



REPUBLIC OF KENYA

IN THE ELC COURT AT NAROK

PET 16 OF 2019

IN THE MATTER OF: ARTICLES 10, 19,20,23,35,40,48,50,60 AND 232 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA REPEALED)

IN THE MATTER OF NAIKARA ADJUDICATION SECTION

BETWEEN

JOSEPH S TOOTIO & 12 OTHERS.....PETITIONERS

-VERSUS-

THE DISTRICT LAND ADJUDICATION

SECTION AND SETTLEMENT OFFICER,

NAROK SOUTH & 24 OTHERS.....RESPONDENTS

AND

NITIANGAU OLE NKOYO & 30 OTHERS.....INTERESTED PARTY

RULING

Before me is a Notice of Preliminary Objection dated 16/7/2019 filed by the 4th -25th Respondents against the Petitioner’s Application dated 2/5/209 raised on points of law and jurisdictional objections that:-

1. That the suit offends the provisions of section 30 (1) of the Land Adjudication Act and therefore, this court lacks jurisdiction to entertain the present Petition.
2. That the Application is grossly incompetent, misconceived and a non-starter and abuses the court process.

The Notice of Preliminary Objection was canvassed by way of Written Submissions. Counsel for the 4th-25th Respondents’ submitted the meaning of a preliminary objection as per the case of *Mukisa Biscuit versus West End Distributors [1969] E.A 696* and the case of *Owners of the Motor Vessel ‘Lillian S’ Caltex Oil Kenya Limited (1989)KLR* on jurisdiction. Counsel further submitted on Section 30 of Land Adjudication Act. It is the Counsel’s submission that once the register has been completed the same is published and displayed for a 60 days inspection period so that everyone gets an opportunity to challenge an entry or an omission therein as per section 26 of the Land Adjudication Act. That pursuant to Section 30, this court lacks jurisdiction to entertain the application until the adjudication register for Naikarra Section has been completed.

Counsel for the Petitioners submitted that for a Preliminary Objection to be sustainable, the same must be on clear points of law and should not entail delving into the contested facts or evidence. That while Section 30 (1) is with regard to interest in land, the same does not apply in a constitutional petition brought under constitutional provisions and most importantly where the petitioners plead that during the adjudication process their constitutional rights were threatened, infringed or violated. Counsel has further submitted on Article 22 of the Constitution on institution of proceeding and Article 23 on the authority of the court to uphold and enforce the bill of rights. Counsel has relied on the case of the *Attorney General Versus Isaiah Muturi Mucee* that no case is congruent to another and as such this is a constitutional petition which ought to be treated separately. Counsel has also relied on the case of *Lemitei Ole Koros & Another versus Attorney General & 3 others (2016) eKLR*. It his submission that the Preliminary Objections raised are unmerited and should be dismissed with costs.

Counsel for the 1st, 2nd and 3rd Respondents submitted that the Petitioners' first port of call should have been the procedure as laid out in Section 30 of the Land Adjudication Act as per the case of **Speaker of National Assembly Versus Karume & Geoffrey Muthinja Kabiru & 2 Others versus Samuel Munga Henry & 1756 Others**. Counsel for the 1st, 2nd and 3rd Respondent has further buttressed the Submissions of Counsel for the 4th -25th Respondent.

I have carefully analysed the Submissions filed by rival parties and the issue for determination is whether this court has jurisdiction to entertain the Application dated 2/5/2019. Indeed I have taken time to peruse the application dated 2/5/2019 and the prayers sought are as follows:-

a) Spent.

b) Spent.

c) Spent

d) That pending the inter-partes hearing and determination of this Application, the 4th-25th Respondents being the members of the Land Adjudication Committee of Naikarra Adjudication Section be restrained from carrying out any functions as members of the Land Adjudication Committee and or conducting themselves as such.

e) That pending the hearing and determination of the Petition, this honourable court be pleased to issue an injunctive order restraining the 1st Respondent and his or her agents, servants, employees, subordinates and any person acting on his/her behalf from continuing with the adjudication, survey and demarcation process of Naikarra Adjudication Section including preparation of the adjudication records.

f) That pending the hearing and determination of the Petition, the 4th-25th Respondents being members of the Land Adjudication Committee of Naikarra Adjudication Section be restrained from carrying out any functions as members of the Land Adjudication Committee and or conducting themselves as such.

g) That costs of this application be provide for.

Indeed, jurisdiction is everything and without it, the court must down its tools. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** in which the court stated, 'So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit'.

The procedure for acquisition of land under Adjudication is clearly set out in the Land Adjudication Act, Cap 284. Section 5 of the Act provides that: - (1) The adjudication officer shall by notice either— (a) establish adjudication sections within the adjudication area; (b) establish the whole adjudication area as an adjudication section. (2) A separate notice shall be published in respect of each adjudication section, and in each such notice the adjudication officer— (a) shall define as clearly as possible the area of the adjudication section; (b) shall declare that interests in land within the adjudication section will be ascertained and recorded in accordance with this Act; (c) shall fix a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer, either in writing or in person or by his agent duly authorized according to law (including recognized customary law); and (d) may require any person making a claim to point out to the demarcation officer or to demarcate or assist in the demarcation of the boundaries of the land in which he claims to be interested or to clear any such boundaries or any other line in the manner and before a date fixed by the demarcation officer.

Section 26 of the Act provides for Objection to adjudication register as follows: - (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.

Section 29 (1) on Appeal provides that:- 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.

Section 30 (1) of the Act provides: - 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. (2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs. (3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.

Based on the foregoing, I find that the Notice of Motion dated 2/5/2019 pre-mature and devoid of exhaustion of all the available remedies provided in the Land Adjudication Act. As such the Notice of Preliminary Objection dated 16/7/2019 is upheld and the Orders granted on 23/5/2019 are hereby vacated with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK ON THIS 13TH DAY OF JULY, 2021

MOHAMED N. KULLOW

JUDGE

13/7/2021

In the presence of:

Ms Mogere for the petitioners

Mr Kamwaro for the 4th and 5th respondents

CA:Chuma