



**Kangogo v Chemen & 3 others (Environment and Land Constitutional
Petition 1 of 2022) [2023] KEELC 16983 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 1 OF 2022**

L WAITHAKA, J

APRIL 24, 2023

BETWEEN

JOHN BEMBEE KANGOGO PETITIONER

AND

JOSEPH KIMUGE CHEMEN 1ST RESPONDENT

THE COUNTY COMMISSIONER- ELGEYO MARAKWET .. 2ND RESPONDENT

DIRECTOR LAND ADJUDICATION & SETTLEMENT 3RD RESPONDENT

COUNTY LAND REGISTRAR, ELGEYO MARAKWET 4TH RESPONDENT

JUDGMENT

The uncontroverted and/or undisputed facts of this case are as follows:-

1. That the parcel of land known as parcel No.773 located in lower Kabito Adjudication Section was subject of the process of determination of interests to land provided for under the *Land Adjudication Act*, Cap 284 Laws of Kenya, (LAA). The process culminated in an Appeal to the Minister filed by the 1st respondent herein, after he lost an objection case he had filed before the Land Adjudication Officer (LAO).
2. The Appeal to the Minister, Case No. 285 of 1994, was determined by the 2nd respondent on 22nd September, 2005 in favour of the 1st respondent.
3. Although the proceedings attached to the affidavit sworn in support of the Petition herein show that the petitioner was heard by himself and his witnesses, the affidavit of the petitioner sworn in support of the Petition as read with the replying affidavit of the 1st respondent sworn on 17th October, 2020 suggest that the petitioner was not heard in the Appeal.



4. It is contended by the 1st respondent that the petitioner was accorded an opportunity to be heard (was summoned to attend the hearing of the Appeal but failed to avail himself).
5. There is no evidence that the petitioner was summoned or notified of the hearing of the Appeal and/or how the summons were served, if at all they were served on him.
6. The 2nd to 4th respondents, through the replying affidavit of George Morara Bosire, the LAO Elgeyo Marakwet, based on the proceedings attached to the petitioner's supporting affidavit, contend that both parties were given an opportunity to present their respective cases, call their witnesses and cross examine adverse party and their witnesses.
7. On account of the averment by the petitioner that he did not participate in the hearing and the acknowledgement of that fact by the 1st respondent, who was a party to the Appeal contained in paragraphs 14, 15, 22 and 24 of the 1st respondent's replying affidavit, I find and hold that the petitioner's contention that he was not given an opportunity to present his case is substantiated.
8. The proceedings of the Appeal to the Minister indicate that on 22nd November 2005, the Appeal was allowed in the absence of the petitioner. In allowing the appeal, the 2nd respondent stated: -

“The defendant was not present. I was informed that he relocated to West Pokot and he cannot be traced. He has never settled on the land.

Judgment.

Appeal Allowed. The land to be registered in the name of Joseph C. Kimuge.”

9. According to the Green Card attached to a letter from the petitioner's advocate to the Chief Land Registrar, dated 10th January 2022, marked JBK-3, the petitioner was registered as the proprietor of the suit property on 7th July, 2010.
10. The registration of the proprietor as the owner of the suit property was cancelled on 18th July, 2019 and the 1st respondent registered as the proprietor thereof on an even date.
11. The 1st respondent, in the affidavit he swore in response to the petitioner's case, states that pursuant to a letter dated 14th November, 2019 addressed to the Chief Land Registrar by the Director of Land Adjudication & Settlement, he was issued with a title deed on 3rd December, 2019. The letter is annexed to the replying affidavit which the 1st respondent swore in response to the petition and marked JC3. Through that letter, the Director of Land Adjudication and Settlement addressed the Chief Land Registrar as follows:-

“Ref: Implementation Of Minister's Decision On Appeal Under Section 29 Of [LAND ADJUDICATION ACT](#), CAP 284

The appeal before the Minister, the details of which are given below has been finalized as per section 29(3)(b)



- a. Land Appeal Case No.285 of 1994;
- b. Name of appellant(s) Joseph Kimuge Chemem
- c. Name of respondent(s) John Bembee Kangogo
- d. District Keiyo
- e. Adjudication Section Lower Kabito
- f. Parcel No.773
- g. Action to be taken: Appeal allowed. Restriction to be removed. Parcel number 773 to be registered in the name of Joseph C. Kimuge. Amended copy of the duplicate adjudication record duly certified in accordance with section 29(3) of *Land Adjudication Act* Cap 284 is attached hereto for your further necessary action.

Please take action on the matter and keep me informed.

12. The evidence adduced in this suit comprised in the Green Card attached to the letter annexed to the petitioner's supporting affidavit, marked JBK3 and the title deed attached to the 1st respondent's replying affidavit, show that the letter referred to above, JC 3, dated 26th June 2014, was acted upon and the suit property registered in the name of the 1st respondent.
13. The Green Card attached to the letter annexed to the petitioner's supporting affidavit, marked JBK3, shows that the suit property was registered in the name of the petitioner before it was registered in the name of the 1st respondent.
14. Given that the suit property was registered in the name of the petitioner at the time the 3rd and 4th respondents purported to act on the decision of the 2nd respondent allowing the appeal filed by the 1st respondent, an issue of law arises, namely, whether the 3rd and 4th respondents had power to cancel the registration of the petitioner as the owner of the suit property.
15. Based on the provisions of Sections 142 and 143 of the Registered *Land Act*, Cap 300 Laws of Kenya as read with Section 107 of the *Land Registration Act*, 2012, it is the considered view of this court that the 3rd and 4th respondent had no power to cancel the registration of the petitioner as the proprietor of the suit property. In that regard, see the said sections of the law which provide as follows:-

“ 142. (1). The Registrar may rectify the register or any instrument presented for registration in the following cases-

- a. In informal matters and in case of errors or omissions not materially affecting the interests of any proprietor;
- b. In any case and at any time with the consent of all persons interested;
- c. Where, upon resurvey, a dimension or area in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.



2. Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

143.(1) subject to subsection (2), the court may order rectification of the register by directing that any registration to be cancelled or amended where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake.

2. the register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

Section 107(1) the [Land Registration Act](#), 2012 provides as follows:-

“ unless the contrary is specifically provided for this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

16. Under Section 2 of the Registered [Land Act](#), Cap 300 laws of Kenya, now repealed, which by dint of the provisions Section 107 of the [Land Registration Act](#) (the Act) applied to the suit property on account of it having been registered in the name of the petitioner on 7th July, 2010. In that regard see the said section which provides as follows: -

“ This Act shall apply to-

....

- a. Any area to which the [Land Adjudication Act](#) is, on or after the commencement of this Act, applied;
- c. any area to which the [Land Adjudication Act](#) applies.”
17. Under Section 27 of the Act, registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
18. Section 29(3) of [Land Adjudication Act](#) pursuant to which the 3rd and 4th respondents cancelled the registration of the petitioner as the proprietor of the suit property does not give them power to cancel the registration of the petitioner as the proprietor of the suit property. In that regard see the said section of the law which provides as follows:-

“ Any person aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-



- a. delivering to the Minister an appeal in writing specifying the grounds of appeal;
 - b. sending a copy of the appeal to the Director Land Administration, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final;
2. The minister shall cause copies of the order to be sent to the Director Land Adjudication and the Chief Land Registrar.
 3. When the appeal has been determined, the Director Land Adjudication shall-
 - a. Alter the duplicate adjudication register to conform with the determination; and certify on the duplicate adjudication register that it has become final for all respects; and send details of alterations and a copy of the certificate to the Chief Land Registrar who shall alter the adjudication register accordingly.
19. It is clear from the above cited provisions of the law that the power given to the 3rd and 4th respondents was to alter the adjudication register as opposed to the register kept under the Registered [Land Act](#).
 20. Adjudication register is defined by Section 2 as read with Section 24 of [Land Adjudication Act](#) as the demarcation map and the adjudication record.
 21. To register, on the other hand, is defined under Section 2 of the Registered [Land Act](#) (repeated) thus:-

“Means to make an entry, note or record in the register under this Act.”
 22. As pointed out herein above, the evidence adduced in this case comprised in the Green Card attached to the letter marked JBK 3 shows that the suit property was registered in the name of the petitioner before the registration was cancelled and fresh registration effected in favour of the 1st respondent.
 23. From the evidence adduced in this petition, it is not clear how the 1st respondent was registered as the proprietor of the suit property way after the appeal to the Minister was heard and determined. I note that there was inordinate delay in effecting the purported decision of the Minister, dismissing the appeal to the Minister.
 24. From the affidavit evidence of the petitioner and that of the 1st respondent to the effect that the petitioner did not participate in the appeal, I entertain doubt on the authenticity of the proceedings of the Appeal to the Minister purporting that the petitioner participated in the appeal. If the petitioner, participated in the Appeal as purported by the proceedings, the 1st respondent who was a party to the proceedings, would have confirmed as much. Having been a participant in the proceedings, this court has no basis for doubting the averments of the 1st respondent contained in paragraphs 14, 15, 22 and 24 of his replying affidavit sworn on 17th October, 2020 (read 2022 as the error on the date was on 10.11.2022 orally amended to read 17th October, 2022).



25. Whilst the 1st respondent claims that the petitioner was summoned to attend the hearing, no evidence was adduced capable of proving that fact. The suggestion in the proceedings that the petitioner could not be traced also negates the respondents' contention that the petitioner was given an opportunity to be heard. Failure to accord the petitioner an opportunity to be heard in the Appeal rendered the decision of the Minister void. In that regard see the case of *Alice Muthoni Wahome v. Inspector General of Police & Another* (2022) e KLR where it was held:-

“I find in this matter the petitioner was not afforded an opportunity to be heard. I further find that taking a draconian action without deference to fair administrative action is void for offending a constitutional imperative.”

26. The upshot of the foregoing is that the petitioner has made up a case for being granted the orders sought which I hereby grant him as prayed in the Petition dated 19th April 2022.

Judgment dated, signed, and delivered at Iten this 24th day of April, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms. Kinyua for the 1st respondent

Ms. Cheruiyot for the 2nd, 3rd, 4th respondents

N/A for the petitioner

Court Asst.: Thomas

