



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 9 OF 2018

**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 AND 23 AND 165 OF THE CONSTITUTION OF KENYA 2010

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 THE LAND CONSOLIDATION ACT CAP 283 AND 284 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 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

STEPHEN KIRIMI M'RINTURI.....PETITIONER

VERSUS

LAND ADJUDICATION AND SETTLEMENTS

OFFICER – IGEMBE DISTRICT.....1ST RESPONDENT

MINISTER FOR LANDS.....2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

AND

PETER KUMBU KIMUNYA.....1ST INTERESTED PARTY

JOSHUA NKUNJA M'MWITHIA.....2ND INTERESTED PARTY

JUDGMENT

1. On 24/09/2018 the petitioner lodged in court a petition supported by his affidavit sworn on 24/09/2018 and his supplementary affidavit sworn on 25/01/2019. The petitioner seeks the following prayers:

- a. *“A declaration that the 1st, 2nd, 3rd, 4th and/or the 5th respondents’ decisions with regard to the petitioner’s land are irregular, fraudulent, ambiguous, irrational and unconstitutional hence null and void.*
- b. *An order of certiorari for purposes of quashing:*
 - i. *The decision of the committee that 1 ½ aces should be hived off the petitioner’s Land Parcel No. 10394 Athiru Demarcation/Athiru Ruujine Adj. Section and be given to Joshua Nkunja.*
 - ii. *The decision of the arbitration board that the parcels given to the petitioner and Joshua Nkunja by the committee, be consolidated and divided into two equal parts; that is the first half to go to the petitioner and the other to Joshua Nkunja M’Mwithia.*
 - iii. *The decision by the Land Adjudication Officer that the 1st Interested Party (Peter Kumbu Kimunya) should take the portion which had been given to the petitioner by the committee and registered as parcel No. 7169; and that the 2nd Interested Party should be given 1 ½ Acres from portion No. 5269 while the petitioner takes the rest of the said parcel.*
 - iv. *The decision of the Minister upholding the decision of the Land Adjudication Officer.*
- c. *A declaration that Land Parcel No. 10394 Athiru Demarcation/Athiru Ruujine Adj. Section (currently divided into land portions 7169 and 5269) belongs to the petitioner.*
- d. *An order of mandamus compelling the Chief Land Registrar to register Land Parcel No. 10394 Athiru Demarcation/Athiru Ruujine Adj. Section in the petitioner’s name.*
- e. *General damages for breach of petitioner’s right to property.*
- f. *Costs of this suit and interests on (e) above.*

2. The petition was opposed by Joshua Nkunja M’Mwithia, the 2nd Interested Party, vide his replying and further replying affidavits sworn on 23/11/2018 and 28/03/2019 respectively as well as by the respondents vide their grounds of opposition dated 3.7.2019. The 1st interested party did attempt to defend the suit though this turned out to be an exercise in futility. This is because on 25.11.2019, the counsel for 1st interested party sought for more time from this court to file a replying affidavit as well as submissions. The court indulged them, giving them 30 days of which documents filed outside the given time-lines were to stand as expunged. The replying affidavit and the submissions were filed way beyond the given time-lines, hence the same stand as expunged.

3. This suit was heard by way of written submissions. The respondents did not file submissions but they have associated themselves with the arguments raised by the interested partie

Case for the Petitioner

4. The petitioner contended that in or about the year 1994 he bought the Suit Land which was originally Land Plot No. 1931 Nkanga from Samwel Kanyi who also gave him the Land Registration Certificate. Unfortunately, Samwel died before the land could be transferred to him. He took possession of the land and extensively developed it. In or around the year 2004 during demarcation, the said land was demarcated and recorded in his name as Land Parcel No. 10394 Athiru Demarcation/Athiru Ruujine Adj. Section (hereinafter **‘the Suit Land’**).

5. The interested parties filed objections against the petitioner with each one of them claiming the suit land. The committee decided that 1½ acres be hived off the Suit Land 10394 to be given to the 2nd Interested Party, whereby the 1½ acres was registered as parcel no. 5269. The 1st Interested Party’s case was dismissed.

6. Thereafter, each of the three parties appealed to the arbitration board where it was held that the parcels given to the petitioner and 2nd Interested Party be consolidated and divided into two equal parts where one portion was to go to the petitioner and the other to the 2nd Interested Party. Petitioner contends that the board’s decision was ambiguous as it talked of land parcel No. 0399 which was unknown to the parties.

7. The dispute then progressed to the objection of adjudication to the register. The decision of the land adjudication officer was that the 1st

Interested Party was to take the portion that had been given to the petitioner by the committee and registered as land parcel No. 7169. The 2nd Interested Party was given 1 ½ acres from the land parcel. No. 5269, while the petitioner was to take the remainder of that parcel.

8. The petitioner then lodged an appeal to the minister who upheld the decision of the land adjudication officer.

9. The petitioner contends that the proceedings and decisions undertaken vide CAP 283 and 284 were fraudulent, irregular and ambiguous. Having exhausted all the other remedies as provided under **CAP 283 and 284 of the Laws of Kenya** he resulted into filing this petition. Besides, the Interested Parties conspired with the respondents to unlawfully deprive him of his lawful ownership of the Suit Land contrary to his constitutional rights especially his right to property under **Article 40**.

10. In support of his petition, the petitioner availed the following documents; A certificate of land registration issued on 16.1.1988 to Samwel Kanyi for plot no. 1931, proceedings of the committee case no. 708/04, proceedings in the Arbitration case no 207/2009, A/R Objection proceedings in case no. 2499, A/R Objection proceedings in case no 958 and documents appertaining to the Appeal to the minister.

11. The petitioner submitted that this suit is properly before the court as he exhausted all the remedies provided for under **CAP 283 and 284** first. He is not substituting any well down procedures since he has already exhausted them all. He is indeed the owner of the Suit Land which was initially known as Land Parcel No. 1931 Nkanga and currently subdivided into Land Parcels No. 7169 and 5269. The proceedings **under CAP 283 and 284** were filled with irregularity, ambiguity and illegality hence null and void. Moreover, the 2nd Interested Party obtained the title deed for land parcel No. 5269 through fraud for it was issued on 6/06/2017 when proceedings before the Minister were still underway, since the appeal was filed in 2012 and concluded in 2018.

12. petitioner has further submitted that according to the decision of the minister, the 2nd Interested Party was entitled to 1 ½ acres but the acreage in the title reflects 0.91 Ha (2.275 Acres). Thus, the petitioner prays that the prayers sought in his petition be allowed. He relied on the case of **Fredrick Mworira v District Land Adjudication Officer Tigania West/East & 3 others [2016] eKLR** to support his case.

Case for the 2nd Interested Party

13. Joshua Nkunja M'Mwithia, the 2nd Interested Party contends that he gathered the Suit Land on 24/07/1991 and was issued with the certificate of land registration for plot No. 1198 in the area of Nkanga. In 1997 he fell sick, was unable to farm and was financially constrained. His neighbor, Samson Mwambia, brought the petitioner to him requesting that he lends his farm to the petitioner until he is well and able to get back on his feet. Soon after the lending of his land to the petitioner, the 1st Interested Party came and chased the petitioner away claiming that the land was his and that the petitioner was a trespasser. He reported the matter to the chief who ruled that the land was his (2nd interested party).

14. The 1st Interested Party thereafter filed a case at the land's office which was determined without his knowledge. He appealed at the District Land Adjudication and Settlement Office where it was ruled that he be given 1 ½ acres from the land given to the 1st Interested Party. He raised an appeal before the arbitration board who decided that the land be divided equally amongst him and the petitioner while the 1st Interested party was found not to be entitled to any land. They appealed to the minister who upheld the decision that they have equal portions. The petitioner has never challenged the minister's decision which is final and he did not file a judicial review either.

15. The 2nd Interested Party submitted that the petition is misplaced as the petitioner has never challenged the decision of the minister in judicial review. Neither has the petitioner pointed out what part of the proceedings and determinations contravened his rights and therefore, the suit is not properly before the court. The legality as to whether the petitioner is or is not the owner of the Suit Land has already been determined in the earlier stages by the committee, adjudication officer, arbitration board and minister. The proceedings were not irregular, ambiguous or illegal. Furthermore, the petitioner should not delve on adjudication numbers which keep on changing during the various stages of gathering, demarcation, adjudication and finally registration. During the proceedings parties were clear that the subject matter was one common parcel.

16. He further submitted that he never obtained the title deed for parcel No. 5269 through fraud and there was no restriction on the said title. Consequently, the petition lacks merit and ought to be dismissed.

17. In support of his case, the 2nd interested party availed the following documents; Title deed for parcel no. 5269 registered in his name and a certificate of land registration. The 2nd interested party also relied on the case of **Peter Odoyo Ogada & 9 others v Independent Electoral And Boundaries Commission of Kenya & 14 others [2013] eKLR** as well as the case of **Fredrick Mworira vs DLASO** (supra).

Case for the respondents

18. The respondent's case as contained in their grounds of opposition is that Article 40 and 64 of the constitution do not afford any protection to the petitioner, that the petition is vague and that the same amounts to an attack on the administrative decisions of statutorily prescribed entities. It is also averred that vide the doctrine of estoppel, the petitioner is precluded from re-litigating the issue of ownership of the land as the issue had already been dealt with.

Determination

19. **Whether the petition has merits and in particular, whether this court can declare the petitioner as the owner of the suit land is the issue for determination.**

20. The petitioner alleges that the Suit Land belongs to him for he purchased it from one Samwel Kanyi. On the other hand, the 2nd Interested Party stated that the Suit Land belongs to him, having gathered the same. There is no dispute that there has been previous litigation regarding the dispute at hand and this occurred in the process of land adjudication. The legal regime governing the adjudication process is mainly found in two statutes, **The Land Consolidation Act Cap 283 Laws of Kenya** and **The Land Adjudication Act Cap 284 Laws of Kenya**.

21. Both the **Land Consolidation Act (CAP 283)** and the **Land Adjudication Act (CAP 284)** have elaborate dispute resolution mechanism. Section 26 (3) of the Land Consolidation Act provides that: **“No appeal shall lie against any decision by the Adjudication Officer.....”**, While under Section 29 (1) of the Land Adjudication Act **“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.....”**. Since the dispute herein had gone all the way to the minister, then it can rightly be assumed that the applicable law was the Land Adjudication Act.

22. The 1st case was the committee case no. 708 of 2004 filed by 2nd interested party against the petitioner. The 2nd case was the Arbitration case no. 207 of 2009 where all the three litigants (petitioner and both interested parties each accusing the others) were involved. This was followed by two A/R Objection proceedings, one being case no.2499 filed by 1st interested party against the petitioner and case no.958 filed by 2nd interested party against the petitioner. Finally, there was the Appeal to the minister case no. 358/15 lodged by the petitioner against the interested parties. It is noted that the decision of the minister is final as stipulated under **CAP 284**. The aforementioned proceedings are the ones the petitioner terms as irregular, illegal and ambiguous resulting in infringement of his constitutional rights.

23. When a person seeks redress through a constitutional petition, it becomes the duty of that party to state his claim with precision by making reference to the provisions of the Constitution violated and the manner of the alleged violation. This principle was established in the case of **Anarita Karimi Njeru v Republic [1979]eKLR** where the High Court held:

“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.”

24. The principle in the **Anarita Karimi Case** was re-affirmed by the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where it was stated as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims..... We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication.....”

26. Applying this test to the facts of this case, it is my view that the petition lacks specificity and precision of the provisions of the Constitution which have been violated and the manner of the alleged violation. The petitioner alleges that his constitutional rights particularly under **Article 40** have been violated. In his pleadings the petitioner asserted that the dispute resolution mechanisms were crippled with illegality, irregularity and ambiguity. He has not demonstrated how the alleged violations occurred considering that those adjudication bodies have statutory mandate under **CAP 283 and 284** to handle such matters that fall within their domain. It is noted that the petitioner submitted himself and fully participated in the proceedings before the adjudication bodies. The fact that he is displeased with an outcome does not mean that there was illegality and or irregularity.

26. Alternatively, having been dissatisfied with the decision making process, recourse for the petitioner lay in filing a Judicial Review matter before the court to establish whether the processes leading to the making of the decision were proper. This was so stated by the Court of Appeal in the case of **Municipal Council of Mombasa v Republic & another [2002] eKLR** where it held as follows:

“The court would only be concerned with the process leading to the making of the decision”.

27. The petitioner has rightly submitted that constitutional petitions should never be used as a substitute for other procedures which have been laid down for enforcement of rights; See case of **Fredrick Mworira (Supra)**. In this case the petitioner has indeed exhausted the remedies available under **CAP 283 and 284 Laws of Kenya**. Instead of filing a judicial review matter, the petitioner has opted to file a petition yet one of his primary concern was the correctness of how the proceedings were conducted during the dispute resolution mechanism measures.

28. In the case of **Evans Chelagat Yatich v Baringo North Sub-County Alcoholic Drinks Committee & another [2019] eKLR** the court cited the case of **Moses Kuria Njuguna vs County Government of Kiambu (2018) eKLR** where it was stated as follows:

“The notion that whenever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by the Constitution is fallacious. The right to apply to the High Court ... for redress when any human right or fundamental freedom is or is likely to be contravened, is diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action ... the mere allegation that a human right of the Applicant has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court... if it is apparent that the allegation is frivolous, vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”(Emphasis added)

29. The legal infrastructure in Kenya comprises of the Constitution at the apex and other laws made by Parliament and by County Governments; all must be read together as part of the same legal ecosystem. This principle was affirmed in **Alphonse Mwangemi Munga and 10 Others v Africa Safari Club (2008) e KLR** where the court held that:

“The Constitution is the Supreme Law of the land but it has to be read with other laws made by Parliament and should not be construed to be disruptive of other laws in the administration of justice ... parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not.”

30. In **petition 6 of 2016 Kisii, John Masiantet Saeni vs. Daniel Aramat Lolungiro & 3 Others, Mutungi J**, while upholding a Preliminary Objection challenging the competency of the Petition had this to say on matters adjudication;

“I do not agree that the provisions of the Land Adjudication Act that deal with the process and procedure of adjudication would constitute procedural technicalities. The Act sets out in considerable detail the process of adjudicating people’s interests and rights over land the subject of adjudication before such land is demarcated for issuance of individual titles on registration. The Act equally sets out a dispute resolution mechanism during the process of land adjudication. The petitioner participated in the adjudication process and invoked the dispute resolution mechanism up to the end resulting in the decision of the Minister on the appeal where the petitioner’s appeal was rejected”.

31. I wholly associate myself with the aforementioned case law. The fact that the petitioner exhausted the remedies available under Cap 284 does not in itself entitle the petitioner to approach this court by way of a petition to challenge the decisions of the adjudication bodies.

32. Even though there is a dispute resolution mechanism available under Cap 283 and Cap 284, this court takes cognizance of the fact that courts have jurisdiction to determine some disputes arising out of adjudication process. However, the courts have to be extremely careful so as not to emasculate the powers bestowed upon the adjudication bodies by the statutes. This was aptly captured by **Okongo J in Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others (2013) eKLR** held as follows;

“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. It is for this reason that, there is injunction under section 30 of the Act to any civil suit being instituted over an interest in land in an adjudication area save with leave of the Land Adjudication Officer. The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. (Emphasize added). As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. 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. (Emphasize added). The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land”.

33. What resonates from the aforementioned jurisprudence is that the courts role is limited to supervision & enforcement of the decisions of adjudication bodies. The courts also ensure that the process of adjudication is undertaken in accordance with the law. The courts can also handle a myriad of disputes arising in adjudication arena as long as such disputes do not fall in the ambit of ascertainment of rights and interests in land as set out in the preamble of cap 283 and cap 284.

34. This is a situation whereby the rights and interests in the suit land have crystallized in form of registration and issuance of the title deed to the 2nd interested party. Such rights are protected under the provisions of section 25 of the Land Registration Act, but can be challenged under section 26 2 (b) of the aforementioned Act. This can only be done in an ordinary suit where the claimant (read the petitioner) would be required to discharge the burden of proof to the required standard through the process of adducing evidence. Filing this petition is away of by-passing the rigorous procedure of adducing evidence and subjecting the same to cross examination; **See Anne Wawuda & 3 others vs Kenya Railways Corporation & another (2105) eKLR.**

35. Accordingly, I am of the view that the petition lacks merits and the same is hereby dismissed with costs to the 2nd interested party.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE