



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

CONSTITUTIONAL PETITION NO. 536 OF 2017

IN THE MATTER OF

ARTICLES 22,23,35 & 40 OF THE CONSTITUTION OF KENYA AND

ARTICLES 6 AND 7 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS AND

PROTECTION OF RIGHT TO OWN PROPERTY UNDER ARTICLES 22,23,35 AND 40 OF

THE CONSTITUTION OF KENYA, 2010

BETWEEN

STANLEY KIPKURUI CHERUIYOT.....1ST PETITIONER

WILSON KIBET BOR.....2ND PETITIONER

JOSEPH KIPYEGON CHERUIYOT.....3RD PETITIONER

JULIUS KIPYEGON CHERUIYOT.....4TH PETITIONER

RICHARD BIRIR BWOGO.....5TH PETITIONER

STANLEY KIPLANGAT SIGEI.....6TH PETITIONER

KAMBARO OLE NAUSIET.....7TH PETITIONER

SAMWEL KIMETO.....8TH PETITIONER

JOSEPH KIPROTICH TONU.....9TH PETITIONER

STANLEY KIPNGETICH CHERUIYOT.....10TH PETITIONER

PHILLIP KIPKORIR CHEBOLE.....11TH PETITIONER

DAVID KIPKURUI KIMETO.....12TH PETITIONER

JULIUS CHERUIYOT ARAP SIGEI.....13TH PETITIONER

JOEL KIPLANGAT RUTOH.....14TH PETITIONER

DAVID KIPKOSGEI CHERUIYOT.....	15 TH PETITIONER
KAURIA ARAP TANGUS.....	16 TH PETITIONER
KIPKORIR BETT	17 TH PETITIONER
DAVID CHEROSE.....	18 TH PETITIONER
KIPKEMOI TOO.....	19 TH PETITIONER
SAMWEL KIBET CHEBOLE.....	20 TH PETITIONER
SAMWEL KIPKORIR CHERUIYOT.....	21 ST PETITIONER
MUTAI STANLEY KIPLANGAT.....	22 ND PETITIONER
RICHARD KIPNGENO KORIR.....	23 RD PETITIONER
KIMANAMBIA CHERUIYOT MARITIM.....	24 TH PETITIONER
JOSEAH KIPSIGEI CHEBOLE.....	25 TH PETITIONER
THOMAS KIPKOECH KILEL.....	26 TH PETITIONER
KIPLANGAT ARAP KORIR	27 TH PETITIONER
KIPKEMOI ARAP CHESIMET.....	28 TH PETITIONER
RAELI CHERONO BARKWET.....	29 TH PETITIONER

-VERSUS-

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, TRANSMARA EAST/ WEST DISTRICTS	1 ST RESPONDENT
THE CHIEF LAND REGISTRAR.....	2 ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....	3 RD RESPONDENT
AND	
KITATEI NTINGIDAI OLE SIPEI & 8 OTHERS.....	INTERESTED PARTIES

JUDGEMENT

A. INTRODUCTION

1. The Petitioners herein commenced this suit by way of a Petition dated 22nd February, 2013. The Petitioners sought the following reliefs: -
 - i. Declaration be issued that the Petitioners are the rightful owners of land parcels number 1903, 1916, 1901, 1902,1904,1905, 1906,1907, 1908,1909, 1910, 1911, 1912, 1913, 1914, 1915, 1917, 1918, 1919, 1623, 1920, 1921, 1922,1923, 1924, 1925, 1472, 2060, 2048 and 1715 respectively within Olonkolin Adjudication Section.
 - ii. An Order of Mandamus by way of Judicial Review do issue compelling the 1st Respondent to re-open the adjudication register so that the Petitioners can inspect the same and ascertain the correctness of the same in respect of their individual land holdings to wit land parcels number 1903, 1916, 1901, 1902, 1904, 1905, 1906,1907,1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1917, 1919, 1623, 1920, 1921, 1922, 1923, 1924, 1925, 1472, 2060, 2048 and 1715 respectively within Olonkolin Adjudication Section.

B. PETITIONERS' CASE

2. The Petitioner's case is anchored on twenty-six (26) grounds set out on its face and the Supporting Affidavit of the Petitioner sworn on 22nd February, 2013 by Stanley Kipkurui Cheruiyot, on behalf of the other petitioners.
3. The Petitioners are resident of Transmara District. They have lived there for over 40 years and they own parcels of land which are subject to Adjudication under the provisions of the Land Adjudication Act, Cap 284 Laws of Kenya.
4. They own parcels of land being number 1903, 1916, 1901, 1902, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1917, 1918, 1919, 1623, 1920, 1921, 1922, 1923, 1924, 1925, 1472, 2060, 2048 and 1715 respectively. However, no title deeds have been issued since the process of adjudication has not yet been completed.
5. They have filed this petition seeking protection of their right to own private property and protection from deprivation of private property pursuant to the provisions of Article 22 of the Constitution of Kenya, 2010.
6. They do contend that their fundamental rights have been grossly contravened in the manner that the 1st Respondent has conducted Adjudication within Olonkolin Adjudication Section; which is marred by inconsistencies, irregularities and fraud. Further, the adjudication register as prepared is not a representative of the true position on the ground.
7. It is their claim that they did not have a chance to inspect the adjudication register since the place that the said register was supposed to be inspected SAUNOSIEK/ ESOKET/ TUMUYIAN TRADING CENTRE; does not exist on the ground, and thus they were unable to ascertain whether their respective land holdings had been captured correctly.
8. They further contend that the members of the said committee did not go to the ground to establish individual land holdings and verify the persons that were in actual possession and ownership of plots.
9. It is also their claim that they have tried on several occasions to access and/or peruse the adjudication register at the 1st Respondent's office with a view of establishing whether their respective parcels of land were properly demarcated but access to the said records and/or information has been denied and are therefore apprehensive that if the adjudication register is presented to the 2nd Respondent in its current state, and given the various claims that have been made by several people relating to their individual parcels of land, they will be deprived of their right to own property and thus seek this court's intervention and protection.
10. They also filed **Chamber Summons** Application dated 22/2/2013 under Certificate of Urgency; seeking Conservatory Orders barring the 1st Respondent from completing the final adjudication register and forwarding the same in respect to Olonkolin Adjudication Section and the barring the 2nd Respondent from causing registration to be effected in accordance with the final adjudication register pending the hearing and determination of the Application and the Petition respectively. **Interim Orders** were granted by Hon Justice L. Waithaka on the 7th June, 2013.
11. A Supplementary Affidavit was filed in response to the allegations made by the Respondents and the Interested parties in their respective Responses/ Replying Affidavits. They attached various annexures to prove their ownership of individual parcel of land within the Adjudication area which were notably different from the parcels that the Respondent indicated as belonging to some of the petitioners.
12. They denied ever lodging any letter of objection as alleged by the Respondent. It was their view that there is an apparent disconnect between real ownership of the land as is on the ground and the position taken by the Adjudication Officer. They also stated that they were not parties to the Judicial Review Misc. App No. 36 of 2011 filed I Kisii as claimed by the Respondents and the Interested Parties.
13. They also aver that their Constitutional rights to own property has been breached, violated and/or infringed and thus seek that a declaration be issued that they are the rightful owners of the above mentioned land parcels.

C. 1ST – 3RD RESPONDENTS' CASE

14. The Respondents opposed the Petition by way of a Replying Affidavit sworn by Mwangangi Wambua and dated 7th March, 2014.
15. It was their contention that the upon Adjudication process being completed, the residents were invited through a public baraza to witness publication of Adjudication register. The same was notified complete in accordance with sections 25 and 26(1) of Cap 284 and thereafter the residents were invited to inspect and raise any objections within the 60 days' period; about 500 hundred objections had been registered, amongst whom were some of the petitioners whose names have been extracted from the register
16. They further claimed that no application was ever made for late objection as provide for in the Act and any claim of access to the register could only be by an appeal to the minister. The petitioners had failed to comply with the requirements of sections 26 & 29 and were therefore estopped from interfering or derailing the Adjudication process.
17. They also stated that the Prayer for an order of mandamus to re-open the register as sought by the Petitioners, had already been determined in Kisii JR Misc. App No. 36 of 2011 and same held to be impractical thus the same amounted to res-judicata. They further stated that the petitioners had failed to comply with the mandatory provisions set out in section 30 of the Act. Consequently, they urged the honourable court to dismiss the Petitioners claim with costs.

D. INTERESTED PARTIES' CASE

18. The Interested Parties filed a Notice of Motion Application dated 1st July, 2013 under Certificate of Urgency; seeking the following Orders;

i. Interim Order of Stay of Proceedings and/ or further proceedings, more particularly, the scheduled mention of the instant proceedings on the 8/07/2013.

ii. The honourable Court be pleased to grant leave to the interested parties herein to be joined and/or enjoined in the instant proceedings, to enable same vindicate their rights and/or interests in respect of the suit lands, whose Adjudication has been determined.

iii. The honourable Court be pleased to grant leave and/or liberty to the interested parties to participate in the hearing of the Petition dated 22.02.2013, together with Chamber Summons dated 22.02.2013, respectively, as well as other subsequent proceedings.

iv. Consequent to prayer 3 herein being granted, the annexed Replying Affidavit be deemed as duly filed and served upon the petitioners and the Respondents, respectively, on payment of the requisite court fees.

v. Costs of this Application do abide the cause.

vi. Such further and/or other orders be made as the court may deem fit and expedient.

19. The said Application was supported by the Affidavit of KITATEI NTINGIDAI OLE SIPEI sworn on the same date. They also filed a Replying Affidavit sworn by KITATEI NTINGIDAI OLE SIPEI dated 1st July, 2013 together with annexures in support of their claim.

20. It was their position that residents and members of Olonkolin Adjudication Section, met on the 10.01.2009 and agreed and/or resolved that the Adjudication process be jumpstarted to oversee the Adjudication and Demarcation process in the area. The District Land Adjudication Officer, Trans-Mara District, in consultation with the District Commissioners, Trans-Mara East and West Districts, respectively, then appointed and nominated various persons to members of Adjudication Committee, which nomination was done in accordance with the provisions of Section 6 of the Land Adjudication Act. The persons so nominated were issued with Letters of Appointment, as Members of the Adjudication Committee.

21. The Adjudication and demarcation process was commenced, the various interests of the residents and members of Olonkolin Adjudication Section, were determined and registered. Pursuant to the determination and finalization of the Adjudication process, various residents and members were issued with Adjudication records, attesting to ownership rights over and in respect of the various plots allocated.

22. Upon the completion and/or conclusion of the Adjudication and Demarcation Process, the District Land Adjudication Officer, issued and published the completion Notice vide Letter dated 10.12.2010, whereby the same called for inspection of the register and lodgment of Objections, if any; various objections were lodged with the 1st Respondent.

23. They denied the Jurisdiction of this honourable court to make the Declarations sought. The orders of Mandamus being sought are misconceived and/or mistaken to the extent that the honourable court cannot decree the re-doing of an act, that has been undertaken and/or concluded. They urged the honourable court to dismiss the Petitioners claim with costs.

E. THE EVIDENCE

24. The honourable court issued an Order directing that the Petition be disposed by way of various Affidavits as filed and written submissions by all the parties. All the parties annexed various evidences in support of their rival claims, to wit:

25. The Petitioner had the following annexure attached to both their Supporting Affidavit and Supplementary Affidavit.

a. SKC1 – Authority to swear Affidavit on behalf of the other Petitioners.

b. SKC 2- Letter on the Appointment of the Land Adjudication Committee dated 16.08.2009.

c. SKC 3 – Notice dated 10.12.2010 on the Completion of the register of Olonkolin Adjudication Section and inspection of the same.

d. SKC 4 – Ownership of plot no. 1903 & 1613 cards issued by the Demarcation Officer, Olonkolin Adjudication Section.

e. SKC 5 - Ownership of plot no. 1905 & 615 cards belonging to Stanley Kiplagat Sigei issued by the Demarcation Officer, Olonkolin Adjudication Section.

f. SKC 6 - Ownership of plot no. 1644 & 1912 cards belonging to Julius Cheruiyot Arap Sigei issued by the Demarcation Officer, Olonkolin Adjudication Section.

g. SKC 7 - Ownership of plot no. 1856, 1915, 1948 & 1949 cards belonging to Kauria Arap Tangus issued by the Demarcation Officer, Olonkolin Adjudication Section.

h. SKC 8 - Ownership of plot cards to the other petitioners issued by the Demarcation Officer, Olonkolin Adjudication Section.

26. The Respondents also attached annexures in support of their case as follows: -

- i. **MM1 – Copy of a Notice dated 30.10.1986 declaring Olonkolin an Adjudication Section.**
- ii. **MM2 – Notice dated 21.04.1988 on appointment of committee members of the Adjudication Section.**
- iii. **MM3 – Notice dated 25.06.1990 on appointment of new committee members of the adjudication section.**
- iv. **MM4 –Chief letter dated 2.06.2010 composition of new committee through a public baraza.**
- v. **MM5 – Notice dated 15.06.2010 appointment of new committee members.**
- vi. **MM6 – Invitation to the baraza dated 11.11.2010 for witnessing the publication of the Adjudication register.**
- vii. **MM7 – Notice dated 18.11.2010 inviting residents to inspect the adjudication register and raise any objections.**
- viii. **MM8 – list of extracted names and objections raised.**
- ix. **MM9 – copy of the ruling in Kisii JR Misc. App. No. 36 of 2011.**

27. The Interested Party also attached the following annexures in support of their case: -

- a) **KNOS1 – Consent to swear the Affidavit on behalf of the other interested parties.**
- b) **KNOS 2 – Copy of the Notice declaring Olonkolin an Adjudication Section**
- c) **KNOS 3- Notice dated 21.04.1988 constitution and appointment of Adjudication committee members**
- d) **KNOS 4 – Notice dated 25.06.1990 appointment of new adjudication committee members**
- e) **KNOS 5 – copy of the minutes and resolutions of the meeting held on 10.01.2009**
- f) **KNOS 6 – copies of letter of appointment of the adjudication committee members.**
- g) **KNOS 7 – copies of the adjudication records**
- h) **KNOS 8 – Notice dated 10.12.2010 for the inspection of the register and lodging any objections.**
- i) **KNOS 9 – copy of the replying affidavit sworn by Mwangangi Wambua dated 21.06. 2010.**

F. ISSUES FOR DETERMINATION

28. I have read and carefully considered the prayers and grounds set out in the Petition; the parties' respective affidavits, exhibits adduced and rival submissions; the relevant constitutional and legal frameworks; and the applicable jurisprudence on the issues that fall for determination in the application. On that account, it is this court's opinion that the issues for determination that arise therefrom are: -

- a. **Whether this Honourable Court has Jurisdiction to determine the Petition herein.**
- b. **Whether the Petitioners have exhausted the available remedies under the Land Adjudication Act**
- c. **Whether the rights of the Petitioners (if any) have been violated.**
- d. **What are the appropriate and just orders this court can make in respect to the petition?**

G. DISCUSSION AND DISPOSITION

A. Whether this Honourable Court has Jurisdiction to determine the Petition herein.

29. It is now well established that the issue of Jurisdiction is central to the dispute resolution of any case; jurisdiction is everything and without it a court labors in vain.

30. In the celebrated case of Owners of the Motor Vehicle M.V. Lillian “s” versus Caltex Oil (Kenya) Limited (1989) KLR1. Nyarangi JA (as he then was) had this to say: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

31. Similarly, The **Supreme Court of Kenya** addressed the issue of Jurisdiction in the case of **Samuel Kamau Macharia v Kenya Bank Ltd [2012] eKLR** in the following words:

“ A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court 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.”

32. The Land Consolidation Act, Cap 283 and the Land Adjudication Act Cap 284 both provide for the process of adjudication, dealing with ascertainment and recording of rights and interests in land and further outline an elaborate mechanism in regard to dispute resolutions related to adjudication processes.

33. Section 30 of the Land Adjudication Act of Kenya provides as follows;

(1) 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)

(4)

(5)

(6)

34. It is not in dispute that the parcels of land in dispute in the present case are all within the Olonkolin Adjudication Section and as such are subject to the provisions of section 30 of the Land Adjudication Act.

35. It is also not in dispute that the adjudication process is yet to be finalized; the adjudication register is still pending and thus has not been closed/ finalized. Moreover, the Petitioners at Prayer no. 3 vide the Chamber Summons dated 22.02.2013 sought interim reliefs barring the Respondents from closing the adjudication register; which Interim Orders were granted on the by Hon Justice L. Waitaha on the 7th June, 2013. This goes further to prove that the adjudication process is yet to be finalized and the Adjudication register has not been closed.

36. The petitioners cannot therefore argue that what they are seeking are orders in rem. What is at the centre of this suit is the interest in the parcels of land as outlined in the Petition.

37. In view of the foregoing therefore, I find that the Petitioners herein in seeking a declaration in an interest in land did not comply with the laid out procedure under section 30 of the Land Adjudication Act; which provisions are mandatory and explicit.

B. Whether the Petitioners have exhausted the available remedies under the Land Adjudication Act

38. Whereas I agree with the Counsel for the Petitioners that this is a constitutional suit, a perusal of the prayers sought in the petition dated 22nd February, 2013 clearly shows that the Petitioner sought to amongst others a declaration that the petitioners are the rightful owners of the land parcels as outlined thereunder.

39. The Land Adjudication Act, in sections 26 and 29, contained various dispute resolution mechanisms. In the case of Abdallah Mangi Mohamed Versus Lazarus & 5 Others [2012] eKLR where **Muriithi J** stated 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, the statutory procedure should be utilized in the determination of the applicant’s claim to the property.”

40. Before seeking recourse from the court, a party ought to exhaust all the available remedies as provided in the Act. From the foregoing, it is clear that the Petitioners had a recourse under Section 26,29 & 30 of the Land Adjudication Act to appeal to the Minister over the denial to peruse the register or the lack of transparency in the manner in which the adjudication process was undertaken.

41. I adopt the reasoning of the court in the case of **Mutanga Tea & Coffee Company Ltd. vs. Shikara Ltd & Another [2015] eKLR** where the Court of Appeal sitting in Mombasa status thus;

“...we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.”

42. Article 159(2)(c) of the Constitution has expressly recognized alternative forms of dispute resolution which in my view would include the dispute resolution mechanisms provided under the Land Adjudication Act. There is nothing to show that the provisions of the Land Adjudication Act which deal with dispute resolution mechanism have been declared unconstitutional. It would therefore be usurpation of the dispute resolution mechanisms provided under the Land Adjudication Act if this Court were to entertain this petition pending the exhaustion of remedies under the Land Adjudication Act.

43. From the foregoing, I do hold that parties must show that they have exhausted all available remedies. Further, parties must follow the laid down Dispute Resolution Mechanism provided for under the relevant laws, in this case, the **Land Adjudication Act, this has not been the case in the present case.**

44. Counsel for the Respondent and the Interested Party also made claims that the petition as filed amount to res judicata particularly with regards to the second prayer seeking an Order of Mandamus. It was their position that the order of Mandamus being sought in the petition had been dispensed and/or determined vide Kisii HCJR Misc. App No. 36 of 2011; which addressed the similar issues as those raised in the instant petition and the same was dismissed with costs. The Petitioner on the other hand does not dispute the existence of the earlier suit filed in Kisii but in response says that the petitioners herein were not parties in the previous suit.

45. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the Civil Procedure Act. The purpose of the doctrine is to ensure that there is an end to litigation and prevents the abuse of the court process by allowing parties to re-litigate matters that have already been finally determined.

46. I have perused copy of the ruling in the previous suit as annexed to the Respondent’s Affidavit and I accordingly note that even though the petitioners herein were not parties in the previous suit; the issues raised and the subject matter of the said suit are both similar and are directly and substantially in issue in the present Petition. Further, the court the previous suit was heard and determined by a court of competent jurisdiction.

47. Section 28 of the Environment Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

48. In view of the above I do find that the Petition herein; in respect to Prayer No. 2, is res judicata. The same issue was sufficiently addressed by the honourable court in Kisii HCJR Misc. App No. 36 of 2011.

49. Having found that this Honourable Court lacks the jurisdiction to entertain the present suit and further that the Petitioners herein did not exhaust the available remedies in accordance to the provision of the Land Adjudication Act, I find that it will be an academic exercise to discuss the other two issues.

50. The upshot of the foregoing is that, I find that the Petition dated 22.02.2013 is not merited for want of Jurisdiction and the same is therefore struck out with costs to the Respondent and the Interested Parties herein. It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK ON 27TH DAY OF OCTOBER, 2021.

MOHAMMED KULLOW

JUDGE

In presence of:-