



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 20 OF 2016

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PURSUANT TO ARTICLES 2,10,19,20,22,23,40(1) (2) (3), 47 (1) AND 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 4 AND 12 OF THE FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION PRACTICE AND PROCEDURE RULES, 2012

BETWEN

MORRIS KIREMA M'ITURU.....PETITIONER/APPLICANT

VERSUS

JAMES M'AMANJA M'RUKUNGA.....1ST RESPONDENT

TIGANIA EAST DISTRICT LAND ADJUDICATION

AND SETTLEMENT OFFICER..... 2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This ruling is in respect of the Preliminary Objection to the entire petition filed on 6th December 2016 brought forth by the 1st Respondent. The grounds raised there in are that the petition has no legal foundation as the applicant failed to exhaust all statutory obligations and remedies provided for under the Land Consolidation Act CAP 283 and the Land Adjudication Act CAP 284. It is also averred that Petitioner had filed a similar matter in respect of the same subject matter. Directions were given way back on 7/12/2016 for the P.O. to be canvassed by way of written submissions.

2. The 1st respondent submitted that the petitioner failed to exhaust all statutory obligations and remedies before filing this petition. He extensively cited the provisions of section 26 of the Land Consolidation Act with emphasize on subsection (3) which provides that “no appeal shall lie against any decision by the Adjudication Officer to dismiss an objection ...”. He also avers that under the Land Adjudication Act, any person who has an objection to the adjudication register ought to appeal within 60 days to the Minister, whose decision is final under Section 30. 1st Respondent avers that these provisions of the aforementioned statutes were intended to limit unnecessary litigation resulting from the adjudication process.

3. In addition, it is submitted for the 1st Respondent that the petitioner had filed *Judicial Review No. 5 of 2014 (Meru)* but the matter was struck out as Petitioner failed to file a substantive motion within the framework provided by Order 53.

4. 1st Respondent therefore claims that Petitioner is simply shopping for justice by jumping from one court to another and from one statute to another. He referred to the case of Abdullah Mangi Mohamed vs Lazurus Beja & 5 others Constitutional Petition No. 59 of 2011. Where it was observed that **“I would agree with the counsel for the respondents that where there is a dispute as to the applicants entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property rather than dog the constitutional court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for the enforcement of the constitutional right to property should be discouraged.”**

5. The petitioner submitted that the petition is meritorious and hence, he ought to be given a chance to be heard. He averred that judicial review applications are *sui generis* (neither civil nor criminal in nature), but have unique jurisdiction mainly to check on public bodies and that Judicial Review deals not with legality of the decision, but the decision making process. He further avers that the provisions of the Land adjudication Act and Land Consolidation Act cited by the 1st Respondent do not bar a litigant like the petitioner from seeking judicial review orders. He also submits that Under Article 23(f) of the Constitution of Kenya 2010 the court has jurisdiction to issue orders of judicial review through a constitutional petition while Article 22 (1) of the Constitution of Kenya gives every person the right to institute court proceedings claiming breach or violation of fundamental rights.

6. Petitioner further claims that the P.O does not raise pure point of law as stated in Mukhisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd 1969 E.A 696. He also claims that the authority of Abdullah Mangi Mohamed (supra) relied on by the 1st respondent is distinguishable from this case in that the dispute in the Abdullah case did not constitute a constitutional petition at all as it was a case of two competing titles.

Determination

7. In Mukhisa Biscuits manufacturing Co. Ltd Vs. West End Distributors (1969) E. A 696 at page 700 law J.A. stated the fundamental nature of a Preliminary Objection as follows;

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit.

Sir Charles Hewbold P added as follows at page 701:-

“A preliminary objection is in the nature of what used to be a demurrer. 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 facts are to be ascertained or if what is sought is the exercise of judicial discretion”.

8. The 1st Respondent raised the Preliminary Objection based on the ground that the petitioner failed to exhaust all statutory obligations and remedies under the Land Consolidation Act and Land Adjudication Act before filing this petition and that a similar matter had previously been filed. Under paragraph 14 (n) of the Petition, the adjudication process referred to by the Petitioner fell under the Land Consolidation Act (Cap 283 laws of Kenya). The petitioner had raised her objection at Tigania East District Akaiga Adjudication section of which a determination/ decision was made.

9. Section 26 (3) of the Land Consolidation Act CAP 283 provides that:

“(3) No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be....” .

10. Once an objection is raised and a decision is made by the adjudication officer his/her decision is final. Petitioner claims that the petition is not an appeal but rather, he is seeking judicial review orders which under Article 23(f) of the Constitution the court has jurisdiction to issue through a constitutional petition. However, the 1st respondent stated that this matter was dealt with in Judicial Review No. 5 of 2014. In that matter the court struck out the application for the notice of motion was not filed in time.

11. Is this Petition Res-judicata?. Section 7 of Civil Procedure Act provides that :

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

12. I have seen the Ruling in In Judicial Review No. 5 of 2014, which is an annexure to the Replying affidavit of the 1st Respondent. In the Judicial Review case, the petitioner sought for an order of certiorari in relation of the proceedings, findings and decision made on 5th December 2013 in objection No. 636 over land parcel number 6348 situated in Akaiga adjudication section. In this suit, petitioner is seeking order of (interalia) certiorari to quash the proceedings, findings and decision made by the 2nd respondent on 5th December 2013 in objection No. 636 over and land parcel number 6348 situated in Akaiga Adjudication Section.

13. When you compare the two suits, the parties are the same, the orders sought are similar. I am of the view that this petition is indeed res judicata.

14. I also find that adjudication process is primarily provided for under two statutes that is the Land Consolidation Act and the Land Adjudication Act. Both acts have elaborate mechanisms in regard to dispute resolutions. The acts deal with ascertainment and recording of rights and interests in land. It is only at the tail end of the dispute resolution mechanism and after the closing of the adjudication register can it be said that such rights and interests in land have been ascertained. I am therefore in agreement with the holding in **Abdullah Mangi Mohamed V Lazarus Beja & 5 Others[2012] eKLR (supra)** that **“where there is a dispute as to the Applicant's entitlement to property, and where there exists a statutory mechanism for the resolution of the dispute, that statutory procedure should be utilized in the determination of the Applicant's claim to the property rather than clog the Constitutional Court with applications for enforcement of purported rights which require prior determination”**.

15. In conclusion, I find that the Preliminary Objection is merited. This Petition is hereby dismissed with costs to 1st Respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 3RD OCTOBER, 2018 IN THE PRESENCE OF:-

Court Assistant: Galgalo/Faith

Mutuma for petitioner

Rimita holding brief for Ondari for 2nd and 3^d respondents

Petitioner

1st respondent

HON. LUCY. N. MBUGUA

ELC JUDGE