



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CONST. PETITION NO. 2 OF 2017

MUTINDA MUSILA.....PETITIONER

VERSUS

FRANCIS MUSEE THENGI.....1ST RESPONDENT

THE DEPUTY COUNTY COMMISSIONER, KITUI WEST.....2ND RESPONDENT

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

JUDGMENT

1. In the Petition dated 25th January, 2017, the Petitioner has averred that he exercised his right under the provisions of Section 29(1) of the Land Adjudication Act by lodging Appeal No. 110 of 1998 challenging the decision of the Land Adjudication Officer; that he expected a fair and just process from the proceedings of the Deputy County Commissioner (*the 2nd Respondent*) and that in awarding parcel number Nzalae/Mutonguni/198 to the 1st Respondent, the 2nd Respondent violated his guaranteed constitutional right of a fair administrative action.

2. According to the Petitioner, the subject matter in dispute between him and the 1st Respondent is parcel of land known as Nzalae/Mutonguni/198 (*the suit property*) which dispute started in 1998; that the dispute started with their deceased parents; that while adjudicating over the dispute, the 2nd Respondent assumed and exercised powers and authority of a Tribunal and that the 2nd Respondent was under an obligation to give to all the parties a fair hearing.

3. The Petitioner averred that he was served with Summons three days after the date fixed for hearing had passed; that the 2nd Respondent extended the hearing of the Appeal to another date, yet he heard the Appeal on a different date and that he was denied an opportunity to present and prosecute his Appeal when the 2nd Respondent purported to dismiss the Appeal for non-appearance.

4. According to the Petitioner, when he attended the hearing on 27th August, 2015 as per the extended Summons, he was advised that the 2nd Respondent had been transferred and that the Appeal would be heard by a different Commissioner; that on 8th August, 2016, he was shocked to learn that the Appeal had been heard and the Award forwarded to Nairobi on 11th September, 2015 and that he was condemned unheard.

5. The Petitioner finally averred that the 2nd Respondent extended the Summons for hearing from 14th August, 2015 to 27th August, 2015, yet he proceeded and dismissed the Appeal on 14th August, 2015 in his absence.

6. The Petitioner is praying for a declaration that the proceedings, trial and the undated verdict of the 2nd Respondent in Appeal Number 110 of 1998 were in violation of his right to a fair administrative action and a fair hearing and hence null and void.

7. In response, the 1st Respondent deponed that the Appeal by the Petitioner was listed for hearing on 6th August, 2015; that the Summons were issued through the office of the Chief; that the Petitioner has admitted that as of 5th August, 2015, he had been informed of the hearing date by his brother, James Masila, of the hearing date and that the Petitioner has admitted that he was aware that the Appeal was to be heard on 14th August, 2015 but failed to attend.

8. The 1st Respondent finally deponed that the 2nd Respondent made orders that were appropriate and that the Petitioner is the author of his own misfortune because he deliberately failed to attend the hearing to prosecute his case.

9. In his submissions, the Petitioner's counsel submitted that the 2nd Respondent extended the Summons to 27th August, 2015 from the hearing of 14th August, 2015; that the dispute ought to have been heard on 27th August, 2015 and that the Petitioner was not notified of any other date. Counsel relied on numerous authorities which I have considered.

10. The 1st Respondent's advocate submitted that the Petitioner's Appeal was set down for hearing on 5th August, 2015; that at the instance of the Petitioner, the hearing was adjourned to 14th August, 2015 and that the Petitioner was informed of the said hearing.

11. The records annexed on the Petitioner's Affidavit shows that immediately after the Nzalae Mutonguni area was declared an adjudication section, the Petitioner's and the 1st Respondent's fathers lodged a dispute with the Land Adjudication Committee which escalated all the way to the Minister. The Petitioner's complaint is that the 2nd Respondent made a decision without hearing him thus contravening the provisions of Article 47 (1) and 50(1) of the Constitution. Article 50(1) of the Constitution provides as follows:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

12. The Petitioner has deponed that after filing Appeal number 110 of 1998 before the 2nd Respondent, he was informed by his brother that the 2nd Respondent had called him and informed him that the Appeal would be heard on 5th August, 2015; that his brother spoke to the 2nd Respondent and the hearing dates were changed from 5th August, 2015 to 14th August, 2015 and that he was informed by his brother of the hearing date of 14th August, 2015.

13. According to the Petitioner's deposition, he did not *“get fare to go home on the 14th August, 2015, but on 17th August, 2015, he was served with Summons for the hearing of the Appeal on 14th August, 2015 by the area Chief.”* It is the Petitioner's case that the Summons were served upon him three (3) days after the date fixed for the hearing of the Appeal.

14. According to the Petitioner, after being served with the Summons, he went to the 2nd Respondent's office; that the 2nd Respondent took the Summons and extended the date of the hearing of the Appeal to 27th August, 2015 and that the dispute was not heard on 27th August, 2015 because the 2nd Respondent had been transferred.

15. It is the Petitioner's case that it was only on 8th August, 2016 that he was informed that his Appeal had after all been dismissed by the 2nd Respondent on 14th August, 2015.

16. The Petitioner admitted that he was made aware of the hearing date of 14th August, 2015 by his brother but could not travel from Machakos to Kitui because he did not have fare. Indeed, it would appear that all along, the Chief of the Area had the Summons for 14th August, 2015 but could not serve the Petitioner because he was not residing at his rural home. However, his brother informed him of the hearing date of 14th August, 2015 promptly.

17. Indeed, the Petitioner has exhibited the Summons dated 7th August, 2015 addressed to him. According to the said Summons, the Petitioner was to appear before the 2nd Respondent on 14th August, 2015. However, it was not until 17th August, 2015 that the Petitioner travelled from Machakos to Kitui West and officially received the Summons.

18. The evidence before me shows that although the Appeal before the 2nd Respondent was to proceed for hearing on 5th August, 2015, the same was adjourned to 14th August, 2015 to enable the Petitioner travel. The Petitioner was accordingly notified by his brother of the date of 14th August, 2015.

19. The Petitioner has admitted that he did not attend to the hearing of 14th August, 2015 due to lack of fare. Having been aware of the hearing date 14th August, 2015, and the Appeal having been dismissed by the 2nd Respondent on the said date for non-attendance, the Petitioner cannot allege that he was not given a fair hearing.

20. Indeed, the right to a fair hearing does not mean that a party chooses as and when he wants to appear before a Tribunal. The right to a fair hearing entails the notification of all parties of the date of the hearing, and eventually giving every party an opportunity to be heard and cross-examine his opponent and witnesses.

21. However, in a situation where a party has been informed of a hearing date, whether by way of Summons, or otherwise, but fails to appear before the Tribunal on the appointed date, then the matter can proceed, his absence notwithstanding. That is what happened in this matter on 14th August, 2015.

22. Having gone to explain his predicament to the 2nd Respondent on 17th August, 2015, it does not matter that the 2nd Respondent did indicate that the Summons had been extended to 27th August, 2015. What matters is whether indeed on 14th August, 2015, the 2nd Respondent adjourned the matter to another date. There is no indication that indeed the matter was adjourned from 14th August, 2015 to 27th August, 2015.

23. The fact that when the Petitioner went to see the 2nd Respondent on 17th August, 2015, the 2nd Respondent indicated that the *“Summons extended to 27th August, 2015”* is not the same as the matter having been adjourned until 27th August, 2015.

24. In view of the Petitioner's admission that he was informed of the hearing date of 5th August, 2015, on which date the Appeal was adjourned to 14th August, 2015, I find that the Petitioner was accorded an opportunity to be heard but failed to appear before the 2nd Respondent. In the circumstances, his right to a fair hearing and to a just and reasonable administrative action was not violated.

25. Consequently, the Petition dated 25th January, 2017 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE