



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION NO. 4 OF 2015

IN THE MATTER OF ARTICLES 22 (1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 23 (1) & (2), 40 AND 50 (1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF MERU CENTRAL DISTRICT LAND DISPUTES TRIBUNAL CASE NO. 79 OF 2006

BETWEEN

DAVID NJOROGE KABARI (On his own behalf and on behalf

of CECILIA NYAGUTHII KAGUONGOPETITIONER

VERSUS

NAFTALY WAGURA KAGUONGO (As the legal representative of the

Estate of SARAH WANGECHII KAGUONGO).....1ST RESPONDENT

HANNAH GATHONI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

(1) The Petitioner, David Njoroge Kabari has filed this petition on his own behalf and on behalf of Cecilia Nyagnthii Kaguongo against Naftaly Wagura Kaguongo (Suing as the legal representative of the Estate of Sarah Wangechi Kaguongo), Hannah Gathoni and the Honourable Attorney General as Respondents.

(2) The petitioner seek the following four declarations:

(a) A declaration that the proceedings before the Meru Central District Land Disputes Tribunal in Case No. 79 of 2005 were conducted in violation of the right to a fair hearing.

(b) A declaration that the proceedings before the Meru Central District Land Disputes Tribunal in Case No. 79 of 2005 were conducted without jurisdiction thereby amounting to unlawful deprivation of property.

(c) A Judicial Review order of certiorari do issue removing into the High Court for purposes of quashing the proceedings and the award of the Meru Central District Land Disputes Tribunal Case No. 79 of 2005.

(d) Costs of this petition.

(3) Filed along with the petition is a Notice of Motion dated 28th July 2015 and brought under *Section 6, 3 & 3A C.P.A, Order 51 C.P.R, Order 40 Rules 1 & 2 C.P.R* and any other enabling laws of Kenya.

(4) That application is seeking an order of stay, staying any further proceedings in MERU C.M.C.C No. 62 of 2006 or the enforcement, or implementation of the decision made on 21st November 2006 in Meru Central District Land Disputes Tribunal Case No. 79 of 2005 and read out in open Court at the Chief Magistrate's Court in Meru on 29th January 2007 pending the hearing and determination of this application inter-partes and thereafter pending the hearing and the petition herein.

(5) Mr. Thangicia instructed by the firm of Mithega & Kariuki Advocates appeared for the petitioner and M/S Kiome appeared for the 1st and 2nd Respondents while M/S Kungu appeared for the Hon. Attorney General.

(6) When the Notice of Motion dated 28th July 2015 filed under certificate of urgency was placed before the duty Judge, the same was not certified urgent.

(7) On 26th February 2016, the 1st and 2nd Respondents through the firm of Charles Kariuki & Kiome Associates filed a replying affidavit opposing the Petitioner's Notice of Motion dated 29th July 2015.

(8) On 7th February 2018, this matter came up for directions where the parties agreed to canvass the petition herein by way of written submissions.

PETITIONER'S SUBMISSIONS

(9) The Petitioner filed his submissions on 30th April 2019 in which he urged that he has brought the petition of his own behalf and that of Cecilia Nyaguthii Kaguongo who is suffering from an infirmity. He submitted that the said Cecilia Nyaguthii Kaguongo is the registered owner of L.R. No. NYAKI/THUURA/208 measuring 10 acres with absolute proprietary rights.

(10) The Petitioner further argued that sometime in the year 2005, the Respondents sued Cecilia Nyaguthii Kaguongo in L.D.T No. 79 of 2005 (Meru Central) alleging that the said Cecilia Nyaguthii Kaguongo (Petitioner) held the suit property L.R. No. NYAKI/THUURA /208 in trust for them. The said proceedings were conducted in the absence of the Petitioner and that she was not granted a chance to be heard. The Tribunal subsequently rendered itself and ordered the subject parcel of land be divided equally between the 1st and 2nd Respondents on one land and Cecilia Nyaguthii Kaguongo on the other.

(11) The Petitioner therefore submitted that the Land Disputes Tribunal acted without jurisdiction and arrived at a null and void award.

(12) The Petitioner therefore sought a declaration that the proceedings in Meru Central District Land Disputes Tribunal in Case No. 79 of 2005 were conducted in violation of the right to a fair hearing. The Tribunal acted without jurisdiction and that the decision arrived at deprived Cecilia Nyaguthii Kaguongo her Constitutional right to own property. She sought that the award resulting from the said proceedings be quashed.

(13) The 1st and 2nd Respondents opposed this petition with a replying affidavit sworn by the 1st Respondent and filed in Court on 26th February 2016.

(14) In their response, the 1st and 2nd Respondents stated that the suit property NYAKI/THUURA/208 registered in the name of Cecilia Nyaguthii Kaguongo who is the mother to the Respondents is family land.

(15) The 1st and 2nd Respondents further stated that Cecilia Nyaguthii is registered as the proprietor of the said parcel under customary trust for and on behalf of 11 other sons and daughters of Sarah Wangechi Kaguongo and Hannah Gathoni Kaguongo.

(16) The Respondents further stated that regardless of the fact that she is the exclusive registered proprietor of the family land, they claim overriding interest in the same land as beneficiaries having lived in the sit land with their families and are still in occupation having carried out substantial developments in their respective portions of land.

(17) The 1st and 2nd respondents further averred that there was an elder's tribunal award which confirmed that the land was family land and that despite the Petitioner's mother being registered as the exclusive proprietor, she was holding the same in customary trust for and on behalf of the heirs of their deceased father.

(18) On 21st November 2006 soon after the award was delivered, they made an application for the award to be adopted by the Court which application is still pending in Court.

(19) The 1s and 2nd Respondents therefore stated that the Petitioner did not invoke the right of Appeal to the Provincial Land Disputes Tribunal but instead opted to file a Misc Application No. 422 of 2007 (Nairobi) seeking Judicial Review writs but withdrew the same subsequently.

(20) In conclusion, the 1st and 2nd Respondents contend that this petition just like the Misc Application No. 422 of 2007 (Nairobi) are forum shopping avenues which the Petitioner is using to frustrate the cause of justice and curtail them from realizing the fruits of a valid award issued by the Land Disputes Tribunal.

ISSUES FOR DETERMINATION

(21) The following are issues for determination:

(a) Whether the proceedings before the Meru Central Land Disputes Tribunal were conducted in violation of the Petitioner's right to a fair hearing.

(b) Whether the same proceedings before the Meru Central Land Disputes were without jurisdiction.

(c) Whether the Petitioner is entitled to the reliefs sought.

(a) Whether the proceedings before the Meru Central Land Disputes Tribunal were conducted in violation of the Petitioner's right to a fair hearing.

(22) Copies of the proceedings from the Meru Central District Land Disputes Tribunal attached to the petition herein shows that when the case commenced hearing on 29th August 2006, the Petitioner was conspicuously absent. Despite being the registered proprietor of the suit property which was the subject of the dispute, the case proceeded her absence notwithstanding.

(23) By directing that the case proceeds in the absence of the Petitioner was a gross violation of the Petitioner's right to her Constitutional right to property. From the onset, it was indicated that the Petitioner who was named as the 1st objector was unwell and admitted in hospital. The tribunal even allowed an adjournment in the first stages but later denied and ordered the case to proceed in her absence.

(24) It is to be noted that **Article 50 of the Constitution of Kenya, 2010** provides that disputes should be determined in a fair and public hearing. When the tribunal directed that the case proceed without the Petitioner who was named as 1st objector being present or any legal representative, her rights to a fair hearing was violated.

(25) Any decision from a hearing where the Petitioner was not involved therefore becomes null and void and of no effect.

(26) In the case of **STEPHN REBERU OLE KIITA VS LAND DISPUTES TRIBUNAL, CENTRAL DIVISION NAROK & ANOTHER (2014) e K.L.R.**, the Court held as follows:

"This is against the principle of 'audi alteram partem' a foundational pillar of natural justice, which affords all parties the chance to have their day in Court. It underscores their right to be heard".

(b) Whether the proceedings in Case No. 79 of 2005 before the Meru Central District Land District Tribunal were conducted without jurisdiction.

(27) The Petitioner contends that Meru Central District Land Disputes Tribunal lacked jurisdiction to try a matter relating to title, subdivision of land and rectification of the register.

(28) I find that the Meru Central District Land Disputes Tribunal exceeded its mandate as provided for under **Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 as read with Section 159 of the Registered Land Act Cap 300 (now repealed)** which reads as follows:

(a) The division of or determination of boundaries to land, including land held in common; or

(b) a claim to occupy or work land; or

(c) a claim on trespass to land.

(29) Disputes relating to title or the possession of land registered under the **Registered Land Act, Chapter 300 Laws of Kenya (now repealed)** were the preserve of the High Court of Kenya or the Magistrate's Court seized with the requisite pecuniary jurisdiction.

(30) There is no doubt in my mind that the issue before the Tribunal related to ownership of the suit property which was at the material time registered in the name of the Petitioner herein.

(31) In determining the issue of ownership of the suit property, the tribunal exceeded its jurisdiction. Any action done without jurisdiction is in my view a nullity and of no legal effect.

(32) Having found that the Meru District Land Disputes Tribunal exceeded its jurisdiction by determining ownership to title registered under statute, the argument presented by the Respondent that the Petitioner did not file an appeal before the Appeals Committee under **Section 8 (1) of the Land Disputes Tribunal Act** therefore have no relevancy. One cannot appeal against a nullity which has no legal effect.

(33) Having found the order of the tribunal and the adoption by the Magistrate's Court on 29th January 2007 a nullity in law, permitting it to continue performing part of the record of the tribunal or the lower Court is a violation of the Petitioner's rights.

(34) Suffice to state in closing that the Respondents remedy, if any, lies elsewhere but not through the Land Disputes Tribunal No. 18 of 1990 (repealed) which though Parliament had good intention for its enactment, ended up causing more harm than good to this country.

(35) Having arrived at the conclusion that the order of the tribunal was a nullity in law, I hereby proceed and issue an order of certiorari to remove into this Honourable Court for purposes of quashing the proceedings and the award of the **Meru Central District Land Disputes Tribunal Case No. 79 of 2005** and adopted by the Resident Magistrate's Court Meru on 29th January 2007.

(36) Costs being a discretionary, I order each party to bear her own costs.

DATED and SIGNED in open Court at Meru this 3rd June, 2019.

E.C. CHERONO

ELC JUDGE

3RD JUNE, 2019

In the presence of:

- 1. Mr. Muchiri holding brief for M/S Nyaga for Petitioner*
- 2. Kirimi holding brief for Kiome for 1st and 2nd Respondent*
- 3. 3rd Respondent – absent*