



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**PETITION NO. 28 OF 2013**

**M'MUGAINE M'NAINGABU.....PETITIONER**

**VERSUS**

**KARUTA MBERIA.....1<sup>ST</sup> RESPONDENT**

**FRIDA KAMBANJA MBERIA.....2<sup>ND</sup> RESPONDENT**

**THE LAND ADJUDICATION OFFICER**

**TIGANIA EAST/WEST DISTRICT.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION.**

1. The petitioner filed this petition dated **31/10/2013** on **18/11/2013** in which he sought the following prayers:-

**(a) A declaration that the petitioner has been deprived of ownership of a portion of land measuring 1.50 acres.**

**(b) A declaration that the petitioner has been denied a right to a fair administrative action.**

**(c) An order directing the 3<sup>rd</sup> respondent to implement the decision of the Land Adjudication Officer made on 11/02/2008.**

**(d) Any other order as is just and fair.**

2. The said petition is supported by the affidavit of the petitioner sworn on the **31<sup>st</sup> October, 2013**. The petitioner also swore a further supporting affidavit dated **15<sup>th</sup> February, 2018** which he filed on the same date. He also filed his submissions on **11/3/2018**.

3. The **1<sup>st</sup>** respondent filed her replying affidavit dated **11<sup>th</sup> January, 2014** on the **15/1/2014**. The **1<sup>st</sup>** and **2<sup>nd</sup>** respondents filed submissions on **20/3/2018**.

4. The Land Adjudication Officer Tigania District, Mr. Japhet Muthaka Muchai filed replying affidavit dated **2<sup>nd</sup> August, 2017** on **17<sup>th</sup> October, 2017**. I have considered these filed documents.

**The Petitioner's Case**

5. In the petition the petitioner avers that he lodged **Objection No. 649** within Kitharene Adjudication Section on **20/06/1994** against one Limberia Kirera. In **Objection No. 649** the petitioner was claiming **1.50** acres from **land parcel No. 1417** Kitharene Adjudication Section.

6. He states that after conducting a full hearing and listening to the respective parties arguments, the Land Adjudication Officer found in favour of the petitioner and the decision was to the effect that the said Limberia Kirera gives the petitioner a portion measuring **1.50** acres to be excised from **land parcel number 1417** Kitharene Adjudication Section. The said decision was pronounced on **11/2/2008** and has never been challenged by Limberia Kirera. It is averred that the **2<sup>nd</sup>** respondent has contravened the decision of his own office by subdividing parcel of **land No. 1417** into two portions being **Nos. 1417** and **3241** Kitharene Adjudication Section.

7. The petitioner states that parcels of land **Nos. 1417 and 3241** Kitharene Adjudication Section are presently recorded in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are the wife and daughter of Limberia Kirera respective. The petitioner has incessantly petitioned the 3<sup>rd</sup> respondent to implement the decision of **11/02/2008** to no avail. It is averred that the petitioner has been deprived of the right to own property and the right to a fair administrative action.

### **The 1<sup>st</sup> Respondent's Defence**

8. The 1<sup>st</sup> respondent's replying affidavit dated **11/1/2014** filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, responds to the petition by confirming the petitioner's allegation that plot number **3241 and 1417** are registered in the names of the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent respectively; that two plots formerly belonged to the 1<sup>st</sup> respondent's deceased husband; that the 2<sup>nd</sup> respondent is her daughter, that the consent of the District Land Adjudication And Settlement Officer only allowed the petitioner to claim part of plot number **1417**, that the two parcels have no pending cases; that the authenticity of the objection proceedings attached to the petition is in doubt; that there is no proof that the deceased was ever served with the hearing notices in respect of the objection; that **Objection Number 649** was heard in **1995** and it was dismissed; that none of the petitioner's rights have been infringed; and that judicial review proceedings against the 3<sup>rd</sup> respondent would have been the appropriate remedy.

### **The 3<sup>rd</sup> Respondent's Defence**

9. The 3<sup>rd</sup> respondent's response to the petition is by way of the sworn affidavit of one **Japhet Muthaka Muchai, Land Adjudication Officer**, who states as follows: that **Parcel Number 1417** originally belonged to Limberia Kirera; that the petitioner's Objection No **649** claiming **1.50** acres out of plot **1417** was dismissed on **21/4/1998**; that however a second objection assigned the same number was heard on **12/2/2008** which awarded the petitioner **2.00** acres of Limberia's land to the petitioner; that in his opinion, the first decision is the right decision. No documentary evidence is attached to the said affidavit. However these facts are reiterated in the supplementary affidavit of the 1<sup>st</sup> respondent filed on **23/1/2018** which attaches several documents. From the contents thereof, it is apparent that when the first objection was lodged by the petitioner the parties entered into a compromise by which the petitioner withdrew his claim in return for an undertaking that the deceased would allow him to have one acre out of the land the deceased was entitled to at another place which had not been subjected to demarcation and adjudication.

10. The 1<sup>st</sup> respondent's supplementary affidavit is countered by the petitioner's further affidavit sworn on **15/2/2018** which admitted the compromise between him and the deceased in the objection proceedings. However in the new affidavit he avers that he only kept his claim in abeyance pending the compensation promised by the deceased. He avers that when the demarcation process began at Ngathuine, the deceased refused to honour his undertaking, thus prompting him to revive the **Objection No 649**, which to him had not been heard and determined. The objection was thus heard and determined on **11/2/2008**. He avers that it was in the latter decision that the deceased was ordered to excise a portion of land of **1.50** acres from **Parcel Number 1417** and have it registered in the petitioner's name. However the by the time of the deceased's demise he had not conducted the excision and the decision has never been implemented to date.

## **DETERMINATION**

### **Issues for Determination**

11. The issues for determination in this matter are as follows:

*a. Whether the rights of the petitioner to own property or to receive fair administrative action have been violated;*

*b. What orders should issue.*

**a. Whether the rights of the petitioner to own property or to receive fair administrative action have been violated;**

12. The existence of the two sets of proceedings in respect of **Objection Number 649** has been confirmed by the 3<sup>rd</sup> respondent. There is therefore no doubt that there was a dispute between the petitioner and the deceased and that the same was resolved by the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent however, despite having resolved the dispute for a second time seems to believe that the first resolution was the correct one. The 1<sup>st</sup> respondent's documents show that the petitioner was to get alternative land from the deceased. The 1<sup>st</sup> respondent is the one now in the deceased's shoes, so to speak, as she is his widow. Her doubts regarding the truthfulness of the record attached to the petition as resolution of **Objection No 649** has been dispelled by the 3<sup>rd</sup> respondent who verifies that it is genuine. The question is why the 3<sup>rd</sup> respondent has not implemented the decision yet he confirms that it is in the official record. This is exactly what has prompted this petition. As long as that decision stands I think that it is not the task of this court to consider whether there was any other decision made there before concerning the suit land. Furthermore it appears that the 1<sup>st</sup> and 2<sup>nd</sup> respondents, being the persons entitled to the second parcel of land that the deceased would get at Ngathuine when demarcation began, would unfairly benefit from acquisition of the deceased's second portion while the petitioner would go without any land. If the petitioner had already been given land from the new Adjudication Section as was intended in the objection proceedings, then there would not have been anything easier than for the 1<sup>st</sup> and 2<sup>nd</sup> respondents to expressly say so in their replies. That however was not done and, in my thinking, an putting an end to this dispute without any remedy being accorded to the petitioner would leave the petitioner quite disadvantaged.

13. I have noted that a subdivision of the land by the deceased which was prompted by the deceased's letter dated **11/2/2006** was something that the Land Adjudication Officer knew about while he was implementing the deceased's wishes. The same land adjudication office that presided over the compromise between the appellant and the deceased was instrumental in subdividing the suit land while all along it knew that the petitioner would be left empty handed. Even then, the justice of the case demanded that the petitioner be not left empty handed. The record of the new Adjudication Section where the petitioner's compensation was to emanate have not been laid before me by any of the

parties, and I consider that the burden of doing that lay with the respondents for the petitioner was solely reliant on them to do so.

What should this court do? It is clear that land cases have a way of destroying lives and livelihoods by their mere pendency in court or before tribunals while none of the disputing parties clearly know their rightful entitlement until a determination is pronounced by the court or tribunal. In the meantime in this country, billions of shillings worth of investment potential both in terms of financial investment aimed at enhancing productivity of the land and man hours attending such disputes are continually being wasted. This is a petition under the Constitution of Kenya which at **Article 159** enjoins this court to do substantive justice to the parties at the expense of technicalities. Article 10 of the same Constitution espouses equity. In my view, it is not in a case such as the instant petition where a technicality that the dispute had been settled earlier should be upheld despite the injustice that holding would mete out to the petitioner. This must be the main point that motivated the Land Adjudication Officer to hear the dispute again and issue a substantive determination, this time not based on the consent on the parties, but on the evidence on the record. It is important to note that the deceased was still alive at the time of the hearing, and that the determination was in the petitioner's favour. Had this been done earlier, the defence now raised by the respondents would have been non-existent. In my view, had the claim in the objection proceedings been denied by the deceased, or had the hearing by the Land Adjudication officer arrived at a finding that did not favour the petitioner, I would have taken an entirely different course. However the admission by the deceased has determined the perspective that this court has to take. In my view there is need to have the dispute between the parties settled at the earliest instead of letting it fester between the parties like an eternal wound. I agree with the petitioner that this was a matter in which the prompt administrative action of the 3<sup>rd</sup> respondent to implement his own decision should have finalised the matter quite easily. I do not find any need to leave the petitioner to pursue any other remedy while the land was admitted by the deceased to belong to the petitioner. The land is still in the hands of the 1<sup>st</sup> and 2<sup>nd</sup> respondents who survived the deceased. It is important to remember that the orders I will make can be enforced simply because the deceased was alive at the time of the second determination which has been acknowledged by the 3<sup>rd</sup> respondent. **Article 23** of the constitution does not limit this court in terms of the remedies that it may apply to any situation in constitutional petitions. In this instance it appeals to this court to issue orders that will reinstate the petitioner's land to him and leave the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pursue the other land that the deceased was entitled to and take possession of it to the exclusion of every other person including the petitioner who, had the compromise borne fruit, would have been a beneficiary thereof.

## **CONCLUSION**

### ***b. What orders should issue?***

14. I therefore find that had the Land Adjudication Officer considered the matter in the above perspective he would have implemented the second decision promptly and put and written *finis* to the dispute. By delaying and failing to do so he has violated the petitioner's right to fair administrative action and this court can not stand and watch as the petitioner is denied his rights. The rights to the land in the adjudicated section could only have been pursued and established by the deceased or his survivors for their benefit and for the petitioner's benefit. However, the survivors are now busy denying the petitioner's claim without showing there is any alternative, yet the deceased had officially admitted the claim during his lifetime. The neglect by the 3<sup>rd</sup> respondent to implement the award has contributed to this untidy situation. It is clear that the rights of the petitioner to prompt and fair administrative action arose immediately the decision in his favour was made in the year **2008**.

15. I therefore find that the petition dated **31/10/2013** has merit and I grant the following orders:

***(a) A declaration that the petitioner has been denied a right to a fair administrative action by the 3<sup>rd</sup> respondent's failure to implement the decision arrived at during the objection which awarded the petitioner the land.***

***(b) A declaration that the petitioner has been deprived of ownership of a portion of land measuring 1.50 acres by the 3<sup>rd</sup> respondent's failure to implement the decision arrived at during the objection which awarded the petitioner the land.***

***(c) An order directing the 3<sup>rd</sup> respondent to implement the decision of the Land Adjudication Officer made on 11/02/2008 by first merging parcels numbers 1417 and 3241 to reinstate the original size of plot number 1417, and subsequently excise the 1.50 acres therefrom and register it in favour of the petitioner.***

***(d) The respondents shall bear the costs of these proceedings.***

Dated, and signed at Kitale on this **1<sup>st</sup>** day of **August, 2018**.

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**

Delivered at Meru on this **29<sup>th</sup>** day of August, 2018 in open court in the presence of:

Mr. Mwirigi for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Kiongo for 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Mr. Kibiti holding brief for Mr. Muriithi for petitioners

C/A Mutua

**MWANGI NJORGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE.**