



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC PET NO. E001 OF 2021

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 21,22,23,

27(1),28,35,40,47,48 AND 54 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JIMMY PARNYUMBE LUKA.....1ST PETITIONER

SIATI MARDADI.....2ND PETITIONER

NAIPERIAI MASAGO.....3RD PETITIONER

KONANA KIRAISSON.....4TH PETITIONER

-VERSUS-

THE CHAIRMAN LAND ADJUDICATION

COMMITTEE LESHUTA LAND ADJUDICATION SECTION.....1ST RESPONDENT

NAROK WEST DISTRICT, NAROK COUNTY.....2ND RESPONDENT

THE DIRECTOR LAND ADJUDICATION AND SETTLEMENT.....3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER NAROK WEST SUB-COUNTY.....4TH RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

MASAI MARA UNIVERSITY.....7TH RESPONDENT

JUDGEMENT

1. The petitioners herein filed this suit on 27th January, 2021 vide the petition dated 25th January, 2021. They pray for Judgment against the respondents for orders: -

(a) A declaration be and is hereby issued that failure to allocate any land to several members of the Leshuta Adjudication Section whereas allocating 210 acres to Maasai Mara University in Plot o. 2585, Leshuta Adjudication Section, is discriminatory and a violation of the Petitioners' and the members' rights to fair administrative action under Article 47 and right to property under Article 40 of the Constitution of Kenya 2010.

(b) An order of certiorari be and is hereby issued to bring into this Honourable court the proceedings and decision in Minister Appeal Case NO. 578 of 2020: Leshuta Adjudication Section for purposes of being quashed and quashing the said proceedings.

(c) An order of mandamus be and is hereby issued directing the respondents to review the decision in Minister Case No. 578 of 2020: Leshuta Adjudication Section and ordering the 1st, 2nd, 3rd and 4th respondents to re-open the adjudication register and allocate land to members of the Leshuta Adjudication Section who were not allocated any portion of land in the said adjudication section and in particular the members listed in the list attached to the supporting affidavit sworn by the 1st Petitioner, Jimmy P. Luka.

(d) An order of cancellation of any title deed issued in favour of the 7th respondent, Maasai Mara University without allocating any land to the members listed in the list attached to the supporting affidavit sworn by the 1st Petitioner, Jimmy P. Luka.

(e) General damages for breach of the petitioners and their members' Constitutional rights.

(f) The respondents be directed to pay the petitioners the costs of this petition.

2. In support of the petition are the affidavits of Jimmy P. Luka, Antas Ntiyani, Dniel Sangoyo, Joseph Lerindo Tuya and Willilam Luka all sworn at Narok on 25th January, 2021. For the purpose of this petition, I shall confine myself to the supporting affidavit of Jimmy P. Luka, the 1st petitioner herein, which is sworn on his own behalf and on behalf of the 2nd to 4th petitioners.

3. The affiant has deposed therein that he is the chairman of persons living with disability within Narok County and he represents their interests. He went on to depose that he represents resident members of Leshuta Adjudication Section located in Narok West Sub-County within Narok County and in particular members who were not allocated any land during the recently concluded adjudication process of the said section some of whom are persons living with disability, that the Leshuta Adjudication Section was declared in the year 2008 and a committee of 26 clusters was formed where each cluster of representatives of special interest groups were included but persons with disability were not considered in the committee,

that the adjudication process started in the year 2011 where it was expected that every person who had an interested within Leshuta Adjudication Section would make a claim and demarcation officers would ascertain the boundaries as adjudicated upon by the committee, that the process of ascertainment of claims and identification of beneficiaries and members entitled to a share in the Leshuta Adjudication Section has always been shrouded with lack of public participation, lack of accountability and transparency, discrimination and procedural impropriety leading to several beneficiaries especially persons with disability being omitted in the final register, that several matters have been filed in this court where parties litigated on several issues of **Narok Elc Constitution Petition No. 2 of 2019**: David Kedienye and Others –versus- AG and Others, that in a meeting held by the Leshuta Land Adjudication Committee on 20th February, 2019 at Leshuta trading centre, it was realized that after all parcels of numbers were issued, some registered members did not get plots and this prompted members to look for an alternative space to accommodate them, that in a consent record in **Narok Elc Constitution Petition No. 8 of 2018**, parties agreed to co-opt Daniel Saangonyo, David Kijuku Kedienye, Katoine Ole Kisotu, Parsimeti Ole Reyia, Suyianka Ole Nkuya and Shapara Ole Mosiro as members of the Adjudication Committee, that the committee in disregard of the consents recorded in the above mentioned cases, has failed to allocate land to several members, that the Adjudication Committee, without conducting any public participation and in violation of the rights of the petitioners to own property, allocated 210 acres to the Maasai Mara University in plot No. 2585, Leshuta Adjudication Section after some committee members were manipulated by the University administration though inducement and empty promises like employment opportunities, award of tenders and scholarships thereby resulted in some registered members of the adjudication section failing to get any allocation, that one Daniel Kijuku Kedienye filed an objection, disputing the decision by the Leshuta Adjudication Committee and the Adjudication officer in allocating 210 acres to the Maasai Mara University whereas several members had completely missed out on the allocation, that while the objection was pending hearing, the Leshuta Adjudication Committee members held a meeting with the representative of the Maasai Mara University on 26th October, 2020 and a resolution was passed to allocate 210 acres to the University and 5 acres to the community water project, that it is the petitioners case that the resolution was discriminatory, capricious, contrary to the tenets of natural justice, oppressive, procedurally unfair and unjust, that the Adjudication Officer acting on the strength of the meeting between the Adjudication Committee and Maasai Mara University Council dismissed the objection filed by David Kijuku Kedienye and allocated the University 210 acres, that the 1st petitioner filed an appeal to the Minister in Appeal Case No. 578 of 2020 against the decision of the Adjudication Officer whereas the appeal was heard on 22nd December, 2020 and the Deputy Commissioner, Narok West dismissed the appeal without giving reasons and without considering the plight of the members who messed in the allocation of land, that his oral request to be supplied with copies of the proceedings and judgement/ruling by the Adjudication Officer and the Deputy County Commissioner was not acceded to at the time of filing the petition and that the petitioners have exhausted remedies provided for under the Land Adjudication Act and since the Constitutional rights have been violated, they can only seek redress in this court.

4. The 2nd, 3rd, 4th, 5th and 6th respondents filed a replying affidavit on 26th May, 2021 in opposition to the petition. The same was sworn by Josephine N. Njoroge, the Land Adjudication and Settlement Officer Narok South/West.

5. The affiant deposed that she had duly been authorized by the 1st respondent to depone to the affidavit. she went on to dispose that the Land Adjudication Committee set aside land in the Adjudication Section and reserved it for Maasai Mara University (then Narok University College) after a formal request was made by the chairman Narok University College, Professor K. Ole Karei EBS, Phd on 26th April, 2011, that a committee meeting was held on 13th April, 2011 at Leshuta Trading Centre with only one agenda to discuss the request from Narok University for a parcel of land to construct a satellite campus at Leshuta and all members agreed to the request, that Daniel Saangonyo and Joseph Tuya who alleged that the decision to allocate Maasai Mara University was made without the engagement of members and without public participation were and are still committee members and attended this meeting, that out of eight persons listed in annexure JPL 3 as being members who missed on allocation of land were amongst 12 persons said to be “improperly excluded for prioritized consideration” in **Constitution Petition No. 8 of 2018** where the 1st petitioner and the 1st respondent in this petition entered into a consent which was adopted

as an Order of the Court on 26th September, 2018, that Leshuta Land Adjudication Committee held a meeting in February, 2019 where one of the resolutions was the adopting of Court Order in Constitution Petition No. 8 of 2018 within 90 days, in addition to the 12 persons recognized by the court order; one hundred and seventy-four (174) persons were listed for consideration, that an order was issued on 2nd April, 2019 in the same **Constitution Petition No. 8 of 2018** in the High Court at Kericho that amended the earlier consent order of 30th August, 2018 arguing that the implementation of it had been delayed by objection to the Adjudication Register Case No. 41 of 441 and these cases have now been concluded and that it was ordered that the 1st respondent do implement the consent by sub dividing parcel No. 2685 and 2687 to the list of persons provided therein, that on 10th April, 2019 an application was made by eight applicants seeking to quash the consent earlier entered into by the 1st petitioner and the 1st respondent herein and sought orders to stay further proceedings and or execution of any orders as a result of the consent recorded by the 1st petitioner and the 1st respondent in this suit, that a ruling was made on 16th December, 2019 and the court stated that the consent order entered by the parties was illegal and void and was thus set aside together with any other consequential orders of the court and the applicants were joined in the suit, that to the best of her knowledge the 1st petitioner has not pursued **Pet No. 8 of 2018** to its conclusive end and is abusing the process of this court by filing multiple suits litigating over the same issues, that the petitioners from that time the University was allocated the land have never filed a committee case or any objection against the adjudication register case on that parcel of land as is required under the Land Adjudication Act, that the land owner in Leshuta Adjudication Section one Shapara Ole Mosiro and not David Kadienye as stated in the petition who also happens to be the chairman of the Land Adjudication Committee filed an objection to the adjudication register case which was heard and determined by the Land Adjudication Officer on 22nd February, 2019, that the procedure demands that if the objector is dissatisfied with the decision of the Land Adjudication Officer should have been the most logical person to file an appeal to the Minister, that the Office of the Land Adjudication and Settlement has never refused a request to avail relevant proceedings of the objection to the adjudication register against parcel no. 2585 belonging to Maasai Mara University, that is how he was able to know that the objection case had been dismissed and advised the petitioner on the procedure to be followed to file an appeal against the decision and the statutory charger for the same.

6. The 7th respondent in opposition to the petition filed its reply on 4th March, 2021 the same being dated 28th February, 2021. It also filed a replying affidavit sworn on 26th February, 2021 by Daniel N. Naikuni Nchorira, the Director Endowment Fund wherein he deposed *inter alia* that the 7th respondent was rightly allocated the land by the Adjudication Committee after the membership of the group agreed to the idea of allocating to the 7th respondent the land and decision communicated to the 7th respondent though the District Land Adjudicating Officer, that the 1st petitioner who is a member of the group never raised an issue then and are surprised that he is doing it now, that the petitioners were not part of those who raised objections before the District Adjudication Officer Narok West District, that the 1st petitioner decided to appeal to the Cabinet Secretary Lands from a decision out of proceedings that he was not a party to and that the petitioners have not disclosed the nature of the prejudice they will suffer if the petition dated 25th January, 2021 is disallowed and the court cannot be left to speculate in favour of the petitioners.

7. The petition was canvased by way of written submissions.

8. In his submissions dated 11th May, 2021 and filed in court, the petitioner identified two (2) issues for determination namely: -

(a) Whether the constitutional rights of the petitioners have been violated by the actions of the respondents and;

(b) Whether the petitioners are entitled to the orders sought in the petition.

9. The 1st petitioner submitted that the actions of the respondents in disregarding the plight of the genuine members who had missed on the allocation of land in the Adjudication Section were discriminatory and violated their rights under Article 27 of the Constitution. The petitioners further submitted the respondents violated their constitutional right to fair administrative action under Article 47 of the Constitution. The petitioners contend that the negative effect of the Adjudication Section Register as presently constituted following the flawed process is an affront and infringement of the petitioners right to own property and acquire property as protected by Article 40 of the Constitution in that: -

(a) Members who have lived on the Section since time immemorial and who are named in this petition in the supporting affidavit are destined to be rendered squatters/landless and evicted from the only land, they have known to be home.

(b) There was no public participation before the decision to allocate the University a total of 210 acres without ensuring that all the entitled beneficiaries had been allocated land.

(c) The petitioners' members have been denied their right to own property under Article 40 of the Constitution.

(d) The objections and appeal filed were all dismissed without considering the grave violation of the petitioners' members constitutional right to own property under Article 40 of the Constitution.

10. The petitioners relied on the cases of **Gitson Energy Ltd -vs- Hon. Francis Chachu Ganya & 6 others (2017)eKLR, PZ Cussons East Africa Ltd -vs-Kenya Revenue Authority (2013)eKLR and Barua Gituma & 6 others -Vs- National Land Commission & 3 others (2019)eKLR**

11. The 2nd to the 6th respondents filed their submissions on 26th May, 2021 the same being dated 20th May, 2021. They identified two (2) issues for determination namely:-

(i) Whether the petition is properly before this court

(ii) Whether the allocation of land to Maasai Mara University was done procedurally

12. In answer to the first issue, their counsel submitted that the Land Adjudication Act sets out an elaborate and comprehensive procedure for dealing with any dispute that arise during the adjudication process.

13. In support of her submissions, the counsel relied on the case of **Mohamed Ahamed Khalid (Chairman) and 10 others –versus- Director of Land Adjudication & 2 others(2013)eKLR** where Angote J held:-

“The law that was applicable for the ascertainment of land rights and interests over trust land is the Land Adjudication Act Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the land adjudication and settlement officer, the land adjudication committee, the land arbitration board and the Minister’s appeal committee.

Indeed, before the Director signs the certificates of finality, the Land Adjudication Act provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the Adjudication register.

The petitioners have not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the matter in which the adjudication process was carried out.

Considering that the Land Adjudication Act, Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place.”

14. The counsel went to submit that in the instant case, an objection was filed and the same was heard and dismissed.

15. The counsel added that the petitioners have not placed any evidence on record to prove that they appealed against the decision of the Minister as provided for in the Act.

16. The counsel’s submissions were, that being the case, the petitioners cannot demonstrate that their rights have been violated without exhausting the mechanisms provided under the Land Adjudication Act.

17. The counsel added that by failing to follow the procedure laid out by a statute with regard to Adjudication process, it was improper for the petitioner to invoke the court’s jurisdiction to question either the procedural proprietary or substantive merits of the adjudication process.

18. It was further submitted that the jurisdiction of the court was prematurely invoked. The counsel relied on the case of **Speaker of National Assembly -Versus- Karume (1992)KLR 21** where the Court of Appeal held that:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

19. The counsel pointed out that even though the petitioner has alluded to the existence of other suits relating to the suit property, he has not demonstrated to the court their status and why he opted to file a fresh petition when there were different suits in place.

20. Regarding the second issue, the counsel submitted that the allocation of land to the 7th respondent was done procedurally ad in compliance with the law.

21. The counsel termed the petition as one that is full of allegations and speculations and that the petitioners have not proved with certainty any violation of their rights.

22. The counsel pointed out that this is due to lack of evidence to prove that people have been displaced and have not been settled elsewhere.

23. The counsel was of the view that whereas the petitioners may have pleaded with reasonable particularity and precision that a specific right exists, they have failed to satisfy the evidential burden that they have a right to the contested property.

24. In support of her submissions, the counsel cited the case of **Titus Barasa Makhanu -vs- Police Constable Simon Kinuthia Gitau & 3 others (2016)eKLR** where J.L. Ongutu stated thus:-

“There is no doubt that it is for the petitioner to satisfy the evidential burden that a specific right exists and which right has been violated or restricted besides pleading the same with reasonable particularity and precision.”

25. Arising from the above the counsel submitted that the petitioners have not proved that their constitutional rights were violated and hence the petition must fail.

26. The 7th respondent in its submissions dated 11th May, 2021 and filed in court on 12th May, 2021 termed the petition as one that is fatally and incurably defective, devoid of any merit and an abuse of the court process.

27. The 7th respondent went on to submit that it was rightly allocated land by the Land Adjudication Committee after the membership of the group agreed to the idea of allocating land and that the decision was communicated to it through the District Land Adjudication Officer vide his letter dated 16th July, 2021.

28. It was further submitted that the 1st petitioner who is a member of the group did not oppose the allocation and that the petitioners were not part of those who raised objections before the District Land Adjudication Officer.

29. The 7th respondent pointed out that 1st petitioner decided to appeal to the Cabinet Secretary Lands from a decision of proceedings he was not party to.

30. The counsel added that the objectors in those proceedings before the District Land Adjudication officer were satisfied with the decision arrived at.

31. The 7th respondent further submitted that it is not a party to consent orders referred to by the petitioners and that its interest in the land is solely for public good.

32. The 7th respondent urged that the petitioners have not disclosed the nature of the prejudice they will suffer if the petition dated 25th January, 2021 is disallowed and that the court cannot be left to speculate in their favour.

33. In reply to the submissions by the respondents, the petitioners filed further submissions on 14th June, 2021 the same being dated 10th June, 2021 wherein they urged that this court has original jurisdiction to hear and determine this suit.

34. The petitioners contend that they have exhausted the appellate mechanisms under the Land Adjudication Act and hence can only seek redress from this court to protect their constitutional rights.

35. The petitioners relied on the case of **Barsogat Investment Ltd -vs- County Government of Vihiga(2021)eKLR** where W. Musyoka, J stated thus:-

“I find the position taken in Republic –Vs- Independent and Boundaries Commission and anor Ex Parte Coalition for Reform and Democracy & 2 others (2017)eKLR, more persuasive. The alternative mechanisms do not oust the jurisdiction of the High Court over a constitutional petition. The High Court retains jurisdiction, after all it has supervisory jurisdiction over all subordinate courts and quasi-judicial tribunals, by dint of Article 165(6) of the Constitution, and it has unlimited original jurisdiction in criminal and civil matters, by virtue of Article 165 (3)(1). What the High Court ought to do, where it is faced with a constitutional petition, over a matter in respect of which alternative dispute resolution mechanisms exist under some law, is to exercise restraint, and allow space to the other tribunals to handle the dispute. There could be some element of overlap, but the constitutional jurisdiction of the High Court under Article 165(3)(b)(d) is specific and unique, and it cannot be exercised through the alternative mechanisms, hence in existence of those alternative mechanisms cannot possibly oust it.”

They also relied on the case of **Kenya Revenue Authority & 2 others -Vs- Darasa Investments Ltd (2018)eKLR**

36. Having perused the pleadings herein, I would agree with the counsel for the 2nd to 6th respondents that the gist of this petition is the allocation of the 210 acres of land in Leshuta Adjudication Section to Maasai Mara University, the 7th respondent herein, an act the petitioners allege that it has left genuine members dispossessed of their legal entitlement to land.

37. It is common ground that the 7th respondent was allocated 210 acres at Leshuta by the Adjudication Committee and the decision was communicated to the 7th respondent by the District Land Adjudication and Settlement officer vide his letter dated 16th July, 2021.

38. One David Kijuku Kedienye filed an objection with the District Land Adjudication Officer and the same was heard and dismissed. The said Kedienye did not appeal to the Minister. The appeal was lodged by the 1st petitioner vide Appeal Case No. 578 of 2020 who was not a party to the objection proceedings.

39. The same was heard by the Deputy County Commissioner Narok West on 22nd December, 2020 who proceeded to dismiss the same.

40. In my assessment, the only issue for determination here is:-

Whether the petitioners have demonstrated any constitutional violations of threats thereof of their right to property?

41. I do note that even though the petitioners claim to have exhausted the redress mechanisms provided for under the Land Adjudication Act and hence are now entitled to seek this court's protection of their constitutional rights, it is clear that the petitioners were not parties to the objection proceedings that were filed by other parties who appear to have been satisfied by the outcome of the said proceedings.

42. I would agree with the 2nd to the 6th respondents that the petitioners have not shown that when the 7th respondent was allocated 210

acres, the act resulted in some people being displaced. In other words, the petition is full of allegation and speculations which the petitioners were duty bound to prove but did not. Besides, there is nothing to show that the allocation of the 210 acres of land to the 7th respondent was not for public good.

43. As earlier on observed in this judgement, the petitioners were not parties to the objection proceedings and the petitioners only ventured into the proceedings by way of an appeal to the Minister.

44. In my view, it is clear that the petitioners did not follow the procedure laid out by the Land Adjudication Act. Whereas, the petitioners are entitled to institute these proceedings as is provided for under Article 22 of the Constitution, I hold that the invocation of the court's jurisdiction to question the procedural propriety or substantive merit of the Adjudication process is improper in that they ignored the laid out procedure that is provided for under the statute which in this case is the Land Adjudication Act.

45. It is not lost on me that the petitioners have not disclosed to this court what became of the other petitions that they have alluded to. Although Articles 21,22,23,27(1),28,35,40,47,48 and 54 of the constitution were cited by the petitioners, no direct particulars of the alleged contraventions thereof have been disclosed.

46. I have come to the conclusion that the petitioners resorted to an arbitrary decision to file a constitution petition when they had other avenues to have their grievances addressed. The petition herein has not been made out of necessity, merit and most importantly to the required legal threshold.

47. That said, in **Gabriel Mutava & 2 others -vs- Managing Director Kenya Ports Authority & Anor (2016)eKLR** the Court of Appeal held as follows:-

“in saying all these, we are not oblivious to the fact that a party is entitled to sue under the constitution even if there is an alternative remedy, and or other mechanism for resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation, we reiterate that the first part of call should always be suitable statutory underpinned forums for the resolutions of such disputes.”

48. Lastly, in **John Harun Mwau & 3 others -vs- Attorney General & 2 Others(2012)eKLR** the learned judges of the High Court held as follows:-

“180 In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost.” Equally, there is no reason why the state should not be ordered to pay costs to successful litigation. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”

49. The upshot of the foregoing is that the petition herein lacks merit. The order that deservingly commends itself is dismissal of the petition with costs to the 2nd to 7th respondents.

SIGNED, DATED and DELIVERD at NAROK via email on this 30th day of November, 2021.

Mbogo C.G

Judge

30/11/2021

In the presence of:

CA:Chuma