



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

CONSTITUTIONAL PETITION NO. 4 OF 2017

IN THE MATTER OF ARTICLES 2, 3(1), 10, 19, 20, 21, 22, 23, 40, 47, 48, 64, 162(2), 165(3) & (60, 258 & 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 13(10, 2, 3, 5 & 7, 14, 17, 20 & 21 OF THE ENVIRONMENT AND LAND COURT ACT, 2011

BETWEEN

JAMES KARIUKI KITHAKA.....PETITIONER

VERSUS

TERESIA WANGARI WARUI

Alias TERESIA WANGARI GITHAKA.....1ST RESPONDENT

PRINCIPAL MAGISTRATE'S COURT, WANG'URU.....2ND RESPONDENT

NATIONAL IRRIGATION BOARD.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

BACKGROUND

The petitioner, James Kariuki Kithaka filed this petition against the respondents for the following orders:

- (a) That there be a declaration that the petitioner's fundamental rights and freedoms as enshrined under Article 4 of the Constitution of Kenya have been contravened and infringed upon by the 1st and 3rd respondents.*
- (b) That there be a declaration that the petitioner's fundamental rights and freedom as enshrined under Article 47 of the Constitution of Kenya have been contravened and infringed upon by 2nd and 3rd respondents.*
- (c) A declaration that the award of the Mwea Land Disputes Tribunal was and is unconstitutional, unlawful, null and void.*
- (d) A declaration that the award of the Central Province Land Disputes Appeals Committee was and is unconstitutional, unlawful, null and void.*
- (e) A declaration that the petitioner's Constitutional right to access to justice and right to a fair trial as protected under Articles 48 and 50 (1) of the Constitution has been violated by the 2nd respondent.*
- (f) An order directing the 1st respondent to vacate 2 acres out of Rice Holding No. 2462 Thiba Section and plot associated with it forthwith.*
- (g) General damages, exemplary damages and aggravated damages under Article 23 (B) of the Constitution of Kenya for*

violation of the petitioner's Constitutional rights.

(h) Costs of the petition.

The petition is supported by an affidavit sworn by the petitioner on 5th September 2017. The said affidavit is further supported by numerous annexures thereto.

- The petition is opposed by way of a replying affidavit sworn by the respondent on 1st March 2018. The respondent also annexed numerous documents in support thereto.
- When the matter came up for directions on 23rd March 2019, the parties agreed to canvass the same by way of written submissions.

PETITIONER'S CASE

- The petitioner, James Kariuki Kithaka stated that the original tenant to the disputed Rice Holding No. 2462, Thiba Section was his late father John Githaka Ithiga.
- The allocation was given to him by Mwea Irrigation Settlement Scheme.
- The petitioner stated that his late father nominated him as his successor in regard to the said rice holding.
- Upon his demise, the Manager of Mwea Irrigation Settlement Scheme filed a succession cause at Wanguru District Magistrate's Court being Misc. Succession Cause No. 30 of 2001.
- On 30th November 2001, the Court gave its verdict and ordered the said rice holding be registered in the name of the petitioner to hold in trust for his mother and siblings.
- In the year 2002 or thereabout, the 1st respondent filed a dispute before the Mwea Land Disputes Tribunal seeking a share of the suit land. The Tribunal rendered itself and awarded the 1st respondent 2 acres and the petitioner to retain the other 2 acres.
- The petitioner filed an appeal to the Provincial Land Disputes Appeal Committee where the Committee on 30th January 2003 held that the petitioner would retain the rice field at Mwea alone and the plot he had developed as a home. The 1st respondent was given the plot which she was using as at that time.
- The awards were read and adopted by the Magistrate's Court at Wanguru Law Courts vide Arbitration Cause No. 28 of 2002.
- The petitioner sought to be recognized as the only tenant of the suit property in Arbitration Cause No. 28 of 2002 after the Provincial Land Disputes Appeals Committee award was read. His prayers were allowed on 3rd July 2003.
- On 23rd March 2006, the 1st respondent made an application vide Misc Succession Cause No. 30 of 2001 and obtained an order to be in occupation of 2 acres of the suit land.
- The 2nd respondent granted the orders but discharged them on 11th May 2006 after hearing inter-parties.
- The 1st respondent was aggrieved by the award of the Provincial Land Disputes Appeals Committee and filed High Court Civil Appeal No. 19 of 2003 (Embu). However, she subsequently withdrew the same.
- The petitioner was aggrieved by the award of the Provincial Land Disputes Appeals Committee and filed an appeal in the Embu High Court being HCCA No. 27 of 2003 (Embu). The said Appeal was dismissed on 20th September 2007.
- During the pendency of the HCCA No. 27 of 2003, the 1st respondent applied to be allowed to utilize 2 acres out of Rice Holding No. 2462 Unit 2 vide an application dated 12th May 2006 which was subsequently allowed.
- After the finalization of HCCA No. 27 of 2003, the petitioner filed SRMCC No. 178 of 2008 (Kerugoya) against the 1st respondent seeking for mesne profits and a permanent injunction restraining her from interfering with Rice Holding No. 2462.
- The Court struck out the said suit for want of jurisdiction and the petitioner being dissatisfied filed HCCA No. 89 of 2008. The said Appeal was dismissed with costs.
- On 28th December 2005, the 2nd respondent delivered a ruling in respect of an application filed by the 1st respondent dated 19th May 2005 in which the 1st respondent had sought an injunction against the petitioner from interfering with her use of the 2 acres of the suit land.

- The Court granted the orders.
- On 29th January 2015, the petitioner filed an application seeking to summon the Senior Scheme Manager, Mwea Irrigation Settlement Scheme to explain to the Court the steps, if any, to comply with the order which compelled him to only recognize the defendants as the only tenant of the rice field.
- The 1st respondent also filed an application dated 23rd June 2015 seeking to set aside the order made on 3rd July 2003 which compelled the Senior Scheme Manager, Mwea Irrigation Settlement Scheme to recognize the defendants as the only tenant of the rice field.
- On 3rd August 2015, the Court delivered its ruling and dismissed the 1st respondent's application dated 23rd June 2015.
- The Court also dismissed the defendant's application dated 29th January 2015 which had not been argued.
- In an application dated 12th April 2016, the 1st respondent sought to review the orders made on 3rd August 2015 to the extent that the Court dismissed his application dated 29th January 2015 unheard.
- The Senior Scheme Manager, Mwea Settlement Irrigation Scheme finally issued the defendant with a tenant card for the 4 acres and license.
- The defendant thereafter withdrew his application dated 12th April 2016.
- The 1st defendant complained to the Senior Scheme Manager, Mwea Settlement Irrigation Scheme who wrote to the 2nd respondent seeking to clarify the correct position.
- The 2nd respondent vide a letter dated 5th October 2016 gave its interpretation of the dispute vis –a-vis the order of the High Court in HCCCA No. 27 of 2003 (Embu).
- The petitioner contends that the 1st respondent is unlawfully occupying 2 acres of the rice field and that he wrote a letter dated 24th November 2016 seeking an explanation relating to the letter dated 5th October 2016 without any response.

1ST RESPONDENT'S CASE

The 1st respondent in her replying affidavit stated as follows:

- That Rice Holding No. 2462 has never been personal property of the petitioner.
- Rice Holding No. 2462 is the property of National Irrigation Board and her together with the petitioner are mere tenants and licensees holding the same under the directions of National Irrigation Board.
- That she has no power or machinery to deprive another tenant of his tenancy and National Irrigation Board's property.
- That rice holdings are governed by statute which is the ***Irrigation Act***.
- That the ***Irrigation Act*** recognized Customary Law and whether or not one holds a tenant card, the land does not become his absolute property and it does not mean he/she is meant to cultivate the land alone and chase away other family members.
- The original tenant of rice holding No. 2462 was her husband one John Kithaka Ithiga.
- That her husband had two wives being her and the petitioner's mother, one Lucy Wamuyu Githaka.
- She stated that she got four (4) children while the petitioner's mother was blessed with five (5) children.
- That after her husband died, the petitioner secretly filed a Succession Cause Misc Succession No. 30 of 2001 (Wanguru) and together with his siblings recorded a consent on 30th November 2001 where he was made successor of Rice Holding No. 2462 Thiba Section in trust for his mother and other siblings of the deceased.
- That she applied to set aside those orders.
- That there is no procedure in law where succession is filed vide a Miscellaneous Cause and that the proceedings giving rise to those orders were null and void.
- That she thereafter filed a dispute before the Mwea Land Disputes Tribunal where she was awarded two (2) acres of the rice holding and the petitioner was also given 2 acres.

- That the petitioner appealed before the Provincial Land Disputes Appeals Committee which did not rule on the rice holding but divided the plots attached to the rice holdings and held that she remains with the plot she was using while the petitioner to remain with the plot he had developed.
- The award was read and adopted as the judgment of the Court.
- The petitioner was dissatisfied and filed HCCA No. 27 of 2003 (Embu).
- That on 20th September 2007, the said Appeal was dismissed and the award of the Provincial Land Disputes Appeals Committee was upheld.
- The issue of jurisdiction of the Mwea Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee is res-judicata concerning rice field No. 2462 Thiba.
- That this petition is a back door appeal from the judgment of Justice Khaminwa.
- She therefore sought to dismiss this petition.

ISSUES FOR DETERMINATION

- (1) Whether the petitioner's Constitutional rights and fundamental freedoms have been violated, infringed and/or threatened.***
- (2) Whether the subject matter of this petition is res-judicata.***
- (3) Who shall bear the costs of this petition?***

ANALYSIS AND DECISION

Let me begin my analysis by noting that this petition holds the dubious distinction of having been heard as a succession cause, a land dispute before the Land Disputes Tribunal, the Provincial

Land Appeals Committee, the High Court and now the Environment and Land Court. The subject of this dispute is a land holding No. 2462 Thiba Section. The land is the property of the National Irrigation Board, Mwea Irrigation Settlement Scheme. The property had initially been allocated to one John Kithaka Ithiga (deceased) who is the Petitioner's father and the 1st defendant's husband. Sometime in the year 2001, the petitioner filed a Miscellaneous Application Cause No. 30 of 2001 (Wanguru) where she was made successor of the rice holding in question in trust for his mother and other members of the deceased family.

- Upon coming to her knowledge of the said cause, the 1st respondent applied to set aside the same.
- Thereafter, the 1st respondent filed a dispute before Mwea Land Disputes Tribunal where upon hearing was awarded 2 acres.
- The petitioner was not satisfied and lodged an appeal before the Provincial Land Disputes Appeals Committee which was dismissed.
- The 2nd respondent thereafter adopted the awards as the judgment of the Court.
- The petitioner was again not satisfied and lodged an Appeal to the High Court in Meru vide HCCA No. 27 of 2003.
- On 20th September 2007, Justice Khaminwa dismissed the said Appeal and the award of the Provincial Land Disputes Appeals Committee upheld. That decision has not been challenged.
- The petitioner later filed a Notice of Motion application before the Magistrate's Court dated 23rd June 2015 under *Order 45 Rule 1 CPR* seeking the review, varying and/or setting aside of orders issued on 3rd July 2003.
- On 3rd August 2015, the Court dismissed that application. Having failed to get back the entire rice holding as aforesaid, the petitioner filed this petition on 5th September 2017.

(1) Whether the petitioner's right to property as protected under Article 40 and 47 of the Constitution has been infringed, violated and/or threatened?

The petitioner in the year 2001 filed a Misc. Succession Cause No. 30 of 2001 (Wanguru) where he was made successor of rice holding No. 2462 Thiba Section which is the subject of this petition.

The 1st respondent moved to set aside the said order after she came to know about the same vide an application dated 23rd March 2006. That application was filed under certificate of urgency. In a ruling delivered on 11th May 2006, the Court dismissed the same with costs on

grounds of res-judicata. The 1st respondent did not appeal against that decision. Instead, the 1st defendant filed a dispute before Mwea Land Disputes Tribunal No. 28 of 2002 where after hearing the parties, it was held that the Rice Holding No. 2462 be sub-divided equally measuring 2 acres each. The petitioner was dissatisfied and lodged an Appeal to the Provincial Lands Disputes Appeals Committee where the Appeal was dismissed and the decision by the Mwea Land Disputes Tribunal was upheld.

The petitioner was still not satisfied and moved before the High Court in Embu in HCCA No. 27 of 2003. On 20th September 2007, Hon. Justice Khaminwa (as she then was) dismissed the Appeal and upheld the decision by the Mwea Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee. The petitioner later moved back before the Magistrate's Court in Arbitration Cause No. 28 of 2002 vide a Notice of Motion dated 23rd June 2015 seeking a review of the orders issued on 3rd July 2003. That application was dismissed alongside another application dated 29th January 2015. The petitioner has now come knocking before me by way of this petition alleging that his Constitutional rights under *Article 40 and 47 of the Constitution* have been violated. **Section 40 of the Constitution of Kenya 2010** provides as follows:

“40 (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property;

(a) of any description; and

(b) in any part of Kenya”

The suit property is a Rice Holding No. 2462 Thiba Section owned by the National Irrigation of Kenya, Mwea Irrigation Settlement Scheme. The management of the scheme is under the ***Irrigation Act Cap 347 Laws of Kenya***. The suit property is leased to tenants including the two protagonists in this case who hold it under the direction and control of the Scheme Manager, Mwea Irrigation Settlement Scheme. Their licence is not absolute. In a similar dispute which came before me in ***ELC No. 11 of 2017 between Naomi Njeri Ayub Vs Mary Nyambura Wangombe & another***, I made the following observations:

“I find that the licence by the applicant is not absolute and is subject to regulations of the Board at any time. The decision of the Board is therefore within the powers granted under the statute establishing the same. I see no reason to quash the same. The Advisory Committee Tribunal can even override orders of Court if the same are not made within the province of the Act (Cap 347). (Emphasis mine”.

I am still of the same persuasion that a rice holding such as the subject of this petition is not an individual property that can be protected under ***Article 40 of the Constitution***. As a tenant and/or licensee, there are statutory enactments that can protect his rights if infringed, violated and/or threatened. ***Article 40 of the Constitution of Kenya 2010*** is not a paucea for all infringement of rights but is a special jurisdiction which must be approached whenever there is a special need. The petitioner had submitted himself to jurisdiction in numerous cases filed by the respondent and he even filed himself cases against the respondent which went on Appeal to the High Court and he lost. He even filed an application for review/varying and/or setting aside some of those decisions before the lower Court which he also lost.

The petitioner cannot now come by way of a Constitutional Petition alleging violation of his Constitutional right to property when he fully participated in all previous proceedings even to the Appellate Court and lost fairly and squarely.

(2) Whether the subject matter of this dispute is Res-judicata?

The doctrine of res-judicata is enshrined in ***Section 7 of the Civil Procedure Act*** which provides as follows:

“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”.

The Court of Appeal aptly put into perspective the doctrine in the

case of ***John Florence Maritime Services Ltd & another Vs Cabinet Secretary for Transport & Infrastructure & 3 others (2015) e K.L.R*** where they cited the case of ***Henderson Vs Stenderson (1843) 67 E.R 313*** and observed as follows:

“..... Where a given matter becomes the subject of litigation in any adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res- judicata applies, except in special cases not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time”

Again in the case of ***Omondi Vs National Bank of Kenya Ltd & others (2001) E.A. 177***, the Court held that:

“Parties cannot evade the doctrine of res- judicata by merely adding other parties or causes of action in a subsequent suit. In that case, the Court quoted Kuloba J. (as he then was) in the case of Njanju Vs Wambugu & another Nairobi HCC No. 234 of

1991 (unreported) where he stated:

***“If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives some cosmetic face lift in every occasion he comes to Court, then I do not see the use of doctrine of res-judicata*”.**

I totally agree with the decision of the learned Judges in the above cases suffice to add that as custodian of justice, Courts should guard against litigants who have a habit of mutating claims by giving it a distinct form to appear genetically different from its original structure.

(3) Who shall bear the costs of this dispute?

Costs is a discretionary power and in most cases, costs always follow the event. Costs is also used as a deterrent measure where the Court finds that the claim was brought in bad faith. In this case, the Court has already made a finding that the subject of the dispute is res-judicata. It is my finding that this petition was unnecessary since the issue of the dispute had been a subject of previous litigations before Courts of competent jurisdiction. As a way of deterrence, I order the petitioner to bear the costs of this petition.

As a parting shot, this petition lacks merit and for the reasons I have given above, the same is dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 11th day of October, 2019.

E.C. CHERONO

ELC JUDGE

11TH OCTOBER, 2019

In the presence of:

1. M/S Githaiga for Petitioner
2. M/S Waweru holding brief for Ann Thungu for the Respondent.