



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION NO. 1 OF 2016

DAVID LUBANGA MALEYAPETITIONER

VERSUS

JAPHETH MUSASA LIBESE

THE HON. ATTORNEY GENERALDEFENDANTS

AND

ERNEST CHAVASU..... INTERESTED PARTY

JUDGEMENT

This petition avers that the petitioner has at all material times from the year 1974 to date been the registered proprietor of land parcel known as North Maragoli/Chavakali/681 a developed property with a shop building over which he holds title a copy of the certificate which is filed with this petition. The suit land was initially registered in the name of Maleya Abulita who was his father but who died in the year 1970. A copy of the green card is annexed to the supporting affidavit of the petitioner and contains the history of the registration of the land. The petitioner obtained registration of the subject land in his name through the Magistrate's Court at Vihiga in Succession Cause No. 23 of 1974. The pleadings in the succession matter are also filed with the petition. That from the year 1974 to the year 2003 a period of 29 years, the humble petitioner enjoyed peaceful and uninterrupted occupation and use of the suit land.

In early the year 2003, the respondent filed a dispute before Sabatia District Lands Disputes Tribunal claiming one half of the land on allegation that the land was part of plot No. 15 Chavakali Market to which one Libese for whose family he was litigating was in joint ownership with Maleya. In the litigation which the respondent commenced before the tribunal no explanation was given in what capacity he brought the claim for the family of Libese. The tribunal nevertheless entertained the claim and gave its verdict in favour of the respondent and directed subdivision of the suit land. The verdict is filed. The petitioner was not happy with the decision of the tribunal and duly filed appeal against the decision to the Kakamega Provincial Land Disputes Appeals Committee being Appeal No. 73 of 2003. The petitioner was never called for the hearing of the appeal and only learnt of the outcome of the appeal from the Senior Resident Magistrates Court Vihiga where the respondent was pursuing execution of the decree in Misc. Land Application No. 34 of 2003. The appeal ruling and copy of the decree were also filed herewith.

That in issuing the subject decree, the Senior Resident Magistrate Vihiga adopted the decision of Sabatia Lands Disputes Tribunal which had been upheld by the Appeals Committee without according the Petitioner a hearing. That an attempt by the Petitioner to move the lower court to review the decree and or vacate it was disallowed thereby rendering the petitioner liable to execution of the decree. The respondent is in hot pursuit to execute the decree notwithstanding the illegalities that attended the process and the ambiguity in the resulting decree. The petitioner contends that the entire proceedings before the Tribunals and the lower Court have violated, continue to violate and threatens to violate his rights under the Constitution and seeks appropriate remedy from this court as stated elsewhere in the petition.

The right of the Petitioner to have the dispute involving his land resolved by a court of competent jurisdiction established in accordance with the law was also guaranteed by the repealed Constitution. That the repealed Land Disputes Tribunals Act which established the dispute resolution mechanisms and organs under the Act contained clear provisions on the composition of the Land Dispute Tribunals and the Appeals Committees. The judicial interpretation of this section settled on the principle that the Land Disputes Tribunal lacked the necessary jurisdiction to try matters of title to land and land ownership which jurisdiction the Sabatia Land Disputes Tribunal wrongly assumed in the matter the subject of this proceedings.

The claim which the Sabatia Land Disputes Tribunal was entertaining, according to the testimony of the respondent and his witnesses on record is said to have arisen in 1959 and was never raised at any time by him or his deceased father at any time or from the year 1970 when the land was first registered in the name of the late Maleya Abulita and hence statutorily time barred. The claim also concerned a land parcel which had been the subject of Vihiga Court Succession Cause No. 23 of 1974 which granted title to the Humble Petitioner and which proceedings ousted the jurisdiction of the Land Disputes Tribunals.

The petitioner submitted that, Article 40 of the Constitution provides guarantees on ownership of private property as a fundamental right. It counts for gross violation of this Constitutional right for the Magistrates' or other court to be used to enforce a decree resulting from unlawful tribunal to alienate private property of the individual as is happening in the lower court with regard to the foregoing proceedings. Articles 22 and 258 of the Constitution contains provisions authorizing the petitioner to seek redress in the manner proposed in this petition.

The remedies sought by the Petitioner are;

- (a) A declaratory order do issue in terms that both the Sabatia Land Disputes Tribunal and the Kakamega Provincial Land Disputes Appeals Committee which heard the dispute and the appeal concerning the claim by the respondent to land parcel North Maragoli/Chavakali/681 were illegal in their composition and for that reason were not competent to entertain as they did the claim or appeal then before them respectively.
- (b) A declaratory order do issue in terms that both the Sabatia Land Disputes Tribunal and the Kakamega Provincial Land Disputes Appeals Committee which heard the claim and the appeal resulting in this petition was bereft of any jurisdiction to entertain the dispute or the appeal which was before them respectively by reason that the respondent lacked the necessary locus standi in the matter, and that the claim if any was statutorily time barred and further that the claim concerned a matter which had been the subject of court proceedings namely Succession Cause No. 23 of 1974.
- (c) A declaration do issue to the effect that all the proceedings before Sabatia Lands Disputes Tribunal, the Kakamega Provincial Land disputes Appeals Committee and the Magistrate's court at Vihiga over land parcel North Maragoli/Chavakali/681 are and remain null and void for all purposes.
- (d) And for an order that the costs of this petition and the costs of the tribunal, the Committee and the lower court be recovered from the respondent.
- (e) The honourable court do grant any other relief in the matter deemed to be necessary to meet the ends of justice.

The respondent submitted, that the issue dates back to the year 2003 and he lodged a complaint before the Sabatia Land Dispute Tribunal. That to put the issues into more perspective the issue dates back to 1958 when their parents, their father and the father to the petitioner herein entered into agreement to do a partnership with each other which partnership involved use, ownership and occupation of the disputed plot (the same can be confirmed from the proceedings before the Tribunal and the Appeals Committee availed by the petitioner). That the two lived together peacefully and even the next generation thereafter with each owning, occupying and using half share of the said plot in a local arrangement as they had agreed at the time of purchase. Things only got murky when the older generation died out and the petitioner herein came about. That it was due to the stubbornness of the petitioner herein that led him to lodge a case before the Land Tribunal in Sabatia. That the Tribunal ruled in his favour and ordered that he be given his portion, the portion belonging to his father. That the petitioner herein appealed to the Provincial Land Dispute Appeal Tribunal sitting at Kakamega. That as clearly indicated in the proceedings availed by the petitioner, he was present and argued his case which appeal was dismissed, and he was given a right to appeal within 30 days. That the same was done on the 18th April, 2006 and the petitioner was duly aware of this noble process and the decision made. That the said 30 days allowed for appeal indeed did elapse without the petitioner lodging an appeal to the High Court as allowed by law. That the decision made by the two Tribunals was not to interfere with the title of the suit parcel of land as this land was at the time jointly owned by their fathers but now due to the dispute each of them was to move on his own. That the decision of the Tribunal was filed before the Senior Resident Magistrate's Court at Vihiga on 8th May, 2003 and adopted in open court in the presence of all parties on the 10th March, 2009 (Attached and marked JML-2 is a copy of the proceedings) That the respondent thereafter in the year 2012 extracted a decree dated 28th November, 2012 with the orders as had been directed by the court (attached and marked JML-2 is a copy of the decree dated 28th November, 2012). That later in the year 2015, the petitioner herein filed an application dated 19th March, 2015 vide Vihiga SPM Misc. Application No. 34 of 2003 seeking for orders that the said decree/judgment be reviewed and/or set aside. That the application by the petitioner was heard by a competent court of a competent jurisdiction which court dismissed the application for want of merit (attached herein and marked JML-3) is a copy of the ruling dated 13th October, 2015). That even before filing the application for review mentioned above, the petitioner filed Kakamega ELC No. 158 of 2014 which case the petitioner through his advocate withdrew the case and was ordered to pay him Ksh. 30,000/= (attached and marked JML-4 is a copy of the certified proceedings). That from the above history of this case, the petitioner herein has always sought refuge in the courts of law but he has never been successful. That indeed the petitioner herein is just a litigious person who wants orders of court to favour him at all cost and will always come up with something to keep him in court. That it is not true that the rights to a fair hearing of the petitioner has been breached or violated as alleged considering he has always been in court dating back from the years 2003 up until this time in 2018.

This court has considered the petition and the submissions therein. The respondent submitted that in the year 2015, the petitioner herein filed an application dated 19th March, 2015 vide Vihiga SPM Misc. Application No. 34 of 2003 seeking for orders that the said decree/judgment be reviewed and/or set aside. That the application by the petitioner was heard by a competent court of a competent jurisdiction which court dismissed the application for want of merit (attached herein and marked JML-3) is a copy of the ruling dated 13th October, 2015). The preliminary issue to be determined here is whether or not this suit is res judicata. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

This court has perused the court records and find that indeed the respondent lodged a case before the Land Tribunal in Sabatia. That the tribunal ruled in his favour and ordered that he be given his portion, the portion belonging to his father. That the petitioner herein appealed to the Provincial Land Dispute Appeal Tribunal sitting at Kakamega. That the decision of the tribunal was filed before the Senior Resident Magistrate’s Court at Vihiga on 8th May, 2003 and adopted in open court in the presence of all parties on the 10th March, 2009 (Attached and marked JML-2 is a copy of the proceedings). That later in the year 2015, the petitioner herein filed an application dated 19th March, 2015 vide Vihiga SPM Misc. Application No. 34 of 2003 seeking for orders that the said decree/judgment be reviewed and/or set aside. That the application by the petitioner was heard by a competent court of a competent jurisdiction which court dismissed the application for want of merit (attached and marked JML-3) is a copy of the ruling dated 13th October, 2015). That even before filing the application for review mentioned above, the petitioner filed Kakamega ELC No. 158 of 2014 which case the petitioner through his advocate withdrew the case and was ordered to pay him Ksh. 30,000/= (attached and marked JML-4 is a copy of the certified proceedings). I find that this petition is res judicata as Vihiga SPM Misc. Application No. 34 of 2003 determined the matter and the applicant applied for a review which was dismissed. The parties were the same and so was the subject matter. Having found this there will be no need in going into the merits and demerits of the petition. I find the petitioner is vexatious and keeps filing numerous cases on the same subject matter. For these reasons I find this petition is not merited and I strike it out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE