



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC PETITION NO. 2 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 40, 47, 50 & 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 40, 47 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE DECISION MADE BY THE DEPUTY COUNTY COMMISSIONER, MAKUENI IN LAND APPEAL TO THE MINISTER CASE NO.290 OF 2009.

BETWEEN

JOHN MUTUKU KITUMA1ST PETITIONER

SAMUEL MAILU KITUMA 2ND PETITIONER

SAMMY MUSAU KITUMA3RD PETITIONER

AND

JAMES MUTIE KIMUYA1ST RESPONDENT

KIAMBA KIMUYA.....2ND RESPONDENT

JOSIAH KIMUYA3RD RESPONDENT

LAND REGISTRAR – MAKUENI4TH RESPONDENT

RULING

1. What is before this Court for ruling is the 1st, 2nd and 3rd Respondent’s Notice of Preliminary Objection dated 13th June, 2019 and filed in court on even date. The three Respondents contend that: -

1) THAT the said application and the suit are incompetent, bad in law as they offend the mandatory provisions of Sections 29 (1) (b) of the Land Adjudication Act Cap 284 Laws of Kenya since the decision of the Minister is always final.

2) THAT the issues canvassed in support of the application and the Petition are Res Judicata the same having been directly and substantially in issue between the same parties in MAKUENI ELC APPEAL NO.4 OF 2017 where judgment was delivered on 6th February, 2019 as against the Petitioners who were then the Appellants.

3) THAT the petitioners ought to have commenced Judicial Review proceedings if they were dissatisfied with the Ministers decision since the decision of the Minister is always final.

4) THAT the said application and the Petition are frivolous, vexatious and an abuse of this Honorable Courts process and ought to be struck out with costs.

2. The Court directed that the Notice of Preliminary Objection be disposed off by way of written submissions. The Respondents and the Petitioners filed their submissions on 03rd July, 2019 and 11th July, 2019 respectively.

3. In their submissions, the Respondents contend that the Petition seeks for orders which can only be issued through a judicial review application. They further contend that the Petitioners are on a fishing expedition since they seem not to know how to approach the Court after the Court delivered its judgement on 06th February, 2019 in ELC Appeal No.4 of 2017.

4. The Respondents were of the view that the Petitioners are in some way challenging the decision made by the Minister in case number 290/2009. They further submit that appeals under the **Land Adjudication Act (Rev 2016) Act Chapter 284 of the Laws of Kenya** provides at **Section 29** as follows: -

“Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

5. The Respondents submitted that from the reading of the aforementioned section, it is clear that the same is couched in mandatory terms that once the Minister has decided on an appeal from an objection, an aggrieved party has no further opening rather than to review the decision of the Minister through judicial review. The Respondents rely on the case of **Martha Kigen vs. Johana Tibino [2017] eKLR**.

6. The Respondents have also submitted that the Petition is not a judicial review application and that some of the orders sought are of judicial review in their nature. The Respondents pointed out that the decision of the Minister was delivered on 16th March, 2017. That judicial review proceedings ought to be commenced within a period of six (6) months from the date of the decision which is not the case in this petition. They were of the view that the mandatory nature of Section 29 of the Land Adjudication Act does not contemplate any other way of re-opening a case already decided by the Minister rather than Judicial Review proceedings.

7. The Respondents have also submitted that the Court having rendered its judgement on the issues in question through its judgment delivered on 06th February, 2019 the matter is res judicata and the petitioners have come back to court through the wrong procedure. That the Petitioners are introducing issues through the back door. They urged the Court to strike out the application together with the petition.

8. On the other hand, the Counsel for the Petitioners submitted that whereas the Petitioners approached the Court through the wrong channel, the mistake of their advocate should not be visited upon them. The Counsel pointed out by the time the ruling in ELC Appeal No.4 of 2017 was delivered in February, 2019, the limitation period in filing a judicial review application had lapsed. The Counsel went on to submit that a party that feels aggrieved by an act or omission that infringes any right under the constitution has the right to petition the Court. The Counsel added that in this instance, the Petitioners seek enforcement of Bill of Rights such as the right to own land, right to fair hearing and right to a fair administrative action among others.

9. It was further submitted that the Petitioners seek to have the Court look at the implications of sticking to the strict provisions of Section 29 of the Land Adjudication Act as opposed to Constitutional redress in case of infringement of rights. The Counsel was of the view that the Court ought to address the issue of substantive justice since there is likelihood of the Petitioners being evicted from a land that they have known as home for a continuous period of 40 years. The Counsel added that the aspect of continuous occupation by the Petitioners on the disputed land has not been challenged by the Respondents. The Counsel urged the court to consider the legal effect of dismissing the Petition and the Notice of Motion as contrasted with the protection of the rights of the Petitioners. The Counsel went on to submit that the Petitioners have this petition as their last resort to seeking redress for the injustices occasioned by the Minister and as such, it is just and fair to stay the Minister’s decision, admit the petition and hear the parties substantively and thereafter make a decision without either of the parties feeling left out.

10. The Counsel submitted that the Petitioners are not on a fishing expedition and added that they have resorted to a Petition owing to the fact that the period for filing for judicial review has lapsed. The Counsel urged the Court to dismiss the Notice of Preliminary Objection.

11. Regarding the issue for the “right forum” the Counsel relied on the case of **Japheth Okumu Olual vs. The County Government of Kisumu & 2 others [2019] eKLR** where the Court held: -

“Consequently, and considering that a dispute relating to land and or the environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters... For those reasons, the Respondents’ objection that this court does not have jurisdiction to determine the petition before it is unmeritorious. Indeed, it is only this court that has the jurisdiction to hear land disputes, notwithstanding how those disputes are commenced.”

12. I have read the Petition and the Notice of Motion application dated 08th March, 2019 and filed in court on even date. Basically the Petition seeks to have the determination of the Deputy County Commissioner Makuani Sub-county in the Minister’s Appeal No.290/2000 be declared unconstitutional for being in breach of Articles 22, 23, 40, 47 and 50 of the Constitution of Kenya. Articles 40, 47 and 50 provide for protection of right to property, fair administrative action and fair hearing. In the Petition and the application, the Petitioners have clearly shown that they were given a hearing by both the District Land Adjudication and Settlement Officer as well as by the Minister in case

number 290/2009. They cannot be heard to say otherwise. The Minister's decision which is otherwise final can only be challenged by way of judicial review. In my view, they have failed to show the constitutional rights that were violated. A person who alleges contravention or a threat of contravention of a constitutional right, must set out the right infringed and particulars of such infringement (See **Anarita Karimi Njeru [1979] KLR 154 and [1979] KLR [62]**).

13. I would agree with the Respondents that the Petitioners therefore are out on a fishing expedition and in my view, litigation must come to an end.

14. The upshot of the foregoing is that the Preliminary Objection has merit and in the circumstances, I hereby proceed to strike out the Petition and the application with costs to the Respondents.

Signed, dated and delivered at Makueni via email this **29th** day of **April, 2020**.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi

MBOGO C.G, JUDGE,

29/04/2020.