



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CASE NO. 38 OF 2017

NEKAPI ENE LEKAKENY.....PLAINTIFF

-VERSUS-

RICHARD MEMUSI KURRARU.....1ST DEFENDANT

DISTRICT COMMISSIONER, NORTH NAROK.....2ND DEFENDANT

DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER, NORTH NAROK.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

A. INTRODUCTION

1. Nekapi Ene Lekakeny (**'The Plaintiff'**) commenced this suit by way of a Complaint dated 21.10.2013; seeking the following Orders: -

i. A Declaration that the recording of the suit property namely Plot No. 1477 Kipise Adjudication Section in the name of the 1st Defendant was irregular, null and void ab initio.

ii. A Declaration that the District Commissioner acted in bad faith and malice by purporting to revert the land back to the 1st Defendant without proper assessment of evidence before him.

iii. A Declaration that the District Commissioner failed to take into consideration relevant factors in making his decision.

iv. A Declaration that the District Commissioner abused the powers conferred on him by Legal Notice No. 73 of 25/4/1978 by making a decision without applying his mind on the facts and circumstances of the case.

v. An Order that the purported Ruling of the District Commissioner, the 2nd Defendant herein made on 6th September, 2011, be set aside.

vi. An Injunction restraining the 1st Defendant either by himself, his agents and or servants from entering, transferring, selling, alienating, encumbering or in any way parting with possession, cutting down trees or any further dealings with Plot No. 1477 Kipise Adjudication Section.

vii. AN ORDER prohibiting the 3rd Defendant from registering or causing to be registered the suit property in the 1st Defendant's name when the register is certified final.

viii. General Damages.

ix. Costs of this suit and interest thereon.

x. Such other of further reliefs as this Honourable Court may deem just to grant.

2. The Plaintiff seeks to challenge the decision of the 2nd Defendant dated 6th September, 2011; sitting on the appeal from Kipise Adjudication Section, whose effect was to overturn the decision of the Land Adjudication Officer, the 3rd Defendant and to revert the suit property to the 1st Defendant herein.

3. It is the Plaintiff's contention that that she has been in occupation of the suit property Plot No. 1477 and has exercised rights in and over the said parcel of land which should be recognized as ownership. when the Adjudication Register was displayed for inspection in 2007, she discovered that the land parcel Plot No. 1477 had been recorded in the name of the 1st Defendant; On 12th December, 2007, she filed an Objection No. 727 of 2007 with the Land Adjudication Officer. The objection was properly heard by the District Land Adjudication and Settlement Officer and on assessment of evidence, the Adjudication Officer made his decision on 23rd February, 2009 to the effect that the property Plot No. 1477 belonged to the Plaintiff.

4. The 1st Defendant aggrieved by the decision of the Land Adjudication Officer, 3rd Defendant herein, appealed to the District Commissioner Narok North, the 2nd Defendant herein, and filed Appeal No. 9 of 2011; which was heard and Ruling delivered on the 6th September, 2011. The effect of the said ruling was to revert the land in dispute to the 1st Defendant herein thus necessitating the present suit.

5. Further, the Plaintiff contends that the ruling delivered on 6/09/2011 is bad in law and of no effect for reasons that the 2nd Defendant in making the said decision failed to take into account relevant considerations and his conduct was manifested by extreme ill will and bad faith against her. There was no proper assessment of evidence, he failed to apply his mind to the facts and circumstances of the case. He also failed to give any or sufficient details on the parcel of land he alleged belonged to the Plaintiff.

6. All the Defendants, entered Appearance and filed their respective Statements of Defence on diverse dates.

7. The 1st Defendant in response to the claims raised by the Plaintiff maintained that the register had been concluded and finalized and the letter of ownership was given in his name. it was his contention that section 23 (d) of the Land Adjudication Act was never contravened and that the 2nd Defendant arrived at his judgment after assessing and analyzing the evidence presented before it by all parties.

8. The 2nd, 3rd and 4th Defendants also filed their statement of defence through the Attorney General's Office dated 21/3/2014 and filed on court on 25/3/2014. The statement of defence contained a blanket denial of all the allegation made by the Plaintiff without any further explanation as to the contrary.

9. It is further their contention that the claim as taken out, drawn and filed is bad in law, vexatious, frivolous, incurable defective and does not disclose a cause of action against them.

B. TRIAL

10. On 3rd May 2017, the Plaintiff's case was heard. The Plaintiff testified as PW1 and produced exhibits 1-6 as per her list of documents and called one witness to testify in support of her case. TOBIKO OLE RAPIO testified as PW2. He stated that he was a member of the Kipise Land Adjudication Committee and confirmed that they allocated the Plaintiff the suit land plot no. 1477 within the Kipise Adjudication Section.

11. On 11th July, 2017, the same came up for Defence hearing. The 1st Defendant testified as DW1, produced his exhibits as per his list of documents and called 2 witnesses to testify in support of his case. SANKALE OLE KARARRU; the 1st Defendant's father, testified as DW2. He maintained that he was given the dispute land by the elders for his eldest son. In 2002, the allottees were given title to their respective land parcels. And stated further that the plaintiff has her own parcel of land different from the suit property. SAMSON KAPONKO testified as DW3. He stated that was the vice chairman of the Committee. He confirmed that the 1st Defendant was allocated land during the demarcation and adjudication process, even though he was a minor at the time it was normal to have the first born be allocated land.

12. After their testimonies the Defence closed their case and the court issued direction on the filing of final written submissions.

C. ANALYSIS AND DETERMINATION

13. I have carefully read and considered the Plaintiff and the various Statements of Defence filed by the Defendants thereto, the respective exhibits and the rival submissions. On that account, it is this court's considered view that the following issues arise for determination: -

a. **Whether this honourable court has Jurisdiction to entertain the suit herein**

b. **Whether the Orders sought in the Plaintiff are tenable**

c. **Who is the Bonafide and/or Legal owner of Plot No. 1477 within Kipise Adjudication Section.**

A. Whether this honourable court has Jurisdiction to entertain the suit herein

14. As was held in the celebrated case of **Owners of Motor Vessel "Lillian S"**, jurisdiction is everything and it goes to the root of the case; without jurisdiction, the court must down its tools.

15. Further, the Supreme Court of Kenya in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that 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... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

16. **Section 29 (1) 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.

17. The Court of Appeal in **Watuku Mutsiemi Watuku & another v Republic & 5 others [2018] eKLR** noted that appeals to the CS/Minister are indeed final under the land adjudication process and subject only to the Judicial Review process of the High Court.

18. From the pleadings filed in court it is evident that the Plaintiff herein is aggrieved by the manner in which the decision making process was conducted by the 2nd Defendant and hence the decision to overturn the 3rd Defendant’s Orders; whose effect was to revert the land to the 1st Defendant. Such allegations can only be dealt with adequately and sufficiently by a court exercising the Judicial Review Jurisdiction. The Plaintiff is majorly focusing on the procedure applied by the 2nd Defendant in arriving at his decision of 06/09/2011 at the appeal stage.

19. The suit as filed herein is a Judicial Review Application disguised as a plaint when in fact the final orders being sought are only tenable under Judicial Review; which is the appropriate forum to deal with issues on the decision making process. It is therefore clearly the intention of the Plaintiff that should the declaratory orders be granted as sought herein, the same would have the same effect as a Judicial Review order of *certiorari* notwithstanding the expiry of time for filing for review or the forum. That is a circumvention of the mandatory and clear provisions of the law particularly under **Section 9(3) of the Law Reform Act** and **Order 53 Rule 2 of the Civil Procedure Rules** dealing with Judicial Review.

20. This court can only supervise the Minister’s administrative process and exercise of power through a judicial review application as that is the process concerned with decision making process. I thus reiterate that; if the Plaintiff was aggrieved by the decision of the 2nd Defendant and wished to challenge it, it was incumbent on her to follow the prescribed procedure as outlined in the Land Adjudication Act, the Law Reforms Act and the Civil Procedure Rules as outlined above. The reasons given that she could not file the Judicial Review Application since the proceedings and decision of the Appeal had not been provided in time are neither here nor there.

21. In **Lepore Ole Maito -vs- Letwat Kortom & 2 Others [2016] eKLR** the court in grappling with the provisions of the Land Adjudication Act with particular regard to the dispute resolution mechanism held as follows: -

“The Land Adjudication Act, sets an elaborate procedure through which the rights and interests of all persons is to be established and once that process and procedure is followed and completed the determination of such rights and interests is final. The Act provides an appropriate mechanism for resolution of any disputes. The Minister is the apex in that dispute resolution mechanism and once an appeal is made to the Minister and determined under the provisions of Section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister’s decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction.”

22. In view of the foregoing, I find that this Honourable Court has no jurisdiction to entertain the present suit as filed, the Plaintiff herein ought to have invoked the court’s judicial review jurisdiction as stipulated.

B. Whether the Orders sought in the Plaint are tenable

23. The next issue for determination is whether the orders sought by the Plaintiff are sustainable and can be granted by this court, particularly, prayer numbers a, b, c, d and g in the plaint. It is this court’s considered view that the said orders as sought have judicial review reliefs connotation and thus can only be granted by the court exercising the Judicial Review jurisdiction.

24. Having held that this honourable court lacks the requisite jurisdiction to determine the present suit, I find that it would amount to an

academic exercise to determine issue no. 3 as indicated above.

CONCLUSION

25. In the Upshot, I find and hold that this Honourable Court has no jurisdiction to entertain the present suit as filed and Order that the suit be and is hereby struck out with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

Judgment delivered virtually in presence of: -

Mr. Lesikito for Plaintiffs

Mr. Yenko for Defendants

Timothy Court Assistant