



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MERU

ELC PETITION NO. 4 OF 2014

JOSEPH KIRIAMBURI M'LINYIRU.....PETITIONER

VERSUS

FLORAH KENDI.....1ST RESPONDENT

MARGARET KAWIRA.....2ND RESPONDENT

IGEMBE DISTRICT LANDS AND SETTLEMENT OFFICER.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The petition dated 28/2/2014 filed on 4.3.2014 against the respondent seeks the following reliefs;

a. "A declaration that the petitioner's fundamental rights guaranteed and freedoms were contravened and grossly violated by the 1st, 2nd and 3rd respondents in their illegal and unconstitutional attempt to conduct the committee proceedings in respect of the Petitioner's parcel No. 4824/Akirang'onde "A" Adjudication.

b. An order cancelling the sub-division and restoration of Parcel No. 10543 to the petitioner.

c. A declaration that the 3rd respondent's decision to subdivide the petitioner's parcel No. 4824/Akirang'onde "A" Adjudication is unconstitutional and illegal.

d. Costs of the suit and interest".

2. The petitioner contended that on or before October 2013, the 3rd respondent conducted committee proceedings between 1st and 2nd respondents on Plot No. 4824/Akirang'onde "A" Adjudication and the verdict was in favor of the respondents. It was his argument that the 3rd respondent conspired to alter and or cause sub-division of his property. The petitioner sought and applied for the said committee proceedings from the 3rd respondent in respect of the objection committee case number 3930 to enable the petitioner to file an appeal but the 14 days lapsed before he acquired them. Therefore, the 1st 2nd and 3rd respondents have greatly compromised the fundamental rights of the petitioner.

3. The petitioner submitted that he is the sole registered owner of Land Parcel 4824/Akirang'onde "A" Adjudication Section where he has been living for 35 years and has extensively developed the said parcel of land by planting trees, miraa and other developments thereon. Additionally, he argued that his constitutional rights were violated by interfering with his proprietary rights over land parcel No 4824/Akirang'onde "A" Adjudication Section.

4. The petitioner denies the existence of any trust over Land Parcel No. 4824/Akirang'onde "A" Adjudication Section and stated that he got the parcel of land from his late father. He claimed that inchoate rights of the respondents should accrue at his death and he should not be compelled to transfer his parcel of land when he is alive. To this end, the petitioner relied on the case of **Muriuki Marigi vs. Richard Marigi Muriuki & 2 Others (1997) eKLR.**

5. The petition was opposed vide the replying affidavit of Florah Kendi dated 17/6/2014 (*note that the one allegedly dated 15.11.2018 mentioned in the submissions of the 1st and 2nd respondent is not in the court file*). These two respondents contend that the petitioner herein

is their uncle. Their grandfather who is the father of the petitioner was the registered owner of Land Parcel No. 4824 Akirang'onde Adjudication section. Their grandfather subdivided the said parcel equally to his children. The petitioner received 0.24 points plus 0.24 which was the share of M'Muunu M'Rinyiru, the deceased father of the two respondents which he held in trust for them. After attaining the age of majority, the two respondents went to look for the petitioner so that they could get their fathers share, but petitioner was not willing to give them the land.

6. They consequently filed objection case No. 3930 which was ruled in their favour but erroneously ordered that 0.24 acres be registered in their joint names (including the petitioner). The Lands officer thereafter sub divided the land into two where one portion, land parcel 4824 was registered in the name of the petitioner, while parcel No. 10543 was registered in the name of petitioner and the two sisters. The 3rd respondent was therefore implementing a lawful decision born out of Objection No. 3930.

7. The respondents in their submissions argued that the petition herein is bad in law as the procedure provided under the Land Adjudication Act were not exhausted. Section 29 provided for the avenues of appeal to the minister by any party aggrieved by the determination of the adjudication officer. The 1st and 2nd respondents contend that the petitioner did not tender any proof to support his claims that he applied for the proceedings in the objection case but the same were not provided.

8. In support of their arguments, the 1st and 2nd respondents relied on the case of **Mohammed Ahmed Khalid (Chairman) and 10 Others vs. Director of Land Adjudication and 2 Others (2013) eKLR**.

9. The Attorney General did not file any pleadings or submissions in this case.

10. I have carefully perused through the petition, affidavits, submissions and the record in its entirety. **The main issue for determination touches on the dispute resolution mechanisms in the adjudication arena.**

11. It is the petitioners case herein that his rights were infringed by the 3rd respondent when they failed to provide him with the proceedings of Objection No. 3930 which had been filed by the 1st and 2nd respondents and ruled in their favour. However, the 1st and 2nd respondents contend that the petitioner did not provide any proof to ascertain his allegation and therefore the suit herein is bad in law and should be dismissed.

12. There is no doubts that the dispute is in the adjudication arena. However, from the material presented before this court, it is not discernible as to which statute (The Land Adjudication Act Cap 284 or the Land Consolidation Act cap 283 Laws of Kenya) was applicable in respect of the objection proceedings case no. 3930. However, the two statutes have elaborate dispute resolution mechanisms. Objection proceedings are conducted in accordance with section 26 of both statutes. Under the Land Consolidation Act, the decision of the Land Adjudication Officer is final, while under the Land Adjudication Act, an aggrieved party can appeal to the minister in accordance with the provisions of section 29 of the aforementioned Act, and the decision thereof is final.

13. In **ELC Petition 21 of 2012, Stephen Michuki Kiunga vs. Nkuni M'Ruchiu and 2 Others**, Judge P. Njoroge stated that;

“It is however true that the constitution is the umbrella of all other laws. It is the anchor upon which they operate. One would imagine a situation where litigants would refuse to appeal and then file constitutional petitions alleging that the magistrates' courts or superior courts had trampled upon their rights and denied them fair hearing and access to justice. Yes, the constitutional provisions are supreme. And yet the constitution protects all other laws including the provisions of the Land Adjudication Act. One cannot have his cake and at the same time eat it. One cannot file a Constitutional Petition when an appeal under the Land Adjudication Act has not been heard and determined”.

Also see my decision on this subject in **-Reuben Mwongela M'itelekwa (suing as the Legal Representative of the estate of M'itelekwa M'mucheke Naituri alias M'itelekwa Mucheke) v Paul Kigea Nabea & 2 others [2019] eKLR**.

14. Bearing the above in mind, it is clear that this court cannot in good faith hear issues on adjudication when the dispute resolution mechanisms set out under the adjudication statutes have not been exhausted.

15. The rules of evidence are clear that **“He who alleges must prove”**. On perusal of the record I agree with the sentiments of the respondents that the petitioner did not provide any evidence to support his allegations that he applied for the objection proceedings and that the 3rd respondent delayed in providing the same.

16. In the circumstances, I find that the petition herein is without merits and the same is dismissed with costs to the 1st and 2nd respondents.

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 Judgement 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 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