



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

Judicial Review 5 of 2009

NJIRU KITHUA.....APPLICANT

VERSUS

THE HON. MINISTER FOR LANDS & 6 OTHERS.....RESPONDENTS

RULING

By his petition amended on 26.09.08, Njiru Kithua prays for the following declarations/orders:-

- (a) *For a declaration that the proceedings and the ruling of the Minister of Lands in Appeal emanating from the Ruling of the District Adjudication Officer, Embu respecting Plot No. 2244 Kirima Adjudication Section, being Appeal Numbers 143 of 1996 and 141/96, 142/96, 146/96, 147/96, 150/96, 151/96, 154/96, 155/96, 159/96, 161/96, 162/96, 169/96, 170/96, 171/96, 144/96, 145/96, 148/96, 152/96, 153/96, 156/96, 158/96, 160/96, 163/96, 164/96, 164/96, 165/96, 168/96, 167/96, 172/96, 173/96, 175/96, 176/96, 177/96 and 178/96 countenanced a mistake on the part of the district land adjudication officer Embu whose decision had been made in violation of the process of adjudication provided for in sections 3-27 in land adjudication act and therefore null and void for violating the Petitioner's right to and the rule and protection of law enshrined in sections 1 and 77 of the Constitution of Kenya.*
- (a) (b) *For a declaration that the proceedings and the ruling of the Minister of Lands in appeal emanating from the Ruling of the district Adjudication Officer, Embu respecting Plot No. 2244 Kirima Adjudication Section, being Appeal Number 143 of 1996 and 141/96, 142/96, 146/96, 147/96, 150/96, 151/96, 154/96, 155/96, 159/96, 161/96, 162/96, 169/96, 170/96, 171/96, 144/96, 145/96, 148/96, 152/96, 153/96, 156/96, 158/96, 160/96, 163/96, 164/96, 164/96, 165/96, 168/96, 167/96, 172/96, 173/96, 175/96, 176/96, 177/96 and 178/96 through which the Minister for Lands allocated parts of plots number 2244 depriving the petitioner the opportunity to assert his interest as provided for in the adjudication act depriving him of his land for violating the petitioner's right to property enshrined in Section 75 of the Constitution of Kenya and the rule and protection of law enshrined in sections 1 and 77 of the Constitution of Kenya. And;*
- (b) *Null and void for violating the petitioner's right to land the and his means for raising food in violation of right to self-*

preservation enshrined in Section 71 and right to human treatment enshrined in section 74 of the Constitution of Kenya.

- (c) *A declaration that the creation of the register and the registration of Plot Number 2244 in the names of the 17 clans under chapter 300 laws of Kenya and its subdivision in MBEERE/KIRIMA/2954-2964 and their resultant subdivisions into MBEERE/KIRIMA/2979-3023,3029-3182, 3183-3310 and all such further resultant subdivisions was illegal, unlawful, null and void and the Petitioner is entitled to its cancellation their register and reversal to the original plot no 2244 under the trusteeship of Mbeere County Council the successor of Embu County Council and/or,*
- (d) *An order calling into this court and quashing the decisions of the Minister of Lands in appeal Nos. 141 -178 of 1996 and the resultant registers for EMBU/KIRIMA/2244 and all its resultant registers for subdivisions thereof.*
- (e) *A declaration that plot Number 2244 has not been adjudicated and petitioner is entitled to its adjudication by either the first, second, third, fourth, fifth, sixth, respondents or the fourth respondent.*
- (f) *An order forbidding the 1st, 2nd, 3rd, 4th and 5th respondents, their servants, agents either by themselves or any other person claiming by virtue of the Minister's decision from surveying, subdividing, alienating, transferring and/or in any other manner dealing with Plot No. 2244 or part thereof before subjecting the same to the process of adjudication as laid out in the Land Adjudication Act Chapter 284 of the laws of Kenya.*
- (g)
- (h) *All such orders as this Honourable court shall deem just and expedient.*
- (i) *A declaration that the respondents are liable to pay the costs of this petition.*

The petition is said to be premised on Sections 1, 70(a) & (c), 75, 77(9) and 84 of the Constitution of Kenya (now repealed), It is also premised on the provisions of the Land Adjudication Act (Cap 284 of the Laws of Kenya) and the Registered Land Act Cap 300 of the Laws of Kenya. The same relates to **Plot No. 2244 KIRIMA ADJUDICATION SECTION**. It lists – total of 7 Respondents and 35 interested parties.

The same is supported by the affidavit of the petitioner dated 12.8.08 which has 13 annexures. An affidavit in reply was filed on behalf of the 2nd Respondent. The Honourable Attorney General filed grounds of opposition on behalf of himself (7th Respondent) and presumably on behalf of 1st, 5th & 6th Respondents who are sued in their official capacities.

Some interested parties did also file replying affidavits. The matter proceeded by way of written submissions which the several counsel on record highlighted or simply adopted.

The facts giving rise to this petition are not disputed but in order to put the same in a clearer perspective, I will summarize the same as hereunder.

Kirima area where the suit land is was declared an adjudication section way back in 1972 pursuant to the Land Adjudication Act. The same was hitherto clan land but the clans had leased out some 7000 acres of the said land to Meka Sisal Development Limited. The adjudication process was undertaken and at the end of it all, the Land Adjudication officer determined that the land in question belonged to the 17 clans jointly. Objections were filed as provided for under the adjudication Act and the Minister for Lands determined the Appeal on 27.5.07 and the petitioner herein was awarded 143 acres.

The Appeal by the Minister is mandated by section 29 of the Land Adjudication Act which only requires the Minister to

“determine the Appeals and make such order thereon as he thinks just and the order shall be final”.

Pursuant to this final decision of the Minister, the District land Registrar Mbeere opened a register for the said plot and the actions enumerated under paragraph 2(g) – (l) of the petition. With the full knowledge of the finality of the Minister's decision, the petitioner

decided to challenge that decision by way of this petition.

Counsel for the Respondent and the interested parties have challenged the justiciability of the petitioners petition urging that the same does not raise any constitutional issues.

I have given careful consideration to the submissions filled by counsel for the petitioner which were quite lengthy. I have also considered the responses thereto by the several counsel.

As stated earlier, the facts as outlined above are not disputed. What is clear however is that the petitioner was unhappy with the decision of the Minister which he could not appeal against. His contention is that the Minister arrived at his decision without "resorting to adjudication". As indicated above however, Section 29 of the Adjudication Act does not require the Minister to adjudicate or call the parties before arriving at his decision. All he needs to do is to make his decision in a way he deems just. The assumption here is that he heard the Appeal and arrived at the decision he deemed just. That decision cannot be challenged vide this petition.

According to the 7th interested party who stated that he concurs with the petitioner, their complaint is based on **"the procedural missteps in the process"** which he says resulted in the **"unfair, unjust and illegitimate alienation of all parties rights on that parcel of land"**

In my considered view however, if their discontent is based on procedural illegality, irregularity or irrationality, then the proper avenue for seeking recourse is through judicial review and not by way of petition. It is imperative to actually note that the 7th interested party has indeed challenged the process through Judicial Review case No. 12 of 2007.

A constitutional petition is meant to determine if a party's rights have been violated in one way or another. Indeed a petition cannot be a basis for quashing decision of quasi judicial or other administrative actions and or decisions.

As far as the petition therefore seeks to have the Minister's decision quashed, then I can only say that the same is misplaced.

Other than the procedural irregularities cited and which I have dealt with above, does this petition raise any constitutional issues? What rights inhere to the petitioner or are conferred to him by the constitution that have been breached and which can now be restored by this court? The petitioner has cited several provisions in the Constitution and endeavored in his submissions to explain them, inter-relate them and give them relevance *vis-a-vis* the facts pertaining to this petition.

Mr. Okwaro for several interested parties faulted the petition submitting that the same is premised on the wrong provisions of the law as the cited sections of the constitution have no relevance at all to the petitioner's circumstances. I must say that I have endeavored to give the said provisions the widest interpretation possible but I do not see for instance what Section 70 of the constitution which deals with the rights to life, liberty, security and protection of the law etc has to do with the manner in which the Minister decided the Appeal before him. I do not appreciate either how Section 74 which relates to torture, being subjected to inhuman and degrading punishment and or other treatment relates to the present petition.

The only provision which would appear remotely relevant is Section 75 of the Constitution which relates to compulsorily acquire property and how the same should be compensated. In the present circumstances however, no land was compulsorily acquired from the petitioner. Section 75 in my view relates to some property to which a person has already acquired inalienable rights but which the Government finds necessary to acquire for public utility. It does not relate to land which a person has no title to. Be that as it may, I am willing to apply the deminimis rule here and ignore the procedural deficiencies in the petition and determine the same on substance.

The gist of this petition, or what should form the basis of the same is whether the petitioner has any property rights over the land in question which he can enforce. Such rights is what would give him the locus to file this petition.

The land in question has never been in the name of the petitioner. The same was Trust Land under the 2nd and 3rd Respondents. The said

7000 acres was set apart by the council under the provisions of Section 117(4) of the constitution. Apparently, the petitioner is also pegging his claim on this provision which provides:-

“No setting aside in pursuance of the section shall have effect unless provision is made by law under which the setting apart takes place for prompt payment of full compensation to any resident of the land set apart”.

Section 117(4)(b) however does in my view deny the petitioner herein the requisite locus in respect of the said land.

It provides – read with Section 117(4) that the person who is entitled to the prompt payment of the full compensation under Section 117(4)

“is otherwise than in common with all other residents of the land in some other way prejudicially affected by the setting apart”.

The petitioner has not shown that he suffered any peculiar loss other than in common with all the other residents of the said land. He cannot therefore invoke Section 117(4) in his favour. He was not entitled to any compensation.

It is my firm finding that there was no breach of Section 116 or 117 of the constitution as relates to the petitioner herein. In brief, I find that no constitutional safeguards in respect of any property rights of the petitioner were breached which can be enforced by way of this constitutional petition.

I therefore agree with the state counsel that the petitioner does not have any enforceable rights over the property in question to entitle him to file this petition. The maxim “*Nemo dat quod non habet*” Clearly finds relevance here. The petitioner cannot seek to enforce rights he does not have.

Any rights he assumed he had over the said property remained inchoate until crystallized through the adjudication process. The adjudication process was carried out up to the last level allowed in law and the process did not confer any rights over the 334 acres he now claims. He has no rights to enforce in respect of the 334 acres as he has no title to them. They simply do not belong to him and the court cannot enforce rights that are not there in the first place. The petitioner needs to acquire individual ownership of the same in order to seek enforcement orders from this court by way of a constitutional petition.

By way of conclusion, I wish to reiterate that the petitioner herein appears aggrieved by the procedures in the Adjudication process which his counsel summed up in his able submissions thus:-

“The petitioner as a consequence lost 334 acres when the procedures set out in the Land Adjudication Act were manipulated to his disadvantage”.

His recourse therefore clearly lies in the Judicial Review process – subject to the provisions on limitation of time within which to file Judicial Review matters.

In sum therefore, I find and hold that this petition must fail. I find the same short in merit and I therefore dismiss it with costs to the Respondents and those interested parties who opposed the petition.

**W. KARANJA
JUDGE**

Delivered, signed and dated at Embu this 28th day of September 2010.

In presence of:- Ms. Kimani for Mr Wati for the petitioner and Mr. Okwaro for some of the interested parties as listed.