



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 22 OF 2014

**IN THE MATTER OF ARTICLE 20 (2), 21 (1) AND (2), 23 (1), 40 (2) AND 165 OF THE
CONSTITUTION, 2010**

AND

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PROPERTY RIGHTS
OF THE PETITIONER**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF LR NO. NYARIBARI CHACHE/B/B/BOBURIA/6939

AND

IN THE MATTER OF KIOGORO LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF KISII CMCC LAND DISPUTES TRIBUNAL CASE NO. 77 OF 2011

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

MARY KERUBO OGOTI PETITIONER/APPLICANT

AND

THE CHIEF MAGISTRATE'S COURT, KISII LAW COURTS. 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, KISII DISTRICT 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

STEPHEN KINARA OGORI 4TH RESPONDENT

MARISERA MORAA OGORI 5TH RESPONDENT

TERESA BITUTU ONDERI 6TH RESPONDENT

JUDGMENT

1. The petitioner, Mary Kerubo Ogoti, has brought the instant petition claiming there has been a violation and/or infringement on her property rights. The petitioner avers that her property rights over land parcel **Nyaribari Chache/B/B/Boburia/6939** in regard to which she was the registered owner have been violated and infringed. The petitioner avers that the Kiogoro Land Disputes Tribunal on or about 7th October 2010 at the instance of the 4th and 5th respondents admitted a dispute relating to the suit property and proceeded to hear and determine the dispute culminating in their ordering the revocation and/or cancellation of the petitioner's title to the suit property. The decision of the Kiogoro Land Disputes Tribunal was subsequently adopted as a judgment and a decree issued in Kisii CMCC Land Disputes Tribunal Case No. 77 of 2011. The decree was executed leading to the revocation and cancellation of the petitioner's title to the suit land and the same being instead transferred and registered in the name of the 6th respondent.

2. The petitioner contends the Kiogoro Land Disputes Tribunal had no jurisdiction to deal with the issue of title to the suit land then registered in the name of the petitioner and their decision/determination was therefore a nullity for want of jurisdiction. The petitioner further contends that the Chief Magistrates' Court equally had no jurisdiction to give effect to a decision of the Tribunal which was a nullity. The petitioner consequently avers that the actions of the Land Disputes Tribunal and the Chief Magistrates Court amounted to a violation and infringement of the petitioner's Constitutional and Fundamental Rights and inter alia cites the following particulars of violation and infringement:

- (a) Entertaining and/or adjudicating upon proceedings without jurisdiction.**
- (b) Exceeding and/or abusing the authority conferred under the provisions of the law.**
- (c) Rendering a determination contrary to and in violation of the doctrine of natural justice.**
- (d) Adoption of a decision that was patently illegal and void.**
- (e) Violating the petitioner's fundamental and constitutional rights.**
- (f) Denying and/or depriving the petitioner of her protection under the Constitution, 2010.**
- (g) Defrauding the petitioner of her ownership rights over the suit property.**
- (h) Divesting the petitioner of titles over the suit property without regard to the due process of the law.**

3. The petitioner contends that the actions of the respondents infringed upon and/or have deprived the petitioner of her interests over the suit property contrary to the provisions of Articles 21 (1), 21(2), 40(2) and 50 of the Constitution 2010. Accordingly, the petitioner inter alia prays for the following reliefs:-

- (i) Declaration that the complaint proceedings and the attendant award of the Land Disputes Tribunal, Kiogoro Division, which was subsequently adopted and ratified by the 1st respondent vide Kisii CMCC Land Dispute Tribunal Case No. 77 of 2011 and the resultant decree were illegal, null and void for want of jurisdiction.**
- (ii) Declaration that the process of enforcement, execution and implementation of the decree arising from Kisii CMCC Land Disputes Tribunal Case No. 77 of 2011 culminating into the revocation of the petitioner's titles over the suit property was void.**

(iii) Declaration that the transfer and registration of the title in respect of LR No. Nyaribari Chache/B/B/Boburia/6939 in favour of the 6th respondent was anchored on an illegal and void process and hence ought to be nullified.

(iv) An order for cancellation of the title in favour of the 6th respondent and rectification of the register in respect of title LR No. Nyaribari Chache/B/B/Boburia/6939 and restoration of the name of the Petitioner as the bonafide and legitimate owner thereof.

(v) An order of eviction against the 6th respondent by herself, agents and/or servants from LR No. Nyaribari Chache/B/B/Boburia/6939.

(vi) An order of permanent injunction against the 4th, 5th and 6th respondents restraining them from in any manner interfering with the suit property.

(vii) Damages.

(viii) Costs of the petition.

4. Simultaneously with the petition the petitioner filed under a certificate of urgency a Notice of Motion seeking an order of inhibition barring the registration of any transactions against the title of the suit property and further sought a conservatory order to preserve the property until the petition was heard and determined. The court granted an interim order of inhibition on the application at the ex parte stage and when the application came up for interprets hearing on 29th October 2014 the court by the consent of the 4th, 5th and 6th respondents granted the order of inhibition of the title to the suit property in the following terms:

“That there be and is granted an inhibition over and in respect of LR No. Nyaribari Chache/B/B/Boburia/6939 and in particular to maintain the current registration status thereof to last pending the hearing and determination of the instant petition.”

5. The 4th, 5th and 6th respondents filed a joint answer to the petition dated 14th July 2014. The respondents state that the suit property was originally registered in the names of Alexina Bosibori Kinara (deceased) and that the petitioner caused the land to be transferred to her without the necessary succession proceedings being undertaken. The 4th and 5th respondents claim they were entitled to a portion of the suit property as heirs of Alexina Bosibori Kinara who was the 4th respondent’s grandmother and mother in law of the 5th respondent but the petitioner fraudulently caused the whole parcel of land **LR No. Nyaribari Chache/B/B/Boburia/6939** to be transferred to her name with the object of disinheriting them. The 6th respondent avers that she purchased a portion of the suit property from the 4th respondent from the portion he was entitled to inherit from his said grandmother.

6. The 4th, 5th and 6th respondents contend that the petitioner’s title was nullified following the decision of Kiogoro Land Disputes Tribunal which was subsequently adopted in Kisii CMCC Misc. App. No. 77 of 2011 and implemented resulting in the cancellation of the title then registered in the petitioner’s name. the 4th, 5th and 6th respondents further state that the petitioner’s Judicial Review application vide ELC Misc. Civil Application No. 87 of 2011 (JR) was struck out effectively leaving the status quo as was; that the petitioner’s title was cancelled and the suit property registered in the 6th respondent’s name. The respondents denied that there was any violation and/or any infringement of the petitioner’s rights. The 4th, 5th and 6th respondents further averred that the instant petition is res judicata as the same issues as were raised in the judicial review and were adjudicated and are the very same issues being raised in the instant petition.

7. The parties on 8th June 2016 agreed to argue the petition by way of written submissions. The petitioners submissions dated 4th August 2016 were filed on 8th August 2016. The 4th, 5th and 6th

respondents submissions dated 5th September 2016 were filed on the same date. The 1st, 2nd and 3rd respondents did not file any response to the Judicial Review and neither did they file any submissions.

8. The petition raises two pertinent issues. Firstly, whether Kiogoro Land Disputes Tribunal had the jurisdiction to entertain the proceedings that they did that determined that the petitioner's title to **LR No. Nyaribari Chache/B/B/Boburia/6939** be revoked. Secondly, whether the revocation of the petitioner's title was lawful and/or legitimate.

9. There is no denial that the petitioner was registered as the owner of the suit property before the 4th and 5th respondents' commenced proceedings before the Kiogoro Land Disputes Tribunal vide LDC No. 4 of 2010. The petitioner submits that the petitioner had gotten registered as owner of the suit property by way of transfer through transmission and having been so registered she became the absolute owner with all the ownership rights conferred and/or vested under Sections 27 and 28 of the **Registered Land Act, Cap 300 Laws of Kenya** (now repealed) and replaced by Sections 24, 25 and 26 of the **Land Registration Act, No. 3 of 2012**. The petitioner submits that the Land Disputes Tribunal lacked the jurisdiction to deal with issues relating to registered land and specifically did not have jurisdiction to deal with matters touching on title to registered land.

10. Section 3 (1) of the repealed **Land Disputes Tribunal Act No. 18 of 1990** made provision for the jurisdiction of the Tribunals established under the Act:-

3(1) Subject to this Act, all cases of a civil nature involving a dispute as to:-

(a) The division of or the determination of boundaries to land, including land held in common;

(b) A claim to occupy or work land; or

(c) Trespass to land;

Shall be heard and determined by a tribunal established under section 4.

11. The Kiogoro Land Disputes Tribunal that heard the matter clearly had no jurisdiction since the dispute before it was beyond the scope of Section 3 (1) of the Act. The dispute touched on and concerned issues relating to determination of ownership/title to the subject land. In the Judicial Review application filed by the petitioner seeking to quash the decision of the Tribunal and the Chief Magistrate's adoption of the Tribunal's decision as judgment Hon. Justice Okong'o struck out the judicial review application on a technicality in that the same was filed without the requisite leave as required under Order 53 Rule 1 (1) of the Civil Procedure Rules. The learned judge nonetheless held the Kiogoro Land Disputes Tribunal lacked the jurisdiction to deal with the matter before it. In his judgment delivered on 6th June 2014 he stated thus:

"...For the completeness of this judgment however, I would wish to state that the 1st respondent (Kiogoro Land Disputes Tribunal) acted without jurisdiction in entertaining the interested parties (the 4th and 5th respondents herein) complaint against the applicant (the petitioner herein, Section 3 (1) of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) sets out the disputes over which the tribunal like the 1st respondent had jurisdiction as follows:-

"...all cases of civil nature involving a dispute as to;

(a) The division of, or the determination of boundaries to land, including land held in common;

(b) A claim to occupy or work land; or

(c) Trespass to land.”

The interested party’s complaint against the applicant concerned ownership and/or title to the suit land. The 1st respondent made a declaration that the suit land belongs to the interested parties and ordered the applicants title to be cancelled and the suit property transferred to the interested parties. The 1st respondent lacked jurisdiction to determine the dispute between the parties and to make an order cancelling the applicant’s title. The suit property was registered under the Registered Land act, Cap 300 Laws of Kenya (RLA) (now repealed). Under the Registered Land Act, only the High Court has jurisdiction under Section 143 (1) thereof to cancel a title issued under the Act. The proceedings of the 1st respondent were therefore conducted without jurisdiction. The 1st respondent’s decision was similarly rendered without jurisdiction and as rightly submitted by the applicant’s advocate was null and void for all intents and purposes.”

12. This paragraph in Hon. Justice Okong’o’s judgment in the judicial review application correctly sums up the legal position in regard to the jurisdiction of the Land Disputes Tribunals, established under the **Land Disputes Tribunals Act No. 18 of 1990** as pertains disputes regarding ownership and/or title to land. Simply the tribunals lacked jurisdiction to deal with such matters. The Kiogoro Land Disputes Tribunal in the premises made a decision on a matter that it had no jurisdiction to deal with and consequently such decision or determination was a nullity. There was in consequence no decision that the 1st respondent could lawfully adopt as a judgment. The 1st respondent could not as it were validate that which was a nullity or an illegality. It is true that the 1st respondent was mandated to adopt decisions emanating from Land Disputes tribunals under Section 7 of the **Land Disputes Tribunal Act** but what was contemplated was that such decisions would be valid and in accordance with the Act. If the decisions were made without jurisdiction, they could not be cleansed by the 1st respondent simply by receiving and adopting them. If the decision was made without jurisdiction, it is in essence not a decision to be accorded the force of law. It therefore follows the instant petition cannot be *res judicata* as the Judicial Review application was never heard substantively but dismissed on a technicality by the court.

13. In a recent judgment delivered by this court on 29th July 2016 in the case of **Joseph Oginga Onyoni & 2 Others –vs- Hon. Attorney General & 2 Others [2016] eKLR**, I considered the fate of a decision made by Nyamarambe Land Disputes Tribunal without jurisdiction and its decision adopted by the Ogembo Magistrate’s court and in the case while approving the decision by my brother **Okong’o, J.** in the case of **Republic –vs- Chairman Borabu Land Disputes Tribunal & 2 Others ex parte Florence Machani [2014] eKLR** where he observed thus:

“...I am of the view that section 7 of the Land Disputes Tribunal Act pursuant to which the decision of the 1st respondent was lodged with the 2nd respondent for adoption envisaged a lawful decision by the 1st respondent. Since the decision of the 1st respondent was a nullity for want of jurisdiction there was nothing on the basis of which the 2nd respondent could enter judgment and issue a decree.”

I added my voice and stated thus:

“A similar scenario as the one the learned judge dealt with obtains in the present matter and I would state that the observation as set out by the judge would apply with equal force to the facts and circumstances of the present case. The 2nd respondent acted without jurisdiction and hence the magistrate’s court could not properly endorse and enter judgment in respect of an award that was null and void. There was no valid award that the magistrate’s court could have given effect to. The award by the tribunal was a nullity and so was the enforcement of the same as judgment and decree of the court.”

14. In the case before me a similar situation is replicated, the 1st respondent endorsed and adopted the decision of Kiogoro Land Disputes Tribunal which without doubt was made without jurisdiction and

therefore a nullity. There was nothing for the 1st respondent to adopt as judgment and the 1st respondent acted in futility. The petitioner suffered the consequence of the implementation of a decision that was null and void for want of jurisdiction and has come before this court for redress. Following the implementation of the null and void decision of the tribunal the petitioner's title in respect of **Nyaribari Chache/B/B/Boburia/6939** was cancelled and is now registered in the name of the 6th respondent. The petitioner contends that she has been deprived of her property without due process of the law as envisaged under the Constitution. This court exercises supervisory authority over subordinate courts and all tribunals and will intervene where it is shown and demonstrated that such courts and/or tribunals have acted in excess of their jurisdiction. I am persuaded that this is such a case. The court will not allow an illegality to be perpetrated and will in appropriate cases step in to remedy the situation.

15. The 4th, 5th and 6th respondents have contended that the petitioner had gotten registered as the owner of the suit property without appropriate succession proceedings being undertaken from Alexina Bosibori Kinara (deceased) who was the original registered owner. The respondents argue that the petitioner did not comply with the Law of Succession Act, Cap 160 Laws of Kenya and contend that the petitioner did not have the locus standi to commence any legal proceedings.

16. In these proceedings the issue was not whether or not the petitioner had obtained grant of letters of administration to the estate of Alexina Bosibori Kinara (deceased) before he got registered as owner of the suit property but rather the issue is whether due legal process was followed to have the title which was registered in her name revoked and/or cancelled. Suffice to note that the tribunal could not itself have jurisdiction to deal with a matter relating to succession. The respondents in their responses to the petition claim that the petitioner had gotten registered as owner of the suit land fraudulently without going through succession. This assertion goes to point to the fact that the tribunal lacked jurisdiction as it could not deal with issues relating to fraud and/or whether the petitioner had properly acquired her title. These were issues which were the preserve of the High Court as it was the High Court then which had the power and jurisdiction to inquire into the validity of the title that the petitioner held.

17. As I have come to the conclusion and holding that the Kiogoro Land Disputes Tribunal lacked the jurisdiction to deal with the matter of title relating to the registration of the petitioner as owner of land parcel No. **Nyaribari Chache/B/B/Boburia/6939** its decision recommending the revocation and/or cancellation of the title was null and void and equally the adoption of the decision by the 1st respondent as judgment of the court and issue of the decree was a nullity and of no effect. In the case of **Macfoy –vs– United Africa Co. Ltd [1961] 3ALL ER 1169 at page 1172**, Lord Denning succinctly stated thus:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

That statement holds true to the circumstances and facts of this case. The tribunal proceeded to deal with the matter without jurisdiction and its proceedings were hence null and void. The magistrate's court purported to adopt the null and void proceedings/decision. The magistrate's adoption of the tribunal's decision was incurably bad and hence also null and void. In the words of Lord Denning **“You cannot put something on nothing and expect it to stay there. It will collapse.”**

18. The petitioner's title to the suit property was unlawfully and illegally cancelled without due process being followed and to that extent her constitutional rights were infringed. The process before the Kiogoro Land Disputes Tribunal was a nullity and so was the adoption of its decision by the court in Kisii CMCC Land Dispute Tribunal Case No. 77 of 2011. The execution of the consequent decree leading to the cancellation of the petitioner's title and the registration of the 6th respondent as the owner was therefore a nullity. The 4th, 5th and 6th respondents assert that the petitioner acquired the title to the suit land fraudulently but with respect that is not a claim that can be determined in this petition. The petition as I have observed is merely challenging the process through which the petitioner's title was cancelled.

Whether or not the petitioner had acquired the title lawfully could be the subject of separate proceedings. In this petition the court cannot investigate whether there was fraud as alleged by the respondents as that would require specific particulars of fraud to have been pleaded and proved and that can only be by way of oral evidence in a trial.

19. In the premises I find the petition meritorious to the extent that the petitioner's title to **LR Nyaribari Chache/B/B/Boburia/6939** was unlawfully cancelled through a process that was null and void. I accordingly grant the petition in the following terms:-

(a) That the petitioner's constitutional right to due process of law was infringed.

(b) That the complaint and proceedings before the Kiogoro Land Disputes Tribunal relating to land title LR No. Nyaribari Chache/B/B/Boburia/ 6939 was a nullity for want of jurisdiction.

(c) That the adoption by Kisii Magistrate's Court in Kisii CMCC Land Disputes Case No. 77 of 2011 of the decision of Kiogoro Land Disputes Tribunal as judgment of the court and issue of decree thereof was null and void.

(d) The transfer and registration of title in respect of title number LR No. Nyaribari Chache/B/B/Boburia/6939 in favour of the 6th respondent was predicated on the illegal and null process before the tribunal and magistrate's court and is therefore a nullity.

(e) An order is hereby issued that the Land Registrar do hereby cancel the title deed of title No. Nyaribari Chache/B/B/Boburia/6939 registered in the name of Teresia Bitutu Onderi and restore the name of Mary Kerubo Ogoti to the register in respect of the parcel of land.

(f) Each party shall bear their own costs of the petition.

Judgment dated, signed and delivered at Kisii this 16th day of December, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ochoki for Ochwangi for the Petitioner

Mr. Abobo for Sagwe for the 4th, 5th and 6th Respondents

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE