



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KAKAMEGA**

**ELC PETITION NO. 14 OF 2015**

**(FORMER CONSTITUTIONAL PETITION NO. 15 OF 2015)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND**

**FUNDAMENTAL FREEDOMS UNDER ARTICLES 13(3)(c), 2(1), 3(1), 10 (1) (b), 19,20, 21(1),22, 23(1)&(3), 25(c),27(1),40(1)&(3),47,48,50(1),60(1) (b),61(2),64(a),159,160,165(1),(3)(a) ,(b) & (e),169(1) (a),258&259 OF THE**

**CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF A CONSTITUTIONAL PETITION BY ERNEST KEVIN LUCHIDIO AGAINST VIOLATION OF HIS RIGHTS AND FUNDAMENTAL FREEDOMS AS ENSHRINED UNDER THE CONSTITUTION BY THE KAKAMEGA CHIEF MAGISTRATE'S COURT**

**MISCELLANEUS AWARD No. 195 OF 2005**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2012**

**AND**

**IN THE MATTER OF SECTIONS 59 & 60(1)(a) OF THE EVIDENCE ACT, CHAPTER 80 LAWS OF KENYA**

**BETWEEN**

**ERNEST KEVIN LUCHIDIO.....PETITIONER/APPLICANT**

**AND**

**THE HON. ATTORNEY GENERAL**

*for and on behalf of the CHIEF MAGISTRATE'S COURT KAKAMEGA).....1<sup>ST</sup>RESPONDENT*

**ZACHARY NDUNDE.....2<sup>ND</sup>RESPONDENT**

**AND**

**BENJAMIN LUTTA.....INTERESTED PARTY**

**JUDGEMENT**

By a Petition dated 29/06/2015, the Petitioner herein instituted the present petition claiming threatened and actual violation of his constitutional rights attendant to property, fair administrative action, access to justice and fair hearing. He seeks remedies specified in the said petition against the Respondents. Despite service of the said petition, neither the 2<sup>nd</sup> Respondent nor the Interested Party entered appearance and or filed their responses. Regarding the 1<sup>st</sup> Respondent, though entered appearance, only proceeded to file grounds of opposition. The

parties thus agreed to proceed to hear the said Petition by way of written submissions.

The Petitioner led evidence that he was the registered proprietor of the whole of that parcel of land known as BUTSOTSO/SHIBEYE/227 (suit parcel), having acquired it by way of purchase from the Interested Party herein. That the Petitioner and the Interested Party are Co - Respondents in **Kakamega CM Miscellaneous Application No, 195 of 2005** instituted by the 2<sup>nd</sup> Respondent purporting to adopt the decision arising from the proceedings of the then Lurambi Division Land Disputes Tribunal purporting to make determinations in favour of the said Respondent over alleged contractual obligations and proprietary rights between the Petitioner and the Interested Party.

The 1<sup>st</sup> Respondent herein, on an unclear day and upon application on part of the 2<sup>nd</sup> Respondent, without cogent, verifiable and or substantive justification whatsoever, purported to make orders excising, appropriating and or otherwise transferring a portion of the Petitioner's parcel of land known as BUTSOTSO/SHIBEYE/227 measuring 0.7 Acres to L.R. No. BUTSOTSO/SHIBEYE/2798 albeit to make it measure 2.5 acres as sought by the 2<sup>nd</sup> Respondent in total disregard to law, procedure and or requisite jurisdiction, any formal and or substantive proceedings and or recognized claim before court, regard to law and or procedure whatsoever.

The Respondents were thus seeking to execute an order made in the absence of the requisite jurisdiction or proper procedure on the part of the honourable court, the 1<sup>st</sup> Respondent herein, any substantive and or recognized claim before it nor requisite procedure or proceedings followed in the course of the proceedings regarding the said Kakamega CM Miscellaneous Application No, 195 of 2005 as the 1<sup>st</sup> Respondent was neither seized of nor duly gazetted to hear and or determine such disputes or claim.

The 1<sup>st</sup> Respondent disregarded principles attendant to the nature of orders and or judgment as it made an order directing the transfer of 0.7 acres from the parcel of land known as L.R. No. BUTSOTSO/SHIBEYE/227 to that known as L.R. No. BUTSOTSO/SHIBEYE/2798 disregarding the impersonality of land known as L.R. No. BUTSOTSO/SHIBEYE/2798 as a legally capable transferee.

The said order was made by the 1<sup>st</sup> Respondent in favour of the 2<sup>nd</sup> Respondent notwithstanding want of *locus standi* on the part of the said 2<sup>nd</sup> Respondent or to the statutory limitations relating to both enforceability of contract as well as claims to interest in land, legitimately expected to have been taken judicial notice of by the 1<sup>st</sup> Respondent, as the Petitioner had acquired and has been in continuous, uninterrupted and peaceful occupation of the said parcel of land for a period exceeding 12 years.

From the foregoing, the following issues may be fronted for determination:

- i. Whether the Petition is Opposed
- ii. Whether the Petitioner's Rights have been violated.

On the issue, Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 prescribes the manner in which a Respondent may respond to a Petition. None of the Respondents or the Interested Party filed any Replying Affidavit in opposition to the said petition.

In **Israel Otieno Agina v. the Attorney General (2011) eKLR pg 4 para 2**, Justice D.S. Majanja on 25/11/2011 observed that the effect of failure to file replying affidavit on evidence is to render the facts raised in the petition and affidavits uncontroverted and consequently to be taken as true and correct as they are. Consequently, they urge that the Petition be deemed as unopposed in the circumstances.

On the second issue as to whether the Petitioner's Rights have been violated, they proceed to submitted that preliminarily, orders of excision and transfer of parcels of land are substantive in nature and may only suffice and or arise from substantive claims and or suits. Under *Section 2 of the Civil Procedure Act*, a "suit" only refers to civil proceedings commenced in a manner prescribed.

Under *Order 3 Rule 1(1) of the Civil Procedure Rules* every suit may only be instituted by presenting a plaint to the court or such other manner as may be prescribed. As there was no formal suit, plaint or such other prescribed mode such as a petition pending before the lower court but a miscellaneous application on the basis of a Land Disputes Tribunal Decision, the orders complained of were not available without a substantive suit instituted in a manner as prescribed by law. They referred to the decision of *Ngaa Jairus, Jin Philip Muchiri Mugo v. Mbeu Kithekwa (2015) eKLR pg. 2 paras. 4 & 5*.

No reasons were granted as to why such mandatory procedure would not be complied with. In any case the procedure adopted in the grant of the orders was inefficient, unlawful, unreasonable and procedurally unfair. Consequently, these offended and violated Articles 47 of the Constitution on fair administrative action as well as Articles 48 on Access to justice and 50(1) of the Constitution on fair hearing in view of the wrong procedure and unfavourable forum adopted.

Indeed, in resorting to such summary mode of determining the Petitioner's property rights vide Kakamega CM Miscellaneous Application No. 195 of 2005, the Respondents, proceeded to infringe on Article 25(c) of the Constitution that prohibits limitation of right to fair trial.

While Articles 60(1), 61 and 64(a) of the Constitution recognize guiding principles of land policy, *inter alia*, security of land rights, ownership of land by inter alia, individuals and its classification as, among others, private land and recognition of private land to consist of land held by any person under any freehold tenure, including the whole of that parcel of land known as L.R. No. BUTSOTSO/SHIBEYE/227 acquired and held by the Petitioner-herein, failure to take judicial notice by the 1<sup>st</sup> Respondent of all these statutory provisions as provided for under Section 59 and 60(1)(a) of the Evidence Act in essence provided viable ground for the violation of the Petitioner's right to property

as guaranteed under Article 40 of the Constitution.

In **Evelyn College of Design Ltd v Director of Children's Department & another [2013] eKLR pg. 4 paras 14 & 15** D.S. Majanja, J. explained that the thrust of Article 40 of the Constitution is to protect proprietary rights under the law and that title once issued is indefeasible and cannot be taken away except in accordance with the constitution and the law.

Indeed, as the date of the said offending order remains unclear when on the application of the 2<sup>nd</sup> Respondent, the Respondent purported to make orders excising, appropriating and or otherwise allocating portions of the Petitioner's parcel of land known as BUTSOTSO/SHIBEYE/227 to the 2<sup>nd</sup> Respondent in total disregard to both law, procedure and or jurisdiction, it unjustifiably denies the Petitioner legitimate access to sufficient information that would aid him to correct or delete the untrue facts or misleading information contrary to Article 35 of the Constitution.

In view of the foregoing, they submit that the Petitioner's case is uncontroverted, raises legitimate claims and prays for the grant of the orders sought as follows:

- a) A declaration that the joint, unlawful and illegal acts of the Respondents complained of herein are offensive to and violate the provisions of Articles 1(3)(c), 2(1), 3(1), 10(1)(b), 19, 20, 21(1), 22, 23(1) & (3), 25(c), 27(1), 40(1) & (3), 47, 48, 50(1), 60(1)(b), 61(2), 64(a), 159, 160, 165(1), (3)(a), (b) & (e), 169(1)(a), 258 & 259 of the Constitution, 2010 and consequently unconstitutional.
- b) A permanent injunction against the 2<sup>nd</sup> Respondent herein, his agents and or representatives and or anyone claiming under them or at their instruction or order, and to wit the District Surveyor Kakamega or such other Surveyor restraining them from implementing the said orders of the Respondent complained of herein.
- c) An order of **certiorari** to remove into this Honourable Court and quash the said order of the Respondent purporting to direct the transfer of 0.7 acres from the Petitioner's parcel of land known as L.R. No. BUTSOTSO/SHIBEYE/227 to that parcel of land known as L.R. No. BUTSOTSO/SHIBEYE/2798 to as to albeit make it measure 2.5 acres.
- d) Costs of this Petition

These are the 1<sup>st</sup> Respondent written submissions in opposition to the Petitioner. Petition dated 29<sup>th</sup> June, 2015 is on whether the 1<sup>st</sup> Respondent violated the rights of the Petitioner as enshrined under the Constitution. It is the 1<sup>st</sup> Respondent submissions that its actions with regard to Kakamega CM Miscellaneous Application No. 195 of 2005 in adopting the award arising from the proceedings of the then Lurambi Division Land Disputes Tribunal Proceedings which made determination in favour 2<sup>nd</sup> Respondent were within the law and did not in any way violate the Constitutional rights and freedoms of the Petitioner under the Constitution.

That the role of the Magistrate's Court in relation to adopting awards that emanated from the then Land Dispute Tribunal was very limited in that the Magistrate's Court had no jurisdiction to alter, amend, set aside, revoke or in any other manner interfere with a land dispute Tribunal award as filed in court and hence the 1<sup>st</sup> Respondent could not be faulted for the decision made then in adopting the award presented to it by the then Lurambi Land Dispute Tribunal.

That the mere fact that the Tribunal may have acted unlawfully as alleged by the Petitioner did not justify the Respondent in declining the award and hence the Respondent cannot be said to have violated the Constitution when they were only following the law then. That section 7(2) of the Land Dispute Tribunal Act, 1980 only compelled the Magistrate's Court to adopt the award.

That in **KHAMONI -J in Republic vs Chairman Land Dispute Tribunal Kirinyaga District & another ex parte Kariuki [2005] eKLR** it was stated as follows;

*"The legislature and definitely the framers of the Land Dispute Tribunal Act, knew that the Act was intended to give Land Dispute Tribunal jurisdiction to adjudicate over all land in Kenya including land registered under the Registered Land Act."*

That Section 8 of the repealed Land Dispute Tribunals Act in which the 1<sup>st</sup> Respondent followed in adopting the award gave the Petitioner the right to appeal if they were dissatisfied with findings of the tribunal but the petitioner never appealed.

It is the Respondents submissions that the Constitutional rights of the Petitioner were not breached by its actions with regard to the adoption of the award of the Lurambi Division Land Disputes Tribunal as adopted in Kakamega CM Miscellaneous Application No. 195 of 2005 as the actions of the 1<sup>st</sup> Respondent were within the law and the 1<sup>st</sup> Respondent did not violate any law in arriving at their decision and hence we urge the Honourable Court to dismiss the Petition as against the 1<sup>st</sup> Respondent.

This court has carefully considered the petition and the submissions herein. The Petitioner herein vide Petition dated 29<sup>th</sup> June, 2015 filed against the Respondents and Interested Party sought the following orders from the Honourable Court. On the issue as to whether the Petition is opposed, the Respondent responded to the Petition through its grounds of opposition dated 22<sup>nd</sup> January, 2016 and filed on 25<sup>th</sup> January, 2016 in opposition to the Petition. Directions were then taken before this Court on 13<sup>th</sup> November 2017 that the petition be heard by way of written submissions. In the **Kakamega CM Miscellaneous Application No, 195 of 2005** the 2<sup>nd</sup> Respondent instituted the case to adopt the decision arising from the proceedings of the then Lurambi Division Land Disputes Tribunal which made determinations in favour of the said Respondent over alleged contractual obligations and proprietary rights between the Petitioner and the Interested Party. The jurisdiction of the

tribunals is very clear in the law. The Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows-

*“3 (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.”*

In this case, the tribunal meandered beyond its boundaries. In **M'Marete v Republic & 3 others, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR** the court held-

*“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”*

The tribunals in the present case dealt with title to property. The dispute between the parties before the Land Disputes Tribunal was essentially a claim to title over the land. The tribunal made orders excising, appropriating and or otherwise transferring a portion of the Petitioner's parcel of land known as BUTSOTSO/SHIBEYE/227 measuring 0.7 Acres to L.R. No. BUTSOTSO/SHIBEYE/2798 albeit to make it measure 2.5 acres as sought by the 2<sup>nd</sup> Respondent in total disregard of requisite jurisdiction. For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Land Disputes Tribunal. The proceedings prima facie violated the Land Disputes Tribunal Act (now repealed). In the case of **Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & another, Nairobi, High Court, JR 370 of 2013 [2014] eKLR**. In that case, Odunga J held as follows-

*“In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.*

In the case of **Republic vs Chairman Eastern Provincial Appeals Tribunal & 4 Others (2015) eKLR** and in the Court of Appeal judgement in **Asman Maloba Wepukhulu & Anor vs Francis Wakwabubi Biketi Civil Appeal No. 157 of 2001 Kisumu**, both courts held that the tribunals under the said act lacked jurisdiction to deal with matters relating to title to land. From the foregoing, I find that this petition is merited and I grant the following orders;

1. A declaration that the joint, unlawful and illegal acts of the Respondents complained of herein are offensive to and violate the provisions of Articles 1(3) (c), 2(1), 3(1), 10(1) (b) . 19,20,21(10,22,23(1)& 3 25(c) . 27(1) a. , 40(1) , &(3) , 47,48,50(1) 60(1) (b) , 61(2) 64 (a) , 159,160,165 (1) 3(a) (b) &(e), 169 (1) (a) , 258 & 259 of the Constitution, 2010 and consequently unconstitutional.
2. A permanent injunction against the 2<sup>nd</sup> Respondent herein, his agents and or representatives and or anyone claiming under them or their instruction or order, and to wit the District Surveyor Kakamega or such other surveyor restraining them from implementing the said orders of the 1<sup>st</sup> Respondent complained of herein.
3. An order of certiorari to remove into this Honourable Court and quash the said order of the 1<sup>st</sup> Respondent purporting to direct the transfer of 0.7 acres from the Petitioners parcel of land Known as LR No. BUTSOTSO/SHIBEYE/227 to that parcel of land Known as L.R NO. BUTSOTSO /SHIBEYE /2798 to as to albeit make it measure 2 ½ acres.
4. Costs of the Petition to the Petitioner.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 31<sup>ST</sup> DAY OF MAY 2018.**

**N. A. MATHEKA**

**JUDGE**