



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 1 OF 2017**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AS ENSHRINED UNDER ARTICLES  
47, 50 OF THE CONSTITUTION.**

**AND**

**IN TH MATTER OF: LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE DECISION OF THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER MALINDI  
DISTRICT DATED 11<sup>TH</sup> NOVEMBER, 2014 IN OBJECTION NO. 2 BETWEEN MOHAMMED SHAHID MUGHAL VS SAID  
BWANAMKUU**

**AND**

**IN THE MATTER OF: PLOT NO. 30 & 31 MEASURING APPROXIMATELY 20 ACRES SITUATE WITHIN KIREPWE "A"  
ADJUDICATION SECTION IN MALINDI DISTRICT**

**BETWEEN**

**MOHAMED SHAHID MOUGHAL.....PETITIONER**

**AND**

**THE MALINDI DISTRICT LAND ADJUDICATION OFFICER**

**THE CHIEF LAND REGISTRAR.....RESPONDENTS**

**IBRAHIM SAID BWANAMKUU.....INTERESTED PARTY**

**JUDGMENT**

**Background**

1. By this Petition dated and filed herein on 20<sup>th</sup> January 2017, Mohammed Shahid Munghal (the Petitioner) prays for:

1. A declaration that the 1<sup>st</sup> Respondent's refusal for three years to notify him of the delivery of the 1<sup>st</sup> Respondent's decision dated 11<sup>th</sup> December 2014 in Objection No. 2 Kirepwe 'A' Mohammed Shahid Moughal –vs- Ibrahim Bwanamkuu, amounted to a violation of his rights guaranteed under Articles 47 and Article 50 of the Constitution of Kenya.

2. A declaration that the Petitioner is entitled to exercise the Petitioner's right to appeal against the 1<sup>st</sup> Respondent's decision dated 11<sup>th</sup> December 2014.

3. An order enlarging the time within which the Petitioner was required to have lodged an Appeal against the 1<sup>st</sup> Respondent's decision dated 11<sup>th</sup> December 2014.

**4. An order of prohibition directed against the 2<sup>nd</sup> Respondent not to enforce the 1<sup>st</sup> Respondent's decision dated 11<sup>th</sup> December 2014 in Objection No. 2 Kirepwe 'A' Mohamed Shahid Moughal –vs- Ibrahim Bwanamkuu pending the hearing and determination of the Petitioner's intended Appeal against the same or further orders of this Honourable Court.**

**5. An injunction does issue restraining the Interested Party, his servants, agents, employees and/or assigns from in any way interfering with the Petitioner's use and possession of Plot No. 30 & 31 Kirepwe 'A' Adjudication Scheme pending the hearing and determination of the Petitioner's Intended Appeal against the same.**

**6. General damages**

**7. Costs.**

2. Those prayers arise from the Petitioner's contention that he has at all times material been in lawful possession and ownership of Plot Nos. 30 and 31 situated in Kirepwe Island within Kirepwe "A" Adjudication Section. The Petitioner avers that sometime in the year 1997, one Said Bwanamkuu started laying claim to the Petitioner's parcels of land aforesaid.

3. As a result of the said claims and following the decision of the Malindi District Land Adjudication and Settlement Officer (the 1<sup>st</sup> Respondent) to register the said Said Bwanamkuu as the proprietor of the said properties, the Petitioner did on 11<sup>th</sup> June 2014 lodge an objection with the 1<sup>st</sup> Respondent and proceeded further on 30<sup>th</sup> June 2014 to institute a suit against the said Said Bwanamkuu at the High Court at Malindi.

4. The Petitioner further avers that some time in 2014, Said Bwanamkuu passed away and the suit against him thereafter abated. On or about 7<sup>th</sup> January 2017 however, Said Bwanamkuu's son Ibrahim Bwanamkuu (the Interested Party) invaded the suit properties on account that the same belonged to his father, assaulted the Petitioner's Caretaker thereon and chased him away before proceeding to burn and raze down all the Petitioner's developments thereon.

5. It is the Petitioner's case that he later came to learn that the Interested Party was in possession of a decision purportedly made by the 1<sup>st</sup> Respondent on 11<sup>th</sup> December 2015 in favour of the Interested Party. The Petitioner asserts that the 1<sup>st</sup> Respondent did not notify him to attend delivery of the decision and he had no way of knowing that the decision was ready.

6. The Petitioner avers that the 1<sup>st</sup> Respondent's failure to notify the parties in the Objection proceedings of its decision was a violation of his rights under Articles 47 and 50 of the Constitution and hence the orders sought herein.

7. In response to the application, the 1<sup>st</sup> Respondent has through its Land Adjudication and Settlement Assistant sworn a Replying Affidavit filed herein on 24<sup>th</sup> March 2017 denying the Petitioner's claims. The 1<sup>st</sup> Respondent concedes that the Petitioner herein filed an objection against the Adjudication Register for Plot No. 31 in Kirepwe 'A' Adjudication Section but avers that there was no requirement under the Land Adjudication Act for the 1<sup>st</sup> Respondent to notify the concerned parties to attend the delivery of the decision.

8. Asserting that the Petitioner's Objection was dismissed for lack of merit on 11<sup>th</sup> December 2014, the 1<sup>st</sup> Respondent asserts that in most circumstances after conducting a hearing, the 1<sup>st</sup> Respondent can deliver its decision immediately or at a later date in which event parties are then directed to collect the decision upon payment of a fee to the 1<sup>st</sup> Respondent.

9. The 1<sup>st</sup> Respondent further avers that in accordance with the provisions of the Land Adjudication Act, the Petitioner was notified that the Judgment and proceedings will be available for collection at a fee from the 1<sup>st</sup> Respondent and it was upon the Petitioner to exercise due diligence and to collect the same within two months of the hearing for the purposes of filing an appeal.

10. The 1<sup>st</sup> Respondent accuses the Petitioner of proceeding despite the pendency of the Objection proceedings to file numerous cases in court contrary to the procedure set out in law and conducting himself with indolence having waited for three years to instead file the Petition. The 1<sup>st</sup> Respondent thus urges this Court to dismiss the Petition with costs.

11. In his Answer and Response to the Petition, dated and filed herein on 5<sup>th</sup> November 2019, Ibrahim Bwanamkuu (the Interested Party) similarly denies the assertions made by the Petitioner. The Interested Party avers that the Petitioner has never been in lawful possession of Plot Nos. 30 and 31 Kirepwe 'A' Land Adjudication Section as stated by the Petitioner.

12. The Interested Party accuses the Petitioner of relying on forged documents to claim ownership of the suitlands. He asserts that following the hearing of the Objection proceedings, all parties were advised that the decision would be delivered on 11<sup>th</sup> November 2014 and there was no need for him to be notified again of the decision.

13. The Interested Party asserts that the 1<sup>st</sup> Respondent neither violated Article 47 of the Constitution in regard to fair administrative action nor Article 50 thereof in regard to the right to a fair hearing as all parties were given an opportunity to effectively participate in the Objection proceedings.

14. The Interested Party thus denies that the Petitioner is entitled to the reliefs sought. Instead the Interested Party urges the court to issue orders as follows: -

**a. A permanent injunction do issue to restrain the Petitioner, his servants, agents or employees or any other person claiming**

**interest under him from trespassing and or interfering with the Interested Party's quiet possession in Plot Nos. 30 and 31 on Kirepwe Island within Kirepwe 'A' Adjudication Scheme;**

**b. The Petition be dismissed with costs to the Interested Party;**

**c. General damages; and**

**d. The decision by the 1<sup>st</sup> Respondent dated 11<sup>th</sup> November 2014 be adopted as order of this Court.**

### **Analysis and Determination**

15. The parties herein agreed to dispose off the Petition by way of Affidavit evidence and through the filing of written submissions. I have accordingly perused and considered the pleadings filed herein and the rival submissions in support thereof. I have also considered the various authorities placed before me by the Learned Counsels for the parties.

16. Both Mohammed Shahid Moughal (the Petitioner herein) and Ibrahim Bwanamkuu (the Interested Party herein) lay a claim of ownership of the parcels of land known as Plot Nos. 30 and 31 situated on Kirepwe Island within what was described as the Kirepwe "A" Adjudication Section. It was apparent that in the course of the land adjudication process in the area, the District Land Adjudication and Settlement Office (the 1<sup>st</sup> Respondent) adjudicated the land to the Interested Party.

17. Aggrieved by the said adjudication the Petitioner lodged an objection in respect thereto. Subsequently, both the Petitioner and the Interested Party were summoned to appear before the Malindi District Land Adjudication and Settlement Office on 15<sup>th</sup> October 2014. According to the Petitioner, he gave his testimony and evidence before the 1<sup>st</sup> Respondent on that date after which he went home and waited to be notified of the 1<sup>st</sup> Respondent's decision.

18. The Petitioner told this Court that he waited for some three (3) years for the decision to be made only to be surprised one day in January 2017 when the Interested Party descended upon the suit premises in the company of Police Officers and started destroying his properties. It is the Petitioner's case that it is only then that he came to learn that the 1<sup>st</sup> Respondent had rendered a decision on 11<sup>th</sup> December 2014 dismissing his Objection for lack of merit.

19. The Petitioner asserts that the actions of the 1<sup>st</sup> Respondent have denied him an opportunity to appeal its decision given that the law prescribes a period of 60 days of doing so failure to which the 1<sup>st</sup> Respondent is then by law permitted to forward its decision on the Objection proceedings to the Chief Land Registrar (the 2<sup>nd</sup> Respondent) for registration.

20. The Petitioner therefore avers that the decision and stance taken by the 1<sup>st</sup> Respondent is unjust and procedurally unfair and that its implementation would amount to violating express provisions of the law and in furtherance of an illegality. It is further the Petitioner's case that the decision violates Article 47 and 50 of the Constitution and the Fair Administrative Action Act in that the Respondent failed to accord the Petitioner equal treatment before the law and an opportunity to be heard on appeal against the impugned decision.

21. It is however the Respondent's and the Interested Party's case that the Petitioner fully participated in the Objection proceedings which were conducted by the 1<sup>st</sup> Respondent and were subsequently dismissed for lack of merit on 11<sup>th</sup> December 2014. In a Replying Affidavit sworn by its Land Adjudication and Settlement Assistant filed herein on 24<sup>th</sup> March 2017, the 1<sup>st</sup> Respondent asserts that there was no requirement in the Land Adjudication Act that the 1<sup>st</sup> Respondent notifies the concerned parties to attend the delivery of the decision as alleged by the Petitioner. It is their case that in most instances upon conducting the hearing, the decision of the 1<sup>st</sup> Respondent can be delivered either immediately or at a later date in which case the parties are then directed to collect the same from the 1<sup>st</sup> Respondent.

22. At paragraphs 8 and 9 of the said Replying Affidavit, the 1<sup>st</sup> Respondent avers as follows:

**"8. That in accordance with the provisions of the Land Adjudication Act, after the hearing the Petitioner was notified by the 1<sup>st</sup> Respondent that the Judgment and proceedings will be available for him to collect at a fee from the 1<sup>st</sup> Respondent.**

**9. That it is therefore not true that the Petitioner herein was not notified concerning the Judgment by the 1<sup>st</sup> Respondent."**

23. While the above averments do not state when and how the Petitioner was notified of the 1<sup>st</sup> Respondent's decision, the Interested Party gives a slightly different version of the events. In his Answer and Response to the Petition filed some two years after the filing of the 1<sup>st</sup> Respondent's Replying Affidavit aforesaid on 6<sup>th</sup> November 2019, the Interested Party asserts as follows at paragraphs 7 and 8 thereof:

**"7. The Interested Party denies the allegations raised in paragraphs 13, 14 and 15 of the Petition and avers that upon the 1<sup>st</sup> Respondent listening to the Petitioner and the Interested Party and their witnesses in the Objection Proceedings which both parties effectively participated(in) the 1<sup>st</sup> Respondent directed that a Ruling will be delivered on the 11<sup>th</sup> November 2014 and parties were directed to secure a copy of the same upon payment of the requisite court fees. The decision was arrived at fairly upon participation by both parties which Ruling declared the Interested Party's father to be (the) lawful owner of the suit properties which the Petitioner has not preferred an appeal of the decision to-date(sic)**

**8. In response to the averments raised in Paragraphs 16, 17, 18, 19, 20 and 21 of the Petition the Interested Party avers and**

states that, the Petitioner was not a keen litigant. He blatantly failed to follow up on the Ruling of the Objection that he had raised. By the time he followed upon on the decision it was time barred for him to raise an appeal on it. This was despite the fact that the parties were advised that the decision with respect to the Objection would be delivered on the 11<sup>th</sup> November 2014 hence there was no need for him to be notified of the decision which is an exercise to frustrate the Interested Party from enjoying the fruits of the decision because litigation must come to an end(sic). The Petitioner is only seeking sympathy from this Court over his own indolence contrary to the Equity maxim of Equity aids the vigilant and not the indolent.”

24. On 24<sup>th</sup> October 2019, this Court granted the 1<sup>st</sup> Respondent upon its request, leave to file a Further Affidavit in support of their case. Subsequently, the 1<sup>st</sup> Respondent filed an Affidavit sworn by one Inspector Musa Ndalo of the National Police Service on 19<sup>th</sup> November 2019. The import of the 20- paragraph Affidavit is that the said officer had received a complaint on 19<sup>th</sup> December 2019, some two years after these proceedings commenced, from the Interested Party herein alleging that the Petitioner had attempted to fraudulently deprive the Interested Party of his property.

25. The said Police Officer deposes that he conducted investigations regarding the acquisition of the parcel of land by the Petitioner from the original owner and that he came to the conclusion that criminal proceedings should be instituted against the Petitioner.

26. It was neither clear to me why the Police would purport to initiate investigations into this matter more than two years after the parties came to Court nor why if such recommendations were made, the Petitioner had not been charged in the criminal proceedings referred to. What was clear to me was that the further Affidavit was an attempt to steal a march on the Petitioner as what was before this Court was not a claim for the ownership of the land per se but a challenge on the process followed by the Respondent in allocating the suit property to the Interested Party.

27. Indeed, even if it could be assumed that Inspector Ndalo had made those recommendations to the Director of Public Prosecutions, there was no evidence that the Petitioner had been given a chance to challenge the validity thereof in a Court of law and this Court was by virtue of Article 50 (2) of the Constitution obliged to presume his innocence until the contrary was proven.

28. The Petitioner’s case before this Court is that he participated in objection proceedings before the 1<sup>st</sup> Respondent and that he was never notified of the date of the Ruling thereafter. As it were, the Land Adjudication Act (Cap 284 of the Laws of Kenya) provides an elaborate procedure that ought to be followed in the event of a dispute such as this one.

29. Under Section 6 of the Act, the Adjudication Officer together with the District Commissioner of the area were required to appoint an Adjudication Committee for the area under adjudication. Under Section 13 of the Act, every person who considers himself to have an interest in land within the adjudication section makes his claim to the recording officer and points his boundaries to the demarcation officer. Where there are two or more conflicting claims as in the case herein and where the recording officer is unable to resolve the conflict, such a dispute is submitted to an Adjudication Committee as provided under Section 19 of the Act. That Adjudication Committee is then required to hear the disputants and to make a decision.

30. As to how those proceedings are to be conducted, Section 12 of Cap 284 provides the procedure as follows: -

**“12(1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion, he may admit evidence which would not be admissible in a Court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord. (Emphasis mine).”**

31. As recognized under the said Cap 284, the Civil Procedure Act (Cap 21 of the Laws of Kenya) makes provision for the procedure to be followed in civil cases. In respect to Judgment and decisions in such proceedings, Order 21 Rule 1 of the Civil Procedure Rules provides thus: -

**“In suits where a hearing is necessary, the Court, after the case has been heard, shall pronounce Judgment in open Court, either at once or within 60 days from the conclusion of the trial notice of which shall be given to the parties or their Advocates.”**

32. That being the case, it was evident to me that Section 12 of the Land Adjudication Act envisages a situation where parties are given notice prior to the pronouncement of decisions made by the Adjudication Officer. This position is indeed made clear by obligations placed on the Adjudication Officer in the absence of a party under Section 11 of Cap 284. The said Section provides that: -

**“11. In the course of the adjudication, the adjudication officer shall have the following powers: -**

**a. ....**

**b. ....**

**c. He may make a claim or otherwise act on behalf of a person who is absent or under a disability if he considers it necessary to avoid injustice.”**

33. In light of the foregoing, I did not agree with the position taken by the Respondents that there was no requirement under the Land Adjudication Act for the 1<sup>st</sup> Respondent to notify concerned parties to be in attendance during the delivery of their decision. And while the

Interested Party purports that the parties were notified on the date of the hearing that the decision would be delivered on 11<sup>th</sup> November 2014, a perusal of the Objection Proceedings (Annexure "JGK2" of Gabriel Musyoki's Replying Affidavit) does not give any such indication.

34. Indeed, contrary to the Interested party's claim that the decision was to be made on 11<sup>th</sup> November 2014, the decision is dated 11<sup>th</sup> December 2014 and there is no indication whether any of the parties was present and/or had been notified that the decision would be made on that date.

35. The Petitioner herein contends that he has been in possession and occupation of the suit property and there was no doubt in my mind that he was bound to be affected by the decision of the Adjudication Committee. Article 47 of the Constitution of Kenya provides in this respect as follows: -

**“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

36. It goes without saying that in discharging the duties conferred upon it under Section 9(2) (b) of the Land Adjudication Act, the 1<sup>st</sup> Respondent was exercising a quasi-judicial function. The law required the 1<sup>st</sup> Respondent to hear and determine matters on any objection raised to the adjudication register. Section 29 of the Act permits any person aggrieved by the determination of an objection made under Section 26 of the Act, to appeal the determination within 60 days to the Minister.

37. In the circumstance presented before me, while it is true that indeed the Petitioner may have taken rather long before following up on his case, it was clear to me that the 1<sup>st</sup> Respondent's failure to notify the Petitioner of its determination prejudiced the Petitioner's right of appeal and thus amounted to a violation of the Petitioner's right to fair administrative action as provided under Article 47 of the Constitution.

38. Given the dire implications of its decision, it was not proper and fair for the 1<sup>st</sup> Respondent to just wake up one day, record its decision on the proceedings and thereafter proceed to quietly file it away without any notification and/or communication being made to the concerned parties. In this respect, the law in my view, imposes an obligation on the 1<sup>st</sup> Respondent to at least take some reasonable steps to give notice of their determination to the parties litigating before them.

39. Arising from the foregoing, I am satisfied that there is merit in the Petition dated and filed herein on 20<sup>th</sup> January 2017. Save for Prayer '6' on general damages for which I found no basis, I allow the Petition as prayed in terms of Prayers Nos. 1, 2, 3, 4 and 5.

40. The Petitioner has 60 days from today to exercise his right of appeal against the 1<sup>st</sup> Respondent's decision dated 11<sup>th</sup> December 2014.

41. In the circumstances herein, I think it is fair that each party should bear their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF MARCH, 2021.**

**J.O. OLOLA**

**JUDGE**