8<sup>th</sup> Respondent's case is that the Petition is incompetent while the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' case is that the Petitioner was the cause of the delay in hearing the Appeals. The Respondents argued that the merit of the decisions in the said Appeals Nos. 14, 51, 16, 12, 13 and 21 all of 2003 have not been challenged.

11. A look at the format of the Petition and the case of *Anarita Karimi Njeru Versus Republic [1979] eKLR* poses the question: what constitutional right was breached by the Respondents? Rule 10 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013 (*the "Mutunga Rules"*) provides for the form of a Petition. Although the law was passed in 2013 after the instant Petition was filed, the same offers useful guidance on what the court ought to look out in a Constitutional Petition.

**The said rule provides thus:**

***"10. (1) An application under Rule 4 shall be made by way of a Petition as set out in Form A in the Schedule with such alterations as may be necessary.***

***(2) The petition shall disclose the following—***

***(a) the petitioner's name and address;***

***(b) the facts relied upon;***

***(c) the constitutional provision violated;***

***(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;***

12. The Constitution and the Practice and Procedure Rules is quite liberal in as far as enforcement of fundamental rights is concerned. For example, Rule 10 (3) of the Rules envisages the acceptance by a court of law an oral Application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

13. In order to satisfy requirements under paragraphs (b) and (d) of Rule 10(1) of the "Mutunga Rules", the court is necessitated to look at the pleadings and the annexures that constitute the facts relied upon. I note that the pleadings in respect of Appeals Nos. 14, 51, 16, 12, 13 and 21 all of 2003 which would show when the Appeals were filed are not part of the record. What is annexed on the Petitioner's Affidavit are handwritten statements and findings of the Minister.

14. Although the Petitioner has annexed the findings of the Minister, he has not challenged the same. Instead, he opted to challenge the length of time between when the decision was made and when the Appeals were filed. This begs the question, what is the procedure for filing an Appeal to the minister and how long should such an Appeal be heard and determined?

15. Section 29 of the Land Adjudication Act provides that

***"1. Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—***

- a) *delivering to the Minister an appeal in writing specifying the grounds of appeal; and*
- b) *sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.*
- c) *The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.*
- d) *When the appeals have been determined, the Director of Land Adjudication shall—*
- e) *alter the duplicate adjudication register to conform with the determinations; and*
- f) *certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.*
- g) *Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.”*

16. From the evidence on record, the court cannot make out when the Appeals were lodged by the Petitioner, and when the same were served on the Director of Land Adjudication. The available evidence makes it difficult, if not impossible, to determine when the Appeals were filed, when the decisions were made by the Minister and when the same was communicated to the Petitioner.

17. In the case of **Robert Muli Matolo v Director of Land Adjudication & 2 others [2014] eKLR**, Justice Mutungĩ observed that;

***“An appeal before the Minister is a quasi-judicial process and it would be expected that the Civil Procedure Rules would have application particularly in regard to parties to the actions/appeals before the Minister. Whereas there may be no established procedure for conduct of matters arising from the Land Adjudication Act and specifically in regard to appeals before the Minister, my view is that the application of the Civil Procedure Rules is not expressly ousted by the Adjudication Act and it is my view that the Civil Procedure Rules would be applicable with the necessary modifications. A party who files an appeal before the Minister against the decision of an Adjudication officer/committee in my considered view would have the obligation and/or duty to have such an appeal prosecuted and determined by ensuring there is the necessary follow up.”***

18. Other than the uncertainty of when the Appeals before the Minister were filed, the Petitioner has not shown by way of tangible evidence that the delay of seven (7) years in hearing the Appeals was occasioned by the Minister. That being the case, I find that the Petitioner has not satisfied the court that his fundamental rights have been infringed upon by the Respondents and on this basis alone, this court cannot grant the orders sought by the Petitioner.

19. Having not been satisfied that there was any fault on the part of the 7<sup>th</sup> Respondent and the other Respondents, the orders sought cannot be granted. For those reasons, I find that the Petition lacks merit and therefore fails. The Petition dated 3<sup>rd</sup> August, 2015 is dismissed with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14<sup>TH</sup> DAY OF JUNE, 2019.**

**O.A. ANGOTE**

**JUDGE**