



**Gathuira v Nelson & 5 others; Ngwaro (Interested Party) (Civil Appeal
11 of 2019) [2024] KECA 956 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 956 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 11 OF 2019
FA OCHIENG, PM GACHOKA & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

EDDAH WANJIRU GATHUIRA APPELLANT

AND

JEREMIAH GITAU NELSON 1ST RESPONDENT

BERNARD K THAIRU 2ND RESPONDENT

COUNTY LAND REGISTRAR – NYANDARUA 3RD RESPONDENT

IRENE KANYI WAINAINA 4TH RESPONDENT

CHIEF MAGISTRATE'S COURT - NYAHURURU 5TH RESPONDENT

HON ATTORNEY GENERAL 6TH RESPONDENT

AND

NJOROGE NGWARO INTERESTED PARTY

(An appeal from the judgment and decree of the Environment and Land Court of Kenya at Nyabururu (Oundo, J.) dated 12th November, 2018 in ELC Petition No.18 of 2017)

JUDGMENT

1. Courts have pronounced several times that parties are bound by their pleadings in litigation. Pleadings are everything. They tell the court and parties the cases and issues that fall for determination. As will become clear in this judgment, the case that was filed by the appellant concerned a violation of her constitutional rights. However, when the veil is lifted, the appellant is fighting to secure a title of land no. Nyahururu South Kinangop 5687, which according to her, was improperly cancelled by the trial court. That cancellation of that title is at the center of the dispute and the basis of the claim for violation of the appellant's constitutional rights.



2. To put the appeal in context, we shall give a summary of the facts. By a petition filed on 17th August, 2016 in the Environment and Land Court (hereinafter ELC) Nyahururu petition no. 39 of 2016, the appellant sought the following prayers:
 - a. A declaration that the cancellation of the petitioner's title no. NyandaruaSouth Kinangop587 pursuant to the decree issued on 25th May, 2012 in Nyahururu SRMC Land Dispute Case No. 1 of 2012 contravened Articles 40, 47 and 50 of *the Constitution* of Kenya, 2010 and is therefore null and void;
 - b. A declaration that the proceedings in Nyahururu SPMC Land Dispute Case No.1 of 2012 offended the rules of natural justice and are therefore null and void and are hereby quashed through an order of certiorari;
 - c. A declaration that the cancellation of subdivisions of original title No. NyandaruaSouth Kinangop1988 and the subsequent creation of titles No. NyandaruaSouth Kinangop13913, 13914, 13915 and 13916 and registration thereof in favour of the 1st, 2nd and 3rd respondents respectively as proprietors is unconstitutional, null and void and are hereby cancelled;
 - d. An order for reinstatement of all the subdivisions or original title No. NyandaruaSouth Kinangop1998 together with the petitioner's registration as proprietor of title no. NyandaruaSouth Kinangop5687 forthwith;
 - e. Costs of this suit plus interest thereon at court's rate;
 - f. Any other or better relief deemed fit by the honourable court.
3. The appellant's position in the ELC and this Court is that on 10th June, 2013 she was registered as a proprietor of all that parcel of land namely NyandaruaSouth Kinangop5687, purchased from Njoroge Ngwaro - the interested party, for valuable consideration. It was her position that she immediately took possession and constructed a residential house which she identifies as her abode. According to the appellant, in July 2016, she learnt that her title deed had been cancelled pursuant to a decree issued on 25th May 2012 in Nyahururu SPMC Land Disputes Case No.1 of 2012; a dispute between the 1st, 2nd and 3rd respondents on the one part against John Ngugi Rubia and Benson Muraya Mwangi on the other part.
4. The appellant's grievance in the petition was that the cancellation and rectification of the register violated her legitimate and constitutional rights as she was not a party to the suit in the magistrate's court. She added that her parcel of land was part of the original title NyahururuSouth Kinangop1988 which was the mother title. She stated that there was no amalgamation of the titles that morphed from the sub-division of the original title and therefore, the subsequent sub-division to create the titles registered in the names of the 1st to 3rd respondents was conducted in contravention of the law.
5. Upon hearing the parties, the learned Judge (M. C. Oundo, J.) dismissed the petition and held as follows:
 - “62. The award should have been appealed to the Lands Appeals Committee constituted for the Province, in accordance with Section 8 (1) of the Land Dispute Tribunals Act (which was not done). Alternatively, the objectors should have commenced judicial review proceedings in the nature of certiorari, to quash the award, which also not done.
 63. This court has jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction, however, this jurisdiction is only exercisable where such decision of



the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the court as in the present circumstance.

64. The award of the Kinangop Land Disputes Tribunal having been adopted by the Senior Principal magistrate's court at Nyahururu ceased to exist on its own, and thus, cannot be the subject of a declaration. The award, having become a judgment of a court of competent jurisdiction, the same can only be varied, vacated, set aside or reviewed by the same court, or by an Appellate Court in an appropriate proceeding.
65. In the decided case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others [2014] eKLR, the Court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case No.139 of 2009 where Makhandia, J. held as follows;

“It is trite law that a valid judgment of a court unless overturned by an Appellate Court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st defendant's rights to the suit premises crystalized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”
63. Having found that the award issued by the North Kinangop land Disputes Tribunal became a Judgment of a Court of competent jurisdiction, since the same was not varied, vacated, set aside or reviewed by the same court, or by an appellate court, in an appropriate proceeding, the 1st, 2nd and 3rd respondents herein had been installed as the proprietors of the suit land.
64. I further find that the interested party herein had no title to pass to the petitioner who likewise had not title to protect and therefore had no legal interest capable of protection under the law.
65. The petitioner cannot therefore maintain a claim for violation of her rights pursuant to the provisions of Articles 22, 23, 40, 47 and 50 of *the Constitution* against the respondents herein.”
6. Aggrieved by the judgment, the appellant filed a notice of appeal and subsequently a memorandum of appeal dated 21st March, 2019. The grounds of appeal can be summarized as follows: That the appellant's piece of land was not the subject of SPMC Land Dispute No. 1 of 2012 and thus could not be affected by the decree issued by the court; that the learned judge erred in holding that the interested party had no interest that could he could rightfully pass to the appellant; that the Environment and Land Court failed to hold that the decision to cancel the appellant's title and 3rd parties titles, without affording them an opportunity to be heard, offended the principles of natural justice; that there was no link between the appellant and the other parties that were involved in SPMCC No.1 of 2022 and thus could not be affected by the resultant decree; and that the appellant's constitutional rights under Articles 40, 47 and 50 of *the Constitution* were violated.
7. When this appeal was heard through a virtual platform, learned counsel Mr.Gakuhi Chege appeared for the appellant while learned counsel Mr. Maragia appeared for the 1st to 3rd respondents. There was no appearance on behalf of the Attorney General who represents the 4th to 6th respondents but the Court noted that service of the hearing notice was duly effected. The Court noted that the interested party was not served but the appellant indicated that he had never participated in the proceedings in the



ELC. Resultantly, the appellant applied to withdraw the appeal against him. There being no objection from Mr. Maragia, advocate acting for the 1st to 3rd respondents, the appeal against the interested party was marked as withdrawn with no orders as to costs.

8. The appellant relied on her written submissions dated 15th November 2022 which were highlighted orally. We have carefully considered those written submissions which rehash the same facts set out in the pleadings. The main argument was that the appellant was not a party to the arbitral proceedings and also never participated in Nyahururu SPMC Land Dispute Case No.1 of 2021, and therefore, the cancellation of her title deed pursuant to the decree in that court, was a contravention of her unreserved right to natural justice and is as such unconstitutional. The appellant argued that she was not served with a notice of cancellation of her title. The appellant also faulted the process of cancellation of her title and the subsequent amalgamation of the titles. The appellant stated that the amalgamation and the resultant sub-division to create 3 new titles was done irregularly and in contravention of the due process of the law. In addition, the appellant vehemently disputed the holding of the learned judge to wit that since the appellant's title was registered on 10th June 2013, there was no interest on land that could be passed to her since the award of the Tribunal had been adopted as a decree on 25th May 2012. To the appellant, this finding was not correct as the interested party was the registered owner of the property as of 7th January, 2002. Finally, the appellant stated that the learned judge erred as the judgment was contrary to his own findings in Nyahururu Petition No. 7 of 2013, Boniface David Chege & 33 Others vs. AG & 4 Others [2017] eKLR that challenged the same award and decree arising from the South Kinangop Land Disputes Tribunal Case No. 77 of 2008 and Nyahururu PMC Land Dispute Case No. 77 of 2018. The appellant submitted that the learned judge had allowed a petition by different petitioners and directed cancellation of their titles. To the appellant, the learned judge ought to have followed the same reasoning to uphold the appellant's agreement that the cancellation of her title based on the impugned award and decree was a nullity. In support of her case, the appellant cited the case of James N. Wa Warebu vs. Republic & 7 Others [1995] eKLR on the rights of persons directly affected by the order of the court being heard. Furthermore, she relied on the authority of Omega Enterprises (Kenya Ltd) vs. Kenya Tourist Development Corporation Ltd & 2 Others [1998] eKLR to support the argument that orders made in breach of the right to be heard are liable to be set aside *ex-debto justitae*; and the case of Barasa W. Wadomba & Another vs. Omonyin Kituyi & 2 Others to the effect that a tribunal's award arrived at in violation of the principles of natural justice can be set aside even after adoption of the award.
9. In opposition to the appeal, the 1st, 2nd and 3rd respondents filed written submissions dated 15th November, 2021 which were highlighted orally. We take the liberty to summarize the submissions as follows:
 - i. That the interested party had no legal title that he could pass to the appellant as at 10th June, 2013. His rights on the land were extinguished on 25th June, 2012 when the award of the Land Disputes Tribunal was adopted as a decree of the court.
 - ii. That the joinder of the 5th respondent (Chief Magistrate's Court) was gratuitous as the court was only exercising its powers governed by the dictates of section 7 (2) of the Land Disputes Tribunal Act (now repealed).
 - iii. That the award of the Land Disputes Tribunal was properly adopted and remained unchallenged to date. Further, the interested party never participated in the trial court even after he was enjoined as a party.



- iv. That there are other proceedings between the parties over the suit property, the subject of this appeal. Therefore, the filing of the petition in the ELC was done in contravention of the *Civil Procedure Act* as the other suits directly and substantially dealt with the same issues.
 - v. That petition in the ELC was a suit for recovery of land that was disguised as a petition for violation of the appellant's constitutional rights. They cited the case of Florence Nyaboka Machani vs. Mogere Amosi Omboi & 2 Others [2014] eKLR to fortify that a judgment of a court remained valid unless overturned by an Appellate Court and is enforceable, the issue of jurisdiction notwithstanding.
 - vi. There was no violation of Articles 22 (1), 23 (3), 40, 47 and 50 of *the Constitution* as alleged by the appellant. The respondents argued that the appellant's claim was based on the interested party's interest in the land which was extinguished on 25th May, 2012 by decree of the court and therefore, he had no legitimate interest that he could pass.
10. We have carefully considered the record of appeal and the submissions by the parties. As stated at the beginning of this judgment, a party is bound by its pleadings and the reliefs sought should be supported by the pleadings and the evidence. At the outset, we wish to note that a careful perusal of the grounds of appeal and submissions is all about the recovery of land. The appellant has said virtually nothing on the violations of her rights yet particulars of breach of constitutional rights must set out the in line with the celebrated case of Anarita Karimi Njeru vs. Republic (1979) eKLR where the court laid out the threshold as follows:
- “If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”
11. This court in *Mumo Matemu vs. Trusted Society of Human Rights, Alliance & 5 others* [2013] eKLR reaffirmed the principle in the following terms:
- “We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this we find the petition before the High Court did not meet the threshold established in that case. At the very least the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of the shortcomings, it was not enough for the Superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting” without requiring remedy by the 1st Respondent.”
12. We also note that the central character in this appeal is Njoroge Ngwaro, the interested party. At the hearing, the appellant on being notified by the Court that the interested party had not been served, withdrew the appeal on the basis that the interested party had died and that in any event, had never participated in the proceedings at the ELC. Therefore, reliance by the appellant on what the interested party did or did not do adds little value to this appeal. The interested party is not a party in this appeal given the withdrawal by the appellant and therefore this appeal will proceed or fail on the merits of the grounds of appeal.
13. We now turn to the merits of the appeal. In our view, the only issue for determination is whether the appellant's constitutional rights were violated. The appellant cited the following Articles of *the*



Constitution that were allegedly violated without indicating which particular sub-article was violated and therefore we shall reproduce their provisions thereto verbatim.

“ Article 40 (1) and (2)

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - a. of any description; and
 - b. in any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

Article 47

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
 - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.

Article 50

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
2. Every accused person has the right to a fair trial, which includes the right-
 - a. to be presumed innocent until the contrary is proved;
 - b. to be informed of the charge, with sufficient detail to answer it;
 - c. to have adequate time and facilities to prepare a defence;
 - d. to a public trial before a court established under this Constitution;
 - e. to have the trial begin and conclude without unreasonable delay;
 - f. to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;



- g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - i. to remain silent, and not to testify during the proceedings;
 - j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
 - k. to adduce and challenge evidence;
 - l. to refuse to give self-incriminating evidence;
 - m. to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
 - n. not to be convicted for an act or omission that at the time it was committed or omitted was not-
 - i. an offence in Kenya; or
 - ii. a crime under international law;
 - o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
 - p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
3. If this Article requires information to be given to a person, the information shall be given in language that the person understands.
4. Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
5. An accused person-
- a. charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and
 - b. has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.
6. A person who is convicted of a criminal offence may petition the High Court for a new trial if-
- a. the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - b. new and compelling evidence has become available.



7. In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
8. This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.
9. Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”
14. To determine whether the appellant’s rights were violated and at the risk of repetition, it is necessary to restate the facts. As correctly stated by the learned judge, the appellant’s title to the parcel of land, the subject of the dispute was issued on 10th June, 2013. Long before this date, there was a hearing that was conducted before the Kinangop South Land Disputes Tribunal, and an award was made by that tribunal which was adopted as a decree of the court on 25th June, 2012.
15. It is common ground that the appeal to the Provincial Land Disputes Tribunal never materialized and that the Judicial Review application that had been filed challenging the adoption of the award was dismissed by the High Court (Emukule J.) on 18th May, 2012 for want of prosecution.
16. The other significant point was that the appellant was registered as the owner of the parcel of land, the subject of the dispute on 10th June, 2013. By that time, the award of the Land Disputes Tribunal had been adopted as an order of the court on 25th June, 2012. The question that arises then is how the respondents could have violated the appellant’s constitutional rights when she was not a registered owner. How could the appellant have been afforded a hearing when she was nonexistent as far as the dispute was concerned, since at the time she had not been registered as the owner? It goes without saying that any violation or grievances that the appellant may have should be directed against Njoroge Ngwaro, who was joined as an interested party in this appeal. The appellant withdrew the appeal against the said party and therefore, we need not say anything concerning him.
17. The appellant needs to be aware of the fact that allegations of violations of constitutional rights is a serious matter. It is not something that it is handled casually. The appellant must give particulars of the breach by each of the respondents. The 1st and 3rd respondents never dealt with the appellant at any one time. Whatever views the appellant may have regarding the proceedings in the Land Disputes Tribunal are immaterial. She had not even acquired the parcel of land at that material time. At the time the only party who could challenge the rights of the respondents to acquire the land was the interested party. He did not and the appellant cannot purport to fill into his shoes. The 1st to 3rd respondents acquired the parcels of land before the appellant engaged in dealings with the interested party. Therefore, there is no constitutional right violation that can be attributed to them. Though the 4th to 6th respondents have not filed any submissions, it is also clear from what we have said that they also did not violate any constitutional rights as alleged.
18. We also note that the petition in the ELC and that appeal before us is all about the recovery of land. It is our holding that the attempt by the appellant to cover it with a disguised constitutional gown is a red herring. It remains a claim for recovery of land and it raises no constitutional issue. Therefore, the learned judge was correct in seeing the petition as such and reached the right conclusion.
19. We note that the appellant has made heavy weather on the holdings to Petition No. 9 of 2017; Bonface David Chege & 33 Others vs. AG & 4 Others [2017] eKLR. We note that the appellant was not a party to that petition. The appellant is insisting to delve into the merits of that appeal and apply the holdings in that petition to this appeal. It is common knowledge that each case is determined in its



own circumstances and it will be improper for us to examine that judgment as urged by the appellant. We refuse to swallow that bait.

20. In conclusion, it is our finding that the grounds of appeal have no merit at all. The appeal is for dismissal and we so order. We uphold the findings of the learned judge. The appellant will pay the costs to the 1st to 3rd respondents. There will be no costs to the 4th to 6th respondents as they did not participate in the hearing.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. OCHIENG

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

