



Kisang v Land Adjudication Officer, Elgeyo Marakwet & 3 others (Environment and Land Constitutional Petition 13 of 2022) [2022] KEELC 13482 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 13 OF 2022
L WAITHAKA, J
OCTOBER 12, 2022**

BETWEEN

JAMES YATOR KISANG PETITIONER

AND

**THE LAND ADJUDICATION OFFICER, ELGEYO MARAKWET 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

WILSON TOROITICH KITUM 3RD RESPONDENT

PHILEMON YEGO KITUM 4TH RESPONDENT

JUDGMENT

Introduction

1. On August 4, 2021, James Yator Kisang, hereinafter referred to as the petitioner, filed this petition seeking to be declared the lawful owner of the parcel of land known as plot No 2518 Chesoi Adjudication Section.
2. The parcel of land known as plot No 2518 Chesoi Adjudication Section (hereinafter known as the suit property) was subject of land adjudication processes provided for under the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
3. During land demarcation and adjudication, the suit property was adjudicated in favour of the petitioner.
4. The 2nd and the 3rd respondents lodged a complaint with the land adjudication committee against registration of the petitioner as the owner of the suit property. The committee heard the complaint and decided that the suit property belonged to the 3rd and the 4th respondents.



5. The petitioner unsuccessfully filed an objection to the land adjudication officer. The petitioner also filed an appeal to the minister, which he lost.
6. In his petition and the affidavit he swore in support of the petition, the petitioner faults the minister for having dismissed his appeal.
7. In support of the petition, the petitioner has deposed that the suit property was acquired by 5 members of their clan namely Suter Kiptoo, Joseph Kiptanui, Kipsang Kiptoo, Joseph Kiptanui Cheserek and Kiptum Yatich; that the members of his clan, who included the his father, cleared the land in 1965 and were to share it equally among themselves; that he inherited his father's share of the land cleared by the elders in 1988 settled thereon and developed it; that in 2000, the area was declared an adjudication section and that the suit property was adjudicated in his favour.
8. Claiming that he was denied a fair hearing and that the various tribunals that heard his case failed to take into account that the suit land was not ancestral land but a bushy area cleared by five households, his household included, the petitioner contends that unless the orders sought are granted, he stands to lose his land unfairly rendering him and his family, who reside in the suit land, destitute.
9. The 1st respondent opposed the petition on the grounds that the suit property falls within an adjudication section for which the consent of the land adjudication officer was required before the suit was filed; that because the petitioner's did not obtain the consent of the land adjudication officer, this court lacks jurisdiction to entertain the petition; that the suit is incompetent, fatally defective, frivolous, scandalous and an abuse of the court process.
10. Through their replying affidavit filed on June 29, 2022, the respondents have deposed that the petitioner was accorded a fair hearing at every stage including the appeal to the minister where he lost. The respondents state that they have been occupying the suit property and plot number 2522 from time immemorial and that initially these parcels were known as parcel number 2972.
11. The respondents have further deposed that in 2015, the petitioner's father was plaintiff in Iten Resident Magistrate's Court in Civil Case No 46 of 2005 in which they were the defendants. The petitioner's father lost that case in which they were laying claim to parcel number 2972 among other parcels. The respondents therefore, argue that the petitioner is seeking to have a concluded matter re-opened.
12. In his further affidavit sworn on October 5, 2021, the petitioner has deposed that the 3rd and 4th respondents have never at any time lived in the suit property; that he has been living in the suit property with his family; that he has developed a home thereon. The foregoing notwithstanding, the petitioner admits that there was a 2nd demarcation occasioned by loss of documents.
13. Pursuant to directions given on June 30, 2022 the petition was disposed of by way of written submissions.

Petitioner's submissions

14. In his submissions, the petitioner has reiterated the averments contained in the petition and the affidavits sworn in support thereof.

1st and 2nd respondent's submissions

15. It is submitted that the petitioner has not exhausted all other forums before approaching the court.



16. Based on the decisions in the cases of *Republic vs County Council of Kwale & Another Ex parte Kondo & 57 others*, Mombasa HCMCA NO 384 of 1996; and *Wilson Njuguna Gakuru & Another vs National Transport and Safety Authority & 2 others (2016) e KLR* it is submitted that the petitioner ought to have filed judicial review proceedings to quash the decisions of the 1st respondent and the minister.
17. According to the 1st and 2nd respondents, it is common ground that due process was followed up to the time the land adjudication officer rendered his decision; the petitioner is said to have admitted that the processes and procedures provided under the *Land Adjudication Act* were followed (complaint lodged with the land adjudication committee; objection to the land adjudication officer and appeal to the minister).
18. In view of the foregoing, it is submitted that the petition offends section 29(b) of the *Land Adjudication Act* which provides that the decision of the minister shall be final.
19. It is further submitted that the petition seeks to appeal or challenge the merit of the decision of the minister.
20. On whether the petition meets the threshold for pleading a constitutional petition, it is submitted that the petitioner has miserably failed to set out in concise terms what rights, if any, were violated, by whom, how and to what extent he has suffered from the alleged violations.
21. The petition is said to be devoid of precision so that it is not easy to determine the real issues in contention. The petitioner is said to have merely cited articles of the *Constitution*, 20, 21, 22, 23, 40(2) and 165(3)(a) without substantiation of the manner in which they have been violated.

3rd and 4th respondents' submissions

22. The 3rd and 4th respondents have submitted that the petition does not raise any constitutional issue in its content; that there is no proof of any procedural impropriety by the various tribunals established under the *Land Adjudication Act* to ascertain and adjudicate claims to interests in land under the act and that none of the tribunals breached any legal rule to cause room for nullification or avoidance of their decisions. It is reiterated that the suit is res judicata.
23. It is further submitted that the petition does not disclose any cause of action and does not meet the constitutional threshold of a constitutional petition. In this regard, it is contended that no specific facts have been identified confirming that specific sections of the *Constitution* were procedurally breached by the minister.

Analysis and determination

24. From the pleadings, affidavit evidence and the submissions filed in this matter, it is common ground that the suit property was subject of the process of ascertaining interests to land provided for under the *Land Adjudication Act*.
25. The process of adjudication of the interests to the suit property culminated in award of the suit land to the 3rd and 4th respondents by the deputy county commissioner in appeal to the Minister Case No 540 of 2020. It is that decision that the petitioner seeks to nullify through the instant petition on grounds that the decision of the minister violated their right to property by inter alia failing to find that the suit land belonged to them, that they were the ones in use and possession of the land and they had been in use of the land for a long period of time.



26. In its ruling delivered on March 10, 2021 in respect of the petitioner application for conservatory reliefs, the court had this to say about this petition:-

' a look at the petitioner's petition shows that he is basically seeking judicial review orders seeking to quash the decision of the committee, adjudication officer as well as the decision.'

'a look at the material presented to this court shows that the petitioner was heard at every stage of the proceedings. The dispute had even been litigated by the petitioner's father in iten resident magistrate's court.

27. In the view of the foregoing, the court determined that the petitioner had not made up a case warranting grant of conservatory reliefs sought.

28. As the trial court, I have carefully read and considered the affidavit evidence adduced in this case. As observed by my brother, Obaga J, in the application for conservatory reliefs cited above, the petition herein is an application for judicial review disguised as a constitutional petition.

29. As observed by the Court of Appeal in the case of *Timotheo Makenge v Manunga Ngochi (1978) KLR 53 at page 63*,

' The act (*Land Adjudication Act*) prescribes within itself a specific and complete code for the treatment of the land adjudication cases through set stages, with the minister empowered to determine appeals to him 'and such make such orders as he may think just'; his orders being final. It cannot therefore be said that he acted without jurisdiction'

30. To the extent that the petition seeks to challenge or appeal the decision of the minister on its merit, the petition offends section 29(b) of the *Land Adjudication Act* which provides that the decision of the minister is final.

31. As was observed by the Court of Appeal in the case of *Municipal Council of Mombasa v Republic & Another (2002)eKLR*, 'judicial review is concerned with the decision-making process, not with the merits of the decision itself, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who made the decision have the power, i.e the jurisdiction to make it, were the persons affected by the decision heard before it was made, in making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there were not sufficient evidence to support the decision-and that, as we have said, is not the province of judicial review'.

32. For the foregoing reasons, I find the petition lacks in merits. Consequently, I dismiss it with costs.

DATED, SIGNED AND DELIVERED AT ITEN THIS 12TH DAY OF OCTOBER, 2022.

LN WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Ms Kibet holding brief Mrs Koech for the petitioner



Ms Odeyo for 1st & 2nd respondent

Dr Chebii for the 3rd respondent

Christine Towett: Court Assistant

