



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC PETITION NO. 7 OF 2017

(Formerly Kisii Elc Case No. 8 of 2014)

WILSON DINDA OLILO.....PLAINTIFF

VERSUS

PRINCIPAL MAGISTRATE COURT OYUGI LAW COURTS

THE DISTRICT LAND REGISTRAR RACHUONYO DISTRICT

THE ATTORNEY GENERAL

DALMAS AKECH NGIELA.....DEFENDANTS

JUDGMENT

1. In a petition comprised of twenty three (23) paragraphs dated 20th March 2014, the petitioner is seeking against the Respondents the following orders;-

- a) Declaration be issued to the effect that the petitioner is entitled to protection under the constitution.
- b) Declaration that the complaint, Proceedings and the attendant Award of the Land Disputes Tribunal, Kasipul Division, which was subsequently adopted and ratified by the 1st Respondent vide OYUGIS PMCC MISC. APPLICATION NO. 1 OF 2005 and the resultant Decree, was illegal, null & void for want of Jurisdiction.
- c) Declaration that the Process of Enforcement, Execution and Implementation of the Decree arising from PMCC MISC. APPLICATION NO. 1 OF 2005 culminating into the Revocation of the Petitioner's title over the suit property, was void.
- d) Declaration that the Transfer and Registration of the Title in respect of LR NO. WEST KASIPUL/KODERA KARABACH/34 (hereinafter referred to as the suit property) in favour of the 4th Respondent, was anchored on an illegal and void process and hence same ought to be nullified.
- e) An Order for Cancellation of the title in favour of the 4th Respondent and rectification of the Register in respect of the suit property, to read the name of the petitioner, as the Bona -fide and legitimate owner thereof.
- f) An order of permanent injunction restraining the 4th Respondent either by himself, agents, servants and/or anyone claiming under the said 4th Respondent from entering upon, trespassing onto, taking possession, building on, building structures on and/or in any other way, whatsoever, and interfering with the petitioner's right and/or interest over the suit property.
- g) Payment of damages, arising from the illegal and void actions by and /or at the instance of the Respondents.
- h) Costs of the petition be borne by the Respondents jointly and/or severally.
- i) The Honorable court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.

2. The petition is anchored on a twenty seven (27) paragraphed supporting affidavit sworn on 20th March 2014 by the petitioner. Annexed to the petition and referred to in the petitioner's supporting affidavit are the following documents;

- 1) Green card of the suit property of 21/9/2007 and 26/10/2007-WDO 1
- 2) Certificate of Official Search dated 5/4/2005 marked WDO 1b
- 3) Proceedings & ruling in Oyugis SRMCC Misc No. 1 of 2005 marked WDO 3
- 4) Certificate of Official Search dated 17/3/2014 marked WDO 4
- 5) Complaint dated 6/2/2008 in Oyugis SRMCC No. 3 of 200 marked -WDO 5
- 6) Judgment in Oyugis SRM CC No. 3 of 2008 marked WDO 6 (a)
- 7) Decree dated 2/12/2008 in Oyugis SRMCC NO. 3 of 2008 marked WDO 6b
- 8) Judgment in Kisii ELCC Appeal No. 7 of 2008 marked WDO 7

3. Briefly the petitioner claims that he was allocated and or awarded plot No. 34 at Kodera Karabach Adjudication Section (now registration Section) following the completion and/or conclusion of adjudication and demarcation process, with no objection and or appeal to the Minister for Lands and Settlement against the plot by anyone whatsoever. Thereafter the plot was registered in the name of the petitioner as the suit property.

4. In the year 2005, the 4th Respondent lodged a complaint with the Land Disputes Tribunal, Kasipul Division (hereinafter referred to as the tribunal) claiming that the suit property was irregularly registered in the name of the petitioner. He sought to impeach and or challenge the petitioner's title to the suit property. The petitioner further claims that the tribunal determined the claim in favour of the 4th Respondent, without notice to or participation of the petitioner. He also claims that subsequently the tribunal, acted ultra vires and in contravention of **Section 3 of the Land Disputes Tribunals Act No. 18 of 1990** (the repealed Act) and recommended the revocation of the petitioner's title to the suit property.

5. The tribunal caused its award to be lodged with the 1st Respondent that purportedly acted in excess of jurisdiction as the 1st Respondent adopted it and issued a decree in favour of the 4th Respondent as shown on document marked WDO-3(hereinafter referred to as award adoption suit). The 4th Respondent filed a suit Oyugis SRMCC No. 3 of 2008 (hereinafter referred to as the eviction suit) for eviction of the petitioner from the suit property and judgment was in favour of the 4th Respondent. A decree (WDO-6b) was extracted and transmitted to the 2nd respondent who implemented it in favour of 4th respondent. The petitioner preferred an appeal vide Kisii HCCA (E & L) No. 71 of 2008 challenging the judgment and decree in the eviction suit but the appeal was dismissed in favour of the 4th Respondent on 7th February 2014.

6. The petitioner further claims that his constitutional and fundamental rights were violated by the respondents. He pleaded particulars of violation and infringement of the same at paragraphs 7 (a) to (i) in the petition. The particulars include; denying and depriving the petitioner of a right to fair hearing, adoption of a decision that was partly illegal and void and divesting the petitioner of title over the suit property without due regard to the due process of the law.

7. In a replying affidavit sworn on 9th February 2014, J. O. Osolo, the 2nd respondent opposed the petition. He did state that he was simply implementing a court order of the 1st Respondent in adopting suit and that the petitioner did not appeal against the judgment of the tribunal hence the transfer was effected in favour of the 4th Respondent. He prayed that the petition be dismissed with costs to the Respondents. In support of his affidavit, the 2nd respondent attached the following documents;

- a) **Adjudication record dated 12/10/1973 marked JOO1**
- b) **Green card of 21/9/2002 and 26/10/2002 marked JOO2**
- c) **Transfer of land form dated 17/7/2007 marked JOO3**
- d) **Application to the land control board dated 7/7/2005 marked JOO4**
- e) **Letter of consent dated 7/7/2005 by Kasipul land control board marked JOO5**

8. By a replying affidavit sworn on 25th April, 2014, the 4th Respondent stated that the petitioner is his nephew who fraudulently registered the suit property in his (petitioner) name. He further stated that the petitioner moved away from his land Ref No. Kodera/Karabach/83 to the suit property whereby the 4th Respondent is the proprietor. He termed the petition maliciously filed to defeat justice and he urged the court to dismiss it with costs.

9. In a supplementary affidavit sworn on 18th April 2016, the 4th Respondent sought the dismissal of the petition with costs. He referred to the decision of the tribunal, the award adopting suit, the eviction suit in which the petition was ordered to vacate the suit property and Kisii High Court (ELC) Appeal No. 71 of 2008 that dismissed the petitioner's appeal. He attached to the affidavit, documents marked DA-1 to DA – 7 which include an order in the eviction suit, a decree and stay order in the said petitioner's appeal case.

10. On 8/2/2016, the court (Mutungi J) directed that the petition be disposed of by way of written submissions. See **order 51 Rule 16 Civil**

Procedure Rules, 2010.

11. The petitioner represented by Oguttu, Ochwangi, Ochwal and Co. Advocates formerly Oguttu Mboya and Co. Advocates filed submissions dated 23/2/2016. The submissions were made on the background of the case and the following three (3) issues for determination;

a) Whether the land dispute Tribunal (Kasipul Division) was seized and/or vested with jurisdiction to entertain proceedings relating to Title and revocation thereof.

b) Whether the Revocation of the Petitioner's title was lawful and legitimate.

c) Whether this Honourable court is seized of Jurisdiction to grant the Reliefs sought?

12. It was further submission by the petitioner's learned counsel that the tribunal acted without jurisdiction, the error be corrected and that the petitioner deserves fair treatment. The counsel relied on the following authorities;-

a) Section 3 (1) of the Land dispute Tribunal Act, No. 18 of 1990 (now repealed).

b) Wamwea –vs- Catholic Diocese of Muranga, Registered Trustees, (2003) KLR, pages 389-398. See holdings number 2 & 6 thereof.

c) Esther Gachambi Mwangi –vs- Samuel Mwangi Mbiri, Court of Appeal, Civil Appeal No. 251 of 2011 (unreported).

d) Mcfoy –vs- United Africa Co., Limited (1961) 3 All E.R, pages 1169-1173, wherein the Honourable court considered the effect of an illegality and proceeded to hold accordingly.

e) Johana Nyakwoyo Buti -vs- Walter Rasugu OmarIba and 2 others Court of Appeal at Kisumu Civil Appeal No. 182 of 2006 (UR) on entry of judgment by the court in accordance with the decision of the tribunal and such judgment could be challenged in fresh proceedings if obtained by fraud or mistake.

13. The 1st, 2nd and 3rd Respondents counsel Winny Ochwal filed submissions dated 19th August, 2016. She identified three (3) issues for determination namely;

i. Whether the 1st Respondents had jurisdiction to adopt and or confirm the decision of the land Dispute, Tribunal, Division as judgment.

ii. Whether the instant Petition has been properly brought before this Honourable court.

iii. Whether the Petition discloses any Constitutional violations.

14. The learned counsel referred to the decision of the tribunal and that of the award adoption suit. She cited authorities as hereunder;-

a) Sections 7 and 8 of the Land Disputes Tribunals Act (repealed Act)

b) Ndunda Miano –vs-Mugo Riakathari (2013) eKLR in regard to entry of judgment by the magistrate in accordance with Section 7 of the repealed Act.

c) Moses Ndiritu Njuguna-vs-Tetu Land Disputes Tribunal and 5 others (2016) eKLR to the effect that Section 7 (2) of the repealed Act left no room for the magistrate to review, alter, amend or set aside the tribunal's award.

15. The 4th Respondent filed his submissions dated 18th April 2016. The decision of the tribunal, the award of the tribunal, the adoption suit, the eviction suit and Kisii High court (ELC) Civil Appeal No. 71 of 2008 all determined in favour of the 4th Respondent, featured in his submissions.

16. The 4th Respondent further relied on **Article 50 (1) of the Constitution of Kenya, 2010** with regard to right to fair trial in his submissions. He identified the following three (3) issues for determination;

a) Whether the 4th respondent's act of seeking redress of a legal claim that he had against the petitioner before the land dispute tribunal (Kasipul Division) was constitutional.

b) Whether the petitioner subsequently after being sued by 4th respondent exhausted all the appeal options that were available for him in the event tha he was dissatisfied with the decision of such tribunal.

c) Can this court act in a vacuum where it is evident that the petitioner has not challenged vide this petition, the judgment of the 1st respondent in the eviction suit (read Oyugis PMCC No. 3 of 2008) and made on 6th May 2008 and the decision of this

court on appeal made on 7th February 2014 (read Kisii HCCA (E&L) No. 71 of 2008?

17. In a Notice of Motion dated 30th November 2016, one William Ngodhe Aketch (4th respondent) sought to substitute the initial 4th Respondent namely Dalmis Aketch Ngiela (Deceased). On 5/12/2016, the court noted that the application was not opposed and it granted the same with costs in the cause.

18. I have studied the entire petition, replying affidavits, a further affidavit by the petitioner and submissions including case law cited by learned counsel for the petitioner, learned counsel for the 1st, 2nd, 3rd respondents and the 4th Respondent in person. The issues for determination as distilled therefrom are :-

- a) **Whether the tribunal and 1st respondent had jurisdiction over the matter,**
- b) **Whether the petition discloses violation of the petitioner's constitutional and fundamental rights.**
- c) **Is the petition merited to enable the court grant the reliefs sought?**
- d) **Who is to bear the costs of the petition?**

19. The petitioner raised question on the jurisdiction of the tribunal to deal with disputes pertaining to the propriety and or validity of the title to the suit property. The 4th Respondents stated that the tribunal was lawfully established and constituted when it entertained and determined the claim against the petitioner. The jurisdiction of the tribunal was to be found in the repealed Act whose **Section 3** read:-

“(1) subject to this Act, all cases of a civil nature involving 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 determined by a Tribunal established under section 4.**

20. The membership of the Tribunal was captured at Section 4 of the repealed Act. The tribunal was lawfully constituted and I fully concur with Okongo J in his ruling on an application by way of Notice of Motion dated 20th March, 2014 herein delivered on 31/10/2014. The learned Judge held, inter alia:

”...I am not persuaded that petitioner's petition has good chances of success. The tribunal was lawfully established and constituted when it entertained and determined the 4th respondent's claim against the petitioner.....”

21. The tribunal dealt with transfer of the suit land which included trespass to the 4th respondent's land as mandated by the repealed Act. The tribunal caused its decision/award to be filed before 1st Respondent for entry of the judgment as commanded then by Section 7 (1) of the repealed Act.

22. Subsequently the award of the tribunal was entered as judgment of the court by the 1st Respondent in the award adoption suit as mandated by the law: see **Ndunda Miano and Moses Ndiritu cases** (supra). This was in consonance with **Section 7(2) of the repealed Act** which stated :-

“The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.” (Emphasis supplied)

23. It is discernable from the award adoption suit that the 1st respondent not only noted the presence of the petitioner, but allowed him to participate in the brief proceedings in court on 7/6/2005 when it entered judgment in terms of the award of the tribunal. The 1st respondent noted:-

“He has not filed an appeal against the verdict.....The report having failed to file appeal within the required period. I confirm the tribunal's decision as judgment of the court.....” (emphasis added).

24. The 4th Respondent filed the eviction suit against the petitioner for orders of eviction, restraint and costs in plaint dated 6/2/2008. The suit was determined on 6/5/2008 in his favour. A decree was issued on 2/12/2008 whereby the petitioner was declared a trespasser on the suit property.

25. The petitioner appealed the verdict of the 1st respondent in the eviction suit to Kisii Environment and Land Court vide Civil Appeal No. 71 of 2008. The court found that the appeal had no merit and dismissed it with costs to the 4th respondent on 7/12/2014. The petitioner was ordered to vacate the suit property and he was given 120 days within which he was to do so. At the conclusion of its judgment the court remarked;

“Unless the respondent agrees to grant this indulgence the appellant Shall vacate and hand over vacant possession of the suit property to the respondent within one hundred and twenty days from the date hereof.”

26. The petitioner alleged violation and infringement of his constitutional rights. On 7/6/05 the 1st respondent adopted the award of the tribunal in favour of the 4th respondent in accordance with the repealed Act and in the presence of the petitioner. The petitioner neither appealed the decision to the then Provincial Appeals committee nor applied for judicial review remedy to the High Court as observed by the learned judge in Kisii High court Environment and Land Court No. 71 of 2008 and in **Johana Nyokwoyo Buti** case (supra).

27. Moreover, the petitioner had a right to appeal from Kisii High court Environment and Land Court Civil Appeal No. 7 of 2008 to the Court of Appeal. He failed and or neglected to do so. I find no flaw in the procedure and in all the foregoing decisions; see **Manyasi-vs-Gicheru and 3 others (2009) KLR 687 at 694.**

28. Notably the petitioner was accorded a fair hearing by the tribunal, the 1st respondent in both the award adopting suit and the eviction suit. The right of fair hearing is anchored under **Article 50 (1) Constitution of Kenya 2010** (the Constitution) which provides;-

“ 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 impartial tribunal or body “

29. I also note that the tribunal, the court in both the award adopting suit and the eviction suit acted within the law in rendering their respective verdicts in relation to the petitioners claim. The 2nd respondent acted on the order of the court and ensured that the title of the suit land passed lawfully to the 4th respondent. Therefore the allegations of violation of constitutional and fundamental rights of the petitioner in the petition are bound to flop.

30. It follows that the 4th respondent is the lawful proprietor of the suit property with interests and rights conferred upon him under **Sections 24 and 25 of the Land Registration Act, 2012 (the L R A, 2012)**. I am conscious of **Article 40 of the Constitution of Kenya, 2010** in respect of protection of right to property. Be that as it may, the material before me abundantly reveal that the 4th respondent is the absolute and indefeasible owner of the suit property and the exceptions under Section 26 of the L R A, 2012 do not apply to him in the circumstances under which he obtained its certificate of title. **Section 26(1) of the LRA, 2012** provides;-

The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme. (emphasis supplied)

31. In light of the foregoing, the tribunal and courts that entertained and determined the petitioner’s claim were mandated by the law to do so. The petitioner was accorded fair hearing and the Rules of Natural justice were observed accordingly.

32. I find the allegations by the petitioner in the petition unproved. His claim is an abuse of the court process. He is not entitled to the prayers sought in the petition which lacks merit.

33. A fortiori, I dismiss the petition

34. On costs of the petition, I am guided by the proviso to **Section 27 of the Civil Procedure Act (Cap 21 Laws of Kenya)** which is a basic rule that costs follow the event within the discretion of the court. In **Rai-Rai (2014) e KLR**, it was observed that the basic rule on costs is not an invaluable rule and indeed the ultimate factor on award or non-award of costs is the judicial discretion. The instant dispute over the suit property has had along winding history and each party has incurred costs. I order that each party bear their own costs of the petition.

DELIVERED, SIGNED and DATED in open court at MIGORI this 31st day of **January, 2018.**

G. M. A. ONGONDO

JUDGE

In the presence of:

Miss Mireri counsel for the Petitioner

Lori-court assistant

G. M. A. ONGONDO

JUDGE