



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**PETITION NO. 6 OF 2011**

**IN THE MATTER OF:       ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF:       ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLE 40,  
47, 48 AND 64 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF:       FURTHER CONTRAVENTION OF SECTION 3(1)  
(4) AND (8) OF THE LAND DISPUTES TRIBUNAL  
ACT MP/18 OF 1990**

**AND**

**IN THE MATTER OF:       CONSTITUTION OF KENYA (SUPERVISORY  
JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE  
INDIVIDUAL) HIGH COURT PRACTICE AND  
PROCEDURE RULES, 2006**

**BETWEEN**

**FAUZIA TARIQ ZUBEDI.....PETITIONER**

**=VERSUS=**

- 1. ATHMAN HASSAN AWADH**
- 2. KILIFI LAND DISPUTES TRIBUNAL**

### 3. THE SENIOR RESIDENT MAGISTRATE KILIFI

#### 4. THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

### J U D G M E N T

#### **Introduction**

1. The Petition before me was filed on 27<sup>th</sup> May 2011. In the Petition, the Petitioner has alleged that he is the registered owner of all that parcel of land known as subdivision no. 517 (original No. 489/3) Section IV Mainland North CR. NO. 25075/3 situated in Kilifi (the suit property).
2. The Petitioner is claiming several reliefs, the main one being a declaration that the suit property belongs to him to the exclusion of all other persons and specifically the 1<sup>st</sup> Respondent. The Petitioner is also seeking for a declaration that the 2<sup>nd</sup> Respondent acted *ultra vires* its statutory mandate in hearing and determining the complaint made before it by the 1<sup>st</sup> Respondent.

#### **The Petitioner's case**

3. The Petitioner has averred in her Petition that her interest in the suit property was registered at the lands registry, Mombasa, on 25<sup>th</sup> March 1992 pursuant to a transfer dated 21<sup>st</sup> February 1992 from Mr. Basheik Abdulhafidh Basheikh Stabul, the then registered owner for a consideration of Kshs.200,000.
4. It is the Petitioner's position that as at the time of the purchase, the suit property was vacant; that during the pendency of his title, the 1<sup>st</sup> Respondent filed a claim of ownership of the suit property with the 2<sup>nd</sup> Respondent in Land Tribunal Case No. 7 of 2004 and purported to sue another person who was not the registered owner.
5. The Petitioner has stated in his Petition that he was never served with summons to appear before the 2<sup>nd</sup> Respondent despite being the registered owner of the suit property; that the 2<sup>nd</sup> Respondent heard the 1<sup>st</sup> Respondent's complaint and on 21<sup>st</sup> December 2004, the 2<sup>nd</sup> Respondent proceeded to deliver its decision and awarded the 4<sup>th</sup> Respondent ownership of the suit property.
6. The Petitioner finally averred that the 2<sup>nd</sup> Respondent's action were *ultra vires* its statutory mandate and in excess of the jurisdiction conferred upon it by the Land Disputes Tribunal Act No. 18 of 1990 and its decision is null and void.
7. The Petition is supported by the Petitioner's affidavit and further affidavit and annexures thereto which I have considered.

#### **1<sup>st</sup> Respondent's case**

8. The 1<sup>st</sup> Respondent filed a Replying Affidavit on 15<sup>th</sup> June 2011 and deponed that indeed the Petitioner is the registered owner of the suit property; that his claim over the suit property is for adverse possession and not ownership and that he was born and brought up on the suit property in the year 1945.
9. The 1<sup>st</sup> Respondent further deponed that the suit property is a subdivision from plot No. 102 (original plot number 274/III/MN Kuruwitu in Kilifi District; that the registered owner of the original suit property was one Famau Mohamed Stambuli, deceased, and that after the death of Famau, Basheikh Abdulhafidh inherited the original plot, sub-divided it and sold the suit property to the Petitioner.
10. According to the 1<sup>st</sup> Respondent, the Petitioner has never taken possession of the suit property since 1992 when he bought it until the year 2011 when he was seen in the suit property taking photographs.
11. The 1<sup>st</sup> Respondent further deponed that he sued Twahik Zubedi in the Lands Dispute Case No. 7 of 2004 because he knew that he had bought the suit property from Basheikh Abdulhafidh and that the award of the tribunal was eventually adopted by the Magistrate.

12. The 1<sup>st</sup> Respondent admitted in his Affidavit that he never served the Petitioner with documents in respect to the Land Disputes Tribunal and the Chamber Summons of 21<sup>st</sup> March 2011 because she is not the one he sued and that since himself and others have lived on the suit property for the last 70 years, it is only fair that he should be declared as the owner of the land by adverse possession.
13. The 1<sup>st</sup> Respondent finally deposed that he has filed HCCC No. 28 of 2008 (Originating Summons) against the Petitioner seeking for orders of adverse possession; that the Petitioner has been avoiding service and that since the said suit is still pending, the Petition was filed prematurely.

### **Submissions**

14. The Petitioner and 1<sup>st</sup> Respondent's advocate filed their written submissions on 23<sup>rd</sup> August 2013 and 13<sup>th</sup> September 2013 respectively.
15. The Petitioner's counsel submitted that the right to own property is a constitutional right that should be observed and protected by this court. Counsel relied on the Provisions of Article 40 and 60 (1) (b) of the Constitution, Article 17 of the Universal Declaration of Human Rights and Article 14 of the African Charter on Human and Peoples' Rights to buttress the argument.
16. The Plaintiff's counsel submitted that the decision of the District Land Dispute Tribunal has threatened, denied, violated and infringed on the Petitioner's rights to property.
17. The Plaintiff's counsel further submitted that the Lands Disputes Tribunal has no jurisdiction to determine the issue of ownership of land. According to counsel, it is only the High Court which has jurisdiction to order for cancellation of title. Counsel relied on the case of **R Vs Chairman, Matungu Land Disputes Tribunal, (2012) e KLR**, section 3 of the Land Disputes Tribunal Act No. 18 of 1990 and Section 64 of the Registration of Titles Act.
18. The Plaintiff's counsel finally submitted that the failure by the 1<sup>st</sup> Respondent to serve her with the pleadings in the Tribunal's suit denied her the right to a fair hearing contrary to the provisions of Article 47(1), and Article 50 of the Constitution. Counsel relied on the cases of **Erick Okongo Omogeni Vs Independent Electoral and Boundaries Commission & 2 others (2013) e KLR** and **Adat Abdulrahani Hassan & 2 others Vs The Registrar of Titles & 2 others (2013) e KLR**.
19. In view of the lack of jurisdiction by the Tribunal, the Petitioner's counsel submitted that the 1<sup>st</sup> Respondent does not meet the threshold specified in law and that the court should grant to the Petitioner the orders of Judicial Review pursuant to Article 23(3) (f) of the Constitution.
20. On his part, the 1<sup>st</sup> Respondent's counsel submitted that where a party is aggrieved by the decision of the Land Disputes Tribunal, the party has to appeal to the Provincial Appeals Committee and may file a further appeal in the High Court.
21. Counsel further submitted that Judicial Review proceedings must be filed in the High Court within six months which the Petitioner did not do after the decision of the Tribunal; that the Petitioner did not seek the leave of the court to file the Petition out of time and the suit should be dismissed on that basis.
22. Counsel finally submitted that the 1<sup>st</sup> Respondent has acquired prescriptive rights over the suit property having been on the suit property for over 12 years and that that is the 1<sup>st</sup> Respondent's defence to this Petition. Counsel relied on the case of **Gulam Mariam Noordin Vs Julius Charo Karisa (2013) e KLR** and the Limitation of Actions Act, cap 22.

### **Analysis of evidence and findings**

23. It is not in dispute that the Petitioner was registered as the owner of the suit property on 16<sup>th</sup> June 1994. It is also not in dispute that the 1<sup>st</sup> Respondent sued Twalik Zubedi in Kikambala Division Land Tribunal Case No. 7 of 2004 in respect to the suit property. According to the proceedings in the said Tribunal, the elders, made the following award.

**“The panel recommends that all the transactions be cancelled and the land be re-allocated to the Plaintiff, ATHMAN HASSAN AWADH because they have**

**stayed in the portion for over 70 years and therefore ATHMAN HASSAN AWADH should refund the money to TWALIK ZUBEDI”**

24. The decision by the elders was made on 21<sup>st</sup> December, 2004, ten years after the suit property had been registered in favour of the Petitioner.
25. The 1<sup>st</sup> Respondent has admitted that the Petitioner was not a party to the proceedings in the Tribunal. According to the 1<sup>st</sup> Respondent's Affidavit, he only sued Twalik Zubedi because he was not aware that the Petitioner was the registered owner of the suit property. He sued Twalik Zubedi because he is the one who claimed to have purchased the suit property from Basheikh Abdulhafidh.
26. The right to own property is provided for under Article 40 of the Constitution. This court is bound to protect that right unless it is shown that the property was acquired unlawfully.
27. In view of the fact that the suit property was registered in the name of the Petitioner by the time the 1<sup>st</sup> Respondent filed the dispute in the Tribunal, any decision that was arrived at by the said Tribunal in respect to the suit property before hearing the Petitioner is null and void.
28. Article 50 of the Constitution and the rules of natural justice demands that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.
29. As was held by the Court of Appeal in the case of **Owuor Okungu vs Lazaro Onyango, Civil Appeal No. 43 of 1982**, a party should have notification before an order can be made to the prejudice of his rights. A party whose rights are likely to be affected by a decision of a court or anybody exercising quasi-judicial functions must always be given an opportunity to present his or her case. The Petitioner was not given a hearing in Kikambala Division Land Tribunal Case No. 7 of 2004 despite the fact that he was the registered owner of the suit property.
30. The 1<sup>st</sup> Respondent has taken the view that the failure by the Petitioner to challenge the decision of the Tribunal within 6 months renders the Petition bad in law and should fail.
31. The Petition herein has been filed pursuant to the provisions of Article 40, 47, 48 and 64 of the Constitution and not Order 53 of the Civil Procedure Rules and the Law Reform Act.
32. Article 23(1) (f) of the Constitution gives this court jurisdiction to grant orders of judicial review in a Petition. I agree with the decision of Gikonyo J in the case of **Alex Malikhwa Wasubwa & 7 Others Vs Elias Nambakha Wamita & 4 others (2012) e KLR** in which he held that nothing prevents a party from applying for Judicial review orders in a constitutional Petition.
33. It would appear that the drafters of the Constitution realised that judicial review orders that the court would more often than not employ to uphold and enforce the bill of rights, which includes the right to a fair hearing, would be defeated by the limitation of time provided for in the Law Reform Act, thus the inclusion of the remedy of judicial review orders in Petitions brought under Article 22 of the Constitution.
34. Article 23(1) (f) of the Constitution has therefore availed to parties an opportunity to seek for Judicial Review remedies in situations where they would have been caught up by the limitation of six months as provided for in the Law Reform Act and the Civil Procedure Rules. In the circumstances, the 1<sup>st</sup> Respondent's claim that the Petition is incurably defective because it is seeking for judicial review remedies after six months from the date of the decision of the Tribunal cannot hold.
35. In view of the fact that the Tribunal's decision infringed on the rights of the Petitioner without giving him an opportunity to be heard, the said decision, as I have stated above, is null and void.
36. The decision of the Tribunal was also arrived out in excess of jurisdiction. The jurisdiction of the Land Disputes Tribunals is stated in section 3 of the repealed Land Disputes Act No. 18 of 1990.
37. The 1<sup>st</sup> Respondent's claim before the Tribunal was for ownership of the suit property. The suit property was already registered in the name of the Petitioner and in the circumstances, the Tribunal could not determine the issue of ownership of the suit property.
38. Where land is registered under the repealed Registration of Titles Act, cap 281 like in this case, it is only the High Court, as provided for under section 64 which has jurisdiction to order for cancellation of a title. Section 3 of the repealed Land Disputes Act does not donate to the Tribunal the mandate to rectify by cancellation of the registers or titles. The decision by the Tribunal purporting to cancel all transactions in respect to the suit property and re-allocating the property to

the 1<sup>st</sup> Respondent was *ultra vires*, null and void. Consequently, all actions, proceedings and orders that arose from the said decision are a nullity.

39. The 1<sup>st</sup> Respondent stated in his Replying Affidavit that there is a pending suit between him and the Petitioner in respect to the suit property being a claim of adverse possession.

40. Having set aside the award by the Tribunal for want of jurisdiction and for non-service, I am of the view that the claim filed by the 1<sup>st</sup> Respondent against the Petitioner for adverse possession should proceed for hearing. It is only after the said suit has been heard that the issue of proprietorship of the suit property shall be determined.

41. In the circumstances, and for the reasons that I have given above, this Judgment is only limited to the setting aside of the decision of the Tribunal and the subsequent orders in the following terms:

**(a) An order of declaration be and is hereby issued that the 2<sup>nd</sup> Respondent acted *ultra vires* its statutory mandate in hearing and determining the complaint made before it by the 1<sup>st</sup> Respondent and the decision which arose therefrom and are other subsequent orders are illegal and null and void *ab initio*.**

**(b) The Respondents to pay the costs of this Petition.**

Dated and Delivered in Malindi this 8<sup>th</sup> day of November, 2013

**O. A. Angote**

**Judge**