



REPUBLIC OF KENYA

High Court at Nakuru

Miscellaneous Civil Application 95 of 2011

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF
THE INDIVIDUAL UNDER SECTION 84 OF THE FORMER CONSTITUTION NOW
ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA, LAND
(GROUP REPRESENTATIVES) ACT CAP 287 LAWS OF KENYA AND THE REGISTERED
LAND ACT, CAP. 300, LAWS OF KENYA**

BETWEEN

NEPATAO OLE MANANGOI.....1ST APPLICANT

NAKOLA OLE TANIN.....2ND APPLICANT

TELEPA SAMANTE.....3RD APPLICANT

OSEUR OLE NARREMO.....4TH APPLICANT

KIRIKA OLE MATIPE.....5TH APPLICANT

KOINGET OLE RUKARRUK SANANTE.....6TH APPLICANT

(suing on their own behalf and all the members of the Lildamat clan)

VERSUS

ATTORNEY-GENERAL & 10 OTHERS.....RESPONDENTS

AND

SALAU OLE KILUSU & 8 OTHERS.....INTERESTED PARTIES

RULING

This Ruling relates to an oral Application made by Ms. Wamucii Counsel for the Applicant on 13th June 2012 seeking to review the order made by Nyamu, J (*as he then was*) on 19.02.2009 directing that the matter be heard by a 2-judge bench and that the same be enhanced to a 3-judge bench.

Counsel for the Applicant submitted that the order of Nyamu, J was made before the new Constitution had come into place and that now Article 165(4) empowers the Chief Justice to appoint a 3 judge bench. She added that this suit is not a mere Judicial Review Application, that the Applicants have pleaded that their rights under Articles 40, 47, 50, 36, 37, 39 of the new Constitution and 27 (*Sections 77, 79, 80, 81, 82 and 85 of the former Constitution*) are being encroached. The Applicant acknowledges that there orders that the matter be determined by way of written submissions and the parties except the Attorney-General have complied. It is those submissions that need to be highlighted before a three judge bench.

Mr. Njuguna for the 8th – 11th Respondents and Miss Ogalo for the 10th Respondent did not object to this Application and Mr. Njuguna added that it is in the interest of justice that the matter is heard by a 3 judge bench.

Mr. Irungu counsel for the 9th Respondent opposed the application to review the order of Nyamu, J of 19.02.2009 or to have the matter heard by a three judge bench. He stated that the issues raised in the suit are of a Judicial Review nature notwithstanding that the application had been brought by way of an Originating Summons. The matter should therefore be determined by one Judge. He added that the parties herein had already filed their written submissions pursuant to the Orders issued by Hon. Lady Justice Gacheche on 19.02.2004 and reiterated by this court on 24.10.2009. Now that the submissions are on record, this is not a right case for appointment of a three judge bench.

I have considered counsel's arguments for and against the appointment of a three judge bench. The suit herein was filed in the High Court at Nairobi on 14th June 2005 by way of an Originating Summons dated 9th June 2005. It was originally referred to as Miscellaneous Civil Application 871 of 2005. The same was brought under Rule 11 of the Constitution of Kenya (*Protection of Fundamental Rights and Freedoms of the Individual*) Practice and Procedure Rules, Sections 71, 75, 77, 80, 81 and 84 of the former Constitution and Section 3 of the Judicature Act.

The Applicants, who have filed this suit on their own behalf and on behalf of 606 members of the Iildamat Clan of the Maasai Community, claimed that their Constitutional rights in relation to a parcel of land in Ntulele Adjudication Section (*hereinafter referred to as the suit land*) measuring 56,000 acres, had been infringed. The 1st – 5th Interested Parties are members of the Keeyonyokie Community. The 6th, 7th, 8th and 9th Interested Parties are also members of the Iildamat clan and are opposed to the Application by the Applicant and support the 2nd Respondent's actions.

The Applicants allege that the suit land is owned by 2222 members of the Iildamat, Keekonyokie and Purko clans jointly. By a notice dated 1st September 1970, the Land Adjudication Officer, (*hereinafter referred to as the 2nd Respondent*) established the Ntulele Adjudication Section pursuant to the powers conferred upon him by the Land Adjudication Act and he defined the 56,000 acres involved. The said notice required the people of Ntulele (*who are comprised of the Iildamat, Keekonyokie and Purko Clans*) to secure the recording of their rights by 21st December 1970. The process of registration of the interested persons did not start until 1981 due to differences between members of the 3 clans. The same was completed on 31st January 1983 by an Adjudication Committee that had been set up comprising of members from the 3 clans. The 2nd Respondent issued a notice dated 31st January 1983 notifying that

the Adjudication Register which was comprised of 2222 members was complete and the same could be inspected.

The 8th and 9th Respondents allegedly carried out subdivisions of the suit land sometimes in 1986 to persons who do not have rights over the suit land to the detriment of the Applicants herein. Thereafter, on 26th November 1992, the 2nd Respondent issued a notice by which he canceled the notice dated 1st September 1970 creating the Ntulele Adjudication Section and provided that the notice of 26th November 1992 would apply retrospectively. He also created 7 subdivisions of the Ntulele Adjudication Section and it is this act that is alleged to be illegal and oppressive to the Applicants.

The Applicants herein accuse the 3rd Respondent of having failed to prepare a special map for Ntulele Adjudication Section since 1983. The members of the Adjudication Section had agreed that they would own the land under a group known as Ntulele Group Ranch. The 4th Respondent is accused of failing to register the Ntulele Group Ranch to date as a result of which the Applicant's ability to enjoy their rights over the property have been infringed. The 2nd to 11th Respondents have been replacing the Maasai land with Modern Land Tenure without due regard to the law.

By the Replying Affidavit sworn by Salau Ole Kilusu the 1st – 5th Interested Parties who represent the members of the Keenyokie Clan supports the Applicants' application. That the 2nd Respondent's power to declare Ntulele an Adjudication Section was spent when the declaration was made in 1970 and the purported redeclaration is therefore a nullity. The decision is contrary to Section 77(9) of the Constitution as it reopened an adjudication process and denied the members of Ntulele Ranch the right to have their ascertained interests registered within reasonable time.

By the Replying Affidavit sworn by John Ole Koonyo on 15th July 2009, the 9th Respondent opposed the suit herein. He alleged that after declaration of Ntulele as an Adjudication Section, there were clashes and the land adjudication staff were unable to complete the work and submit the adjudication maps to the Director of Survey for printing. The government therefore caused Ntulele Adjudication to be administratively divided into seven homogeneous groups and this led to cessation of the hostilities. That members from these homogeneous groups were involved in this division. The division was purely administrative.

The 6th–9th Interested Parties by the Replying Affidavit sworn on 21st October 2011 oppose the suit herein and support the action of the 2nd Respondent further sub dividing the Ntulele Adjudication Section by the Notice dated 26th November 1992. They allege that this action has caused peace in the area.

ORDERS SOUGHT

The Applicants have sought numerous reliefs and they include, *inter alia* -

1. A declaration that the Applicant's rights under Sections 71, 75, 77(9) and 82 of the Constitution have been breached.
2. A declaration that the Applicants are entitled under the Registered Land Act (*repealed by Act No. 3 of 2012*) to be registered as proprietors of their share of the 56,000 acres.
3. Orders of mandamus against the 2nd, 3rd and 4th Respondents compelling them to discharge their duties under the Land Adjudication Act and the Land (*Group Representatives*) Act with regard to preparation of the map of the Ntulele Adjudication Section and registration of the Applicant's rights to the suit property.
4. An order of prohibition against the 9th and 10th Respondents prohibiting them from interfering with the adjudication process of the suit property.

ISSUES FOR DETERMINATION

The issues for determination in this matter are -

- (1) Whether the suit herein is *res judicata* a similar sit for Judicial Review order (*Miscellaneous Civil Application No. 383 of 1993*) having been struck out on 31st May 2005.
- (2) Whether the suit herein is null and void because leave to apply for the orders of mandamus and prohibition was not sought before the same was filed.
- (3) Whether the 2nd Respondent acted in contravention of the Land Adjudication Act in issuing the Notice dated 26th November 1992 further cancelling the notice issued on 1st September 1970 and further subdividing Ntulele Adjudication Section.
- (4) Whether the Applicants' rights to life, protection from deprivation of property, to secure protection of the law, to have their ascertained interests registered within time, and to be protected from arbitrary and capricious power have been violated.
- (5) Whether orders of mandamus can be issued compelling the 3rd Respondent to prepare a map in respect of the land comprised in Ntulele Adjudication Section.
- (6) Whether an order of mandamus can be issued compelling the 4th Respondent to cause to be kept a register of the members with interests in the Ntulele Adjudication Section.
- (7) Whether the 7th and 8th Respondents in adjudicating rights over the suit property in 1986, usurped the powers of the 2nd and 3rd Respondents under the Land Adjudication Act.
- (8) Whether a prohibitory injunction ought to be issued against the 7th to 10th Respondents restraining them from interfering with the adjudication process.

I agree with the counsel for the Applicant that the suit herein does raise substantial issues of both constitutional and judicial review nature. Section 165(4) of the Constitution, 2010 provides that where a matter is certified by the court as raising a substantial question of law under clause (3)(b) or (d) it shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice. This provision was not in force at the time Nyamu, J made the order of 19.02.2009 for appointment of a 2 judge bench.

I therefore certify this matter as raising substantial issues of law and recommend to the Hon. the Chief Justice to appoint a bench of 3 judges to hear and determine the matter.

Dated, signed and delivered at Nakuru this 26th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE