



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

CONSTITUTIONAL PETITION NO. 7 OF 2014

IN THE MATTER OF ARTICLES 3,19,20,21,22,23,40 AND 159 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 1, 3,27, 28, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 (REPEALED)

AND

IN THE MATTER OF THE ENVIRONMENTAL AND LAND COURT ACT NO. 19 OF 2011

BETWEEN

MARY MUKHONJA.....1ST PETITIONER

JOSHUA MWACHI BURUDI.....2ND PETITIONER

VERSUS

JOSEPH KEDIMUK.....1ST RESPONDENT

THE CHIEF MAGISTRATE KITALE LAW COURTS....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

INTRODUCTION

1. The petitioners are joint registered owners of **LR. No. Kwanza/Kwanza Block 3/Luhya/270** measuring **1.580 hectares** (suitland). Between 9/3/2005 and 13/2/2006 the first respondent bought three (3) acres from **Maxwell Burudi**, husband to the first petitioner. It would appear from the documents annexed to the petitioners' petition that Maxwell Burudi's land was about 5 acres. It is not clear whether the land held by Maxwell Burudi had been registered as at the time he sold 3 acres to the first respondent. What is however clear is that the petitioners had themselves registered as owners of the suitland which is three acres by way of transfer after the first petitioner had purchased his 3 acres from the husband of the first petitioner.

2. After the first petitioner got herself registered as one of the owners of the suitland, she moved to Kwanza Land Disputes Tribunal where she filed a claim against the first respondent seeking to have him evicted from the suitland on grounds that he was a trespasser. The Tribunal heard the claim and found that indeed the first respondent had purchased three acres from the husband to the first petitioner. The first petitioner's claim was therefore dismissed. The first petitioner was aggrieved with the verdict of the Tribunal. She filed an appeal to the Provincial Appeals Committee in Nakuru. Before her appeal could be heard and disposed of the **Land Disputes Tribunal Act No. 18 of 1990** was repealed following the enactment of the **Environment and Land Court Act of 2011 (ELC Act)**. As a transitional measure before the courts under the ELC Act could be established, the Chief Justice issued a Gazette Notice dated **9/2/2012** which provided that all proceedings which were pending before the Provincial Appeals Committee as at the date of the enactment of ELC Act were to be moved to the nearest High Court for hearing and determination.

3. Though the Gazette Notice was silent on who was to initiate the movement of matters pending before the Provincial Appeals Committee, naturally, the appellant or any other party to the appeal was expected to initiate the movement of the files. In the instant case, the first petitioner did not bother to ask for her file which was lying at the Provincial Appeals Committee at Nakuru pursuant to the Gazette Notice of 9/2/2012 or even after the Environment and Land Court was duly established and judges posted to select stations.

4. The first respondent filed a notice of motion dated 6/3/2014 before the lower court seeking the surveyor to go and excise 3 acres from the suitland and give it to the first petitioner as per the decree of the court which was issued in **Kitale CMC Land Case No. 75 of 2008**. The trial magistrate who heard the application declined to grant the orders sought but she gave the first petitioner time to move the High Court for orders with respect to the first petitioners appeal pending before the Provincial Appeals Committee at Nakuru. The first petitioner was to move the court within 30 days.

5. Instead of the first petitioner moving to the High Court as rightly advised by the lower court, the first petitioner moved to the High Court where she filed the present petition on 19/9/2014. The petition was thereafter transferred to the Environment and Land Court on 16/5/2016. In the petition, the petitioners seek the following reliefs:-

a. **An order of prohibition to prohibit the second respondent from hearing and or entertaining applications made by the first respondent in execution of the decree issued on 9/4/2009 vesting three acres of LR. No. Kwanza/Kwanza Block 3/Luhya/270 on the first respondent.**

b. **An order of declaration to declare the proceedings before Kwanza Land Disputes Tribunal a nullity for being *ultra vires* their jurisdiction and for the nullification of the consequent decree issued by the second respondent.**

c. **An order of declaration to be issued to declare the proceedings before Kwanza Land Disputes Tribunal and the second respondent court a nullity for non compliance with the rules of natural justice and also for being unconstitutional.**

PETITIONER'S CASE

6. The petitioners contend that they were registered as joint owners to the suitland on 4/10/2006. That in or around 2008, the first petitioner started claiming 3 acres out of the suitland. The first petitioner moved to the Kwanza Land Disputes Tribunal where she filed a claim seeking to have the first petitioner declared a trespasser on the suitland. The Tribunal heard her claim and issued its verdict which verdict was adopted as judgment of the court vide **Kitale Chief Magistrate Court Land Case No. 75 of 2008**. The petitioners contend that a decree was extracted which decree gave the first respondent three acres of the suitland yet he was not a claimant in the proceedings or a party to the proceedings.

7. The first petitioner further contends that she filed an appeal against the decision of Kwanza Land Disputes Tribunal but that appeal has since been frustrated by operation of law in that the **Land Disputes Tribunal Act No.18 of 1990** has since been repealed. The first petitioner contends that she has been asking for her file to be transferred from the Provincial Appeals Committee in Nakuru in vain. The first petitioner therefore contends that the failure by the secretary to the Provincial Appeals Committee to forward her file to the Environment and Land Court has contravened Article 40 of the Constitution.

8. The petitioners also contend that the Kwanza Land Disputes Tribunal condemned the second petitioner unheard. That he was a joint owner of the suitland but he was not heard. That the Tribunal had no jurisdiction to entertain a matter touching on registered land. That the Tribunal made orders which were not prayed for. That the first respondent's claim is statute barred.

SECOND AND THIRD RESPONDENTS CASE

9. The second and third respondents have opposed the petitioners' petition based on grounds of opposition filed in court on 3/12/2014. The second and third respondents contend that this petition is an abuse of the process of the court in that it is a judicial review matter which is disguised as a constitutional petition. That there are no constitutional issues raised in this petition. That the first petitioner is guilty of laches for failure to ensure that her file before the Provincial Appeals Committee is brought to court for action and therefore the court cannot aid the indolent.

ANALYSIS

10. The petitioners were expected to cite the constitutional provisions which were violated and the nature of injury caused or likely to be caused. I have carefully gone through the petition and documents relied on by the petitioners. To appreciate whether there is any breach of any constitutional rights, the genesis of this petition has to be looked at. I have already given the background of this petition in this judgment and I need not repeat the same. What I need to determine is whether the petitioners allegations are true and if so if there is breach of any constitutional provisions.

11. In the body of the petition, the first petitioner who appears to be the main actor claims that she has made several attempts to have her file lying at the Provincial Appeals Committee at Nakuru in vain. There is absolutely no document or single letter annexed to the petition to show that she has called for the file. The petitioners were aware that the Land Disputes Tribunal Act had been repealed and what was supposed to happen with regard to the pending matters. The petitioners never made any efforts to have the file brought to the High Court or Environment and Land Court for action. The petitioners were prompted to act after the first respondent moved to execute the decree in **Land Case No. 75 of 2008**.

12. The petitioners have not indicated in what manner their constitutional rights have been violated. It is the first petitioner who moved the Kwanza Land Disputes Tribunal to declare the first respondent as a trespasser on the suitland. When the Tribunal listened to the claim by the first petitioner, the Tribunal found that the first respondent was not a trespasser as he had bought 3 acres from the husband of the first petitioner. The first petitioner moved to the Tribunal after she ensured that the land in issue had been transferred from her husband's name into her own name and that of the second petitioner.

13. The first respondent had purchased the land before the same was registered in the name of the petitioners. From the Tribunal ruling, it is clear that the first petitioner and her husband were conspiring to deny the first respondent from enjoying the land he had bought. The first petitioner was a witness to

the agreement for sale. She later turned around and had the three acres registered in her name and that of the second petitioner before she tried to eject the first respondent. She was the initiator of the claim and her claim was based on trespass which the Tribunal had jurisdiction to entertain. The issue of the land being registered does therefore not arise. When the first petitioner preferred an appeal, it was incumbent upon her to ensure that it is heard to finalization. She cannot claim that any of her rights have been violated. Article 40 of the Constitution deals with protection to right to property. The petitioners have not shown how their right under Article 40 has or is likely to be violated. Contrary to their allegations, it is the first respondent's right to acquire property which is likely or is about to be violated by the machinations of the petitioners.

14. The first petitioner was given 30 days by the lower court to make sure that she moves the High Court with respect to her pending appeal before the Provincial Appeals Committee. Instead of even making an application before the court to have the file brought for hearing and disposal, she went and filed a constitutional petition which raises no constitutional issues. The petition seeks to attack the Tribunal verdict which has nothing to do with breach of any constitutional provisions. She was the one who filed the claim before the Tribunal. The Tribunal heard her and respondents who included her husband who had sold the three acres to the first respondent. When she was dissatisfied with the Tribunal verdict, she filed an appeal which appeal she is not keen to prosecute. She cannot therefore turn round and claim that she was not given a fair hearing as envisaged in Article 50 of the Constitutional or that she was not subjected to fair administrative action under Article 47 of the Constitution.

15. The first petitioner has clearly stated in the petition that the second petitioner was only brought in this petition because he is a joint owner of the suit property. When the first petitioner chose to file a claim against the first respondent and her husband, she did not find it necessary to enjoin him. She cannot therefore be heard to claim that the second petitioner was condemned unheard. The claim before the Tribunal was one seeking to declare the first respondent a trespasser. It was not a claim for ownership of land. There is therefore no basis for the second petitioner to claim that he was not heard.

DECISION

16. The petition is devoid of any constitutional issues. It is just an abuse of the process of court which is aimed at evicting the first respondent from land he lawfully acquired. I proceed to dismiss the same with costs to the respondents.

Dated, signed and delivered at Kitale on this **18th** day of **August, 2016**.

E. OBAGA

JUDGE

In the presence of Mr. Barongo for Mr. Murgor for Petitioners. Court Assistant – Isabellah.

E. OBAGA

JUDGE

18/8/2016