



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

PETITION NO. 3 OF 2012

JACOB MICHUBU KIRAMBURI PETITIONER

VERSUS

JOHN MITHEA M'ETHANGATHA - CHAIRMAN

AKIRANGONDU NJURI NCHEKE 1ST RESPONDENT

IGEMBE NORTH DISTRICT AKIRANGONDU 'A'

L.A.O. PHILIP 2ND RESPONDENT

ATTORNEY GENERAL..... 3RD RESPONDENT

JUDGMENT

1. The petitioner filed this petition dated 3/4/2012 on 4/4/2014. I replicate the orders sought in the prayers in that petition verbatim as herein below:-

(1) That an order of declaration that the act of the respondent of taking the petitioner's property without compensation is null and void.

(2) That an order for the return of the petitioner's parcel of land taken No. 2040, 2041, 2470 and 2471 formerly No. 684.

(3) Alternatively the respondents be ordered to compensate the petitioner to the full value of any part or whole parcel which we may not recover.

(4) Costs and interests in the suit.

2. The said petition is supported by the affidavit of the petitioner sworn on the 3rd April 2012. The petitioner also swore a further supporting affidavit dated 10th January 2013 on the same date. He also filed his submissions on 8/3/2018.

3. The 1st respondent filed his Answer to Petition dated 20/12/2012 on the 21/12/2012 and later he filed a further replying affidavit dated 13th March 2013 on 14th March 2014. The 1st respondent also filed submissions on 5/4/2018. I have considered these filed documents.

The Petitioner's Case

4. In the petition the petitioner avers that he is the administrator of the estate of Simon Kiramburi Kirugua. Simon Kiramburi Kirugua gathered parcel number 684 and it measured 5.15 acres. He also gathered parcel number 677 measuring 3.39 acres. Later parcel number 684 was irregularly and without any notice to the petitioner or his family, transferred to the Njuri Njeke represented in these proceedings by the chairman who is the 1st respondent.

5. The deceased then lodged an objection which was determined by the Committee which ruled that the land was transferred to the 1st respondent for a public purpose, but no compensation was offered to the petitioner's family for deprivation of its property rights.

6. After the transfer the parcel was later subdivided into four parcels that is 2040, 2041, 2470, and 2471. The petitioner avers that his father was not granted a hearing during the hearing of the claim in the year 1977.

7. The petitioner avers that the Njuri Ncheke are not representatives of government and had no right to be given the land belonging to the petitioner and his family. He avers that by the judgment of the Land adjudication officer, he has been deprived of his “*constitutional right to property*” without compensation which he states is against the letter and spirit of the constitution.

8. In his affidavit evidence he reiterates the contents of the petition and he further states that in the year **2008** he lodged an objection regarding the suit land with the Land Adjudication Officer Maua. The objection was heard and the land was awarded to the 1st respondent yet again. He avers that the 1st respondent gave contradictory evidence at the hearing of the objection but they were nevertheless awarded the land.

9. He stated that the land on which the Njuri Ncheke used to meet belonged to his great grandfather and after his demise they claimed ownership of the suit land and refused to vacate.

10. He avers that in the year **1966** his father instituted a suit against the Njuri Ncheke before the District officer and the Chief. It was ruled that his father do give bulls, rams and honey so that the Njuri Ncheke may vacate the land.

11. He supports these statements with a copy of a letter dated **11/2/1975** in which it appears that one Simeon is writing to the Land Adjudication Officer Maua over the suit land asking that it be returned to him.

12. He was also at one time arrested when he went to cut down a tree on the suit land but acquitted for lack of evidence when the Njuri Ncheke failed to attend court to give evidence.

The 1st Respondent's Defence

13. The 1st respondent's position is that the petitioner has conceded that he had lodged an objection which was determined but after this he never appealed to the minister as required by **Section 29** of the **Land Adjudication Act**. He submits that where there is a specified procedure for resolving certain issues that procedure needs to be followed and exhausted. He cites the case of **Meru Petition Number 129 of 2011 –Frederick Mworira Vs District Land Adjudication Officer Tigania West /East And 3 Others** to support this proposition.

14. Secondly the respondent avers that a land ownership dispute can not be determined in a petition and a civil suit was better placed to do so. He relied on the case Nairobi high court petition number 613 of 2014- Patrick Musimba vs the national land commission & 4 others. He submitted that the 1st respondent had demonstrated by way of an affidavit that they have owned the land parcel since time immemorial, and that they have exhibited evidence of long occupation and use while the petitioner has not exhibited any evidence that would support his claim.

15. Lastly the respondent avers that the remedies sought are not concisely stated and relies on the case of **Nairobi Constitutional Petition Number 47 of 2010 Ledidi ole Tauta & Others vs The Attorney General and 2 Others**.

DETERMINATION

Issues for Determination

16. The issues for determination in this matter are as follows:

- a. *Were the petitioner's rights to a fair hearing violated?*
- b. *Were the petitioner's rights to property in land violated by wrongful appropriation of his land for public purposes?*
- c. *Is the petition fatally flawed for want of specificity?*

Were the petitioner's rights to a fair hearing violated?

17. In this case the objection lodged by the petitioner's father has been decided. After the petitioner lodged his own objection the decision issued by the Land Adjudication Officer, the 2nd respondent read as follows in part:

“The objector's late father did file a Land Committee case which was ruled in favour of the respondent. If at all the objector was dissatisfied he should have filed an Arbitration Board case but he did not. A/R objections are filed against the demarcation process and not the gathering process.”

18. It is clear that the petitioner's deceased father was in his lifetime granted a hearing. The decision in the petitioner's father lodged was issued in favour of the 1st respondent. In the Objection lodged by the Petitioner, the Land Adjudication officer also issued a determination that was in favour of the 1st respondent herein. The record in respect of the petitioner's objection shows clearly how the matter before the Land Adjudication Officer proceeded from the beginning to the end. It forms part of the petitioner's own exhibits.

19. The Land Adjudication Officer faulted the petitioner's objection for being an A/R objection which, instead of being filed against demarcation, appeared to target the issue of gathering of the land. He also found that the petitioner's witness had confirmed that the land originally belonged to the 1st respondent. I therefore find that both the petitioner and his deceased father were granted a hearing and a

decision was made on the merits of each objection. There is therefore no evidence of violation of the right to natural justice.

b. Were the petitioner's rights to property in land violated by wrongful appropriation of his land for public purposes?

20. There is obvious need to explore this question regardless of the finding that the petitioner as well as his father were accorded a hearing.

21. The argument by the petitioner is that he owns the land and that it was wrongly appropriated for a public purpose.

22. The 1st respondent on the other hand objects to the entire petition and submits that there were appropriate statutory procedures under the Land Adjudication Act to resolve the land ownership issue and that the petitioner has failed to exhaust the mechanism laid out in that Act.

23. I have considered that argument. It is the correct position that **section 29** provides a leeway for a person who is aggrieved by a decision made on objection proceedings under **section 26** of the Act to appeal to the Minister. The petitioner has not demonstrated that he did so before filing this petition.

24. In the first place the petitioner should have exhausted that procedure before approaching court. Land adjudication mechanisms were provided for in statutes. The wisdom in doing so was that the disputes as to the real ownership of land was placed in the hands of the competent authorities who would oversee the adjudication process.

25. The decision as to ownership of the land at the adjudication stage was made by the court. Matters relating to customary law claims on land were to be determined by these authorities. A decision on the propriety of the procedure that the said authorities employed in order to arrive at the conclusion that the 1st respondent owned the land could be challenged during the adjudication process, and the decision could be quashed by way of certiorari.

26. The situation is different however when one challenges the merits of a decision made by those authorities in a constitutional petition like the instant case. That is quite evident in this court's recent decision in **Meru ELC Judicial Review No. 70 OF 2010 Republic Versus the Director of Land Adjudication & Settlement Officer and another** and other decisions.

27. The court recently dealt with a situation similar to that in the instant case in the case of **Johnson Mithika M'ikiao Alias Josphat Kabuthia Versus Rose Mukiri Thaitumu- Meru ELC Petition No. 22 of 2012**. In that case the petitioner had sought to be declared the owner of a plot of land numbered **1104**. That plot of land had already been subdivided into two portions one of which was registered in the 1st respondent's name pursuant to the outcome of the Arbitration Board proceedings on an objection lodged by the petitioner. The court stated as follows:

"33. When the petitioner approaches this court vide this petition and asks for orders that would, if issued declare parties rights in respect of the entire parcel number 1104 while the same has been the subject of substantive adjudication through a process of adjudication that is recognized by the law and it has been shared out between him and the 1st respondent, his claim has to be scrutinized thoroughly, for issuance of those orders may finally dethrone the very mechanisms set for processing of each individual's right to land and shake public confidence in the adjudication process and the offices vested with the duties of adjudication.

34. In my view it is not at this stage that a claim of violation of substantive rights to property may be lodged by the plaintiff. This court can only pronounce itself on the issue of whether the rights to due process under the constitution and the law have been followed by the proper authorities with regard to adjudication of his rights to land.

28. Numerous earlier decisions including **Harrikissoon Vs. Attorney-General Of Trinidad And Tobago [1980] A.C. 202, Karume Vs Republic, Alphonse Mwangemi Munga & 10 Others V African Safari Club Limited [2008] eKLR** held that where there was a clear procedure provided, that procedure needed to be followed and that a constitutional petition could not be made a substitute for such a process.

29. It is not lost on this court that **Section 29** of the Act makes a decision by the Minister in respect of an appeal arising out of a determination under **section 26** of the Act final. That is a path that the petitioner and his father should have pursued but which they evidently failed to.

30. In this case, it is clear that adjudication of ownership in respect of the suit land having been conducted and a decision on ownership made, the court could not issue the orders sought as the taking away of the land was done during the process of adjudication. The 1st respondent also objects to this petition and opines that land ownership disputes should not be addressed in a constitutional petition. This is the correct position.

c. Is the petition fatally flawed for want of specificity?

31. The 1st respondent raised this issue. It is now trite that when a person files a petition alleging a violation of right he must state with specificity the right so violated, the clause of the constitution on which he relies and the manner in which that right has been violated.

32. The celebrated case of **Anarita Karimi Njeru and [1979] KLR 162** has been recently followed by many other decisions on the same point. The 1st respondent relies on the **Ledidi case**. But looking at the petition, can a reasonable mind consider it to be poorly drawn to the extent that it may be deemed to fail this test in the **Anarita Karimi** case (supra)?

33. The heading of the petition cites **Articles 21,22,23,40, and 50** of the current **Constitution of Kenya 2010** and **section 84(6)** of the **Former Constitution of Kenya**. Using the **Anarita Karimi** case test one would expect the clauses of the constitution cited to be mentioned in the body and prayers of the petition as the petitioner attempts to state his case regarding violation of right. Not even one paragraph of his petition bears any clause of the constitution. I find this to be irregular. The petition therefore fails the **Anarita** case test quite early in the day and must also fail for that reason.

CONCLUSION.

34. The upshot of the above is that the petition dated **3/4/2012** is without merit and it is hereby dismissed with no order as to costs.

Dated, and signed at Kitale on this 1st day of August, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August, 2018 in open court in the presence of:

Mr. Kiongo for 2nd and 3rd respondents

Mr. Mutunga for Kiome for petitioner

Mutuma for 1st respondent

C/A Mutua

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.