



REPUBLIC OF KENYA



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Adan & 4 others v Cabinet Secretary Ministry of Lands & Planning & another (Environment & Land Petition 002 of 2021) [2023] KEELC 22100 (KLR) (11 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND PETITION 002 OF 2021
PM NJOROGE, J
DECEMBER 11, 2023**

BETWEEN

**FATUMA DULLO ADAN 1ST PETITIONER
REHEMA JALDESA 2ND PETITIONER
ABSHIRO SORAH HALAKE 3RD PETITIONER
HASSAN HULUFO 4TH PETITIONER
KOROPU TEPO 5TH PETITIONER**

AND

**CABINET SECRETARY MINISTRY OF LANDS & PLANNING 1ST
RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

JUDGMENT

1. In this Petition, the petitioners seek orders that:
 - a. A declaration be and is hereby issued that the 1st respondent's Land Adjudication (Application) Order, 2019 issued Vide Legal Notice No. 150 of 2019 without consultation and public participation of the people of Isiolo County is illegal, unconstitutional, null and void.
 - b. A declaration be and is hereby issued that the Land Adjudication (Application) Order, 2019 issued Vide Legal Notice No. 150 of 2019 by the 1st respondent violates the constitutional right of the people of Isiolo County to fair administrative action thus an abuse of administrative power, unlawful, null and void ab initio.



- c. An order of certiorari be and is hereby issued to bring before this Honourable Court for purposes of being quashed the 1st respondent's Land Adjudication (Application) Order, 2019 made vide Legal Notice No. 150 of 2019 dated August 27, 2019.
 - d. A declaration be and is hereby made that the ongoing survey and demarcation of Land in Isiolo County violates the constitutional rights for the people of Isiolo County thus unlawful, null and void ab initio.
 - e. An order of mandamus be and is hereby issued compelling the 1st respondent to lawfully and procedurally commence the process of adjudicating community land in Isiolo County afresh in compliance with the *constitution*, the [Community Land Act](#), 2016 and the [Land Adjudication Act](#).
 - f. The respondents be and are hereby directed to pay the petitioners costs of this Petition.
2. The application was canvassed by way of Written Submissions.
 3. The petitioners submit that they have come to this court pursuant to article 22 (1) of the *constitution* to protect the interests of the communities in Isiolo County whose rights have been denied, infringed upon and been threatened with violation by the 1st respondent. They say their rights are buttressed by article (19) (2), article 20 (1), article 40, article 10 and article 47 of the *constitution*.
 4. The petitioners frame the issues for determination as:
 - a. Whether there was public participation before the issuance of Legal Notice No. 150 of 2019 and its Subsequent Amendment Vide Legal Notice No. 1 dated December 20, 2019;
 - b. The legality of Legal Notice No. 150 of 2019 and amended Legal Notice No. 1 dated December 20, 2019;
 - c. Whether the [Community Land Act](#) is operational and whether it applies to the 1st respondent and Interested Party;
 - d. Whether the ongoing survey and demarcation of Community Land in Isiolo County is lawful;
 - e. Whether the Petition is merited and whether the petitioners are entitled to the reliefs sought.
 5. Regarding public participation, the petitioners submit that there was no meaningful public participation when Legal Notice No. 150 of 2019 and its subsequent amendment vide Legal Notice No. 1 dated December 20, 2019 was made. To buttress their submission in the area of public participation, the petitioners proffer the following cases:
 - a. [Muthara Njuri Ncheke Council of Elders & Another Versus Committee of Ngare Mara/ Gambella Adjudication Section & 2 Others](#) [2019] eKLR.
 - b. [Kiambu County Government and 3 Others Versus Robert N. Gakuru & 3 Others Versus Robert N. Gakuru & 3 Others](#) [2017] eKLR.
 - c. [Richard Owuor & 2 Others \(suing on behalf of Busia Sugarcane Importers Association\) Versus Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & cooperation & 7 Others](#) [2021] eKLR.
 - d. [Martin Nyaga Wambora Versus County Assembly of Embu & 37 Others](#) [2015] eKLR.
 6. Regarding whether or not Legal Notice No. 150 of 2019 and Amended Legal Notice No. 1 dated 20th December, 2019 adhered to legal requirements, the petitioners submit that the Legal Notices



fall short of acceptable legal requirements. They buttress their submission by proffering the case of *Richard Owour & 2 Others* (Op.Cit) and say that the petitioners rights for human dignity as enshrined in article 28 of the *constitution* were infringed upon. They also proffer the case of *Poverty Alleviation, Network & Others Versus President of South Africa & 19 Others*, CCT86/08 [2010] 2 ACC 5 where the court unequivocally held that the right to public participation was necessary to preserve human dignity and self respect. In a nutshell, just as stated in paragraph 4 above, the petitioners are saying that the legal notices which instigated the impugned land adjudication process lacked integrity for having not achieved required legal thresholds.

7. Regarding whether or not the *Community Land Act* was operational and was applicable to the 1st respondent and Interested Party when the Impugned Legal Notices were issued, the petitioners are unequivocal that the *Community Land Act* was operational. They say that the Act was enacted in 2016 whereas the impugned Legal Notices were issued 3 Years later in 2019. They quote article 116 of the *constitution* as stating that “Subject to clause 3, an Act of Parliament comes into force on the 14th day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force”. They proffer the case of *Trusted Society of Human Rights Alliance Versus Cabinet Secretary Devolution and Planning & 3 Others* [2016] eKLR for their proposition that article 116 of the *constitution* was meant to cure the mischief where the executive and its bureaucrats could unnecessarily and capriciously delay the operation of Acts of Parliament. They also refer the court to the case of *Republic Versus Joe Mucheru, Cabinet Secretary, Ministry of Information Communication & 2 Others: Katiba Institute & Another (Exparte): Immaculate Kasait; Data Commissioner (Interested Party) – Judicial Review Application* [2021] KEHC (Judicial Review).
8. On whether the ongoing survey and demarcation of Community Land in Isiolo is lawful, the petitioners say that the Intention to Survey, demarcate and register Community Land as mandatorily required by Section 8 (4) of the *Community Land Act* was never done through a public Notice. They also state that by stating that the *Community Land Act* was not operational, the Interested Party had admitted that the continued process of adjudication had not followed the requirement of Section 8 (4) and 8 (5) of the *Community Land Act*. They submit that this renders the Surveying and demarcation of Community Land in Isiolo as unlawful.
9. Concerning whether or not the Petition is merited and whether or not the petitioners are entitled to the reliefs sought, the petitioners submitted that their petition was merited and Ipso Facto, they were entitled to the reliefs sought. They referred the court to the case of *Musa Ogaro Osaro Versus Wilfred N. Gutwa (Director of Human Resource) & 3 Others* [2021] eKLR where the court cited the case of *Trusted Society of Human Rights Alliance Versus Attorney General & 2 Others* [2021] eKLR where the court had opined as follows:

“.....the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the Constitutional Violation alleged.” They also stated that the court reaffirmed the said proposition as held in the case of *Anarita Karimi Njeru Versus the Republic* [1976-1980] which had been decided under the retired Constitution. They unequivocally submit that they have pellucidly demonstrated the constitutional and Statutory Provisions which have been violated to their detriment.
10. The 1st and 2nd respondents framed issues for determination as:



- a. Whether or not the Legal Notices No. 150 of 2019 and the amended Legal Notice No. 1 of 2020 conformed to the Legal Requirements.
 - b. Whether or not the remedies of Certiorari and Mandamus are available to the petitioners.
 - c. Whether or not the ongoing Survey and demarcation of Land in Isiolo County is illegal and unconstitutional.
11. On whether Legal Notices No. 150 of 2019 and the amended Legal Notice No. 1 of 2020 conformed to Legal Requirements, the respondents are unequivocal that they conformed to legal requirements. They explain that the Isiolo County Assembly, as an expression of its desire to have Isiolo County benefit from the National Government's titling programme requested for titling. The assembly submitted to the 1st respondent an inventory of all Community Land in Isiolo and gave clear illustrations of areas falling outside the purview of the [Community Land Act](#) and those areas available for titling under the [Land Adjudication Act](#). They say that the Ministry of Lands partnered with the Ministry of Lands and Physical Planning to ensure titling in the County. The Assembly requested for adjudication to take place in the settled areas of Oldonyiru, Ngaremara, Kiino, Garbatulla and Merti.
12. The respondents decry the position that at the time the adjudication process commenced in Isiolo, the County had only 340 titles, a situation that did not augur well for sustained development in the County. They admit that Legal Notice No. 150 of 2019 did not fully comply with the law and hence the issuance of an ameliorative Gazette Notice, Legal Notice No. 1 of 2020. The respondents are unequivocal that the impugned process was being conducted under the [Land Adjudication Act](#) and NOT under the [Community Land Act](#). They say that Section 3 (1) of the [Land Adjudication Act](#) empowers the Minister to apply the Act to any area of Community Land if
- a. The County Government in whom the land is vested so requests.
 - b. The Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered; and
 - c. The [Land Consolidation Act](#) (Cap 283) does not apply to the area.
13. More substantially, the respondents unequivocally submit that the legality of Legal Notice No. 150 of 2019 and Amended Legal Notice No. 1 of 2020 was definitively decided by the Honourable Lady Justice Lucy N. Mbugua in the Case of Fatuma Adan Dullo & 4 Others Versus Cabinet Secretary Ministry of Lands and Physical Planning & 2 Others [2020] eKLR.
- Interestingly the case proffered by the respondents is this case where a ruling was made by the Honourable Lady Justice Mbugua, at its infancy stage.
14. I opine that this is a case which is veritably Sui Generis. The petitioners vide their application dated 14th November, 2019 sought interlocutory conservatory orders. That application was canvassed in a manner which made it difficult for the court to avoid into delving into issues which should have rightly been argued in the mother petition.
- The petitioners and the respondents were complicit in this state of affairs. As a result the court pronounced itself eruditely concerning the legality of the impugned Land Adjudication Process. In its ruling at paragraph 64 and 65 of its ruling delivered by Lady Justice Lucy N. Mbugua on 18th November, 2020 the court opined as follows;



- 64: “One more point of concern is that as long as Community Land remains unsurveyed and undemarcated, then conflicts of great magnitude will continue to thrive. This is because such land may be viewed as Res-nullis (it’s nobody’s, it is no one’s property. It is open access
- 65: In the final analysis, I find that the Amended Notice in the Kenya Gazette Supplement No. 1 of 2020 dated 20th December, 2019 was properly issued under *Land Adjudication Act* Cap 284 Laws of Kenya. I therefore find no merits in the application dated 14/11/2019; hence the same is hereby dismissed. The outcome of the Main Suit.”

15. At paragraph 42 of her ruling the Honourable Lady Justice Mbugua stated as follows:

- 42: “It is quite clear that the *Community Land Act* recognizes the application of other written Laws in so far as determination of rights in Community Land is concerned. One of these other written laws happens to be the *Land Adjudication Act*.”

Hence the Honourable Judge held that the impugned adjudication process was being prosecuted legally under the *Land Adjudication Act* and not under the *Community Land Act*.

16. The respondents have submitted that since the impugned surveying and demarcating process was being implemented under the *Land Adjudication Act* and all the pre-requisites had been adhered to, the survey and demarcation of land in Isiolo was legal and constitutional.
17. Regarding the issue of public participation, the respondent submitted that meaningful public participation had taken place. They say that at paragraph 57 of *Fatuma Adan Dullo & 4 Others Versus Cabinet Secretary Ministry of Land and Physical Planning & 2 Others (Supra)*, the Honourable court had noted that the respondents under paragraph 8 of Michael Irungu’s affidavit gave particulars of the apposite sensitization schedule. They also submit that public participation may take different forms as there is no one shoe size fits all approach. They proffered the case of *Richard Owour & 2 Others (Op. Cit)* as having cited with approval the case of *Independent Electoral and Boundaries Commission (IEBC) Versus National Super Alliance (NASA) Kenya & 3 Others [2017] eKLR* which has said as follows:

“...the mechanism used to facilitate public participation namely, through meetings, press, conferences, briefing of members of public, structured questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested parties.”

They also submit that the Honourable Justice Lucy N. Mbugua in *Fatuma Adan Dullo and 4 Others Versus Cabinet Secretary of Lands and Physical Planning and 2 Others (Supra)* found that the respondents had embraced the public participation which the petitioners sought to discredit. The Honourable Judge had also opined that the adjudication process was an elaborate procedure which incorporates a participatory approach at the various stages of its implementation. They buttress this submission by proffering the case of *Silverio Akubu & 4 Others Versus Charles Bario Salisio & 3 Others [2019] eKLR* where the Court stated as follows:

“The fact that the committee members are appointed from the area residents is a clear signal that these members became the EYE and EAR of the residents. They are entrusted with the duty of shepherding the process in such a manner that they even take into account the interests of persons who are absent and they also bring to the attention of the DLASO the



existence of land which has no claimants. This is not all, they have the mandate to determine disputes arising from the adjudication process.”

18. The respondents conclude by submitting that the land survey and demarcation of various parts of Isiolo County complied with relevant laws, that public participation in relation to Legal Notice No. 1 of 2020 was done in observance of the right public participation and that the impugned process was being implemented under the [Land Adjudication Act](#) and not under the [Community Land Act](#).
19. With regard to the remedies of Certiorari and Mandamus sought by the petitioners, the respondents submit that they are not merited as the process they seek to impugn has been conducted in accordance with the law.
20. I opine that prayer (a) in the Petition is the overarching one. It seeks a declaration that the apposite Land Adjudication Application Order is illegal, and unconstitutional for having been issued without consultation and public participation of the people of Isiolo County. Should this prayer be upheld then prayer (b) that the 1st respondent violates the Constitutional rights of the people of Isiolo County to fair administrative action and thus is an abuse of administrative power, unlawful and null and void ab initio is veritably anchored. Should prayer (a) in the petition not be upheld all other subsequent prayers will flounder and will be rendered Otiose.
21. I do find that the Honourable Lady Justice Lucy Mbugua in her ruling delivered on 18th November, 2020 had unequivocally, pellucidly and definitively made findings that the Amended Notice in the Kenya Gazette Supplement No. 1 of 2020 had been properly issued under the [Land Adjudication Act](#), was legally issued and public participation had occurred before it was issued.

Regarding public participation at paragraph 57, 58, 59, 60, 61 and 62 of her ruling the Honourable Justice Lucy N. Mbugua, had eruditely pronounced herself that meaningful public participation had taken place. I opine that this Judge has equal jurisdiction to that of the Honourable Justice Lucy N. Mbugua. A Judge seized of concurrent jurisdiction to that of another Judge, cannot sit as an appellate court concerning findings of the other Judge. Should the petitioners have been dissatisfied with those findings they ought to have escalated the matter to the court of Appeal. I am inclined to uphold those findings.
22. I have carefully considered the pleadings, the authorities and the submissions proffered by the parties to buttress their veritably diametric and incongruent assertions. I, however, decry that the Interested Party, the County Government of Isiolo, did not file submissions. Nevertheless, they all along supported the respondents. I have come to my Independent decision that meaningful public participation had taken place before the impugned Legal Notice was issued, that the Impugned Land Adjudication (Application) order, had legally been issued under the [Land Adjudication Act](#) which was the applicable law and that the [Community Land Act](#) was not the applicable law.

Having so found, I find that prayers (a) (b) (c) and (d) in the petition are not merited.
23. As an aside, I do note that after denial of conservative orders by this court on 18th November, 2020 the titling process which the petitioners wanted arrested has been going on. In view of what I have already said, I find that the titling process is being conducted legally and in accordance with the *constitution*. This finding will not render the titling process that has been in operation for 4 years an exercise in futility which, if found unlawful, would result in loss of immense public resource. I also opine that titling accords, with the instruction by the *constitution* at article 60 (i) (c) that land be held, used and managed in a sustainable and productive manner.
24. In the circumstances, I issue the following orders:



- a. This Petition is dismissed.
- b. As the Petition evinces public interest concerns, no costs are awarded in favour or against any of the parties.

DELIVERED IN OPEN COURT AT ISIOLO THIS 11TH DAY OF DECEMBER, 2023 IN THE PRESENCE OF:

Court Assistant: Balozi/Rahma

HON. JUSTICE P.M NJOROGE

JUDGE

