



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
PETITION NO. 21 OF 2012

STEPHEN MUCHUKI KIUNGA.....PETITIONER/APPLICANT

VERSUS

NKUNI M'TURUCHIU.....1ST RESPONDENT

DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER TIGANIA EAST & WEST.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This ruling relates to a preliminary objection filed by the Attorney general on 23rd July, 2013. Its grounds are:

1. **THAT** the petitioner offends the provisions of Section 30(3) of the Land adjudication Act, Cap 284 Laws of Kenya in instituting this petition.
2. **THAT** the orders sought cannot be granted.
3. **THAT** this petition is bad in law.
4. **THAT** the costs of this preliminary objection be borne by the petitioner

The Petitioner/applicant's petition is dated 1st October, 2012. The Petitioner prays for:-

- (a) A declaration that the refusal by the 2nd respondent to issue consent to the petitioner to file a civil suit against the 1st respondent over land P/No.773, measuring about 14 acres situate in Thau Mumui adjudication Section, is unconstitutional the petitioner's right to a fair hearing and access to justices as ordained under Articles 48, 50 and 159 of the constitution of Kenya, in view of the provisions of section 8 of the Land Consolidation Act, Cap.283 and Section 30 of Land Adjudication Act, Cap.284, Laws of Kenya.
- (b) A permanent injunction, restraining he 1st respondent and his representatives, family members, assigns, agents, servants, employees and anybody else acting at his behest, directions or instruction from entering into, trespassing, onto, cultivating, developing, and/or whatsoever interfering with the petitioner's quiet, peaceful, undisturbed, uninterrupted, exclusive and actual possession, user and enjoyment of land P/No.773 measuring about 14 acres, situate in Thau Mumui Adjudication Section.
- (c) Costs of the Petition and interest thereon.

Oral submissions were made on 22.8.2010.

Mr. Kiongo for the 2nd and 3rd Respondents stated that the Preliminary objection was based on section 30(3) of the Land Adjudication Act, Cap 284, Laws of Kenya. He submitted that the petition as amended offended the said section as the petitioner had failed to exhaust the remedy provided by that section by failing to appeal to the minister for Lands within 28 days of the decision being challenged. He argued that the Minister should have made his decision, after which, if the Minister did not give the aggrieved person the apposite consent required to allow the petitioner to file court proceedings, he should then have filed Judicial review proceedings. He opined that the petition was premature and the orders sought could not be granted until all remedies provided by law were exhausted.

Mrs. Ntarangwi for the 1st Respondent supported the Preliminary Objection and stated that by failing to comply with section 30 of the Land Adjudication act, the petitioner had failed to demonstrate that his rights had been infringed upon. The petitioner ought to have exhausted all legally available remedies before alleging that his rights had been breached. She pointed out that the Court was not aware of what the Minister would have decided had the appeal process allowed by the Land Adjudication Act had been exhausted. She opined that Section 30 subsection 3 of the Land Adjudication Act was intended to protect the rights of the parties. In view of failure to take advantage of the available remedies, this dispute could not qualify to be a Constitutional matter. She reiterated that the petitioner had demonstrated nothing to show that an appeal had been made, that the Minister, and if it had been made, that the minister had declined to give the required consent.

Mr. Mbaabu for the petitioner vehemently opposed the preliminary Objection. He termed the Preliminary Objection extremely frivolous. He pointed out that what was in this matter was a Constitutional petition and not a Civil Suit. The petition was grounded upon the constitutional provisions cited on its face and particularly Articles 22, 23 and 40 of the constitution. He opined that as the constitution was the Supreme Court, a Constitutional petition could not be challenged by way of reference to inferior provisions. In any case, he pointed out, the Preliminary Objection was not based on any constitutional provisions. He also pointed out that section 30(3) of the land Adjudication Act uses the word “may” and not “shall” and, therefore, it gave any aggrieved person the latitude to choose to appeal or not to appeal to the Minister. According to his argument, if the legislature had intended an appeal to the Minister to be mandatory, then it should have used the word shall. He reiterated that what was in Court was a Constitutional petition which did not require the consent of the Land Adjudication Officer or if denied, the consent of the Minister for Lands.

Mr. Mbaabu pointed out that Article 20 (3) (b) of the Constitution enjoins the court when applying the bill of rights to interpret it in such way that most favoured enjoyment of the rights sought. He pointed out that the petitioner had come to Court to protect his rights under Article 22 of the Constitution. He also said that the petitioner was seeking a fair trial, which right could not be limited as decreed by Article 25 of the Constitution. He referred to Article 50 which was the Article of the Constitution dealing with fair hearing. Reference was also made to Article 159 (2) of the Constitution and Section 19 of the Environment and Land Court Act which require that Justice be administered without due regard to procedural technicalities.

Finally Mr. Mbaabu referred to the Supplementary Affidavit of the Petitioner sworn on 29.7.2013 showing that a title deed had been issued on 25.2.2004 long before this case was filed. In the circumstances, he opined, the issue of consent would have been superfluous as the suit land had changed from administration under the Land Adjudication Act to the Registered Land Act. He lamented that the Preliminary Objection had not been supported by any authorities. He further added that as the petition had been filed under a certificate of urgency, the petitioner had no time to appeal to the Minister.

Mr. Kiongo made a brief reply. He said that since paragraph 12 of the petition stated that the 2nd respondent's refusal to issue consent to file a Civil Suit connoted collusion and connivance between the 1st and 2nd respondents to unjustly deprive the petitioner of the suit land and to enrich the 1st respondent unjustly, it is clear that the petitioner was challenging the refusal to grant consent by the 2nd Respondent. This being the case, Mr. Kiongo opined, the petitioner should have appealed to the minister had the Minister granted the consent, the petitioner would not have filed this petition.

Mr. Kiongo said that since counsel for the petitioner had raised the issue of the title Deed issued to he petitioner, he had responded to that matter vide a Replying affidavit sworn by Samson Asande, the 2nd Respondent, on 20th August, 2013. He pointed out the petitioner had indeed appealed to the minister and wondered how then a title Deed could have been issued when the petitioner had filed an appeal to the Minister, which appeal had not been heard and determined.

I have considered the pleadings, the averments and the submissions of the parties. It has long been established that jurisdiction is key to the arbitration of disputes in courts and tribunals. It has also been established that a preliminary objection can be predicated on pure points of law only. Since the Preliminary Objection herein has not been challenged on the point of whether it is based on pure points of law or not, I find that the main ground, which is non compliance with section 30 (3) of the Land Adjudication, Cap 284, is a pure point of law.

As Justice Nyarangi, JJA, said in the case of “The MV Lilian S” LR, 1989 at page 14: “Jurisdiction is everything. Without it, a Court has no power to make one more step”. Where a Court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

This position was restated by the Supreme Court of Kenya in **Samuel Kamau Macharia V. Kenya Commercial Bank and 2 Others. Civil. Appl. No.2 of 2011** as follows:

“We agree with counsel for the first and second respondents in his submission that the issue as to whether a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

Having found that the Preliminary Objection herein is predicated on a pure point of law, I will now consider its merit.

The Constitutional provisions cited on the face of the petition and during submissions are part of the Constitution of Kenya and their contents must be upheld by Courts of Justice. Article 50, on fair hearing, is part of the Constitution, although to me, mostly it concerns hearing of a Criminal nature. The Constitution however protects the rights of fair hearing. The petitioner has that right which should be protected.

The Petitioner's petition seeks a declaration that the refusal by the 2nd respondent to issue consent tot the petitioner to file a Civil Suit was unconstitutional and breached the petitioner's right to a fair hearing and access to Justice as decreed by Articles 48, 50 and 159 of the Constitution. It also seeks a permanent Injunction against the 1st respondent and other specified parties with a legal nexus to him.

The Preliminary Objection is mainly grounded on the submission that the petitioner had not exhausted available remedies under the land adjudication Act. After perusing the uncontroverted averment of the 2nd respondent in his replying affidavit sworn on 20th day of August, 2013, it comes out clearly that an appeal had been filed by one M'Tuaruchiu M'Kareria and this appeal had not been heard and determined by the Minister when this petition was filed. As pointed out by Mr. Kiongo for the 2nd and 3rd respondents, it was irregular for the petitioner to obtain a title deed when this appeal had a point of law, I will now consider its merit.

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This Court is not in a position to know the position that the Minister of Lands would have taken had the petitioner appealed as allowed by section 30 of the Adjudication Act. I think that had the appellant appealed and been granted the Minister's consent, he would not have filed this petition. It is quite clear that the petitioner had not exhausted the available remedies.

It is true that section 30(3) of the Land Adjudication Act uses the word "may" and not "shall" but that does not change the fact that had the petitioner appealed to the Minister and obtained the requisite consent, he would not have filed this petition.

Any court would find it difficult to grant a declaration that the Constitutional rights of the petitioner had been trampled upon, when the petitioner himself had refused to exhaust the available appeal process. I also find that the filing of this petition when there was an appeal to the Minister for Lands filed by another party amounted to forum shopping.

I agree with the petitioner that Constitutional provisions are supreme. They override all other statutory provisions. It is, however, true that the Constitution is the umbrella of all other laws. It is the anchor upon which they operate. One would imagine a situation where litigants would refuse to appeal and then file constitutional petition's alleging that the Magistrates' Courts or the superior courts had trampled upon their rights and denied them fair hearing and access to justice. Yes, the Constitutional provisions are supreme. And yet the Constitution protects all other laws including the provisions of the Land Adjudication Act. One cannot have his cake and the same time eat it. One cannot file a Constitutional petition when an appeal under the Land Adjudication Act has not been heard and determined. Also available appeal processes should be exhausted.

In the circumstances, I uphold the 2nd and 3rd Respondents notice of Preliminary Objection dated 23rd July, 2013. the petition herein is dismissed with costs to the respondents.

Dated and signed at Meru this 30th day of September 2013.

P. M. NJOROGE

JUDGE

Delivered in open court this 14th day of February, 2014 in the presence of:

Cc. Daniel/Mwonjaru

M. Mutunga h/b Carlpeters Mbaabu for petitioner

Nyenyire h/b Mrs Ntarangwi for 1st Respondent

Kaumbi h/b for 2nd and 3rd Respondent

P. M. NJORGE

JUDGE