Mbondo v Ministry of Lands and Settlement Scheme & 3 others (Constitutional Petition 174 of 2011) [2023] KEELC 541 (KLR) (8 February 2023) (Judgment)

Neutral citation: [2023] KEELC 541 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION 174 OF 2011

CK YANO, J

FEBRUARY 8, 2023

BETWEEN

NZIOKI MBONDO ..... PETITIONER

AND

THE MINISTRY OF LANDS AND SETTLEMENT SCHEME . 1ST RESPONDENT

THE DISTRICT ADJUDICATION OFFICER ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

DAVID KABERIA ..... 4TH RESPONDENT

JUDGMENT

1. By a petition dated December 7, 2011 and filed on December 8, 2011, the petitioner prays for the following reliefs:

    a. A declaration that land parcel Number 1408 within Kiengu/Kanjoo Adjudication section and measuring 5.0 acres belongs to the petitioner.

    b. An order of Judicial Review in the nature of mandamus compelling to reflect the petitioner as the true legal owner of the said land parcel number 1408 within Kiengu/Kanjoo Adjudication Section in the adjudication register

    c. Costs of this petition.

2. An application was made to amend the petition and orders were made allowing the application on October 8, 2012. However, no amended petition was filed and served within 14 days of October 8, 2012 as ordered by the court on October 8, 2012.

3. In support of the petition, the petitioner filed a supporting affidavit sworn on December 7, 2011.

4. It is the petitioner's case that the suit land is ancestral land that was passed on to him by his late father and to which he has lived in since when he was 2 years old. That the suit land is even part of the mother land from which the petitioner gifted his children who have settled on the adjacent parcels under different titles. The petitioner avers that the interested party influenced the office of the 2nd respondent to record one of the portions of the petitioner's father's land in his name measuring 8 acres and on the ground started claiming the petitioner's portion measuring 5 acres.

5. The petitioner states that land cases started and that when he filed a committee case, the interested party, using clan affiliation, influenced the outcome and it was ruled that the land belongs to the interested party, though neither him nor any of his family members have ever occupied the land which the petitioner states he was brought up in and still lives to-date.

6. The petitioner avers that when the adjudication register was published, he filed an objection thereto challenging the registration of the interested party as owner of the petitioner's land together with two others who had been allocated land in the petitioner's father's land vide objection numbers 167, 168, and 172 relating to parcel numbers 1408, 1412 and 1416. The petitioner states that all the three objections were heard together and the parcels were reverted to him. The petitioner has annexed copies of the proceedings marked 'NMI"

7. The petitioner avers that the interested party appealed to the 1st respondent vide appeal number 223 of 2010 which was heard and determined on March 9, 2011. Copies of the proceedings and verdict of the minister as represented by the District Commissioner Igembe South District in the current Meru County marked 'NM2" are annexed. The petitioner states that he found it surprising that the observations made by the District Commissioner during the site visit and the actual total findings were all in his favour, but when it came to the actual verdict, the District Commissioner awarded the disputed land Parcel Number 1408 to the interested party without attaching any reason for such verdict. That the 1st respondent proceeded to order the 2nd respondent to implement his decision by deleting the petitioner's name in the adjudication register and inserting that of the interested party.

8. It is the petitioner's contention that the decision by the 1st respondent is in blatant breach of the petitioner's constitutional right to property and urged the court to protect him.

9. At the hearing, the petitioner testified as Pw 1 and adopted his witness statement dated October 12, 2021 as his evidence in chief and produced the documents in his further list of documents filed on March 1, 2022 as P exhibits 1 to 5 respectively. These are a copy of his National Identity card, proceedings receipt dated April 1, 2011, copy of demarcation book, Proceedings of appeal to the Minister and objection to the adjudication register. The petitioner was cross examined by Mr Kieti for the respondents and Mr Anampiu for the interested party and re-examined by Ms Aketh for the petitioner.

10. In brief, the petitioner stated that his complaint was against the minister's decision. The petitioner also called two witnesses, Samuel M'Kiunga who testified as Pw 1 and Zakayo Mulinge Nzioka who testified as Pw 3. They both adopted their witness statements dated October 12, 2021 as their evidence in chief.

11. The respondents did not file any response but called Joseph Mbai, the Land Adjudication and Settlement Officer Igembe Central/North/South Sub counties who testified as DW 1. He adopted his witness statement filed in court on February 15, 2022 as his evidence in chief and produced a copy of demarcation book, proceedings on appeal to the minister and objection to the adjudication register as D exhibits 1,2 and 3 respectively.

12. He testified that according to their records, the petitioner is the rightful owner of the suit land measuring 5 acres. DW 1 was cross examined and re-examined.

13. DW 1 admitted that he was conversant with the provisions of the *Land Adjudication Act* and explained that a dispute starts from the committee, then the board, AR objection and finally an appeal to the minster whose decision is final. DW 1 stated that he was not challenging the decision of the minister, though he was not in agreement with it adding that he had not implemented the minister's decision because the petitioner had filed this case. His conclusion was that the petitioner who is on the record should remain in the register.

14. The interested party opposed the petition by way of a replying affidavit sworn on December 14, 2011. It is the interested party's case that land parcel number 1408 within Kiengu/Kanjoo Adjudication section is his and does not belong to the petitioner. The interested party avers that they did the case with the petitioner as per the *Land Adjudication Act* which went up to the appeal to the minister in which the interested party retained Parcel No 1408 measuring 5 acres. That they exhausted the legal process before the committee, adjudication and appeal to the minster and therefore the petitioner has no further claim over the land.

15. The interested party avers that he has developed the suit land and planted various trees on it, adding that the petitioner has his own land measuring 8 acres but is claiming other people's land including that of the interested party. The interested party has annexed copies of Arbitration Board Proceedings marked "DKI" and "DK2" and argued that the petitioner should not deny other people their lawfully acquired parcels of land since they too are entitled to protection of their rights to property under the *Constitution*.

16. The interested party states that the petitioner, who is a Kamba, was not even born in Kiengu and should not benefit from land belonging to Kiengu clan. The interested party argues that the petitioner's claim is ridiculous, unfounded, vexatious and frivolous and otherwise bad in law and inapplicable, adding that the minister had the rights under the law to make the decision he made over the land pursuant to the provisions of the *Land Adjudication Act* and that the petitioner has not challenged that jurisdiction and this court cannot fault the same. That this court cannot be requested to do work of adjudication of land when there is a clear procedure and the law applicable which has already been exhausted in favour of the interested party. The interested party prays that the suit be dismissed with costs.

17. During the hearing, the interested party testified as DW 2 and adopted the contents of his replying affidavit as his evidence in chief and was cross examined and re-examined. He reiterated that the dispute over the suit land had been deliberated until an appeal to the minister and whose decision he had no problem with.

18. In his submissions dated November 1, 2022 and filed on November 14, 2022 through the firm of Vivian Loice Aketch & Co Advocates, the petitioner submitted *inter alia*, that the adjudication process was biased, unfair and unreasonable. That the testimony of the 1st respondent clearly demonstrates that the hearing at the office of the minister was not fair and that a biased decision was reached, infringing on the rights of the petitioner. It was further submitted that the petitioner has been prejudiced by the adjudication process on land parcel number 1408 within Kiengu/Kanjoo Adjudication Section and measuring 5 acres and that the interested party is just a man who preyed on the vulnerable old man with the intention of ripping him off his land and with the stereotype that a person from a different tribe cannot own large tracks of land in the area. The advocates for the petitioner prayed that this court quashes the decision of the minister giving the interested party the petitioner's land, compel the respondents to register the same in the petitioner's name and finally cancel the title registration of the suit land in the name of the interested party.

19. The respondents did not file submissions.

20. In his submissions dated October 28, 2022 and filed on October 31, 2022 through the firm of Gikunda Anampiu & Co. Advocates, the interested party submitted inter alia, that the current proceedings are judicial review proceedings which do not concern itself with the merits of the decision but the process through which the decision was made. Counsel for the interested party relied on the case of *Land Adjudication and Settlement Officer Maara Sub County & 3 others, exparte applicant: Minyiri Ragwa, Njeru Kirika (interested party)*, *Republic Vs Kenya National Examination Council exparte Gathenji and Others* Civil Appeal No 266 of 1996.

21. It was submitted that in this case, the minister visited suit land and made inquiries from neighboring people before arriving at his decision. That the petitioner, his witnesses and the interested party and his witnesses were heard and therefore the proper procedure was followed. It was also the interested party's submission that the petitioner's witnesses cannot adduce any collaborative evidence since they did not participate during the committee proceedings, AR objections or during the appeal to the minister, and therefore their evidence is inadmissible.

22. Counsel for the interested party cited the provisions of Section 29 of the *Land Adjudication Act* Cap 284 Laws of Kenya and argued that in this case, the interested party appealed to the minister according to the said section and that the appeal proceedings were conducted through the due process and a decision reached by the minister. That according to the evidence adduced, all parties were afforded an opportunity to be heard.

23. The interested party's advocates also relied on the case of *Commissioner of Lands Vs Kunste Hotel Ltd* [1997]eKLR and submitted in this case, the petitioner has not demonstrated through evidence with clarity the erroneous information relied on by the minister. It was therefore submitted that the due process was followed hence this petition is hollow and stands on quick sand and should be dismissed with costs.

Analysis And Determination

24. Having analyzed the pleadings, the evidence adduced and the submissions filed, I find that the following issues call for determination;

    i. Whether the petition raises any constitutional issue.

    ii. Whether the petitioner is entitled to the orders sought.

25. The petition herein is brought pursuant to Articles 19, 20, 22, 23, 40 and 159 of the *Constitution* of Kenya. In order for the petitioner to succeed in any Constitutional Petition the law requires that the petitioner must demonstrate that the constitutional rights subject matter of the petition have actually been denied or violated or are threatened with denial or violation.

26. The petitioner herein is seeking orders of a declaration that the suit land parcel No 1408 within Kiengu/Kanjoo Adjudication Section belongs to him and an order of Judicial Review in the nature of mandamus to have the said land registered in the petitioner's name in place of the interested party.

27. Therefore, it is clear to me that the petition before this court is essentially an appeal against the decision of the 1st respondent which was made on March 9, 2011. In the said decision, the 1st respondent ruled that the interested party be given 5 acres of the land in dispute and for the same to be registered in his name. The 2nd respondent was to implement the said decision.

28. Section 29 of the *Land Adjudication Act* Provides as follows-;

> "(1) 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 minster by
>
> a. Delivering to the minister an appeal in writing specifying the grounds of appeal, and
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> 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"

29. While commenting on the above provisions, Angote J in *Tili Nguutu Vs Cabinet Secretary for Lands, Housing and Urban Development & 2 others* [2021] eKLR stated as follows;

> " As stated in the above provisions, the decision of the 1st respondent is final. The only avenue that was available to the petitioner was to file a Judicial Review application to challenge the said decision pursuant to the provisions of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*. The above provisions of the law allow this court to exercise supervisory jurisdiction over tribunals and quasi-judicial bodies, notwithstanding that their decision might be final. In *Re Malres*; application, (1958 153 at 155 it was held as follows;
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> "It is well settled law that the jurisdiction of this court to exercise its power of supervision over inferior courts and tribunals will not be taken away unless there are express words clearly defining the intention of the legislature to do so. The expression that decisions of tribunals shall be final and without appeal or final and conclusive, have effect ... on so far as an appeal on the facts are concerned, but do not preclude the issue of certiorari for excess of jurisdiction or for error of law (*Re Gilmorea* application (1) (1957) ALL ER 796"

30. In this case, there was an appeal to the minister (the 1st respondent herein) in accordance to Section 29 of the *Land Adjudication Act*. The 1st respondent made a decision in favour of the interested party and that decision still stands as it has not been set aside, vacated or quashed. The petitioner has now filed this petition which is essentially an appeal against the decision of the 1st respondent. There is no application for judicial review orders of certiorari that is before this court seeking to quash the said decision of the 1st respondent made on March 9, 2011. Instead, the petitioner seeks orders of a declaration and mandamus which if granted will substitute the decision of the 1st respondent. Therefore the proceedings herein are an appeal against the decision of the 1st respondent but disguised as a constitutional petition.

31. To the extent that the petition seeks to appeal against the decision of the 1st respondent and considering that all parties were granted a fair hearing by the 1st respondent, it is my finding that the petitioner, *prima facie*, has not raised any constitutional issues in the petition herein. The issue of whether the 1st respondent's decision was fair and reasonable can never amount to a constitutional issue considering that the 1st respondent was exercising a mandate donated to him by the law.

32. Further, it is trite law that judicial review is only concerned with the decision making process not with the merits of the decision itself. (see *Municipal Council of Mombasa Vs Republic & Another* [2002] eKLR). In addition, in order for the petitioner to succeed in any constitutional petition, the

law requires that he/she must demonstrate that the constitutional rights subject matter of the petition have actually been denied or violated or are threatened with denial or violation.

33. In the case of *Bernard Murage Vs Fine Serve Africa Ltd & 3 others* [2015] eKLR, the Supreme Court held that:

> "Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first"

34. In this case, it is not denied that the 1st respondent made his decision as envisaged under Section 29 of the *Land Adjudication Act* and heard all the parties before arriving at his decision. In my view, no procedure was breached by the minister. I do not think that the dispute herein qualifies to be a constitutional issue. In my view, this is an issue that falls squarely in the realm of private law. There are a host of authorities that elucidate the principle that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of litigation.

35. In the case of *Uhuru Muigai Kenyatta Vs Nairobi Star Publications Limited* [2013] eKLR, Lenaola J (as he then was) applied the holding in *Re Application by Bahadur* (1968)LR (Cost) 297 and held that;

> "Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (*supra*) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction..."

36. In Re application by *Bahadur case* (*supra*), the court in Trinidad and Tobogo held as follows;

> "The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringement of rights can found a claim under substantive law, the proper cause is to bring the claim under that law and not under the constitution"

37. I wholly agree with the above prepositions of law. It is my view that there exists a robust statutory procedure within the area of private law where the petitioner could pursue the dispute herein including the filing of an ordinary civil suit for appropriate remedies. The petitioner could also have sought for an order of certiorari to quash the 1st respondent's decision if the same was arrived in excess of jurisdiction or without following due process among other reasons.

38. For those reasons, it is my finding that the petition herein is not meritorious and the orders sought cannot be granted. Therefore the petition is hereby dismissed with costs.

DATED, DELIVERED AND SIGNED AT MERU THIS 8TH DAY OF FEBRUARY, 2023.

In presence of

Court assistant – Kibagendi

M/S Aketch for petitioner

Gikunda Anampiu for interested party

No appearance for A.G for respondent

C.K YANO

ELC JUDGE