



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. 2 OF 2014

IN THE MATTER OF ALLEGED CONTRAVENTION OF

CONSTITUTIONAL RIGHTS FREEDOMS AND GUARANTEES

UNDER ARTICLE 22, 40 & 47 OF THE CONSTITUTION OF KENYA

ISAIAH MBAABU (Suing on behalf of Athimba Clan).....1ST PETITIONER

PASQUALE MUKETHA (Suing on behalf of Akachiu Clan).....2ND PETITIONER

IBRAHIM KARANI (Suing on behalf of Nkula Clan).....3RD PETITIONER

VERSUS

THE LAND ADJ. & SETTLEMENT OFFICER

IGEMBE SOUTH DISTRICT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

MATI KABERIA BAIBIRI.....3RD RESPONDENT

KOBIA BAIMURU.....4TH RESPONDENT

PAUL SOLOMON MIRITL.....5TH RESPONDENT

JUDGMENT

1. This petition was filed on 14.1.2014 and is supported by the affidavit of Isaiah Mbaabu sworn on 9/01/2013. The petitioners seek the following prayers:

- a) *A declaration that the petitioners clans fundamental constitutional rights have by virtue of the 1st respondent’s actions been violated.*
- b) *A declaration that the actions of the respondents are unconstitutional and illegal.*
- c) *A declaration that the land allocated to 3rd - 5th respondents which land has been alienated from the petitioners clan land, it be reverted back to the petitioners’ clan.*

d) *A declaration that all that land between Meru National Park and Kiolu river belongs to the petitioners’ clans and the 3rd to 5th respondents have no right to it.*

e) A permanent declaration barring the 1st respondent from allocating the petitioners clan land parcel to 3rd - 5th respondents.

f) Costs of the petition to be borne by the respondents.

2. The petitioners contended that their clans hold, own and occupy all the unregistered land between Meru National Park and Kiolu River in Igembe District Meru County within Lower Athiru Gaiti Adjudication Section. That this area is currently undergoing demarcation and the 1st respondent has introduced and or sneaked the 3rd - 5th respondents to the area. If the 1st respondent succeeds in alienating the land the petitioners will be deprived of their ancestral land and will be left destitute.

3. The 3rd – 5th respondents in their answer to the petition filed on 30/08/2019 opposed the petition, denying the averments put forth by the petitioners. They stated that the petitioners have no capacity and or *locus standi* to file the petition on behalf of their clan members. The 3rd – 5th respondents have identified themselves as the committee members of Athimba and Ankula clan of Kindani Location and were given directions by the District Land Adjudication and Settlement Officer (DLASO) Meru North District to allocate land to individual members of the clan occupying the Suit Land. The Suit Land became an adjudication section as per **CAP 284 LAWS OF KENYA**, based on notice of establishment of an adjudication section amendment to notice No. ADM/1A/10/VOL.VI/311 of 30/07/1966 dated 3/03/1989.

4. They have only been exercising their mandate as committee members of Lower Athiru Gaiti ‘A’ Adjudication Section, while the 1st respondent has been exercising his mandate as per the law in demarcating the land. The clan land ceased to exist since 1989 as all the land has been demarcated and allocated to individual owners and others set apart for public utility. Thus, the 1st respondent has not been allocating land to them but rather to the clan members who have been enjoined as Interested Parties.

5. The two hundred and thirty seven (237) Interested Parties filed their application to be enjoined as interested parties on 2.7.2018 (dated 20.6.2018) which application was allowed on 25.3.2019. The interested parties then filed their answer to the petition on 30/08/2019. They contended that the petitioners are not representatives of the clan members and hence do not have the capacity to sue. They aver that 3rd-5th respondents are the committee members of Athimba, and Ankula clans of Kindani location. Their averments are in tandem with what has been put forth by the 3rd-5th respondents.

6. The 1st and 2nd respondents have opposed the suit through the affidavit of one J.M Muchiri filed on 4.3.2019. They aver that the demarcation process in the adjudication section was taking place safe for the portion which was the subject of the petition owing to a court order of 17.1.2014 stopping them from demarcating the said land. They have made reference to **Section 5 (1) and (2) of the Land Adjudication Act**, where it is stipulated that any person claiming an interest in land is free to make his claim to the recording officer and even point out to the demarcation officer the relevant boundaries.

7. The 1st and 2nd respondents have not denied any person either from Athimba, Akachiu or Nkula clans or indeed from any other quarter from pointing out their interests in land for purposes of demarcating and recording the same. These respondents have also pointed out the dispute resolution mechanisms provided for under the **Land Adjudication Act** where a claimant can lodge cases in the following tiers; **Land Adjudication Committee case, arbitration board case, objection to adjudication register** and even **appeal to minister** in accordance with **Sections 19, 20, 21, 22, 25, 26 and 29** of the **Land Adjudication Act cap 284**.

8. It was further argued by the 1st and 2nd respondents that the petitioners have not complied with the provisions of **section 30 of Land Adjudication Act Cap 284** which provides that a consent in writing of the adjudication officer be obtained before the filing of the suit.

9. The 1st and 2nd respondents aver that three persons should not be allowed to trample on the rights of everyone else using the clan titles or indeed derail the process of land adjudication whose intent and purpose is to ascertain and record rights and interests in trust land.

10. The 1st and 2nd respondents argued that if the petitioners are granted their prayers, this would be in contravention of the Land Adjudication process as the petitioners would assume land ownership rights which have not been ascertained thereby interfering with rights of others as well as derailing the government policy of having all trust land/community land adjudicated and ownership ascertained for faster poverty alleviation and economic development.

11. The 1st and 2nd respondents therefore concluded that they should be allowed to carry out their adjudication duties as provided for under the relevant statute under **section 9 and 10** of the aforementioned Act. They also aver that the 3rd, 4th and 5th respondents are members of the land adjudication committee of lower Athiru Gaiti ‘B’ appointed in accordance with section 6 (1) of the Act and were sworn before the Chief Magistrate Maua to perform their duties, hence the said committee members should equally be allowed to perform their duties as provided under section 20 and 21 of the aforementioned Act.

12. This matter was canvassed by way of written submissions. The petitioners submitted that they are the owners of the disputed land which is ancestral land under customary tenure. They live and are in exclusive possession of it. Introduction of strangers on the land is in contravention of their proprietary rights envisaged in the Constitution. Thus, the adjudication process was not only fraudulent but intended to deprive them of their land. The petitioners have relied on the case of **PZ Cussons East Africa Limited vs Kenya Revenue Authority (2013) eKLR**.

13. The 1st and 2nd respondents submitted that the court lacks jurisdiction in the first instance for consent was not obtained as required under **Section 30(1) of the Land Adjudication Act** from the adjudication officer to institute this suit. Besides, the petition is premature for **Section 19, 20, 21, 22, 25, 26 and 29 of the Land Adjudication Act CAP 284** provide for the process to be followed where claims are made regarding interest in land. **Section 26 of CAP 284** gives the petitioners the right to file an adjudication register objection case to be heard by the adjudication officer alone but they did not explore this platform. Neither did they lodge an appeal to the minister as stipulated under **Section 29**, hence the petition lacks merit and is an abuse of the court process.

14. The 1st and 2nd respondents relied on the following authorities:

- **Stanley Lezen Mulwa vs Leonard Kapala Makangulu and 2 others (2007) eKLR.**
- **Ntiga Nkanga vs Charles Nyaga (2008) eKLR.**
- **“Lilian’ “S” vs Caltex Oil Kenya Ltd (1989) 1 KLR 1**

15. The issues for determination are:

- a) Whether the petitioners have locus standi**
- b) Whether the petition is merited**

Locus Standi

16. According to the **Black’s Law Dictionary, Tenth Edition** at page 1084 it defines *locus standi* as:

“The right to bring an action or to be heard in a given forum.”

17. In this case, the petitioners stated that they are persons who represent the Athimba, Akachiu and Nkula clans. They have provided the authority to file the suit which has been signed by their members.

18. In the case of **Rees & Others, Martin & Another –Vs- Davies & Others (1969) 1 All ER 283**, the court stated that;

“The rule as to representative proceedings should be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice and should be applied, not in any strict sense, but according to its wide and permissive scope.”

19. In **Moses Onchiri v Kenya Ports Authority & 4 others [2017] eKLR**, the Court of appeal stated that;

“Under Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules), any person alleging violation or threatened violation can petition the High Court, and any person acting as a member of, or in the interest of a group or class of persons may also petition the High Court on behalf of the members, group or class of persons for redress. The same principle in Order 1 Rule 13 aforesaid must, by necessary implication apply where a petition has been instituted on behalf of many people”.

20. It may not be practical or realistic for the petitioners to have obtained each and every signature of a clan member. However, it was incumbent upon the petitioners to demonstrate that indeed they derive their mandate to institute these proceedings from the clan. There are tell-tale signs indicating that the petitioners do not have such authority.

21. The first point of consideration touches on the authority provided by the petitioners which is a set of three documents. The **1st authority is from Nkula clan given to Ibrahim Karani** (3rd petitioner) signed by 15 persons. The **2nd authority is from Akachiu Clan to Pasquale Muketha** (2nd petitioner). This one contains 11 members majority of whom are in the 1st authority i.e **Titus Mwenda, Patrick Kaunga, Daniel Kamenchu, Peter Bariu, Henley Mwingwa, M’Munyiri M’Mpurutha, David Kibuthania and Francis Mutiana M’Mukira** who are listed as numbers 8, 4, 7, 1, 3, 2, 12 and 14 in the 1st authority.

22. A similar scenario is played out in the **3rd authority from the Athimba Clan to Isaiah Mbaabu** (1st petitioner) where 11 persons have signed the authority but some like **Francis Mutiana M’Mukira, David Kibuthania M’Etirikia, Kaburi M’Mauta and Silas Imanene** are also found in the 1st list as numbers 14, 12, 6 and 5 respectively. The identity cards of the persons who have signed in two or three authorities are the same. The question which begs for an answer is, do some members belong to all the clans across the board. I am not persuaded that the authorities given are from the clans in light of the aforementioned discrepancies.

23. The second issue to consider is that the petitioners and even the persons who have signed the authorities have not given an account of how the clan gave the authority to file the suit.

24. As stated herein, clans may consist of large groups of people and it may be difficult to get all their signatures. I would have expected the petitioners to have held consultative engagements with their respective clan members by way of minuted meetings (commonly known as Baraza’s) in order to have something tangible to indicate that they were given authority. The petitioners have not demonstrated the manner in which their clans actually mandated them to file suit.

25. The 3rd issue to consider is that some members of the clans are the interested parties who have come forward to oppose the suit averring that the petitioners do not represent them. The interested parties recognize the 3rd-5th respondents as the persons with the mandate to represent their interests in land since the said respondents are the committee members in the adjudication process. No evidence was adduced to counter these averments of the interested parties.

26. In paragraph 10 of the petition, the petitioners allege that the 3rd-5th respondents are none clan members who have been sneaked onto the land by the 1st respondent. However, the petitioners have not demonstrated how they themselves are clan members let alone denounce the aforementioned respondents.

27. My conclusion on this point is that the petitioners have not demonstrated that they are the actual representatives of the clan members. The petition fails on this point.

The merits of the Petition

28. The second issue for consideration is whether the petition is merited. The petitioners have stated that the land is currently undergoing demarcation. Accordingly and based on the notices of the 1st respondent, the disputed land is under adjudication as per the **Land Adjudication Act**. Thus, the issue of ascertaining the petitioners' rights stand guided by the provisions of the aforementioned Act.

29. **Mutungi J** in the case of **John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others [2017] eKLR** held that:

“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.”

30. **The Land Adjudication Act** has provided mechanisms in which disputes ought to be resolved. The petitioners' have not utilized and exhausted these mechanisms. On this point, I make reference to the cases of; **Meru ELC Petition 21 of 2012, Stephen Michuki Kiunga vs. Nkuni M'Ruchiu and 2 Others; Meru ELC Petition 6 of 2017 Reuben Mwangela M'Itelekwa (suiing as the legal representative of the estate of M'Itelekwa Naitiri) vs. Paul Kigea Nabea; Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others [2015] eKLR.**

31. Another issue of concern is on consent where under **Section 30 (1) of the Land Adjudication Act**, it is provided as follows:

“(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.”

32. Thus, to invoke this court's jurisdiction before the register of the adjudication section is finalized, it was mandatory for one to obtain consent from the adjudication officer.

33. In **Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others (supra) Munyao J** held that;

“It will be noted that Section 30 (1) above, prevents the institution of suits in court, on matters concerning an interest in land in an adjudication section, until the adjudication register has become final, except with the consent of the adjudication officer. The adjudication register becomes final after exhausting the mechanism provided in the Land Adjudication Act, which provides for the determination of who is entitled to an interest in the land in question. ...The process of determining interests in land provided by the Land Adjudication Act, has not been exhausted.....But if a litigant wants to sue the Adjudication Officer, because the officer has decided that he is not entitled to the land in question, then in such a case, the litigant, must exhaust the appeal process provided in the Land Adjudication Act, or if he feels that the issue needs to be decided by the court, then he must seek the consent of the Land Adjudication Officer, for the litigation in this instance, would clearly be litigation "concerning an interest in land.”

34. What emerges from the present case is that the adjudication register is yet to be finalized. It is also apparent that the petitioners are claiming ownership of the suit land. It follows that consent was needed from the adjudication officer before the filing of this suit.

35. Finally, I find that the petitioners have not been candid on who the 3rd-5th respondents are. The petitioners have termed these parties as strangers who have been sneaked onto the land by the Land Adjudication Officer. However, it is crystal clear that the parties 3rd - 5th respondents are members of the Land Adjudication Committee lower Athiru Gaiti “B” adjudication section appointed in accordance with **section 6** of the **Land Adjudication Act**.

36. In the case of **Silverio Akubu & 4 others v Charles Baariu Salesio & 3 others [2019] eKLR**, while emphasizing the importance of the adjudication committees, 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...”

37. What resonates from the above analysis is that the committee members are the ones who have the statutory mandate to represent the clan members because they actually come from those communities. If the petitioners had an issue with the appointment of these committee members, then they ought to have challenged the legitimacy of the said committee (as was the case in **Silverio Akubu case**), but they simply cannot disown the committee members.

38. In light of the above analysis, I conclude that this petition is not merited. The same is hereby dismissed with costs to the respondents and the interested parties. Any orders of injunction issued in this matter are hereby discharged.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment has been given on notice. 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 Judgment 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