



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC PETITION 16 OF 2016**

**JACOB MAKUNYU & 122 OTHERS.....PETITIONERS**

**VERSUS**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER ,**

**IMENTI CENTRAL DISTRICT.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**GIDEON MUCHUI ARITHI**

**JEREMIAH MUTHEE THAIMUTA**

**CHARLES KABERIA LINTARI**

**JOSEPH MBAABU NDUNG’U**

**DR. THIANKUNU MWIRABUA & 1832 OTHERS....APPLICANTS/INTERESTED PARTIES**

**RULING**

1. Before me is an application dated 25.10.2019, filed on 29.10.2019 brought pursuant to the provisions of Order 1 rule 1 and Order 1 Rule 10 of the Civil Procedure Rules. The applicants are GIDEON MUCHUI ARITHI, JEREMIAH MUTHEE THAIMUTA, CHARLES KABERIA LINTARI, JOSEPH MBAABU NDUNG’U, DR. THIANKUNU MWIRABUA and 1832 others. They are seeking orders to be enjoined in these proceedings as interested parties. The application is supported by the grounds on the face of the application and the supporting affidavits of Gideon Muchui Arithi filed on 29.10.2019 and 4.12.2019.

2. The applicants contend that they are the lawful and legal occupants of the suit land located in Mbwaa ‘A’ Adjudication section since time immemorial. That on 30.10.2014, the Court of Appeal at Nairobi in civil appeal no. 129 of 2005 adopted a consent order dated 30.10.2014 as an order of the Court of Appeal which order paved way for adjudication process to take place including Mbwaa A. That thereafter adjudication of Mbwaa ‘A’ commenced as per the Court of Appeal order. However, when the adjudication process was approximately 98% to completion, the petitioners herein filed this petition and obtained injunctive orders stopping further adjudication in Mbwaa ‘A’.

3. The applicants further contend that being the owners and occupants of Mbwaa A, they have a great interest in that land of which the injunction issued in the petition has fettered the adjudication in the area.

4. To demonstrate that adjudication had been ongoing before the injunctive orders were issued, the applicants have availed annexure GNA 1 as the copy of the demarcation register for Mbwa A.

5. The application has been opposed by the petitioners through the replying affidavit of Jacob Makunyu filed on 20.11.2019. The petitioners contend that this petition does not concern itself with the proprietorship of various parcels on the ground but rather the unilateral decision to christen the area in dispute as Mbwaa ‘A’.

6. They also contend that it is not true that the adjudication process in Mbwaa ‘A’ was stalled by this petition when it was coming to a close, rather little had been done owing to the resettlement and establishment of Mbwaa ‘A’ adjudication section.

7. The petitioners further stated that the applicants have not demonstrated that the decision in this matter will directly impact on them, that the applicants have no recognizable stake in the matter, that they (applicants) will not be prejudiced if the orders are not granted and that the applicants are mere busybodies whose sole intention is to procrastinate the hearing and determination of this petition.

8. The respondents have also opposed the application vide the replying affidavit of Diana Mbugu (the District Land Adjudication and Settlement officer) filed on 8.7.2020. She avers that the applicants are busy bodies who are on a shopping expedition since the issue of the injunctive order given on 18.7.2016 was announced in a public baraza to all the residents of Tigania West sub-county by the District Land Adjudication and settlement officer and deputy county commissioner Tigania West.

9. It is further contended that the interested parties shall not suffer any prejudice if they are excluded from this petition since they can subject themselves to the dispute resolution mechanisms provided for under cap 284 which includes the filing of Committee cases, Arbitration board cases, Adjudication Register objection cases and appeals to the minister. Further, the applicants can also file Judicial Review as well as Constitution Petition cases.

10. The respondent's also state that the petition does not deal with the issue of ownership and or ascertainment of rights, rather it is dealing with the issue of creation of a new adjudicating section from Ruiru Rwarera adjudication section.

11. The respondents contend that the notice to establish the Mbwaa 'A' adjudication section was made public in a public baraza as provided for under Cap 284 and therefore, all the residents of Mbwaa 'A' were aware of the aforementioned notice. Thus, the applicants were aware of the petition as well as the injunctive orders but they are now seeking to derail justice by making an application to be enjoined as parties at this late stage. To this end, the respondents have availed a copy of the notice establishing Mbwaa A as an adjudication section.

### **Submissions of the applicants**

12. In their submissions, the applicants have reiterated the contents in their application and affidavits of Gideon Muchui Arithi. Additionally, they have made reference to **Rule 2 of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2013**. They have submitted that the **Black's Law dictionary page 1132 9<sup>th</sup> edition** defines an interested party as: "A party who has a recognizable stake and therefore standing on the matter".

13. The applicants have also relied on the following case law:

**(i) Altana Corporations limited vs Clarence Matheny Leadership Training Institute; National Land Commission (Garnishee) Ethics and Anti-corruption commission (intended interested party) (2019) eKLR.**

**(ii) Brek Sulum Hemed vs Constituency Development Fund Board & another (2014) eKLR.**

**(iii) Catherine Nyambura vs Director of Public prosecution & 3 others (2018) eKLR.**

**(iv) Chief Land Registrar & 4 others vs Nathan Tirop Koech & others (2018) eKLR.**

**(v) J.S Yadav vs state of U.P & another (Supreme Court of India) – 18.4.2011.**

**(vi) Kenya Medical Laboratory Technicians and Technologists Board & 6 others vs Attorney General & 4 others (2017) eKLR.**

**(vii) Lagoon Development Limited vs Beijing Industrial Designing & Research Institute (2015) eKLR.**

**(viii) Parsaloi Ole Meikoki vs Commissioner of Lands & 9 others (2017) eKLR.**

**(ix) Raila Amolo Odinga & another vs Independent Electoral Boundaries Commission & 2 others & Michael Wainaina Mwaura (as amicus curiae) (2017) eKLR.**

**(x) Rising Star Commodities Limited vs Mohammed Iqbal Mohamed (2019) eKLR.**

**(xi) Rose Florence Wanjiru vs Standard Chartered Bank of Kenya Limited & 2 others (2014) eKLR.**

**(xii) Samuel Murithi Watatua & another vs Republic (2012) eKLR.**

**(xiii) Yusuf Abdi Adan & another vs Hussein Ahmed Farah & 3 others (2016) eKLR.**

### **Submissions for the petitioners**

14. The petitioners have equally reiterated the contents of the affidavit of Jacob Makunyu. They have added that the application is defective since the five parties have merely purported to bring the application on behalf of 1832 other individuals who have neither given them written authority to come to court nor is there indication as to who these interested parties are.

15. The petitioners have relied on the following authorities:

- (i) Nakuru Judicial Review 19 of 2016, Republic vs the County Government of Nakuru & 3 others.
- (ii) Meru ELC Petition 12 of 2019; Hellen Muthoni Kabengi & 20 others vs municipal manager Isiolo municipality and 4 others.
- (iii) Republic vs Musanka Ole Runkes Tarakwa & others Exparte Joseph Lesalol Lekition & others (2015) eKLR.
- (iv) John Kariuki & 347 others vs John Mungai Njoroge & 8 others, Nakuru HCCC no. 152 of 2003 (unreported).
- (v) Nyeri Employment and Labour Relation Court constitutional petition no. 7 of 2016 Beatrice Wanjiru, Mary Mumbi Gatimu & others vs the Attorney General & another.
- (vi) Nyeri petition 12 of 2016, Gladys Nyawira & others T/A Nyeruruma self-help group vs the County Government of Nyeri & another.
- (vii) Mombasa ELC no. 225 of 2016, Abdalla Abdurman vs The Ministry of Lands and Planning & Housing Mombasa County & 5 others.

### Submissions of the respondents

16. The respondents have reiterated their averments set out in the affidavit of Diana Mbugu, adding that the application has been brought late in the day and that equity aids the vigilant and not the indolent. Further the respondents contend that the applicants shall not suffer any prejudice if their application is not allowed because the Land Adjudication Act Cap 284 provides dispute resolution mechanisms of which the applicants have not exhausted the same.

17. The respondents have relied on the following authorities:

- (i) Attorney general of Uganda vs Omar Awadh & 6 others (2013) eKLR.
- (ii) Shirvling supermarket limited vs Jimmy Ondicho Nyabuti & 2 others (2018) eKLR.
- (iii) Civicon Limited vs Kivuwatt Limited & 2 others (2015) eKLR.
- (iv) Law Society of Kenya vs Commissioner of Lands & others, Nakuru High court civil case no. 464 of 2000.
- (v) Alfred Njau and others vs city council of Nairobi (1982) KAR 229.

### Determination

18. The issue for determination is *whether the applicants should be enjoined in this suit as interested parties*.

19. As rightly submitted by the applicants in their second set of supplementary submissions, the **Black's law dictionary 9<sup>th</sup> Edition** defines an interested party as;

*“a party who has a recognizable stake (and therefore standing) in the matter”.*

20. **Rule 2 of the constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2013** also defines an interested party as follows:

*“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”.*

21. **Order 1 rule 10 (2) of the Civil Procedure Rules** provides as follows;

*“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”. **Emphasize added.***

22. A party claiming to be enjoined in proceedings must have an interest in the pending litigation but the interest must be legal, identifiable or demonstrate a duty. In the case of **Joseph Njau King'ori vs Robert Maina Chege and 3 others (2002) eKLR**, Nambuye J. (as she then was) had this to say on the issue at hand:

*“It is clear that the guiding principles for an intending party to be joined are as follows: (1) he must be a necessary party (2) he*

***must be a proper party (3) in the case of the defendant there must be a relief flowing from that defendant to the plaintiff (4) the ultimate order or decree cannot be enforced without his presence in the matter (5) his presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the dispute”.***

Also see the cases cited by the applicants as well as the case of **Abdalla Abdulman vs. The ministry of lands** and the case of **Gladys Nyawira and Others T/A as Nyeruruma self-help group** both cited by the petitioners.

23. Thus, in the present suit, the court has to establish whether the applicants are necessary parties, whether they have an interest in the matter, whether they shall be affected by the final decree and whether they have an identifiable stake in the dispute at hand.

#### **Prayers in the petition**

24. The first point of call is the petition. What is the nature of the claim in that petition? The petitioners have in paragraph 5 and paragraph 11 of the affidavit of Jacob Makunyu contended that this petition does not concern itself with proprietorship of the suit land, that the petition is all about the renaming of an existing adjudication section which was christened as Mbwa A adjudication section. For the respondent, they aver in paragraph 4 of the affidavit of Diana Mbugu that the petition does not deal with the issue of ownership and or ascertainment of rights, rather it is about the creation of a new adjudication section from Ruiru Rwarera Adjudication section.

25. This is however far from the truth. In order to determine what this petition is all about, all one needs to do is to look at the prayers sought in the petition of which I proceed to extract the said prayers as follows:

*(i) A declaratory order that the constitutional right to the humble petitioner to own property in Mbwa ‘A’ Adjudication Section and the protection of the rights to property pursuant to Article 40 of the constitution of Kenya, 2010 has been grossly breached, denied, threatened and infringed by the arbitral actions of the respondents.*

*(ii) A declaratory order that the petitioners are legal owners of parcels of land in Mbwa ‘A’ Adjudication section.*

*(iii) An order of Judicial review in terms of certiorari to quash the Administrative decision by the respondent to hive out Mbwa ‘A’ Adjudication section from the main Ruiru-Rwarera adjudication section which is unlawful and defeating property right of ownership of land.*

*(iv) An order of permanent injunction against the respondents, their agents, representatives, servants and any one claiming through them from issuing new land numbers in respect of parcels of land in Mbwa ‘A’.*

*(v) Any other order the court deems fit for the ends of justice to be met.*

*(vi) Costs and interests.*

26. It is crystal clear from these prayers particularly prayer no.1 & 2 that the petitioners want to be declared as the owners of the suit land in the aforementioned adjudication section. Thus contrary to the averments made by the petitioners and the respondent, the issue of ownership is paramount in the petition.

#### **The interests of the petitioners and applicants**

27. I find that the claim of the petitioners as the owners of the suit land is at par with that of the applicants. In paragraph 4 of the affidavit of Gideon Muchui Arithi as well as in ground no. 1 in the application of the applicants, the proposed interested parties contend that they are the lawful and legal occupants of the land known as Mbwa ‘A’, having occupied this land since time immemorial. Likewise in paragraph 3 of the petition, the petitioners have identified themselves as the Imenti sub tribe of the Ameru community who were in actual possession of the said properties situated in Ruiru Rwarera adjudication section but they were invaded and temporarily evicted by the strangers who are the Tigania sub-tribe of the Ameru community.

28. What resonates from these averments of both applicants and the petitioners is that there is a dispute pitting one community against another of which both are claiming rights of occupation and entitlement to the suit land. In that regard I would say that the interests of the applicants and those of the petitioners have to be established within the suit and not when one of the groups is left out.

#### **Dispute resolution mechanism**

29. The respondents have averred that the applicants have not exhausted the dispute resolution mechanism available under cap 284 Laws of Kenya hence they should not be enjoined in this suit. It is however apparent that the dispute is not just about ascertainment of rights and interests in land. There is a simmering dispute as to how Mbwa ‘A’ adjudication section came into existence. The applicants through the affidavit of Gideon Muchui Arithi have given a detailed account of how adjudication in the affected area was undertaken. They state that a consent order was made in the Court of Appeal case no. 129 of 2005 which paved way for the adjudication process to be undertaken in Mbwa ‘A’. They contend that pursuant to that order, adjudication commenced and was almost at the point of completion when the injunctive orders were given in this petition.

30. In paragraph 16 of the petition the petitioners aver that Mbwa ‘A’ adjudication section was hived out from Ruiru-Rwarera adjudication section secretly, fraudulently and with intent to defeat justice and the petitioner’s proprietary rights. The respondents in paragraph 4 of the affidavit of Diana Mbugu state that the issue of creation of a new adjudication section out of Ruiru-Rwarera is to be determined via this petition.

31. This court has witnessed an avalanche of disputes emanating from Ruiri-Rwarera/Mbwaa 'A' adjudication section which disputes have spilled over to this court. In the case of **Johnson Mbaabu Mburugu and another vs Mathew Nabea and 9 others, 2020 (eKLR)**, I stated as follows regarding the creation of an adjudication section out of Ruiri-Rwarera adjudication section;

**“32. The question is, does the dispute herein fall under the dispute resolution mechanisms provided for under the aforementioned statutes. There are tell-tale signs that this is not an ordinary dispute to be resolved under the mechanisms set out in the two Acts. Firstly, it has emerged from the pleadings of the petitioner that the suit parcels were in RUIRI RWARERA ADJUDICATION SECTION, but were later taken to MBWAA 1 ADJUDICATION SECTION. The 1-5 and 7th respondents contend that the land parcels in the adjudication section of Ruiri/Rwarera adjudication section were quashed and nullified on 10. 10.2014 vide an order of the Court of Appeal no. 129 of 2005 which order and the annexures have been availed as exhibits. Both the interpretation and the implementation of these documents are clearly matters which invite arguments. In short, the creation of MBWAA 1 ADJUDICATION SECTION and the ensuing adjudication process is a matter under scrutiny before this court (emphasis added). For instance, the consent availed by the respondents talks of land adjudication being undertaken within six months from October 2014 to March 2015. The declaration which is the subject matter of this dispute was apparently made on 13.2.2016.**

**“33. Secondly, I am privy to the fact that the creation of MBWAA 1 ADJUDICATION SECTION has had a ripple effect where there has been an avalanche of hotly contested constitutional petitions finding their way before this court. I am able to point out some of them as Petition 16 of 2016 coming up on 27.4.2020, Petition 6 of 2019 and Petition 2 of 2019 both coming up on 4.5.2020. It is paramount that these matters be handled at the same time so as to harmonize the resolution of the disputes”.**

**34. Thirdly, it has emerged that the dispute in this particular case had spilled over into the ordinary courts as criminal and civil cases. See Meru CMCC no. 393 of 2011 and Meru criminal Case no. 1087 of 2011. This again is a manifestation of the gravity of the matter”.**

32. From the foregoing extract, it is clear that this court has already pronounced itself to the effect that the dispute at hand is complex and goes beyond the issue of ascertainment of interests in land. It follows that the averments made by the respondents that the applicants should subject themselves to the dispute resolution mechanisms available under the Land Adjudication Act are not sustainable.

33. In any event, why the “double talk” from the respondent. Why does the respondent state that the applicants should pursue their claims through the dispute resolution mechanisms available under Cap 284 but is not recommending the same route for the petitioners, yet the claim of the latter too is primarily a claim for ownership of the suit land.

#### **Injunction orders**

34. One of the substantive prayers in the petition is “*an order of permanent injunction against the respondent, their agents, representatives, servants and any one claiming through them from issuing new land numbers in respect of parcels of land in Mbaa A*”. It is also not in dispute that orders of injunction were given vide a ruling delivered on 7.11.2016 halting adjudication process in Mbwaa A adjudication section. In paragraph 6 of the aforementioned ruling, the court stated as follows;

***“For avoidance of doubts, the DLASO, TIGANIA WEST , MR. ALI CHEMASUET , who is in charge of MBWAA A ADJUDICATION SECTION is restrained from adjudicating , issuing new numbers or in any other way dealing with land parcels in MBWAA A ADJUDICATION SECTION until this petition is heard and determined.”***

35. There would have been no need for the petitioners to approach the court in their application for injunction if adjudication was not ongoing. And ultimately, the petitioners desire that the said adjudication process be halted permanently. Where does this leave the applicants if they are not given an opportunity to board this ship at this stage. After all, the applicants have already stated that adjudication was close to completion when the petition was filed and injunctive orders were given. It is therefore apparent that the injunctive orders in force as well as the permanent orders of injunction sought in the petition directly affects the applicants.

#### **Locus standi**

36. In their submissions, the petitioners aver that the applicants' style of approach to this court seems to be in the nature of a representative suit where it is expected that all the 1832 proposed interested parties must have given their written consent or authority. They contend that failure to get the said authority is fatal to the application. I find that nowhere in their response to the application of 29.10.2019 as outlined in the affidavit of Jacob Makunyu is the issue of consent/authority raised. I therefore find that the petitioners have not properly raised this issue before this court.

37. On the other hand, the respondents vide the replying affidavit of Diana Mbugu, the district land adjudication and settlement officer have stated that the applicants have no locus standi in this matter as the group falls under Ruiri-Rwarera Adjudication section and not Mbwaa section. This is however an averment which requires factual analysis. In any event, the district land adjudication officer (Diana Mbugu) in paragraph 4 of her affidavit of 8.7.2020 has stated that the petition concerns the creation of a new adjudication section from Ruiri-Rwarera section which in essence means that the claimants in Ruiri-Rwarera adjudication section are actually the ones who are affected by this dispute in so far as Mbwaa 'A' is concerned.

#### **Right to be heard**

38. **Article 50 (1) of the Constitution** provides that:

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.***

39. In **Mombasa court of appeal case No. 15 of 2015 JMK VS Mwk and MFS**, the court while emphasizing the rules of natural justice cited the case of **Mbaki and others vs Macharia and another (2005) 2 EA 206** where the court stated that:

***“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”***

Also see **Catherine Muthoni Kiriungi & another v Chairman, Land Adjudication & Settlement Officer, Tigania East Central Division & 3 others [2017] e KLR**.

40. Considering the complexity of this dispute where the court will in the final analysis be called upon to determine how an adjudication section was hived off from another adjudication section, then I find it expedient for the affected parties including the applicants to be given an opportunity to be heard in this petition.

### **Conclusion**

41. In the final analysis, I find that the applicants have demonstrated that they have an interest in the matter, that they have an identifiable stake in this case, that they stand to be affected by the orders which have been sought in this petition and hence, they are necessary parties. I therefore find that the application filed on 29.10.2016 is merited and the same is hereby allowed. The costs of the said application shall abide the outcome of the petition.

**DATED, SIGNED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

### **ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 28.10.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**