



Mjomba v County Government of Taita Taveta & 4 others (Environment & Land Petition 10 of 2020) [2022] KEELC 2191 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 10 OF 2020**

M SILA, J

JUNE 9, 2022

BETWEEN

MWAWASI MARTIN MJOMBA PETITIONER

AND

COUNTY GOVERNMENT OF TAITA TAVETA 1ST RESPONDENT

**TAITA TAVETA COUNTY LAND ADJUDICATION AND SETTLEMENT
OFFICER 2ND RESPONDENT**

**DEMARCATON OFFICER OF NDARA 'A' ADJUDICATION
SECTION 3RD RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS HOUSING AND PHYSICAL
PLANNING 4TH RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The petitioner filed this petition on 12 May 2020. The petitioner claims a violation of various of his constitutional rights. The petition is long and winded comprising of 93 paragraphs, unnecessarily in my view, and I will try to break it down into a more digestible fashion. It is the pleading of the petitioner that he purchased from one Godson Ndarai Chabalo, the Plot No 3117, located in Ndara 'A' Adjudication Scheme in Voi. In the year 2017, the 2nd respondent, the Taita Taveta County Land Adjudication and Settlement Officer, published a notice inviting objections to the Adjudication Register. The petitioner lodged two objections. The first objection was that it is his, name and not Mr. Chabalo's, which should appear in the register ; the second objection was on the presence of a road on the land. The first objection was allowed but his objection on the road was dismissed. He contested the decision dismissing his objection regarding the road by filing an appeal to the Cabinet Secretary for Lands Housing and Physical Planning. The appeal is said to have been filed on 22 March 2018 and is



still pending. The petitioner has raised complaint about the manner in which his objection was heard, inter alia, that it was heard in his absence, which he avers was unprocedural, and he has raised issues of bias against him. He has raised various issues in an attempt to demonstrate that the decision was wrong. He also complains that despite his pending appeal, the 1st respondent, the County Government of Taita Taveta, proceeded to grade the road. He also contends that the grading of the road was done in the middle of his land instead of being done 6 metres from the boundary of the Plot No. 3319, which he claims has rendered the whole of his land useless. He avers that he requested the 3rd respondent to provide him with the map for his land and the adjacent parcels of land but his request has been rebuffed and not elicited any response. He states that he requires this map to prepare for his appeal. He has also raised issue about the delay in hearing his appeal. In this petition, the petitioner has asked for 20 orders covering 4 pages, noted as prayers (a) to (t) and much of what is sought therein is repetitive. I will not transfer that inelegant drafting into this judgment but will instead break down the prayers into categories as follows :-

- i. Prayer (a) seeking a general declaration of violation of various provisions of the constitution.
 - ii. Prayers b, c, d, f, g, h, l, m, p, q; they attack the decision of the adjudicating officer which dismissed the objection regarding the road and seek to have this decision quashed.
 - iii. prayer (e) touching on the complaint of the petitioner of not being provided with the map of the area despite his request.
 - iv. Prayer (i) contests the decision of the 1st respondent of grading the road;
 - v. Prayers (j) (k) and (o) relate to the pending appeal before the Minister. The petitioner complains of, not being informed of the status of the appeal before the Minister, the fact that the appeal is yet to be heard, and seeks to have an order of mandamus to compel the Minister to set timelines for hearing the appeal.
 - vi. Prayer (n) seeking seeking general damages for violation of the petitioner's constitutional rights.
 - vii. General prayers comprising of prayer (r) on costs; prayer (s) for an order for mention one month after judgment to confirm compliance with orders issued; prayer (t) seeks any further relief.
2. The 2nd to 5th respondents are represented by the State Law Office. They opposed the petition by filing a notice of preliminary objection, a reply to the petition, and a replying affidavit sworn by Thomas K. Bosire, the Taita Taveta County Land Adjudication and Settlement Officer. In the preliminary objection, it is contended that this suit is fatally defective for want of consent of the Land Adjudication Officer to institute suit as required by Section 30 (1) of the Land Adjudication Act, Cap 284, Laws of Kenya. In the reply to the petition, it is pleaded that the petition raises no constitutional issue and is couched as a petition in order to defeat the requirement of Section 30 (1) of the Land Adjudication Act. It is further pleaded that the suit land was demarcated in favour of one Marium Talu Omari on 7 May 2012; that Marium Talu transferred the land to Godson Ndarai Chabalo, who sold the land to the petitioner. That the road which is the subject matter of the petition was demarcated at the time Marium Talu held the land; that the petitioner tried to erect a structure on the road but was stopped by members of the public; that after the adjudication register was completed, the petitioner raised an objection; that he was notified of the date of the hearing but instead of attending, he deputised his wife to attend; that the objection was heard and determined on 2 February 2018; that the petitioner lodged an appeal which is yet to be heard and determined; that under Section 18 (b) of the Land Adjudication Act, the demarcation officer has power to demarcate a right of way necessary for providing access; that



the demarcation of the public access road was done pursuant to Section 18 (b) and (c) of the [Land Adjudication Act](#) at the time the of demarcation of the property to Marium Talu Omari on 7 May 2012; that the petitioner cannot lay claim to the access road; that the petition is premature having been brought before the final determination of the appeal; that certiorari cannot issue as the petition was filed more than 6 months after the decision on the objection. The replying affidavit repeats what I have set out above.

3. The petitioner filed a supplementary affidavit. He more or less traversed what was deposed by Mr. Bosire.
4. The 1st respondent appointed counsel but did not file anything to oppose the petition.
5. I had earlier directed that the preliminary objection be heard first, but upon reflection, and in order to save judicial time, I directed that the issues raised in the preliminary objection be argued together with the petition. I further directed parties to file written submissions, which they did, and I have taken note of them before arriving at my decision. I will start with the preliminary objection, for if it succeeds, then the whole petition must be struck out.
6. The preliminary objection is founded on the provisions of Section 30 of the [Land Adjudication Act](#), which is drawn as follows :-

30 (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.

It will be seen that Section 30 (1) above refers to Section 29 (3), and I opt to set out the whole of Section 29, which is drawn as follows :-

29. Appeal

- (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
 - (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
- (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.
- (3) When the appeals have been determined, the Director of Land Adjudication shall—
 - (a) alter the duplicate adjudication register to conform with the determinations; and
 - (b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy



of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

- (4) Notwithstanding the provisions of section 38(2) of the *Interpretation and General Provisions Act* (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

7. In his submissions of Mr. Makuto, learned State Counsel, submitted that by his own pleadings, the petitioner states that he filed an appeal to the Minister, which appeal is still pending. He referred me to the case of *Musana Ole Pere & another v District Land Adjudication Section and Settlement Officer – Narok South & 23 others* [2019] eKLR where it was held inter alia that the filing of a constitutional petition does not obviate the need for the consent of the Land Adjudication Officer. He submitted that the requirement to obtain consent is not a technicality and therefore this court has no jurisdiction to hear this petition.
8. The petitioner on the other hand submitted that Section 30 (1) is not a blanket provision that bars filing of matters in court without consent of the Land Adjudication Officer and submitted that it only applies to civil proceedings seeking ascertainment or recording of interests before the Adjudication Register becomes final. He submitted that this petition challenges the adjudication process and invokes the court's inherent supervisory jurisdiction. He referred me to my decision in the case of *R vs Musanka Ole Runkes Tarakwa & 5 others ex parte Joseph Lesalol Lekitio & others* [2015] eKLR, where I inter alia held as follows :-

A suit that questions the process of land adjudication, rather than the determination of interests, would not be a suit concerning an interest in land, and would therefore not require the consent of the Land Adjudication Officer. Thus, where the Adjudication Officer, does not, for example, appoint an Adjudication Committee, as provided by Section 6 of the *Land Adjudication Act*, a person may be perfectly entitled to institute proceedings in the nature of mandamus, to compel him to appoint the said Committee. That would not be a determination of interests in land, but would be a proceeding aimed at giving legitimacy to the adjudication process. In such an instance, the consent of the Land Adjudication Officer would not be needed, for the proceeding would not be one "concerning an interest in land." But if a litigant wants to sue the Adjudication Officer, because the officer has decided that he is not entitled to the land in question, then in such a case, the litigant, must exhaust the appeal process provided in the *Land Adjudication Act*, or if he feels that the issue needs to be decided by the court, then he must seek the consent of the Land Adjudication Officer, for the litigation in this instance, would clearly be litigation "concerning an interest in land."

9. He also submitted that a party who wants to protect his fundamental rights and freedoms under *the Constitution*, does not require consent from the Land Adjudication Officer. He submitted that under Article 23 (f) of *the Constitution*, one of the provided remedies are orders of judicial review. He submitted that judicial review proceedings are neither civil nor criminal and what is barred under Section 30 (1) are civil proceedings. He referred me to the decision in the case of *Domenica Kalotia Kalalu v Tigania East District Land and Settlement Officer & another* [2019] eKLR where it was held that a suit for judicial review does not require consent of the Land Consolidation officer.



10. I have considered the above arguments. I stand guided by my decision and above dictum in the case of *Musanka Ole Runkes (supra)*. As stated therein, where a suit is filed, which does not seek any determination of interests in land under adjudication, then such suit can be entertained by the courts and consent of the Land Adjudication Officer is not required. As elaborated therein, an example is where a party raises issue regarding the process being followed. That was indeed what was affirmed in the case of *Domenica Kalotia (supra)*. If the process is what is being questioned, which does not call for any substantive determination of any rights over the land under adjudication, then a suit may be filed, for the court has jurisdiction to ensure that the procedure set out in the law is followed.
11. When I look at this petition, I think there are both substantive and procedural issues being raised. One of the issues that the petitioner raises is that the decision regarding the road was wrongful and should be quashed. I am afraid that this is a substantive issue touching on the adjudication of rights and this court cannot go into the merits or demerits of such decision. That ought to fall within the purview of the appeal that has been filed by the petitioner. I am aware that part of the reason why the petitioner seeks orders to quash the decision of the Land Adjudication Officer is that there were some alleged procedural lapses and thus the prayer for certiorari to quash the said decision. Prerogative orders are in the discretion of the court and the court may decline to exercise its jurisdiction where there is an alternative remedy. The petitioner has the remedy of appeal which he has in fact exercised. There is nothing barring the petitioner from raising all issues, including any procedural lapses, within his appeal to the Minister. In my opinion this is the best remedy to pursue under the circumstances and I decline to exercise the jurisdiction of this court in so far as this petition seeks orders to have this court question or quash the decision of the Land Adjudication Officer. I had earlier outlined that prayers b, c, d, f, g, h, l, m, p, q, of this petition all relate to the decision of the adjudication officer, and for the reasons above, they are hereby dismissed. The issues therein should be pursued at the appeal before the Minister.
12. I had mentioned earlier the other prayers, but for ease of reference, I will reiterate them. Prayer (a) of the petition is a general declaration of violation of various articles of *the constitution*; prayer (e) refers to failure to provide the ground map by the Demarcation Officer; prayer (i) refers to the decision by the 1st respondent of making the road; prayer (j) is a complaint of not being informed of the status of the appeal; prayer (k) complains against failure to set down the appeal for hearing; prayer (n) is the prayer seeking general damages; prayer (o) is seeking an order of mandamus to have the appeal set down for hearing within time limits to be decided by this Honourable Court; prayer (r) is on costs; prayer (s) seeks an order for mention one month after judgment to confirm compliance with orders issued; prayer (t) seeks any further relief. In my considered opinion, these prayers have nothing to do with the substantive decision of the adjudication officer regarding the determination of interests in land. They are therefore not caught up by the provision of Section 30 of the *Land Adjudication Act* and can be entertained by this court.
13. Thus the preliminary objection succeeds to the extent above.
14. I will straight away turn to the prayers above which I have held can be entertained. I will start with prayer (i) because I can quickly dispose of it. The petitioner complains against the action of the 1st respondent of grading the road. I see no issue here because the 1st respondent graded the road in accordance with what had been decided during adjudication. The petitioner contends that this defeats his right of appeal but it doesn't. If he succeeds on appeal, he can take over the land which is covered by the road. The petitioner never sought a stay of the adjudication officer's decision pending the appeal and since the road has already been done, he will have to await the decision on appeal.
15. On prayer (e) which seeks an order for the petitioner to be supplied with the map of the area, it is only fair that if there is a map of the area, then one be provided to the petitioner. Under Section 24 of the



Land Adjudication Act, the Adjudication register is noted to comprise of the “Demarcation Map” and the “Adjudication Record.” There must therefore be, at the very least, the Demarcation Map. In his reply, Mr. Bosire, did not advert to this aspect of the petitioner’s case and did not state whether or not there is a map and why they did not respond to the petitioner’s requests to be provided with the map. I can see that the petitioner wrote several letters to the demarcation officer asking for the map. I have seen the letters dated 20 April 2018 and 22 August 2012. These letters were copied inter alia to the County Adjudication/Settlement Officer, and the Director, Land Adjudication and Settlement. These letters do not appear to have elicited any reply from any of the above officers. That is not good conduct on the part of the public officers. It is the duty of public officers to serve the public, and where one makes a request for data or information, the least that is expected of a public officer is to have the courtesy of replying to the request. Ignoring a letter is not an option for a public servant. The Demarcation Officer ought at the very least have responded to the petitioner’s letter by giving the demarcation map or giving reasons why the map cannot be availed to the petitioner.

16. Though none of the parties referred me to the Land Adjudication Regulations, 1970, the petitioner, in fact, has a right to be supplied with the demarcation map under these regulations, prepared pursuant to Section 35 of the Land Adjudication Act. Regulation 4 of the Regulations relates to appeals to the Minister and Regulation 4 (5) provides as follows :-

Obtaining copies of records—

Any party to an appeal shall be entitled to obtain copies of demarcation maps on payment of fees at the rates prescribed for certified copies of Registry Maps by the Fifth Schedule to the Registered Land Act (Cap. 300), and copies of relevant documents including the proceedings and decisions of committees, boards and adjudication officers in respect of the holdings in dispute on payment of copying fees at the rates prescribed for the provision of copies of court judgments in a subordinate court.

17. It will be seen from the above that under the Land Adjudication Regulations, the petitioner had a right to obtain copies of demarcation maps as he is a party to an appeal to the Minister. This is an explicit right under the Land Adjudication Act. Even if this right was not there in the Land Adjudication Act, I would have held that the petitioner had a right to this information, and still retained that right in spite of Regulation 4 (5) above, pursuant to Article 35 of the Constitution which provides for the right to access information. Article 35 of the Constitution is drawn as follows :-

Access to information

- (1) Every citizen has the right of access to—
 - (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicise any important information affecting the nation.

This Article 35 right is given statutory support by the Access to Information Act, Act No. 3. Section 4 thereof states as follows :-

- (4) Right to information



- (1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - (a) the State; and
 - (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
- (2) Subject to this Act, every citizen's right to access information is not affected by—
 - (a) any reason the person gives for seeking access; or
 - (b) the public entity's belief as to what are the person's reasons for seeking access.
- (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
- (4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
- (5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.

18. It will be seen how seriously Kenyans consider the right to information, and as can be noted by Section 4 (3) above, information is to be provided expeditiously, and if there is any costs, then this needs to be reasonable. I am persuaded that the 2nd and 3rd respondents failed in their duty to provide information regarding the map to the petitioner. It was their duty to do so under the Land Adjudication Regulations, Article 35 of *the Constitution*, and Section 4 of the *Access to Information Act*. As I have stated above, they did not even have the courtesy to respond to the letters of the petitioner. Since this right to be provided with a demarcation map is there in the Regulations, I hereby order the 2nd and 3rd respondents to immediately respond to the petitioner's letters dated 20 April 2018 and 2 August 2018, and provide the demarcation map to the petitioner within the next 30 days.

19. Prayers (j), (k) and (o) are related, for they complain about the process of appeal. Pursuant to Section 29 of the *Land Adjudication Act*, one has avenue to appeal the decision of the Adjudication Officer to the Minister within 60 days of the decision. The problem with Section 29 of the *Land Adjudication Act*, is that it does not give a time frame for the determination of the appeal by the Minister, yet this is the tail end of resolution of disputes regarding the adjudication section. It is critical that such appeal be heard immediately so that the rights of the parties can be ascertained with finality, and so that the adjudication can be complete, or else there is risk of the adjudication process stalling at this stage. It would in fact be best if a time period was given for the determination of the appeal, and maybe Parliament needs to consider amending Section 29, so as to provide a time frame for the conclusion of such appeals. I cannot, in the absence of a specific period in the statute, impose a time limit, but I would encourage the Minister to ensure that such appeals are determined, at the latest, within 6 months of them being lodged. There is no reason for such appeals to take any longer period because the Minister does not have to determine the appeals personally. It will be seen that under Section 29 (4) of the *Land Adjudication Act*, the Minister can delegate the power to hear such appeals to other persons. It cannot therefore be



argued that such appeals can suffer from a backlog of cases. Given this provision, the Minister ought to immediately, upon receipt of an appeal, proceed to straight away appoint a person to hear such appeal, unless the Minister is going to hear the appeal himself/herself. The Minister in hearing such appeals is exercising a quasi judicial function and is therefore bound by the provisions of Article 159 (2) (b) of *the Constitution*, which provides that in exercising judicial authority, courts and tribunals shall be guided inter alia by the principle of “justice shall not be delayed.”

20. In our case, the appeal was lodged on 22 March 2018. It is now June 2022. More than 4 years have lapsed. That to me is an inordinately long period of time and is an impediment to the right of the petitioner to access justice within a reasonable time. No reason has been given why the petitioner’s appeal has not been heard despite the lapse of 4 years. He has not even been given any information on when such appeal is expected to be heard. It would be unjust to have the petitioner wait indefinitely to be heard. I am persuaded, given the time that has lapsed without the petitioner’s appeal being heard, that the petitioner is entitled to an order for mandamus, to compel the Minister to hear the appeal within a specified time. I hereby issue an order of mandamus, compelling the Minister to have the petitioner’s appeal heard within the next 6 months. As I have mentioned, there cannot be an excuse for any further delay, because the Minister has power to delegate to another person to hear the appeal.
21. Prayer (n) is the prayer seeking general damages for gross violation of the petitioner’s constitutional rights. I am not persuaded to award any general damages.
22. Prayer (r) seeks the costs of this petition. I am persuaded to award costs. I have outlined the failures of the Land Adjudication Officers and the Minister above. This petition would not have been necessary if they had provided the petitioner with the information which the law gives him a right to and if they had proceeded to have the appeal heard within a reasonable time. I therefore award the petitioner the costs of this petition as against the 2nd – 5th respondents. Prayer (s) seeks a mention one month after judgment. I do not see any reason to give this prayer. If there is non-compliance by the respondents to act on the orders of this court, the petitioner is at liberty to apply. Prayer (t) seeks any further relief, and I am not persuaded that there is any further relief to be granted. Prayer (a) was a general declaration of violation of *the Constitution*. I have already outlined what was breached in my judgment above and need not go specifically to all the articles in *the constitution* set out in that prayer.
23. Judgment accordingly.

DATED AND DELIVERED THIS 9 TH DAY OF JUNE 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MOMBASA

