



DICKSON MUKWE LUKEINE (PETITIONING ON HIS OWN BEHALF

AND ON

BEHALF OF THE RESIDENTS OF OLDERKESI ADJUDICATION SECTION).....PETITIONER

AND

**THE ATTORNEY
GENERAL.....1ST
RESPONDENT**

**THE MINISTER FOR
LANDS.....2ND
RESPONDENT**

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, NAROK SOUTH DISTRICT.....3RD RESPONDENT

**DISTRICT REGISTRAR OF
LANDS.....4TH RESPONDENT**

**THE CHIEF
REGISTRAR.....5TH
RESPONDENT**

**RULING
Introduction and Background**

1. The matter concerns land adjudication in Olderkesi Location of Narok South District which was declared to be an adjudication section under **section 5** of the **Land Adjudication Act (Cap 284 of the Laws of Kenya)**. The adjudication process is established under the Act for the purpose of ascertaining the recording of rights and interests in land prior to land registration.

2. This matter was commenced by the petitioners who are citizens of the Maasai Community, in Narok South District and who seek to challenge the process commenced so far on the ground that it is riddled with inconsistencies, irregularities and fraud in preparation of the adjudication register. Among the complaints raised by the petitioners are;

- a) In certain cases, people from the same family have been treated differently, with some people being registered while other in the same family left out;
- b) In some cases, some people are registered while their children are denied registration.
- c) Women have been dismissed as ineligible in accordance with Maasai Customary Law.

- d) In some cases, children have been registered while their parents are discriminated against;
- e) In certain cases the not even the petitioners' identification documents such as National Identity Cards and or passports are sufficient proof of identity to the recording officers.

Petitioners' Case

- 3. It is the petitioner's case that they have been treated in a discriminatory manner which constitutes a threat to their rights to property under **Article 40** of the Constitution. The petitioners seek, inter alia, orders that the adjudication process be set aside.
- 4. The petition is accompanied by a Notice of Motion dated 4th September 2012 where the petitioner seeks an order that, ***".....pending hearing and final determination of this petition, this Honourable Court be pleased to issue interim injunction orders barring the respondents from continuing with and completing the adjudication of land with regard to the Olderkesi Adjudication Section."***
- 5. Dickson Mukwe Lukeine has sworn an affidavit on 4th September 2012 where he sets out certain facts to support the petition. He states that he is one of the committee of 25 clerks constituted by the 3rd respondent to carry out recording for purposes of the adjudication process. He alleges that while the recording and registration of residents was underway, the recording officer in the company of the village Chairman declared that only those whose parents lived in Olderkesi in 1971, when the said Chairman was allegedly circumcised, were eligible to be registered as land owners and that the rest should own land in Tanzania, where their ancestors could be traced.
- 6. The petitioner also alleges that the process of adjudication has been marred with massive irregularities and fraud as indigenous persons are being discriminated and removed from the adjudication register on the flimsy reason that according to the village chairman, they are Maasais of Tanzania origin and cannot own land in Kenya.
- 7. The petitioner also alleges that there is massive corruption with incidences of private investors and non-indigenous persons being registered to own land while local residents have been discriminated against.
- 8. Mr Juma, counsel for the petitioners, argued that the facts disclosed prima facie evidence of breach of **Article 27** and **40** of the Constitution as the petitioners would be denied the right to establish their claim and consequently the petitioners would suffer irreparable loss and damage. Counsel contended that this was a proper case for the grant of interim conservatory relief.

The Respondents' Case

- 9. The respondents have opposed the application through the replying Affidavit of Anthony David Mureithi, the District Land Adjudication and Settlement officer, sworn on 17th September 2012.
- 10. The respondents' objection to the motion is threefold. First, that the petitioner has not provided proof or evidence that any person has been denied registration for whatever reason or whose names had been deleted from the list of members vetted and compiled by the adjudication committee. Second, that the adjudication officer followed the process and procedure set out in the Act and that the process set out under the Act protects property rights. Thirdly, that the process of adjudication is still in the initial stages and the Committee is in the process of vetting and registering residents of Olderkesi and it would not be in the interests of justice to intervene in the process.
- 11. Mr Kakoi, counsel for the respondents, urged the Court not to interfere with the process of adjudication as this would bring confusion in the process. Further, counsel contended that **section 30** of the Act is clear that the court shall not entertain civil proceedings concerning an interest in land in an adjudication section until the adjudication register for the adjudication sections has become final.

Determination and disposition

12. This is an application for conservatory orders made under the provisions of **Article 23** in order to enforce fundamental rights and freedoms. It is therefore not an answer to the application that this court cannot intervene in an adjudication process as provided by **section 30** of the Act. **Article 23** is a special remedy which is not subject to the strictures imposed by the statute or other law but where there is a statute governing the subject matter the court may take into account statutory provisions in framing an appropriate remedy to enforce the right or fundamental freedom violated.

13. At this stage, I am obliged to balance the rights of the parties and the public. Property rights are protected by the Constitution but are realised through the property statutes that govern relationships between individual citizens and individuals and the State. The **Land Adjudication Act** (the Act) is one such statute that is enacted to identify, ascertain and record the rights and interests of persons in trust land with a view to registration.

14. Simply put, the Act provides a scheme in which the property rights of the residents of Olderkesi location are legalised. **Part II** of the Act provides for appointment of adjudication officer, an adjudication committee and arbitration board. These officers and bodies are given specific powers and responsibilities to hear disputes and objection in the process of land adjudication. For example, **section 12** of the Act provides;

12(1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.

(2) Any proceedings conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of Chapter XI and XVIII of the Penal Code.

15. I also note that under **section 20** of the Act, the Committee appointed for an adjudication section has the following functions;

20. *The Committee appointed for an adjudication section shall-*

(a) adjudicate upon and decide in accordance with recognised customary law any question referred to it by the demarcation officer or the recording officer;

(b) advise the adjudication officer or any officer subordinate to him upon any question of recognised customary law as to which he has sought its guidance;

(c) safeguard the interests of absent persons and persons under disability;

(d) bring to the attention of officers engaged in the adjudication any interest in respect of which for any reason no claim has been made;

(e) assist generally in the adjudication process.

16. The collectivity of the provisions I have cited is that the **Land Adjudication Act** has provisions to deal with the complaints that are raised by the petitioners and the officers and committees are indeed obliged to consider and deal with these complaints bearing in mind the values and principles set out in **Article 10** of the Constitution.

17. It is not disputed that the adjudication process is still ongoing and the adjudication register is yet to be completed. **Sections 26, 26A, 27, 28** and **29** provide for a system of objections and appeals which the petitioners and the residents of Olderkesi adjudication section may invoke to raise all their grievances.

18. These processes are complementary to the judicial process and by virtue of **Article 159(2)(c)**, this Court is obligated to promote these modes of alternative dispute resolution. In the same vein, it is not inconsistent with the provisions of **Articles 22** and **23** to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising and promoting and protecting certain rights and in this case property rights.

19. Turning back to this case, I am aware land adjudication is a sensitive matter. It is for this reason that a statutory scheme has been enacted to take into account the various contending interests. The allegations made by the petitioner though serious in nature are rather vague and at this stage, I am not persuaded that a conservatory order will assist the process of adjudication. The grant of such an order will halt the entire process and engage the court in a task best suited to be carried out by officers on the ground.

20. I also note that the adjudication officer has deponed that, *“this office is able, willing and ready to hear and determine any complaints or land Committee cases that the petitioners would file now or in the future which in the cause of applying that the Act”* The petitioners are therefore advised to utilise the procedures established by the Act to resolve their disputes.

21. In the circumstances, I find that no basis has been established for the grant of conservatory orders and therefore the Notice of Motion dated 4th September 2012 is dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 28th day of September 2012.

D.S. MAJANJA

JUDGE

Mr J. Juma instructed by Rachier and Amollo Advocates for the petitioners.

Mr Kakoi, Litigation Counsel, instructed by the State Law Office for the respondents.