



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. 3 OF 2018

(Formerly CONSTITUTIONAL PETITION NO. 27 OF 2015)

CONSOLIDATED WITH PETITION NO. 26 OF 2015) MACHAKOS

BETWEEN

JOSEPHINE WANJIKU (alias WANJIRU).....PETITIONER

KENNETH KARUGO MWANGI (alias KENNEDY MWANGI).....PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

AND

NABOOSHI ENE NKUSA.....1ST INTERESTED PARTY

MAXIMA VENTURES LIMITED2ND INTERESTED PATY

BENCHMARK ESTATE LIMITED.....3RD INTERESTED PARTY

JOSEPH KAPAITO.....4TH INTERESTED PARTY

JUDGMENT

Introduction

This matter entails two consolidated Petitions No. 26 of 2015 and 27 of 2015 respectively.

In the Petition No. 26 of 2015 dated the 23rd June, 2015 the Petitioner Kenneth Karugo Mwangi (alias Kennedy Mwangi) who is the 2nd Petitioner in the consolidated Petition, seeks the following orders:

- a) CERTIORARI to call and remove and quash in its entirety the decision of the tribunal and any subsequent decree/order issued therefrom to alienate 5 acres of the suit premises from the Petitioner and to allocate the same to the Interested Party;
- b) COMPENSATION for the gross violation of the Petitioner’s human rights and fundamental freedoms;
- c) Costs of this suit and interest thereon;
- d) Interest for all monetary awards calculated from the date of filing of this Petition;
- e) Such further Orders as it may deem to be just and appropriate.

While in Petition No. 27 of 2015, the Petitioner JOSEPHINE WANJIKU (alias WANJIRU) the 1st Petitioner herein seeks the following prayers:

- a) CERTIORARI to call and remove and quash in its entirety the decision of the tribunal and the subsequent decree issued therefrom to alienate 20 acres of the suit premises from the Petitioner and to allocate the same to the Interested Parties.
- b) MANDAMUS directing and compelling the Respondent and /or its agents to cause the alienated suit premises reinstated to the Petitioner.
- c) An order of Rectification of the Land Register directing that all entries and/or registrations subsequent to the aforesaid Senior Resident Magistrates' Court Land Tribunal Case No. 48 of 2011 Kajiado, Decree be cancelled and all the lands registered in the names of the 1st, 2nd and 3rd Interested Parties or any other party deriving title therefrom do revert to the Petitioner as one composite Title No. KAJIADO/ KAPUTIEI/ 1841;
- Alternatively -
- d) The Respondent (Attorney General) be ordered to indemnify the Petitioner for all the loss and costs ensuing from the loss of her land as aforesaid;
- e) Costs of this suit and interest thereon;
- f) Interest for all monetary awards calculated from the date of filing this Petition;
- g) Such further Orders as it may deem to be just and appropriate.

Evidence of the Petitioners

The 1st Petitioner claims to have been the owner of land parcel number Kajiado/ Kaputiei North/ 1841 measuring 36 acres which she bought from the 1st Interested Party in 1992. She contends that the 1st Interested Party filed a complaint in the Kajiado Land Disputes Tribunal vide Tribunal Cause No. 626/03/2011 against her claiming she never sold the land to the 1st Petitioner and the same should revert to her. She explains that the Tribunal made the following Award:

- i. That the title number Kajiado/ Kaputiei North/ 1841 be returned to the Registrar for amendment/ correction.
- ii. That the surveyors to enter into parcel number: Kajiado/ Kaputiei North/ 1841 and annex 16 acres from JOSEPHINE WANJIRU (objector) and the remainder for NABOOSHI ENE NKUSA (Claimant).

She insists that the 1st Interested Party was in conspiracy with the Tribunal who fraudulently and corruptly made an Award in her favour. Further, that she lodged an appeal No. 38 of 2011 at the Land Disputes Appeal Committee on 5th July, 2011 but the same was never heard due to failure of the Committee to be constituted. She confirms that the Award of the Land Disputes Tribunal was adopted vide the Kajiado Senior Resident Magistrate's Court on the 17th January, 2012 and a Decree issued to that effect. Further, that she lodged an Appeal No. 16 of 2012 at the High Court in Machakos but withdrew it. She avers that the 1st Interested Party caused her land Kajiado/ Kaputiei North/ 1841 to be subdivided into Kajiado/ Kaputiei North/ 67032; 67033 and 67034 which she registered in her name and those of the 2nd and 3rd Interested Parties' respectively. She reiterates that the 1st, 2nd and 3rd Respondents have deprived her of the suit premises without due legal process and are in violation of her rights.

The 2nd Petitioner contends that he purchased land parcel number Kajiado/ Kaputiei North/ 1246 measuring 10 acres in 1998 from Kapaito Mooi who has since passed on. He claims in 2011, the 4th Interested Party JOSEPH KAPAITO in his capacity as the deceased son, lodged a complaint with the Kajiado Central Land Disputes Tribunal, vide Case No. 635/04/2011 against him and after hearing, they made the following Ruling:

- i. That due to the scarcity of land for the family of the late Kapaito Mooi, the surveyor to enter into parcel No. KAJIADO/ KAPUTIEI NORTH/ 1569 and subdivide it into two equal portions of five (5) acres for Kennedy Mwangi and five (5) acres for the family of the late Kapaito Mooi.
- ii. That title No. KAJIADO/ KAPUTIEI NORTH/ 1569 be returned to the registrar and amend it as per ruling No. 1 above.
- iii. That the Claimant's family to meet the cost of the transaction.

He claims the 4th Interested Party conspired with the Tribunal who fraudulently and corruptly made an Award in his favour. He confirms lodging an Appeal with the Land Disputes Appeal Committee Nakuru on 20th September, 2011 vide Appeal No.54 of 2011 but the same was never heard due to failure of the Committee to be constituted. He confirms that the Award of the Land Disputes Tribunal was adopted vide the Kajiado Senior Resident Magistrate's Court on the 23rd August, 2011. He avers that his rights have been violated as the 4th Interested Party would proceed to implement the Tribunal's decision upon discharge of the Charge over his land.

The Petitioners claim the Petition is undefended but the 3rd Interested Party claims to have filed a replying affidavit in respect of Petition No. 27 of 2015 on 22nd January, 2016 and served the same upon the Petitioner therein. I note there is a replying affidavit filed by the 3rd Interested Party sworn by HERBERT MWANGI who is its Director but the same is in response to application dated 23rd June, 2015 and not the Petition, which application was withdrawn. In the circumstance, I hold that the Petition is indeed undefended.

Insofar as the Petition is undefended, it is incumbent upon the Court to determine the same on its merits. I note the 1st and 3rd Interested Parties as well as the Petitioners filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Petition filed herein including the supporting affidavit as well as the Parties' submissions, the following are the issues for determination

- Whether the Petitioners are entitled to the orders sought in the Petition
- Whether any of the Petitioners' rights were violated.
- Who should bear the costs of the Petition.

As to whether the Petitioners are entitled to the orders sought in the Petition.

The Petitioners are seeking for Orders of Certiorari and Mandamus to challenge/quash the Land Disputes Tribunal Decisions cited above as well as the resulting Magistrate's Order and Decree.; rectification of titles to the suit land and for the same to revert to them as well as compensation. I note the Petitioners claim emanated from two decisions of the Kajiado Central Land Disputes Tribunal which were both adopted by the Kajiado Senior Resident Magistrate's Court as indicated above. They both contend that the Tribunal made the two decisions without jurisdiction and this culminated in their parcels of land being taken away by the 1st and 3rd Respondents. They insist as a result of the Ruling from the Tribunal their rights to equality; property; fair administrative action; access to justice and fair hearing were violated. Further, that they are entitled to the Orders sought since the Petition is undefended. In their submissions, they relied on the cases of **Israel Otieno Agina V Attorney General (2011) eKLR**; **M'Marete V Republic & 3 Others (2004) eKLR**; **Ernest Kevin Luchidio V Attorney General & 2 Others (2018) eKLR**; **Masagu Ole Naumo V Principal Magistrate Kajiado Law Courts & Another (2014) eKLR**; **Republic V Chairman Eastern Provincial Appeals Tribunal & 4 Others (2015) eKLR**; and **Evelyn College of Design Limited V Director of Children's Department & Another (2013) eKLR** to buttress their arguments in respect of their claim herein and the fact that it was undefended.

The 1st Interested Party in opposition to the Petition submitted that the Petition is incompetent in challenging the Tribunal's decision and resulting Magistrates' Order including Decree. Further, that the Rulings from the Tribunal cannot be challenged after the same have been adopted as judgment and Decree of the Court and the Petitioners are not entitled to the orders sought. She relied on the following cases of **Florence Nyaboke Machani v Mogere Amosi Ombui (2014) & (2018) eKLR**; **Nyaga Muindi V James Kirangi Ngari (2017) eKLR**; **Cyprian Shivachi Shisanya V Emily Kayanda (Ebenezer Women Group & Another (2018) eKLR**; **Margaret Wambui Mwangi v Chief Lands Registrar, Kajiado (2019) eKLR**; **Evans Otieno Nyakwama V Cleophas Bwana Ongaro (2015) eKLR**; **Kuria Kiarie & 2 Others V Sammy Magera (2018) eKLR** and **John Mbugua Gitao V Simon Porkoyirt Mokare & 4 others (2017) eKLR** to support these arguments.

The 3rd Interested Party filed its submissions and insisted that the Petitioners' claim was statute barred; proceedings in the Tribunal was lawful; and that it is a bona fide purchaser for value without notice as to defect in title. It relied on the authorities of **Ruth Kavindu & Rael Syovonza V Josiah Mbaya Mantu & B Mbaya HCCC No. 2091 of 1974**; **Isaac Ngatia Kihagi V Paul Kaiga Githui (2017) eKLR**; **Willy Kimutai Kitilit V Michael Kibet (2018) eKLR**; **MWN V Inspector General of Police & 4 others (2019) eKLR**; **Annarita Karimi Njeru V Republic (1976 – 1980) KLR 1272**; **Arthi Highway Developers Limited Vs West End Butchery Limited & 6 others**; and **Katende V Haridar & Company Limited (2008) 2 EA 173** to support its arguments in opposition to the Petition.

I wish to make reference to certain provisions in the Land Disputes Tribunal Act (repealed) which governed proceedings in the Tribunal. Section 3 (1),(a), (b), (c) and (7) of the repealed Land Disputes Tribunal provided that: **'(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.'..... (7) The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party's witness or witnesses.'**

The said Act at Section 7 provided the procedure to be adhered to once an Award was made, while section 8 provided for the Appeals mechanism as follows: **'7. (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal. (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act. 8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.'**

In the current Petition, there were two Rulings (Awards) which were issued in respect of the Petitioners parcels of land and the said Rulings (Awards) were adopted by the Kajiado Senior Resident Magistrate's Court as Judgments and Decrees issued to that effect. I note the said Rulings (Awards) were adopted in 2011 and 2012 respectively while the Petitions herein were filed in June 2015. The Petitioners have not informed court on whether they lodged judicial review proceedings against the Tribunals' decision which remedy was available to them if they were aggrieved. However, in this petition it is evident that they failed to apply to quash the Tribunal's decision and let the Senior Resident Magistrate adopt the Rulings as judgments of the Court with Decrees issued to that effect.

In the case of **Peterson Maina Karitu V Augustine Mwangi Ndonyi & Another (2009) eKLR**, Justice Makhandia held that: **'The legal effect of the entry of judgment in terms of the award was that the award ceased to exist.Unless and until this judgment is set**

aside, the award of the Land Disputes Appeals Committee is incapable of being challenged since it is of no legal consequence. Whether the award of the Appeals Committee is set aside or not does not change the status of the judgment of the subordinate court.

Further, in the case **MASAGU OLE KOITALEL NAUMO v PRINCIPAL MAGISTRATE KAJIADO LAW COURTS & ANOTHER (2014) eKLR**, the Learned Judge was very clear that once the Award was adopted it ceased to exist but as a judgment of the court and hence could not be challenged on its own.'

This position was also well articulated in the case of **Florence Nyaboke Machani v Mogere Amosi Ombui (2014) & (2018) eKLR**.

From the legal provisions cited above, I hold that it was pertinent for the Petitioners to apply to quash the two Rulings before their adoption by the SRM's Court. By failing to do so, it is evident the Petitioners were not vigilant enough to exercise their rights as stipulated in the then statute and have come late in the day to claim them.

In associating myself with the aforementioned judicial decisions, I find that since the two Rulings (Awards) had been adopted by the Senior Resident Magistrates Court, they ceased to have effect and the Decrees issued thereafter still stand. I hence find that the orders the Petitioners are seeking are untenable.

On the issue of the Petitioners claiming that their rights were violated. The Petitioners claim various rights including rights to equality; property; fair administrative action; access to justice and fair hearing were violated by the Tribunal's actions. The Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, stated that:

*“...the principle in **Anarita Karimi Njeru (supra)** underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in **Anarita Karimi Njeru (supra)** that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”*

In relying on this case, I find that the Petitioners have generalized complaints against the Tribunal and failed to demonstrate in precision how their Constitutional Rights were violated with the said Tribunals' proceedings and Rulings respectively. I opine that they had a remedy to institute proceedings of Judicial Review to quash the Tribunal's decisions but they opted not to. Further, they have claimed compensation for the violation of their rights but failed to demonstrate the grounds upon which the Hon. Attorney General was to be held liable for the actions of the Tribunal. In the circumstance, I hold that they have not fully complied with the basic tenets of constitutional reference to prove their rights as enshrined in Articles 27, 28, 40, 47 48 and 50 of the Constitution have been violated.

On the question of rectification of title. I note this is governed by section 80 of the Land Registration Act. The Petitioners' infer fraud and conspiracy on the part of the Tribunal culminating in the subdivision of their land. From the proceedings herein, the Petitioners have not enjoined the said Tribunal that contributed to the fraud culminating in the change of acreage as well as ownership of their lands. It is trite law that where there are allegations of fraud, the same must be strictly proved. This position has been reaffirmed in the Court of Appeal decision of **Kuria Kiarie & 2 others V Sammy Magera (2018) eKLR**. In associating myself with this decision, I find that the Petitioners have failed to prove the allegations of fraud as against the Tribunal as well 1st and 3rd Interested Party but only made generalized statements in respect to the same hence the prayer for rectification of their titles must fail.

On the issue of orders sought for certiorari and mandamus, I note the Petitioners were accorded a hearing at the Tribunals but insist they were discriminated upon as the Tribunal made orders touching on titles to their land, yet they did not have jurisdiction to do so. In the case of **Livingstone Kunini Ntutu Vs Minister for Lands & 4 others (2014) eKLR**, the learned Judges Odunga and Weldon Korir stated as follows: ' **we are of the view that judicial review is not the most efficacious remedy where what is in contention is the ownership of the suit property.**' In associating myself with this decision, insofar as the Petitioners were seeking prayers for certiorari and mandamus, I am of the view that this Petition was not the appropriate avenue as the issues raised touched on ownership of land. Further, I note the Petitioners were accorded audience at the Tribunal that made their decision, which was adopted by the SRM's Court and the Decrees exist to date which have not been appealed from. I find that the prayers for certiorari and mandamus must hence fail.

The upshot of the foregoing is that the Petitioners are not entitled to the orders sought in the Petition, which I proceed to dismiss with costs to the Interested Parties.

Dated signed and delivered in open court at Kajiado this 17th day of October, 2019

CHRISTINE OCHIENG

JUDGE