



Suter v The District Land Adjudication & Settlement Officer & 4 others (Environment and Land Constitutional Petition 5 of 2022) [2022] KEELC 15231 (KLR) (6 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15231 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 5 OF 2022
L WAITHAKA, J
DECEMBER 6, 2022
IN THE MATTER OF CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 22,
23, 40, 47, 48, 50, 60, 63, 253 AND 258 OF THE
CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTION ACT, 2015
AND
IN THE MATTER OF ADJUDICATION PROCESS IN
CHESOI ADJUDICATION SECTION
AND
IN THE MATTER OF ADJUDICATION OF PARCEL
NUMBER 1853

BETWEEN

JOSEPH CHERUTICH SUTER PETITIONER

AND

THE DISTRICT LAND ADJUDICATION & SETTLEMENT
OFFICER 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT ... 2ND
RESPONDENT

THE DIRECTOR OF SURVEY 3RD RESPONDENT



THE CHIEF LAND REGISTRAR 4TH RESPONDENT

PETER CHEPKURUI CHEMASTIAN 5TH RESPONDENT

JUDGMENT

Introduction

1. This Petition relates to land parcel number No.1853 situated in Chesoi Adjudication Section, Elgeyo Marakwet County (hereinafter referred to as the suit property). The suit property was subject of a dispute between Joseph Cherutich Suter, the petitioner herein, and Peter Chepkurui Chemastian, the 5th respondent herein before the Marakwet District Land Committee and Land Arbitration Board established pursuant to the provisions of the Land Adjudication Act, Cap 284 Laws of Kenya (LAA).
2. Both the Land Committee and the Arbitration Board decided the dispute preferred before them in favour of the 5th respondent.
3. Dissatisfied with the decision of those Tribunals, the petitioner instituted the instant suit seeking the following orders:-
 - a. A declaration that his rights under Articles 10, 35, 40, 47, 50 and 63 of the Constitution of Kenya 2010 have been infringed and/or violated;
 - b. An order of *certiorari* to remove into this court for purpose of been quashed all proceedings and the determination/recommendation/decision/order made by the respondents to demarcate, subdivide and allocate any part of the suit property;
 - c. An order of *certiorari* to remove into this court for purpose of been quashed all proceedings and the determination/recommendation/decision/order made by the respondents to demarcate, subdivide and allocate plot No.2554 out of plot No.1853 to the 5th respondent;
 - d. An order of prohibition to prohibit the 3rd and 4th respondents, their agents/servants and/or person acting or any person acting on their behalf from acting upon/implementing and/or enforcing any decision to demarcate, subdivide and allocate any portion of the suit property;
 - e. An order of *mandamus* to compel the 1st and 2nd respondents to reconstitute the Land Adjudication Committee in consultation with and with the participation of the petitioner for purposes of demarcating and or adjudicating the suit property afresh in compliance with the Land Adjudication Act, the Constitution of Kenya and the Fair Administrative Actions Act, 2015.
4. The Petition is premised on the grounds that the Tribunals (Land Committee and Arbitration Board) which heard the dispute between the petitioner and the 5th respondent over the suit property was biased; that the process that led to hiving off a portion of the suit property and allocating it to the 5th respondent was illegal; that the 1st and the 2nd respondents failed to take into account the petitioner's interest in the suit property and that the 1st and 2nd respondents refused to provide and/or make available information to the petitioner concerning the status of the adjudication process in respect of the suit property.
5. The petitioner claims that his constitutional rights under Articles 10, 35, 40, 47, 50(1) and 63 of the Constitution of Kenya were violated.



6. The petition is supported by the affidavit of the petitioner sworn on 24th February, 2022 in which the above grounds are reiterated. Annexed to the affidavit are the proceedings of the Land Committee and the proceedings of the Arbitration Board marked JSC 1 and JSC 2 respectively among other documents.

1st to 4th respondent's response

7. The 1st to 4th respondents filed a replying affidavit denying the allegations contained in the Petition. In that affidavit, the respondents have deposed that the proceedings were fairly conducted; that the particulars of alleged bias have not been provided; that no arguable reason has been given to belief that the decision-makers were biased; that the issue of bias was not raised before the Tribunals; that the alleged denial of access to information is not proved; that there is no proof that the petitioner lodged an Appeal against the decision of the Land Adjudication Officer; that the petitioner is not the owner of the suit property and that the petitioner has no cause of action against the 1st and the 2nd respondents.

5th Respondent's response

8. The 5th respondent filed the affidavit he swore on 20th April 2022 in which he inter alia depones that he bought a portion of the suit property from the petitioner in 1992; that he took possession of the suit property and began utilizing it; that during land demarcation and adjudication the portion was adjudicated in his name and given plot number 2549 and that sometime in 2005 the petitioner removed his fence and maliciously destroyed his property.
9. The 5th respondent has further deponed that owing to loss of the previous demarcation records/ documents, fresh demarcation was done in 2009; that the petitioner caused the suit property to be registered in his name and began developing it disregarding his interest therein; that he complained to the Provincial Administration and lodged a case before the District Land Committee; that the Committee awarded him a portion of the suit property measuring 50 by 100 feet and that the petitioner appealed to the Arbitration Board but lost. Further, that the petitioner's son filed an objection against the decision of the Arbitration Board but lost the Appeal and that the petitioner lodged an appeal to the Minister. To prove the averments in his affidavit, the 5th respondent has annexed several documents to his affidavit, among them the proceedings of the objection case filed by the petitioner's son, marked PCC7.
10. Pursuant to directions given on 9th June 2022, the petition was disposed of by way of written submissions.

Submissions

Petitioner's submissions

11. In his submissions, the petitioner makes reference to Article 10 of the *Constitution* which imposes an obligation on state organs, state/public officers to facilitate participation of the people whenever they are implementing public policy decisions and submits that his right under that article were violated as he was not given adequate opportunity to participate in the adjudication process that led to the 5th respondent being allocated a portion of the suit property; that he was not consulted or involved when the allocation was done; that from the documents relied on by the 5th respondent it is not clear whether the property in the agreement allegedly entered into between the petitioner and the 5th respondent is the same as the subject matter of this suit and whether the parties therein are the parties to this suit and



that the 1st to 4th respondents failed to prove that there was public participation during the process of adjudication in Chesoi Adjudication Section.

12. The 1st and 2nd respondents are also said to have violated Article 47 by failing to properly constitute the board that heard the petitioner's appeal. The petitioner claims that the board was comprised of three members when the law provides for five. Based on the case of *M'ibari Gatuguti v. Land Adjudication Officer Imenti South/North Districts & 2 others* (2018)e KLR where it was inter alia held that it is a mandatory requirement of law that the adjudication officer appoints in writing not less than five persons from the panel (Land Committee) to form an Arbitration Board from time to time; it is submitted that the decision of the panel was null and void.
13. It is further contended that the proceedings attached to the 5th respondent's replying affidavit and marked PCC2 do not reveal the persons who presided over the hearing.
14. The petitioner maintains that the respondents did not take into account his evidence and failed to give reasons for the decision they made; failed to provide him with information and constituted a biased adjudication committee, composed of persons who were not residents of Chesoi Adjudication Section contrary to section 6(1) of *LAA*.
15. It is reiterated that the petitioner's right to access to information under Article 35 of the *Constitution* was violated by 1st respondent by failing to supply the petitioner with the minutes/proceedings and/or verdict of his appeal despite making physical visits to request for them.
16. With regard to the contention by the 1st to 4th respondents that this court is not the right forum to litigate the issue of none compliance with Article 35, it is submitted that the court has power to hear and determine the issue of denial of information raised by the petitioner.
17. It is further submitted that no evidence has been provided by the 1st to 4th respondents to show that the adjudication process was done in compliance with the *Constitution* and the law.
18. On whether the petitioner has proved that he is the owner of the suit land, it is submitted that the evidence adduced, JCS 1 and JCS 2, shows that the suit property belongs to the petitioner.
19. Concerning the alleged lack of precision in particularizing violation of constitutional rights reference is made to the decision in the case of *Nation Media Group Ltd v Attorney General* (2007)1 E.A 261 where it was stated that a constitutional court should be liberal in the manner it goes round dispensing justice and that it should look at the substance rather than technicality and submitted that the alleged constitutional violations have been elaborately pleaded.
20. On whether the petitioner is entitled to the reliefs sought, it is submitted that the petitioner's rights have been violated hence intervention of this court is required. Based on Article 23 of the *Constitution* and the cases of *M'ibari Gatuguti, Nation media Group Ltd supra* and the case *Simon Natal Ntoitha v. Sub-County Land Adjudication and Settlement Officer, Igembe North & 2 Others* (2022) e KLR, it is submitted that the petitioner has made up a case for being granted the orders sought.

1st to 4th Respondent's submissions

21. In their submissions, the 1st to 4th respondents, have 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; that the petition is devoid of precision so that it is not easy to determine the real issues in contention; that the petitioner has terribly failed to provide adequate particulars of the alleged violations of his rights or how he suffered because of the said violations. It



is submitted that a mere mention of a few articles of the Constitution without substantiation is not enough.

22. The alleged denial of fair trial by 1st respondent by constituting a biased committee to hear the dispute that resulted in award of the suit property to the 5th respondent is said to be lacking precision and submitted that it can only be affirmed through a hearing and testimony from credible witnesses; that there is no indication that the petitioner was not afforded ample opportunity to ventilate his case.
23. It is further submitted that there is evidence that the petitioner and his witnesses gave an elaborate account of his case and that at no point did he object to the same.
24. The petitioner is said to have failed to discharge the duty imposed on him by section 107 of the Evidence Act, Cap 80 Laws of Kenya of proving his case.
25. It is submitted that the alleged biasness on the part of the committee was neither raised when the committee was sitting nor proved. Similarly, the alleged unfairness is said to be supported by the evidence on record, proceedings.
26. It is contended that the proceedings show that the petitioner was given a fair hearing-was notified of hearing of the appeal and was heard on his appeal.
27. On the contention that the 1st respondent failed to review and analyze the evidence presented by both parties and their witnesses; it is submitted that this court has no mandate to go into the merits of the decision or to sit on appeal of the 1st respondent's decision.
28. It is further submitted that there is no proof of any wrongdoing on the part of the 1st respondent in the way the committee stage and appeal were conducted.
29. The Petitioner is said to be simply casting aspersions.
30. The claim that 1st respondent failed to take into account the petitioner's interest over the suit property and to provide the petitioner with information and documents regarding the decision rendered on 25th August, 2021 is refuted and submitted that the petitioner is merely seeking a reconsideration of the evidence adduced during the appeal and based on the decision in the case of Okongo Jin Tobias Osidi & another v. Cyprianus Otieno Ogalo & another; 6 others (2013) e KLR and submitted that this court lacks such mandate in judicial review proceedings.
31. It is further submitted that the petitioner's rights over the suit property are not absolute for the reason that demarcation and adjudication process in respect of the suit property had not been done.
32. On whether the petitioner is entitled to orders sought, it submitted that the petitioner has not made up a case for being granted the orders sought.

5TH respondent's submissions

33. On behalf of the 5th respondent, it is submitted that the 5th respondent is a beneficial owner of a portion of the suit property having purchased it from the petitioner as attested by the sale agreement of 27th November, 1992; that the sale agreement met all the conditions for disposition of interest in land under section 3(3) of the Law of Contract Act and that the petitioner is trying to remove attention from the agreement by claiming that there is doubt whether the property named in the sale agreement and the parties thereto is the same as the suit property and the parties thereto, the parties to this suit;



34. It is submitted that the 5th respondent has explained the history of the suit property which history shows that the parties to the agreement and the subject matter of the agreement is the same as the subject matter of this suit and that the parties thereto are also the parties to this suit.
35. It is pointed that, in his pleadings, the petitioner does not question the authenticity of the sale agreement or deny receiving the consideration agreed between him and the 5th respondent and submitted that he should be estopped from denying the agreement.
36. It is further submitted that the petitioner has come to court with unclean hands and that he is trying to unjustly enrich himself.
37. It is submitted that as a purchaser of a portion of the suit property, the 5th respondent has a right to protection of his interest to the suit property and that the petitioner cannot purport to claim that his rights have been violated and ask the court for prayers that will result to the rights of another citizen being violated.
38. It is reiterated that ascertainment of rights to the suit property was done in accordance with the processes and procedure provided under LAA and submitted that the petitioner has not made up a case for being granted the reliefs sought.

Analysis and determination

39. From the pleadings, affidavit evidence and the submissions, I find the sole issue for the court's determination to be whether the petitioner has made up a case for being granted the orders sought.
40. With regard to that issue from the affidavit evidence adduced in this case it is either common ground or uncontroverted that the suit property was subject of the process of ascertaining rights and interests in land contemplated under LAA.
41. The suit property had a dispute between the petitioner and the 5th respondent which dispute was resolved by the Land Committee and the Arbitration Board in favour of the 5th respondent.
42. Aggrieved by the decisions of the above tribunals, the petitioner brought this suit seeking the reliefs listed herein above. Although the petitioner has fashioned his suit as one for judicial review, it is clear from the substance of the suit that the petitioner is challenging the decision of the 1st to 4th respondents of awarding the suit land to the 5th respondent. It is also noteworthy that the petitioner did not exhaust the process/procedure provided for under LAA. For instance, there is no evidence that he objected to the Land Adjudication Officer or lodged an Appeal to the Minister.
43. The only issue that stands out and worthy the attention of this court is the issue of failure to properly constitute the Board that heard his appeal to the Arbitration Board. Concerning that issue, it is not worthy that the petitioner did not specifically plead the issue in its pleadings to accord the respondents an opportunity to address it. He merely raised it through his submissions.
44. Its trite law that submissions are neither pleadings nor evidence. In that regard see the case of *Ngang'a & Another v Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are



not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

Also see the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR where the Court of Appeal stated:-

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

45. Having failed to specifically plead and particularize the alleged failure by the respondents to properly constitute the board that heard his case before the board, the petitioner is estopped from relying on the alleged allegation or fact as it is not part of his pleadings.
46. The upshot of the foregoing is that the petition has no merit and is for dismissal. Consequently, I dismiss it with costs to the respondents.
47. Orders accordingly.

Dated, signed and delivered at Iten this 6th day of December, 2022.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Ms. Cherotich holding brief for Ms. Odwa for the Petitioner

Mr. Odongo holding brief for Ms. Cheruiyot for 1-4th Respondents

Mr. Adongo for the 5th Respondent

Christine Towett: Court Assistant

