



REPUBLIC OF KENYA



**Waithaka v Attorney General & 4 others (Environment & Land Petition
10 of 2021) [2023] KEELC 707 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 707 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND PETITION 10 OF 2021

A OMBWAYO, J

FEBRUARY 10, 2023

**IN THE MATTER OF ARTICLES 20 (1) & (2), 22(1),
23(1) AND (2) & 64 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTIONS OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 40 (1) AND (3), 43 (1) (B),
47 (1), 50 (1), 60 (1) (B) AND (D) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOM UNDER SECTIONS 75 &
77 (A) OF THE NOW REPEALED CONSTITUTION (1963).**

AND

ELC PETITION NO. 10 OF 20211

**IN THE MATTER OF SECTIONS 24, 25, 26 AND 80 (2) OF THE LAND REGISTRATION
ACT 2012 AND THE ENVIRONMENT AND LAND COURT ACT, 2011**

AND

**IN THE MATTER OF SECTION 24, 25, 26 AND
80 (2) OF THE LAND REGISTRATION ACT, 2012**

AND

THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

**IN THE MATTER OF LAND PARCEL NUMBER SOLAI/
NDUNGIRI BLOCK 3/390 (WANYORORO “B”)**

BETWEEN



GEORGE KIGOTHO WAITHAKA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

LAND REGISTRAR- NAKURU 2ND RESPONDENT

**SENIOR RESIDENT MAGISTRATE NAKURU LAW COURTS 3RD
RESPONDENT**

ROBERT MWANGI KIRAGU 4TH RESPONDENT

**ANTHONY NJOROGE MUIRURU , JOSEPH GACHAHI MWARANGU, PETER
MWARANGU & MUIRURI FAMILY SELF HELP GROUP 5TH RESPONDENT**

JUDGMENT

1. George Kigotho Waithaka hereinafter referred to as the petitioner has come to this court against the honorable Attorney General, Land Registrar Nakuru and the Senior Resident Magistrate Court Nakuru Law Court and others by way of constitutional petition claiming that the petitioner was at the material times the registered owner of Solai/Ndungiri Block 3/390 (Wanyororo “B”) measuring 0.4895 Hectares as per the title deed issued to the petitioner through the 2nd respondent on June 26, 1992 and therefore was vested with absolute ownership thereof with all rights and privileges appurtenant thereto and the rights are protected by the *Constitution of Kenya* and Municipal Laws on land.
2. That sometimes in 1998 the 5th respondent lodged a claim before the Bahati Land Dispute Tribunal in respect of the land and the Tribunal made order that the land belonged to Muiruri family who is the 2nd respondent. The Tribunal directed the Senior Resident Magistrate’s Court Nakuru to issue an order to the Land Registrar Nyandarua to cancel the petitioner title deed number Solai/Ndungiri Block 3/390 (Wanyororo “B”) and to have it re-issued on the names of the 5th Respondent. The award of the Tribunal in case number 5 of 1998 was adopted by the Magistrates Court and a decree was issued cancelling the petitioner title deed and awarding a fresh title to the 5th defendant.
3. The petitioner Faults the Land Dispute Tribunal that it acted without jurisdiction and in excess of jurisdiction. Moreover, that the Tribunal breached rules of Natural Justice. The petitioner complaint against the 3rd respondent was that the court breached rules of Natural justice by not hearing the petitioner. Moreover, that the award was a nullity but the 3rd respondent adopted the same. Moreover, that as a result of the action of the respondent the petitioner’s rights were violated
4. The petitioner prays that a declaration that the plaintiff is the lawful owner of Land parcel No Solai.Ndungiri Block3/390 (Wanyororo “B”). He further prays for an order revoking the title deeds issued to the defendants for land parcel No Solai/Ndungiri Block 3/390 (Wanyororo “B”) he seeks for Cost of this suit.
5. The supporting affidavit reiterates the grounds of the petition. The 4th and 5th respondent through the affidavit of the 4th respondent. The nutshell of the replying affidavit is that the petitioner is abuse of the process of the court and a mischarge of the civil judicial procedure.
6. I have considered the submissions by the petitioner and the respondent and do find that the main issue to determine is whether the petition is well founded.



7. Section 8 of the repealed *Land Disputes Tribunal Act* provided for a case where a tribunal had made an award that:

“(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

(2)

(3)

(4)

(5)

(6)

(7)

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeal Committee to the High Court on a point of law within sixty days from the date of the decision complained of.

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.

(10)

8. It will therefore be seen that the said *Act* provided an elaborate procedure for resolution of disputes relating to the division of, or determination of boundaries to land, a claim to occupy or work land or trespass to land where jurisdiction was donated to a tribunal established under the Act and further established an appeal process for parties dissatisfied with determinations by such a tribunal. The *Act* limited appeal to the High Court on questions of law only.

9. The petitioner did not challenge the decision of the tribunal in accordance with the said procedure set out in the *Act*. Neither were judicial review proceedings taken to quash the award. The petitioner instead chose to file the petition for declaratory orders and compensation.

10. The petitioner had the right to appeal against the award of Bahati Land Disputes Tribunal to the Rift Valley Provincial Appeals' Committee. This is vide Section 8(1) of the *Land Disputes Tribunals Act*. He chose not to do so.

11. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have not been given an opportunity to look at the proceedings of the Nakuru senior



resident magistrates court land disputes case no 3 of 2020 but I have seen the order adopting the award as a judgment of the court dated May 19, 2000.

12. 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 petitioner had all avenues to impugn the award as well as the judgment. He did nothing.

13. This court observes that the record of the proceedings of the tribunal show that the petitioner was served several times but did not attend the tribunal proceedings and ended up like the Alaskan Fox that was described by the Court of Appeal in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2014] eKLR thus

“..... 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 crystallized. 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.”

14. I do find that the petition lacks merit and is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF FEBRUARY 2023.

A O OMBWAYO

JUDGE

