



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

ELC PETITION CASE NO.11 OF 2020

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INTERPRETATION OF ARTICLES 2 3

10 22 23 25 27 28 40 AND 63 OF THE CONSTITUTION OF KENYA

BETWEEN

MOSES BARKUTWO.....1ST PETITIONER

NICHOLAS KIGEN.....2ND PETITIONER

BENJAMIN KIGEN.....3RD PETITIONER

DAVID KORIR.....4TH PETITIONER

AND

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER

ELGEYO-MARAKWET COUNTY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND IN THE MATTER OF

MOSES BARMOTO STEPHEN SANG

CHRISTOPHER SANG

JEREMIAH CHANGWONY SAMUEL CHEMWOTEI

JOAHAN KIMULWO

DAVID BARBOI

WISLON BARMAO

STEPHEN KIPRONO KIPCHOGE

SAMWEL KWAMBAI

JOSEPH WENDOT

RICHARD KIGEN.....INTERESTED PARTIES

RULING

This ruling is in respect of the respondents' preliminary objection dated 30th September 2020 seeking for dismissal of the petition on the following grounds:

- a) That the court lacks jurisdiction as Section 30 of Land Adjudication was not complied with.
- b) That the suit parcels fall within land that has been adjudicated and therefore court cannot entertain this matter.
- c) That the petitioners suit is incompetent as they have failed to exhaust the remedies available to them.
- d) That the suit is an abuse of the court process and be dismissed with costs

The petitioner filed this petition contemporaneously with an application for injunction. The applicants served the application and the respondents filed their response together with a notice of preliminary objection on the grounds that the court does not have jurisdiction to hear and determine the petition.

Counsel agreed to canvas this application vide written submissions which were duly filed.

RESPONDENTS'SUBMISSIONS TO THE PRELIMINAR OBJECTION

Counsel the respondents listed the following issues for determination by the court namely:

- a) Whether the court lacks jurisdiction pursuant to Section 30 of the Land Adjudication Act.
- b) Whether pursuant to section 30 the petitioners had exhausted the remedies as set out in Land Adjudication Act?
- c) Whether the court has jurisdiction over ongoing adjudication process?

On the first issue as to whether the court lacks jurisdiction pursuant to Section 30 of Land Adjudication Act, counsel submitted that it was incumbent upon the petitioners to get the consent of the Land Adjudication Officer to institute these proceedings. Counsel cited the provisions of Section 30 of the Land Adjudication Act.

Section 30 provides

(1) 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.

It was counsel's submission that jurisdiction is everything and where it is found that the court lacks jurisdiction then the only option left to the court is to down its tools and dismiss the matter for being incompetent.

Mr. Kuria relied on the case of **Samuel Kamau & Another v. Kenya Commercial Bank and two others — Sun Ct. Civil Application No. 2 of 2011** where the Supreme Court captured the issue of jurisdiction as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, Court of law can only exercise jurisdiction as conferred or other written

law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it. is not one of mere procedural technicality; it goes to the very heart of the matter. for without jurisdiction, the Court cannot entertain any proceedings. '

Counsel submitted that from the pleadings filed by the petitioners it is evident that they are seeking to challenge the appointment of the adjudication committee that was constituted pursuant to section 6 of the Land Adjudication Act hence challenging the adjudication process by way of disputing the appointments of the adjudication committee.

Further that the petitioner's assertions that by being denied the opportunity to vie for appointment as members of the adjudication committee would lead to uncertainty and miscarriage of justice in adjudicating the interests in land of the petitioners and more specifically the Kaptoiyoi clan.

Mr. Kuria relied on the case of **Nakuru ELC Judicial Review case No. 13 of 20142 Republic vs Musanka Ole Runkes Tarakwa Lempaso Ole Kuyioni & 2 others and Joseph Lesalol Lekitio & Others (exparte applicants)**, where Munyao J held that:

"A suit that questions the process of land adjudication, rather than the determination of interests, would not be a suit concerning an interest in land, and would therefore not require the consent of the Land Adjudication Officer. Thus, where the adjudication officer, does not for example, appoint an adjudication committee, as provided by section 6 of the Land Adjudication Act, a person may be perfectly entitled to institute proceedings in the nature of mandamus, to compel him to appoint the said committee. That would not be a determination of interests in land but would be a proceeding aimed at giving legitimacy to the adjudication process. In such an instance, the consent of the Land Adjudication Officer would not be needed, for the proceeding would not be one concerning an interest in land".

Further in the case of **Reuben Mwangela M'itelekwa (suing as the Legal Representative of the estate of M'itelekwa M'mucheke Naituri alias M'itelekwa Mucheke) v Paul Kigea Nabea & 2 others [2019] eKLR** Justice Lucy Mbugua held that:

"Thus as long as a claimant desires that there be a determination regarding a right and interest in land, YES a consent would certainly be required even in the filing of petitions, but in other disputes, the consent is not required. In the present dispute, such a consent would certainly be required. I have however not seen the consent though the petitioner has made reference to the same in paragraph 18 of his petition".

It was Mr. Kuria's submission that section 30 applies in this petition and that it is evident that the petitioners are apprehensive that their interest in land will be trampled upon by the committee. Counsel also relied on the case of **Musana Ole Pere & another v District Land Adjudication Section and Settlement Officer Narok South & 23 others Paramalai Pere & another Interested Part) [2019] eKLR** where Justice Mohammed Noor Kullow held that:

"The Petitioners have asked the court to disregard the provisions of section 30 as what is before court is a constitutional petition and not a civil suit as envisaged under section 30 of the Land Adjudication Act. I have read the petition and the Affidavits filed by the petitioners and one thread that runs through them is that the Petitioners are aggrieved by the process by which the entire adjudication process is undertaken. Under the provisions of the Land Adjudication Act the objective of the court was to clearly provide for the ascertainment and recording of rights and interest and a reading of this Act shows the legislature wanted ascertainment of rights under the Act and the address of all complaints under the process to be free from other process and hence the enactment of section 29 and 30 of the Act which provided for resolution and as such I find that the petition before the court is one which the petitioners want to seek their rights and hence the same cannot escape the provisions of the Land Adjudication Act."

Counsel therefore urged the court to dismiss the petition on that limb as the same is incompetent.

On the issue as to whether the petitioners have exhausted the remedies set out in the Land Adjudication Act, counsel submitted that the Land Adjudication Act has laid down an elaborate procedure for settling disputes between parties and it was upon the petitioners to demonstrate that they had complied with the procedures before moving to court.

It was counsel's submission that sections 26 and 29 of the Land Adjudication Act provides that an aggrieved party must first demonstrate that they pursued those mechanisms before attempting to invoke the jurisdiction of the courts to determine such land disputes. Section 26 and 29 of the Land Adjudication Act provides that:

26 Objection to adjudication register

- (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion on of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation on and inquiries as he thinks fit he shall determine the objection.

29. Appeal

- (1) 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—
 - (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - (b) 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.

Mr Kuria cited the case of **Reuben Mwangela M'itelekwa (suing as the Legal Representative of the estate of M'itelekwa M'mucheke Naituri alias M'itelekwa Mucheke) v Paul Kigea Nabea & 2 others [2019] eKLR** where Justice Lucy Mbugua held that:

“...parties must follow the laid down Dispute Resolution Mechanism provided for under the relevant laws, in this case, the Land Adjudication Act or the Land Consolidation Act. The Preliminary Objection succeeds on this 1st limb.”

Further in the case of **Speaker of National Assembly Versus Karume [1992] KLR 425** the Court held that;

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

This position was adopted with approval by Hon. Justice. M.J. Anyara Fmukule, J, in Mombasa High Court Petition NO. 18 of 2013: Anne Warnuda & 3 Others Versus Kenya Railways Corporation Another [2015] eKLR.

Counsel also cited the case of **Stephen J Michuki Kiunga vs. Nkuni Moruchiu and 2 Others ELC Petition 21 of 2012** where Judge P.Njoroge stated that:

“It is however true that the constitution is the umbrella of all other laws. It is the anchor upon which they operate. One would imagine a situation where litigants would refuse to appeal and then file constitutional petitions alleging that the magistrates courts or superior courts had trampled upon their rights and denied them fair hearing and access to justice. Yes. the constitutional provisions are supreme. And yet the constitution protects all other laws including the provisions of the Land Adjudication Act. One cannot have his cake and at the same time eat it. One cannot file a Constitutional Petition when an appeal under the Land Adjudication Act has not been heard and determined”*

Counsel therefore urged the court to uphold the preliminary objection and find that the court does not have jurisdiction to hear and determine this petition.

INTERESTED PARTIES SUBMISSIONS ON THE P.O

Counsel for the interested party echoed the submissions of the respondent and urged the court to uphold the preliminary objection on the ground that the court does not have jurisdiction to hear the matter as no consent was sought and obtained from the Land Adjudication Officer before filing this suit.

PETITIONERS’ SUBMISSIONS

Counsel for the petitioners submitted that the petitioners preferred this petition dated 27th August 2020 seeking for various orders and contemporaneously filed an application seeking interim conservatory orders as well as stay against the entire adjudication process.

That in response to the petition and the application, the respondents filed a replying affidavit and also raised a preliminary objection dated 30th September 2020 seeking to have the application and petition dismissed for want of jurisdiction pursuant to the provisions of section 30 of the Land Adjudication Act.

Counsel listed two issues for determination of the court and submitted that the court ought to determine the issue of jurisdiction and whether the petitioners have exhausted all the remedies under the Land Adjudication Act.

On the issue of jurisdiction, counsel submitted that the respondent has correctly pointed out the provisions of Section 30 that bars any proceedings where a party seeks to assert interest in land and cited the case of **Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others [2015] eKLR**, where Justice Munyao held as follows:

In a situation regarding land under adjudication, there is an elaborate process that is laid down by the Land Adjudication Act, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication. There would be no bar to institution Judicial review proceedings, to question the process being undertaken, and in my view, such proceeding which go to question the process undertaken in the adjudication process would not require the consent of the Land Adjudication Officer. This is because such a dispute would not be a dispute "concerning an interest in land" which is what Section 30 (1) specifically bars. The term "interest", in relation to land under adjudication, as defined by Section 2 of the Land Adjudication Act," includes absolute ownership of the land and any right or interest in or over the land which is capable of being registered under the Registered Land Act (Cap. 300)".

24 A suit that questions the process of land adjudication, rather than the determination of interests would not be a suit concerning an interest in land and would therefore not require the consent of the Land Adjudication Officer. Thus, where the Adjudication Officer, does not, for example, appoint an adjudication committee as provided by Section 6 of the Land Adjudication Act, a person may be perfectly entitled to institute proceedings in the nature of mandamus to compel him to appoint the said Committee. That would not be a determination of interests in land but would be a proceeding aimed at giving legitimacy to the adjudication process. In such an instance, the consent of the Land Adjudication Officer would not be needed for the proceeding would not be one "concerning an interest in land."

Mr. Tororei therefore submitted that the court has jurisdiction to hear and determine this petition as it does not deal with an interest in land. Counsel urged the court to look at Paragraph 25 of the petition which states that no public participation was conducted prior to the adjudication process, that the appointment process was being undertaken in the middle of the pandemic and in the process disfranchised the older members of the community and that all the members appointed to the committee are from one gender and thus violates Article 27 of the Constitution.

Counsel submitted that the petitioners being faced with the stipulated violations are entitled to approach the court for redress. Further that the court's jurisdiction as invoked by the Petitioners herein is supervisory in nature pursuant to Article 162 (2) (b) as read with Article 165 (6) of the Constitution which gives this court the power to supervise the adjudication process.

Counsel relied on the case of **Tobias Achola Osindi & 13 others vs Cyprian Otieno Ogalo & 6 others** where the court found that the court comes in to ensure that the process is being conducted in accordance with the law. The court also held that in exercise of this supervisory role, it has the power to interpret and determine any point or issue of law that may arise in the course of the adjudication process. That in exercise of this supervisory role, the court is cognizant of the fact that it lacks the power to usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interest in land.

It was Mr. Tororei's submission that the preliminary objection is unmerited on the basis that the petition does not touch on any interests in land as raised in the objection and therefore this court has supervisory jurisdiction hence no consent was required before coming to court. That the petitioners came to court to challenge the legitimacy of the process.

Counsel also urged the court to be guided by the case of **Republic vs Musanka Ole Runkes Tarakwa Lempaso Ole Kuyioni & 2 others ex-parte Joseph Lesalol Lekitio & Others** where it held that:

“A suit that questions the process of land adjudication, rather than the determination of interests, would not be a suit concerning an interest in land, and would therefore not require the consent of the Land Adjudication Officer”.

Counsel submitted that the legitimacy of the adjudication process has been challenged on three fronts namely, lack of public participation before the adjudication process was commenced in contravention of Article 10 of the Constitution which calls upon state organs and officers; public organs and officers to embrace national values and principles in making any decisions under law including public participation and in preferring this petition, the court is called upon to make a finding of a violation of this provision and the unconstitutionality of the process; Secondly, the extent of the unconstitutionality of the adjudication committee in light of the composition of the members being of the same gender in violation of Article 27 of the Constitution. Article 258 of the Constitution guarantees every person the right to institute court proceedings in cases where the Constitution has been contravened or is threatened with contravention and in this case,. That the committee members are all male denying women a say in the process.

The last violation is in respect to the respondents' failure, neglect and/or refusal to comply with section 5 of the Land Adjudication Act whereby no notice was issued to the residents of the area declaring that interest in land within the said area would be ascertained and recorded in accordance with the Land Adjudication Act.

In cases where no notice was issued under section 5 of the Act, courts have held that no consent is required as was held in the case of **The Muthaara Njuri Ncheke Council of Elders & Another vs the Committee Ngare Mara/Gambe11a Adjudication section and 2 others**, where the court held that a consent was not required under the Land Adjudication Act when the dispute raised is over the legitimacy of a corrigendum notice issued pursuant to section 5 of the Land Adjudication Act.

On the issue as to whether the petitioners have exhausted the remedies under the Land Adjudication Act, counsel submitted that Section 26 of the Act gives relief to a claimant dissatisfied with adjudication register on the grounds of its incorrectness or incompleteness to lodge an objection to the adjudication officer after which a determination will be arrived at and if the claimant be dissatisfied with the decision of the adjudication officer, (s)he may prefer an appeal for determination to the Minister under section 29 of the Act.

Mr Tororei submitted that the petitioners are not challenging the correctness or completeness of the adjudication register or preferring an appeal from a determination of the land adjudication officer but challenging the legitimacy of the process. Further that the petitioners are faulting the adjudication process for being unconstitutional premised on Article 258 of the Constitution of the Constitution which guarantees every person the right to institute court proceedings in cases where the Constitution has been contravened or is threatened with contravention. Counsel therefore urged the court to dismiss the preliminary objection.

ANALYSIS AND DETERMINATION

This preliminary objection is premised on the provisions of Section 30 of the Land Adjudication Act which requires a party to seek and obtain consent from the Land Adjudication Officer before filing a suit in court. Section 30 of the Land Adjudication Act provides that

S. 30 (1) 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.

The two issues for determination are as to whether this court has jurisdiction to hear and determine this petition and whether the petitioners have exhausted the remedies under the Land Adjudication Act.

The court is guided by the remedies the petition is seeking to determine whether it has jurisdiction to hear this matter and whether a consent under section 30 of the Land Adjudication Act is required before filing this petition.

Courts have rendered many decisions on the issue of lack of consent from the Land Adjudication Officer and such cases brought to court without such consents have been dismissed or struck out. It should be noted that such cases are distinguishable where such consent is required in matters that deal with the ascertainment of interest in land and those that challenge the legitimacy of the process.

When a party is aggrieved and is challenging the legitimacy the process, the court is the right forum for ventilating such matters. It would be moot to expect the Land Adjudication Officer to grant a consent to question a process which borders of unconstitutionality and or criminality or impunity. This would expose any rot or irregularity in the administration of the work at the Land Adjudication office.

Looking at the prayers that the petitioners are seeking for as laid down in the petition as follows:

- a) A Declaration be and is hereby issued that the Respondent's conduct and actions contravene the Constitution and/or are likely to contravene or infringe upon the Petitioners fundamental rights and freedoms guaranteed under Article 2(1), 2, 3(1), 22(1), 23(1), and 63 of the Constitution.
- b) A Declaration that the decision by the 1st Respondent in appointment/ proposed appointment of the 2nd-13 Interested parties to serve in the Land Adjudication Committee in respect of Keiyo South Adjudication Area is unlawful, null and void.
- c) A Declaration that the Petitioners are entitled payment of damages and compensation for the gross violations and contraventions of their constitutional rights and freedoms under the aforementioned provisions of the Constitution.
- d) A permanent injunction restraining the Respondents and the Interested parties, their servants, agents, representatives and / or anyone else acting for and/or their behalf from continuing with the said adjudication process in Emsea/Chang'ach Adjudication section unless and until the rights of the Petitioners and the Residents of Emsea/Chang'ach Adjudication section are respected.
- e) A declaration that the current Land Adjudication Committee, if any has been sworn in, and being the Interested Parties herein, be disbanded forthwith and a public baraza be held where the Land Adjudication officer shall appoint a new Land Adjudication Committee with the approval of the land owners.
- f) That this court be pleased to order that a fresh adjudication process be undertaken in Emsea/Chang'ach Adjudication section taking into account public participation as required by the constitution and the relevant statutes including Land Adjudication Act and that the process be undertaken by any other Land Adjudication Officer other than the Current Adjudication Officers in conduct of the adjudication process and whose actions has precipitated this petition,
- g) Any other relief that this Honorable court may deem fit and just to granting the interest of justice

From the above prayers it is evident that the petitioners are challenging the legitimacy of the process and not seeking for a declaration of rights and proprietary interests in the suit land. The petitioners are complaining that there was no public participation, no notice was issued declaring the area an adjudication area and finally that the committee appointed were from one gender the male gender violating Article 27 of the Constitution. The Petitioners are within their right to question the legitimacy of the process by bringing this matter to court as the Land Adjudication procedures would not have the jurisdiction to deal with violation of rights as provided for in the constitution.

I am in agreement with the holding of Justice Lucy Mbugua in the case of **The Muthaara Njuri Ncheke Council of Elders & Another vs the Committee Ngare Mara/Gambe 11a Adjudication section and 2 others**, where the court held that a consent was not required under the Land Adjudication Act when the dispute raised is over the legitimacy of a corrigendum notice issued pursuant to section 5 of the Land Adjudication Act.

Justice Munyao also held in the case of **Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others [2015] eKLR**, that a suit that questions the process of land adjudication. rather than the determination of interests would not be a suit concerning an interest in land and would therefore not require the consent of the Land Adjudication Officer.

On the second issue as to whether the petitioners have exhausted the laid down procedures under the Land Adjudication Act, having found that the petitioners are challenging the legitimacy of the process of adjudication, the petitioners would not be required to use the process as laid down under sections 26 and 29 of the Act. Section 26 provides for an aggrieved person who feels that the register is incomplete or incorrect may file an objection within 60 days upon which the notice of completion was published. Once the objection has been considered by the adjudication officer and if a party is still aggrieved then they have a right of appeal to the Minister within 60 days after the date of determination.

The petitioners have not reached the stage of ascertainment of rights therefore these provisions have not yet become available to them. Having said that, I find that the preliminary objection lacks merit and is therefore dismissed with costs.

Parties to comply with order 11 within 30 days and mention the matter before the Deputy Registrar for compliance.

DATED and DELIVERED at ELDORET this 19th DAY OF JANUARY, 2021

M. A. ODENY

JUDGE