



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PETITION NO. 14 OF 2018

KITHOME MWERA MALILI.....PETITIONER

VERSUS

MUNYOKI MWERA.....1ST RESPONDENT

JULIUS KITHOME MWERA.....2ND RESPONDENT

MWINZI KITALU.....3RD RESPONDENT

MUATHA MAKAU.....4TH RESPONDENT

KINYWA IKIRIKIRI.....5TH RESPONDENT

THE DEPUTY COUNTY COMMISSIONER, KYUSO..... 6TH RESPONDENT

ASSISTANT COUNTY COMMISSIONER.....7TH RESPONDENT

THE ATTORNEY GENERAL.....8TH RESPONDENT

JUDGMENT

1. In his Petition dated 27th August, 2018, the Petitioner has averred that pursuant to the provisions of Section 29(1) (a) and (b) of the Land Adjudication Act, he lodged Appeals Nos. 57 of 2016; 59 of 2016; 61 of 2016 and 62 of 2016 challenging the decisions of the Land Adjudication Officer.

2. The Petitioner has averred that he had a legitimate expectation of a fair and just process, a fair hearing and a fair and just adjudication and verdict as guaranteed by Article 25(c) and 35(1) (a) and (b) of the Constitution.

3. According to the Petitioner, the Deputy County Commissioner, (*the 6th Respondent*) did not give the dispute a fair and impartial hearing; that the 6th Respondent was openly biased, harsh and cruel to him and that the Deputy County Commissioner ended up filing a criminal case against him during the hearing of the Appeals.

4. The Petitioner averred in the Petition that although the 6th Respondent was obligated under the Article 35(1) of the Constitution to provide the information or verdict of his determination, he (*the Petitioner*) came to know about the verdict vide a letter dated 20th March, 2018 which was addressed to a civil society; that by failing to provide the verdict to him and other parties in the dispute, the Deputy Commissioner violated Article 47(1) (2) of the Constitution and that the said inordinate administrative actions of the Deputy County Commissioner adversely affected his fundamental rights to an expeditious process.

5. The Petitioner is seeking for a declaration that the undelivered proceedings of the trial by the Deputy County Commissioner and the Assistant County Commissioner was in breach of his guaranteed rights to a fair hearing; a declaration that the purported sub-delegation of the powers of the Deputy County Commissioner to the Assistant County Commissioner is unconstitutional and a declaration that in refusing to release the verdict and the proceedings to the parties or the Ministry, the Deputy County Commissioner and the Assistant County Commissioner acted in violation of Article 35(1) (a) and (b), 47 (1) and 48 of the Constitution.

6. In his Affidavit, the Petitioner deponed that the dispute that has led to this Constitutional Petition started during the hearing before the Deputy County Commissioner, where, an elder sitting with the Deputy County Commissioner, asked him if he had paid dowry for his son,

the 2nd Respondent, who was claiming parcel of land number 724 in Appeal No. 57 of 2016; that he declined to answer the question and that the Deputy County Commissioner then ordered the police who arrested him and locked him up in the cells.

7. The Petitioner deponed that while being arrested, the Deputy County Commissioner remarked that he (*the Petitioner*) should treat the Appeal as lost; that he was then charged in Kyuso Law Courts for creating disturbance by using threatening language to the Deputy County Commissioner and that the second Appeal was heard by the Assistant County Commissioner after the Deputy County Commissioner purported to sub-delegate the case to him.

8. The Petitioner finally deponed that he lodged a complaint with a human rights civil society operating in Kitui known as Kitui Community Justice Centre; that it was from the contents of the Deputy County Commissioner's letter addressed to the Civil Society that he learnt for the first time that his Appeals had been dismissed and that the said verdicts have never been forwarded to him or his advocate to date.

9. Although, all the Respondents were served with the Petition, none of them filed a response. The Petitioner's advocate filed his submissions on 25th April, 2019. In his submissions, counsel stated that the complaint by the Petitioner stems from a clear conflict in the exercise of powers given by the Constitution to the 6th Respondent.

10. The Petitioner's counsel submitted that without hearing the Petitioner, the 6th Respondent declared the Petitioner a hostile witness and dismissed the Appeal; that the Petitioner's Appeal was dismissed in a summary manner without a trial or hearing and that a mistrial should be ordered by this court.

11. This Petition concerns parcel number 724 in Appeal No. 57 of 2016; parcel number 269 in Appeal No. 59 of 2016; parcel number 250 in Appeal No. 61 of 2016 and parcel number 267 and 268 in Appeal No. 62 of 2016. The said Appeals were heard, or were supposed to be heard, by the Deputy County Commissioner, Kyuso, pursuant to Section 29 of the Land Adjudication Act which provides as follows:

“(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.”

12. According to the Affidavit of the Petitioner, the 6th and 7th Respondents heard the five aforementioned Appeals on 14th and 15th December, 2016. According to the Petitioner, during the hearing of the Appeals, and in particular the hearing of Appeal No. 57 of 2016 between him and his son, he declined to answer the question of whether he had paid dowry for his son or not. When he refused to answer the question, the 6th Defendant ordered for his arrest and arraignment in court.

13. The charge sheet annexed on the Petitioner's Affidavit shows that he was charged with the offence of “*creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) of the Penal Code.*” The particulars of the charge were framed as follows:

“Kithome Mwera Mwalili: On the 15th day of December, 2016 at Deputy County Commissioner's office in Kyuso Sub-County within Kitui County, created a disturbance in a manner likely to cause a breach of the peace by using threatening language against the Deputy County Commissioner Kaburu Kaimba.”

14. The Respondents have not denied that indeed the Petitioner was charged solely on the basis of having declined to answer a question posed to him. The 6th Respondent has not denied that he is the complainant in the criminal matter, and that the said complaint was lodged by himself before he delivered his decision in the Appeals before him.

15. Having lodged a complaint to the police, which complaint led to the arrest and charging of the Petitioner before the conclusion of the Appeals, the 6th Respondent should have referred the Appeals to the Cabinet Minister in charge of Lands to appoint another gazetted Deputy County Commissioner to hear the Appeals.

16. I say so because it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done (*See Hewart C. J. in Republic vs. Sussex Justices, Ex-parte McCarthy (1924) 1KB, 256 at page 259*). There is no way justice could be seen to be done in a situation where an arbiter in a dispute is also a complainant in a criminal case against one of the contestant in a matter before him.

17. The Petitioner has alleged that the 6th and 7th Respondents, even after dismissing his Appeals, have never communicated their decisions either to him, his advocates or the Cabinet Secretary in charge of Lands.

18. The Petitioner has annexed a copy of a letter dated 20th March, 2018 by the 6th Respondent addressed to the Co-coordinator, Kitui Community Justice Centre. In the said letter, the 6th Respondent informed the said civil society organization that all the four Appeals that the Petitioner filed in respect to parcels of land numbers 724, 280, 269, 268 and 267 had been dismissed and that the files “*will be forwarded to*

the Cabinet Minister for Lands and Physical Planning by the end of March, 2018 from where copies of the proceedings can be obtained.”

19. From the said letter, it is obvious that the 6th Respondent was not willing to supply to the Petitioner with the copies of the proceedings and Awards in the Appeals that were lodged by the Appellant. Indeed, despite promising to forward the proceedings to the Cabinet Secretary by end of March, 2018, the 6th Respondent had not done so by 27th August, 2018 when this Petition was filed. The 6th Respondent did not deny the allegations by the Petitioner that those proceedings have never been supplied either to the Petitioner or the Cabinet Secretary contrary to the provisions of Article 35(1) of the Constitution and Section 29(1) of the Land Adjudication Act. Article 35(1) of the Constitution states as follows:

“(1) Every citizen has the right of access to—

a. information held by the State; and

b. information held by another person and required for the exercise or protection of any right or fundamental freedom.”

20. The Petitioner in this matter was entitled to the proceedings in respect of the Appeals he had filed. The said proceedings and Awards have never been supplied to him despite the numerous requests he has made through his advocate. The denial by the 6th Respondent to supply to the Petitioner the proceedings and Awards in respect to the four Appeals denies the Petitioner not only his right to information held by the 6th Respondent, but also his right to access a court of law to question or challenge the said proceeding and verdict, which right is guaranteed by Article 48 of the Constitution.

21. The right to information held by a public officer, like in this case, was considered in the South African case of **Van Huyssteem vs. Minister of Environmental Affairs and Tourism & Others (1995) 4 LRC** where the Supreme Court held as follows:

“Section 23 of the Constitution conferred a right of access to information which could be relied upon by the Applicants in the instant case. The documentation sought was reasonably required for the purpose of protecting the Applicant’s right to the trust properly potentially threatened by the proposed development. The Applicants had therefore made out a case under s. 23 in respect of relevant documentation in the possession of the first Respondent.”

22. The infringement of the Petitioner’s right to information held by the 6th Respondent renders the decisions by the 6th Respondent invalid. In the circumstances, I allow the Petition dated 27th August, 2018 as follows:

a. A declaration be and is hereby issued that the undelivered proceedings of the trial by the Deputy County Commissioner and the Assistant County Commissioner all were fundamentally in breach and/or violation of the guaranteed rights to a fair hearing as per Article 25 (c), 27(1) and (2) and 50(1) of the Constitution of Kenya, and hencefore, null and void.

b. A declaration be and is hereby issued that in keeping and/or refusing to release the verdict and the proceedings to the parties or to the Ministry of Lands, the Deputy County Commissioner and the Assistant County Commissioner acted in violation of Article 35 (1) (a) and (b), 47(1) and 48 of the Constitution of Kenya 2010.

c. A declaration be and is hereby issued that Appeals Nos. 57 of 2016; 59 of 2016; 61 of 2016 and 62 of 2016 be heard afresh by another independent gazetted Deputy County Commissioner.

d. The costs of the Petition to be paid by Mr. Kaburu Kaimba, the Deputy County Commissioner, personally.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE