



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

MISCELLANEOUS APPLICATION NO. E041 OF 2021

SUSAN MARY NAITORE THIMANGU (Suing As Next Friend Of KENNAH

MARTIN THIMANGU KAUYANGI APPLICANT

VERSUS

LAND ADJUDICATION OFFICER TIGANIA WEST.....1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

SIRIAKA MURITHI KARITHI.....INTERESTED PARTY

RULING

1. The notice of motion dated 18.10.2021 brought under **Order 32 Rule 1 and 15, Order 40 Rule 1, Order 42 Rule 16, Order 51 Rule 1, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Section 8 of Land Consolidation Act and Article 159 of the Constitution** seeks for:

a. Stay of further proceedings or implementation of the land adjudication officer's decision of 12.10.2021 over Land Parcel No. 4960 Mbwaa B adjudication section.

b. Temporary injunction restraining the interested party from trespassing, entering, cultivating, erecting or interfering with the subject land pending hearing and determination of intended judicial proceedings.

c. An order compelling the land adjudication officer Tigania West Sub-County to issue the applicant with a consent under Section 8 of the Land Consolidation Act to proceed to this court for judicial review proceedings.

2. The application is supported by an affidavit of Susan Mary Naitore Thimangu and a supplementary affidavit sworn on 7.12.2021.

3. The grounds are the applicant is the recorded owner of the land measuring 4.6 acres since 1969 and the interested party has declined to sign a lease; has cunningly sought and obtained a portion yet he is a lessee; hearing of the matter was undertaken without proper representation of the applicant who is of advanced age; the decision was obtained unlawfully but the land adjudication officer has denied him a consent.

4. The respondent opposes the notice of motion by grounds of opposition dated 23.11.2021.

5. The first ground is that the application offends Section 8 and 9 of the Law Reform Act and the Fair Administrative Action Act 2015.

6. Secondly is an order for injunction and a stay cannot issue by way of miscellaneous application with no substantive suit.

7. Thirdly is the applicant has not demonstrated the adjudication process falls under the provisions of **Cap 283**, and that the applicant has not exhausted **Section 30 (3) of the Land Adjudication Act**.

8. Further the respondent states the decision complained about was that of an adjudication committee and hence did not emanate from the 1st respondent and lastly that the applicant cannot purport to act as next friend of Kennan Martin Thimangu Kinyangi who is not a minor or adjudged to be of unsound mind despite being the respondents in the objection proceedings.

9. With leave of court, parties opted to canvass the application through written submissions dated 6.12.2021 and 21.12.2021.

10. The applicant submits the court has supervisory jurisdiction under **Article 165 (6) and (7) of the Constitution** to ensure fair administration of justice since under **Cap 283** an aggrieved party by the decision of the adjudication officer has no recourse for a Minister's appeal except appealing to the arbitration board under **Section 10**.

11. It is the applicant's view that since the land adjudication officer exercised both administrative authority and quasi-judicial powers, he falls under the inherent jurisdiction of the court on supervision. The court is urged to look at substantive justice and not procedural technicalities guided by the dicta in *Joshua Mutoto Werunga –vs- Joyce Namunyak & 2 Others [2015] eKLR* quoting *Raila Odinga & 5 Others –vs- Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR*.

12. Secondly the applicant submits **Article 159 (2) (d) of the Constitution** mandates the court to administer justice without undue regard to technicalities and urges the court to ignore non-compliance with procedure especially since there will be no prejudice or apparent injustice to the other party as held in *Okoth Obado –vs- Edward Akongo Oyugi & 2 Others [2014] eKLR*.

13. Regarding the prayer to compel the issuance of a consent to sue under **Section 8 of the Land Consolidations Act**, the applicant relies on *Meru ELC Misc. Appl. No. 32 of 2016 Ex parte Reuben Liria & Mary Wangui Parmutia case*.

14. On the other hand the respondents submit there is nothing attached over the mental status of the applicant and that the power of attorney is suspect if the applicant is said to be having some mental impairment.

15. Secondly, it is submitted the applicant filed a supplementary affidavit dated 7.12.2021 without leave and which pleads new information not provided for in the notice of motion.

16. The respondent's submit the applicant should not be allowed to introduce new facts and information which would be prejudicial. The respondent's rely on *Astute Africa Investments & Holdings –vs- Spire Bank Kenya Ltd & Another [2018] eKLR* and *Kenya Pharmaceutical Association & Another –vs- Nairobi City County and the 46 Other: County Governments & Another [2017] eKLR* on the essence of pleading of material facts and elegance.

17. Further the respondent's rely on *Mohammed Mohamud Ali –vs- IEBC [2019] eKLR* on the proposition on specificity of pleadings and the need to reign on a party travelling beyond its pleading.

18. Additionally the respondents submit rules of procedure cannot be done away with as held in *Nicholas Kiptoo Salat –vs- IEBC & 7 Others [2013] eKLR*.

19. As to the decision complained about, the respondents submit it was made by the land adjudication committee which under **Section 21 of Cap 284** an aggrieved party has 14 days to appeal to the executive officer of the committee.

20. The court has gone through the application, grounds of opposition and the rival submissions. The issues for determinations are:-

a. If the court has been approached through the proper procedure.

b. If the court has powers to grant the orders sought.

21. As a starting point, the applicant's claim is based on a refusal by the 1st respondents to issue consent to institute judicial review proceedings. All what an applicant in a judicial review proceedings requires under **Order 53, Article 47** and the **Fair Administrative Action Act 2015** is a decision which is sought to be quashed. There is nowhere the consent to sue under **Section 8 of the Land Consolidation Act** is a mandatory requirement.

22. Article 60 of the Constitution provides for Principles of land policy among them the encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution. This is repeated under **Article 159 (2) (c) of the Constitution**.

23. These principles are implemented through the national government policies and through legislation. The Land Consolidation Act is one of the legislations with clear timelines and specific dispute resolution mechanisms. My view is those mechanisms and timelines must be invoked before a party purports to invoke the inherent jurisdiction of this court. See *Mutanga Tea & Coffee Limited –vs- Shikara Limited & Municipal Council of Mombasa (Now County Government of Mombasa). (2015) eKLR*.

The applicant complaint is failure to be issued with a consent to institute a suit.

24. A consent to institute a suit is only required under Section 26 of the **Land Consolidation Act**. Judicial review proceedings are not suits as defined under the **Civil Procedure Act**.

25. Secondly, before this court, there is no substantive motion in which orders can be issued. The application is a miscellaneous application and not a miscellaneous case. The applicant ought to have sought for mandamus to compel to whoever has withheld such a consent to issue it. See *Jared Otieno Aridi –vs- District adjudication and Settlement officer Bondo and Rarieda [2017] eKLR*.

26. The issue at hand is that the applicant was given a right of appeal within 14 days. Though supplementary affidavit filed without leave on

7.12.2021, he now admits there is a pending appeal to the Land Arbitration Board which is yet to be heard and determined.

27. The appeal was lodged on 24.10.2021 whereas the current application was filed on 18.10.2021. The letter seeking for the consent to sue was lodged on 14.10.2021. In my view the applicant must choose what he wants and before which forum.

28. There are internal mechanisms set out under the **Land Consolidation Act** available to the applicant (**See Sections 8 and 26 of the Land Consolidation Act**).

29. The issues raised in this application are the same issues the respondent has appealed against before the Land Arbitration Board. He should exhaust that procedure before turning to court. **See Abdullah Mangi Mohamed –vs- Lazarus Beja & 5 Others [2012] eKLR, Kanampiu M'rimberia –vs- Julius Kathane & 3 others [2019] eKLR.**

30. In **Samuel Kamau Macharia & another –vs- Kenya Commercial Bank Limited & 2 others [2012]**, the Supreme Court held a court's jurisdiction flows from either the statute or the Constitution. The applicant states the land adjudication officer and the land committee are quasi-judicial bodies which this court has inherent jurisdiction to superintend for conducting illegal, wrong, and sham committee hearing violating the rules of natural justice and hence awarding the interested party a portion of the applicant's land.

31. Whereas this court has powers, its jurisdiction has to be invoked in the right manner. In the instant application no leave has been sought for the grant of prerogative orders of mandamus, certiorari and prohibition. The applicant has not filed a Constitutional petition for grant of conservatory orders.

32. The prayers sought for stay of further proceedings and or implementation of the land adjudication officer's decision, temporary injunction and an order to compel for the issuance of consent are not based on any substantive suit, petition or judicial review proceedings.

33. In **Speaker of the National Assembly –vs- James Njenga Karume [1992] KLR 425** the court held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an act of Parliament that procedure must be strictly followed.

34. The applicant has ripe appeal before the arbitration board. He has also sought for the consent from the 1st respondent. There is a clear procedure to follow if the consent has been unreasonably withheld by the 1st respondent. It is not clear if the applicant has already submitted to that procedure.

35. Again, the law allows the applicant to move for judicial review orders if he seeks an order to compel a public officer who has failed to exercise a public duty. That procedure has not been invoked.

36. The applicant however submits that the court **Under Article 165 (6) and (7) of the Constitution** has supervisory jurisdiction and can make appropriate orders to ensure the fair administration of justice and that since the Land Consolidation Act does not provide a party in the objection proceedings aggrieved to appeal to the Minister, the court can exercise the inherent jurisdiction and make the appropriate orders.

37. If the applicant is questioning the legitimacy of the process of Land adjudication rather than determination of interests, he does not require a consent so as to file a judicial review proceedings or a petition. **See Republic –vs- Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others** quoted in **Reuben Mwangera M'Itelekwa (Suing as the Legal Representative of the estate of M'Itelekwa Mucheke –vs- Paul Kigea Nabea & 2 Others [2019] eKLR**

38. The applicant cannot have it both ways. He cannot litigate both in court and before the **Land Arbitration Board**. Similarly, he cannot complain about the legitimacy of the land adjudication process while at the same time subject himself to the process and before the determination is made one way or the other rush to court seeking the stay of proceedings and a temporary injunction.

39. He cannot approbate and reprobate at the same time. To allow such an application would not be in the best interest of justice in furtherance of expeditious disposal of justice under **Article 159 of the Constitution**. The same **Article** allows the courts to encourage alternative dispute mechanisms as provided by law.

40. This court would defer the issues and allow the structures set out under the **Land Consolidation Act** to perform their statutory mandate within the given timelines.

41. In the premises, I find the notice of motion herein incompetent and without merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF JANUARY, 2022

In presence of:

Orimbo for applicant

Kendi for respondents

Court Assistant - Kananu

HON. C.K. NZILI

