



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAROK

ELC PETITION NO. 4 OF 2018

SARUNI OLE LOONKUSH & 9 OTHERS.....PETITIONERS

–VERSUS–

THE ATTORNEY GENERAL & 14 OTHERS.....RESPONDENTS

RULING

1. On 26th February, 2018, the Petitioners filed the present Petition through their Petition dated 24th February, 2018 wherein they sought the following reliefs against the Respondents:

- i) A conservatory order be issued by this Honourable Court restraining the Respondents from demarcating, alienating, subdividing, wasting or dealing in any other way with any sections of the 62,336 hectares of Narok/Naroosura/1;*
- ii) An order of declaration be issued in the terms that the registered members of Naroosura Group Ranch are entitled to have transparent and clear participation with regard to the dealing of the subject parcels of land herein;*
- iii) The group representatives of Naroosura Group Ranch be and are hereby ordered to restrain from subdividing the Petitioners' farm further without their consent;*
- iv) The office of ministry of lands in Nairobi be and is hereby restrained from processing Title Documents of 62,336 hectares of the land known as Narok/Naroosura/1;*
- v) The office of ministry of lands in Nairobi be and is hereby ordered to revoke all titles issued for the subject parcels herein to persons/institutions/corporate bodies for commercial purposes and personal gain;*
- vi) The Respondents be and are hereby ordered to do all that is legally bestowed upon them by law, in their official capacities to prevent the evolving injustices on the subject parcels of land;*
- vii) It is fair and just that any subdivision/demarcation or alienation of the subject parcel be stayed pending the hearing of this application; and*
- viii) The orders sought in the interlocutory application to not only apply and bind the Respondents herein, but also their successors in title, assigns and all other persons entrusted with the duty and/or responsibility of securing the subject parcels of land in the transitional national and devolved county government.*

2. The dispute revolved around the parcel of land known as LR Narok/Naroosura/1 measuring approximately 62,336 Hectares which the Petitioners stated had, on 6th June, 1970, been earmarked as an adjudication section by the Land Adjudication Officer, Narok District. The Petitioners pleaded that they were aggrieved by the ongoing sub-division and allocation of the said land terming that process as being irregular and unlawful, hence, the Petition now before the court.

3. Respondents opposed the Petition by filing their respective responses thereto. Relevant to this ruling, on 9th November, 2021, the 5th – 15th Respondents filed a Notice of Preliminary Objection wherein they contended that:

- i) In view of section 30(1) of the Land Adjudication Act Chapter 284 of the Laws of Kenya, this Honourable Court lacks the requisite jurisdiction to entertain the said Petition either as drawn or at all;*
- ii) The Petition is thus grossly incompetent, misconceived, a non-starter and an abuse of the court process. Accordingly, the 5th – 15th Respondents shall urge the Honourable Court to dismiss the Petition in its entirety in limine with costs.*

4. Parties agreed to canvass the Notice of Preliminary Objection by way of written submissions. The 5th – 15th Respondents filed their written submissions on 1st December, 2021, while the Petitioners filed theirs on 28th December, 2021.

5. In support of the Notice of Preliminary Objection, the 5th – 15th Respondents submitted that a preliminary objection is one that raises a pure point of law, and which is argued on the assumption that all facts pleaded by the other side are correct. According to the 5th – 26th Respondents, under the Land Adjudication Act, a court cannot entertain a claim on interest in land which is still under adjudication without the consent of the adjudication officer as provided under section 30 of the Land Adjudication Act.

6. The 5th – 15th Respondents further contended that the Land Adjudication Act sets out an elaborate and comprehensive procedure for dealing with any dispute that arises during the adjudication process. To the 5th – 15th Respondents, the jurisdiction of the court is ousted and cannot be invoked unless the process set out under the Land Adjudication Act has been exhausted.

7. It was also submitted that the Petitioners had not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the manner in which the adjudication process was carried out. It was also contended that the Petitioners had not demonstrated that they sought and were denied consent by the adjudication office.

8. The 5th – 15th Respondents therefore urged the court to find that their preliminary objection has merit and to proceed to strike out the Petition with costs.

9. In support of their submissions, the 5th – 15th Respondents relied on the cases of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1996) EA 696*, *EWM vs PM [2013]eKLR*, *Owners of the Motor Vessel Lillian “S” vs Caltex Oil Kenya Ltd (1989) KLR*, *Justus Ntuiti vs Mwirichia Kaumbuthu [2004]eKLR*, *Benjamin Okwaro Estika vs Christopher Anthony Ouka & Another [2013]eKLR*, *Kilusu Julius Sile & 60 Others vs Chairperson, Oloirien Adjudication Section “B” Committee & 3 Others [2016]eKLR* and the case of *Mohamed Ahmed Khalid (Chairman) & 10 Others vs Director of Land Adjudication & 2 Others [2013]eKLR*.

10. Opposing the Notice of Preliminary Objection, the Petitioners contended in their submission that the same is not brought in good faith, is misconceived and that protection of their constitutional rights should not be defeated by mere technicalities. The Petitioners also submitted that their protection under the Constitution supersedes any other statutory provisions which tend to whittle down their constitutional rights.

11. Further, the Petitioners termed the Notice of Preliminary Objection as raising matters of mere technicalities, thus, they urged the court to administer justice without undue regard to procedural technicalities. It was therefore urged by the Petitioners that the Petition is properly before the court and that the court has jurisdiction to hear and determine it.

12. The Petitioners also contended that their Petition raises constitutional issues and that their rights are at risk if the said preliminary objection is allowed. The Preliminary Objection was also challenged by the Petitioners on the basis that the same does not raise pure points of law.

13. It was further contended that the 5th – 15th Respondents had acquiesced to the suit having participated in the initial proceedings. According to the Petitioners, it is hypocritical for the 5th – 15 Respondents to state that this court has no jurisdiction when they have previously sought orders that have been to their advantage.

14. The Petitioners also submitted that there are instances of wrongful allocation, sub-division of community land, all which cannot happen without the approval of the Land Adjudication Officer, hence, it was their contention that seeking the approval/consent would only delay the matter further. The Petitioners also took issue with the timing of the Notice of Preliminary Objection urging that the same is not brought in good faith.

15. The court was therefore urged to disregard the Notice of Preliminary Objection and hold that it has the requisite jurisdiction to hear and determine the present Petition. To buttress their submissions, the Petitioners relied on the case of *Bob Thomson Dicken Ngobi vs Kenya Ports Authority & Others [2017]eKLR*, *County Government of Meru & Another vs District Land Registrar and Settlement Officer Tigania East Sub-County & 180 Others [2018]eKLR*, *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1996) EA 696*, and the case of *Muhu Holdings Limited vs Jmaes Muhu Kangari [2017]eKLR*.

16. Having carefully considered the Notice of Preliminary Objection and the submissions filed by the respective parties in this case, the court is of the opinion that the following issues arise for consideration and determination:

i) Whether this Honourable Court has the requisite jurisdiction to hear and determine the Petition; and

ii) Whether the 5th – 15th Respondents’ Notice of Preliminary Objection is sustainable.

17. I will address the issues together. The parameters for consideration of a preliminary objection are now well trodden. The least I can do in the circumstances is to take cognizance of the holding of the court in the celebrated case of *Mukisa Biscuit* where the court in respect to a preliminary objection stated:

“It raises a pure point of law which is argued 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.”

18. It is crystal that in their Notice of Preliminary Objection, the 5th – 26th Respondents are challenging the jurisdiction of this court to hear

and determine this Petition. It is trite law that where the question of jurisdiction is raised then the court must first and foremost investigate and establish whether it has the requisite jurisdiction to hear and determine the matter. This is so because jurisdiction is everything without which a court of law acts in vain.

19. Before delving into the substantive issues, it is imperative to address some of the issues that arose from the Petitioners' submissions. First, it is trite law that a Preliminary Objection can be raised at any stage of a proceeding before judgment. Second, an issue touching on the jurisdiction of a court or tribunal is not a mere technicality as suggested by the Petitioners. As was stated by the Supreme Court in **Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Ltd & 2 Others (2012)eKLR**

...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."

20. The question of jurisdiction being a preliminary point is germane as the same sets the stage for the case in so far as determining the competence of the court or tribunal to make a determination on a dispute. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

21. Looking at the import of the Notice of Preliminary Objection by the 5th – 15th Respondents, it is apparent to this court that the same is founded on the ***doctrine of exhaustion*** which requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the courts. The principle has been expressed and upheld in several decisions. In the case of **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017]eKLR** the doctrine was expressed by the Court of Appeal as follows:

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

22. The purpose of the principle was earlier stated by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015]eKLR** as follows:

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

23. In the present Petition, it is apparent that the Petitioners are aggrieved by the adjudication process carried out on parcel of land known as LR Narok/Naroosura/1 measuring approximately 62,336 Hectares which the Petitioners stated had, on 6th June, 1970, been earmarked as an adjudication section by the Land Adjudication Officer, Narok District. The Petitioners pleaded that they were aggrieved by the ongoing subdivision and allocation of the said land terming that process as being irregular and unlawful, hence, the Petition now before the court. The Petitioners have thus moved this court to challenge the aforesaid adjudication process.

24. On their part, the 5th – 15th Respondents contend that the Petitioners have invoked the jurisdiction of this court prematurely since they have not exhausted the dispute resolution mechanisms provided for under the Land Adjudication Act.

25. In this regard, it is imperative to appreciate the relevant provisions of law. Under sections 26 and 29 of the Land Adjudication Act respectively, it is provided 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 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 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.

(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.

(4) Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

26. On case law, in *Kinyamal Ole Tare v Sotua Sakana Muyia [2015]eKLR*, this court held that:

“...this court has no jurisdiction in these proceedings to interfere with or impeach the defendant’s title to the suit property on account of any error that was committed during the land adjudication process. A party with such grievance has to follow the dispute resolution mechanism set out in the Land Adjudication Act that I have outlined above...”

27. With the above in mind, it matters not whether the dispute concerns the process of adjudication as alleged by the Petitioners herein. The law as I understand it is that a dispute concerning any error that was committed during the land adjudication process has to be referred to the dispute resolution mechanism set out in the Land Adjudication Act that I have outlined above. While this court is clothed with jurisdiction to hear and determine constitutional petitions falling within the ambit of its specialized jurisdiction touching on land and environment, I am of the view that the court ought not to intervene until it is satisfied that the dispute resolution mechanisms provided in law have all been exhausted.

28. Turning to the issue of consent under section 30 of the Land Adjudication Act, the said section provides that:

30. Staying of land suits

(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.

29. The issue that arises from the foregoing is whether the consent under section 30 can be relied on to institute court proceedings to challenge a Land Adjudication Officer’s decision. To answer this, the holding of Okongo, J in *Tobias Achola Osindi & 13 others versus Cypriano Otieno Ogalo & 6 Others, H.C.CNO 4 OF 2011 KISII* is of particular relevance. The court in its decision stated that:

“The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...”

...the court cannot however 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 interests in land. Due to the foregoing, a consent issued by the Land Adjudication Officer under section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to court for determination issues which should be determined by the adjudication officer or through the dispute resolution machinery laid out in the Act”.

30. From the analysis, it is clear that even if the Petitioners had the aforementioned consent, they cannot use it to move to court to challenge the adjudication process therefore usurping and/or by-passing the laid down dispute resolution mechanisms provided for in statute.

31. In light of the foregoing, it is my finding that the Petitioners had indeed bypassed the dispute resolution mechanisms provided under the Land Adjudication Act. They had clearly not exhausted the laid down procedures in the aforementioned statute before filing the present Petition, hence, the jurisdiction of this court had been invoked prematurely.

32. Having found that the jurisdiction of this court was prematurely invoked, the upshot of the above is that I find that the Notice of Preliminary Objection by the 5th – 26th Respondents is sustainable. Accordingly, since this court lacks jurisdiction in this case,

I strike out the Petition with costs to the Respondents.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 9TH DAY OF FEBRUARY, 2022.

MBOGO C.G,

JUDGE

9/2/2022

IN THE PRESENCE OF:

CA:T.Chuma