



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ongidi & another v Oduge & 5 others; Rakwach (Interested Party) (Environment & Land  
Petition E004 of 2020) [2022] KEELC 4933 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4933 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION E004 OF 2020**

**A OMBWAYO, J**

**SEPTEMBER 22, 2022**

**IN THE MATTER OF ARTICLES 1, 3, 6, 10, 19, 21, 22, 23, 27, 28, 32, 35, 41,  
42, 43, 47, 48, 64, 65, 67, 165, 258 AND 259 CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF LAND ACT, 2012**

**AND**

**IN THE MATTER OF CONTRAVENTION AND/OR APPREHENDED  
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**BETWEEN**

**PHILIP OTIENO ONGIDI ..... 1<sup>ST</sup> PETITIONER**

**KENNEDY ODHIAMBO ONGIDI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**BENJAMIN OTIENO ODUGE ..... 1<sup>ST</sup> RESPONDENT**

**LAND ADJUDICATION OFFICER, NYANDO ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, NYANDO ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**ERASTUS AKOTH RAKWACH ..... INTERESTED PARTY**



## JUDGMENT

### Petitioners Case

1. Philip Otieno Ongidi, Kennedy Odhiambo Ongidi (hereinafter referred to as petitioners) have come to this Court against Benjamin Otieno Oduge and the Land Adjudication Officer, Nyando, Land Registrar, Nyando, Chief Land Registrar, National Land Commission, The Attorney General and Erastus Akoth Rakach praying for a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have violated the Constitution, the Land Act 2012, the Land Registration Act 2012 and the Land Adjudication Act and that the adjudication on Land Parcel Wawidhi “B” 4158 was discriminatory, un-procedural, illegal and unconstitutional and violates the Judgement of the Court in HCC 386 and No 121 of 2000 and Court of Appeal Judgement in No 77 of 2005.
2. Moreover that the 4<sup>th</sup> and 5<sup>th</sup> respondent failed to observe the national values and principles of governance as set out in article 10 of the Constitution in the manner issues by refusing, failing and neglecting to call the 1<sup>st</sup> and 2<sup>nd</sup> respondent to account for illegal and unconstitutional actions. The petitioner prays for general damages against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the interested Parties.
3. The seek a declaration that land parcel Wawidhi “B” 4158 is 40 acres and annexing parts of it violated the petitioner’s Constitutional right to their property. That the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents be directed to rectify the land parcel Wawidhi “B” 4158 to be in consonant with the Court Judgement in HCCC AND 121 OF 2000 and Court of Appeal Judgement in No 77 of 2005. Last but not least, the respondents to pay the petitioners costs of the petition in any event.
4. The facts in support of the petition are that Land Parcel Wawidhi “B” 4158 was owned by Maricus Ongidi having lived there for 30 years. The interested party parcelled out 10 acres from the 40 acres owned by Maricus Ongidi Odhare. That Maricus filed a case in court against the 1<sup>st</sup> interested party and others in Kisumu Chief Magistrates Court Case No 25 of 1995. The said Court on or about 26<sup>th</sup> October delivered the judgement ordering the evicting of the interested parties.
5. That the interested parties specifically the 1<sup>st</sup> interested party filed an appeal being Appeal No 121 of 2000 which Appeal was dismissed by Justice Tanui on 18<sup>th</sup> of March 2002 and the 1<sup>st</sup> Party was evicted from that land.
6. That in the meantime the said Maricus Ongidi filed a case against the other interested parties or their Fathers in HCC No 386 OF 1995 which case determined in favour of the said Maricus Ongidi on or about the May 10, 2000. The said interested parties or their Fathers Appealed to the Court of Appeal vide Appeal No 77 of 2005. That the Court of Appeal dismissed that Appeal with cost on or about March 5, 2015. That the interested parties colluded with 1<sup>st</sup> respondent to defeat a lawful court order. That the 1<sup>st</sup> respondent using powers as the adjudication officer parcelled out and created numbers from 4158 which was 40 acres but now remains 25 acres.
7. The petitioners claim that the 1<sup>st</sup> respondent through fraud conspired with the interested parties and created parcels number Wawidhi B/6280, 5973, 5798, 5791, 5800 and amended maps to reflect the creation of the parcels of land. The petitioners claim that as the sons of Maricus Ongidi, they are entitled to the ancestral land without interference.



## Respondents' Case

8. The 1<sup>st</sup> respondent is the Land Adjudication and settlement officer Kisumu county. He swore an affidavit on behalf of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents. According to the 1<sup>st</sup> respondent, the parcels of land in contention are within Wawidhi Registration section of Nyando Adjudication area Kisumu County.
9. The parcels of land were demarcated in 1988 and registered in the names of the Land owners. There has been no re-demarcation to create new boundaries.
10. He states that the petitioners land 41518 is 10.2 acres and not 40 acres. The respondents state that the adjudication record was published and all the parcels of land were subject to objection as provided by section 26 of the [Land Adjudication Act](#) Cap 284 Laws of Kenya.
11. That both petitioners and the nine interested parties filed cases against each other and the same were determined by the Land Adjudication Organization on November 28, 2013. That the owners of the parcels of land were given consent to sue but never did so.
12. That adjudication process was finalised and the Registrar was forwarded to the director of Land Adjudication and settlement on the March 19, 2019. According to the adjudication regulations the plots are registered as follows:
  1. P/No 6250 Erasto Akoth Rakwach.
  2. P/No 3470 Thomas Omolo Apondo
  3. P/No 3471 Samwel Rabach Sure
  4. P/No 3472 Andrea Okoko Sure
  5. P/No 5799 Joseph Muga Ojiem
  6. P/No 5975 Barnabas Jamwa Muga
  7. P/No 5798 Mariro Okelo Muga
  8. P/No 5791 Daniel Ojwang Ongudi
  9. P/No 5800 William Olwendo Ojuang
13. There is no pending dispute. The 1<sup>st</sup> respondent denies fraud or any wrong doing.
14. Daniel Ojwang Ongidi the 5<sup>th</sup> interested party on his behalf and on behalf of the 1<sup>st</sup> interested party states that the petition is a nullity having been filed against deceased persons thus interested parties number 2, 3, 4, 5, 6 and 7. That the affidavit in support of the petition is not commissioned and is not dated. Moreover, that the petitioners have not exhausted the available remedies of appeal to the Minister whose decision is final.
15. Moreover, he states that the petitioners have violated section 30 (1) of the [Land Adjudication Act](#) cap 284 Laws of Kenya. The gist of the 1<sup>st</sup> and 8<sup>th</sup> interested party statement is that adjudication process is not complete and title deeds have not been issued.
16. The 1<sup>st</sup> and 8<sup>th</sup> Interested Parties deny any wrong doing in the adjudication process and state that the process was elaborate and that was within the law. The suit land are a product of an elaborate process of survey and adjudication in the presence of the parties.



17. The next of kin of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> interested parties filed their responses through Joseph Odhari Rabach. According to Joseph Odhari Rabach the interested parties are deceased and no grant has been made in respect of their estate and therefore the claim against them is incompetent. The gravamen of the Interested Parties statement in the replying affidavit and further affidavit filed on October 27, 2021 is that the adjudication process was proper and within the law and that the petitioners have not exhausted the available remedies as per the [Land Adjudication Act](#) and that no consent to sue has been granted.
18. The petitioners submit that their position is that the suit property was illegally and fraudulently acquired and subdivided as such. That article 40 (6) is very clear on property fraudulently and illegally acquired.
19. That the petitioners have proved that the actions of 1<sup>st</sup> and 2<sup>nd</sup> respondents in annexing over 10 acres of the petitioners land violate articles 40, 67 of the [Constitution of Kenya](#).
20. Secondly, the petitioners submit that they have demonstrated that the 1<sup>st</sup> respondent using powers and the adjudication officers parcelled out and created numbers from 4158 which was 40 acres but now remains 25 acres in contention of article 10 of the [Constitution of Kenya](#).
21. Thirdly, the petitioners argue that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had no power to interfere with the land boundaries after the court had made its decision.
22. The land was 40 acres and the 1<sup>st</sup> and 2<sup>nd</sup> respondents had no authority to interfere with the same. Ultimately that the petitioners' rights have been violated and the respondent action amounts to abuse of office power and [leadership and integrity Act](#) No 19 of 2012.
23. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents submit that suit parcels of Land are situated within Wawidhi registration section of Nyando adjudication area of Kisumu County. The plots were demarcated in 1985 and the adjudication process was conducted within the provision of the Adjudication Act Cap 284 Laws of Kenya.
24. The adjudication record was published on September 9, 2010 and the interested parties were given 60 days to raise objection as provided under section 26 of the [Land adjudication Act](#) Cap 284 Laws of Kenya. Parties filed objections against each other but were dismissed by the Land Adjudication Officer on November 28, 2013. Despite consent to sue being given, the parties never filed suit and never appealed to the Minister in accordance to the law.
25. The adjudication register was forwarded to the director of land adjudication and settled on the March 19, 2019. The adjudication was finalised and the register forwarded to the chief land registrar for processing of title deeds.
26. The respondents submit that the adjudication process was in conformity with the law and therefore procedural constitution and non-discriminating and hence the petition is not merited.
27. On whether parcel number Wawidhi 4158 "B" is 40 acres, the respondents submit that there is no evidence that it was 40 acres and that the issue should have been determined through an appeal from the objections. According to the respondents there is no evidence that the respondents have violated article 10 of the [Constitution of Kenya](#).
28. Ultimately the respondents submit that the petition is a boundary dispute that can be dealt with using statutory mechanism. The respondents rely on [Moile Yenko & 7 Others v National Land Commission & 5 others \(2016\) eKLR](#) where the court held that where there exist sufficient and



adequate mechanism to deal with a specific issue or dispute by other designed constitutional organs, the jurisdiction of the court should not be invoked.

29. The respondents further refers to *Papinder Kaur Atwal v Majit Singh Amrit Nairobi* petition No 236 of 2011 where it was held by Justice Lenaola that

All the authorities above would point to the fact that the contact is a solemn document and should not be a substitute for remedying emotional personal question or have control of excuses within administrative processes.”

30. The interested parties argue that the petitioners have contravened section 30 (1) of the [Land Adjudication Act](#) Cap 284 that provides:-

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.”

31. The Interested Parties submit that the supporting affidavit to the petition is not sworn hence the petition is incompetent. The affidavit is unsworn and the supporting documents are not commissioned.

32. The interested parties further submit that the petitioners have not proved that the parcel of land Kisumu/Wawidhi B/4158 was at any one point measuring the alleged 40 acres and the issue of acreage was not raised at any point. The Interested Parties submit that the petitioners have not demonstrated that they deserve the orders sought.

33. The court has considered the petition, facts in the supporting affidavit, responses and rival submissions and do find that contrary to the allegation by the Interested Parties that the affidavit in support of the petitioners was not commissioned, according to the law, the documents on record indicate otherwise that the affidavit was properly sworn and the documents commissioned hence the interested parties allegations and arguments are not well founded on this point.

34. The petitioner has not demonstrated that the respondents breached article 40 of the [Constitution](#) as the petitioners are challenging the process of adjudication whereas article 40 of the Constitution only comes into place after adjudication process is completed and titles issued and proprietary rights ascertained. On this point alone it is my view that the petitioner has not satisfied the principles set out in the case of [Anarita Karimi Njeru v Republic](#) [1979] eKLR where the High Court held:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

35. The principle in the *Anarita Karimi* case was re-affirmed in the case of [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) [2013] eKLR and [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) [2014] eKLR.

36. The nutshell of the cited case is that when a person seeks redress through a constitutional petition, it becomes the duty of that party to state his claim with precision by referring to the provisions of the Constitution that have been violated and the manner in which the provisions were violated.



37. The petitioners have referred to article 67 of the *Constitution* that provides for the functions of the National Land Commission but the petitioners have not demonstrated that they invoked the Jurisdiction of the National Land Commission and that the National Land Commission did not address the issues raised or refused to hear them.
38. The petitioners have invoked the provision of article 10 of the *Constitution of Kenya* and claimed that by creating parcels of land from 4158 which was 40 acres but now remains 25 acres, they contravened Article 10 of the Constitution. It is not clear how parcelling 10 acres from 40 acres out leads to a balance of 25 acres and how the petitioners were affected. It appears that the petitioners are guessing as at what happened that allegedly led to reduction of the size of 4158. I have carefully read the adjudication record and do find that the adjudication officer followed due process to parcel out the disputed portions of land. In Kisumu HCCC No 386 of 1995, Hon. Justice Wambilyanga as he then was observed that plot number 4158 was procedurally adjudicated in favour of the “ plaintiff in that case” thus Maricus the father of the petitioners. In Judgment of the court there was no determination that the land was 40 acres.
39. This court observes from the record that an adjudication committee was created within section 6 of the *Land Adjudication Act* Cap 284 Laws of Kenya which provides that:-
- In respect of each adjudication section, the adjudication officer, after consultation with the District Commissioner of the district within which the adjudication section lies, shall appoint not less than ten persons resident within the adjudication section to be the adjudication committee for that adjudication section.
- The adjudication officer shall appoint an executive officer for each committee to keep its records and to inform the recording officer of its decisions, and the executive officer shall attend and may speak at any meeting of the committee, but may not vote.”
40. The Committee made a determination and objections were filed and determined. It is also clear that the adjudication register was prepared and forwarded to the Director of Land Adjudication and Settlement on 19/3/2019.
41. Section 26A of the *Land Adjudication Act* Cap 284 provides:-
- When the time for objection under section 26 (1) has expired, the adjudication officer shall prepare a No Objection Register in respect of any land not subject to an objection, and deliver the same to the Director of Land Adjudication who shall—
- certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and
- Forward the no objection register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section 28.
- certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and
- Forward the no objection register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section 28.
- The provisions of this section shall apply to all adjudication registers not yet finalized before its commencement.”
42. The adjudication register was forwarded to the Chief Land Registrar for processing of title deeds. There is no pending dispute before the Land Adjudication and Settlement Officer. I do agree with the



respondents and interested parties that the laid down mechanism under Cap 284 Laws of Kenya have been applied in making a determination in respect of the suit property hence the petition is misguided.

43. I do agree with the finding in *Moile Yenko & 7 others v National Land Commission* (2016) eKLR that that where there exist sufficient and adequate mechanism to deal with a specific issue or dispute by other designed constitutional organs, the jurisdiction of the court should not be invoked. The upshot of the above, I do find the petition not merited and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>nd</sup> DAY OF SEPTEMBER, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020

