



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC PETITION NO. 24 OF 2017

(CORAM; MOHAMED N. KULLOW J)

KIROKET OLE PUNYUA.....PETITIONER

-VERSUS-

UMASH OLE MWANIK.....1ST RESPONDENT

THE COUNTY DIRECTOR

OF ADJUDICATION AND SETTLEMENT, NAROK.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3rd RESPONDENT

RULING

The **1st Respondent** has by preliminary objection dated 28th June 2020 objected to the hearing of notice of motion application dated 7th November 2017 and entire petition by the petitioner is based on the following preliminary points of law that;

1. The honourable court is devoid of jurisdiction under article 162 (2) (b) of the Constitution of Kenya 2010 to hear and determine this suit as it seeks to challenge by way of a judicial review application in accordance with order 53 of the civil procedure rules 2010.
2. The petition herein is frivolous and a gross abuse of the court process since the petitioner herein seek to attack the land adjudication officer's findings by seeking his reliefs through a wrong forum.
3. The petitioner herein has not exhausted the existing right to appeal the land adjudication officer's findings as stipulated under section 29 of the land adjudication act cap 284 laws of Kenya
4. The petitioner herein ought to have the objection proceedings before the said land adjudication officer quashed and / or set aside because presently, the proceedings are valid before the eyes of the law.
5. The 1st respondent is the registered owner of all those parcels of land known as land title no. CISMARA/KOJONGA/471 and land title no. CISMARA/KOJONGA/472 of which the respective certificates of title deeds 'validity has not been challenged pursuant to sections 26(1) & 80 of the land registration act no. 3 of 2012 have not been shown to have been obtained by either; misrepresentation, illegality, a corrupt scheme, fraud, mistake or omission.

PETITIONERS SUBMISSIONS: -

Petitioners has argued that the petition is properly before this Court in line with the provisions of article 162(2) of the Constitution.

Petitioners contend that the constitution has expanded the horizons of locus standi, where any person now has the right to bring an action where breach of the Constitution is threatened in relation to a right or fundamental freedom.

Petitioner case

The petitioner submitted that what is before court is not a preliminary objection but a counter application which should be best determined if the court allowed to investigate facts at hearing which be in the interest of justice if both parties.in support of the same has relied in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696 at page 700.**

The petitioner has argued that the facts of the case in issue is not agreed upon and the petitioner herein was not in any way informed of any of the adjudication process and was not able to seek remedy as stipulated within the land adjudication act.

The petitioner has submitted that the matter in dispute is of a fraudulent process that led to the issuance of title deeds of the parcels of land CIS- MARA/ KOJONGA/471 and CIS-MARA /KOJONGA/472 in which the respondents benefited out a fraudulent process.

The preliminary objection filed by the respondents is a clear waste of the courts time since the petitioner herein filed an objection which was heard and determined. The 1st respondents herein being dissatisfied with the decision instituted a complaint with the police which led to a criminal proceeding against the petitioner instead of seeking consent from the 2nd respondent so as to institute every proceeding. Therefore, urged the court to dismiss the preliminary objection and the matter heard on its merits.

RESPONDENT'S SUBMISSION

Petitioner have cited section 25,26, 26A,27 and 28 of the land Adjudication Act Cap 284 in support of their position that the land adjudication is an administrative decision and that therefore the same is not subject to an appeal process but rather judicial review. The act also provides for various administrative remedies that ought to be exhausted before approaching the court for further remedies. Section 26 gives an objector an opportunity to object to any proposed land adjudication in writing for consideration by the adjudication officer.

Under section 26A and 27 of the Act if there are no objections, the adjudication officer is mandated to finalize the adjudication register, subject to appeals, and then send the same to the director of land adjudication for alterations. The director then sends the adjudicating register to the chief land registrar for registration accompanied with the list of appeals.

An aggrieved objector in the adjudication process is required to lodge an appeal to the minister under section 29 of the act.

Guided by section 8 (1) and (2) of the land consolidated act cap 283

1st respondent contend that the act clearly outlines the applicable procedure in the land adjudication and registration process which the petitioner has failed to adhere to.in fact it is inconceivable how the plaintiff failed to file an appeal to the minister as provided under the act or even acquire the prerequisite consent from the relevant officer.

The 1st Respondent's relied on the court of appeal decision in the ***Owners Of Motor Vessel 'Lilian's Vs Caltex Oil Kenya Ltd (1989) 1 KLR 1 Reuben Mwangela Mitelekwa (Suing As The The Legal Representative Of The Estate Of Mitelekwa M'much Eke Naituri Alias Mitelekwa Mucheke) V Paul Kigea Nabea & 2 Others (2019) eKLR*** where the court have insisted that where the petitioner has failed to adhere to the spirit of the law and provision of the law as stipulated in the land adjudication act with regards to filing an appeal, the court must down it's tools.

The 1st Respondent argued that a perusal of the petition reveals that the petitioner is agitating for his rights and interests in land within kojonga adjudication section. The same land was subject of proceedings in the objection proceedings where he lost in the decision dated 18th September 2009. The petitioner ought to have lodged an appeal to the minister within 60 days of the challenged decision as per section 29 of the Land Adjudication Act in the event that the proceedings were conducted under the Land Adjudication Act. If the law applied was the land consolidation act then the decision in the objection proceedings was final unless the issue of compensation was raised.

The 1st respondent argued that the petition is an abuse of the court process, vexatious and frivolous in law. The remedies which were available to the petitioner after the 18th September 2009 District land adjudication officer decision were:

To appeal to the minister under section 30(3) of the Land Adjudication Act Cap 284 Law of Kenya; or

To seek an order of judicial review under sections 8 and 9 of the Law Reform Act, Cap 9 of laws of Kenya and Order 53 Of the Civil Procedure Rules.

That the two alternative remedies mentioned above were never attempted by the petition since the year 2009 when the decision was made by the district land adjudication officer. Instead, the petitioner had to wait until 2017 to file the current petition. The petitioner has not demonstrated that the minister would have infringed his fundamental rights if he had filed the necessary appeal as provided for by the land adjudication Act.

Therefore, urged the court to dismiss the petition, uphold the district land adjudication officer's findings and regularize land title held by the 1st respondent since no evidence has presented to demonstrate that the same was fraudulently acquired.

That section 30 (1) of the Land Adjudication Act bars the petitioners from instituting 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 the Land Adjudication Act.

DETERMINATION

I have considered all the argument raised herein including the submissions of the parties and I sum up the issues for determination as

follows: -

i) *Whether the Petitioner has exhausted the procedure for redress provided in the Land Adjudication Act?*

ii) *Whether the Court has jurisdiction to determine this matter*

Law and Guiding Principles

(a) Preliminary objection:

It would be important at this point to outline what constitutes a preliminary objection in our jurisprudence. It is also imperative that I briefly outline what in law constitutes *res judicata*.

Justice Law in the Court of Appeal case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** at page 700 defined a preliminary objection as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

On his part, Justice Newbold P in the same case gave the following essential features of a preliminary objection:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The above definitions have withstood the test of time and I will adopt them for the purpose of this Ruling.

Having read the notice of preliminary objection and the rival submissions filed by the Counsel on record for the parties herein, my finding is that the only issue for determination is whether the Petitioner has exhausted the procedure provided in the Land Adjudication Act, chapter 284 of the Laws of Kenya. Whereas I agree with the Counsel for the Petitioner that this is a constitutional suit and not civil proceedings, a perusal of the prayers sought in the petition dated 7th November, 2017 clearly shows that the Petitioner sought to amongst others a declaration that the proceedings and ruling by the district Land Adjudication Officer Narok to be null and void for want of fair hearing.

Before seeking recourse from the Court, a party ought to exhaust all available remedies provided for in the Act unless the laid down procedures have been declared unconstitutional. **Section 29 of the Land Adjudication Act provides** as follows: -

“(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.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall—

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

It is clear to me that the Petitioner had a recourse under section 30(3) of the Land Adjudication Act chapter 284 to appeal to the Minister over the denial or lack of a fair hearing. The Petitioner has not given reasons why he could not pursue this avenue before coming to court.

In the case of **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR** where the Court of Appeal sitting in Nairobi held: -

“...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.”

In the case of **Mutanga Tea & Coffee Company Ltd. vs. Shikara Ltd & Another [2015] eKLR** where the Court of Appeal sitting in

Mombasa status thus;

“...we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

*The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, **including** reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “**including**” leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.”*

As was held by the Court of Appeal in the above cited cases and Article 159(2)(c) of the Constitution has expressly recognized alternative forms of dispute resolution which in my view would include the dispute resolution mechanisms provided under the Land Adjudication Act. There is nothing to show that the provisions of the Land Adjudication Act which deal with dispute resolution mechanism have been declared unconstitutional. It would therefore be usurpation of the dispute resolution mechanisms provided under the Land Adjudication Act if this Court were to entertain this petition until the Petitioner has exhausted the clear provisions that have been provided for under sections 12 to 26 of the said Act.

On the issue of whether the court has jurisdiction to determine this matter, **Section 30 of the Land Adjudication Act** which provides that: -

“(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. [Rev. 2012] Land Adjudication CAP. 284 L5 - 17 [Issue 1].

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.”

I am persuaded by the authorities that were referred to me by the Respondents and which authorities are of superior court and which authorities take precedence over the authorities relied upon by the Petitioner.

The upshot of the foregoing is that the Preliminary Objection has merits and I proceed to strike out the petition with no order as to costs.

DATED,SIGNED and DELIVERED IN VIRTUAL COURT on this 16th day of February, 2021.

Mohammed N. Kullow

Judge

16/2/2021

In the presence of:

CA:Chuma

Mr Meingati for the 1st respondent

Ms obondo holding brief for Onduso for the Petitioners

Mohammed N. Kullow

Judge

16/2/2021