



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

ELC JUDICIAL REVIEW CASE NO. E005 OF 2021

BETWEEN

NJERU MAIRANI.....1ST APPLICANT
JOEL NGATIARI.....2ND APPLICANT
DANIEL NYAGA.....3RD APPLICANT

VERSUS

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....1ST RESPONDENT
THE LAND ADJUDICATION OFFICER-MERU SOUTH ADUDICATION AREA...2ND RESPONDENT
CABINET SECRETARY LANDS & PHYSICAL PLANNING.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

1. Pursuant to leave granted on the **20th of September 2021**, the Applicants filed the notice of motion application dated 22nd September 2021 seeking orders that:

- a) That an order of mandamus do issue compelling the 2nd respondent (the Land Adjudication Officer- Meru South Sub-county) to receive the ex- parte applicants’ claims of interest in Lands within the subject adjudication sections specified in the formal claims of interest dated 28.2.2021 (exhibited herewith as annexure NJ-2) and/or direct the recording officers of Kamaindi and Kamwimbi “B” Adjudication sections to receive the same as mandatorily provided under sections 5 (2) (c) and 19 (4) of the Land Adjudication Act.
- b) That an order of mandamus do issue compelling the 2nd respondent to issue a legally valid and effective Notice under sections 5 (2) (c) of the Land Adjudication Act fixing/specifying/setting the period (commencement and closure dates) within which all persons interested in lands in Kamaindi and Kamwimbi “B” Adjudication Sections are to present their claims thereof to the recording officers.
- c) That an order of certiorari do issue to call up and quash the decision by the 2nd respondent made on **21.6.2021** orally communicated to the ex parte applicants rejecting their “group” claims of interest in the subject lands on behalf of their respective Mbeere clans as well as the said 2nd respondent’s illegal direction to the recording officers of Kamaindi and Kamwimbi “B” Adjudication sections to reject and/or refuse to accept the said ex parte applicant’s aforesaid group claims.
- d) The an order of prohibition do issue barring the 1st,2nd and 3rd respondents from further enforcing the subject Notice of demarcation and survey of land in Kamaindi/KAMWIMBI “B” Adjudication sections dated **17.2.2021** and/ or proceeding with the said demarcation exercises without regard to the inviolable right of the ex-parte applicants under section 5 (2) (c) of the Land Adjudication Act to present their claims of interest in the subject lands for consideration in accordance with the Law.

2. The application is based upon the statement dated **14.9.2021** and the verifying affidavit of Njeru Mairani sworn on **14.9.2021** and a supplementary verifying affidavit filed on **14th October, 2021**.

THE APPLICANTS' CASE

3. The ex-parte applicants are the chairmen of their respective Mbeere clans, namely Mbutha ya Gatua Clan, Mukera Clan and Mbuya ya Kamuri Clan. The Applicants are suing on their own behalf and that of the chairmen/leaders of the thirteen (13) Mbeere Clans claiming interest in lands within Kamaindi and Kamwimbi "B" Adjudication sections. The Applicants aver that in its Judgment dated 18.12.2018 in ELC JR Case No. 16 of 2017 (Njeru Mairani & 2 Others –vs- The A-G & 4 Others), this Honourable Court noted at paragraph 16 and 19 that the Respondents had discriminated against the ex-parte Applicants and accordingly clarified that the ***“Respondents may issue another Declaration which does not breach the constitutional rights of the Applicants.”***

4. The Applicants aver that on **10.2.2020** while issuing directions on the Applicants' application to cite the Land Adjudication Officer for contempt of court, this Honourable court exhorted the said officer to follow the letter and spirit of the laid-down law while undertaking the intend Demarcation exercise. That on **17.2.2021**, the 2nd Respondent issued the Notice of Demarcation and survey of land in Kamaindi/Kamwimbi "B" sections pursuant to section 5(2) (c) of the Land Adjudication Act, notifying the general and resident public as follows:

“This is to bring to your attention that demarcation and survey work will be carried out from 3rd March, 2021 in the above mentioned section.

Please convey this information to all persons claiming an interest in land within the adjudication section so that they can make their claim according to the Land Adjudication Act Cap 284 Laws of Kenya.”

5. The applicants contended that the said notice did not fix/set/specify the period within which to present the claims as mandatorily and materially prescribed. The Applicants aver that on **28.2.2021**, they inquired from the 2nd Respondent about the demarcation period and where the recording officers would be stationed for the purpose of presentation of their claims and were told that they would be informed in due course through the Land Adjudication Committee. The Applicants aver that the said demarcation period has never been clarified by the 2nd Respondent in a cavalier disregard of the law. The Applicants further aver that they were never notified of the location of the respective recording officers' site/offices, but the applicants managed to trace the same after the demarcation exercise was flagged off on **17.6.2021** during an official function at Kabururu Market presided over by the County Commissioner, Tharaka Nithi. That on **21.6.2021** the Applicants appeared before the recording officer (Kamwimbi "B" Adjudication Section) at Kabururu market to present their respective clan claims of interest in the specified lands, but the recording officer refused to receive the same on the ground that he had been directed by the 2nd Respondent to reject them as per the ministerial directive by the 3rd Respondent. That the said recording officer then directed the applicants to the 2nd Respondent who was working inside one of the GOK vehicles. The Applicants aver that the 2nd Respondent dismissively listened to them and told them that her position still stood and that the applicants' clan group claims would not be accepted by the recording officers. The Applicants state that their attempts to engage the 2nd Respondent in a meaningful discussion of the matter and in particular the decree dated **18.12.2018** were thwarted when the 2nd Respondent dared them to go to court. The Applicants aver that they were then ejected from the place and were also not given audience by the County Commissioner Tharaka Nithi.

6. The Applicants allege that the 1st, 2nd and 3rd Respondents have refused, failed and/or neglected to acknowledge receipt of and/or respond to their demand letter dated **22.7.2021** and that even the Applicants' advocate who visited the 1st Respondent's offices at Ardhi House was not given audience citing Covid – 19 protocols. The Applicants believe that the supreme spirit of the Fair Administrative Action Act obligates administrators and state organs to show thematic responsiveness in regard to complaints of violation of the right to administrative actions which are expeditious, efficient, lawful, reasonable and procedurally fair. They contend that the Respondents' cavalier attitude is simply unacceptable and bespeaks abuse of power and impunity. The Applicants state that they believe that the Respondents are part of the scheme which has always been pursued by what they call the powerful Tharaka Nithi Political Leadership to portray the subject lands as GOK settlement scheme and to dispossess the Mbeere Community of the same. The Applicants pointed that in the aforesaid ELC JR Case No. 16 of 2017 at Chuka, this Honourable Court found and determined that the applicants had been unfairly discriminated against by being excluded from the previous demarcation exercise. The Applicants lament that it is disheartening that the Respondents are once again orchestrating that conspiracy to dispossess them of their ancestral lands by constricting the law against them. It is the Applicants contention that they ought to be allowed to present their claims in the manner provided in law. The Applicants have exhibited copies of documents allegedly from the file of the 1st Respondent showing a long history of the dispute, copies of claims submitted by the Applicants to the 2nd Respondent and a copy of a demand letter.

THE RESPONDENTS' CASE

7. The Respondents opposed the application and filed grounds of opposition dated **4th October, 2021** as follows:

1. That the application is barred by dint of the doctrine of res judicata as captured by the provisions of section 7 of the Civil Procedure Act.
2. That this matter involving the same parties over the same subject matter has been heard and concluded and judgment delivered on **18th December, 2018**.
3. That this court should not interfere or concern itself with a matter that is already adjudicated by a court of competent jurisdiction, the only way that this court may be involved is if there is an appeal or review.
4. That the application is bad in law on the ground that once the Land Adjudication and Settlement Officer issued another declaration in compliance with the court order, the declaration seized to be separate from the judgment which ordered it.

5. That in paragraph 19 of the Judgment dated **18th December, 2018**, the court ordered that the Respondents may issue another declaration which does not breach the constitutional rights of the Applicants.

6. That the Respondents on **17th October, 2019** issued another declaration establishing Kamaindi adjudication section as per the provisions of section 5 of the Land Adjudication Act Cap 284 Laws of Kenya.

7. That this matter is governed by Land Adjudication Act Cap 284 Laws of Kenya which provides for the procedure to be followed during an adjudication process. It provides for the statutory duties of the adjudication officer and the mechanism for ascertain rights and interests in land.

8. That under section 29(3) of Cap 284 the court can only entertain a suit of this nature if the adjudication section has become final in all aspects, the adjudication process is still at its commencement stage, and thus this suit is immature.

9. That the parties need to first exhaust and demonstrate that they have exhausted all the procedures provided for under the Land Adjudication Act.

10. That the application is misconceived and a non-starter.

11. That the application is vexatious, frivolous, scandalous and an abuse of court process.

8. The Respondents also filed a replying affidavit sworn by C.K. Mbui, the 2nd Respondent on **6th October, 2021**.

9. He avers that on **18th December 2018** Hon. Justice P.M Njoroge delivered a judgement in Chuka ELC JR No.16 of 2017 and the decree was issued to the effect that;

a) An order for prohibition to prohibit the 2nd,3rd,4th and 5th respondents from effecting declaration reference number ADM/LA/4/118 of **4th October, 2012** the 5th respondent declaring Kamaindi of Kamaindi Location in Igambang'ombe division pending the hearing and determination of the judicial review hereof.

b) An order of mandamus be issued bring into this court and compelling the respondents to cancel and remove declaration reference number ADM/LA/4/118 of **4th October, 2012** by the 5th respondent declaring Kamaindi location in Igambang'ombe division of want representation.

c) That the respondent may issue another declaration which does not breach the constitutional rights of the applicants.

10. The 2nd respondent avers that he complied with the said orders as follows: there was a re-declaration of Kamaindi Location in Igambang'ombe Division Meru South District as an Adjudication section with well-defined boundaries as per the notice Ref.No.ADM/LA/4/300 dated **17th October,2019**.

11. He avers that as soon as the re-declaration was done, the former declaration Ref.No ADM.LA/4/118 of **4th October 2012** ceased to apply.

12. The 2nd respondent contends that following a complaint that the Mbeere community was not well represented in the Land Adjudication Committees, it necessitated the land Adjudication & Settlement Officer to call for public barazas for election of the Adjudication Committee for Kamwimbi 'B' and Kamaindi Adjudication Sections.

13. The 2nd respondent avers that the exercise was done in conjunction with the Office of the Deputy County Commissioner, Igambang'ombe, and the area chiefs and it was well published enabling the land owners to attend and elect their representative Adjudication committees and that the meeting took place on **30th October 2019** and **19th November 2019** respectively. A copy of the minutes for the meetings are annexed.

14. He states that the committee members were inclusive of the Mbeere community and were sworn in before the Commissioner of Oath, and that those members of Mbeere community included the exparte applicants herein.

15. It is averred that on **16th September 2020**, a public meeting was conveyed by the Deputy County Commissioner in conjunction with the Land Adjudication Officer where the land owners from Kamaindi and Kamwimbi "B" discussed their pertinent issues concerning land and resolved to commence the land adjudication process. That the exparte applicants were in attendance and did not raise any issue.

16. The 2nd respondent has deponed that on **17th February 2021**, the Land Adjudication and Settlement Officer issued a notice of demarcation and survey whereby all the land owners claiming interest in land within Kamaindi and Kamwimbi 'B' Adjudication sections which include the exparte Applicants were asked to make their claims, in accordance with Section 5 (2) (c) Land Adjudication Act Cap 284. A copy of the notice has been exhibited.

17. The 2nd respondent avers that the demarcation and survey was launched under RR1 program on **17th June 2021** in Kamaindi and Karii, Kamonka, Kanthanje and Kathingithu and work started and went on well with the cooperation of all land owners.

18. He further avers that the demarcation and survey of land in Kamwimbi “B” and Kamaindi was completed and all committee cases and Arbitration Board cases finalized. That this led to the publication of Kamwimbi ‘B’ on 4th August 2021 and publication of Kamaindi on **19th August 2021**. Copies of the publications have been annexed, and the Respondents contend that the inspection of the Adjudication Registers for both Adjudication sections is still going on as per section 25(c) and 26(1) of Cap 284.

19. He avers that the members of the Mbeere community participated fully and cooperated with officers and that their parcels of land were demarcated and surveyed and others filed committee cases against their opponents. This was in compliance with Justice P M NJOROGE judgement delivered on **18th December 2018** as held under paragraph 18 and 19 of the said judgement.

20. The 2nd respondent avers that in concerted effort by the leadership of Tharaka Nithi who came together to ensure that the remaining adjudication areas are finalized it was a great work with a breakthrough and the different communities in Kamaindi and Karii, Kamoka, Kanthanje and Kathingithu are a happy lot. He further avers that as a result, the government as well as other leadership ought to put in the necessary measures to ensure that all the land owners attain their land Title Deeds at the end of the Adjudication process.

21. The Respondents reiterate that the judicial review application herein is premature, ill-advised and misplaced.

ANALYSIS AND DETERMINATION

22. The court has carefully considered the evidence on record, the submissions made and the applicable law. The Applicants are seeking orders of Judicial Review in the nature of mandamus, certiorari and prohibition. The gist of the Applicants’ case is that the ex-parte 13 Mbeere Clans have always asserted, and they continue to assert, that the parcels of land described in the claims of interest in and dated **28.2.2021** and delineated in the sketch maps attached thereof belong to the said clans, and therefore they have the legal right to present their claims of interest in the said lands. The Applicants’ complaints are that the notice of demarcation and survey dated **17.2.2021** did not fix/set/specify the period within which to present the claims of interest in the subject lands, and that the 2nd Respondent rejected the applicants’ claims of interest in the said lands. Both parties are in agreement that there were previous proceedings to wit **Judicial Review ELC Case No. 16 of 2017** at Chuka: *Njeru Mairani & 2 Others –vs – The Attorney General & 4 Others* in which the court in its judgment decreed inter alia, that the Respondents may issue another declaration which does not breach the constitutional rights of the Applicants’. The Respondents argue that this suit is res judicata. The issues that I find for determination are whether the application herein is res judicata, and if not, whether the orders of Judicial Review sought herein are available.

23. The law on res judicata is provided for by section 7 of the Civil Procedure Act which states 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.”

24. In the case of E.T. –V- Attorney General & Another [2012] eKLR, it was held that:

“For the operation of the doctrine of res judicata, first the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (see the case of Karia & Another –v- the Attorney General and others (2005)1 EA 83, 89”).

25. I will now delve right into the comparison of the two suits in order to make a determination as to whether the instant suit is res judicata. I have scrutinized each and every Applicant in Chuka Judicial Review Case No. 16 of 2017 in contrast with the Applicants in this instant suit. I note that the Applicants are the same in both suits. I also note that the Respondents are the same in both suits, save the Commissioner of Lands and the Chief Land Registrar who are missing in the present suit and the Cabinet Secretary Lands & Physical Planning missing in the former suit.

26. In ELC JR Case No. 16 of 2017, the claim was for orders of Judicial Review in the nature of prohibition and mandamus while in the present suit, the Applicants are also seeking orders of Judicial Review in the nature of mandamus, certiorari and prohibition. The two suits relate to claims over interest in the same subject lands in Kamaindi and Kamwimbi “B” Adjudication sections. The former suit, i.e. J.R. Case No. 16 of 2017 at Chuka was heard and determined on merit by a court of competent jurisdiction and Honourable Justice P. M. Njoroge proceeded and made a determination on **18th December, 2018**, where he granted the orders of prohibition and mandamus as well as an order ***“That the Respondents may issue another Declaration which does not breach the constitutional rights of the Applicants.”***

27. Having perused the pleadings and determination in the former suit J.R. Case NO. 16 of 2017, it is my finding that the present suit is res judicata. The Applicants in the former suit merely gave a face lift to their suit and are back in court litigating on the same issues. Parties cannot evade the doctrine of res judicata by merely adding or removing other parties or cause of action in a subsequent suit. Parties are forbidden from litigating in instalments. If allowed parties will forever re-litigate the same issues with the same opponent before court of competent jurisdiction. Litigation must come to an end and parties will not be allowed to litigate matters already settled and reopen closed matters. The court must remain cautious against such parties who are out to abuse the process of court by litigating endlessly on new cause of actions yet seeking the same remedies. I do find that the Applicants have misused the process of court in order to reopen already decided issues.

28. I do note that the court in the decree in JR Case No 16 of 2017 besides granting the Applicants the prayers they sought, also decreed on how the Respondents may proceed in resolving this long outstanding dispute. In my view, the actions of the Applicants to institute the

present suit may derail the execution of the decree in JR No. 16 of 2017 and is an abuse of the court process.

29. The upshot of this is that I find that the notice of motion application dated **22nd September, 2021** is res judicata and an abuse of the court process and I proceed to strike out the same with costs to the Respondents.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 14TH DAY OF DECEMBER, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Applicants present in person

Kirimi h/b Ms. Kungu for A.G. for Respondents

C. K. YANO,

JUDGE