



Aengwo & 71 others v County Land Adjudication and settlement officer, Baringo & 5 others; Kuikui Adjudication Section & 3 others (Interested Parties) (Environment and Land Constitutional Petition E010 of 2021) [2022] KEELC 4866 (KLR) (20 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E010 OF 2021**

L WAITHAKA, J

SEPTEMBER 20, 2022

**FORMERLY ELDORET ELC CONSTITUTIONAL PETITION NO.E010 OF 2021
IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ARTICLES 22, 23 AND 23
AND 165 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 26A, 27 AND 28 OF THE
LAND ADJUDICATION ACT-CAP 284 LAWS OF KENYA**

AND

**IN THE MATTER OF SECTION 4, 5 AND 6 OF
THE COMMUNITY LAND ACT NO.27 OF 2016**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT NO.13 OF 2019

AND

IN THE MATTER OF THE SURVEY ACT CAP 280 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 7 OF THE LAND ACT NO.6 OF 2012

AND

IN THE MATTER OF KUIKUI ADJUDICATION SECTION



BETWEEN

AENGWO TOROTICH 1ST PETITIONER
WILSON CHEROP 2ND PETITIONER
DAVID CHETALAM 3RD PETITIONER
ISIAH CHIRCHIR 4TH PETITIONER
DAUDI YATORI 5TH PETITIONER
ISAACK TOROITICH 6TH PETITIONER
DANIEL CHEPCHIENG 7TH PETITIONER
JOHN CHIRCHIR 8TH PETITIONER
JOEL CHEPSONGOL 9TH PETITIONER
SAMMY CHEPSONGOL 10TH PETITIONER
DAVID CHESIRE 11TH PETITIONER
MATHEW KAIMOI 12TH PETITIONER
FRANCIS KIBOR 13TH PETITIONER
SYMON CHEMAMET & 58 OTHERS 14TH PETITIONER

AND

**COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER,
BARINGO 1ST RESPONDENT**
DIRECTOR OF LAND ADJUDICATION & SETTLEMENT . 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
COUNTY GOVERNMENT OF BARINGO 4TH RESPONDENT
COMMITTEE OF BARWESA "A" ADJUDICATION 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT

AND

KUIKUI ADJUDICATION SECTION INTERESTED PARTY
**REGISTERED TRUSTEES SEVENTH DAY ADVENTIST CHURCH KAMPI
NYASI INTERESTED PARTY**
**REGISTERED TRUSTEES FULL GOSPEL CHURCH KAMPI
NYASI INTERESTED PARTY**
**BOARD OF MANAGEMENT KAMPI NYASI PRIMARY
SCHOOL INTERESTED PARTY**



JUDGMENT

1. The Petitioners herein, who have described themselves as inhabitants of Kuikui Land Adjudication Section within Kampi Nyasi Trading Centre, Kaboskei Kerio Location in Baringo County, filed this petition seeking judgment against the Respondents for:-
 - a) A declaration that the actions of the respondents to adjudicate, demarcate and register their parcels of land in the name of the 4th respondent as plot number 1957 is unlawful, arbitrary, discriminatory, unreasonable, contrary to good governance and without regard to their legitimate expectation to fair administrative action.
 - b) A permanent injunction to restrain the 3rd and 4th respondents either by themselves, their employees and/or servants from registering, alienating, dealing with, engaging in construction activities, transferring and/or evicting them from their parcels of land.
 - c) A declaration that the purported adjudication, demarcation and consequent registration, allocation, reservation process of parcel 1957 and other parcels wrongly adjudicated and demarcated by Barwesa “A” Adjudication Committee in Kuikui Adjudication Section in the guise of public utilities in favour of the County Government of Baringo and other private entities is unlawful, illegal, null and void ab initio.
 - d) A declaration that the Adjudication Committee set up for Kuikui Adjudication Section in 1993, due to lapse of time, its neglect, dereliction of duty, recklessness and being moribund be dissolved forthwith and a new Adjudication Committee be put in place.
 - e) A declaration that the Director of Land Adjudication and Settlement has not faithfully implemented and discharged his statutory duties under the *Land Adjudication Act* for unduly delaying the finalization of the Kuikui Adjudication Section since 1993 to date thereby causing hardship to them and therefore be ordered to conclude the adjudication process within the next two years from the date of determination of the petition and the same be done in accordance with the existing laws and procedures.
 - f) A declaration that any title issued by the 3rd respondent in favour of Baringo County Government, especially in land parcel number 1957 within Kuikui Adjudication Section and any other resultant title issued after the adjudication and demarcation of Kuikui Adjudication Section by Barwesa “A” Adjudication Committee be revoked/cancelled forthwith for being illegal and unprocedural.
 - g) Such other orders and directions as the court may deem fit to meet the ends of justice.
 - h) Costs of the petition.
2. As can be discerned from the averments on the face of the Petition, the affidavit sworn in support of the Petition and the reliefs sought, the Petitioners’ case is premised on the grounds that adjudication of parts of the area in which their land is situated was done by the wrong Land Adjudication Committee to wit Barwesa “A” Adjudication Committee; that the Committee irregularly adjudicated some community land in favour of the County Government of Baringo-in particular parcel number 1957; that their area was supposed to be adjudicated upon by Kuikui Adjudication Committee and that the 1st Respondent did not go to the ground to establish the rights and interests of the occupiers of the land.



3. Further, that the 1st Respondent used Global Positioning Reconnaissance Systems (GPRS) to curve out their land. That the 1st, 2nd and 4th Respondents denied the Petitioners an opportunity to object to the adjudication by concealing the entire adjudication process and that the Respondents deprived the Petitioners and their community the right to own land by allocating huge chunks of land to the 4th Respondent (the County Government of Baringo) and the Interested parties.
4. Terming the adjudication of parcel number 1957 in favour of the 4th Respondent selective, illegal, capricious, prejudicial to them and discriminatory, the Petitioners, have deposed that they are in occupation of the parcel and have extensively developed it. The Petitioners are apprehensive that they may be evicted from the parcel by the 4th Respondent and the Interested parties. The Petitioners have further deposed that there was no public participation before the parcels of land in question were adjudicated in favour of the 4th Respondent and the Interested parties.
5. The Petition is opposed through the replying affidavit of John Ongalo Laku, the Principal Land Adjudication & Settlement Officer, Baringo County, sworn on February 4, 2022. Through the affidavit, the Respondents have deposed that the petition is incurably defective, incompetent, frivolous, scandalous and devoid of substance; that the affidavit sworn to verify the facts on which the petition is premised is full of falsehoods and misrepresentations tailored to win sympathy of the court; that the Petition is bad in law because the Petitioners have not exhausted all remedies provided by the [Land Adjudication Act](#) and that the court lacks jurisdiction to hear and determine the Petition because the suit is in respect of property within an ongoing adjudication process.
6. The Respondents have further deposed that Barwesa and Kuikui Adjudication Sections were established in accordance with the applicable law and procedures; that Barwesa “A” Adjudication section was amended and accepted by all and that the amendment was widely publicized and no complaint was raised in respect thereof; that parcel No 1957 was reserved for Likwon Trading Centre and that it was among the parcels that were demarcated in the newly created boundary area; that on October 14, 2015, in accordance with Section 25(c) and 26(1) of the [Land Adjudication Act](#) (LAA), the Adjudication Register for Barwesa Adjudication Section was declared complete and all Interested parties called upon to inspect the register.
7. It is further deposed that the adjudication process was successfully carried out; that no claims on boundary disputes between the two adjudication sections were raised as required by law and that some individuals raised objections upon notification meaning that the residents of the two adjudication sections were aware of the impugned activities of the Respondents.
8. It is further deposed that the 4th Respondent, County Government of Baringo, was registered as proprietor of parcel No 1957 not as the absolute owner but as a trustee because the parcel had been set aside as a public utility for use by the public; that the allocation was within the law; that Kuikui Adjudication Section is still in progress and that the Petition impugns the lawful exercise of the Petitioner’s mandate.
9. The Respondents have deposed that no evidence has been laid to demonstrate that the 1st and 5th Respondents including the 1st Interested party violated the rules of natural justice or that the Respondents were biased against the Petitioners; that all due procedures as stipulated under the [LAA](#) were followed and all registrations were made in line with the Act; that the Petitioners have not adduced any evidence to prove that their right to a fair administrative action was violated and that if the Petitioners were aggrieved by the actions of the Respondents they should have challenged them using the procedure provided under the [LAA](#).
10. The Petitioners are said to be guilty of laches hence undeserving of any equitable remedy.



11. It is contended that the Petition lacks specificity making it difficult to understand what the Petitioners are complaining about and that it is meant to circumvent the procedures in the [LAA](#).
12. The Respondents have further deposed that there is no evidence that the Respondents violated any of the cited constitutional and statutory provisions and that the Petition is not a class action or a public interest litigation as purported.
13. Pursuant to directions given on June 14, 2022 the Petition was disposed off by way of written submissions.

Petitioners' submissions

14. On behalf of the Petitioners, reference is made to the case of *Peter Mwau Muinde and Another v Insurance Regulatory Authority & others* (2018) e KLR and submitted that in the instant Petition, the Petitioners have specifically pointed out the provisions of the [Constitution](#) the Respondents have violated, the manner in which the provisions were violated and the reliefs sought and reiterated that the Petitioners' land was covertly adjudicated upon by the wrong adjudication committee leading to the subject matter of the Petition to wit land parcel No 1957 being secretly allocated to the 4th Respondent. Those allegations are said to be uncontroverted. It is reiterated that Barwesa Adjudication Section and Kuikui Adjudication Section are different adjudication sections, each with its own Independent Adjudication Committee.
15. It is reiterated that the Petitioners were never consulted nor invited to participate in the adjudication process contrary to Article 35 of the [Constitution](#) of Kenya which provides for right to access information. The Respondents are also said to have contravened Article 10 of the [Constitution](#).
16. The 1st Respondent is said to have neglected his duties by allowing Barwesa Adjudication Committee to adjudicate parcel number 1957 which falls in Kuikui Adjudication Section.
17. It is reiterated that the residents of Kuikui Adjudication Section were waiting for the area to be adjudicated only to learn that it had been adjudicated by Barwesa Adjudication Section and parcel number 1957 which they extensively occupy, reserved for the 4th Respondent.
18. On whether the Petitioners' proprietary rights were violated, reference is made to Sections 4, 5 and 6 of [LAA](#) and submitted that there is no evidence tendered by the respondents to show that those sections of the law were complied with. It is further submitted that there is no evidence that the respondents complied with Section 5 of the [Physical Land Use and Planning Act](#).
19. On whether the Petitioners are entitled to the orders sought, it is submitted that there can never be an alternative remedy available to the Petitioners when the entire process was flawed and clouded in secrecy.
20. Based on Articles 23(1) and 165 of the [Constitution](#), it is submitted that this court has jurisdiction to hear and determine applications for redress of a denial, violation of, or threat to a right or fundamental freedom in the Bill of Rights.
21. It is pointed out that the process of generating title in favour of the 4th Respondent has gone beyond the control of the adjudication officer and submitted that it is only through this Petition the decision of the Respondents can be reversed. In that regard reference is made to the case of *Harun Mwau vs Peter Gastrow & others* (2014) e KLR where it was held that the [Constitution](#) ought to be invoked when there is no other recourse for disposing the matter.



22. The process of allocating land to the 4th Respondent is said to have been flawed, a sham, null and void for want of procedure.
23. It is further submitted that the 5th Respondent had no jurisdiction to adjudicate upon Kuikui Adjudication Section. The 5th Respondent is said to have transgressed its boundary.
24. The 1st and the 2nd Respondents are said to have violated the Petitioners' legitimate expectation that they would be consulted in the process of adjudication.
25. This Petition is said to be the only avenue the Petitioners have to challenge the impugned actions/ decision of the Respondents.

Respondents' Submissions

26. The Respondents have submitted that the Petitioners did not offer any evidence that the land was ever illegally allocated to the 4th Respondent or that the registration was done in absence of their participation in the objection proceedings; that the Petitioners did not state how the alleged allocations could have violated their rights and fundamental freedoms. Further, that the adjudication process was successfully carried out and that there was no boundary dispute between the two adjudication sections.
27. Regarding adjudication of plot No 1957, it is explained it was registered in favour of the 4th Respondent as a trustee because it had been set aside as a public utility for use by the public. The allocation is said to have been lawful.
28. Kuikui Adjudication Section is said to be still in progress and that the committee constituted as per provisions of Section 6 of [LAA](#) are always replaced when need arises.
29. It is contended that the Petition impugns not only the decision of the Respondents but also seeks to overturn the process that was concluded contrary to provisions of [LAA](#); that there is no evidence that the 1st Respondent violated the rules of natural justice or that the Respondents were biased against the Petitioners or that there was a pre-determined decision on the part of the Respondents.
30. It is reiterated that all due procedures stipulated under [LAA](#) were followed and that all registrations were made in line with the Act. It is further submitted that there is no evidence that the Petitioners right to fair administrative action was violated.
31. The Petitioners are said to be guilty of laches for having failed to lodge a complaint and assert their rights when the boundaries between Barwesa Adjudication Section and Kuikui were being amended in 2011. The Petitioners are said to have acquiesced to the amendment hence estopped from challenging the decision very late in the day. The claims made against the 2nd Respondent are said to be unfounded and in bad taste.
32. It is contended that because the Petition lacks specificity, it is difficult for the court to ascertain what the complaint of the Petitioners is. It is reiterated that there is no evidence of violation of Articles 10, 35 and 47 of the [Constitution](#) and submitted that the reliefs sought are untenable and cannot be granted as the Petitioners did not exhaust the remedies provided under [LAA](#).
33. The Respondents are said to have offered a cogent justification of their action concerning registration, transfer and issuance of titles to the various Respondents and Interested parties.



Analysis and determination

34. I have carefully read and considered the pleadings filed in this Petition, the evidence adduced and the submissions by the Respective parties. The key issue for the court's determination is whether the Petitioners have made up a case for being granted the orders sought or any of them.
35. As can be discerned from the pleadings and submissions by the Petitioners, the Petitioners were aggrieved by adjudication of land situate in Kuikui Adjudication Section by Barwesa "A" Adjudication Section (BAAS). Particularly, the Petitioners appear to be aggrieved by adjudication of parcel number 1957 in favour of the 4th Respondent-the County Government of Baringo by BAAS. The Petitioners' inter alia contend that BAAS lacked jurisdiction to adjudicate land falling in the jurisdiction of Kuikui Adjudication Area.
36. Concerning that contention, the Respondents have deposed that BAAS was established in 1985 and that its boundary was amended in 2011. Notice of amendment of the boundary is annexed to the affidavit sworn in reply and opposition to the Petition and marked JOL 1(b).
37. The Respondents have further deposed that there was no objection to the amendment of the boundary. That following the amendment of the boundary, BAAS adjudicated 25 parcels of land in what was originally Kuikui Adjudication Section and that some of the persons affected by the adjudication objected against the outcome of the exercise as by law provided.
38. According to the Respondents, the fact that there were objections by some of the residents affected by the adjudication process, is evidence that the Petitioners were aware of the impugned process. The Respondents fault the Petitioners for having failed to challenge the process through the process provided for under the LAA, if they were aggrieved.
39. There being evidence that the boundaries of Barwesa Adjudication section were amended and that there were objections in respect of some of the parcels that were adjudicated pursuant to the amended boundaries, I am not satisfied that the impugned adjudication was done secretly as alleged by the Petitioners. From the affidavit evidence adduced by the Respondents, I gather that some of the Petitioners, for instance, David Chesire (Petitioner No 11) objected to the impugned adjudication, meaning that some of the Petitioners were aware of the impugned adjudication process and challenged it in accordance with the established legal mechanisms of challenging such a process.
40. Although the 1st Respondent has not offered explanation of the circumstances that led to amendment of the boundary and demonstrated that the Petitioners were represented in the Adjudication Committee, I am of the considered view that the Petitioners having failed to challenge the process through the procedure provided for under the LAA cannot be heard to say that this Petition is the only avenue they have to challenge the impugned decision of the Respondents.
41. In the case of Daniel Musili Nyeki & 49 others v Cabinet Secretary of Lands & Settlement & Another; Benard Malonza Musya & 30 others (interested parties) (2021) e KLR it was observed:-
- “The Land Adjudication Act is described as “An Act of Parliament to provide for ascertainment and recording of rights and interests in trust land, and for purposes connected therewith and purposes incidental thereto.” The Act has a detailed dispute resolution mechanism from the time of inception of claims to the final decision of the minister under section 29. If followed through to its conclusion, the dispute resolution mechanism is supposed to deliver constitutional protection and just determination of rights...”



42. In the case of *Speaker of the National Assembly vs James Njenga Karume* (1992) e KLR the court of appeal held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or Act of Parliament, that procedure should be strictly followed”.

43. In *Robert Kulinga Nyamu vs Musembi Mutunga & another* (2022) e KLR it was stated:-

“I however, do not agree with the submissions by the Appellants Counsel for the reason that the quasi-judicial institutions referred to are established under the Land Adjudication Act whose purpose is to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto. The dispute resolution mechanism provided under the said Act is elaborate, Section 13 of the Act provides for commencement or institution of a claim as follows; “Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act” Section 10 provides as follows; “The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connexion with such claims...”

The elaborate dispute resolution process culminates with the appeal to the Minister under Section 29 which provides that;

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 delivering to the Minister an appeal in writing specifying the grounds of appeal; and 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.”

44. In *Dume Deri Mumbo & 19 others vs Cabinet Secretary of Lands, Housing & Urban Development & 6 Others* [2016] eKLR, the court stated:-

“The issues that are being raised in the current suit as to which clan owns the suit property were conclusively dealt with by the various bodies, including the Minister, pursuant to the provisions of the Land Adjudication Act. Considering that the suit herein is wholly challenging the decision of the Minister to allocate the 7th Defendant's clan 2/3 of the suit property, and in view of the provisions of Section 29(1)(b) of the Land Adjudication Act which provides that the decision of the Minister shall be final, the Plaintiff cannot appeal against the said decision in the manner that he has done. I say so because the mechanism to resolve disputes within an adjudication area have been set out in the Act. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings. As was stated by the Court of Appeal in the *Nicholas Njeru* case (*supra*), during the various proceedings, the issues in the current “appeal” were thrashed to the pulp and the issues as to which clan owned the suit property was determined in the year 2012. This court cannot re-open that issue as claimed by the



Plaintiff by way of an ordinary suit, without disclosing the new cause of action that has arisen.”

45. In the circumstances of this case, the Petitioners who did not take advantage of the dispute resolution mechanisms provided under LAA have moved this court to challenge the exercise of the mandate of the Respondents, particularly the 1st and 5th Respondent on alleged breaches of the constitutional and legal rights. The Petitioners’ case is that the impugned adjudication was secretly carried out by the wrong adjudication committee, BAAS.
46. Upon consideration of the totality of the evidence adduced by the Respondents showing that the boundaries of the two adjudication sections were amended; that there was no objection to the alteration of the amendment of the boundaries and that there were objections by some of the persons affected by the adjudication exercise, I am not satisfied that the Petitioners did not know about the impugned activities of the Respondents. I find the excuse given by the Petitioners for failure to use the dispute resolution mechanism provided in LAA to be not convincing.
47. In my view, the issue raised in the Petition ought to have been addressed through the procedure provided under LAA. For the foregoing reasons, I agree with the Respondents contention that the Petition is meant to circumvent the dispute resolution procedure provided under LAA and to that extend an abuse of the court process.
48. The upshot of the foregoing is that the Petition is found to be bad in law and is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 20TH DAY OF SEPTEMBER, 2022.

L. N. WAITHAKA

JUDGE

