REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LAND COURT

ELC PETITION NO. 9 OF 2015

IN THE MATTER OF: AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

OR FREEDOMS UNDER ARTICLES 20(1), 21(1), 22(1), 10, 40, 47, 50 AND 64 OF THE

CONSTITUTION OF KENYA 2010;

IN THE MATTER OF: THE REGISTERED LAND ACT,

CAP 300, (repealed)

IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTION 3(1) OF THE LAND DISPUTES TRIBUNAL ACT

CAP 303A, (repealed);

IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012 AND THE LAND ACT, 2012

AND

IN THE MATTER OF: THE LAND TITLE TETU/KABAGE/438

BETWEEN

MOSES NDIRITU NJUGUNA..PETITIONER

-VERSUS-

THE TETU LAND DISPUTES TRIBUNAL................1ST RESPONDENT

THE CHIEF MAGISTRATES COURT, NYERI...........2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, NYERI.............3RD RESPONDENT

THE HONORABLE ATTORNEY GENERAL..............4TH RESPONDENT

AND

ANNA NYARUAI NJUGUNA...........................1ST INTERESTED PARTY

GRACE NYAGUTHIMA NJUGUNA................2ND INTERESTED PARTY

JUDGMENT

1. Moses Ndiritu Njuguna, hereinafter referred to as the petitioner, filed the instant petition alleging that his rights over the parcel of land known as **Tetu/Kabage/438** (hereinafter called the suit property) were violated or are threatened with violation by the respondents. In this regard, the petitioner, who is the registered proprietor of the suit property, explains that the suit property was subject of a dispute preferred by the interested parties herein to the 1st respondent, Tetu Land Disputes Tribunal.

2. Upon hearing the dispute preferred before it, the 1st respondent made an award in favour of the interested parties.

3. Aggrieved by the decision of the 1st respondent, the petitioner appealed to the Nyeri Provincial Land Disputes Appeals Committee (hereinafter referred to as the Appeals Committee). The Appeals Committee partially reversed the decision of the 1st respondent, in that it awarded to the interested parties 1 acre each from the suit property instead of the 2 acres each the 1st respondent had awarded the interested parties.

4. The petitioner contends that following the decision of the Appeals Committee, the interested parties unlawfully got the award adopted and an order issued for sub-division of the suit property and transfer of the portions awarded to the interested parties made. The petitioner further explains that his efforts to get the orders issued in favour of the interested parties set aside were in vain as his application for setting aside the orders was dismissed by the court which adopted the award of the Tribunal.

5. Arguing that he is the indefeasible owner of the suit property and terming the decision of the 1st and 2nd respondent illegal, the petitioner contends that his constitutional right to access to justice, fair hearing and right to property was infringed by the 1st respondent by acting *ultra vires* its statutory mandate.

6. The petitioner also faults the 2nd respondent for having adopted the award of the tribunal and ordering sub-division of the suit property and transfer of the portions awarded to the interested parties.

7. Contending that by adopting the award of the 1st respondent, the 2nd respondent violated/infringed his right to access to justice, right to have the dispute resolved by application of law and by independent and impartial tribunal and the right not to be arbitrarily deprived of property of any description, the petitioner explains that the petition is anchored on the provisions of **Articles 22, 23, 40, 47, 48** and **64** of the Constitution of Kenya, 2010.

8. The petition is supported by the affidavit of the petitioner sworn on **9th March, 2015** in which the following documents are annexed in support of the averments contained in the petition and the supporting affidavit;

i) A copy of the title deed issued to the petitioner showing that he is the registered proprietor of the suit property;

ii) A copy of the proceedings and ruling in Tetu District Tribunal Case No. Tetu/LDT/92002(8);

iii) A copy of the proceedings of the Appeals Tribunal;

iv) A copy of the application dated 1st November, 2012 in which the petitioner sought to set aside the order issued in favour of the interested parties;

v) A copy of a letter the petitioner's advocate wrote to the Resident Judge, Nyeri High Court

requesting for his intervention in delivery of the ruling in the application cited in (iv) above; and

vi) A copy of the letter the Resident Judge Nyeri High Court wrote in reply to the letter referred to in (v) above.

9. Maintaining that the conduct of the respondents and in particular the 1st respondent, infringed his constitutional rights, the petitioner urges the court to enter judgment in his favour and against the respondents for:-

a) A declaration that the hearing and determination of the Tetu Land Disputes Tribunal case number Tetu/LDT/9/2002(8) in relation to Tetu/Kabage/438 and in particular the finding and award dated the 31st October, 2002 is in breach of his right protected under **Articles 48** and **50(1)** of the Constitution of Kenya and those proceedings and finding be declared null and void *abinitio*;

b) A declaration that the Tetu Land Disputes Tribunal in case number Tetu/LDT/9/2002(8) in relation to Tetu/Kabage/438 acted *ultra vires* its statutory mandate in hearing and determining the complaint made by the interested parties and the decision arising there from and all other subsequent orders including the order issued on 6th February, 2015 be declared null and void *abnitio*;

c) A declaration that the petitioner is the absolute legal proprietor of Land reference number Tetu/Kabage/438 and a declaration that the order of sub-division of the petitioner's title to their parcel of land known as Tetu/Kabage/438 and awarding it to the interested party and the process leading thereto are unconstitutional and contravenes the petitioners fundamental rights and freedoms as recognized by the constitution of Kenya and therefore void, illegal, invalid and incapable of enforcement and or of no legal effect;

d) Consequently, an order prohibiting the respondents and interested parties whether by themselves, their officers, agents and/or servants or employees from further dealing, registering transferring and or interfering with the parcel of known as Tetu/Kabage/438 be made.

e) Such other orders as this court may deem just in the circumstances.

10. The petition is opposed through the grounds of opposition dated **24th March, 2015** filed on behalf of the 2nd and 3rd respondent, and the replying affidavit of **Moses Nderitu Njuguna** who describes himself as an administrator of the estate of the 1st interested party.

11. In the grounds of opposition, it is pointed out that the parties to the dispute herein have lived in the suit property peacefully both before and after issuance of the impugned orders and submitted that the balance of fairness and justice, tilts in favour of non-issuance of the orders sought. It is also contended that the application (read the petition) has been brought too late in the day.

12. In his replying affidavit, the 1st interested party, **Moses Nderitu Njuguna**, contends that no appeal was filed against the orders issued in C.M. Award No.55 of 2005; that the petitioner is unprocedurally trying to appeal the decision issued in favour of the interested parties and that it is unconstitutional for the applicant to challenge a court order or judgment or other decision of a lawful Tibunal by way of Constitutional reference.

13. Terming the petition bad in law, the 1st interested party contends that the petitioner wants to deny the interested parties their entitlement to the suit property by perpetual litigation.

14. The petition was disposed of by way of written submissions.

<u>Submissions by the petitioner</u>

15. In the submissions filed on behalf of the petitioner, the following issues are framed for the courts determination:-

1. Whether the 1st respondent acted within its mandate in ordering sub-division of the petitioner's title?

2. Whether the 2nd respondent was correct in adopting the 1st respondent's decision?

3. Whether the petition discloses any constitutional violations?

4. Whether it was proper for the applicant to bring this petition? and

5. Whether the remedies sought in the petition are available to the petitioner?

16. With regard to the 1st issue, reference is made to the provisions of **Section 3(1)** of the Land Disputes Tribunal Act, No.18 of 1990 (now repealed) and various decided cases and submitted that the rights of the petitioner to hold the suit property absolutely were infringed by the 1st respondent by ordering the sub-division of the title held by the petitioner when it had no power to do so.

17. On whether the 2nd respondent erred by adopting the decision of the 1st respondent reference is made to the decisions in the cases of **Republic v. Senior Resident Magistrate Gatundu Law Court & 3 others ex parte David Gitangu Chege (2013) eKLR** and **Republic v. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another HCMA No.689 of 2001 (2006) 1 E.A 318** cited with approval by **Odunga J.** in the case of **Republic vs. Senior resident Magistrate Gatundu Law Court** (*supra*) and submitted that the adoption of the decision of the 1st respondent was bad in law and as such a nullity.

18. In **Republic v. Senior Resident Magistrate Gatundu Law Court** (*supra*), **Odunga J.** based on the decision in the case of **Macfoy vs. United Africa Co. Ltd (1961)2 All ER 1169 at 1172** stated:-

> **"In my view if the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since a decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void. This is in line with the celebrated decision in Macfoy vs. United Africa Co. Ltd (1961) 2 All ER 1169 at 1172 to the effect that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad in law but incurably bad and there is no need for an order of the court to set it aside, though sometimes it is convenient to have the court declare it to be so. Where the court finds this to be so the actions taken in pursuance of actions taken in breach of a court order must therefore break down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse."**

The judge further observed:-

> **"…despite the irregularities, the court cannot countenance nullities under any guise since the High Court has supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has power to strike out nullities."**

19. On whether the petition discloses any violation of the petitioner's constitutional rights and freedoms, it is submitted that under Article 22 of the constitution of Kenya, 2010 any person who believes that his fundamental rights have been infringed or are likely to be infringed has a right to approach the court for issuance of appropriate reliefs. Referring to the averments contained in the petition under the heading legal foundations of the petition as read with the facts on the face of the petition, the petitioner maintains that the petition discloses breaches of his constitutional rights.

20. On the propriety or otherwise of the petition, reference is made to the respondents' contention that the petitioner is appealing the impugned decision of the 1st and 2nd respondent through the current proceedings and reiterated that the petitioner has demonstrated infringement of his constitutional rights. Based on the case of **Daniel Ochengo Oendo vs. David Okerio Ogechi & 3 others (2015) e KLR** it is submitted that all what the petitioner is required to do is to prove his rights were violated or were threatened with violation. In that regard, it is submitted that in the instant case, the petitioner has clearly demonstrated that his fundamental rights under **Article 40, 47** and **50(1)** have been violated.

21. On whether the petitioner is entitled to the remedies sought in the petition, reference is made to the decision in the case of **Jotham Amunavi vs. Chairman Sabatia Division Land Disputes Tribunal** and submitted that the petitioner has made up a case for being granted the orders sought.

Submissions by the respondents

22. On behalf of the respondents, it is submitted that no constitutional violations have been demonstrated to invoke the constitutional jurisdiction of this court. In this regard, it is reiterated that the petitioner is challenging a valid court order by way of constitutional reference instead of seeking remedy under the statute which provides the substantive law and procedure.

23. It is further submitted that enjoyment of fundamental rights and freedoms is not absolute (is subject to the rights of others and as such is exercised on the basis of proportionality and public interest).

24.Maintaining that the petition does not disclose a constitutional issue, counsel for the respondents submits that if the petitioner was aggrieved by the decision of the 1st respondent, he ought to have challenged it through the mechanism provided in statute; should have either appealed or applied to have it quashed.

25. Referring to the decision in the case of **Booth Irrigation v. Water Products Ltd …HCC Misc. Application No.1052 of 2004** where **Nyamu J.,** (as he then was) held:-

> **"… unchallenged court orders cannot be the basis of constitutional application"**

26. Counsel for the respondents has urged the court to stop the petitioner in his tracts.

27. On whether the petitioner's constitutional rights have been violated, it is submitted that the petitioner is vague in his allegations of constitutional violations (The petition is said to be lacking facts and demonstration as to how his rights were violated and by who).

Analysis and determination

28. The genesis of the dispute brought to this court is an award made by the 1st respondent. As pointed out herein above, the 1st respondent awarded the interested parties 2 acres each from the suit property, which is registered in the name of the petitioner. Although it is not clear from the evidence adduced in this petition, whether the petitioner appealed against the decision of the 1st respondent within the time stipulated in law, there is evidence that, the petitioner appealed to the Appeals Committee.

29. The Appeals Committee referred the dispute to elders who partially reversed the award of the 1st respondent by awarding the interested parties 1 acre each from the suit property.

30. The evidence on record shows that the petitioner participated in the proceedings before the 1st respondent and the Appeals Tribunal.

31. The proceedings at the Appeals Tribunal make it clear that the parties were notified of their right of appeal. There is no evidence that any of the parties to the dispute appealed against the Award. The evidence on record shows that, long after the award of the 1st respondent had been adopted as the

judgment of the lower court, the petitioners filed an application before the lower court seeking to have the judgment and decree entered in favour of the interested parties set aside. That application was dismissed by the lower court.

32. It is the refusal by the 2nd respondent to set aside the judgment entered in favour of the interested parties which prompted the petitioner to file the petition.

33. From the petition, it is clear that the petitioner was aggrieved by the decision of the 1st respondent of awarding the interested parties two acres out of the suit property, when the property was at the material time registered in his name. The petitioner faults the 2nd respondent for having entered judgment in favour of the interested parties in accordance with the award of the 1st respondent.

34. Whilst it may be true that the 1st respondent may not have had jurisdiction to hear and determine the dispute preferred before it, it is important, at the inception to point out that the 2nd respondent had a duty imposed by statute to adopt the award of the Tribunal as a judgment provided that it was satisfied that it was a regular award of the Tribunal.

35. It has been stated in many authorities that the lower court had no mandate to alter, amend, question or set aside the award of the tribunal. In this regard see the case of **Chege Macharia v. Francis Kimani Kirimira Nyeri Civil Appeal No. 20 of 2015** where the Court of Appeal Observed:-

> **"Once the tribunal heard a dispute and made a determination, that was the end of the matter on the merits and all that remained was adoption by the Magistrates' Court. That much is clear from a plain reading of Section 7(2) of the repealed Act. It has also been the subject of many judicial pronouncements to the effect that a magistrate is under a statutory compulsion to enter judgment in terms of the award once he receives it from the chairman of the tribunal. It not being open to him to alter, amend, question or set it aside, See, MUTEMI MWASYA –VS- MUTUA KASUVA MACHOKOS HC.C.A. 140 of 2001; CHRISPUS MICHI GAKU –VS- KARANJA WAINAINA [2006] e KLR and PETER OUMA MITAI –VS- JOHN NYARARA KISII HCCCA 297 of 2005. So long as the court was satisfied that an award was on the face of it issued by a proper Tribunal and not a nullity, it was under duty to adopt it."**

36. Also see **Peterson Nguchi Kaburi v. Joseph Thuku Kaburi Nyeri Civil Appeal No. 18 of 2015** where the Court of Appeal stated:-

> **"Musinga J, was of course right in expressing that view. It is also quite clear that he was referring to a valid award, made by a Tribunal properly constituted, regularly forwarded to a magistrates' court as a decision of that tribunal together with any depositions or documents that were taken or proved before such tribunal. Musinga J, cannot possibly have been referring to a pseudo award or anything not an award, that was purporting to be one. There are many other decisions of the High Court and the Court of Appeal which speak to a magistrates' limited role in simply adopting the award of a tribunal but they all deal with valid awards even where the correctness on the awards themselves may be questionable. But there has to be an award."**

37. The view of Musinga J. referred to by the Court of Appeal was:-

> **"The jurisdiction of the Land Disputes Tribunal is clearly set out in Section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, Section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal… The provisions of Section 7(2) of the Act are explicit as to what has to be done by the magistrate's court. That provision of the law does not leave any room for the magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by**

the said award they can either prefer an appeal to the Appeals Committee as provided under Section 8(1) of the Act or, if there are reasonable grounds of challenging the decision by way of judicial review application, proceed to institute such proceedings before the High Court and not otherwise."

38. A review of the evidence adduced in this case shows that the award presented to the 2nd respondent was a regular one. That being the case, it was not open for the 2nd respondent to review, alter, amend or set it aside. The duty of the 2nd respondent was to adopt it which it graciously did.

39. As was observed by **Musinga J.,** the recourse of any person aggrieved by the said award was to challenge the decision by either preferring an appeal to the Appeals Committee or if aggrieved by the decision of the Appeals Committee by preferring an appeal to the High Court, on a point of law, or if there exists reasonable grounds by challenging the decision by way of judicial review proceeding and not otherwise.

40. Whereas it is true that the wrong award may raise some issues touching on the petitioner's right to property, which is guaranteed under the constitution, it is *an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at* all. In this regard see the case of **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR** where it was stated:-

"In NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A. 250 (CC) the Court stated thus;

> ***"It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention."***

15. Similarly in Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost.755, Georges CJ held as follows;

> ***"It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22). The judge went on to add that:*** **"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."**
>
> **I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.**
>
> **The complaint in this case is not so serious as to attract Constitutional sanction."**

41. It has also been held, in numerous authorities, that where a statute establishes a dispute resolution procedure, then the procedure must strictly be followed in resolving the dispute. In this regard see **East Africa Pentecostal Churches Registered Trustees & 1754 others v Samwel Muguna Henry & 4 others [2015] eKLR; Francis Gitau Persimeri v. Alliance Party & 4 Others (2012)** eKLR *and*

Republic v Susan Kihika & 2 others Ex Parte George Mwaura Njenga [2014] eKLR .

42. **In Republic v Susan Kihika & 2 others Ex Parte George Mwaura Njenga** (supra) it was stated:-

> **"There is a wealth of decisions where the courts have been reluctant to invoke jurisdiction to assist a litigant who has chosen not to exhaust other available statutory procedures for the redress of grievances."**

In the case of **Susan Nyambura Wahome & 4 others v Central Province, Land Disputes Appeals' Committee & 2 others** (unreported); the Court of Appeal observed:-

> **"the problem the learned judge identified was the tribunal overstepped their jurisdiction when they ordered a sub-division of the suit premises and transfer thereto to the appellants….The learned judge's intention is clear, it was to nullify an order that was made in excess of jurisdiction as she posited in part of her ruling as follows:-**
>
> **"the fact that judgment has been entered in terms of the award cannot preclude this court from granting an order of prohibition to stop execution of the judgment whose very source was a nullity."**
>
> **In our considered view, this observation is not entirely correct in law because the order of prohibition that was issued did not solve the complex problem that was facing the court and the parties. Firstly, the tribunal was a creature of the law and both parties submitted themselves to its jurisdiction and it is the 4th respondent who appealed before the Provincial Land Disputes Committee. In other words he could have applied to quash the decision of the Land Disputes Tribunal instead of appealing. The issue we have to address is the fact that the tribunal is said to have exceeded its jurisdiction and went a step further to order sub-division of land. After considering the evidence and establishing that all parties were occupying the suit land the tribunal ordered the sub-division of the land among the appellants and 4th respondent. Perhaps if the tribunal merely declared that the appellants were in occupation of the suit land and stated the portions the portions they occupied without making definitive order of sub-division and transfer and leaving the parties to seek the orders of transfer in the High Court that would have been within the acceptable limits of the Act….Even if we were to consider this dispute within the principles of the overriding objectives in the administration of justice, which can be done because courts have shifted and they no longer worship at the altar of technicalities, we are afraid this is not one of them. This is a matter that touches on a principle of law regarding effects of remedies in judicial review and also touches on the fundamental rights to property by members of the same family who have occupied land through their mother in all their lifetime and now the suit land is registered in the name of one of them, the 4th respondent. It is the 4th respondent who pursued the wrong remedy after he lost a case for what would have been an appropriate remedy. Was he entitled to litigate in installments and after he lost the case for orders of certiorari, file another suit seeking the orders of prohibition?**
>
> **We think not…"**

43. As pointed out, in the instant case, the petitioner only filed this appeal after he lost his chance to lodge an appeal to the High Court as provided under the Land Disputes Tribunal Act. No reason whatsoever has been given for the petitioner's failure to use the procedure provided in the parent statute. The question to answer is whether the petitioner is justified in bringing the current proceeding after he failed to follow the procedure provided in law.

My answer to this question is "he is not". I say so because he was under a legal obligation to strictly exhaust all the available statutory procedures before resorting to other mechanisms. To allow the petitioner to be heard on the issues raised in this petition would, in my view, be tantamount to allowing the petitioner to circumvent the timelines for appealing provided in the parent statute. Such a move, might in my view open the court to a flood of cases, if every other person affected by a seemingly wrong application of the law were to be allowed to challenge the impugned decision by way of a constitutional

reference.

44. In view of the foregoing, I find the petition to be misconceived and dismiss it with costs to the respondents.

Dated, signed and delivered at Nyeri this 26th day of April, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Gesumba h/b Ms Masaka for 2nd, 3rd and 4th defendants

Moses Ndiritu Njuguna – petitioner

N/A by the 1st and 2nd interested parties

Court assistant - Lydia