



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC PETITION NO. 4 OF 2017

FORMERLY KISII PET. NO. 32 OF 2016

WANJIRU MBURU KOKO

PETER MWAURA KOKO

MBUGUA MBURU (IN THE CAPACITY

AS THE ADM OF THE ESTATE OF

MBURU MWAURA KOKO ALIAS MPOLO MWAURA

ALIAS MBORO MWAURA.....PETITIONERS

VERSUS

MWORONA OLE POKARE.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION

& SETTLEMENT OFFICER.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

The Petitioners had by a Petition dated 14/11/13 sought for the following orders:-

- (a) It be declared that the revocation of the Petitioner', or the deceased's registration as the owner of that parcel of land known as PLOT NO. 267 KOJONGA ADJUDICATION SECTION or NAROK/CIS MARA/KOJONGA/267 by the second respondent violates the Petitioner's Constitutional rights to protection of private property under article 40 of the Constitutional of Kenya.
- (b) It be declared that the revocation of the Petitioner', or the deceased's registration as the owner of that parcel of land known as PARCEL NO. 267 KOJONGA ADJUDICATION SECTION, or NAROK/CIS MARA/KOJONGA/267 by the second respondent violates the petitioners' right to a fair hearing under article 50(1) of the Constitution of Kenya.
- (c) It be declared that the revocation of the Petitioners' or the deceased's registration as the owner of that parcel of land known as PARCEL NO. 267 KOJONGA ADJUDICATION SECTION, or NAROK/CIS MARA/KOJONGA/267, was and is without a legal basis.
- (d) A permanent injunction be granted to restrain the respondents by themselves, their servants and/or agents from violating the Petitioners Constitutional rights guaranteed under the Constitution of Kenya by depriving the Petitioners of their property known as PARCEL NO. 267 KOJONGA ADJUDICATION SECTION, or NAROK/CIS MARA/KOJONGA/267 and or entering in to remaining upon, committing acts of waste, equitable or otherwise, laying claim over or trespassing thereon without the petitioners' consent.
- (e) A permanent injunction be granted to restrain the Respondents by themselves, their agents' servants and/or agents from violating the petitioners' constitutional rights guaranteed under the Constitutional of Kenya by making any claim to ownership of

the Petitioner's property PARCEL NO. 267 KOJONGA ADJUDICATION SECTION, or NAROK/CIS MARA/KOJONGA/267 seeking to limit or restrict the Petitioner's enjoyment of the said property.

(f) A mandatory injunction compelling the second respondent to cancel the purported revocation of the petitioner's registration as the owner of that parcel of land known as PARCEL NO. 267 KOJONGA ADJUDICATION SECTION, or NAROK/CIS MARA/KOJONGA/267 and to compel the second respondent to retain or effect, the petitioner's registration as owner of the said property.

(g) A mandatory injunction to compel the third respondent to cancel the purported registration of the first respondent as the owner of the parcel of land known as PLOT NO. 267 KOJONGA ADJUDICATION SECTION or NAROK CIS MARA/KOJONGA/267 or in whatever other manner described and the intended issuance of title to him.

(h) A mandatory injunction to compel the third respondent to register the petitioners as the owner of the parcel of land known as PLOT NO. 267 KOJONGA ADJUDICATION SECTION or NAROK CIS MARA/KOJONGA/267 or in whatever other manner described and issue of title to him.

(i) The respondents do pay the costs of this petition.

The Petitioners are the Administrators of the estate of the late Mburu Mwaura Koko alias Mpolo Mwaura alias Mboro Mwaura who died intestate on the 3rd day of January, 2005. It is the petitioners' contention that the deceased was the owner and entitled to that parcel of land known as parcel 267 Kojonga Adjudication Section, or Narok/Cis Mara/Kojonga/267 and thus the petitioners are entitled to the said parcel of land as Administrators of his estate.

The Petitioners have averred that the Respondents had contravened and violated the petitioners' and the deceased constitutional rights as the 1st Respondent laid claim over the petitioners' property known as plot No. 267 Kajonga Adjudication Section or Narok/Cis Mara/Kajonga/267 and had caused the same to be transferred to him. The Petitioners' further contend that the 2nd respondent has caused the transfer of the said plot to the 1st Respondent and consequently revoked the petitioners' rights, interest and entitlements to and over the aforesaid plot and hence deprived the petitioners of the said plot in contravention of Article 40 of the Constitution of Kenya 2010. The Petitioners have further stated that the 2nd Respondent had contravened and violated the provisions of Article 50(1) of the constitution of Kenya by depriving the petitioners' or the deceased the right to a fair hearing by holding meetings and hearings to determine a case involving the petitioner without informing them of the case that they had an interest in.

The Petition was opposed by the respondents. The 1st Respondent in his replying affidavit averred that he is the registered, beneficial and legitimate owner of the land parcel No. Cis Mara/Kojonga/267. He stated that he was a member and resident of Kojonga Adjudication Section and that the deceased was his tenant who had leased the suit property for agricultural purpose and that during the allocation process he realized that the deceased had clandestinely misled the officials of the Ministry of Land to replace his name as the owner of the suit land and have the same registered in his name and when the adjudication process was concluded and the register availed he filed an objection with the Land Adjudication officer being objection No. 180 on Plot 267 and upon conducting hearings attended by the deceased the adjudication officer ruled in his favour.

He further stated that he did not obtain title to the land by fraud as alleged by the petitioners. The 1st Respondent to oppose the petition herein stated that his registration is prima facie evidence of being the legitimate and absolute owner of the land. He further averred that the petition does not meet the threshold of a Constitutional Petition as the fact shows that this is a dispute between two individuals which could be settled as a Civil Suit. He stated not to have violated the rights of the petitioners' as alleged.

The petition was also opposed by the 2nd and 3rd respondent by way of a replying affidavit sworn by Patrick N. Muyalo the Narok North and East Sub-County Land Adjudication officer. He averred that the suit plot is situated within Kajonga Adjudication Section which was established on 16/6/1979 and every person who had an interest in land within the said adjudication section was required to make his claim and Plot No. 267 was originally demarcated and registered in the name of the deceased Mburu Mwaura Koko and the adjudication register was published on 26/8/1998 for inspection and filing of objection where anyone who felt aggrieved by the entries on the register could file their objections.

The 2nd respondent contended that pursuant to the publication of the adjudication register, the 1st respondent had filed an objection registered as objection No. 180 against the entry of Mburu Mwaura Koko and when the said objections were heard the same was headed in favour of the 2nd respondent Mworona Ole Pokare and the same was decided pursuant to the provisions of section 13(3) of the Land Adjudication Act and that the deceased never filed any appeal against the decision of the land adjudication officer and consequently a certificate of finality was issued and a title issued to the 1st Respondent.

The 3rd and 4th Respondent had annexed to their supporting affidavit various records namely the declaration of the adjudication section, sketch maps of the sections, copies of the adjudication record, adjudication register, the 2nd respondent objections and decisions thereof, and the certificates of finality.

During the hearing of the petition the petitioners called 2 witnesses. PW 1 Wanjiru Mburu Koko who stated that she was the wife of the deceased and the Administrator of his estate. She stated that she had lived on the suit land from 1964 to date and raised her children on the suit property and that she never participated at the hearing before the Land Adjudication Officer in which the 1st Respondent was confirmed as the owner of the suit property.

PW 2 Ologolimot Ole Shambesha stated that he was a former member of the Kojonga Adjudication Section and knew the deceased

personally and was allocated the suit plot and that the allocation of the land was enforced into a book that was kept by the area chief who would later verify the entries and he recalled that there were no complaints in respect of the land that was allocated to the deceased Mburu Mwaura Koko.

The 1st Respondent testified on his own behalf and stated that he was the owner of the suit parcel and he had initially leased the land to the deceased but during the adjudication process, the deceased purported to own the land causing it to be registered in his name in the adjudication register and when he realized the same he filed his objection pursuant to the land adjudication act and his objection heard and was determined in his favour.

DW 2 who was the Land Adjudication Officer stated that it was true that the land was registered in the name of the deceased but the same was cancelled upon objection filed by the 2nd Respondent and that title to the same was issued to the 1st respondent.

I have considered the petition that is before me, the testimony of the witness and the submissions filed by counsel for the petitioners and the respondents. At the conclusion of the hearing of the petition even though the parties had not filed any agreed issues for determination, the same could be scanned from their testimony and I find the following are issues for determination.

1. Whether the 1st respondent had acquired title to plot No. 267 Kajonga Adjudication section illegally
2. Whether the petitioners' rights have been infringed upon
3. Whether the petition satisfied the threshold of a constitutional petition and
4. Whether the petitioners are entitled to the reliefs sought

On the 1st issue it is the petitioners contention that the 1st respondent had illegally and fraudulently obtained title to the suit plot this assertion is based on the fact that they never attended nor were they heard during the hearing of the objection proceedings before Land Adjudication Officer and thus denied their right to a fair hearing as envisaged under Article 50(1) of the Constitution of Kenya 2010. From their testimony PW 1 stated that they were aware of the same and only came to learn about it after they went to collect their title. DW2 the Land Adjudication officer in his testimony stated that the objections were heard and determined on 15/5/2009 some 11 years after the filing of the same and even though summons were served on the deceased and his family they never attended the hearing. The land adjudication officer had produced copies of the summons for the hearing that was issued to chief for service upon the parties.

It is not disputed that the 1st respondent was allocated and registered as the owner of the suit land upon the hearing and determination of the 1st respondent's objections. The petitioners even after learning of the said determination had the option to pursue against the same to the Minister pursuant to section 30 of the Land Adjudication Act. However, they failed to pursue their appeal. I find that the circumstances leading to the issuance of the title to the 1st respondent was proper and same was acquired legitimately. In their testimony the petitioners have not placed any material before me to prove that their right to a fair hearing was infringed upon in any event once a person is issued with a title he becomes vested with absolute ownership of the property pursuant to the provisions of section 24 and 25 of the Land Registration Act and the same can only be challenged with proof that the same was acquired or procured fraudulently and the party to whom the title is registered was a party to the fraud.

In the case of Dr Joseph Arap Ngok –Versus- Justice Moiwo Ole Kewa and 5 others Nairobi Civil Appeal No. 60 of 1997 the court held that

“Section 23(1) of the Registration of titles Act (now repealed but substantially reproduced as section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud and misrepresentation to which the owner is proved to be a party. Such is the scarcity of the title bestowed upon the title holder under the Act”.

In the instant case the petitioners have not been able to discharge the burden of proof to show that the acquisition of title was fraudulent and the 1st respondent was a party to the said fraud. Further to the above I find that the title to the land was not unlawfully acquired to warrant the petitioners protection under Article 40(6) of the Constitution of Kenya 2010. The process upon which the 1st respondent had acquired title was one that is provided for under the Land Adjudication Act. The upshot of my finding is that the 1st respondent had obtained title to the suit land legally and procedurally and that the petitioners had disregard their right to appeal to the Minister under the Land Adjudication Act.

On the second issue whether the petition herein satisfied the strict requirements of a Constitutional Petition In the case of **Anne Njoki Kinyanjui –versus- Barclays Bank of Kenya Ltd**(2015)eKLR the court in considering the threshold that one must satisfy in filing of Constitutional Petition, the court observed that:

“it is not enough to state that a right had been violated. One must demonstrate the manner of violation. In addition, where a party has a remedy under some other legislation, the court would decline to determine whether or not there has been a constitutional violation courts have held in my decisions that it would be improper to convert every issue into a constitutional issue and present it before the constitutional and Human Rights Division for determination.”

In the instant case the issue in dispute is one in which the petitioners have alleged that the 1st respondent had obtained title to the suit property by fraud and they were denied their right to a fair hearing. However, from the testimony and the evidence before the court the petitioners were challenging the decision of the Land Adjudication officer upon hearing objections which is a quasi-Judicial and

Administrative functions that can be challenged by way of Judicial Review, furthermore the Land Adjudication Act under section 25 offers a party aggrieved by the decision of the adjudication officer an avenue for appeal to the minister which the petitioners have regrettably failed to exercise.

Where a public officer or any organ of the government fails to comply with the laws the appropriate way is to apply for judicial review the decision of the state office in determining an objective proceeding under the Land Adjudication Act in mind can't constitute a violation of human rights and I thus find that the instant petition does not meet the threshold of Constitutional Petition more so where there exists another remedy and in the circumstances I find that the petitioners have not discharged the burden of proof to warrant me to grant the orders sought and consequently dismiss the petition dated 14/11/2013 with costs.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **2nd** day of **October, 2020**

Mohammed Kullow

Judge

2/10/2020

in the presence of:

CA:Chuma

Mr. Kamwaro for the 1st Respondent

Mr Kambo holding brief for Kariuki for the petitioners

N/A for the 2nd, 3rd, 4th respondents

Mohammed Kullow

Judge

2/10/2020