



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

PETITION NO. 35 OF 2016

JOHNSON MBAABU MBURUGU.....1ST PETITIONER

CATHERINE GAKII MBAABU.....2ND PETITIONER

VERSUS

MATHIU NABEA.....1ST RESPONDENT

KARAMBU NKONGE.....2ND RESPONDENT

PURITY NKATHA.....3RD RESPONDENT

MURITHI MATHEW.....4TH RESPONDENT

JANE MWENDA MUTHEE.....5TH RESPONDENT

ZAKI KANGI MWANGI.....6TH RESPONDENT

ISAAK GICHURU MAGAMBO.....7TH RESPONDENT

JEVASIO MWANGI.....8TH RESPONDENT

DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER TIGANIA WEST DISTRICT.....9TH RESPONDENT

ATTORNEY GENERAL.....10TH RESPONDENT

RULING

1. This matter relates to a **Notice of Preliminary Objection** dated and filed on **18/12/2018** raised by the 1st to 5th and 7th respondents, where they have stated that:

a) *“The court has no jurisdiction to entertain this petition since the petitioners have not explored and exhausted the remedies provided for under Section 11, 17, 18 & 26 of the Land Consolidation Act CAP 283 and Section 6, 7, 8, 10, 12, 13, 17, 18, 20, 21, 22, 26 & 29 of the Land Adjudication Act CAP 284.*

b) *This matter is legally incompetent and fatally defective for want of consent under Section 8 (2) of the Land Consolidation Act CAP 283 and Section 30 (1) of the Land Adjudication Act CAP 284*

c) *For want of specificity of the alleged violations, the entire petition is legally incompetent, fatally defective and an epitome of abuse of the due process of the court”.*

2. This matter was argued by way of oral submissions where the counsels relied on their filed list of authorities. In order to have an inner

depth of the matter at hand, I have found it necessary to lay out a summary of each party's claim by making reference to the pleadings. I however, note that the parties, particularly the petitioners and 1-5th and 7-8th respondents have filed countless affidavits and other documents whereby the file has become very voluminous in a span of three or so years. In the maze, I was not able to find the response to the petition by the 9th and 10th respondents, hence I have not managed to get a summary of their case.

3. The parties have in total availed a list of 40 authorities! Shared between the parties as follows; 20 for the petitioner, 14 for the 1st -5th and 7th respondents and 6 for the 9th and 10th respondents contained in two separate lists for each party. This in itself is a pointer to the contentious nature of the matter. I will borrow the words of Judge Njoroge in the case of **Chuka ELC No. 2 of 2018, The Attorney General vs. Isaiah Muturi Mucee** and state that **“all the authorities they have proffered are good authorities in their circumstances and facts”**. I commend all the advocates for their industrious and resourceful jurisprudence manifested in their submissions and the cited authorities. However, I may not be able to analyze each and every authority availed by the parties, though I find it necessary to point out points of departure in some of the cases. This I will do when analyzing the issues for determination.

Case for the 1st-5th and 7th Respondents

4. The 1st – 5th and 7th respondents contend that the Disputed Land in **Ruiri/Rwarera Adjudication Section** were quashed and nullified vide a **Court of Appeal order on 10/10/2014 in Nairobi Civil Appeal No. 129 of 2005**. The nullification was pursuant to a **consent dated 24/9/2014** filed in court on **8/10/2014**. As a result, the Disputed Land ceased to exist. The petitioners were accurately aware of the foregoing for the appeal emanated from a representative suit filed on their behalf and others.

5. It is therefore not true that the 9th respondent arbitrarily declared part of **Ruiri-Rwarera Adjudication Section** as **Mbwa 1 Adjudication Section**. The former **Ruiri-Rwarera Adjudication Section** was divided into two by the duly and legally established **“Overseer Land Adjudication Committee”** which was formed by consent of over 120 parties in **Nairobi Court of Appeal Civil Appeal No. 129 of 2005**. The 1st respondent is a gatherer and the others are purchasers for value. If the petitioners had a genuine grievance, they would have first referred their dispute to the Committee. The purported map and ownership confirmation letters by the petitioners must have been fraudulently obtained from rogue land officers so as to justify their illegal intention to grab other people's land.

6. These respondents have made reference to a case **Meru CMCC No. 393 of 2011**, where the petitioners sought a permanent injunction and eviction order against the defendants, who are some of the respondents in this petition. The respondents are in exclusive and actual possession, occupation and cultivation of the Disputed Land. The petitioners have never utilized any portion of the subject Land Parcels. Petitioners have been targeting the 1st respondent's gathering because he is an elderly, poor, illiterate, susceptible, vulnerable and defenseless person given that the Disputed Land is at a prime location. If the petitioners have a justiciable grievance they would have filed an A/R Objection case. They are hopping from one court to the other after their injunction application in the said Chief Magistrate's case failed to see the light of day.

7. The 1st -5th and 7th respondents further contend that the issues raised by the petitioners were raised in **Nairobi HC Misc JR application No. 344 of 2003** and were settled in the **Court of appeal case no. 129 of 2005 Nairobi**.

8. During the hearing of the Preliminary Objection, the 1st -5th and 7th respondents relied on two sets of authorities. The first list dated 21. 2.2019 contains the following references;

(1) Preamble and sections 11, 13, 14, 17, 19 & 26 of the Land Consolidation Act Cap 283.

(2) Preamble and sections 6, 7, 8, 10, 11, 12, 13, 20, 21, 22, 26 & 29 of the Land Adjudication Act Cap 284.

(3) Preamble to the Land Adjudication Act cap 284.

(4) Preamble to the Land Consolidation Act, cap 283.

(5) Meru ELC Petition no. 2 of 2012: Zipporah Nkoyai vs James Kaberia M & 2 others.

(6) Meru H.C. Petition No. 2 of 2012: Stephen Michuki Kiunga vs Nkuni M'Turuchiu & 2 others

(7) Anne Wawuda & 3 others vs Kenya Railways Corporation & another (2015) eKLR which quotes:-

•Speaker of National Assembly vs Karume (1992) KLR 425.

•South African case of Andrew Lionel Philips and 15 others vs National Direction of Prosecutions (CC of 2004).

•Abdallah Mangi Mohamed vs Lazarus & 5 others (2012) eKLR.

(8) Meru ELC Case No. 167 of 2011 Nicholas Mugambi & others vs Zachary Baariu & 6 others.

(9) Nyeri court of appeal, civil appeal No. 221 of 2010: Stephen Kungutia & 2 others vs Severina Nchulubi.

(10) *Meru HCCA No. 306 of 2013: Samuel Kilemi & another vs Festus Gituma Kuthuka* which quotes;

• *Supreme court of Kenya in civil application No. 11 of 2016 (Hon. Lady Justice Kalpana H. Rawal vs Judicial Service Commission & others).*

• *The court of Appeal decision in the Owners of Motor Vessel “Lillian’s” vs Caltex oil Kenya Ltd (1989) 1 KLR 1.*

• *The court of appeal decision in Kauka Maimai Hamisi vs Peris Pesu Tobiko & 2 others (2013) eKLR.*

(11) *Malindi court of appeal civil appeal no. 46 of 2014: Ransa Co. Ltd & 2 others vs Manca Francesco (2015) eKLR.*

9. The second list is dated 13.8.2019 containing one reference which is *Meru ELC Petition no. 6 of 2017, Reuben Mwangela M’Itelekwa versus Paul Kigea Nabea & 2 Others.*

10. It was submitted for the 1st – 5th and 7th respondents that all the three limbs set out in their P. O are on points of law. On jurisdiction, these respondents relied on authorities number 5,6,7,8,10 and 11 as well as the authority in the list dated 13.8.2019 to emphasize the point that the land is under adjudication. They also aver that from the petitioners’ verifying and supporting affidavits, it shows that they (Petitioners) have not exhausted all their remedies for they neither filed a committee case, arbitration case, A/R objection case nor raised an appeal to the minister. Moreover, the petitioners have a pending case **Meru CMCC No. 393 of 2011** in the lower court. From their pleadings it is apparent that they have not exhausted all their remedies under **CAP 284**. Even though the Constitution is supreme, it does not do away with the other statutory mechanisms provided by the law, that is **CAP 283 and 284**.

11. On limb number 2, the respondents nos.1-5 and 7 contend that the petition is incompetent as consent was not given to file the matter. Looking at the prayers sought by the petitioners, the same is to ascertain rights in an adjudication section hence consent was required. On this point these respondents relied on the case *Meru ELC Petition No. 6 of 2017: Reuben Mwangela M’Itelekwa v Paul Kigea Nabea & 2 others*, particularly paragraph 23 and 35.

12. Finally, on limb no. 3, it is averred that the petition is incompetent as it does not specify alleged violations. On this point, the respondents have relied on the authority in the list dated 13.8.2019 paragraph 38 onwards.

Case for the 9th and 10th Respondents (The State)

13. These respondents have opposed the Preliminary Objection. Just like the 1st-5th and 7th respondents, the 9th and 10th respondents have availed two sets of reference of which the first list is dated 15.2.2019 containing the following;

(i) *Section 2 and 19 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.*

(ii) *Supreme Court civil application no. 36 of 2014: IEBC Vs Jane Cheperenger & 2 others (2015) eKLR.*

(iii) *Meru ELC Petition No. 2 of 2012 Zipporah Nkoyai vs James Kaberia and 2 others.*

(iv) *Meru ELC Petition No. 5 of 2014: Berano M’Mwithiga M’Arauki vs District Land Adjudication and Settlement officer Tigania East, West and 2 others.*

(v) *Chuka ELC petition No. 02 of 2018: The Hon. Attorney General vs Isaiah Muturi Mucee.*

(vi) *Meru High court Petition no. 4 of 2010: MCK Registered Trustees vs Attorney General and others.*

14. The second list is dated 15.8.2019 containing the case of

• *East Africa Court of Justice Reference No. 8 of 2017: Pontrilas investments limited versus central Bank of Kenya & Attorney General of the Republic of Kenya.*

15. It was submitted for the 9th and 10th respondents that the Preliminary Objection does not meet the threshold as it does not contain pure points of law. To establish whether the petitioners have or have not explored and exhausted all remedies, evidence is necessary which is an issue of facts. On the issue of jurisdiction, these respondents have urged the court to specifically see the second case in their list of 15.2.2019 as well as the lone case in the list of 15.8.2019.

16. On the issue of consent, the 9th and 10th respondents aver that the regime of law in which the disputed Land falls under is not certain hence there is a need to bring the declaration which declared the suit land as an adjudication section to establish this fact. i.e, is it cap 283 or 284 to be relied on? These respondents have urged the court to dismiss the Preliminary Objection.

Case for the Petitioners

17. A summary of petitioner’s claim is that they are the registered owners of **Land Parcels No. 1079 and 5165** respectively (herein referred

to as *the Disputed Land*) situated within the former **Ruiri Rwarera Adjudication Section** which is currently part of **Mbwaa 1 Adjudication Section**. They claim to have been in exclusive ownership, possession and occupation of the suit land. On or about 13/2/2016, without notice to the petitioners or their involvement, the 9th respondent arbitrary decided to declare part of former **Ruiri Rwarera Adjudication Section** as **Mbwaa 1 Adjudication Section**. The areas declared as Mbwaa 1 Adjudication fell within Imenti North District (now Tigania West Sub County) which was already declared as **Ruiri Rwarera Adjudication Section**. The decision which was unprocedural and fraudulently made by the 8th respondent illegally shifted part of what formed Ruiri Rwarera Adjudication Section to a new entity referred to as Mbwaa 1 Adjudication Section, thus, depriving the petitioners of their parcels of land. In the month of June 2016, the 1st – 9th respondents trespassed into the Disputed Land, subdivided it and issued new numbers causing them to be registered in the names of the 1st – 8th respondents.

18. The 9th respondent ignored the petitioners' pleas not to interfere with the land parcels. The Disputed Lands are subject of a case *Meru CMCC No. 393 of 2011* pending in Meru Chief Magistrates Court. All their efforts to get their land back have hit a deadlock necessitating this constitutional petition. The 9th respondent's actions are intended and meant to deny the petitioners' right of user, peaceful occupation and enjoyment of their lands. The 9th respondent cannot purport to invoke the provisions of **Section 29 and 30 of CAP 284 Laws of Kenya** and give away the Disputed Land to the 1st – 8th respondent as this is a violation of their rights to own property as provided for by the Constitution.

19. During the hearing of the Preliminary Objection, the petitioners too stated that they would rely on two sets of authorities. The first one is dated 4.3.2019 containing the following references;

- (1) **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors LTD (1969) EA 696.**
- (2) **Supreme Court of Kenya Petition No. 10 of 2013, Hassan Ali Joho & another vs Suleiman Said Shahbal & 2 others.**
- (3) **STI Services and Trading International NV – Vs Walford Meadows Ltd Nairobi (Milimani) High Court Civil case No. 1450 of 1999.**
- (4) **Meru HCC No. 37 of 2016 (OS) Samson Mbaabu Nkarichia vs Sacinta Kinya Gituma.**
- (5) **Supreme court of Kenya Civil Misc. Application no. 36 of 2014, independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 others.**
- (6) **Supreme Court of Kenya civil Misc. application no. 50 of 2014, aviation & Allied workers union Kenya vs Kenya Airways Limited & 2 others.**
- (7) **Oraro vs Mbaja (2005) 1KLR.**
- (8) **Giovanni Papa vs Marafiki Pamoja Homes Company Limited, Malindi High Court Civil case No. 26 of 2007.**
- (9) **Meru ELC Petition No. 5 of 2014 Brano M'Mwithiga M'Arauki vs District Land Adjudication & settlement officer Tigania East and West & 2 others.**
- (10) **Chuka ELC Petition no. 2 of 2018 the Hon. Attorney General vs Isaiah Muturi Mucee.**
- (11) **Meru HC Petition No. 4 of 2010 Methodist Church in Kenya Trustees registered vs The Attorney General & others.**
- (12) **Mungai vs Council of Legal Education and others,(2015)2EA.**
- (13) **Nairobi HC Petition No. 95 of 2012 Maisha Nishike Limited vs the permanent secretary ministry of lands and 5 others.**
- (14) **Waititu vs Independent Electoral and Boundaries Commission (IEBC) and others (2014) 2 EA, 346.**
- (15) **Nairobi Court of Appeal civil appeal no. 327 of 2014 Kenya National Highway authority vs Shalien Masood Mughal & 5 others.**
- (16) **Vijay Morjaria vs Nansing Madhusingh Darbar, Hulashib Nansing Darabar, civil appeal no. 106 of 2000 (2000) 7349 (CAK).**
- (17) **Captain Harry Gandy vs Caspar air Charters Ltd (1955) EACA 139.**
- (18) **Plotti vs the Acasia Company Ltd (1959) EA 248.**
- (19) **Sarah Wanjiku Mutiso vs Gideon M. Mutiso, civil appeal Number 109 of 1986 and 122 of 1986 LLR 4879 (CAK).**
- (20) **The environment and land court act 2011, Act no. 19 of 2011.**

(21) The constitution of Kenya 2010.

(22) The constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2013.

(23) The old constitution of Kenya.

(24) The land consolidation act, cap 283 laws of Kenya.

(25) The land adjudication act cap 284 laws of Kenya.

(26) The judicature act, cap 8 laws of Kenya.

(27) The civil procedure act cap 281 laws of Kenya.

(28) The civil procedure rules.

20. The second list is dated 12.6.2019 containing the case of;

Nyeri Court of Appeal, Civil appeal No. 11 of 2016 Amin Mohammed Ali alias Debby vs Fund Account manager, Laikipia East Constituency Development Fund & 11 others.

21. It was submitted for the petitioners that the issue of law must come from the pleadings. The counsel for the petitioners emphasized the supremacy of the Constitution in relation to the hearing of petitions arguing that the Constitution Petition Rules of 2013 were made to ensure that constitutional fundamental rights and freedoms are not thwarted by other laws and rules. On the point of jurisdiction, the court was urged to particularly look at the following cases in the list of 4.3.2019;

-Case no 2, case no3 (my own decision), case no. 4, case no 6 (page 4 paragraph 15, 16 and 21- page 5 paragraph 15 and 22), case no 7 (page 141 paragraph 1,2,4,and 6 and page 145, 147 and 150), case no 8, case no.16, case no 17, case no. 18 and case no. 19.

22. On the issue of consent, it was submitted that **Section 8 of the Land Consolidation Act** and **Section 30 of the Land Adjudication Act** do not apply as petitions do not need consent, and on this point, reference was made to the cases no 9, 10, 11, 12, 13 and 15 in the list of 4.3.2019.

23. On the issue of violations of rights, it was submitted that the Disputed Suit Lands were in an area known as **Ruiriri Rwarera Adjudication Section** and pursuant to a consent order of the Court of Appeal they were moved to **Mbwaa 1 Adjudication Section**. The petitioners lands were then taken by the 1st to 8th respondents hence the violations of their rights. Nowhere in the Court of Appeal decision did the court state that people who own land in Ruiriri Rwarera should be evicted. Therefore, due process should be followed to hear the case for there are facts which are disputed thus the Preliminary Objection should not be sustained.

24. Further, the court has been urged to look at the affidavit of DLASO dated 13/2/2018 (*I was not able to trace this document*), which shows how unique this petition is as it requires evidence to give a decision based on facts. For instance, there was a **Criminal Case No. 123 of 2013** where the court stated that the two suit parcels belong to the petitioners.

DETERMINATION

25. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696**, as follows:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Sir Charles Newbold in the same case had this to say on matters of P.Os:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

26. A preliminary objection is therefore strictly on a point of law and not of fact. It should not be hazy with factual details liable to be contested and proved by presentation of evidence. Its legitimacy need not be founded from factual information which stands to be tested but should be anchored on legal principles. It cannot be raised if any facts have to be ascertained. The court will therefore analyze the three limbs of the Preliminary Objection to see if they meet the threshold set out in the **Mukisa Biscuit** case.

Jurisdiction

27. Jurisdiction is key for without it a court cannot make any other step. It is derived from the Constitution, legislation or both. The Supreme Court in the case of **Samuel Kamau & Another v. Kenya Commercial Bank and two others – Sup. Ct. Civil Application No. 2 of 2011** rightly captured this as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

28. From the pleadings, I have no doubts that the issues at hand are concerned with the adjudication process, where the statutes which mainly govern the process are the **Land Adjudication Act** and the **Land Consolidation Act**. The two statutes capture the steps of adjudication from the start when a declaration is made up to the time of finalization or close of the register of adjudication. The aforementioned statutes provide dispute resolution mechanisms which need to be followed in case of any grievance arising during the process of adjudication.

29. Okongo J in the case of **Tobias Achola Osindi & 13 others versus Cypriano Otieno Ogalo & 6 Others, H.C.CNO 4 OF 2011 KISHI** held that:

“The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act.....

In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process”.

30. Muriithi J in the case of **Abdullah Mangi Mohamed v Lazarus Beja & 5 Others [2012]eKLR** held 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, that statutory procedure should be utilized in the determination of the Applicant's claim to the property rather than clog the Constitutional Court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for the enforcement of the constitutional right to property should be discouraged.”

31. The centrality of the issue of jurisdiction has been aptly captured in the authorities availed by the 1-5 and 7th respondents as case numbers 7 i, ii, iii, and 10 in the list dated 21.2.2019. This far, I am in agreement with the legal position advanced by these respondents through the case law. Further, it is evidently clear that there is a procedure which has been laid down by the **Land Adjudication Act and Land Consolidation Act** on how one can seek redress for grievances which ought to be followed first before seeking enforcement of Constitutional rights.

32. The question is, does the dispute herein fall under the dispute resolution mechanisms provided for under the aforementioned statutes. There are tell-tale signs that this is not an ordinary dispute to be resolved under the mechanisms set out in the two Acts. Firstly, it has emerged from the pleadings of the petitioner that the suit parcels were in **RUIRI RWARERA ADJUDICATION SECTION**, but were later taken to **MBWAA 1 ADJUDICATION SECTION**. The 1-5 and 7th respondents contend that the land parcels in the adjudication section of **Ruiri/Rwarera adjudication section** were quashed and nullified on 10. 10.2014 vide an order of the **Court of Appeal no. 129 of 2005** which order and the annexures have been availed as exhibits. Both the interpretation and the implementation of these documents are clearly matters which invite arguments. In short, the creation of **MBWAA 1 ADJUDICATION SECTION** and the ensuing adjudication process is a matter under scrutiny before this court. For instance, the consent availed by the respondents talks of land adjudication being undertaken within six months from October 2014 to march 2015. The declaration which is the subject matter of this dispute was apparently made on 13.2.2016.

33. Secondly, I am privy to the fact that the creation of **MBWAA 1 ADJUDICATION SECTION** has had a ripple effect where there has been an avalanche of hotly contested constitutional petitions finding their way before this court. I am able to point out some of them as **Petition 16 of 2016** coming up on 27.4.2020, **Petition 6 of 2019** and **Petition 2 of 2019** both coming up on 4.5.2020. It is paramount that these matters be handled at the same time so as to harmonize the resolution of the disputes.

34. Thirdly, it has emerged that the dispute in this particular case had spilled over into the ordinary courts as criminal and civil cases - see **Meru CMCC no. 393 of 2011** and **Meru criminal Case no. 1087 of 2011**. This again is a manifestation of the gravity of the matter.

35. Fourthly, the particulars of the notice declaring the affected parcels as adjudication sections have not been availed, hence as rightly submitted by Mr. Kiongo for the 9th and 10th respondents, this court cannot discern which legal regime the land falls under. For the petitioners to participate in the dispute resolution mechanisms provided in the adjudication process, they would need an entry point. As at now, none of the parties have stated the stage of the adjudication process and the actual applicable law.

36. The final tell-tale sign that all is not well is the fact that the 9th and 10th respondents are not in support of the Preliminary Objection. These respondents are the ones entrusted with onerous task of shepherding the adjudication process, with the District Land Adjudication and Settlement Officer (DLASO) having immense authority in matters of dispute resolution mechanism in both the **Land Adjudication Act** and

The Land Consolidation Act.

The petitioners have raised very serious allegations against the 9th respondent (see paragraph 18 and 19 of the petition). Thus ordinarily, I would have expected these respondents to be supporting the Preliminary Objection. It is however, quite peculiar that Mr. Kiongo, counsel for the 9th and 10th respondents wishes that the matter proceeds to full trial before this court. It is paramount for this court to see the pleadings of the 9th and 10th respondents in order to know their stand on this matter. As I have already stated somewhere in this ruling, I have not managed to trace these pleadings (if at all they are available).

37. From the foregoing analysis, it becomes clear that the present case is distinguishable from the authorities cited by the 1st -5th and 7th respondents. All the other cases, save number 11 (which basically touches on issue of compliance with the law and procedure) and cases no. 7 and 10, have their disputes anchored on the adjudication process. I will therefore briefly highlight the issues in those cases so as to point out the point of departure from the present case;

- **Reuben Mwangela M’Itelekwa (supra)**. This is my own decision. The Petitioner had filed and lost A/R Objection cases and lost. He failed to file an appeal to the minister. A Preliminary Objection was filed on grounds inter-alia that the petitioner had not exhausted the available remedies of which I upheld the Preliminary Objection as **the process of ascertainment of rights and interests in land had commenced and the petitioner had participated in objection proceedings** under **section 26 of the land adjudication Act or Land Consolidation Act**.

- **Case no 5 of Zipporah Nkoyai**. Again, this is my own decision; The petitioner was claiming land of her deceased father. The court noted that **the Objection proceedings were underway when the petition was filed**. I dismissed the petition on the basis that the land ownership dispute ought to be resolved through the dispute resolution mechanisms available.

- **Case no 6. Stephen Muchuka Hiunga Meru High court**. This is a ruling by Judge P.Njoroge. In this case, the court found that **the petition had been filed when there was an appeal pending before the minister**. The petition was challenged via a Preliminary Objection on the basis that the petitioner had not exhausted the available remedies. The court upheld the Preliminary Objection, even terming the actions of the petitioner as forum shopping.

-**Case no.8; Meru ELC NO. 167 OF 2011, Case of Nicholas Mugambi & Dominic Kaindio**, a ruling by Judge Kemei G. **The land dispute had gone to the land committee of which**, the plaintiffs in that suit were aggrieved by the decision of the committee on account of administration of a meru traditional oath known as Nthenge. A Preliminary Objection was raised on account that the plaintiffs had inter-alia not exhausted all the remedies available under the statutes of adjudication. **The court upheld the Preliminary Objection noting that the plaintiffs had not escalated the dispute through the stages of arbitration, A/R Objection and Appeal to the minister.**

38. What resonates from the above analysis is that the cited cases no.5,6, 8 and the case of Reuben Mwangela all have a common denominator which is the ascertainment of rights and interests in land of which in most of the cases, the parties had already immersed themselves in the dispute resolution mechanisms through a known applicable law but somehow, the claimants in those suits had opted to abandon the laid down stages of dispute resolution mechanisms.

39. In the case of **See Kanampiu M’Rimberia vs. Julius Kathane and Others, Meru H.C.C. No. 6 of 2009**, where a claimant had abandoned an appeal before the minister, I stated that it was not an option for a party to seek redress in a court of law in so far as ascertainment of rights and interests in land are concerned.

40. The present case goes beyond ascertainment of rights and interests in land. The issue of the legality of the adjudication process and the applicable law has been raised. The case **Meru Petition 5 of 2019, The Muthaara Njuri Ncheke Council of Elders & Another vs. The Committee Ngare Mara/Gambella Adjudication section and 2 others** is a classic example of a matter where the dispute did not fit in the dispute resolution mechanisms provided under the adjudication statutes even though the land was under adjudication. In that case, I was dealing with a matter where a corrigendum notice had been issued beside the main notice of 11.3.2016 in respect of Ngare mara adjudication section. I held thus;

“The present dispute is challenging the legitimacy of the Adjudication process though there is also a question for determination touching on the rights and interests of the parties. I therefore make a finding that the suit is properly filed before this court”.

41. Likewise, in the present case, even though there is a question of ascertainment of rights and interests in land, the legitimacy of the current adjudication process has also been questioned, where the answer appears to lie on facts to be adduced or clarified since Ruirii adjudication section itself had been in existence years earlier.

42. In the case of **Mehuba Gelan Kelil & 3 Others vs. Abdulkadir Shariff Abdirhim & 4 Others [2014] Eklr.**, the court stated that;

“It is trite law that a preliminary objection should be based on pure points of law which do not require copious probing of evidence in order to ascertain”

43. My conclusion on this issue is that this court has jurisdiction to hear the matter along with the other pending cases touching on Ruirii Rwarera area where it is clear that the issues are extremely contentious and rather peculiar. The preliminary objection fails on this point.

Consent

44. Section 30 (1) of the Land Adjudication Act CAP 284 provides that:

“(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.”

Section 8 (2) of the Land Consolidation Act has a similar proviso.

45. This court pronounced itself on this issue in the case of **Meru Petition 5 of 2019, The Muthaara Njuri Ncheke Council of Elders & Another vs. The Committee Ngare Mara/Gambella Adjudication section and 2 others (supra)**, where I held that a consent was not required under the Land Adjudication Act as the dispute concerned the legitimacy of a corrigendum notice issued pursuant to **section 5 of the Land Adjudication Act**. In that case I had extensively relied on the case **Nakuru ELC Judicial Review case No. 13 of 2014, Republic vs Musanka Ole Runkes Tarakwa Lempaso Ole Kuyioni & 2 others and Joseph Lesalol Lekitio & Others (exparte applicants)**, where Munyao J held that;

“A suit that questions the process of land adjudication, rather than the determination of interests, would not be a suit concerning an interest in land, and would therefore not require the consent of the land adjudication officer.

46. This court has again been invited to look at its own decision of **Reuben Mwongela M’Itelekwa (supra)** at paragraph 35 on page 23 where I held that;

“As long as a claimant desires that there be a determination regarding a right and interest in land, YES, a consent would certainly be required even in the filing of petitions, but in other disputes the consent is not required”.

47. Again, I find that the facts of the present case are distinguishable from the case of Reuben Mwongela on the issue of consent. As already established herein, this is a rather peculiar case where by an adjudication area was created out of another adjudication section. This came to be via a court of appeal order of which the implementation of the same is an issue to be determined. Thus, just like in the case of **Muthaara Njuri Ncheke (supra)** which I quoted in the **Reuben Mwongela case (Reuben)**, the legitimacy of the process itself is an issue for determination. It cannot therefore be said that the issue is simply one of determination of rights and interests in land.

Violations of rights

48. There is certainly an ownership dispute which spilled into the magistrate’s courts in form of criminal and civil cases. However, as I have already stated, the issue is deeper as it touches on the manner of interpretation and implementation of the court of appeal/consent order which gave rise to the new MBWAA 1 ADJUDICATION SECTION. The petitioner has accused the 9th respondent of secretly, unlawfully, illegally and arbitrarily creating the MBWAA1 ADJUDICATION SECTION. I am yet to see the response of the DLASO. However, the advocate for the DLASO is certainly not in support of the PO. I am keen to see the response considering that much of the blame has been heaped on this respondent in the petition.

Conclusion

49. In the final analysis, I find that the Preliminary Objection has no merits. Due to the intricate and convoluted manner of this dispute, I do not wish any party to hail this ruling as a winner or loser. It is paramount that the court gets to the bottom of the problem afflicting the area in question in a whole some manner by hearing the petition. In the circumstances, I direct that each party bears their own costs of the Preliminary Objection.

50. I also find it necessary to impose some house-keeping measures to facilitate efficient and effective prosecution of this matter seeing that the file is very voluminous. All the pleadings of the parties as well as the actual hand written or typed record of the court are to be maintained in the original file to be identified as volume 1, while the rest of the documents are to be placed and maintained in a separate file identified as volume 2. The 9th and 10th respondents are also to clarify whether they have filed a response to the petition.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 26TH FEBRUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Nyamu Nyaga for petitioners

Murithi for 1st to 5th and 7th respondents

Kiongo for 9th and 10th respondents

HON. LUCY. N. MBUGUA

ELC JUDGE