



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**PETITION NO.5 OF 2012**

**BABACH ONYANGO GEORGE.....1ST**  
**PETITIONER**

**ROSE ATIENO ONYANGO.....2ND**  
**PETITIONER**

**ABSALOM ONYANGO BABACH.....3RD**  
**PETITIONER**

**BONFACE ONYANGO BABACH.....4TH**  
**PETITIONER**

**VERSUS**

**THE LAND ADJUDICATION OFFICER, BONDO.....1ST**  
**RESPONDENT**

**THE LAND ADJUDICATION OFFICER COMMITTEE, MAGETA .....2ND**  
**RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION..... 3RD**  
**RESPONDENT**

**CHIEF LAND REGISTRAR.....4TH**  
**RESPONDENT**

**THE ATTORNEY GENERAL.....5TH**  
**RESPONDENT**

**RULING**

1. The petitioners – **BABACH ONYANGO GEORGE** (1st Petitioner), **ROSE ATIENO ONYANGO** (2nd Petitioner), **ABSALOM ONYANGO BABACH** (3rd Petitioner) and **BONFACE ONYANGO BABACH** (4th Petitioner) – filed their petition here on 9/7/2012.

Together with the petition was also filed an application, a Chamber Summons, seeking, inter alia, various conservatory orders. That application is the subject of this ruling.

2. Both the petition and the application are against five respondents - **The Land Adjudication Officer, Bondo** (1st respondent), **The Land Adjudication Officer Committee, Mageta** (2nd Respondent), **Director Of Land Adjudication** (3rd Respondent), **Chief Land Registrar** (4th

respondent) and **The Attorney General** (5th Respondent).

3. There is an interested party – **PAUL OWUOR GONGO** – who is brought on board together with the respondents.
4. The suit concerns four land parcels , which are stated to be plot numbers **350, 351, 369 and 371**, all within **Mageta Land Adjudication**, and which the petitioners allege to own but which the respondents, or some of them with complicity of the others, have partially or fully awarded to the interested party.
5. The petitioners felt aggrieved. They asked for records but were met with rebuff. It would appear they ran out of options and came to court.
6. The Chamber Summons filed here has eight (8) prayers but at this stage, prayers 1, 3 and 5 are moot, having been dealt with earlier. The focus then is on prayers 2, 4, 6, 7 and 8, which are as follows:

**Prayer 2:** That the 1st, 2nd 3rd and 4th Respondents be forthwith ordered to avail to the petitioners and the court the historical ownership of plot Nos 350, 351, 369 and 371.

**Prayer 4:** That pending the hearing and determination of the petition the respondents be restrained from taking any further steps to adopt and/or effect the following decisions of Mageta Land Adjudication Section.

- a. Mageta Land Committee case No.143 in respect of Plot No.350 made on 15/4/2011
- b. Mageta Land Committee case No.144 in respect of Plot No.351 made on 15/4/2011
- c. Mageta Land Committee case No.162 in respect of Plot No.369 made on 13/3/201
- d. Mageta Land Committee case No.164 in respect of Plot No.371 made on 13/3/2011

**Prayer 6:** That pending the hearing and determination of the petition the interested party be restrained from entering, taking possession of or interfering with the petitioners possession of the suit properties being Plot Nos **350, 351, 369 and 371** of Magera Land Adjudication Section or any portion thereof.

**Prayer 7:** That the court be pleased to give such further or other directions or conservatory orders as it may deem fit and just to grant.

**Prayer 8:** That costs of the application be in the cause.

7. The grounds advanced in support stipulate, inter alia, that the petitioners are the lawful owners of Plot numbers **350, 351, 369 and 371** (Suit properties), that they are challenging the decisions of 1st to 4th Respondents, that the proceedings and the decisions violated their Constitutional rights more specifically the right to property, the right to compensation in case of deprivation and the right to fair administrative action.
8. It was also alleged that the decisions were made without compliance with provisions of Land Adjudication Act (cap 284); That the respondents declined to give records to the petitioner; that violation might continue if conservatory orders are not granted; and finally that the interested party may take possession or appropriate the suit properties or even evict the petitioners therefrom.
9. The 1st and 2nd petitioners swore their supporting affidavits separately. The contents of the affidavits however are broadly similar. Both said they were not called to participate in the proceedings that gave rise to the decisions they are challenging; both said they are the lawful

owners of their respective suit properties; both allege non-compliance by the respondents with both statutory and constitutional provisions; both allege denial of relevant records by the respondents, and both alleged that the respondents were acting out of malice.

10. The supporting affidavit of the 3rd petitioner, which is also on behalf of the 4th petitioner, is also broadly similar to the other two affidavits but it also has crucial differences. The 3rd petitioner alleged he was asked to give money and was sidelined when he declined. And while portions of 1st and 2nd petitioners parcels were taken away partially, his own parcel and that of the 4th petitioner were fully allocated to the interested party.
11. The response of the interested party to the application is lacking. The interested party first responded to the petition vide a replying affidavit filed on 17/10/2012 and grounds of opposition filed on the same date. It is clear he was responding to the petition, not the application. At that time, the interested party had no counsel. He however engaged services of counsel later on and the counsel, Mr Odhiambo, filed a further replying affidavit which seems ambivalent. It addresses the petition and talks of application at the same time. But the focus mainly is on the petition.
12. The respondents response was filed on 30/1/2013. This one squarely focuses on the application. It was deponed, inter alia, that contrary to petitioners allegations that they were never summoned for hearing, they were indeed summoned but declined to appear.
13. The respondents said due process was followed in all what was done and the petitioners were faulted for coming to court when they had not exhausted all other avenues available.
14. No oral arguments were proffered in this application; submissions were filed instead. The petitioner's submissions were filed on 16/10/2013. The respondent's submissions were filed on 30/10/13 while those of the interested party were filed on 25/10/2013.
15. The submission's of the petitioner mainly reiterate in amplified way the contents of the application. There is however a rendition of the applicable constitutional provisions and an exposition of various judicial pronouncements on the issues raised.
16. Some overview is necessary. It was pointed out, inter alia, that the argument that the court does not have jurisdiction to entertain the matter because consent was not sought from adjudication officer as enjoined by Section 30 of Land Adjudication Act (cap 284) does not hold because what the petitioners are alleging is violation of constitutional rights. The right to come to court with such a claim is constitutionally provided.
17. And judicial pronouncement on such an issue is to be found in **Kibunja Vs The Attorney General and 12 others. Misc. APPL. No.259/1998** where the then **Chief Justice. Hon. Chunga** asserted the right to defend such claim irrespective of any other avenues that may be available. He asserted that constitutional matters take precedence over other matters.
18. And the requirements to grant a conservatory order were said to be that the applicant's case must be prima facie arguable and then there is need to show that the application will be rendered nugatory if the order is not granted. Judicial pronouncements on these orders are to be found in **BIDCO OILS Refineries Vs Attorney General & 2 Others: PETITION No. 177/2012 and Muslims for Human Rights (MUHORI) and 2 others VS Attorney General: PETITION No.7/2011.**
19. According to the petitioners, the petition herein will be rendered nugatory if a conservatory order is not granted. The suit properties are said to be allocated to the interested party. The respondents may alter records to give effect to their decision. The interested party may then become the registered owner, evict the petitioners, or develop or sell the land. If this happens, nothing will be left for the court to revisit at the trial.

20. The submissions of the interested party are petition -rather than application- focused. The submissions start by alleging that the most important question is whether the petition is properly before the court and end by asking that the petition be dismissed. The application is not addressed at all.
21. The respondents submissions are application – focused but one glaring weakness is that there is no adequate attempt to address or respond to the constitutional issues raised by the petitioners. The submissions merely outline the process of dispute resolution as contained in Land Adjudication Act (cap 284). Then an attempt is made to comment on the constitutional issues. But the attempt is puny and inarticulate.
22. Consider this: While the petitioners have pointed out the exact provisions of the constitution that were violated, how they were violated, and judicial pronouncements dealing with such issues in the past, the respondents submissions only make generalised Comments and are without a response to the decided cases availed.
23. I have considered the material laid before me. It is plain that the interested party's submissions are off- target. They are directed at the petition rather than the application. The responses made, whether one is talking of grounds of opposition, the replying affidavit or the further replying affidavit, are all mainly directed at the petition.
24. But that is not all. Even if one were to overlook that and look at the contents, it is clear that the interested party is using provisions of Statute to counter arguments based on constitutional provisions. It is difficult, infact well nigh impossible, to successfully counter constitutional provisions or considerations with statute – based arguments. The two don't rank in pari – passu. Constitutional considerations outweigh statutory concerns.
25. The submissions of the respondents are not off- target but they dwell largely on statute – created procedure forgetting that allegations of violations of fundamental freedoms are not beholden to such procedure.

And where attempt is made to respond to constitutional issues, such attempts comes across as jumbled and lacking in depth.

26. The end result therefore is that the petitioners application is not effectively countered. Indeed, the concerns raised about denial of access to information (article 35), denial of fair administrative action (article 47), denial of fair hearing (article 50) can not be wished away. One sees the need to grant the necessary conservatory orders to preserve the prevailing status -quo and to forestal actions that might irrevocably change the suit properties before the suit is heard and determined.

27. There is also need to assert the constitutional rights of access to information by granting the prayer requiring that denied records be availed.

28. It is in light of all this that I hold that the application herein is meritorious. I hereby grant prayers 2, 4, 6 and 8.

**HON A.K. KANIARU**

**ENVIRONMENT & LAND – JUDGE**

**20/8/2015**