



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 286 OF 2017

(FORMERLY NAIROBI ELC NO.305 OF 2016)

(FORMERLY CONSTITUTIONAL PETITION NO.106 OF 2016)

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 27,40(2),47(1), 48,50 AND 169 OF THE CONSTITUTION

AND

IN THE MATTER OF: FURTHER CONTRAVENTIONS OF SECTION 3(1), 4 OF THE LAND DISPUTES TRIBUNAL ACT 18 OF 1990(REPEALED)

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

ALFRED NG'ANG'A NJAU1ST PETITIONER

MARGARET NJOKI NJAU.....2ND PETITIONER

AND

HONOURABLE ATTORNEY.....1ST RESPONDENT

THE CHIEF MAGISTRATE COURT THIKA.....2ND RESPONDENT

LEONARD NJAU NJOROGE.....3RD RESPONDENT

JOYCE WANGUI MANGI.....4TH RESPONDENT

JUDGMENT

By a Petition dated 23rd March 2016, the Petitioners herein sought for the following orders against the Respondents:-

a). A declaration that the purported agreement dated 14th April 1988, vide which the 3rd Respondent purported to sell ½ share of the 1st Petitioner's suit plot to the 4th Respondent was illegal, null and void ab initio and conveyed no proprietary interest whatsoever to the 4th Respondent.

b). A declaration that the proceedings both before the Githurai Land Disputes Tribunal and the Chief Magistrate's Court at Thika being D.O Case No.3 of 2011, contravened the rules of natural Justice and the 1st Petitioner's right Under Article 40(2), 47(1) and 50 of the Constitution and thus illegal and null and void

c) **An order of Certiorari do issue to bring to this Honourable Court for the purposes of being quashed the award of the Githurai Land Disputes Tribunal made on 3rd February 2011 and the subsequent decree of the Chief Magistrates Court at Thika in D.O Case No.3 of 2011 made on 28th March 2011, and all other consequential orders made therein for being in violation of the provisions of the Constitution of Kenya, 2010 and the rules of Natural Justice**

d) **An order do issue directing the land registrar, Thika District Lands Registry to forthwith cancel the registration of the 4th Respondent i.e JOYCE WANGUI MWANGI a co-proprietor in the register of the suit plot known as Title No. Ruiru/Kiu Block 1/3/72(suit plot) so as to retain the 1st Petitioner as the sole proprietor thereof and to issue forthwith the 1st Petitioner with a new title deed in respect thereto.**

e) **Such other or further relief as this Honourable Court may deem fit and just in the unique circumstances of this matter**

f) **Costs of the Petition**

In their Petition, the Petitioners averred that the 3rd Respondent and 2nd Petitioner being husband and wife jointly bought a share for the 1st Petitioner their son who was at the time a minor from **Mwana Mukia Housing Cooperative Society limited** and the 1st Petitioner was then allotted **Plot No. 372 (Original 743) on the 6th of December 1985**. Further that vide an agreement dated **14th April 1988**, the 3rd Respondent sold to the 4th Respondent a half share of the suit property without the 2nd Respondent's knowledge and consent. The 4th Respondent's name was then endorsed on the share certificate as a co-owner with the 1st Petitioner and the plot was allocated a new Number. That the 3rd Respondent did not have any authority to deal with the land on behalf of the 1st Petitioner.

That in **January 2011**, the 1st Petitioner was summoned at the District Officer's office in Githurai for the hearing of an alleged dispute **on 3rd February 2011** at the **Githurai Land Disputes Tribunal**, instituted by the 4th Respondent as against the 2nd Petitioner. However, he was neither a party to the said agreement nor did he have capacity to transact and that he had not been served with any documents and or notice of the alleged dispute. However when he appeared before the Tribunal, he was informed of the purported agreement and without being given an opportunity to be heard, the tribunal made an award to the 4th Respondent and the said award was confirmed by the Chief Magistrates at Thika. In pursuance to a Court order, the 4th Respondent caused herself and the 1st Petitioner to be registered as co proprietors of the suit land.

That though the 1st Petitioner lodged an appeal against the Judgment, the appeal was however withdrawn and the 1st Petitioner Sought for review of the order made **on 28th March 2011** vide an Application dated **16th October 2015**, but the Application was struck out on a Preliminary Objection that the Court did not have Jurisdiction. The Petitioners particularized fraud by the 3rd and 4th Respondents under paragraphs (a) and (b) respectively.

It was the 1st Petitioner's contention that the dispute was outside the jurisdiction of the Tribunal and therefore the award and subsequent Judgment by the Court in Thika was *ultra vires* and of no legal effect. Further the 2nd Petitioner averred that the conduct of the 3rd Respondent was fraudulent and illegal as he did not have capacity to sell the suit land and therefore the transaction was in contravention of **Article 40(2)** of the Constitution. That the Proceedings at the **Githurai Land Disputes Tribunal** were also in contravention of **Article 50(1) and 169(1) (d)** of the Constitution. The Particulars of illegality were also set out under paragraph 25 of the Petition. The 1st Petitioner averred that he has been illegally and unlawfully disposed off of his ½ share of the suit land. In his **Supporting Affidavit**, the 1st Petitioner reiterated the contents of the Petition and urged the court to allow the Petition.

The 1st and 2nd Respondents filed grounds of opposition to the Petition and denied that the Petitioners rights have been infringed upon, violated or threatened and averred that the Petitioners have not demonstrated any constitutional issues for the court to determine. That the Petition lacks merit and it is an abuse of the Court process the Court was urged to dismiss it with costs.

The 4th Respondent filed a **Replying Affidavit** on **19th October 2018** and averred that the 3rd Respondent informed him that he bought the suit property and had the same registered in the 1st Petitioner's name for convenience as he was a minor. That the 3rd Respondent sold to her ½ share of the suit property through a sale agreement dated **14th April 1988**. Further that the 3rd Respondent did not need authority to sell the suit property. She averred that the 1st Petitioner was served with the documents when there was a dispute at the tribunal and he was heard and he called witnesses before the matter was decided. That the rights of the 1st Petitioner have been decided through a legal process and by competent bodies with jurisdiction. She further averred that the 1st Petitioner's having not appealed the award, or seeking for Judicial Review Orders, their rights with regards to the suit property have already been decided and he cannot plead violation of his rights and that this Court has no original Jurisdiction over the issue.

It was therefore her contention that the agreement was lawful and conferred the rights of the ½ share to her and the mere fact that the 3rd Respondent had the suit premises registered in the 1st Petitioner's name was a mere formality.

The 3rd Respondent filed a **Replying Affidavit** sworn on the **5th of July 2016**, and averred that he was doing construction work and ran out of money. That he therefore met the 4th Respondent through his sister and she agreed to lend him **Kshs.19,000/=** that assisted him in finishing the construction. He averred that they agreed that he would pay the amount as soon as possible. However before the completion of the construction, the 4th Respondent demanded for her money. That he did not have the money and he agreed to add the name of the 4th Respondent the share certificate as collateral and they further agreed that upon repayment, her name would be cancelled upon. He then surrendered the original certificate and a new Certificate was issued.

Further that though he had saved up the monies in the same year, he was unable to trace the 4th Respondent. He then received information that the 4th Respondent intended to sell the suit property and he reported the issue to the area chief. That he further learnt that the 4th Respondent had filed a land dispute case at **Githurai Land Disputes Tribunal**, and that the matter had proceeded to conclusion. He further averred that he was shocked to learn of a sale agreement and had he been allowed to participate in the proceedings, he would have challenged the validity of the sale agreement. It was also his contention that he never sold the ½ share of the suit premises to 4th Respondent and that the receipt issued to the 4th Respondent was only for purposes of adding her name to the Share Certificate and not transferring and issuance of certificate. He urged the Court to investigate how the 4th Respondent obtained the sale agreement.

The parties filed written submissions which the Court has now carefully read and considered. The court finds the issues for determination are:-

- 1. Whether the Petitioners rights have been infringed**
- 2. Whether the Petition is barred by Limitation of time.**
- 3. Whether the Petitioners are entitled to the orders sought**

1. Whether the Petitioners rights have been infringed

The Petitioner has averred that the purported agreement dated **14th April 1988**, was in violation of the 1st Petitioner's right to own property and that the same was **null and void** as the 1st Petitioner being a minor was protected under the provisions of **Article 40** of the **Constitution** of Kenya.

Article 40 of the **Constitution** guarantees every citizen of Kenya a right to own property. Further **Sub-section 2** provides that Parliament may not enact law that allows the state or any individual to deprive another of their right to property arbitrarily.

What then this Court must establish is whether the agreement that was made between the 3rd and 4th Respondents was in violation of the 1st Petitioner's right. It is not in doubt that the 3rd Respondent was the one who bought the suit land and had it registered in the name of 1st Petitioner. Further it is also not in doubt that the same was registered in the name of the 1st Petitioner while he was still a minor. However from the sequence of events that followed, it would mean that the 3rd Respondent still had a beneficial interest in the suit land. This is so because he entered into an agreement with the 4th Respondent which in his Affidavit has acknowledged that he used the money that he got to construct some residential houses. It therefore goes to show that the 3rd Respondent being the person who bought the suit property, he intended that he would benefit from it and he did so. Further the 1st Petitioner at the time being a minor, would explain why the land buying company allowed the 3rd Respondent to add the name of the 4th Respondent in the share certificate as a co-owner. It would therefore mean that the intentions of the 3rd Respondent rebutted the presumptions of resulting trust. See the case of ***Samson Ngugi Philip Kangori ...Vs... Peter Njuguna Samson [2018] eKLR*** where the Court held that:-

“The general law on resulting trusts, as enunciated in Snell's The Principles of Equity, 27th Edition at page 177, is that when a father buys a property and puts it in the name of his son or daughter, prima facie, it is a gift to the child. There is therefore a presumption that when property is registered in the name of a child by his parent, the property is not held in trust but is property that is meant to be owned by that child.

It is trite law that presumptions are merely that presumptions. They can be rebutted by even slight evidence of a party's actual intentions that are inconsistent with the presumption. In the case of Mackowick Vs Kansas City (1906) US, Justice Lamm, in a prosaic manner, had this to say;

“as the equitable presumptions of resulting trusts may be viewed as the bats of the law- flitting in the twilight but disappearing in the sunshine of actual facts”.

The Plaintiff has given reasons to show that despite the Defendant being his son and the suit property having been registered in his name at the tender age of 2 years, he nevertheless had intended to create a resulting trust. It is on record that the Plaintiff's intention in registering the land in the name of his son was for self-serving reasons – wealth accumulation. It was not illegal for civil servants to acquire land so much so that the Plaintiff cannot be said to have come to equity with unclean hands.

In the instant case the Plaintiff has explained that he paid for the land using his salary as a civil servant. No evidence was tendered to contradict this position. The Plaintiff's intention as explained in evidence was that title would result back to him at the right time. There is no evidence to show that it was a gift.”

Taking into account the above finding of the court, this court finds and holds that the agreement between the 3rd and 4th Respondents did not contravene or violate the rights of the Petitioners in any way.

The Petitioners have further alleged that the proceedings in the **Githurai Land Disputes Tribunal** and in the **Chief Magistrate's Court at Thika** violated their rights to administrative action as provide by **Article 47** and **50** of the Constitution as they were not afforded a chance to be heard. It is the evidence of the 1st Petitioner that he was notified by the **Githurai Land Disputes Tribunal** about the proceedings and that he attended, but was not given a chance to be heard. The Court has seen the proceeding of the **Land Disputes Tribunal** that have been

presented as evidence, It is clear from the same that the 1st Petitioner was given an opportunity to present his case and was even afforded a chance to present his case and he testified.

The allegations therefore that the Petitioners were not given an opportunity to be heard are therefore baseless. Consequently, the Court finds that since the 1st Petitioner appeared before the **Land Disputes Tribunal** at **Githurai** and was allowed to present his case, then he was given an opportunity to be heard and he cannot allege that his rights were infringed. Further it is evident that at the Chief Magistrate's Court, the Petitioners were heard and their Application was dismissed. It is therefore not true that the Petitioners herein were not given an opportunity to be heard.

The Petitioners have also averred that the **Githurai Land Disputes Tribunal** had no jurisdiction to hear and determine the dispute in question. However it is clear from the evidence that the said award had already been adopted by the Chief Magistrates Court and it therefore became a valid Court Judgment that the only way the Petitioners could have challenged the said Jurisdictions is by appealing against that Judgment and a determination would have been made.

The proceedings of the Court or of the tribunal are not subject to this Petition as in seeking for the sought declarations herein, the Petitioners would be forum shopping as this Court would only be making a determination without a proper understanding. A Petition is not an Appeal and cannot impugn a valid Court Judgment. See the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR** where the Court stated:-

“It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

We, in our own, find the above proper and legally founded. We see no reason to interfere with it. Appellants appeal has no merit and we accordingly dismiss it with costs to the Respondents.”

Accordingly, the Court finds and holds that the Petitioners have failed to prove that their rights were violated in any way and therefore the claim is disallowed.

2. Whether the Petitions is barred by time.

The 4th Respondent has averred that as the Petition is hinged on a contract, the same is barred by the Limitation of time under **Section 4(1)** of the **Limitations of Actions Act**, which provides that actions that relate to contract must be filed within a period of six years. However this is a Constitution Petition and it is not a claim based on contract and therefore the guiding principle has always been that there is no time limit within which a Constitution Petition has to be filed. However the Court must examine each case and gauge the length of time taken before the Petition was filed to be able to make a determination. See the case of **Samuel Ndiba Kihara ...Vs... Attorney General [2019] eKLR**

“The common principle that runs through the above decisions is that while there is no time limit within which a petition alleging a violation of constitutional rights can be instituted, courts have however frowned upon the filing of such cases after the lapse of a considerable length of time and emphasized the need to examine each case and be satisfied that a reasonable explanation has been made for such delays. In essence, therefore, the mere fact that the Constitution does not impose a time limit for the filing of cases seeking the enforcement of constitutional rights does not give litigants the *carte blanche* to sit on their laurels for years on end only to institute claims long after the occurrence of the events complained about. Of critical importance is that there must be a plausible justification for the delay.”

The Petition in question was filed in **2016**, while the rights that the Petitioners have alleged were violated were allegedly violated in **2011** when the **Land Disputes Tribunal** made its decision. It took the Petitioners **5 years** to prosecute the Petition. The 4th Respondent submitted that the cause of action accrued in the year **1988**, when the agreement was made, while the Petitioners have alleged that the impugned decision was made in **2011** and thus infringed their rights. From the available evidence, it is more likely that the cause of action accrued in **2011**, and thus this Court finds that the time had not lapsed even if time was to be considered. However since the Contract was executed in **1988**, that is over **30 years** and indeed it is a considerable long time.

Further, the Court notes that the reasons as to why the Petitioners did not file the Petition in time is because they had had their time in Court in other forums but after being dissatisfied with the decisions of those other forums, they approached this Court in another capacity. If indeed time had lapsed, this would not have been a satisfactory explanation by the Petitioners on why they took too long to file the claims herein.

3. Whether the Petitioners are entitled to the orders sought

The Petitioners have sought for various declarations. First that the purported agreement was **illegal null** and **void** and thereby conveyed **no** proprietary interest. First this Court found that the Petitioners had dealt with this issue in the **Land Disputes Tribunal** and the same was determined. Though that was not a Court of equal status with this court, the Petitioners had an option of appealing against the said decision. However, they failed to do so and instead chose to come before this Court via a Petition. The Court finds that the Petitioners have tried to forum shop when they felt that they did not get the Orders they wanted. Further this Court has already held and found that the 3rd Respondent rightfully entered into the said agreement and as such the prayer is not tenable. Further the Court has already held that the proceedings at the

Githurai Lands Disputes Tribunal did not offend the '**principles**' of **Natural Justice** and as such the same cannot be quashed.

Having failed to prove their case, the Court finds that the Petitioners are not entitled to the prayers sought especially the prayer for cancellation of the 4th Respondent's registration. The Court finds the prayers sought by Petitioners are not merited and they are therefore disallowed.

The Upshot of the foregoing is that the Petitioners have failed to prove their claim on the required standard and consequently, the court finds and holds that the Petition dated **23rd March 2016** is not merited and the same is dismissed entirely with costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of December, 2019.

L. GACHERU

JUDGE

6/12/2019

In the presence of

No appearance for Petitioners

No appearance for 1st Respondent

No appearance for 2nd Respondent

3rd Respondent present in person

Mr. Juma holding brief for Mr. Mutua Muthuva for 4th Respondent

Jackline - Court Assistant.

L. GACHERU

JUDGE

6/12/2019