



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**PETITION NO. 10 OF 2019**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40  
OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLES 22, 23 AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 26A, 27 AND 28 OF THE LAND ADJUDICATION ACT CAP, 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 24, 25 AND 26 OF THE LAND REGISTRATION ACT**

**AND**

**IN THE MATTER OF SECTION 7 OF THE LAND ACT NO.6 OF 2012**

**AND**

**IN THE MATTER OF ENVIRONMENT AND LAND ACT 2011**

***BETWEEN***

**MIKE MAKARENA.....PETITIONER**

***-VERSUS-***

**THE DISTRICT LAND ADJUDICATION AND**

**SETTLEMENT OFFICER TIGANIA EAST.....1<sup>ST</sup> RESPONDENT**

**PERMANENT SECRETARY,**

**MINISTRY OF LANDS.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 6.5.2019 is brought under the following provisions of law: *“Rules 3(1), 23 and 24 of the constitution of Kenya (Protection of rights and fundamental freedoms), practice and procedure rules 2013, Articles 22, 23, 40 and 165 of the constitution of Kenya, 2010, the Land Act 2012, the Environment and Land Act 2011, Sections 24, 25 and 26 of the Land Registration Act, sections 26A, 27 and 28 of the Land Adjudication Act and all the other enabling provisions of the law”.*

2. The petitioner is seeking orders of a temporary injunction restraining the Respondents, their employees, agents, servants, representatives and/or anybody else whomsoever acting for and/or on their behalf from continuing with the Land Adjudication process in respect of **Ngaremara/Gambela Adjudication section** pending the hearing of the Petition. The Petitioner is also seeking for conservatory orders stopping Respondents, their employees, agents, servants, representatives and/or anybody else whomsoever acting for and/or on their behalf from continuing with the Land Adjudication process in respect of **Ngaremara/Gambela Adjudication section** pending the hearing and determination of the petition herein as well as costs of this application.

3. The grounds in support of the application are that the petitioner represents the residents of the **Ngaremara/Gambela Adjudication Section** within Tigania East District. The 1<sup>st</sup> Respondent is conducting the Adjudication process in the said section in total disregard of the interests of the area residents whereby the 1<sup>st</sup> Respondent has secretly, fraudulently and against the wishes/interests of the area residents dished out (to his conspirators) their land which has since time immemorial been used by the area residents. The petitioner contends that the 1<sup>st</sup> Respondent has also fraudulently, secretly and against the wishes/interests of the area residents demarcated and dished out land belonging to residents including Persons living With Disabilities (PWD) hence depriving them of their land and the residents stand to lose their land if the illegal process of adjudication continues. The petitioner avers that the atmosphere on the ground is quite emotive, volatile and tensed, and anarchy may result and already several demonstrations have been experienced in the area. The application is also supported by the affidavit of the Petitioner where he has reiterated the grounds in support of the application.

4. In the submissions of the Petitioner, it is contended that the residents of **Ngaremara/Gambela Adjudication Section** were not involved in the process of adjudication and that the 1<sup>st</sup> Respondent is dishing out their land to non-residents. The Petitioner urges the court to stop the adjudication process and enter a fresh process which will safeguard the rights of the residents. In support of his case, the Petitioner has cited the following authorities:

- **Meru High Court E.L.C petition No.15 of 2016: Jacob Mantili Kang'anga vs District Land Adjudication & Settlement officer Igembe District and Anor (2016) eKLR.**

- **MRAO versus First American Bank of Kenya Limited and 2 others (2003) KLR.**

- **Petition No. 87 of 2017 Nairobi Constitution and Human Rights Division, Kenya Human Rights Commission vs. A.G and Another.**

- **Kiambu County Government and 3 others vs Robert N. Gakuru and others (2017) eKLR.**

5. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents have opposed the application vide the replying affidavit of one Eliab Kamaru, the Sub County Land Adjudication & Settlement Officer (DLASO) Tigania East Sub County who's area of operation covers Tigania East and Tigania Central. He contends that on 11.3.2016, the **Ngaremara/Gambela adjudication section** was declared, and a notice to that effect was issued pursuant to the provisions of **section 5** of the **Land Adjudication Act Cap 284** of the Laws of Kenya. As from July 2017 to date, ascertainment and recording of rights and interests has been and is ongoing whereby adjudication committees and Demarcation team have duly been appointed with the participation of land owners.

6. The DLASO avers that under **section 13 Cap 284** of the Laws of Kenya, the law clearly lays down mechanism on how claims are to be lodged and addressed. The petitioner herein who alleges to have emanated from Nkaroui village within the **Ngaremara/Gambella Adjudication Section** has not appeared before the adjudication team to lay claim of his interest. Further as per attached list of alleged disfranchised land owners, his name does not appear, hence his claim is false. The DLASO availed a schedule containing the particulars of 66 persons who have duly been issued with parcel numbers and who apparently appear in the list attached to the Petition.

7. The DLASO further contends that as stipulated under the statute, (the land Adjudication Act), the demarcation officers together with land committees have been ascertaining land ownership and to date the team has demarcated and surveyed over 40,000 parcels, whereby a total of 1500 disputes have been registered and over 1200 cases have been heard and determined, but none of those disputes have emanated from the Petitioner herein. The DLASO has stated that the allegation being raised by the Petitioner that the 1<sup>st</sup> Respondent is allocating land to foreigners is not true as the 1<sup>st</sup> respondent does not have powers to do so.

8. The 1<sup>st</sup> 3<sup>rd</sup> respondents contend that the Notice of Motion and the petition are incompetent, frivolous and an abuse of the court's process and thus should be dismissed. These Respondents did not file any submissions. Instead they associated themselves with the submissions of the 4<sup>th</sup> respondent.

9. The 4<sup>th</sup> respondent is the County Government of Meru which has also opposed the application vide the replying affidavit of Jackson Mukaria Muriungi dated 22.8.2019, who is the Land Administrator with the County Government of Meru. He avers that the adjudication process in the **Ngaremara/Gambella** area is being conducted within the confines of the law, that it is not true that the area is being given to outsiders by the 1<sup>st</sup> Respondent and that the demarcation is proceeding well on the ground where the respective land owners are being recorded as the owners thereof and any land with a dispute shall be handled through the elaborate dispute resolution mechanisms under the provisions of **CAP 284** Laws of Kenya.

10. The 4<sup>th</sup> respondent further contends that the area residents have elected their land committee members and so far, there is no complaint by the land committee members on the adjudication process and that the constitutional rights of the area residents have not been violated because the due process of recording, demarcating and dispute resolutions is going on within the parameters of **CAP 284** Laws of Kenya. The 4<sup>th</sup> Respondent is not aware of any conspirators and there is no evidence that has been tabled to show that a stranger has been given land which belongs to a resident of the adjudication area in question. The 4<sup>th</sup> respondent states that annexure MM1 availed by the petitioner amounts to a dispute of demarcation which should be handled at the time of objection hearings. The 4<sup>th</sup> respondent urges the court to dismiss

the application and the petition with costs to the respondent.

11. It has been submitted by the 4<sup>th</sup> Respondent that since adjudication is ongoing, then the Petitioners should lodge land committee cases to any parcel they feel was wrongly recorded in accordance with the Dispute Resolution Mechanism provided for under the act, that the Petitioner is using the back door to solve their objection on demarcation by avoiding the laid out procedure under the relevant statute, that no prima facie case has been set out to halt the lawful legal process and that the Petitioners have not demonstrated that irreparable damages would occur unless an injunction is issued.

12. In support of its case, the 4<sup>th</sup> Respondent has relied on the following cases:

- **Speaker of the National Assembly -vs- Karume [1992] eKLR.**
- **Lepore Ole Maito –vs- Letwat Kortom & 2 others [2016] eKLR.**
- **Stanley Lezen Mliwa Vs. Leonard Kapala Makangalu & 2 others.**
- **Showind Industries Vs. Guardian Bank Limited & Another (2002) 1 EA.284**
- **Giella vs. Cassman brown.**
- **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR.**
- **Locabail International Finance Ltd vs Agro-export and others (1986) 1 ALLER 901.**
- **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR.**

#### **RENDITION**

13. “**Anything that can go wrong will go wrong**”, so goes an adage, and **Ngaremara/Ngambella** area appears to be a classic example where the land disputes are becoming more and more convoluted. The area has been bogged down by intense and diverse litigation long before the issuance of the notice of 11.3.2016 declaring the area as an adjudication section, immediately after the issuance of the said notice and with such fervent litigation reaching a crescendo in year 2019. In Meru Petition 7 of 2017, I had made the following observation;

*“The 1<sup>st</sup> Interested Parties have stated that they have been discriminated by successive Governments since independence by failure to issue the residents with title deeds. They have given an account of how they had to file **Meru High Court JR. NO. 100 OF 2010** in a bid to stop the land grabbing that had set in due to the proximity of the Land to the **LAPSET PROJECT, Isiolo Resort City and Isiolo Airport, perpetrated by unscrupulous officials of the defunct Meru County Council....”***

14. Thus the proximity of this area to the **Lamu Port- Southern Sudan- Ethiopia Transport Corridor (LAPSSET)**, which is one of Africa’s largest and most ambitious transport and infrastructure project, **Isiolo Airport** and **Resort city**, appears to have a strong bearing on the unending land disputes in this area. Against this background, I deem it fit to highlight some of the issues raised in Meru ELC **Petition 7 of 2017** and Meru ELC **Petition 5 of 2019**. I will also touch on the dispute resolution mechanism provided under the relevant statute.

#### **Meru Petition 7 of 2017**

15. The **Ngare Mara/Gambella Adjudication area** was declared as an adjudication section vide the notice issued on 11.3.2016 which triggered an influx of cases. The 1<sup>st</sup> salvo after the notice was thrown by the 4<sup>th</sup> Respondent herein along with the then governor who had filed **Petition 7 of 2017 Meru**, where they wanted the adjudication process to be halted. In that case, the **1<sup>st</sup> interested parties** were allegedly the **local residents** who claimed that they were duly sensitized about the adjudication process and they longed to have the adjudication process completed having been discriminated by successive governments. These interested parties claimed that it would be frustrating for them to miss a lifetime opportunity to acquire titles to the land. In a rather detailed Judgement delivered on 1.2.2018, this court dealt with inter-alia, **the historic aspect of the adjudication process, the law applicable, the principle of legitimate expectation, the principle of intra and inter-generational equity, right to development, public participation and the component of finance.**

16. In paragraph 141 of the aforementioned Judgment, I stated thus;

*“The owner of the land, (In the present case, the community) remains the central feature in so far as the dispute is concerned.”*

The residents of the area are the ones who were at the forefront in agitating to have the land tenure system changed from the customary holding to the individual tenure system. The present prayers by the petitioner herein are certainly not in tandem with what the residents desired in **petition 7 of 2017**. I note that in the aforementioned case, this court arrived at a conclusion that the **Adjudication Process in Ngaremara/Gambella Adjudication should continue.**

#### **Meru Petition 5 of 2019**

17. This is an ongoing case where the Petitioners/Applicants have identified themselves as **local residents** of Muthara, Amuthumba,

Ngaremara Ranching areas where they averred that the notice of **11.3.2016** did not cover the above-mentioned areas. They also stated that the corrigendum notice of **29.6.2018** was issued clandestinely, to extend to the above mentioned areas. In that case the committee of **Ngaremara/Gambella Adjudication Section** was sued as the 1<sup>st</sup> respondent but it associated itself with the sentiments of the Petitioners. In a ruling delivered on **24.5.2019**, the court allowed the Adjudication Process to continue in the Ngaremara/Gambella Adjudication Section as per the notice of 11.3.2016. It is clear that the orders sought in the present application are in conflict with the orders sought in **Petition 5 of 2019**.

18. It is also not lost to this court that the file **petition 5 of 2019** is not the only pending matters touching on disputes emanating from **Ngaremara/Ngambella** area. At least I am able to recall the existence of files **Petition no. 9 of 2019** and **petition no. 19 of 2019** in **Meru ELC** and there is a need to have all the matters running simultaneously so as to avoid confusion and absurdity.

### **Dispute Resolution Mechanism**

19. As rightly stated by the Respondents, the Land Adjudication Act cap 284 laws of Kenya has elaborate procedures in dispute resolution mechanisms.

20. **Section 14 of the Land Adjudication Act** provides that:

***“Not less than seven clear days before the demarcation of an adjudication section is begun, the demarcation officer shall give warning of the intended demarcation and recording of claims, and of the time and place at which it will begin, in such manner as the adjudication officer considers most likely to bring the matter to the knowledge of the persons who will be affected by the demarcation and recording (emphasize added).”***

21. **Section 13** of the said Act provides that:

***(1)“Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act (emphasize added)..... (5) Where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs”.***

22. **Section 26** of the aforementioned Act provides that;

***“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. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit, he shall determine the objection”.***

23. **Section 29** of the said Act provides for the process of the appeal to the minister.

24. From the foregoing provisions of law, it is apparent that the dispute resolution mechanism is quite elaborate, so much so that the residents can even lodge claims in respect of their deceased kindred as seen in subsection 5 of section 13 of the Land Adjudication Act. The petitioner has rightly quoted this statute in the heading of the petition meaning that he recognizes this Act as being applicable. He even captures the process of finalization of the adjudication register subject to appeals as provided under section 26-28 of the Act. The petitioner has not given any plausible explanation as to why he has not invoked the dispute resolution mechanism provided under the Act particularly the one available under section 13 since the process is still at the stage of recording of rights.

25. There are quasi-judicial bodies under the Land Adjudication Act who are empowered to deal with disputes arising in the adjudication process, which bodies include the adjudication committees, the arbitration board, the Land Adjudication Officer and the Minister I deem it necessary to give some elaboration on the Adjudication Committee.

26. **Section 6(1)** of the **Land Adjudication Act** provides that:

***“In respect of each adjudication section, the adjudication officer, after consultation with the District Commissioner of the district within which the adjudication section lies, shall appoint not less than ten persons resident within the adjudication section to be the adjudication committee for that adjudication section.”***

27. The functions of the committee are provided for under **Section 20** of the Act where it is stipulated that;

***“The committee appointed for an adjudication section shall— (a) adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer;***

***(b) advise the adjudication officer or any officer subordinate to him upon any question of recognized customary law as to which he has sought its guidance;***

***(c) safeguard the interests of absent persons and persons under Disability. (emphasize added);***

(d) bring to the attention of officers engaged in the adjudication any interest in respect of which for any reason no claim has been made;

(e) assist generally in the adjudication process”.

28. In the case of **Silverio Akubu & 4 others vs Charles Baariu Salesio & 3 others, Meru ELC No. 29 of 2018**, where I was dealing with the question of quorum of a committee I stated as follows:

*“The fact that the committee members are appointed from the area residents is a clear signal that these members become the EYE and EAR of the residents. They are entrusted with the duty of shepherding the process in such a manner that they even take into account the interests of persons who are absent and they also bring to the attention of the DLASO the existence of land which has no claimants. That is not all, they have the mandate to determine disputes arising from the Adjudication Process. From this analysis I can safely state that the committee is a powerful body in the Adjudication Process”.*

29. What is crystal clear is that the interests of the residents including those who have disabilities are supposed to be taken care of through the lawfully appointed committees. The Petitioners have not demonstrated that they have raised their issues with the relevant committees.

30. In the case of **Kanampiu M’Rimberia vs. Julius Kathane & 3 Others, MERU H.C.C.NO. 6 OF 2009**, I stated that;

*“The Land Adjudication Act is a self-contained statute that has detailed procedures of how matters are to be conducted and at what point the jurisdiction of the court is to be invoked.”*

Also see- **Petition 77 of 2014, Mombasa, David Mtawali Kazungu Yaa vs. NLC and 3 Others, (Komingoi J), Tobias Achola Osindi & 13 others vs Cyprianus Otieno Ogalo & 6 others H.C.C.C No. 4 of 2011 Kisii, (Okango J.)**.

31. I must also point out that in the case of **Jacob Mantili Kangángá vs DLASO Igembe district and another Meru ELC Petition no. 15 of 2016** cited by the petitioner, the conservatory orders were issued pursuant to the agreement of the parties.

### **Conclusion**

32. In the case of **Charter House Investment Ltd vs Simon K Sang & 3 others (2010) eKLR**, the Court of Appeal observed that:

*“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by a court of equity has never been guaranteed as a matter of right..”*

33. In the present case, I decline to exercise discretion in favour of the applicants for the reasons which I now summarize as follows:

- (i) The decision of this court in **Meru ELC Petition 7 of 2017** where I captured the importance of the adjudication process.
- (ii) The pronouncement of this court in the ruling of **24.5.2019** in **MERU ELC Petition 5 Of 2019** where I made an order for the adjudication process at **Ngaremara/Ngambella** to continue.
- (iii) In Meru Petition 5/19, the committee of **Ngaremara/Ngambella** had wanted the adjudication process to continue in so far as the notice of 11.3.2016 is concerned.
- (iv) The Petitioners have not raised their concerns with the relevant quasi-judicial dispute resolution mechanism bodies provided for under the relevant statutes.
- (v) The orders sought should not be granted at this stage in order to avoid confusion and conflicting decisions.

34. **The application dated 6/5/2019 is hereby dismissed with Costs to the Respondents.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 16<sup>TH</sup> JANUARY, 2020 IN THE PRESENCE OF:-**

C/A: Kananu

Kiety for 1<sup>st</sup> – 3<sup>rd</sup> respondents

Ken Muriuki holding brief for Maranya for petitioners

C.P Mbaabu holding brief for 4<sup>th</sup> respondent

**HON. LUCY. N. MBUGUA**

