



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT NYAHURURU

PETITION NO 18 OF 2017

(FORMERLY NAKURU PET 39/2016)

IN THE MATTER OF ARTICLES 22, 23, 40, 47, & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012 AND THE REPEALED REGISTERED LAND ACT CAP 300, & FAIR ADMINISTARYION ACTION ACT

BETWEEN

EDDAH WANJIRU GATHUMBA.....PETITIONER

VERSUS

JEREMIAH GITAU NELSON.....1st RESPONDENT

BERNARD K THAIRU.....2nd RESPONDENT

IRENE KANYI WAINAINA.....3rd RESPONDENT

COUNTY LAND REGISTRAR, NYANDARUA.....4th RESPONDENT

CHIEF MGISTRATE COURT, NYAHURURU.....5th RESPONDENT

HON ATTORNEY GENERAL.....6th RESPONDENT

AND

JEREMIAH NGWARO.....INTERESTED PARTY

JUDGEMENT

1. On the 18th August 2016, the Petitioner filed his Petition and application dated 18th August 2016 in the Environment and Land Court sitting at Nakuru.

2. On the 18th August 2016, the application which sought for conservatory orders pending hearing of the petition was placed before the Hon. Munyao Sila (J) who gave interim orders to preserve the titles in issue and the status quo in the following terms.

(i) There is issued an order of inhabitation prohibiting the registration of any disposition or any registration of whatsoever nature in the register of the land parcels NYANDARUA/SOUTH KINANGOP/13913,13914,13915, AND 13916 pending inter partes hearing of the application dated 17/8/2016

(ii) The respondents are hereby stopped from offering for sale, selling, charging leasing or in any other way, dealing with the said land parcels NYANDARUA/SOUTH KINANGOP/13913, 13914, 13915, and 13916 pending inter partes hearing of the application dated 17/8/2016

iii) The occupation on the ground in the said land parcels NYANDARUA/SOUTH KINANGOP/13913, 13914, 13915, and 13916 not to be disturbed by the Respondents or any other person pending inter partes hearing of the application dated 17th August 2016.

3. The matter was fixed for inter partes hearing which was set for the 11th October 2016 on which day there was neither appearance on part of the state law office for 4th – 6th Respondent and the interested party as he was unwell.
4. Counsel holding brief for the counsel for the 1st -3rd Respondents then sought for an adjournment which was granted with costs assessed at ksh.10,000/= to be paid to the petitioners before the next date. The matter was set for mention on the 16th November 2016 with an extension of interim orders.
5. On the 16th November 2016, counsel for the respondent was absent wherein the interim orders were extended and a mention dated set for the 7th March 2017.
6. Subsequently, the file was transferred to the Environment and Land Court sitting in Nyahururu wherein it was placed before me on the 29th January 2018 wherein although there was representation for the Petitioner and the 1st- 3rd Respondents, there was no appearance for the Honorable the Attorney General for the 4th – 6th Respondents. Parties then took directions by consent to have the application dated the 17th August 2016 be disposed of by way of written submissions and the same to be highlighted on the 5th March 2018. The interim orders were extended.
7. On the 5th March 2018, parties had not filed their submissions and the matter was adjourned to the 28th May 2018 on which day the court was informed that the 4th – 6th Respondents had neither filed their responses to the petition nor their submissions. Counsel for the Petitioner and the 1st - 3rd Respondents agreed not to highlight on their submissions and asked the court to look at the same and to make a decision thereon.
8. Miss Cheruiyot -Senior State Counsel for the Honorable the Attorney General for the 4th – 6th Respondents submitted that she was not ready to proceed as they had not put in any response to the petition. She sought for a period of 7 days to file our response and submissions and 14 days to file submissions after service.
9. The interested party on the other hand submitted that he had no objection to the petition as he was the person who had sold the land and there was nothing for him to file. Both counsel for the Petitioner and the 1st -3rd Respondents had no objection to the application for adjournment by the 4th -6th Respondents.
10. Leave was granted to all the parties to file and serve their responses and submissions to the Petition and the matter re-scheduled for mention on the 31st July 2018 to confirm compliance on which day the court confirmed that parties had filed their submissions, not on the application but on the substantive petition. The Application dated the 17th August 2016 was thus overtaken by events.

The Petitioners case.

11. The Petitioner's case is that at all times from the 10th June 2013, she was the proprietor of all parcel of land Known as Nyandarua/South Kinangop/5687 measuring approximately 0.166 hectares having acquired the same for the interested party herein for a valuable consideration.
12. That the Petitioner immediately took vacant possession of the same together with all the permanent improvement including a permanent house. That sometime in July 2016, the Petitioner learnt that her title deed had been cancelled by the 4th Respondent in execution of a decree that had been issued on the 25th May 2012 in Nyahururu Senior Principle Magistrate's Court Land Dispute Case No. 1 of 2012 which was between the 1st -3rd Respondents as Plaintiffs and John Ngigi Rubia and Benson Murava Mwangi as Defendants.
13. That the decree, which was pursuant to an adoption of an elder's award in an undisclosed suit, had inter alia directed the rectification of the land Register and cancellation of the all transactions, partitioning and transfers made against the land reference No. Nyandarua/South Kinangop/1988 since 1993 which was the mother title to the petitioner's land parcel.
14. That the Petitioner was not party to the any arbitration proceedings nor proceedings in the Nyahururu Senior Principle Magistrate's Court Land Dispute Case No. 1 of 2012 therefore the cancellation of her title deed was in contravention of the Constitutional rights to natural justice and to own property. And further since there had been no notice issued to the Petitioner by the 4th Respondent of the intended cancellation of her title, her right to fair administration Action was also contravened.
15. Based on the above grounds the Petitioner thus prayed for the following reliefs:
 - i. A declaration that the cancellation of her title No. Nyandarua/South Kinangop/5687 pursuant to a decree issued on the 25th May 2012 in the Nyahururu Senior Principle Magistrate's Court Land Dispute Case No. 1 of 2012 contravened Articles 40, 47, and 50 of the Constitution of Kenya and is therefore null and Void.
 - ii. A declaration that the proceedings in Nyahururu Senior Principle Magistrate's Court Land Dispute Case No. 1 of 2012 offended the rules of natural justice and were therefore null and void and are hereby quashed thorough an order of certiorari.

iii. A declaration that the cancellation of said divisions of the original title No. Nyandarua/South Kinangop/1988 and the subsequent creation of titles No. Nyandarua/South Kinangop/13913, 13914, 13915, and 13916 and registration thereof in favour of the 1st, 2nd and 3rd Respondents respectively as proprietors is unconstitutional, null and void and are hereby canceled .

iv. An order of reinstatement of all the subdivisions of the original title No. Nyandarua/South Kinangop/1988 together with the Petitioner's registration as proprietor of title No. Nyandarua/South Kinangop/5687 forthwith.

v. Costs of this suit plus interest thereon at court's rate.

vi. Any other or better relief deemed fit by the honorable court.

16. The Petitioners' submission was that it was wrong to have the title to her suit property cancelled pursuant to orders granted in a case she was not party to thereby denying her the right to be heard and a right to fair administrative Action with the resultant that her right to property was infringed.

17. To buttress her submission, the Petitioner relied on the decided cases of:

i. Sky Africa Holdings Ltd v Registrar of Titles & Attorney General Ex Parte Sky Africa Holdings Ltd [2016] eKLR

ii. Japheth Nzila Muangi vs Kenya Safari Lodges & Hotels Ltd.[2003] eKLR

18. While relying on the decided case of **JMK vs MWM & Another [2015] eKLR**, the Petitioner also submitted that her right to natural justice was also infringed when the impugned decision was executed without affording her the right to be heard, an action which was null and void.

19. That Petitioner further relied on the cases in **Evelyn College of Design Ltd v Director of Children's Department & another [2013] eKLR** and secondly on the case of **Multiple Hauliers East Africa Limited V Attorney General & 10 others [2013]eKLR** to submit that her rights to private property under Article 40 of the Constitution and fair Administration under Article 47 of the Constitution were infringed and prayed for the orders sought herein.

The 1st-4th Respondents' case

20. In opposition to the petition, the 1st -4th Respondents' filed their grounds of opposition and submission to the effect that they were the genuine proprietors of parcels of land known as Nyandarua/South Kinangop/13913, 13914, 13915, and 13916 as they held title deeds to the same parcels of land having purchased the same from John Ngugi Rubia and Benson Muraya Mwangi wherein by a decree of the court dated the 25th May 2012 they were confirmed as such.

21. That it was not true that the Petitioner herein purchased the said suit land from the interested party herein as it was clear for their sworn affidavits that John Ngugi Rubia sold the suit land to Samwel Kamau Kinyanjui who in turn sold it to the 3rd Respondent herein.

22. That proceedings in the District Tribunal had been instituted by the Respondents herein wherein upon being successful, the objectors namely Benson Muraya Mwangi instituted a Civil Miscellaneous Application No. 27 of 2008 by way of a judicial Review seeking to quash the decision of the Tribunal but when they failed to prosecute the same, it was dismissed for want of prosecution on the 18th May 2012. Subsequently, the 1st-3rd Respondents filed Miscellaneous Application No 1 of 2012 to have the award by the Tribunal adopted. The application was not challenged by John Ngugi Rubia and Benson Muraya Mwangi who were represented.

23. That pursuant to the adoption of the award, John Ngugi Rubia and Benson Muraya Mwangi were invited pursuant to an application dated the 18th December 2012, to surrender the titles to the suit land and there after execute transfer of the same but when they failed to do so, the court executive officer signed the said transfer forms.

24. When the 4th Respondent was served with a court order dated the 8th April 2014, he cancelled the said title issued to the Petitioner.

25. The 1st -3rd Respondents' contention is that on the 10th June 2013, when the Petitioner was registered as the proprietor of Nyandarua/South Kinangop/5687, there already existed a court decree emanating from the proceedings of the Land Tribunal that had already given the Respondents the right to proprietorship. The court decree had not been challenged.

26. That it was not true that Petitioner had purchased the suit land from the interested party as there was no proof of an agreement attached to corroborate her contention and further that the interested party herein had not annexed an affidavit confirming the fact that he had sold the suit land to the Petitioner herein and further that the green cards attached to the Petition did not bear the interested party's name.

27. That it was incumbent of that the Petitioner to enjoin the said John Ngugi Rubia and Benson Muraya Mwangi to the Petition so as to enlighten the court to make justifiable orders.

28. The respondents also submitted that this case was Res Judicata by virtue of there being previous decided matters filed in the Nakuru High Court Civil suit No. 1552 of 1995 and Nairobi High Court Civil Suit No. 1445 of 1998 that touched on the same subject matter as the present suit. The 1st-3rd Respondent submitted that in view of the above, that this application ought to be dismissed.

The 4th -6th Respondents' case

29. The 4th -6th Respondents' case is that the Petition herein cannot stand as none of the Petitioner's right had been infringed by them. That to begin with, the 4th Respondent merely acted in compliance with a court order and therefore cannot be held culpable of violation of the Constitution.

30. That the present proceedings began in the land Dispute tribunal way back in the year 2000 wherein the adoption of the award in Magistrate's court was done in the year 2012. That by the time the Petitioner was registered as the proprietor of the suit property herein, the matter had already been settled and orders issued by the court.

31. That the Petitioner was a stranger to all these proceedings and could not be enjoined in the same as she had no interest in the property as at the time.

32. The Respondents' further submission as that there had been no evidence to prove that the Petitioner had brought to the attention of the court that she had an interest in the suit property which information was wilfully omitted. That it had been upon the vendor to inform the Petitioner that the suit land was encumbered with litigation so as to enjoin him in the proceedings which information, the vendor willfully omitted to inform the Petitioner.

33. That further, pursuant to the provisions of Section 7(2) of the Land Disputes Tribunal Act (now repealed) the jurisdiction of the 5th Respondent was limited to the effect that:

The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

34. The mandate of the court therefore did not extend to revising an order or enjoining additional parties to the proceedings and hearing herein.

35. The principles of natural justice were adhered to at the tribunal being that both parties in as far as the ownership of the suit land was concerned, the claimant and the objector were present and subsequently heard in accordance to the principles of justice.

36. That in as much as the Petitioner is aggrieved, her remedy did not lie in the enforcement of Articles 40, 47 and 50 of the Constitution. The 4th, 5th and 6th Respondents herein did not contravene any of her rights.

37. The interested party did not file his submissions.

Analyses and determination

38. I have anxiously considered the content of the Petitioner's Petition as well as the supporting affidavit, the Respondents' replying affidavit as well as the written submissions all Counsel and the relevant provisions of the law and Authorities herein cited. I find the issues arising for determination are as follows:-

- i. Whether the Petition discloses a legal interest capable of protection under the law.
- ii. Whether any of the Petitioners' Constitutional rights had been infringed.
- iii. Whether the Petitioner is entitled to the orders sought in the Petition.

39. From the pleadings and documents filed in this suit, it is clear that the Petitioner is challenging the cancellation of her title, to land parcel No. Nyandarua/South Kinangop/5687, by the 4th Respondent in execution of a decree that had been issued on the 25th May 2012 in Nyahururu Senior Principle Magistrate's Court Land Dispute Case No. 1 of 2012.

40. That the said decree, which was pursuant to an adoption of an elder's award, had inter alia directed the rectification of the land Register and cancellation of the all transactions, partitioning and transfers made against the land reference No. Nyandarua/South Kinangop/1988 since 1993, which title was the mother title to the Petitioner's land parcel.

41. That the said cancellation was done in total disregard to the principles of natural justice as she was not a party to the proceedings and in the process she was denied her the right to be heard and a right to fair administrative Action with the resultant that her right to property was infringed.

42. The Petitioner contends that the acts by the Respondents in the circumstances were unlawful, unjust and in contravention of her, Constitutional rights. She argues that the Respondents contravened Articles 22, 23, **40, 47, and 50** of the Constitution and should be so declared.

43. The Respondents on the other hand have argued that none of the Petitioners rights under the said articles of the constitution were violated for reasons that at the time the proceedings both in the Land tribunal and subsequently in the magistrates court were conducted, she was not the proprietor of the suit land and therefore could not be enjoined in the proceedings. That indeed the proprietors of the suit land at the time failed to challenge the award issued at the land tribunal which was later adopted in the Magistrate's court and become an order.

44. Fundamental rights and freedoms are specifically set out in Chapter Four of the Constitution which rights and freedoms are individually identifiable and defined from article 26 to 51 of the Constitution.

45. In order to consider whether the Petitioner's rights as stated above were violated and/or infringed, I think it is necessary to set out the said provisions;

46. Article 22(1) of the Constitution provides that:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened”.

47. Article 23(3) of the Constitution provides that;

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

48. Article 40 of the Constitution provides that;

Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

49. Article 47(1)(2) of the Constitution provides that;

1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

50. Article 50(1) of the Constitution provides that;

(1) 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 and impartial tribunal or body.

51. I note that the facts surrounding this Petition originated from a hearing instituted at the North Kinangop Land Disputes Tribunal in claim No. 77 of 2008 which was moved on the 18th March 2008 by the 2nd, 3rd and 1st Respondents herein being Mr. Bernard Kamundu Thairu, Mrs Irene Kanyi Wainaina and Mr. Jeremiah Gitau Nelson as the Claimants and attended by John Ngugi Rubia and Mr. Benson Muraya Mwangi the objectors.

52. The claimants demanded that the 1st objector Mr. John Ngugi Rubia do transfer to them their respective parcels of land which they had bought from him.

53. On the 28th May 2008 the Land Disputes Tribunal made a finding that;

a) The transaction entries sub-divisions and transfers made in land registrar against that land reference Nyandarua/ South Kinangop/668 since 1993 were fraudulent illegal null and void.

b) An order for rectification of the Land register and cancellation of all the transaction pertaining, the registration and transfers made against land reference Nyandarua/ South Kinangop/1988 since 1993.

c) 1st Objector to deliver to the court all title deeds issued against the said land to the court, the objector is in breach of the contracts.

d) Claimants entitled to;

i. 1st Claimant- Mr. Bernard Kamundu Thairu-7 acres and 5 acres

ii. 2nd Claimant- Mrs Irene Kanyi Wainaina -3 acres

iii. 3rd Claimant- Mr. Jeremiah Gitau Nelson-8 acres of the original suit premises and the 1st objector to transfer these pieces of land to the first buyers.

e) Objector was restrained either by himself, his agents, legal representatives authorized servants and or agents from trespassing the said premises to any other person other than the claimants.

f) 1st objector to honor the sale agreement that had with the said Bernard M. Mwangi the (2nd objector) as he had already taken his money for 8 acres and acquired title to plot 3598.

g) Since the 23 acres on the original Nyandarua/ South Kinangop/1988 is not enough, the extra 8 acres to be taken from any other piece of land belonging to J.N Rubia and family.

h) Land Registrar requested to do the needful with immediate effects

i) Cost award Ksh 200,000/=

54. Subsequently, the objectors filed an appeal to the Provincial Appeal Committee but did not prosecute it. On the 7th August 2008, they filed a Miscellaneous Civil Application No. 27 of 2008 at the High court sitting in Nakuru, seeking to file a judicial Review to quash the decision of the Tribunal. The application was allowed vide an order dated the 28th August 2008.

55. After 4 years when the objectors failed to prosecute their application, the same was dismissed on the 18th May 2012 for want of prosecution. The 1st 2nd and 3rd Respondents herein, filed Land Dispute No. 1 of 2012 dated the 10th January 2012 in the Nyahururu Principle Magistrate's Court- Nyahururu, seeking to have the Tribunal's award adopted as a Judgment of the Court in terms of the provisions of the Land Disputes Tribunal Act (now repealed). Suffice to say that the Objectors herein who were now the Defendant/Respondents in the application were ably presented by counsel.

56. The award was subsequently adopted on the 25th May 2012 and a decree issued pursuant to the award issued by the North Kinangop Land Disputes Tribunal.

57. At this point, that the Senior Principal Magistrate's Court at Nyahururu, at which the award for adoption was filed, had no jurisdiction to question its regularity or otherwise, as its role was merely that of adoption and issuance of a decree.

58. Up to this point, it must be noted that the Petitioner was not in the picture as she had not acquired any proprietorship to the suit property.

59. Vide an application dated the 18th December 2012, the 1st Respondent herein moved the court to compel the objectors in the Land Dispute Tribunal (the respondents in that application) to execute all relevant necessary documents to facilitate the subdivision and subsequent transfer of the parcel No. Nyandarua/ South Kinangop/1988 in the alternative the executive officer be empowered to execute the same to which a court order dated the 25th May 2012 was issued.

60. When John Ngugi Rubia and Mr. Benson Muraya Mwangi failed to surrender to the court all the title deeds as per the court order, the 1st, 2nd and 3rd Respondents herein filed another application dated the 8th April 2014 asking the court to dispense with the order requiring the surrender of the titles in respect to the court order issued on the 25th May 2012 and instead empower the Executive Officer of the court to sign the relevant forms for the purpose of execution of the decree. The court obliged them vide an order dated the 8th April 2014 the same was effected by the 4th Respondent. The up to this point, I find that the process of the law was followed.

61. It therefore follows that by the time the Petitioner herein was registered as the proprietor of the suit land on the 10th June 2013, the interested party had no interest to pass to her, in line with the award by the tribunal and the subsequent adoption of the same as a decree on the 25th May 2012.

62. The award should have been appealed to the Lands Appeals Committee constituted for the Province, in accordance with Section 8(1) of the Lands Disputes Tribunals Act (which was not done). Alternatively, the objectors should have commenced judicial review proceedings in the nature of certiorari, to quash the award, which also not done

63. This court has jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction, however this jurisdiction is only exercisable where such decision of the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the Court as in the present circumstance.

64. The award of the North Kinangop Land Disputes Tribunal having been adopted by the Senior Principal Magistrate's Court at Nyahururu ceased to exist on its own, and thus, cannot not be the subject of a declaration. The award, having become a Judgement of a Court of competent jurisdiction, the same can only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.

65. In the decided case of case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR**, the court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case NO. 139 OF 2009 where *Makhandia, J held as follows*;

“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.”

66. Having found that the award issued by the North Kinangop Land Disputes Tribunal became a Judgment of a Court of competent jurisdiction, since the same was not varied, vacated, set aside or reviewed by the same Court, or by an appellate Court, in an appropriate proceedings, the 1st, 2nd and 3rd Respondents herein had been installed as the proprietors of the suit land.

67. I further find that the interested party herein had no title to pass to the Petitioner who likewise had no title to protect and therefore had no legal interest capable of protection under the law.

68. The Petitioner cannot therefore maintain a claim for violation of her rights pursuant to the provisions of Articles 22, 23, **40, 47, and 50** of the Constitution against the Respondents herein.

69. To this effect thereof the Petition dated the 17th August 2016 is herein dismissed with costs to the Respondents.

Dated and delivered at Nyahururu this 12th day of November 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE