



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION NO. 604 OF 2015

(Formerly Nyeri ELC Petition No. 13 of 2015)

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
 UNDER ARTICLES 10, 40, 43 AND 47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE LAND ADJUDICATION ACT CHAPTER 284 OF THE LAWS OF
 KENYA, THE LAND REGISTRATION ACT NO. 3 OF 2012, THE LAND ACT NO. 6 OF 2012
 AND THE LAND DISPUTES TRIBUNALS ACT, 1990 (REPEALED)**

AND

IN THE MATTER OF LAND TITLE NUMBER: KIAMBAA/KIHARA/1224

BETWEEN

PENINA NDUTA KARONGO

(Suing as the legal representative of the Estate of

EUNICE WANJIRU MUNGA).....PETITIONER

AND

SAMUEL MWAURA FELIX KARIUKI.....1ST RESPONDENT

EMILY NJERI NG'ANG'A.....2ND RESPONDENT

THE REGISTRAR OF LANDS, KIAMBU COUNTY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

R U L I N G

Background:

1. On 10/06/2015, the Petitioner, Peninah Nduta Karongo, through the Firm of Viola & Onyango Company Advocates, lodged an undated and unsigned Petition in which she alleged contravention of fundamental rights and freedoms under Articles 10, 40, 43 and 47 of the Constitution of Kenya 2010. She named the following as Respondents: 1) Samuel Mwaura Felix Kariuki (1st Respondent), Emily Njeri

Ng'ang'a (2nd Respondent), the Registrar of Lands-Kiambu County (3rd Respondent) and The Attorney General (4th Respondent).

2. At Paragraph 1 of the said Petition, she avers that she brings the Petition in her capacity as the Legal Representative of the Estate of the Late Eunice Wanjiru Munga ("the Deceased"). She says that she is a daughter in law of the said Eunice Wanjiru Munga.

3. The Petitioner further states that she is a widow of the late Henry Karongo Munga.

4. She further states that she had a brother in law by the name Stephen Kimani Munga who died in the year 2000. Upon the demise of Stephen Kimani Munga, the 2nd Respondent herein, Emily Njeri Ng'ang'a, filed a claim at the District Land Disputes Tribunal in Kiambu, claiming title to Land Title Number:- Kiambaa/Kihara/1224 on the ground that she was the widow of the late Stephen Kimani Munga. The Petitioner's late husband, Henry Karongo Munga, and mother-in-law Eunice Wanjiru Munga, were named as Respondents in the said Claim at the Kiambu District Land Disputes Tribunal.

5. On 10th December 2007, the Kiambu District Land Disputes Tribunal made a determination and award to the effect that Land Title Number: Kiambaa/Kihara/1224, registered in the name of Eunice Wanjiru Munga, be transferred to the 2nd Respondent herein, Emily Njeri Ng'ang'a.

6. Pursuant to the said Determination and Award, adoption and enforcement proceedings were commenced by Emily Njeri Ng'ang'a in Kiambu Chief Magistrate Court Land Case Number 3 of 2009. It is apparent from Exhibit Number "PK4" attached to the Petitioner's undated Affidavit filed in this Court on 10/6/2015 that the Award was adopted as a Judgment of the court and an enforcement decree was issued by the Kiambu Chief Magistrate Court on 14/1/2009 directing that Land Title Number Kiambaa/Kihara/1224, registered in the name of Eunice Wanjiru Munga, be transferred to Emily Njeri Ng'ang'a, the 2nd Respondent herein.

7. The Kiambu Land Registrar (3rd Respondent herein) proceeded to act on the Decree and caused the suit property to be registered in the name of Emily Njeri Ng'ang'a (the 2nd Respondent in the present Petition). Emily Njeri Ng'ang'a is therefore the current Registered Proprietor of the suit property.

8. The Petitioner contends that her late husband, Henry Karongo Munga, lodged an appeal to the Provincial Appeals Committee of Central Province and that it was still pending determination when the Land Disputes Act was repealed.

9. The Petitioner contends that the determination of the defunct Kiambu District Land Disputes Tribunal and the actions of the 1st, 2nd and 3rd Respondents were patently corrupt, irregular, illegal, unlawful, fraudulent and unconstitutional.

10. Through the present Petition, the Petitioner challenges and seeks to annul the Award of the Tribunal and the subsequent registration of the suit property in the name of the 2nd Respondent. She specifically prays for the following:-

(a) A declaration that the defunct Kiambu Land Disputes Tribunal acted beyond their powers in determining that the 2nd Respondent was a wife of the late Stephen Kimani Munga.

(b) A declaration that the defunct Kiambu Land Disputes Tribunal acted in excess of their mandate by making the decision to compel the late Eunice Wanjiru Munga (Deceased) to transfer Kiambaa/Kihara/1224 to the 2nd Respondent.

(c) A declaration that the transfer of Kiambaa/Kihara/1224 by the 2nd Respondent to the 1st Respondent was irregular and fraudulent.

(d) An order of injunction compelling the 3rd Respondent to cancel the title issued in the name of the 1st Respondent and revert it to the original name of Eunice Wanjiru Munga.

(e) An order of injunction be issued restraining the 1st Respondent and 2nd Respondent by themselves, agents, servants, employees or otherwise howsoever from charging, transferring or dealing in the land in any way that is prejudicial to the estate of Eunice Wanjiru Munga (deceased).

(f) Costs

(g) Any other relief the court may deem fit and expedient to grant.

11. From the wording of the prayers in the Petition, the Petitioner does not challenge the consequential Judgment and Decree issued by the Kiambu Chief Magistrate Court in CMCC 3 of 2009 (some papers bear number CMCC 3B of 2009).

12. Together with the Petition, the Petitioner filed an undated Chamber Summons Application seeking, among other orders, a temporary restraining injunction against the 1st Respondent.

13. On being served with the Petition and the Application, the 1st Respondent filed a Notice of Preliminary Objection dated 15/7/15 through which he has raised four grounds of preliminary objection to the Petition under the following Limbs:-

(a) That the Petitioner has no capacity to sue (lacks *locus standi*.)

(b) That this suit is time barred.

(c) That the Honourable court lacks jurisdiction.

(d) That the suit and its accompanying Chamber Summons herein are *res judicata*.

14. The Respondent has made several arguments under each of the limbs and he urges the court to strike out the Petition in its entirety.

15. At the hearing of the Preliminary Objection, parties opted to proceed by way of written submissions.

Submissions

16. On the issue of locus standi, the 1st Respondent argued that the Petitioner was not the closest relative of the late Eunice Wanjiru Munga, and as such she did not qualify to apply for the grant. He quoted Section 39 of the Law of Succession Act which sets out the pyramid of consanguinity.

17. On the issue of limitation, the 1st Respondent argued that the Kiambu Land Disputes Tribunal's decision was adopted by the Chief Magistrate court on 14/1/2009 and that any redress should have been sought within 6 months as provided for under Section 9(2) of the Law Reform Act.

18. On the issue of jurisdiction, the 1st Respondent argued that Prayers (a) and (b) in the Petition are prayers for orders of certiorari and that the Environment and Land Court does not have jurisdiction to grant certiorari orders.

19. Lastly, on the issue of res judicata, the 1st Respondent argued that the issues which the Petitioner is raising in this Petition ought to have been raised in Kiambu CMCC 193 of 2012 which involved the same subject matter and parties. He further argued that given that the issues in the Petition had been adjudicated upon and determined by the Kiambu District Land Disputes Tribunal, the Petitioner is precluded by the doctrine of res judicata against raising them.

20. In reply, the Petitioner's Advocate submitted that the Grant of Letters of Administration obtained by the Petitioner was for the purpose of preserving the Estate. She further argued that the filing of this Petition is intended to achieve that preservatory purpose. Further, she argued that the forum for challenging the issuance of the grant is in the Succession Cause, not in this Petition.

21. On the issue of limitation, counsel for the Petitioner submitted that when the Land Disputes Act was repealed, the Appeal against the determination of the Kiambu District Land Disputes Tribunal was pending before the defunct Central Province Appeals Committee at Nyeri. He argued that the Environment and Land Court Act confers jurisdiction upon the Environment & Land Court to take over matters that were pending in the Land Dispute Tribunals at the time of repeal of the Land Disputes Act.

22. On the issue of jurisdiction, the Petitioner's Advocate submitted that Article 162 (2) (b) of the Constitution and Section 13(7) of the Environment & Land Court Act confer jurisdiction upon this court to hear and determine the Petition herein. She urged the court to dismiss the Preliminary Objection with costs.

Issues for Determination

23. The Notice of Preliminary Objection raises two issues for my determination:-

(i) The first issue is whether the Notice of Preliminary Objection raises any valid preliminary objection warranting a determination at this point.

(ii) The second issue is, if it does, what is this court's determination on the preliminary objection.

Law and Guiding Principles

(a) Preliminary objection:

24. It would be important at this point to outline what constitutes a preliminary objection in our jurisprudence. It is also imperative that I briefly outline what in law constitutes res judicata.

25. Justice Law in the Court of Appeal case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696 at page 700** defined a preliminary objection as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

26. On his part, Justice Newbold P in the same case gave the following essential features of a preliminary objection:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

27. The above definitions have withstood the test of time and I will adopt them for the purpose of this Ruling.

(b) The Doctrine of Res Judicata

28. The doctrine of res judicata is enshrined in Section 7 of the Civil Procedure Act which provides as follows:-

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”

29. The Court of Appeal gave a rendition of the doctrine of res judicata in **John Florence Maritime Services Limited & Ano. Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR** in which it cited verbatim the following paragraph in **Henderson Vs Henderson (1843) 67 ER 313**.

“.....where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.....”

30. The rationale behind res judicata was outlined in the above case as follows:-

“the rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

31. It is settled jurisprudence that res judicata is a principle of general application. It applies to substantial suits as well as to interlocutory applications brought within suits.

(c) Legal Effect of Repeal of the Land Disputes Act

32. The arguments presented in the preliminary objection focus on the legal proceedings conducted within the framework of the repealed Land Disputes Act. It is therefore important to outline the legal ramifications of the repeal of an Act of Parliament on court proceedings, more particularly, the proceedings subject matter of this Petition.

33. Section 31 of the Environment and Land Court Act repealed the Land Disputes Act, (Act No. 18 of 1990). Section 30 of the Environment & Land Court Act provides a transitional framework for all cases pending in the Land Disputes Tribunals. It provides as follows:-

“(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2), The Chief Justice may, after the court is established, refer part heard cases where appropriate, to the court.”

34. The law on the legal status of decisions made by the land disputes tribunals established under the repealed Land Disputes Act is contained in Section 23(3) of the Interpretation and General Provisions Act

(cap 2) which provides as follows:-

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

35. In my view, Section 23(3) (e) of the Interpretation and General Provisions Act preserves and protects decisions and awards made by the defunct land disputes tribunals. Similarly, it preserves and protects adoption judgments pronounced by magistrate courts within the framework of the repealed Land Disputes Act. They remain valid judgments of the courts. The resultant decrees remain valid binding instruments capable of execution.

Determination

36. The first ground of preliminary objection in the 1st Respondent’s Notice of Preliminary Objection is that the Petitioner has no capacity to sue (or lacks *locus standi*). Under this limb, the Respondent makes reference to Paragraph 18 of the Supporting Affidavit. He also refers to the levels of consanguinity as defined in the Law of Succession Act. He then seeks to challenge the Grant of Letters of Administration which the Petitioner used to commence the present Petition. In my view, an issue that calls for the interrogation or impugning of the Petitioner’s Grant of Letters of Administration cannot be determined as a preliminary point of law. It calls for evidence, further ascertainment of facts and nullification proceedings within the succession cause. This cannot qualify to be canvassed as a preliminary objection. I accordingly reject this ground of objection.

37. The second ground raised in the Notice of Preliminary Objection is that the suit herein is statute-barred. This, in my view, would qualify to be determined as a preliminary objection.

38. The Petitioner seeks to recover land by impugning the determination and award made by the Kiambu Land Disputes Tribunal. At Paragraph 10 of the Petition, the Petitioner pleads that the determination and award were made on 10/12/2007 and adopted as a judgment of the court on 14/1/2009. The Respondent argues Section 9 of the Law Reforms Act prescribes a limitation period of 6 months for applying for judicial review.

39. In my view, Section 9 of the Law Reform Act should be read together with the rest of Part VI of the Act. This part provides a framework for the exercise of civil and criminal jurisdiction by the **high court** whenever a party seeks any of the prerogative writs of mandamus, prohibition and certiorari. I have deliberately highlighted the word “high court” because the Environment and Land Court was created pursuant to Article 162 of the Constitution of Kenya 2010 to exclusively deal with disputes relating to the environment and the use and occupation of, and title to land. Although it is a court of equal status as the

high court, it is not the high court and cannot be the high court contemplated under Part VI of the Law Reform Act. Consequently, in my view, the limitation period imposed on the high court under Section 9 of the Law Reform Act does not affect judicial review proceedings instituted under Section 13(7) of the Environment and Land Court Act.

40. I should add that, under Section 19(2) of the Environment & Land Court Act, the Environment & Land Court is bound by the procedure laid down by the Civil Procedure Act. By dint of this provision, the Civil Procedure Rules promulgated under the Civil Procedure Act apply to all proceedings in the Environment & Land Court.

41. The framework set out in Order 53 of the Civil Procedure Rules would apply to judicial review Proceedings in the Environment & Land Court. A party seeking enlargement of time within which to initiate judicial review proceedings may move the court under the provisions of Order 50 Rule 6 of the Civil Procedure Rules.

42. What is before court is not a judicial review application; it is a petition. Section 7 of the Limitation of Actions Act provides for a limitation period of 12 years for any action to recover land. Section 4(4) of the same Act provides for a similar period for any action brought upon a Judgment. Taking into account the foregoing, it is clear that the 12 year period started running from 2007 and 2009 respectively and the 12 year limitation period had not lapsed in 2015 when the Petition was filed. That ground of preliminary objection therefore has no merit. I accordingly reject it.

43. The third ground of objection is that this court lacks jurisdiction to grant an order of certiorari. This ground, in my view, has no legal basis because Section 13(7) expressly confers upon this court jurisdiction to make prerogative orders. For the avoidance of doubt, Section 13(7) provides as follows:-

“13(7)in the exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court may deem fit and just including- (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs”

An order of certiorari is a prerogative order. Consequently, I disallow that limb of objection and affirm that this court has jurisdiction to grant orders of certiorari.

44. The last limb of objection is that this Petition and the Chamber Summons herein are *res judicata*. In my view, this is a proper point of preliminary objection. It is an issue that can be determined and rejected or allowed purely on the basis of the law and the averments contained in the pleadings. I will therefore proceed to consider it.

45. Based on the background outlined in the preceding paragraphs of this Ruling, this ground of preliminary objection raises the following legal questions:-

(a) What is the legal status of determinations and awards made by the defunct district land disputes tribunals and adopted as judgments of the magistrate courts within the framework of the repealed Land Disputes Act?

(b) Should a party aggrieved by a determination, award or judgment made by a tribunal under the repealed Land Disputes Act commence and maintain fresh a declaratory Petition under the bill of rights as a mechanism for invalidating the award/determination/judgment?

(c) What forum is available for review of or appeal against determinations, awards and judgments made under the repealed Land Disputes Act?

46. The first question is answered by the legal discussion set out in the preceding paragraphs.

47. The second question was partly answered by the Court of Appeal in the case of **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others (2014) eKLR**. In this particular Appeal, a party who was aggrieved by a verdict of the Borabu Land Disputes Tribunal did not challenge the decision of the Tribunal in accordance with the procedure set out in the repealed Act. Neither were judicial review proceedings taken to quash the award. He instead chose to file suit for declaratory orders and compensation. The Court of Appeal entirely agreed with the trial Judge's decision to dismiss the suit. The Court of Appeal endorsed the following legal reasoning by Makhandia J (as he then was)

“The 1st defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed he was even advised by the SRM's court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate's court at Keroka and in particular the order adopting the award as a judgment of the court dated 23rd May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the court would have allowed the application unless it was satisfied that the respondent's counsel was duly served with the application and or a hearing notice and had failed to turn up.

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.”

48. I entirely agree with the reasoning of the Court of Appeal and Makhandia J (as he then was) that a declaratory suit is not a remedy available to a party aggrieved by a decision of the district land disputes tribunal (now repealed). In my view, to allow a fresh declaratory petition against a decision and valid Judgment made within the framework of the repealed Land Disputes Act would go against the spirit of finality in litigation and would offend public policy.

49. Section 16(A) of the Environment & Land Court Act contemplates the likeliness of appeals against decisions of tribunals and provides a clear framework for such appeals. Indeed, it provides a window for filing appeals out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

50. Secondly, in view of my finding to the effect that the limitation period of 6 months set out under Part VI of the Law Reform Act does not apply to the Environment and Land Court, an aggrieved party can, subject to the provisions of Order 50 Rule 6 of the Civil Procedure Rules, make a late application for judicial review of a decision of the defunct land dispute tribunal, provided that the decision has not been adopted as a judgment of the court. If the decision has been adopted as a judgment of the court, the remedy available to an aggrieved party is an appeal within the framework of Section 16A of the Environment and Land Court Act.

51. The upshot of this Ruling is that the Preliminary Objection by the 1st Respondent is upheld on the

ground that a fresh declaratory suit does not lie against a determination or judgment obtained within the framework of the repealed Land Disputes Act. The forum available for redress against a determination, award or judgment pronounced within the framework of the repealed Land Disputes Act is judicial review or appeal proceedings within the framework of the Environment and Land Court Act. I accordingly strike out this Petition. The 1st Respondent shall have costs of the Petition.

Dated, signed and delivered at Nairobi on 23rd day of March 2017.

.....

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Petitioner

.....Advocate for the Respondents

.....Court clerk