



Ogao v Chairman, Land Disputes Tribunal, Nyamira County & 2 others (Environment and Land Constitutional Petition E002 of 2024) [2024] KEELC 14111 (KLR) (11 November 2024) (Ruling)

Neutral citation: [2024] KEELC 14111 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2024
JM KAMAU, J
NOVEMBER 11, 2024**

BETWEEN

BENARD OOGA OGAO PETITIONER

AND

**CHAIRMAN, LAND DISPUTES TRIBUNAL, NYAMIRA COUNTY 1ST
RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

**RICHARD MOGWASI (ACTING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF CHARLES ONYARI ONDIEKI - DECEASED) 3RD RESPONDENT**

RULING

1. This suit is by way of a Petition dated 6/6/2024. In the Petition the Petitioner seeks for;
 - a. An order do issue directing the award issued by the 1st Respondent on 14/5/2008 be vacated.
 - b. An order directing that Nyamira CMCC ELC No.26 of 2020 be heard and determined on merit.
 - c. Costs of the Petition.
2. The Petitioner buttresses his Petition on the ground that in 2005 the 3rd Respondent herein, i.e. the Estate of Charles Onyari Ondieki, being represented in Court by its legal representative, Richard Mogwasi trespassed into and occupied a portion of the Petitioner's property, WEST MUGIRANGO/ BONYAMATUTA/911 (0.06Ha) and started putting up a pit latrine thereon. The 1st Respondent did enter on the suit land and sub-divided it giving the 3rd Respondent a portion of the land. This was done when Kisii HCCC No.126 of 2006 seeking orders for the 3rd Respondent to vacate the suit land was still in existence. He admits that he never applied to have the award of the 1st Respondent vacated. But that the 1st Respondent did not have powers to give the order it issued hence making the



Petitioner lose half of his property. The matter is still pending in Nyamira CMCC No. 26 of 2020 following Directions from the High Court, Kisii. He blames the failure to act decisively in not setting aside the award of the 1st Respondent i.e. the Land Disputes Tribunal, Nyamira to his ignorance of the law and wrong advice from his then Advocates. He did attach to the Affidavit supporting his Petition a copy of his Title Deed given to him on 16/6/2000 the year he bought the parcel of land, a copy of the Complaint filed by himself against one Charles Onyari Ondieki over the same suit land, the Award of Nyamira Land Disputes Tribunal Claim No. 11 of 2007, a copy of the Complaint in High Court at Kisii Civil Case No. 266 of 2010 between the Petitioner and the said Charles Onyari Ondieki again over the same parcel of land together with order directing the District Land Registrar and Surveyor, Nyamira District to ascertain the exact position of the boundary between WEST MUGIRANGO/BONYAMATUTA/911 & 2001 respectively and to file their Report within 30 days of the order of 21/10/2010. The corresponding Report dated 16/3/2011 is also attached to the Petition. There is also a copy of the Notice of Preliminary Objection by Charles Onyari Ondieki, the Defendant in the Chief Magistrate's Court at Nyamira in CMELC No. 26 of 2020 which was formerly Kisii ELC No.1196 of 2016. The same is dated 7/11/2023 but without the pleadings thereon.

3. On 30/10/2024 Counsel for the 3rd Respondent, Mr. Okemwa raised a Preliminary Objection on first jurisdiction and also that the Petition is an abuse of the process of the Court and thirdly that the Petition is an afterthought. He stated that the claim was heard and determined in Nyamira Land Disputes Tribunal Case No. 11 of 2007. It was later adopted as a Judgment of the Court in Kisii Chief Magistrate's Court under Miscellaneous Civil Application No.134 of 2010 without an appeal being preferred. This was 16 years ago. The award was adopted as Judgment of the Court on 2/11/2010 and issued on 24/5/2011. There was also a similar preliminary objection in the Chief Magistrate's Court at Nyamira.
4. On his part, the 3rd Respondent argued that he has a right to raise the issue since in his view his rights are being trodden upon and that the Tribunal did not have powers to determine the matter as it did confer Title to land to the 3rd Respondent. He also argued that this is not a preliminary objection and that in Constitutional Petitions there are no time limits.
5. I have looked at all the attachments and documents placed before this Court and more particularly the Ruling of his lordship Justice Asike Makhandia in Kisii HCCC No. 266 of 2010 which though not very clear the first 3 pages show that the suit property subject of this Petition i.e. WEST MUGIRANGO/BONYAMATUTA/911 was one of the subjects of the suit between the Petitioner herein and the 3rd Respondent's late father Charles Onyari Ondieki. It is also not in dispute that Kisii ELC No. 1196 of 2018 touching on the same subject was transferred to Nyamira Chief Magistrate's Court and given ELC No. 26 of 2020. On 7/11/2023 the Advocate for the 3rd Respondent's father raised a Preliminary Objection in Nyamira CM ELC No.26 of 2020, the upshot of Kisii ELC No.1196 of 2016, the same objection raised herein. That is the case I was asked to stay pending the Hearing of this Petition and although I ordered that the lower court file be placed before me, the same was not done. I have not had the benefit of being advised of the outcome of the preliminary objection dated 7/11/2023 in the lower court and it is my considered opinion that the same ought to be heard by the lower court first. I do not see any unconstitutionality in the Hearing and determination of that suit which in any case was referred thereto by a competent court of equal jurisdiction to this Court. I do not wish to give my views as to whether the Award emanating from Nyamira Land Disputes Tribunal Case No. 11 of 2009 is capable of being disturbed since the same has its rightful place which must come after the lower court accomplishes the tasks before it. The upshot of the above is that the parties herein are returned to their Court of origin – Nyamira Chief Magistrate's Court Civil Suit No.ELC 26 of 2020. It is so ordered.



RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 11TH DAY OF NOVEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Petitioner's Counsel: Mr. Masoro h/b for Mr. Moseti

Respondents' Counsel: Mr. Ranah for the 1st and 2nd Respondent

