



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

PETITION NO. 28 OF 2019

IN THE MATTER OF ARTICLE 10(2), 22 (1) (2) (b) (c) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLES 40 (1), 47, 60(1), 63, 68 (c) (ii), 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COMMUNITY LAND ACT 2016

AND

IN THE MATTER OF LEGAL NOTICE NO. 150 OF 2019

BETWEEN

HON. FATUMA ADAN DULLO.....1ST PETITIONER/APPLICANT

HON. REHEMA JALADESA.....2ND PETITIONER/APPLICANT

HON. ABSHIRO SOKA HALAKE.....3RD PETITIONER/APPLICANT

HON. HASSAN HULUFO.....4TH PETITIONER/APPLICANT

HON. ABDDI KOROFU TEPO.....5TH PETITIONER/APPLICANT

VERSUS

CABINET SECRETARY MINISTRY OF

LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....3RD RESPONDENT

RULING

1. This matter relates to the Notice of Motion dated 14/11/2019 brought under *Article 23 (3) (b) and (c) of the Constitution* and *Rules 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012* and all other enabling laws. The applicants seek conservatory orders restraining the respondents, their servants, agents, representatives, adjudication officers, surveyors and/or any other person whomsoever or anyone acting under their authority

howsoever from commencing, undertaking and/or continuing with adjudication, survey and demarcation of community land in Isiolo County pursuant to Legal Notice No. 150 of 2019 dated 27th August 2019 (hereinafter “the notice”) pending the hearing of the application and the petition.

2. The application is premised on the grounds set out in its body, supporting affidavit of Hon. Fatuma Adan Dullo, senator of Isiolo County, sworn on 14/11/2019 and supplementary affidavit of Hon. Abshiro Soka Halake, also a Senator of Isiolo County, sworn on 20/01/2020.

3. It is contended that all the land in Isiolo County is community land held by the County Government of Isiolo in trust for the people of Isiolo County. The 1st respondent vide the Notice purportedly issued an adjudication order against all community land within Isiolo County except the gazetted areas of Resort City, Isiolo Township, LAPSETT route, Kenya Defence Forces School of Infantry and Combat Engineering, National Reserves and Isiolo Holdings Grounds. The Notice was supposedly made pursuant to **Section 3 (1) of the Land Adjudication CAP 284, Section 8 of the Community Land Act** and **Article 10 of the Constitution of Kenya**. However, it did not abide by the said provisions of the law.

4. According to **Section 3(1) of the Land Adjudication Act**, it is required that before adjudication order is issued, the County Government must first request the minister. Thereafter, the minister *inter alia* considers it expedient, proceeds to issue the adjudication order. The petitioners contend that no such request to the 1st respondent by the County Government of Isiolo was duly made prior to the issuance of the Notice.

5. The petitioners also contend that there was no public participation as required by **Article 10 (2) (a) of the Constitution** and **Section 8 (2) of the Community Land Act, 2016**. Presently, there is no Community Land Management Committee set up for administration and management of community land in Isiolo County pursuant to **Section 15 of the Community Land Act 2016**. It is averred that survey and demarcation of community land within Isiolo County has since commenced in **Oldonyiro, Ngaremara, Kinna, Garbatulla and Merti** despite the lack of participation and/or notification of the people of Isiolo County under **Section 8(4) and (5) of the Community Land Act, 2016**. It is also averred that in some areas within the County, residents are being issued with eviction notices.

6. The petitioners contend that the alleged adjudication process including survey and demarcation being carried out has exposed the people of Isiolo County to manifestly illegal and unlawful process which is a direct affront to their legitimate expectation that their views and opinions in regard to their community land would be considered before any such administrative action is taken.

7. When the petitioners raised their concerns over the arbitrary publication of the Notice and commencement of the adjudication process without prior consultation, involvement and participation of the community and County Government, the 1st respondent alleged *inter alia* that they will amend the notice to specify the settlement arrears but affirmed that the survey and demarcation that was already ongoing will not be interrupted. Thus the intention to amend the Notice is a clear admission of its vagueness and impropriety. Therefore, it is imperative that the “notice” be quashed for the adjudication to be commenced *de novo* in strict adherence to the law.

8. The respondents have opposed the application vide the replying affidavit of Michael Irungu Kagwe, Deputy Director of Land Adjudication and Settlement, sworn on 9/12/2019. He deponed that the whole of Isiolo is Community land except for Isiolo Townships. Since in Isiolo County there are only 340 title deeds, the Isiolo District Development Committee (D.D.C) of 24/08/2012 resolved that there be a process of commencement of adjudication. The County Assembly of Isiolo expressed their desire to benefit from the national titling programme as per the Land Housing and Urban Development Committee report of 15/01/2018 and County Assembly Report of 4/07/2018.

9. The County Government requested for the adjudication of the settlements in Oldonyiro, Ngaremara, Kinna, Garbatulla and Merti areas to enable the commencement of the issuance of individual titles. Public sensitization was conducted in the said areas and he (the deponent) even attended a radio interview on Angaf Radio station and fielded questions from the public.

10. The respondents contend that Adjudication process has begun in certain areas such as Ngaremara and Garbatulla. However, the stumbling block in the registration of land ownership was the none gazettement of the County as an adjudication area as per **Section 3 of the Land Adjudication Act**. The gazettement of Isiolo County as an adjudication area was to enable the application of the Land Adjudication Act in declaring and registration of the land ownership in the County.

11. The respondents contend that Isiolo County title deeds issuance stakeholders and land housing and urban development committees of Isiolo County Assembly held consultative meetings from 8 – 16/11/2019 to propose an amendment to the schedule of the Notice. On 6/12/2019, the same was forwarded to 1st respondent who were in agreement with the proposed amendment. In the amended notice, only the settlement areas were to be adjudicated upon under **the Land Adjudication Act CAP 284** while the rest which is open grazing land should be registered as community land under **the Community Land Act**, which is yet to be operationalized.

12. The respondents contend that the gazettement of Isiolo County as an adjudication area does not extinguish the rights of persons in the County to pursue compensation of their land that has been gazetted for other uses. The petitioners are therefore not entitled to the orders sought as the same would curtail issuance of titles to citizens of the county without any justifiable reason.

13. The application has also been opposed by the Interested Party vide the replying affidavit of Rashid Mude Arale, Chief Officer for Lands and Physical Planning in the County Government of Isiolo, sworn on 9/12/2019. He deponed that the County Assembly of Isiolo through the Land, Housing and Urban Development Committee engaged the 1st respondent and its agencies between 1st - 15th December 2017 to address inter-alia issues on land adjudication in the County for the residents to benefit from the President’s offer of issuance of 3 Million title deeds of which other Kenyans from similar counties with land registration issues are benefiting.

14. On 4/07/2018 the County Assembly of Isiolo debated and adopted the committee’s report. On 16/04/2019 in compliance with **Regulation 12 (1) of the Community Land Regulations, 2017** the County Assembly of Isiolo submitted to the 1st respondent an inventory of all the

community land in Isiolo with clear illustrations of areas falling outside the purview of **the Community Land Act**, and thus available for titling under **the Land Adjudication Act**. The inventory was copied to the Senate and National Assembly where the petitioners sit and there is no record of any objection to it.

15. It was agreed that the Notice be amended so as to restrict its application to townships and settlement areas where only individual titles will be issued in exclusion of community land falling under **the Community Land Act** which will be adjudicated separately as provided for under the latter Act. The County Assembly of Isiolo submitted its report for the amendment of the Notice.

16. The interested party contends that not all land in Isiolo County is community land as alleged by the petitioners, for land in townships and settlement areas, there are individual developments and residences which constitutes private land which is eligible for issuance of individual titles. No adjudication notice has been issued under **Section 8 (4) of the Community Land Act** as yet regarding community land in Isiolo County as the Act is yet to be operationalized. He is aware that the Interested Party has since constituted a County Boundary Dispute Resolution and Land Committee following the deliberations and resolutions of the meeting held on 8/10/2018.

17. It is further contended by Rashid Mude that the 1st respondent and the Interested Party have been in a participatory and collaborative process and at every stage with room for accommodation of views and representations from either side. Due process and legal procedure has been followed. It is misleading for the petitioners to allege that the intended adjudication process will negatively affect the community's interest in Community Land since these are two different processes affecting two different areas.

18. It is further averred that the notice was issued in accordance with **Section 3(1) of the Land Adjudication Act** as read with **Section 5 (2)** of the said Act. No notice has been published within the meaning of **Section 8(2) of the Community Land Act** as the said Act is yet to be operationalized. Thus the application is premature, speculative and fundamentally lacking in substratum.

Submissions

19. The petitioners submitted that **Article 23 (3) (c) of the Constitution of Kenya** grants this court the power to issue conservatory orders to enforce and uphold rights envisaged under the bill of rights. The Notice issued an adjudication order against community land within Isiolo County without proper procedure and public participation of the community as a whole including the Community Assembly and Community Land Management Committee. There are fears and concerns of the people of Isiolo County for they may be taken advantage of and their land may be allocated to third parties. Furthermore, the amendment of the Notice does not cure the illegality and irregularity of the process. The overriding objective is the overwhelming echoes of the legitimate concerns of the people who have no confidence in the adjudication process and whose constitutional right to participation has been violated. Unless conservatory orders are issued tension among the people of Isiolo will heighten.

20. The petitioners relied on several cases including **Attorney General v Sumair Bansraj (1985)38 WIR286**, **Steve Furgoson & Another v The A.G. & Another Claim No.CV 2008-00639- Trinidad & Tobago, Petition No. 16 of 2011 Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 others, Judicial Service Commission v Speaker of the National Assembly & another Petition No. 518 of 2013, Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, Muslims For Human Rights (MUHURI) & 2 others v Attorney General & 2 others High Court Petition No. 7 of 2011** and **Kelly Malenya v Attorney General & Another; Council of Governors (Interested Party)(2019)eKLR**.

21. The 1st and 2nd respondents submitted that the gazettelement of Isiolo areas as adjudication area was to enable the application of **the Land Adjudication Act CAP 284** in declaring and registration of land ownership. Due considering was given to the fact that **the Community Land Act** is yet to be operationalized. For conservatory orders to be granted, a party is required to demonstrate that there is real danger and that they will suffer prejudice as a result of the violation which must be weighed against public interest. It is in the public interest that the orders sought should not be issued.

22. The respondents have further submitted that the whole process of adjudication incorporates the aspect of public participation, whereby the exercise involves the parties within the adjudication area to ascertain their rights and interest. They relied on the case of **Centre for Rights and Education Awareness and 7 others** and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** to support their submissions.

23. The Interested Party submitted that the petitioners have not established a *prima facie* case to warrant the orders sought. The allegations raised by the petitioners are not true. For the Land, Housing and Urban Development Committee of the Interested Party met the 1st respondent from 11th to 15th December 2017 where the demarcation of land in Isiolo County was deliberated. The deliberations were adopted by the County Assembly of Isiolo in the proceedings of 4th July 2018. A report was sent to the 1st respondent to facilitate the amendment of the impugned adjudication order. Thus, the order was not final and has since been amended vide the **Kenya Gazette Supplement No. 1 of 2020**. Therefore, in essence the **Gazette Notice No. 150 of 2019** which is the subject of this application does not exist.

24. The Interested Party submits that adjudication is a lengthy process that must be conducted according to **the Constitution, the Community Land Act** and **the Land Adjudication Act**. The adjudication order vide the Notice is only one of the first steps of the procedure. The Interested Party is still in the process of further deliberating on the effects of its request for adjudication. The Interested Party will invite the public to participate in the process at the opportune time. Thus, the petitioners have only singled out one of the steps. Moreover, the applicants have not demonstrated the prejudice occasioned if the orders are not granted. The petitioners were on several occasions invited by the Interested Party to several meetings to give their views but did not honor the same. They have not demonstrated any prejudice that they or the people of Isiolo County are likely to suffer. Furthermore, the petitioners' apprehensions concern their personal political interests instead of the benefits the community will gain from the adjudication process. They relied on cases of **Robert N. Gakuru & another v Governor Kiambu County and 3 others [2013] eKLR, Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 (1990 – 1994) EA 156 (1992) KLR 8** and **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others Petition No. 2 of 2013** to support their submissions.

Determination

25. The gist of the determination herein is; ***Whether to issue conservatory orders pending the hearing of the petition .***

26. **Article 23 (3) of the Constitution of Kenya** provides reliefs which may be awarded to remedy a legal wrong or injury caused by reason of violation of a constitutional right. A conservatory order is one of the reliefs a party may be given by the court to ensure that their right as provided for under the Bill of Rights is upheld and enforced. G. V. Odunga J in the case of **Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR** elaborated on what a conservatory order is as follows:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

27. Further, the Supreme Court of Kenya in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** held as follows:

“[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

28. Musinga J (as he was then) in the case of **Centre For Rights Education And Awareness (Creaw) & 7 Others v Attorney General [2011] eKLR** held as follows:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

29. The burden is on the petitioners to demonstrate to the court that they have a *prima facie* case and unless the conservatory order is granted, they will suffer prejudice. It is also incumbent upon the petitioners to demonstrate that the orders have been sought in public interest. According to the petitioners the Notice published by the 1st respondent issued an adjudication order against community land within Isiolo County without proper procedure and without public participation of the community as a whole including the Community Assembly and Community Land Management Committee taking into account, that all land in Isiolo County is community land. The respondents and the interested party contend that not all land in Isiolo County is community land. They also aver that proper procedures have been followed.

30. In order to arrive at a just determination regarding the conservatory orders, this court finds it expedient to analyse the following issues;

- 1) ***The definition of Community Land, the applicable law and the tenure holding there in.***
- 2) ***The legality of the Legal notices No. 150 of 2019 dated 27/08/2019 and No. 1 of 2020 dated 20/12/2019.***
- 3) ***Public participation.***

Community Land

31. **Is all land in Isiolo County community land as alleged by the petitioners?.** None of the parties have given a basis of their claims. The applicants have simply made a sweeping statement that *“all land in Isiolo County is Community Land held by the County Government of Isiolo in trust for the people of Isiolo pursuant to Section 6 (1) of the Community Land Act.”* The respondents and the interested parties on the other hand aver that there are some areas in townships and settlement where there are individual developments and residencies.

32. **Article 63 of the Constitution of Kenya 2010** states that all community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. The definition of community land is as follows:

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).

33. The custodian of such unregistered community land is the County Government as set out under subsection 3 where it is stipulated as follows;

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held (emphasize added)...”

34. Parliament enacted **the Community Land Act** to give effect to **Article 63 (5) of the Constitution**; to “provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.”

35. **Article 63 (2) of the Constitution** therefore sets out at least 6 categories of what constitutes community land. Thus it is clear that the classification calls for a rigorous exercise to define what amounts to community land. I believe that this is the reasoning behind the provisions of **Rule 12 of the Community Land rules of 2017** where it is stipulated that;

“Within eighteen months, from the commencement of these Regulations, every county government shall, in consultation with communities, prepare and submit to the Cabinet Secretary an inventory of all unregistered community land within the county”.

36. I believe the bone of contention lies with the term **“all that community land”**, which is the starting phrase used in the schedule of both notices. The petitioners contend that the notices could only have been issued in line with the provisions of **Section 8 of the Community Land Act**.

37. I find that while the Constitution of Kenya (Article 63) gives a broad overview of what community land is, both the **Community Land Act** and the **Land Adjudication Act** provides a more elaborate understanding of what amounts to community land, and how community land rights are held (tenure system). The Land Adjudication Act primarily deals with ascertainment of rights and interests in land, recording of such rights and interests held in a communal tenure system in order for those rights and interests to transition to individual tenure system. The preamble of the said Act provides as follows;

“An act of parliament to provide for the ascertainment and recording of rights and interest in community land, and for purposes connected therewith and purposes incidental thereto”.

38. **Section 4 (3) (d) of the Community Land Act** provides that;

“Community land shall vest in the community and may be held under any of the following tenure system ...

such other tenure system recognized under this Act or other written law” Emphasize added.”

39. **Section 6(6) of the aforementioned Act** also provides that;

“Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable Law. emphasize added”.

40. **While section 8(1) of the said act** states that;

“Subject to this Act and any law relating to adjudication of titles to land (emphasize added), the Cabinet Secretary shall, in consultation with the respective county governments, develop and publish in the Gazette a comprehensive Adjudication programme for purposes of registration of community land.”

41. In the case of **The County Government of Meru & another v District Land Adjudication and Settlement Officer Tigania East Sub-County & 18 others [2018] eKLR**, while dealing with the question of whether to stop adjudication process, I stated as follows;

“The importance of the ascertainment and recording of rights in unregistered community land can be discerned from the fact that the two main statutes dealing with the adjudication process (the Land Adjudication Act and Land Consolidation Act) were

not repealed by the enactment of Community Land Act, yet other legislation dealing with Community Land for instance, The Land (group Representatives) Act Cap 287 and Trust Land Act (Cap 288) have been axed”...

42. It is quite clear that the Community Land Act recognizes the application of other written laws in so far as determination of rights in community land is concerned. One of those other written laws happens to be the Land Adjudication Act.

43. I now come to the issue of the tenure system. As already stated herein, the Land Adjudication Act provides for conversion of customary land rights to individual tenure system. The Community Land Act has gone further to give an even more elaborate and broad manner of determination of rights and interests in community Land.

44. **Section 4 (3) of the Community Land Act** provides that;

“Community land shall vest in the community and may be held under any of the following tenure system;

a) Customary

b) Freehold

c) Leasehold and

d) Such other tenure system recognized under this Act or other written law”.

45. **Section 5 of the Community Land Act** provides that ;

“(1) Every person shall have the right, either

individually or in association with others (emphasize added), to acquire and own properly, in accordance with Article 40 of the Constitution-

(a) of any description; and

(b) in any part of Kenya.

(2) Customary land rights shall be recognized, adjudicated for and documented for purposes of registration in accordance with this Act and any other written Law (emphasize added).

(3) Customary land rights, including those held in common (emphasize added) shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer”.

46. What resonates from the above provisions of law is that the rights which every person is entitled to in community land are **two-fold**, that is **individual rights** or **rights held in association with others**. The import of the provisions of section 5 (3) is that not all customary land rights are held in common. In summary, the tenure system in community land can fall under the category of land rights (including customary land rights) held in common or held individually. Further, under the Land Adjudication Act and the Community Land Act, the tenure system in community land can change and transition to individual tenure system or to land held in association with orders.

47. When the Community Land Act came to be, it was envisaged that there would be a seamless and harmonious transition of the application of the Community Land Act and other Adjudication statutes. See my decision in **The County Government of Meru & another v District Land Adjudication and Settlement Officer Tigania East Sub-County & 18 others (supra)**. Sadly, this has not been the case since the Community Land Act is not fully operationalized.

48. In light of the foregoing analysis, the term **“all that community land situate within Isiolo County”** captured in the two notices must be read within the context elaborated under the Land Adjudication Act and the Community Land Act where individual rights as well as rights held in common are recognized.

The legal notices

49. The second issue to interrogate is the legality of the notice(s). The respondents and the interested party have given an account of the events leading to the issuance of the 1st legal notice no. 150 of 2019. It is the County Assembly of Isiolo which had expressed the desire to benefit from the national titling programme. To this end, on 16/04/2019 the County Assembly submitted to the 1st respondent an inventory of all community land in Isiolo with clear illustrations of areas falling outside the purview of **the Community Land Act** and those available for titling under **the Land Adjudication Act**. The County Government requested for the adjudication of settlements in **Oldonyiro, Ngaremara, Kiina, Garbatulla and Merti** areas to enable the issuance of individual titles. The county government of Isiolo partnered with the Ministry of Lands and Physical planning to ensure titling in the county. Only the settlement areas were to be adjudicated upon under **the Land Adjudication Act CAP 284** while the rest, which is open grazing land was to be registered as community land under **the Community Land Act**, which is yet to be operationalized.

50. The Legal Notice No. 150 of 2019 dated 27/08/2019 issued an adjudication order. In its Schedule it indicated adjudication will be

conducted in:

“All that Community Land situate within Isiolo County except gazetted areas of Resort City, Isiolo Township, Lapset route, Kenya Defence Forces School of Infantry and Combat Engineering, National Reserves and Isiolo Holding Grounds.”

51. The aforementioned legal notice was not in tandem with the deliberations emanating from the county. The report which formed the basis for the need of a titling programme availed as “RMA-1” mentions specific areas which were earmarked to have a change of land tenure system (see page 5 , 6 & 7 of the aforementioned document). Furthermore, the aforementioned notice was not in compliance with the provisions of the Land Adjudication Act section 5, which requires that the areas affected by the notice be specified.

52. However, within no time, the respondent did make an Amendment vide the Notice in the *Kenya Gazette Supplement No. 1 of 2020* dated 20th December 2019. The Schedule of the amendment is indicated as follows:

“All that Community Land situate in the county specified in the first column of the adjudication area specified in the second column and of the portion specified in the third column of the table hereunder other than the gazetted areas of the Resort City, Lapset route, Military and Security Installations, National Reserves and Isiolo Holding Grounds.”

The amendment specified which areas in Kina, Garbatula, Ngaremara, Burat, Wabera, Oldonyiro, Chari, Cherab wards as well as Bulapesa were to be adjudicated upon.

53. As per this second notice, the 1st respondent was exercising its powers conferred by **Section 3 (1) of the Land Adjudication Act**, where it is stipulated as follows;

“(1) The Minister may by order apply this Act to any area of community land if—

(a) the county government in whom the land is vested so requests; and

(b) the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered; and

(c) the Land Consolidation Act (Cap. 283) does not apply to the area”.

54. **Section 5 (1) of the Land Adjudication Act** provides as follows;

“The adjudication officer shall by notice either— (a) establish adjudication sections within the adjudication area; (b) establish the whole adjudication area as an adjudication section.....

A separate notice shall be published in respect of each adjudication section, and in each such notice the adjudication officer—

(a) SHALL DEFINE AS CLEARLY AS POSSIBLE THE AREA OF THE ADJUDICATION SECTION;

55. In **Muthara Njuri Ncheke Council of Elders & another v Committee of Ngare Mara/Gambella Adjudication Section & 2 others [2019] eKLR**, I stated that section 5 (2) (a) of the Land Adjudication Act is couched in mandatory language and requires that the land to be adjudicated upon be clearly defined. In the above mentioned case, this court did not hesitate to issue conservatory orders to halt adjudication exercise in respect of a corrigendum notice which was wanting in definition of the area. This is the scenario which could have applied in respect of the initial notice No. 150 of 2019. However, the said notice is of no effect in view of the amendment. I have no reason to fault the amended notice as it clearly conforms with the requisite statutory provisions. From the averments and annexures produced by the respondents and Interested Party, it is apparent that the Minister issued the notice in line with the request made by the County Government, contrary to the allegations made by the Petitioners.

56. Further, I find that the interested party has given an account of how it undertook the inventory of the community land in Isiolo culminating in a report which was submitted to the respondents on 16.4.2019. The interested party avers that the report was also submitted to the Senate as well as the National Assembly. The petitioners have not expressed their comments on this report. The prima facie evidence so far availed is that the interested party and the respondent followed the law as per Rule 12 of the Community Land Regulations and the Land Adjudication Act before embarking on the exercise of issuance of the notices.

Public participation

57. On the issue of public participation, the respondent has in paragraph 8 of the affidavit of Michael Irungu given the particulars of the sensitization schedules. The interested party has also tabled the report which gave rise to the request for a titling process, which report captures pertinent issues appertaining to public participation. There was a team which was working hand in hand with the National land Commission where they managed to project that 46 250 titles would be issued from 50 identified settlement / trading centers. In total, 38 public participation exercises were carried out in the ten wards and this information is captured on page 7 of the report. Thus on the face of it, there was indeed public participation. This evidence can however be put under scrutiny during the trial.

58. I have perused the deliberations of the County Assembly appertaining to the debate and adoption of the report “RMA-1”, and the words of one Hon. Member Fayo have caught my attention. He stated as follows;

“Mr. Speaker sir. I rise to support the report. This will be a milestone for the residence , for the good citizens of Isiolo County. Such a thing like surveying , mapping of our land has been hollow dream ever since this Country became independent. This is the best news our people can get”.

59. The passion oozing from these utterances is palpable; to the effect that the people of Isiolo have longed to have their rights and interests in land ascertained and documented through the process of surveying and mapping which would ultimately lead to the registration of the land.

60. The Interested Party submitted that the issuance of the notice is just the first step in the procedure of adjudication , that they are still in the process of further deliberating on the effects of its request for adjudication and that public participation is an ongoing process in so far as adjudication is concerned. I am in agreement with these averments. This is because the entire adjudication process is elaborate and incorporates a participatory approach at the various stages of adjudication. For instance, **under Section 6 of the Land Adjudication Act**, the Adjudication committees are appointed from the area residents. The committees are a powerful feature in ensuring that the rights and interests of the area residents are protected.

61. In **Silverio Akubu & 4 others v Charles Baariu Salesio & 3 others [2019] eKLR** , 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”.

62. The foregoing is just an example of how the concept of community involvement which in essence entails public participation runs throughout the process of adjudication in so far as the Land Adjudication Act is concerned.

Conclusion

63. I must point out that the application dated 14.11.2019 was not filed in good faith. The petitioners are well aware of the importance of the County Government in this dispute considering that the said government is the custodian of unregistered community land. One of the reasons why the petitioners are challenging the adjudication process was that the County Government of Isiolo did not make any request to the minister in line with the provisions of **Section 3 (1) of the Land Adjudication Act**. That being the case, then the petitioners were expected to bring the County Government on board from the word go. This was however not the case. The County Government was enjoined in these proceedings through the intervention of the orders of Judge Okongo (ELC NAIROBI), who handled the matter at the initial stage. The petitioners therefore did not exhibit transparency in their quest for the orders sought as is expected under Article 10 of the Constitution.

64. One more point of concern is that as long as community land remains un-surveyed and un-demarcated, then conflicts of great magnitude will continue to thrive. This is because such land may be viewed as **Res-nulliis** (it's no body's, it's no one's property, it is open access).

65. In the final analysis, I find that the Amended Notice in the *Kenya Gazette Supplement No. 1 of 2020* dated 20th December 2019 was properly issued under the Land Adjudication Act Cap 284 Laws of Kenya. I therefore find no merits in the application dated 14.11.2019, hence the same is hereby dismissed. The issue of costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 24.9.2020. In light of the declaration of measures restricting court operations due to the *COVID-19pandemic* 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