



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

Elc Constitutional Petition No. 4 Of 2014

(Formerly Nyeri HCCC NO. 4 OF 2010)

IN THE MATTER OF SECTION 84(1) OF
THE CONSTITUTION OF KENYA (REPEALED)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER
SECTIONS 75(1) AND 82(2) OF THE REPEALED CONSTITUTION OF KENYA

NOW ARTICLE 40(2) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

GEOFFREY MWANGI WACHIRA PETITIONER

AND

JOSEPH MWANGI IRUNGU RESPONDENT

(SUBSTITUTED BY SUSAN WAMUYU MWANGI)

PETITION FOR PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
INDIVIDUAL

IN HIGH COURT CIVIL CASE NO.2 OF 1990

BETWEEN

JOSEPH MWANGI IRUNGU PLAINTIFF/RESPONDENT

(SUBSTITUTED BY SUSAN WAMUYU MWANGI)

AND

GEOFFREY MWANGI WACHIRA ... DEFENDANT/APPLICANT

JUDGMENT

1. The petitioner herein, **Geoffrey Mwangi Wachira**, instituted the current petition against the respondent (**Susan Wamuyu Mwangi**) seeking the following orders:-

a) That the Parcel of land Known as Iriaini/Gatundu/119 allegedly forcefully taken from him by the respondent be reinstated to him;

b) That the Costs of HCCC No. 2 of 1990 and the current petition be provided for;

c) Such other orders as this court may deem just to grant.

2. It is the petitioner's case that the Parcel of land Known as Iriaini/Gatundu/119 (hereinafter the suit property) was compulsorily taken from him by the respondent and his advocate by instituting Nyeri HCCC No. 2 of 1990 where they alleged that he had fraudulently obtained title to the suit property. The petitioner contends that despite the respondent having failed to prove fraud against him, the Land Disputes Tribunal to which the dispute had been referred for arbitration, ruled in her favour (in favour of the respondent). Further that in reaching its decision, the tribunal relied on documents which purported to have been signed by him yet they were forgeries.

3. The petitioner admits that he agreed to have the matter referred to arbitration but contends that he did not consent to violation of his Constitutional rights under **Section 75(1)** and **82(2)** of the former Constitution of Kenya.

4. In the affidavit the petitioner swore in support of the petition, the petitioner maintains that his Constitutional rights were violated in the arbitration proceedings. In that regard, the petitioner has given a detailed account of how he gained rights to the suit property and how he lost them to the respondent. He contends that the award of the tribunal that was subsequently adopted as an order of this court (read High Court) was arrived at through an unconstitutional process. The petitioner, who does not disclose what made the award unconstitutional, contends that his advocate and the respondent's advocate conspired against him and ensured the documents in support of his case were not produced before the Tribunal. He accuses his advocate and the advocate for respondent of frustrating his bid to appeal against the decree of this Court issued in favour of the respondent pursuant to the impugned award.

5. The petitioner further contends that the respondent had no documents to prove entitlement to the suit property and that the Court order used to evict him from the suit property was forged.

6. Maintaining that the respondent is not entitled to the suit property, the petitioner deposes that the respondent intends to dispose of the suit property, which action will greatly prejudice him and his family.

7. The genesis of the Petitioner's woes can be traced to Nyeri HCCC No. 2 of 1990; **Joseph Mwangi Irungu (substituted by Susan Wamuyu Mwangi) v. Geoffrey Mwangi Wachira**. In that suit, the Respondent, through her husband **Joseph Mwangi Irungu** (now deceased) sought judgment against the Petitioner for the following orders:-

i. *That the purported correction of name by the Defendant (the Petitioner in this Petition) which in effect acted as a transfer of the parcel of land known as Iriaini/Gatundu/119 from the Plaintiff to the defendant was and is still illegal.*

ii. *That the purported correction of name being illegal from the beginning and having been a transaction of an Agricultural land without Land Control Board consent is null and void.*

iii. *That the defendant do transfer this parcel of land from himself to the plaintiff who is the rightful owner.*

iv. *That the defendant do pay costs of this suit.*

v. *That the Honourable court may be pleased to grant the plaintiff any better relief it may deem fit to grant.*

8. On 3rd December, 1990 the parties to Nyeri HCCC No.2 of 1990 entered into consent that:-

“By consent all matters in dispute are hereby referred to arbitration under the Chairmanship of the D.O Mathira. Each party to nominate two elders to make four who shall assist the D.O to deliberate over all the disputed areas. Award to be filed within 150 days.”

9. The award of the tribunal was read to the parties on 21st April, 1992 and parties allowed to lodge any objections thereto within thirty (30) days.

10. As advised by the court, the petitioner applied to have the award set aside on the ground that no fraud had been established against him. The application to set the award aside was objected to by Mr. Wachira for the plaintiff, who submitted that the suit property was transferred to the petitioner wrongfully.

11. In the ruling of the court delivered on 3rd December, 1992 the judge observed:-

“I have carefully considered the arbitration proceedings as well as the pleadings and the affidavits and the submissions tendered in this application. The decision reached by the panel is that of the majority and is based on evidence tendered before it.

There is no doubt whatsoever that the defendant fraudulently and with intent to deprive the plaintiff of the suit property land purportedly corrected his name and effected a transfer in his favour and indeed surreptitiously without due regard to law. That was illegal and of no effect. (Emphasis supplied).

The award is valid in all respects and there is no proof of misconduct. Further, there are no further grounds to justify setting it aside.

The application is dismissed with costs.”

12. Those are the circumstances under which the Petitioner lost his alleged right to the suit property. The record before me shows that the petitioner unsuccessfully tried to appeal against that decision of the Court. The fate of the petitioner's bid to appeal against the above decision of the court declaring the impugned award valid was spelt by the Court of Appeal vide a ruling delivered on 14th May, 2010. In that ruling, the Court of appeal dismissed the Petitioner's application for extension of time within which he ought to have appealed against the decision of the Court refusing to set aside the award herein. In dismissing the Petitioner's application the judge stated:-

“The appellant it would appear, filed a notice of appeal against the decision of the judge which dismissed his application to set aside the award. But he filed no appeal and in the course of events, the High Court entered judgment in terms of the elders' award. The deceased Joseph Mwangi Irungu whose place has now been taken by his widow, Susan Wamuyu Mwangi, Sought the eviction of the Applicant from the disputed land. To forestall the inevitable eviction, the applicant reached some consent with the decree holder and the purpose of the consent was to give him time within which he was to vacate the land. That time came and passed. The applicant still stayed put on the land. When he was to be evicted it appears the applicant then challenged the consent order which had given him some breathing space. Juma J., who heard the challenge, dismissed it and the applicant filed Civil appeal No. 123 of 2003 to which I have already referred. That appeal inevitably failed and as I have said was dismissed by the court on 12th June, 2009. On 13th July, 2009, one month after the dismissal of his appeal, the applicant was back in the court, this time around seeking leave to be allowed to appeal against the decision of Tunoi J., which had dismissed his application to set aside the elders award. He had filed a notice of appeal against the decision made by Tunoi J., but abandoned that notice. He now comes to me some eighteen years later to extend for him time within which to lodge a notice of appeal and a record of appeal.....I appreciate that the applicant is a lay person and is trying to do his best to get back land which he probably believes belongs to him. But even lay men must be able to understand and appreciate that they have come to the end of the road. Litigation whether conducted by laymen or otherwise, must at some stage come to an end

and it is my duty to tell this applicant that he must accept that he has lost the land and cannot be allowed to once again revive the litigation....”

13. Barely 6 days after the court of appeal dismissed the petitioner’s application for extension of time within which he ought to have filed an appeal against the decision of **Tunoi J.**, which had dismissed his application to set aside the elders award, the petitioner filed this petition alleging breach of his constitutional rights under **Sections 75(1)** and **84(1)** of the former Constitution.

Analysis and determination

14. From the above survey of the circumstances leading to lose of the petitioner’s interest to the suit property to the respondent, there is no doubt that the petitioner lost his interest to the suit property through a process sanctioned by law. There is evidence that he was accorded opportunity to challenge the process but failed to succeed in impugning the process. The sole question that arises then is, whether the petitioner can be heard to claim that his constitutional rights to ownership of the suit property were violated.

15. My answer to the above question is negative. The petitioner must be told, in no uncertain terms, that whereas the Constitution protects rights of individuals to own property, that protection does not extend to properties that have been found to have been illegally obtained. In this regard see **Article 40(6)** which provides as follows:-

“40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

16. There being evidence that the Petitioner’s claim to the suit property was found by a competent court to have been unlawfully acquired, I find the petition herein to be unmaintainable. Noting that the Petitioner was advised by the Court of Appeal on the fate of his interest to the suit property but chose to ignore that advice, I find this petition to be an abuse of the court process and dismiss it with costs to the respondent.

Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 23rd day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Geoffrey Mwangi Wachira – Petitioner

Susan Wamuyu Mwangi – respondent

Court assistant - Lydia