



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC PET NO. 21 OF 2019

IN THE MATTER OF ARTICLES 10,20,21,22,23,35,40,48,50,60,61,63,64,165,232,258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE LAND ACT,2012

IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

IN THE MATTER OF THE COMMUNITY LAND ACT (2016)

BETWEEN

JOHN PAUL KIRRUTI & 7 OTHERS.....PETITIONERS

AND

NTARI OLE SHONKO & 10 OTHERS.....RESPONDENTS

RULING

The Petitioners had by a petition dated 23rd August, 2019 brought under Articles 10,20,21,22,23,35,40,48,50,60,61,63,64,165,232, 258 and 259 of the Constitution of Kenya 2010 on their own behalf and on behalf of the residents of Oltepesi Adjudication Section Narok County sought for declarations: -

- a. That the application raises urgent issues that need to be heard during the High Court vacation
- b. That the 8th Respondent issued a notice on 14th June, 2019 declaring the section complete and opened the adjudication register for inspection.
- c. That it is now past the statutory 60 days required for inspection of the adjudication section before the 8th respondent can forward a no objection register.
- d. That the petitioners and members of Oltepesi adjudication section are apprehensive that the 8th respondent will at any time forward the no objection register to the 10th respondent.
- e. That there have been numerous objections raised by the members of Oltepesi adjudication section but none has ever been heard, not even issuance of summons to the objectors.

It is in the Petitioners contention that the 1st to 6th respondents in collusion with others fraudulently embarked on the demarcation of land and allocated the land to others to the detriment of the members of Oltepesi Adjudication Section and inequitably allocating land to themselves and other non-members.

The 1st to 7th petitioners contend that they have been in occupation of their individual parcels of land for several years raising from 15 to 25 years and their names are missing from the register, while the acreage of land owned by the 3rd, 4th, 5th and 6th and 7th had there acreage reduced and they accuse the 1st to 6th respondent of impunity in allocating large tracts of land to themselves and that the adjudication process has been characterized by serious irregularities and the same done without public participation leading to a flawed process and if the same is allowed to continue their individual constitutional rights will be violated and they will suffer substantial damage and loss and they thus pray that the actions of the 1st to 8th respondents be declared null and void.

The 1st to the 7th respondents raised a preliminary objection on points of law to the entire petition on the grounds that the petitioners' rights and interests have not crystallized as being capable of protection under Article 40 of the constitution of Kenya, 2010 and that the petitioners have failed and/or refused to exhibit the remedies provided for under the Land Adjudication Act and consequently the court lacks the requisite jurisdiction to entertain the proceedings as the same is premature, misconceived and incompetent and an annuity pursuant to the practice directions of this court, I will first wish to dispose off the preliminary objection as raised by the 1st to 7th respondents and to this end the parties had filed their respective submissions to have the preliminary objection disposed off.

However, the 8th to 11th Respondents elected not to file any submissions and I will thus make a determination of the preliminary objection their lack of filing their submissions notwithstanding.

The 1st to 7th respondents submitted that the petitioners have no title to the land as the adjudication process is ongoing and hence their rights have not crystallized into rights capable of being protected under Articles 40 of the constitution of Kenya 2010.

The Respondents on whether the petitioners have exhausted the remedies provided for under the land adjudication act referred to the provisions of section 29 (1) of the Land Adjudication Act which provide that any person affected by an Adjudication register in any respect may within 60 days upon the publication of the register object to the adjudication office in writing. It is their contention that the petitioners have filed their objection before the Land Adjudication Officer and the same is yet to be heard and they are thus bound to wait for the determination of their objections.

The petitioners in submissions contend that their rights have crystallized because the Adjudication process is almost to be completed and land has inequitably been allocated to non-defending persons and that the Adjudication officer had opined that this matter be addressed by court as the matter was contentious.

On whether they have exhausted the Dispute Dissolution Resolution mechanism under the Land Adjudication Act they contend that the Adjudication offices had issued a Notice of completion of register on 14/6/2019 but the same came to their knowledge in August 2019 a few days to its lapse. They stated that they have filed their objections but the adjudication officer had failed to hear the objection and referred the matter to court.

It is the petitioners further contention that the consent granted by the Land Adjudication Officer under Section 30(1) of the land Adjudication Act overrides the provisions of Section 26 and 29 of the Act and therefore the court has jurisdiction to hear and entertain the petition taking into account the provisions of section 162(20) of the constitution of Kenya, 2010 establishing the ELC and under section 13 (2) of the ELC Act.

The Petitioners' lastly contended that the preliminary objection as drawn does not raise pure points of law.

I have read and considered the preliminary objection dated 16/9/2019 and the rival submissions filed by the parties and the issue for determination before me are:-

1. Whether the rights of the Petitioners under section 40 of the constitution of Kenya are capable of enforcement.
2. Whether the court lacks the jurisdiction to hear the petition herein in view of the provisions of section 26 and 27 of the Land Adjudication Act and in view of the preliminary objection

What constitutes a preliminary objection on points of law is now well settled as stated in the case of **Mukhisa Biscuits Manufacturing Limited –versus-Westend Distributors Limited(1969)EA 696**. It raises pure points of law and if when it is argued as a preliminary point may dispose off the suit.

It is the 1st to 11th Respondents contention that the instant petition offends the provisions of section 26 and 29 of the Land Adjudication Act as the petitioners have not exhibited the Dispute Resolution Mechanism within the said and thus the petition is premature as it offends a statutory provision of section 26 (1) of the Land Adjudication Act which provides:-

“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.”

The above provision provides that a person aggrieved by an Adjudication process must file their objections with the Land Adjudication Officer within 60 days of the publishing of the completion of the register. The Petitioners admit that they have filed their objections with the land adjudication officers but he has failed to hear the same and consequently referred the same to the court. I have looked at the pleadings and I have not seen any reference by the Land Adjudication of this dispute to the court and furthermore no such process of reference exists it is the petitioners who have come to court on their own and if the consent by the Land Adjudication officer under section 30 is what they inferred as a reference that is absolutely wrong.

The procedure outlined under section 26 and 29 of the land Adjudication Act are elaborate and that in my opinion should be the first point of call for any person who is dissatisfied with a decision during an Adjudication process. If the land adjudication officer had refused to hear the petitioners' objections as claimed the right recourse ought to have been by way of a Judicial Review Application compelling the Land Adjudication Officer to hear their objections.

It is my finding that where a statute provides for mechanism for the resolution of any dispute as integrated under section 26 and 29 of the

Land Adjudication Act then a party must first exhaust that particular process and in view of the above I find that the preliminary objection is merited and the same therefore succeeds on the ground that the court lacks jurisdiction to hear the instant petition.

On whether the petitioners' rights under Article 40 of the constitution have crystalized I will not make a determination on the same as I find that I have no jurisdiction.

The upshot of the above is the preliminary objection succeeds and I strike out the petition. Each party to bear their own costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **5th** day of **MAY, 2020**.

Mohammed Kullow

Judge

5/5/2020

In the presence of:

CA:Chuma

N/A for the parties

Mohammed Kullow

Judge

5/5/2020