



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC JUDICIAL REVIEW NO. 06 OF 2020

FRANCIS MANTHI KITOBEAPPLICANT

VERSUS

THE COUNTY SURVEYOR - MAKUENI COUNTY.....RESPONDENT

AND

TABITHA MAKA

TITUS MUTUKU KIMANDI

NICHOLAS KYALO KIMANDI INTERESTED PARTIES

RULING

1. What is before this court for ruling is the Respondent’s Notice of Preliminary Objection dated 15th December, 2020 and filed in court on 17th December, 2020. The Respondent seeks to have the Notice of Motion application dated 23rd September, 2020 and filed in court on 25th September, 2020 dismissed with costs on the ground that;

a) That this Honourable Court lacks jurisdiction to entertain this application for lack of the mandatory statutory consent to file this case by virtue of section 8 of the Land Consolidation Act, Cap 283 and Section 30 of the Land Adjudication Act, Cap 284, Laws of Kenya as the Adjudication of Kyamuoso Adjudication Section has not been finalized.

2. Directions were issued that the application be canvassed by way of written submissions and at the time of writing this ruling, it is only the Respondent who had filed his.

3. Relying on Section 8 of the Land Consolidation Act, Chapter 283 and Sections 29 and 30 of the Land Adjudication Act, Chapter 284, the Respondent has submitted that there is no evidence to show that the Applicant herein sought consent of the Land Adjudication Officer which was denied on the basis that he had lodged an appeal before the Minister. The Respondent further submitted that having been denied consent, Applicant should have lodged an appeal before the Minister within 28 days as is provided under Section 30(3) of the Land Adjudication Act.

4. In support of their submissions, the counsel for the Respondent relied on the case of **William Mutuura Kairiba -Vs- Samuel Nkari & 2 Others [2018] eKLR** where the court stated thus;

“At the outset, I find that this preliminary objection raises important pure points of law. The first ground concerns filing of suits without the consent of District Adjudication Officers as required by the law. The second ground concerns the non-exhaustion of legal stipulations.

Section 30 (1) of the Land Adjudication Act states as follows;

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 adjudications section has become final in all respects under section 29(3) of this Act.

The effect of Section 30(1) is that unless the register has become final under Section 29(3) of the Act, all courts are mandatorily prohibited from entertaining disputes concerning land falling within adjudication areas.”

5. They also relied on the case of Reuben Mwangera M'itelekwa -Vs- Paul Kigea Nabea [2014] eKLR where it was held;

“There is no argument regarding the fact that the adjudication register for the Adjudication section where the suit land is situate had not become final in all respects under Section 29(3) of the Land Adjudication Act at the time when this suit was filed.

An examination of the court records reveals that a consent from the Land Adjudication Officer was not annexed to the suit documents when this suit was filed. The Plaintiff has annexed to his further supporting affidavit a consent form the District Land Adjudication Officer dated 27th June, 2011. The said consent concerns Parcel Nos. 4419, 6127, 4946 and 6323. Parcel No. 372 is not mentioned. The requirement for consent to be granted by the Land Adjudication Officer before a suit can be granted is a statutory requirement. It cannot be considered a procedural technicality. It is not a mere technicality. It is a legal issue. In accordance with Section 30 of the Land Adjudication Act this Court and any other court should not entertain any suit filed except with the consent of the Adjudication Officer until the register for that adjudication section has become final.

Section 8(1) of the Land Consolidation Act directs that no cognizance should be taken of any suit appertaining to an adjudication rea unless there was prior consent in writing of the Adjudication Officer. section 8(2) requires officers of all courts to be satisfied that the opposite consent has been granted by the Land Adjudication Officer before issuing any plaint or other legal process for the institution or continuance of any proceedings prohibited by Section 8(1).”

6. They further relied on the case of Musana Ole Pere & Another -Vs- District Land Adjudication Section and Settlement Officer – Narok South & 23 Others; Paramalai Pere & Another (Interested Party) (2019) eKLR where it was held;

“By virtue of the provisions of the provisions of Section 30 of the Land Adjudication Act the Petitioners were under a mandatory obligation to seek for the consent of the Land Adjudication Officer.”

7. Arising from the above, the Respondent submitted that the adjudication register has not been finalized, and the Applicant having not obtained the necessary consent as per the provisions of Section 8 of the Land Consolidation Act and Section 30(1) of the Land Adjudication Act, this court is prohibited from entertaining this matter.

8. The Respondent has also submitted that this court lacks jurisdiction to entertain matter.

9. Having read the Preliminary Objection and the submissions filed by the Respondent, I do note that the relevant provisions of the law provide as follows;

1. Section 8 of the Land Consolidation Act.

“ (1) Subject to the provisions of this section, no person shall institute and no Court whatever shall take cognizance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuation of such proceedings has been given.”

2. Section 30(1) of the Land Adjudication Act;

“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.”

3. Section 30(3) of the Land Adjudication Act.

“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.”

4. Section 26 of the Land Adjudication Act.

“(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.”

5. Section 29 of the Land Adjudication Act;

“(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.”

10. From my reading of the above mentioned sections, it is clear that written consent of a Land Adjudication Officer is a mandatory statutory requirement which cannot be circumvented. There is nothing on record to show that the Applicant sought for consent from the Land Adjudication officer before filing this matter. And even if he sought for the said consent and the same was denied, there is nothing on record to show that he has exhausted the elaborate procedure provided for under the Land Adjudication Act before moving this court. Accordingly, the adjudication register has not become final and the implication is that this court is prohibited from entertaining this matter.

11. The upshot of the foregoing is that the Preliminary Objection has merits and the Notice of Motion application dated 23rd September, 2020 is dismissed with costs to the Respondent.

Signed, dated and delivered at Makueni via email this 9th day of September, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi