



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. PETITION CASE NO. 54 OF 2015**

**(FORMERLY H.C PET 4 OF 2011)**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND BILL OF RIGHTS OF THE CONSTITUTION OF KENYA**

*AND*

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22 (1), (2), (4), 23, 24, 28 (C), 40, 43 (B), 63 OF THE CONSTITUTION**

*AND*

**IN THE MATTER OF THE ARTICLE 2 (5) OF THE CONSTITUTION OF KENYA**

*AND*

**IN THE MATTER OF THE ARTICLES 1, 8(2), B, 9, 10, 18, 26, 28, 33, 37, 42, 43 AND 46 OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)**

*AND*

**IN THE MATTER OF HISTORICAL AND CURRENT INFRINGEMENT OF THE CULTURAL SETTLEMENT AND ECONOMIC RIGHTS OF THE KARABA RESIDENTS IN KARABA, WACHORO AND RIAKANAU ADJUDICATION SECTIONS MBEERE SOUTH DISTRICT AS INDIGENOUS PEOPLE WITHIN THE MEANING OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE (UNDRIP) AND THE CONSTITUTION OF KENYA**

*AND*

**IN THE MATTER OF PROTECTION FROM DEPRIVATION OF PROPERTY AND LAND**

*BETWEEN*

FRANCIS MUSYOKI MAKENZI & 61 OTHERS.....PETITIONERS

*VERSUS*

THE DIRECTOR FOR LAND ADJUDICATION & SETTLEMENT..1<sup>ST</sup> RESPONDENT

THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

THE REGISTRAR OF LANDS.....3<sup>RD</sup> RESPONDENT

*AND*

SAMUEL MULINGE KYALO & 36 OTHERS.....APPLICANTS

**RULING**

1. By a notice of motion dated 3<sup>rd</sup> October 2018 brought under **section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya), Order 1 Rule 10 (2) and 25 of the Civil Procedure Rules 2010** and **all other enabling provisions of the law**, the intended interested parties (hereinafter *the Applicants*) sought the following orders;

a. That this honourable court be pleased to enjoin the 37 Applicants as interested parties.

b. That this honourable court be pleased to grant leave to the intended interested parties/Applicants to file their pleadings within a period of 21 days of being enjoined in the suit herein.

c. That this honourable court do issue conservatory orders restraining the Respondents by their servants, agents, employees, and/or whosoever else claiming the suit lands from destroying and evicting the interested parties from their ancestral land in Karaba, Wachoro and Riakanau Adjudication Sections within Mbeere South District also community land project from interfering with the interested parties continued occupation and possession of the parcels of land pending the hearing and determination of the petition. (sic)

d. That this honourable court do issue injunctive orders restraining the Respondent Registrar Embu County by their servants, agents, employees, and/or whosoever else from issuing title deeds regarding ancestral land in Karaba, Wachoro and Riakanau Adjudication Section within Mbeere South District pending the hearing and determination of the petition. (sic)

e. That this honourable court be pleased to order site visit/scene visit of the parcel of land situated within Karaba, Wachoro and Riakanau Adjudication Sections.

f. That this honourable court do grant any other and/or further order it may deem just and fit to grant.

g. That costs of this application be in the cause.

2. The said application was based upon the several grounds set out on the face of the motion. It was stated that the Applicants were beneficial owners of various portions of land located within Karaba, Wachoro and Riakanau Adjudication Sections where they have resided since 1960s. It was further stated that any decision reached in the pending petition might affect their interest in the properties they claim within the said adjudication sections.

3. The application was supported by an affidavit sworn by Samuel Mulinge Kyalo on 3<sup>rd</sup> October 2018. The said affidavit reiterated and expounded upon the grounds set out in the motion. It was stated that the Applicants were born and brought up within Karaba, Wachoro and Riakanau locations which they considered their ancestral land. It was contended that the adjudication process was not lawfully conducted hence some strangers who are not residents of the locations were allocated the land which the Applicants have occupied all along.

4. The Applicants were apprehensive that title deeds for their land might be issued to strangers hence they wanted to be joined in the petition since any reliefs or orders granted herein might affect their interest in the portions of land which they claim as beneficiaries. They annexed various documents and photographs to the supporting affidavit in a bid to demonstrate their interest in the aforesaid adjudication sections.

5. The Attorney General filed a statement of grounds of opposition dated 8<sup>th</sup> November 2018 in opposition to the said application. It was contended that the Applicants had not disclosed sufficient interest in the subject matter of the petition to warrant their being joined in the proceedings. It was further contended that the Applicants had not demonstrated a violation or threatened violation of any of their constitutional rights hence they were not entitled to any conservatory orders.

6. The Attorney General also filed a notice of preliminary objection dated 8<sup>th</sup> November 2018 in which various objections were raised to the said application. It was contended, *inter alia*, that the application was in contravention of **sections 26, 29 and 30 of the Land Adjudication Act (Cap 284)**; that the court had no jurisdiction to entertain it; that the adjudication process in the said areas was concluded in the 1980s; and that a conservatory order could not be granted in respect of a process which is already concluded.

7. When the said application was listed for hearing on 12<sup>th</sup> November 2018 it was directed that the application and notice of preliminary objection be disposed of through written submissions. The Applicants were granted 21 days within which to file and serve their submissions whereas the Petitioners and the Respondents were granted 21 days upon service to file and serve their respective submissions.

8. The record shows that whereas the Respondents filed their submissions on 16<sup>th</sup> November 2018, there is no indication of the Applicants and the Petitioners having filed any submissions by the time of preparation of this ruling. The court shall, nevertheless, proceed to determine the application.

9. The court has considered the Applicants' said application dated 3<sup>rd</sup> October 2018, the Respondents' grounds of opposition and notice of preliminary objection both dated 3<sup>rd</sup> November 2018 and the Respondents' submissions on record. The main issues which arise for consideration are the following;

a. Whether the Applicants have made out a case for joinder as interested parties.

b. Whether the Applicants have made out a case for issuance of a conservatory order in terms of prayer (c) of the said application.

c. Whether the Applicants have made out a case for the grant of an injunction in terms of prayer (d) of the said application.

d. Whether the Applicants have made out a case for the grant of an order for a site visit.

e. Whether there is merit in the Respondents notice of preliminary objection dated 8<sup>th</sup> November 2018.

10. The court has considered the entire material on record on the 1<sup>st</sup> issue. The Applicants claim that they occupy land which falls within Karaba, Wachoro and Riakanau Adjudication sections which they consider to be their ancestral land. They claim to have a beneficial interest therein and contend that the land adjudication process left them out in favour of strangers who were not ordinarily resident within those areas.

11. According to Black's Law Dictionary (9<sup>th</sup> Edition) an interested party is defined as a person who has a *recognizable stake* in a matter hence a standing to be heard. The court is thus satisfied that the Applicants have demonstrated that they have a recognizable stake in the subject matter of litigation. They shall accordingly be admitted as interested parties herein.

12. The 2<sup>nd</sup> issue is whether the Applicants have made out a case for the grant of a conservatory order. The conservatory order sought in prayer (c) of the said application is worded in a very curious manner. It is seeking to restrain the Respondents, their servants, agents, employees or "whosoever else claiming the suit lands" from evicting the Applicants from their settlements within the 3 adjudication sections.

13. It was not alleged or contended that the 3 Respondents in the petition had taken any steps or were in the process of evicting the Applicants from their settlements. On the contrary, the Applicants were merely apprehensive that the persons who were allocated land and whom they described as "strangers" could seek to take possession and thereby evict the Applicants and their families. If the Applicants intended to stop the allottees from taking possession, then a conservatory order directed at the Respondents would be entirely misplaced. It would not serve any useful purpose. The court is, therefore, far from satisfied that the Applicants have demonstrated a case for the grant of a conservatory order against the Respondents.

14. The 3<sup>rd</sup> issue is whether the Applicants have demonstrated a case for the grant of an interlocutory injunction against the Respondents. The court is of the view that the usual principles for the grant of an interlocutory injunction as enunciated in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358** would apply. The Applicants are required to demonstrate a *prima facie* case with a probability of success at the trial. The court is alive to the fact that the Applicants have just been joined as interested parties. They are yet to file any pleadings of their own. The court has no idea what kind of reliefs or orders they shall seek once they file their pleadings. It would, therefore, be impossible for the court to assess whether or not the Applicants have a *prima facie* case with a probability of success at the trial in the absence of pleadings. The court shall consequently decline to grant an order of injunction.

15. The prayer for a site visit by the court is a curious one. The Applicants did not explain in their supporting affidavit why a site visit would be necessary and how it would be useful to the resolution of the pending petition. There were no submissions either in support of this prayer. The court finds that there is no sufficient material on record to justify the grant of such an order. It is accordingly declined.

16. The final issue is on the merits of the Respondents' notice of preliminary objection dated 8<sup>th</sup> November 2018. Although the Respondents raised a total of eleven (11) points of objection in the said notice, the Attorney General only argued the first two points. The first is that the said application contravened **sections 26, 29 and 30 of the Land Adjudication Act**. The second is that the jurisdiction of the court is ousted by **section 30 of the Land Adjudication Act**. The rest of the objections are, therefore, deemed to have been abandoned by the Respondents.

17. As was stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors [1969] E.A 696** a preliminary objection must raise a pure point of law. In the said case, Sir Charles Newbold P, stated as follows;

**"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."**

18. Similarly, in the case of **Francis Kamau Murai & Another Vs Gatundu & Mangu Co. Ltd & Another [2015] eKLR** the court quoted the following passage from the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation Kisumu HCCC No. 22 of 1999**;

**"When preliminary points are raised, they should be capable of disposing of the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone."**

19. Bearing in mind the above definition and description of a preliminary objection, the court is of the opinion that the only legitimate objection is the one relating to the jurisdiction of the court to entertain the application. It was submitted by the Respondent that the court has no jurisdiction to entertain the application in the absence of a written consent from the concerned **Land Adjudication Officer under section 30 (1) of the Land Adjudication Act**.

20. The said section stipulates 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.**

21. The court finds this objection to be quite strange. The consent of the Land Adjudication Officer is required under **section 30 (1) of the Land Adjudication Act** only if the adjudication register has not become final in all respects. The question of whether or not the register has become final is a question of **fact**. There is no affidavit on record by the Respondents asserting that the register has not become final. On the

contrary, the Respondents stated as follows in paragraph 7 of their grounds of opposition;

*“The adjudication process was carried out and concluded in the 1980s but the Applicants have not provided any convincing reasons as to why they never engaged in the adjudication process as required by the law.”*

22. Such an averment should, of course, have been contained in an affidavit and not a statement of grounds of opposition. The court has also noted that in their opposition to the granting of an injunction and conservatory order, the Respondents submitted that such orders should not issue because the process of adjudication was long concluded. The court shall not allow the Respondents to blow hot and cold at the same time. They should not take the court for a ride. The court consequently finds no merit in the said preliminary objection and the same is hereby overruled.

23. The upshot of the foregoing is that the Applicants’ notice of motion dated 3<sup>rd</sup> October 2018 succeeds only in part. The Respondent’s notice of preliminary objection dated 8<sup>th</sup> November 2018 is overruled in its entirety. Accordingly, the court makes the following orders;

- a. The Applicants’ notice of motion dated 3<sup>rd</sup> October 2018 is hereby allowed in terms of order Nos. A and B.
- b. The interested parties shall file and serve any necessary pleadings and affidavits within 21 days from the date of the ruling.
- c. The rest of the prayers in the said application are hereby declined.
- d. The Respondents’ notice of preliminary objection dated 8<sup>th</sup> November 2018 is hereby overruled in its entirety.
- e. Costs of the application shall be in the cause.

24. It is so ordered.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 14<sup>TH</sup> day of FEBRUARY, 2019.**

In the presence of Ms. Maina holding brief for Mr. Nyamu for the Petitioners, Mr. Siro for Mrs. Njoroge for the Respondents and in the absence of the Applicants.

Court clerk Mr. Muinde.

**Y.M. ANGIMA**

**JUDGE**

**14.02.19**