



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

CONSTITUTIONAL PETITION NO. E004 OF 2020

IN THE MATTER OF ARTICLES 2, 10, 20, 22, 23, 28, 40, 47, 48, 50

AND 2 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ENVIROMENT AND LAND COURT

AND

IN THE MATTER OF FAIR AND ADMINISTRATIVE ACTION ACT NO.4 OF 2015

BETWEEN

MANGOKA KALUMA MUTIYSA.....PETITIONER

AND

THE CABINET SECRETARY FOR LANDS,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2NDRESPONDENT

JOHN NDUNDA KAILI.....3RD RESPONDENT

FRANCIS MULWA KYENGO.....4TH RESPONDENT

MUTUNGI MULWA.....5TH REPENDENT

RULING

1. By a Petition dated 7th of October 2020, the Petitioner herein sought for the following orders: -

- a) **A declaration that the Petitioner has a right over the land known as plot no 154 Kasunguni Adjudication Section.**
- b) **A judicial review order of Certiorari to quash the decision and or judgment of the 1st Respondent herein.**
- c) **An order of permanent injunction restraining the Respondents from interfering, trespassing either through themselves and or agents with the portion occupied by the Petitioner.**
- d) **The Respondents be condemned to pay costs of the Petition to the Petition.**

2. The Petitioner simultaneously filed a Notice of Motion under certificate of urgency of the even date and sought for the following orders: -

- a) **Spent.**

b) That the Honourable Court be pleased to stay the determination and/or consequential orders made by the 1st Respondent in Appeal No. 207 of 2012 pending the hearing and determination of this application.

c) That the Honourable Court be pleased to stay the determination and/or consequential orders made by the 1st Respondent in Appeal No. 207 of 2012 pending the hearing and determination of the Petition.

d) That the costs of the application be borne by the Respondents.

3. The application is supported by the Applicant's supporting affidavit sworn on the 7th of October 2021.

4. The Petitioner avers that sometime in 1986, the clan divided land No. 154 which belonged to their grandparents amongst the family members. That he inherited the portion of land known as No. 154 took possession and built structures. That the 3rd to 5th Respondents in total disregard of the said sub division, invaded his land thereby infringing his right to property. He further averred that the 1st Respondent conduct and action offends his proprietary rights as provided in the constitution as the law obliges its officers to uphold human dignity, rights, integrity transparency and accountability. He averred that the decision by the 1st Respondent was biased, unfair, unlawful, unreasonable and not backed by sound reasoning and that it exposed him to the risk of losing his property and urged the court to set it aside.

5. The 1st and 2nd Respondents opposed the application through the grounds of opposition dated the 29th of September 2021 as follows: -

a) That the honourable court lacks jurisdiction to entertain the Petitioner's petition.

b) That the Petitioner has failed to demonstrate with specificity any right violated.

c) That the Applicant has failed to provide proper evidence to support his claims as against the 1st and 2nd Respondents.

d) That the application and petition are not merited and the same should be dismissed with costs to the 1st and 2nd Respondents.

6. The 3rd Respondent and on behalf of the 4th and 5th Respondents opposed the application vide his replying affidavit sworn on the 15th of December 2020. He averred that it was not true that the Petitioner had inherited land parcel 154 from his grandfather as the said land belonged to his father who in turn sub divided it amongst his four sons. He averred that the clan committee erred by awarding the land to the Petitioner and that when he declared interest of ownership in 1986, the section had already been declared to be under adjudication. He further averred that he had settled on the disputed land for over fifty years and that there exists no constitutional issue before the court.

7. The application was canvassed by way of written submissions.

8. The Applicant through the written submissions filed on the 16th of June 2021 submitted that the 1st Respondent denied him his right to fair administrative procedure by subjecting him to procedural impropriety which culminated to a decision that was not based on facts. The Petitioner asserts that he was the owner of land parcel number 154 Kasunguni Adjudication Section, having inherited the same from his grandfather. He asserts that the irrational and unmerited decision by the 1st Respondent offends the provisions of Article 40 of the constitution and that he was at risk of losing property owing to the decision made by the 1st Respondent. He argues that the decision should be set aside as it was unfair and unlawful. He submitted that the court has a duty under Article 23 to uphold and enforce the bill of rights by determining applications for redress of denial, violation, infringement or threat to a right or fundamental freedom. The Petitioner relied in the case of **National Bank Ltd Vs Wilson Ndolo Ayah (2009) eKLR**.

9. The 1st and 2nd Respondents through their written submissions filed on the 30th of September 2021 argued that the court lacked jurisdiction to hear the matter which had arisen from land adjudication. He submitted that the Petitioner being aggrieved by the decision of the 1st Respondent ought to have filed a judicial review and not a constitutional petition to address his grievances. They contend that the Petitioner had not demonstrated any violations of the constitutional provisions cited in the petition as the 1st Respondent was mandated by the Land Adjudication Act to hear and determine Appeals before him. They buttressed this with the cases of: -

a) Speaker of the National Assembly Vs James Njenga Karume (1992) eKLR;

b) "The MV Lillian "S" Vs Caltex Oil Kenya LTD (1989) KLR

c) Watuko Mutsiemi Watuku & Another Vs Republic & 5 Others (2018) eKLR;

d) Onesmus Masumbuko & Others Vs Augustino Baya Thotho (2019) eKLR;

e) Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001;

f) Misc. Application No. 504 of 2003 Republic Vs Permanent Secretary of Public Works & Housing (2014) eKLR;

g) Anarita Karimi Njeru Vs Republic (1979) 1 KLR 154;

h) Tili Nguutu Vs Cabinet Secretary for Lands, Housing and Urban Development & 2 Others (2021) eKLR 19.

10. The submissions on behalf of the 3rd to the 5th Respondents were filed on the 25th of July 2021. They submitted that the Petitioner had failed to lay out with precision the manner in which his constitutional had been violated.

11. I have carefully considered the application response and rival submissions and I find that the issue for determination is whether the Petitioner/Applicant is entitled to the orders sought herein.

12. The first issue for determination is whether the Petitioner's constitutional rights have been violated.

13. Article 22(1) of the Constitution provides as follows: -

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.”

14. When a party institutes a constitutional petition contending that there has been violation of its rights and fundamental freedom, the right must be clear and unequivocal, the violation must be discernible and the Respondent must be identified to have been the violator.

15. In **Anarita Karimi Njeru Vs The Republic (1976-1980)** the court laid down the substantive test to be applied when making a finding on whether the alleged violation formed the basis of the Petitioner's complaint. The court held that: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

16. The Applicant in his Petition is seeking for an order of Certiorari to quash the decision and/or judgment of the 1st Respondent amongst other orders. In his application, the Applicant is seeking for stay of the determination and/or any consequential orders made by the 1st Respondent in Appeal No. 207 of 2012 pending the hearing and determination of the application and the petition herein. It is not in dispute that the 1st Respondent has the mandate under Section 29 of the Land Adjudication Act to hear and determine appeals arising from objections within the adjudication areas under the act. The decision issued by the minister was an administrative decision.

17. The Applicant herein is aggrieved by the decision of the Minister in Appeal No. 207 of 2012. He avers that the decision was biased, unfair, unlawful, unreasonable, and that it was not backed with any reasoning. He stated that the decision should be set aside to ensure justice and fairness. He further submitted that the decision by the Minister deprived him of his constitutional right to property. The Petitioner's main complaint is that he is aggrieved with the decision of the minister.

18. Section 7 of the Fair Administrative Action Act provides that;

“Any person aggrieved by an administrative action or decision may apply for review of the administrative action to: -

a) A court in accordance with Section 8.

b) A tribunal in exercise of its jurisdiction conferred in that regard under written law.”

19. Section 9 provides for the procedure to be followed in judicial review. These provisions provide that any party aggrieved by the decision of the Minister can apply for judicial review of that decision. His matter proceeded before the Land Adjudication Officer. Being aggrieved by the decision the Applicant appealed against the decision before the Minister. I have looked at the proceedings before the Minister and I find that the Appeal in case number 207 of 2017 was dismissed on the 12th of August 2020. The Applicant in his application averred that the decision was unreasonable.

20. The Minister's decision being an administrative action the Applicant could only approach the court by way of judicial review. I am guided by the case of **Speaker of the National Assembly Vs James Njenga Karume (1992) eKLR** where the court of Appeal held that: -

“In our view, there is considerable merit in the submission 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

21. Similarly, in the case of **East Africa Gas Co Ltd and Another Vs National Land Commission & 3 Others (2013) eKLR** the court held that;

“.....where the constitution and any law not inconsistent with the constitution provides a procedure for the resolution of disputes, the procedure ought to be followed, adhered to and applied in the resolution of disputes to which such law or constitution prescribe.”

22. I am in agreement with the holding in the case of **Onesmus Daniel Masumbuko & Others Vs Augustino Baya Thotho (2019)** where the court held that;

“...That being the case and the minister’s decision being an administrative action, the appellant could only come to this court if there was sufficient reason therefore by way of judicial review. Otherwise in the circumstances before me the appeal herein is misconceived and without any foundation.”

23. The Petitioner contends that the actions by the 1st Respondent have violated his right to property as envisaged by the constitution. He asserts that he is the rightful owner of land parcel number 154 Kasunguni Adjudication Section having inherited it from his grandfather. The said parcel of land was the subject matter in Appeal number 207 where the Petitioner had filed an appeal before the minister. The Petitioner has not laid a basis for invoking the provisions of article 40 of the Constitution. The 1st and 2nd Respondent have argued and correctly so in my view that the Petitioner could have sought for judicial review of the decision rendered by the Minister. It is clear that there is a procedure that offers redress for the grievance that the Petitioner has raised. He must follow that procedure. The Petitioner’s claim though based on Constitutional provisions is for judicial review as it seeks to challenge the process in arriving at the minister’s decision. He must follow that procedure. The Petitioner cannot by pass the provisions of the Fair Administrative Act to litigate under a constitutional petition. The dispute falls in the arena of a judicial review process. He has not established that the Respondents have violated his constitutional rights.

24. Accordingly, the Petition and application dated 7th of October 2020 are hereby struck off with costs to the Respondents.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF DECEMBER, 2021.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi