



**Cheserek v Chairman Board of Management, Patkawanin Primary School & 2 others (Environment and Land Constitutional Petition 14 of 2022) [2022] KEELC 13427 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13427 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ITEN**  
**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 14 OF 2022**  
**L WAIHAKA, J**  
**OCTOBER 11, 2022**  
**FORMERLY ELDORET ELC CONSTITUTIONAL PETITION**  
**NO.2 OF 2020**  
**IN THE MATTER OF AN APPLICATION UNDER ARTICLES**  
**27(1)(2)(3)(4) & (5); 40, 47(1)(2) & (3)(A)(B) AND 48**  
**OF THE CONSTITUTION OF KENYA 2010**  
**AND**  
**IN THE MATTER OF ENFORCEMENT FUNDAMENTAL**  
**RIGHTS UNDER ARTICLES 40, 47 AND 50 OF THE**  
**CONSTITUTION OF KENYA 2010**

**BETWEEN**

**MICHAEL CHESEREK ..... PETITIONER**

**AND**

**CHAIRMAN BOARD OF MANAGEMENT, PATKAWANIN PRIMARY SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**AREA CHIEF-KIMALEL LOCATION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. This suit relates to a parcel of land reserved for Patkawanin Primary School (hereinafter referred to as the school). According to the petitioner, sometime in 1970s residents of Patkawanin area, through their elders donated land for public utilities, among them the school. Among the elders who donated land for the school was the petitioner's father (Cheserek Chebii).
2. Claiming that the parcel of land donated by his father was fraudulently extended by some elders without their consent, thereby disinheriting them, the petitioner states that in 2014, in particular, on June 21, 2014, they held a meeting and resolved that the boundary between their land and the school's land is Kimarion road.
3. Lamenting that attempts to get the resolution ratified and implemented, have been in vain, the petitioner blames the respondents for prosecuting a scheme aimed at disinhering his family.
4. The petitioner further claims that on July 16, 2020, the respondents sanctioned demarcation in the area in dispute without involvement and/or participation of his family.
5. Claiming that their ancestral land rights have been infringed and their fundamental freedoms denied, violated and/or threatened with violation by the respondents, the petitioner brought this petition *inter alia* seeking to enforce the resolution allegedly made on June 21, 2014.
6. The petition is opposed on the grounds that it is frivolous, speculative, premature and devoid of truth; that the petitioner did not exhaust the internal dispute resolution mechanisms provided for in the applicable statutes ([Land Adjudication Act](#)(LAA), Cap 284 Laws of Kenya, and the [Community Land Act](#) (CLA) No 26 of 2016); that the petitioner has failed to demonstrate or assert proprietary interest in the suit property and that the petition does not meet the legal threshold of a constitutional petition enunciated in the case of [Anarita Karimi Njeru vs The Republic](#) 1976-1980) KLR 1272.
7. The respondents have *inter alia* deposed that the land occupied by the school, measuring approximately 66 hectares, was donated by elders; that the boundary between the school's land and the land belonging to the community was ascertained by elders in 1973; that the school has been in use and occupation of the land ever since that time and that neither the petitioner nor his father raised any objection to the use and occupation of the land.
8. Terming the resolution of 2014 an attempt to illegally convert the land belonging to the school to private land, the respondents contends that the resolution is incapable of enforcement by court.
9. The respondents have further denied the allegations of wrongdoing and violation of the petitioner's constitutional rights.
10. Pursuant to directions given on May 31, 2022, the petition was disposed of by way of written submissions.

### Petitioner's Submissions

11. The petitioner filed lengthy submissions/ response to the issues raised in the respondents' replying affidavit and submissions. In the Submissions, the petitioner acknowledges that the land occupied by the school was donated by elders but claims that the land donated by his father was fraudulently



- extended by the elders; he maintains that in 2014, they held meetings and resolved that the boundary between the school's land and their land would be Kimao road.
12. The petitioner admits that he has not produced the resolutions he seeks to enforce but explains that his attempts to get them from the respondents were futile as the respondents claim that they were lost. The petitioner urges the court to probe the circumstances upon which the resolutions got lost.
  13. On the legality or otherwise of the resolutions, the petitioner submits that they were as a result of public participation hence binding and legal.
  14. Concerning the demarcation that was allegedly done in 2020 without their involvement, the petitioner maintains that there was such a demarcation but admits that evidence in form of survey plans/maps is required before a court can make a determination on the alleged demarcation. He suggest that survey can still be done and the evidence brought to this court for determination of the issues he has raised.
  15. On whether he exhausted the internal dispute resolution mechanisms provided by the applicable statutes before filing the instant petition, based on the many correspondences exchanged between him and the respondents, among other government offices, demonstrating his desire to have their concerns addressed, the petitioner states that he had no other option but to file the instant suit to compel the respondents to act on his concerns.
  16. On whether this court has jurisdiction to hear and determine the petition, the petitioner submits that this court is the appropriate forum for addressing the issues he has raised in the petition.

### **Respondents' Submissions**

17. In their submissions, the respondents have identified two issues for the court's determination. These are whether the court has jurisdiction to entertain the issues raised in the petition; and whether the petitioner has made a case to warrant grant of the reliefs sought.
18. On whether this court has jurisdiction to entertain the issues raised in the petition, it is stated that it is not in dispute that the subject matter of this petition was initially trust land managed by Kimalel Group Ranch Society and submitted that the governing legislations for the suit land were the [Trust Land Act](#), Cap 288 and [Land \(Group Representatives\) Act](#), Cap 287 (repealed); that it was under the said legal frameworks that the petitioner's rights and interests could be recognized, ascertained, adjudicated and documented for purposes of registration and issuance of titles; that the process of recognition, ascertainment and recording of interests in trust land such as the suit land is provided for under the [LAA](#) and that [LAA](#) has a detailed dispute resolution mechanism from the time of inception of claims to final decision of the Minister under Section 29 which if followed through to its conclusion, is supposed to deliver constitutional protection and just determination of rights.
19. The petitioner is said to have jumped the gun by initiating the instant petition before exhausting the available internal dispute resolution mechanisms and submitted that the petitioner did not tender evidence to show that his dispute with the 1<sup>st</sup> respondent was ever recorded by the Land Adjudication Officer (LAO) under Section 13 of LAA or the LAO ever made a decision capable of being challenged or enforced in any forum including this court.
20. It is pointed out that the petitioner admits that the adjudication process is still ongoing and that the register of Kimalel Section has not been closed.
21. Wondering on what basis the petitioner commenced the petition, the respondents have submitted that the petition is barred by Section 30 of LAA as no consent of LAO was obtained before the petition was filed.



22. The petitioner is said to have failed to demonstrate that the adjudication register for Kimalel Section is final or closed or that he obtained consent from LAO before commencing the instant proceedings.
23. Based on the decisions in the cases of *William Mutuura Kairiba vs Samuel Nkari & 2 others* (2018)e KLR ; *Daniel Musili Nyeki & 49 others v Cabinet Secretary of Lands & Settlement & Another, Benard Malonza Musya & 30 others (Interested Party)* (2021)e KLR, it is submitted that the doctrine of exhaustion must work against the petition.
24. It is further submitted that the jurisdiction of this court is ousted by Sections 4, 39, 40, 41 and 42 of *CLA*. It is pointed out that Section 4 of the *CLA* provides mechanisms through which customary land rights may be recognized, ascertained, adjudicated and documented for registration and issuance of titles.
25. It is submitted that the petitioner's customary interests in the suit land would be recognized, adjudicated and registered under the *CLA*; that under Sections 39, 40, 41 and 42 of the *CLA*, disputes concerning ascertainment of customary rights in any community land ought to be resolved amicably through conciliation, mediation or arbitration and that court option must be the last resort; that the petitioner did not demonstrate that he exhausted available dispute resolution mechanisms or even attempted conciliation, mediation or arbitration and that there is no evidence that the petitioner ever formally lodged a complaint to the Registrar of Community Land or LAO or National Land Commission (NLC).
26. The petitioner is said to have convened informal gathering without knowledge or participation of the respondents and resolved to affect the boundary of the 1<sup>st</sup> respondent's land (read the school's land), which action is said to be incapable of being conciliatory.
27. The informal gathering relied on by the petitioner is said to have been convened by unqualified persons and its decision said to be illegal as it fundamentally affected the interest of the respondents in the suit land without giving them opportunity to be heard.
28. Based on the case of *Daniel Musili supra* and the dictum in *Isiolo County Assembly Service Board v Principal Secretary (Devolution) Ministry of Devolution and Planning* (Nairobi Constitutional Petition No 370 of 2015 (2016)eKLR, it is reiterated that on account of the doctrine of exhaustion, the petitioner should have exhausted the mechanisms provided under *LAA* and the *CLA* before resorting to this court.
29. On whether the petitioner has made a case to warrant grant of the reliefs sought, it is submitted that the petitioner failed to prove the alleged violation of his rights and fundamental freedoms; that the petitioner confirmed that he has no proprietary interest in the suit land crystallized in his favour and that he is still claiming ancestral rights. In that regard, it is pointed out that the entities charged with the mandate of recording and ascertainment of interest in the area under *LAA* are yet to render themselves and there is no survey report to assist the court in determining the extent and acreages for the disputed areas and submitted that before ascertainment of interests in the adjudication section, the petitioner cannot claim violation of his right to property.
30. According to the respondents, what is on record are mere moral lamentations of violations or threatened violations of ancestral interests in land.
31. Based on the respondents' replying affidavit, it is contended that it is not in dispute that the school is occupying land which was donated by a group of elders in 1970; that the current boundary of the school was fixed in 1973; that the petitioner's father participated in the ascertainment of the boundary



and did not raise any objection but voluntarily shifted from the land and went to Marigat where he settled with his family.

32. It is contended that the petitioner intends to use the court to circumvent Section 24 of the CLA that dictates how public land may be converted to private use and submitted that a court action is not one of the ways in which conversion can be achieved.
33. It is pointed out that the alleged resolution of June 21, 2014 sought to be adopted is not part of the record of the court and submitted that adopting it would be tantamount to adopting hearsay. It is further submitted that the circumstances under which the resolution was made have been substantially impugned in that the people who made the resolution had no legal mandate to make it. The resolution is said to be illegal *ab initio*.
34. Based on the decision in the case of Scott vs Brown (1982) 2 QB 724 where it was held that no court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of illegal transactions, if the illegality is duly brought to the notice of the court, it is submitted that the court cannot sanction an illegality.
35. The allegations of abuse of power or neglect of duty by the respondents are said to be not proved and the claim for damages for abuse of office or for ignoring ancestral land rights to land said to be premature and incapable of being granted.

### **Analysis and Determination**

36. This petition relates to land within an adjudication area. Ascertaining of interests in the area in which the land is situated is yet to be done.
37. The petitioner acknowledges that the boundary between the land belonging to the school and that belonging to the community was ascertained by elders but claims that the elders fraudulently extended the land donated by his father. The alleged fraudulent extension of the school boundary was raised through submissions. It neither formed part of the petitioner's pleadings nor was it substantiated by way of evidence. As such, it cannot form a basis of availing the petitioner any of the reliefs sought.
38. The resolutions made on June 21, 2014, which the petitioner seeks to enforce through this petition, were not produced in court. Without evidence of those resolutions this court cannot make any determination based on them.
39. Whilst the petitioner blames the respondents for frustrating their efforts to get the resolutions ratified, the Petitioner did not demonstrate to the court that the respondents owes him or his family any duty to have the resolution ratified. The respondents are not the beneficial owners of the suit land.
40. The respondent's interests in the suit land, if any, is limited to their duty to protect the public interest in the land as officials of the school and government respectively. Any engagement concerning the land occupied by the school should be between the School's Board of Management and not the 1<sup>st</sup> respondent, individually, the National Land Commission and any other stakeholders with interest in the suit land.
41. Concerning the demarcation allegedly carried out in 2020 in the suit land, no evidence was adduced capable of proving that fact. The petitioner in his submissions, acknowledges that evidence is required to prove that fact by stating that this court can order the parties to address the issues he has raised and bring the resolutions made to this court for determination.
42. Although the petitioner has demonstrated some attempt to have the dispute concerning ownership of the suit property resolved, by engaging the respondents and some other public officers, his decision to



lodge this petition before exhausting the dispute resolution mechanism provided for under the Land Adjudication Act and the Community Land Act, was ill-advised.

43. Clearly, the petition offends the provisions of Section 30(1) of the LAA, as it relates to an area under adjudication yet no consent of the LAO was obtained before it was filed. In that regard see the said section which provides as follows:-

“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 land adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

44. As was observed by the Court of Appeal in the case of Timotheo Makange v Manunga Ngochi (1978) KLR 53, “The Act (Land Adjudication Act) prescribes within itself a specific and complete code for treatment of the Land Adjudication cases through set stages, with the Minister empowered to determine appeals to him” and make such orders as he thinks just, “his orders being final. It cannot therefore be said that he acted without Jurisdiction .....

45. Perhaps, in mistaken belief that the resolution allegedly made in 2014 divested the land donated to the school from the school and vested it in his family, the petitioner thinks that the resolution vested some rights to him and his family, that cannot be the case as the only legally recognized process of ascertaining interests in an area declared to be an adjudication area is that provided for under the Land Adjudication Act.

46. No evidence of violation or threatened violation of the petitioner’s rights by the respondents has been adduced to warrant issuance of any of the reliefs sought by the Petitioner.

47. The upshot of the foregoing is that the petition is ill-advised, lacking in merit and for dismissal.

48. On costs, counsel for the respondents has extended an olive branch to the petitioner by suggesting that each party bears his/her costs.

49. Consequently, I dismiss the petition with no orders as to costs.

50. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 11<sup>TH</sup> DAY OF OCTOBER, 2022.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered virtually in the presence of:

Michael Cheserek (Petitioner Acting in person)

Ms. Tigor for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Christine Towett: Court Assistant

