



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 191 OF 2012

PAULINE MUIA MAINGI1ST PETITIONER

THOMAS NGOMO NDUNDA2ND PETITIONER

PAUL MUINDE NDUNDA3RD PETITIONER

PETER ITUMO NDUNDA4TH PETITIONER

VERSUS

ATTORNEY GENERAL1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION ... 2ND RESPONDENT

DIRECTOR OF SURVEY3RD RESPONDENT

MINISTER FOR LANDS4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners in this matter are the widow and sons of Daniel Ndunda Maingi (“the deceased”) who died in 1985. They are also administrators and beneficiaries of his estate. The deceased settled on land in Nzalae area in Kitui County in the 1960s and farmed there until his death.
2. The petitioners’ grievance is straight forward. It is that the land the deceased left them was adjudicated in 1975 and the exercise was completed in 1978 but as the beneficiaries of the land, they have not been issued with title deeds to their property. As a result, the petitioners, in the petition dated 2nd May 2012 seek the following reliefs;

- a. *A declaration that their constitutional rights under Articles 27, 35, 40 and 47 of the Constitution of Kenya have been violated by the respondents since 12th June 1978, in view of clauses in this petition.*
 - b. *A declaration that the deceased and the petitioners were the proprietors of a total of 110 acres of land within Nzalae Adjudication Section.*
 - c. *An order be issued compelling the respondents to disclose to the petitioners the results of adjudication process for Nzalae Adjudication Section which was completion 12.6.1978.*
 - d. *An order be issued compelling the respondent to publish the completion of adjudication process of Nzalae Adjudication Section as required by the Adjudication Act Chapter 284 of the Laws of Kenya.*
 - e. *An order compelling the respondents and their agents to issue title deed to the petitioners as administrators of the estate of the deceased or in their names for 110 acres of land in Nzalae adjudication section, more particularly in the area the petitioners have settled and have been farming.*
 - f. *The respondents be ordered to pay costs of this petition.*
3. At the first mention for directions for the matter, I dealt with prayer (c) and (d) of the petition as the petitioners sought information from the State under **Article 35** of the Constitution. By a ruling dated 16th July 2012, I made an order that, “*The 2nd respondent, the Director of Land Adjudication, is hereby directed to furnish to this Court and the petitioners the final results of the adjudication of the Nzalae Land Adjudication Section as set out in the letters dated 27th April 2004 (Ref No. 4/233/(54)) within 60 days from the date hereof.*”

The factual background

4. As a result of the order, the 2nd respondent, the Director of Land Adjudication caused to be filed a replying affidavit sworn by Ms Susan Kidemi, the Assistant Director of Land Adjudication and Settlement. The Adjudication Department is now part of the National Land Commission which is established under **Article 67** of the Constitution and the **National Land Commission Act (Act No. 5 of 2012)**.
5. In the affidavit sworn on 21st December 2012, Ms Kidemi set out the history of the Nzalae Migwani area and the facts relating to the deceased land. Since the facts reflect the official record; it would do well to recite these facts, as part of the petitioners’ case is that they have lacked this information.
6. The Nzalae Migwani area, situated within the present day Mwingi District of Kitui County, was declared an adjudication section on 12th February 1975 and the adjudication process carried out in accordance with the provisions of the **Land Adjudication Act (Chapter 284 of the laws of Kenya)**. The adjudication was completed on 12th June 1978 subject to the outstanding appeals.
7. On completion of the adjudication, objections were heard and considered and those dissatisfied with the decisions on the objection filed appeals to the Minister. The appeals were heard by the District Commissioner exercising delegated authority under **Legal Notice No. 73 of 1978**. The deceased appealed and his appeal together with 74 other appeals were heard and determined. His appeal, **Appeal Case No. 179 of 1979**, was successful and he was awarded 11 acres by the District Commissioner on 14th February 1983.
8. The entire Nzalae Migwani land parcel is registered in the name of Nzalae Migwani Group Ranch under the **Land (Group Representatives) Act (Chapter 287 of the Laws of Kenya)**. It comprises persons whose rights and interests were ascertained and recorded during the adjudication. The title was not issued to the Group Ranch as there was a restriction placed by the Chief Land Registrar on 9th December 1978 restricting registration of any dealings in the land parcel until appeals to the Minister has been finalized. It was necessary to do so to protect the interests of successful appellants in the event the Minister awarded them land.

9. The Assistant Director states that the appeal decisions including that of the deceased have not been implemented due to practical and logistical problems. Ms Kidemi depones that Land Adjudication Officer, Mwingi and the District Surveys, Mwingi have been unable to implement the appeal orders due to the proliferation of very many people squatting on the Nzalae Migwani Group Ranch. These squatters have built schools, churches, permanent homes and other amenities on the land parcel and they claim to own the land on which they occupy. She further depones that from the time the appeals are determined, any attempt by the District Surveyor to implement the decision has been met with violence. She states that, “*Squatters and other hooligans armed with machetes, rungs and crude weapons have violently chased the District surveyor away.*”
10. It is the respondents’ position that the Provincial Administration and the police have not been helpful and thus the appeals have not been implemented. The 2nd respondent’s states that once the squatter problem is addressed, the deceased property can be surveyed and the title documents duly issued.

The issue for determination

11. The facts of the case are not disputed. What the petitioners seek is the compliance with the provisions of the ***Land Adjudication Act***. All the parties agree that once the adjudication and appeals were completed, then the deceased would be entitled to have the interest so identified and ascertained protected by the issuance of a title to the property.
12. Upon completion of the adjudication process the provisions of the **section 104 (2)** of the ***Land Registration Act (Act No. 3 of 2012)*** which replaced the ***Registered Land Act (Repealed)*** provides as follows;

104. (2) Upon receiving an adjudication register from the Director of Land Adjudication, the Registrar shall forward it to the Deputy Registrar or Registrar in charge of the registration unit concerned, who shall prepare a register for each person shown in the adjudication record as an owner of land, and every person shown in the adjudication record as being entitled to an interest that does not amount to ownership of land shall be registered as being so entitled, subject, in every case to, any restriction of the power of the proprietor or of any person so entitled to deal with the land and to any interest, lease, right of occupation, charge or encumbrance affecting the land.

13. In light of the facts and the legal provisions, I directed the respondents to find out how the appeal decisions affecting the petitioners could be implemented. The response to my directive was contained in a letter dated 28th May 2013, in which the 2nd respondent stated as follows;

The Attorney General,

Attorney General’s Chambers

Sheria House,

P. O Box 40112-00100,

NAIROBI

28th May 2013

RE: NRB HC PT NO. 1919 OF 2012

PAULINE MUIA MAINGI & OTHERS VS THE HON AG.

The above mentioned matter refers.

On 6th March 2013 the Court (Majanja J.) directed that the Director of Land Adjudication &

Settlement files in Court a report of how the Department was to implement the decisions of the Minister on appeal cases in the matter.

We have considered the matter at length and how best to implement the appeal decisions. It has to be kept in mind, however, that:-

- 1. The Department of Land Adjudication and Settlement in the past has not been in a position to implement the decision of the Appeal cases (48) heard before District Commissioner since 1980's owing to rivalry between the land owners (Group Ranch) and the people settled on the land. The issue has not been resolved to date even with the intervention of the Provincial Administration in providing security to the surveyors. The squatters living on the land are claiming rights of ownership on the disputed land.*
- 2. Nzalae/Migwani Group Ranch members (281), the 48 successful beneficiaries and the squatters (about 6000 by the 1999 correspondences provided by the Mwingi Provincial Administration Office – see letter at page 74 of the petition document). It is now over 10 years since. The population may have increased tremendously.*
- 3. The mandate of the department of Land Adjudication and Settlement has been taken over by the National Lands Commission as provided under the Constitution. The commission is mandated to implement the land adjudication programme and facilitate the establishment of the settlement schemes as provided under sections 134 and 135 of the Land Act. The Commission is required to work in collaboration/liaison with the respective County Governments.*

We are of the view that, owing to the various interests in the Land (Group Ranch members, the 48 successful appeals and the squatters) the matter can be resolved as follows:-

- a. The adjudication process undertaken at the Nzalae/Migwani be nullified, and the certificate of incorporation of the Group Representatives dissolved by a Court of Law. The land held by the group averts to community land and this still facilitate fresh registration and settlement of all the occupants of the land. The conversion of land from private to community is provided under section 9(1) and (2) of the land Act, 2012. However, the community land law is in the process of being enacted.*
- 4. The National Land Commission shall in liaison with the County Government establish a settlement scheme in Nzalae./Migwani area to settle the squatters or opt to utilize the land under the Community tenure.*
- 5. Persons residing on the land can then establish their interests in the land under the adjudication process to be undertaken by the National Land Commission and the Mwingi County Government.*

S. KIDEMI

FOR: DIRECTOR OF LAND ADJ. & SETTLEMENT

- 14. The issue in this matter is whether the petitioners have a proprietary interest and whether the interest is protected by the Constitution. Proprietary rights are acquired through established law. In this case, it is not in dispute that the deceased was the beneficiary of adjudication process which was completed in accordance with the law. It is not denied that the petitioners are entitled to the adjudicated parcel save that the State now pleads impracticality of implementation of the result of the adjudication.*
- 15. Before I conclude on this issue, I would like to say something about **Kitui RMCC No. 272 of 2004** between **Pauline Maingi v Kata Uvyu and Others**. In that case the 1st petitioner sued the defendants for trespass to the land and destruction of euphorbia and sisal plants of the land she occupies in Nzalae Migwani. The case was dismissed on account of the fact that the petitioner has not established proof of ownership of the land. The magistrate noted in her judgment dated 29th September 2011 that, “I also note that the no proof of ownership or possession was produced by the plaintiff to enable her establish her rights over the said property. It's clear that the defendants*

are all squatters on the land parcel Nzalae settlement area, an area which has not been adjudicated hence no one can claim ownership of the land parcel or part thereof.”

16. Mr Wamostsa, counsel for the respondents, argued that this case was conclusive of the fact that the petitioners and the defendants in that case were squatters and that they had no rights to the suit property. I reject this argument for three reasons. First, the decision in **Kitui RMCC No. 272 of 2004** was reached without the knowledge of that land adjudication had been carried out in the Nzalae area. Second, the failure by the State to complete its task of adjudication exposed the deceased and others to the position of squatters yet their interests in the land had been determined in accordance with the law. Thirdly, the suit proceeded in contravention of the provisions of **section 8** of the **Land Adjudication Act** which provides that the courts shall not take cognisance of any suit in which ownership or any right or interest over land in an adjudication area is in dispute without the consent of the adjudication officer.
17. The lack of action on the part of the State also caused residents and farmers in the Nzalae area to file another case namely; **Republic v Attorney General, Minister of Land and Housing and Nzalae Group Ranch, Nairobi HC Misc. Appl. No. 1209 of 2005**. In that case the residents sought, “An order of mandamus to compel the Minister for Lands Adjudication and Housing commence the process of adjudication in an area known commonly as Nzalae Migwani Trust Land in terms of the current settlement pattern on the ground in disregard of the self styled Nzalae Group Ranch.” They also sought an order of prohibition, “to prohibit the Minister of Lands and Housing from implementing the decision he may have made against the ex-parte applicants interested in respect of Nzalae Migwani Trust Land.” The application was not prosecuted and was dismissed for want of prosecution on 17th February 2012 as such it has no bearing on the petitioners’ interests in this matter.
18. As the adjudication process had been completed and what remains is registration of the interests of the petitioner in the Land Register, I find and hold that the petitioners, as administrators of the Estate of Daniel Ndunda Maingi (deceased) are entitled to 11 acres of land in the Nzalae Migwani Adjudication Section.
19. It is the duty of the State under **Article 21(1)** of the Constitution to, “**observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.**” The duty of the State in these circumstances cannot be held hostage by people who actively resort to lawless measure to deprive others of their accrued rights under legislation passed by Parliament. In this respect therefore, failure to complete the adjudication and issue a title of the suit land to the petitioners as the successors of the deceased is a violation of the petitioners’ rights and guarantee to property.

Relief

20. Apart from the declarations, the petitioners have sought an order that they be issued with a title deed for the land so ascertained after adjudication. **Article 23** empowers the court to frame appropriate relief in order to vindicate the rights violated. In **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) at para. 19 the Constitutional Court of South Africa stated, “Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”
21. The problems of implementation as was explained by the 2nd respondent are real and affect thousands of people termed as squatters. This is a legacy of the land problems we have in Kenya and which the Constitution through its many provisions on land has attempted to address. The National Land Commission has been established with a mandate, inter alia, “to initiate

investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress.”

22. I am conscious of the fact that the grant of the orders sought may lead to eviction of squatters and without alternative arrangements; their rights may also be violated. In ***Satrose Ayuma and 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and Others Nairobi Petition No. 65 of 2010 [2013]eKLR***, the Court observed that, “[91] *that their eviction from the suit premises without a plan for their resettlement would increase levels of homelessness and this Court must strive to uphold the rights of the Petitioners and especially the right to be treated with dignity.*” Likewise the court in exercising its remedial power must be conscious of the effects of its orders on others and enforce the same having regard to the national values and principles and objects of the Bill of Rights. The Constitution obliges the Court to uphold the human dignity of all persons.

23. The petitioners’ case is by no means an isolated one as there are other parties in similar circumstances who have waited for the adjudication to be completed in accordance with the law. It is part of the general failure of the State to abide by its own obligation to observe, protect, promote and fulfil property rights. The failure affects all the beneficiaries of the adjudication process whose rights were recognised in accordance with the ***Land Adjudication Act***. It also affects those who have invaded the land and become squatters.

24. I have taken into account what has been stated by the 2nd respondent in the letter dated 28th May 2008 at paragraph 13 above and in order to give effect to the rights of the petitioners and taking into account the circumstances surrounding this case, I grant the following reliefs;

- a. I declare that the petitioners, as administrators of the Estate of Daniel Ndunda Maingi (deceased), are entitled to 11 acres of land in the Nzalae Migwani Adjudication Section.
- b. I direct the National Land Commission in liaison with the Kitui County Government explore ways of resolving the settlement of squatters and other persons in the Nzalae Adjudication area having regard to the rights of the persons whose interests were adjudicated upon and ascertained under the ***Land Adjudication Act***.
- c. The National Land Commission and County Government shall come up with a plan for such settlement within six (6) months from the date hereof and the plan shall be filed in court.
- d. The parties hereto shall have the liberty to apply to the court to seek further orders and directions.
- e. The respondents shall bear the petitioners’ costs.

DELIVERED and DATED at NAIROBI this 4th day of October 2013

D.S. MAJANJA

JUDGE

Mr Musyoki instructed by B. M. Musyoki and Company Advocates for the petitioners.

Mr Wamotsa, Litigation Counsel, instructed by the State Law Office for the respondent.