



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
PETITION CASE NO. 9 OF 2016

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THREATENED INFRINGEMENT AND VIOLATION OF THREATENED
INFRINGEMENT AND VIOLATION OF ARTICLES 20 (1), 23(3)(E), 27, 40,47(1) AND 259 (1) AND
260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLES 22(1) (2), 50 (1) AND 258 OF THE CONSTITUTION OF KENYA,
2010

AND

IN THE MATTER OF: SECTION 29 AND 30 OF THE LAND ADJUDICATION ACT, CAP 284

AND

IN THE MATTER OF: RULE 4 AND 10(1) OF THE CONSTITUTION OF KENYA (PROTECTION
OF RIGHTS AND FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

MUNYITHYA MUSYOKA NZAVI.....PETITIONER

VERSUS

THE LAND ADJUDICATION OFFICER

KYUSO ADJUDICATION AREA.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MANZI KAVOI NGUILU1ST INTERESTED PARTY

ATRHI RIVER MINING CO. LTD.....2ND INTERESTED PARTY

RULING OF THE COURT

1. The 1st Interested Party raised a preliminary objection dated 11th April, 2016 to the Petitioner's Petition as follows:-

(a) The petition is res judicata

(b) The Petition raises no reasonable cause of action and is an abuse of the Court process.

(c) The Application is incompetent and lacks merit.

(d) There is another pending case being High Court of Kenya ELC Case No. 287 of 2016 – Munyithya Masyuko Nzavi =Vs= Manzi Kavoi Nguilu and Another

2. The 2nd Interested party also raised a Preliminary Objection dated 16/11/2016 to the Petitioner's Petition as follows:-

(1) The suit herein lacks merit, is frivolous, not reasonably purposeful, is an abuse of the court process.

(2) The suit offends Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 as adopted is the case of ANARITA KARIMI NJERU =VS= REPUBLIC [1979] KLR 154.

(3) This Honourable Court has no jurisdiction to hear and determine the suit herein and therefore offends the Provision of Article 162 (2) and 165 (b) of the Constitution of Kenya 2010.

(4) The suit herein is fatally defective and be struck out.

3. Parties herein agreed to canvass the above Preliminary Objection by way of written submissions.

4. 1st and 2nd Interested Parties Submissions:

1st and 2nd Interested Parties filed joint submissions which were presented by Counsel for the 2nd Interested Party.

It was submitted for the Interested Parties that the Petitioner's Petition offends the Provisions of Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 as he has failed to cite the Constitutional Provisions which has been violated. It was further submitted that even though the Petitioner is challenging the Application of Section 30 of the Land Adjudication Act, he has not explored remedies under Article 22 and 23 of the Constitution of Kenya 2010. Further it was submitted that nothing in Section 30 of the Land Adjudication Act Cap 284 Laws of Kenya bars a party from approaching the Court for conservatory orders as appropriate. The Interested Parties feels that the Petitioner has not clearly demonstrated which rights have been violated to warrant this Petition since Section 30 of the Act does not bar him from approaching the Court for conservatory orders. The Interested Parties therefore maintains that the Petition herein does not meet the standard enunciated in ANARITA KARIMI NJERU case.

It was also submitted for the interested parties that this court has no jurisdiction to hear this Petition pursuant to the Provisions of Article 162 (2) and 165(5) of the Constitution since the matter in dispute concerns land which should be canvassed before the Environment and Land Court.

5. Petitioner's Submissions:-

It was submitted for the Petitioner that the 1st Interested Party's claim that the suit is Res judicata, has no basis since the pending suit namely **Nairobi High Court ELC No. 287 of 2016** has since been withdrawn by the Petitioner on the 21/06/2016. It was further submitted that the Constitutionality of certain sections of the Land Adjudication Act are not issues raised in that suit.

It was submitted for the Petitioner that the Petitioner has fully complied with the Provisions of Rules 4 and 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and further that this court has jurisdiction to entertain this Petition since the same relates to the Provisions of the Land Adjudication Act and how the gaps and inadequacies of the Act can lead to the violation of the Petitioner's rights to land as protected under the Constitution and thus seek certain declarations in relation to that Act and as such this court is to determine the question whether Section 30 of the Act is incumbent with the Constitution and therefore the Petition has nothing to do with a dispute over land.

6. I have considered the submissions of the learned Counsels for the Petitioner and the two interested parties. The issues for determination are as follows:-

(1) Whether this suit offends Rule 10 of the constitution of Kenya Protection of Rights and fundamental Freedoms) practice and Procedure Rules, 2013.

(2) Whether this court has jurisdiction to hear this Petition.

Before I embark on the above issues, I find it is necessary to enumerate the reliefs sought in the Petitioner's Petition dated 29th April, 2016. They are as follows:-

(a) A declaration that pending the hearing of the Appeal by the Petitioner to the Minister (Cabinet Secretary) of the Ministry of Lands, Housing and Urban Development from the decision of the Nгааie Adjudication Section Arbitration Board awarding land parcel number Nгааie Adjudication Section 3112 to the Interested party made on the 3rd March, 2016 there be stay of dealings on land by way of sale, charge, mortgage, subdivision lease, partion or disposal until the said appeal is heard and determined.

(b) A declaration that Section 30 of the Land Adjudication Act limits the Petitioner's access to the courts only with the consent of the Adjudication Officer or the Minister whilst his appeal to the Minister is pending the said Section is in contravention of article 22(1) of the Constitution.

(c) A declaration that to the extent that Section 30 of the Land Adjudication Act has no Provisions providing for interim relief or conservatory orders whilst the Petitioner's appeal to the Minister (Cabinet Secretary) is pending, the said Section exposes the Petitioner to the threat of being arbitrarily deprived of his property without compensation pending appeal to the Minister and this being contrary to Articles 40 (2)(a) and 40(3) of the Constitution.

7. Whether this suit offends Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

The above Rules provides as follows:-

(10) (1) An Application under Rule 4 shall be made by way of Petition as set out in form A in the Schedule with such alterations as may be necessary.

(2) The Petition shall disclose the following:-

(a) the Petitioner's name and address;

(b) the facts relied upon;

(c) the Constitutional Provisions violated;

(d) the nature of the injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit, or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the Petitioner or any other of the Petitioner's, which is related to the matter in issue in the petition;

(f) The petition shall be signed by the Petitioner or the advocate of the Petitioner and

(g) The relief sought by the Petitioner.

(3) Subject to Rules 9 and 10 the Court may accept an oral Application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral Application entertained under sub-rule (3) shall be reduced into writing by the Court.

8. The Petitioner in the reliefs sought namely (b) and (c) maintains that Section 30 of the Land Adjudication Act limits his access to the Courts as he must secure a consent from the Adjudication Officer which he feels is a violation of his fundamental rights and freedom under Articles 22 (1) and 40 (2) (a) and 40 (3) of the Constitution since the Section exposes him to the threat of being arbitrarily deprived of his property without compensation while the Appeal is still being awaited for determination by the Minister.

There is need to look at the relevant provisions of the Land Adjudication Act in issue herein. Section 30 of the said Act relates to staying of suit as follows:-

(1) Except with the consent in writing of the Adjudication Officer no person shall institute and no Court shall entertain any civil proceedings concerning an interest in land in an Adjudication Section until the Adjudication register for that adjudication Section has become final in all respect under section 29 (3) of the Act.

(2) Where any such proceedings were began before the publication of the notice under Section 5 of this Act, they shall be discontinued, unless the Adjudication Officer, having regard to the stage which the proceedings have reached otherwise directs.

(3) Any person who is aggrieved by the refusal of the Adjudication Officer to give consent or make a direction under sub-section (1) and (2) of this Section, may within twenty eight (28) days after the refusal appeal in writing to the Minister whose decision shall be final.

(4) The foregoing provisions of this Section do not prevent a final order or decision of a court made or given in the proceedings concerning land in an adjudication Section being enforced or executed if at the time of this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.

(5) A certificate signed by an Adjudication Officer certifying land to be, or to have become on a particular date, land within an adjudication Section shall be conclusive evidence that the land is such land.

(6) Every certificate purporting to be signed by an Adjudication Officer shall be presumed to be signed unless the contrary is shown."

9. The above Section 30 of the Land Adjudication Act provides for the procedure to be resorted to when land in question is still under an Adjudication Section and governed by the Land Adjudication Act Cap 284 Laws of Kenya. The Petitioner contends that the Section 30 aforesaid does not provide for interim relief of conservatory orders while appeals to the Minister are pending for determination. In essence therefore, the Petitioner seems to be challenging the Land Adjunction Act yet he still can approach the courts pursuant to Article 22 and 23 of the Constitution for remedies. In any case the relevant Section 30 of the Act does not appear in any way to bar a party from approaching the court vide Article 23 of the Constitution which provide as follows:-

23 (1) *The High court has jurisdiction in accordance with Article 165 to hear and determine Applications for redness of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.*

(2) *Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine Applications for redness of a denial, violation or infringements of or threat to a right or fundamental freedom in the Bill of Rights.*

(3) *In any proceedings brought under Article 22, a Court may grant appropriate relief including*
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(a) *A declaration of rights*

(b) *An injunction*

(c) *A conservatory order*

(d) *A declaration of an invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill or Rights and is not justified under Article 24.*

(e) *An order for compensation*

(f) *An order of Judicial Review.*

10. Looking at paragraph 19 of the Petitioner's Petition it is clear that the Petitioner is yet to seek the consent of the Adjudication Officer or the Minister concerned and he has not shown that such a consent under Section 30 of the Act has been refused. The Petitioner states as follows:-

“The Petitioner has not approached the Minister or the Adjudication Officer for consent but since consent is likley to be refused because of the pending appeal or would take long to be decided on.”

11. It follows therefore that if the Petitioner has not sought for the consent as directed under Section 30 of the Act and further exhausted the remedies thereunder and further in the absence of proof or refusal of such consent, then the Petitioner has failed to prove that his rights have been violated. He has not shown that indeed his rights have been violated such as that the Adjudication Officer or Minister has refused to grant consent. He says in his Petition that the consent is likely to be refused yet he has not made a move. How does he know that it will be refused yet there is no evidence in that regard? The Petition is therefore premature. The Petitioner was duly bound to state with precision the nature of the breach and the Section allegedly breached and how it was violated. I am guided by the decisions in the cases of ANARITA KARIMI NJERU =VS= REPUBLIC [1979] KLR 154 and MUMO MATEMU =VAS= TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR where the courts held that Petitioners have to demonstrate in their pleadings and affidavits that their rights have been violated and proceed to set out with a reasonable degree of precision that of which they complain as well as the provisions said to be infringed and the manner in which they are alleged to be infringed.

It is clear from the above therefore that the Petition herein does not meet the threshold in the decision in

ANARITA KARIMI NJERU =VS= REPUBLIC [1979] KLR 154 and further under Rule 10 of the Constitution (Protection of Rights and Fundamental Freedoms), Procedure and Practice Rules, 2013.

12. Whether this Court has jurisdiction to hear this Petition:

As this is a matter now lodged before the High court, the relevant provisions of the Constitution that donate jurisdiction are found in Article 165 and 162.

Article 165(3) provides:-

“Subject to clause (5) the High court shall have –

(a) Unlimited original jurisdiction in criminal and civil matters.

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office other than a tribunal appointed under Article 144.

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including determination of-

(i) the question whether any law is inconsistent with or in contravention of this Constitution,

(ii) the question whether anything said to be done under the authority of this Constitution f any law is inconsistent with or in contravention of this Constitution,

(iii) any matter relation to constitutional powers of state organs in respect of county governments and any matter relative to the Constitutional relationship between the levels of government and

(iv) a question relating to conflict of laws under Article 191,

(v) any other jurisdiction, original or appellate conferred on it by legislation.

Article 165(5) provides thus:-

“***The High Court shall not have jurisdiction in respect of matters –***

(a) reserved for the inclusive jurisdiction of the Supreme Court under this Constitution or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).

Article 162 of the Constitution provides:

162(1) The superior courts are the Supreme Court, the court of Appeal, the High Court and the Courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(a) employment and labour relation; and

(b) the environment and the use and occupation of, and title to land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in Clause (2)

(4) The Subordinate courts are the courts established under Article 169 or by Parliament in accordance with that Article.”

13. The Petitioner herein has clearly stated that the genesis of his case emanates from a decision made by the Ngaai Adjudication Section Arbitration Board set up under Section 7 of the Land Adjudication Act Cap 284 Laws of Kenya with regard to land parcel number Ngaai Adjudication Section 3112 given on the 3/3/2016 and in which the Petitioner has appealed to the Minister (Cabinet Secretary) of Lands Housing and Urban Development under Provisions of Section 29 of the said Act. In the Petitioner’s Petition paragraph 7 it is stated as follows:-

“The Petitioner who is now 79 years has always occupied, tilled and used the piece of land now known as Ngaai Adjudication Section 811 measuring a total of 88 acres. Te Petitioner’s acquisition of the land was through actual occupation of the land clearing it and using it as his own without interference from anyone since 1952.”

14. From the above description it is quite clear that the dispute is entirely relating to the use and occupation of and title to land and therefore by dint of Article 162(2) of the Constitution, this matter ought to be properly filed before the Environment and Land Court. The Petitioner’s in his submissions confirmed that a similar suit being **Nairobi High Court ELC No. 287 of 2016** has been withdrawn. If that is so then the Petitioner should now proceed to file the dispute before the Environment and Land Court at Machakos as the High court herein does not have jurisdiction to entertain the Petitioner’s dispute but the E.L.C. Court.

15. In the result it is the finding of this court that the Interested Parties Preliminary Objections dated 11th April, 2016 have merit. The same are hereby upheld. Consequently the Petitioner’s Petition dated 29th April 2016 is ordered struck out with costs to the two (2) Interested Parties.

It is so ordered.

Dated, signed and delivered at MACHAKOS this 24th day of JULY, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Keyonzo – for Petitioner

Omati – for Nyamu – for Interested Party

C/A Kituva