



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 5 OF 2019

THE MUTHARA NJURI NCHEKE COUNCIL OF ELDERS1ST PETITIONER

THE AMUTHUMBA/NGAREMARA PASTORALIST COMMUNITY

BASED ORGANIZATION.....2ND PETITIONER

VERSUS

THE COMMITTEE OF NGARE MARA/GAMBELLA ADJUDICATION SECTION

THROUGH

THE CHAIRMAN CYPRIAN KAUME MUKIRA.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER

TIGANIA EAST SUB COUNTY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Vide the notice of motion filed in court on 8.4.2019, the applicants/petitioners are seeking conservatory orders in the nature of a temporary injunction to be issued against the 1st and 2nd respondents by themselves their servants, employees, agents or anyone acting on their behalf from further conducting the demarcation and adjudication process over all that chunk of land to wit Muthara, Amuthumba/Ngaremara ranching area which is situated north of the Isiolo - Garbatula road stretching to Waso-Nyiru river to North Igembe all the way to Igembe East and Samburu county to the North west pending the inter-partes hearing of this application and the main petition. The applicants have prayed that costs be in the cause.

2. The application is anchored on the grounds set out on the face of the application and on the affidavits of Justus Mugaa M’Impwii and Domesiano Mwiki.

3.The applicants contend that they are the local residents of the area known as Muthara, Amuthumba/Ngaremara ranching area measuring approximately 40, 000 acres which area was never declared as an adjudication area. The adjudication process that was approved and gazetted was strictly for the Ngaremara/Gambella adjudication section as per the world view imagery and survey maps coordinates which do not extend to the Muthara, Amuthumba/Ngaremara ranching area.

4. The petitioners aver that as indigenous people, they are entitled to the protection of the constitution and that by extending the adjudication process to include the ranching area which they communally occupy without first establishing it as an adjudication section and without public participation is tantamount to alienating their land and disfranchising them as a community which would offend their fundamental rights and freedoms under the bill of rights.

5. The applicants further state that the 1st and 2nd respondents have now without any colour of right , without any public participation, without the involvement of the community and stakeholders and in blatant contravention of the constitution and the land adjudication Act illegally extended the adjudication process to include the Muthara, Ngaremara/Amuthumba ranching area whereby, they have commenced demarcation of the ungazetted area and dishing out the demarcated portions to foreigners and their cronies to the detriment of the petitioners and the bonafide residents of the said region.

6. The applicants claim that the **adjudication notice issued on 11/3/2016** defined the area to be covered by the notice and it did not include

the land within Muthara, Amuthumba, Ngaremara ranching area. They further state that the **corrigendum notice of 29/6/2018** was clandestinely issued without any consultation, whereby it sought to extend and annex the Muthara, Amuthumba/Ngaremara ranching area to be part of the adjudication process in the Ngaremara/Gambella adjudication section.

7. Applicants contend that the provisions of section 5 of the land adjudication act (cap 284 laws of Kenya) were not complied with, in that no notice was issued to the residents of the area declaring that interests in land within the said area would be ascertained and recorded in accordance with the adjudication act, that no committee was appointed thereof and that there was no public participation.

8. The applicants therefore contend that they have established a case of clear breach of their rights whereby the 2nd respondent acted without any colour of right, without any public participation, without the involvement of the community and stakeholders in blatant contravention of the constitution and the land adjudication act.

9. During the hearing of the application the 1st respondent associated themselves with the sentiments and arguments of the petitioners. On the other hand the respondents and the interested parties appear to be on the other side, whereby they are opposing the application. It is noted that the interested party came on board this suit via a consent order of 8.5.2019.

10. The 2nd and 3rd respondents (the Attorney General) have opposed the application and in doing so they have relied on the affidavit of Eliab Kamaru (the Land Adjudication and Settlement officer commonly known as the DLASO) filed on 7th May 2019 and the annexures thereof. They have urged the court to refer to this court's decision in Meru ELC Petition No. 7 of 2017, whereby the notice of 11/3/2016 had been challenged. These respondents contend that the areas which were left out in that notice of 11/3/2016 had to be incorporated in the corrigendum of 29/6/2018. Counsel for the 2nd and 3rd respondents explained that the 1st notice of 11/3/2016 was covering the area up to Modogashi – Isiolo road, while the corrigendum added an area below Modogashi - Isiolo road and the area south of Karama adjudication section. Further the counsel, clarified that these additional areas were previously known as **Isiolo River** and **Mula**.

11. The 2nd and 3rd respondents dispute that the petitioners are the ones in occupation of the suit land. They aver that the real occupiers of the area in question are the interested parties who are not objecting to the ongoing exercise of adjudication. The 2nd and 3rd respondents also question why the petitioners took long to bring this dispute in April 2019 when the corrigendum notice was issued on 26/6/2018. The 2nd and 3rd respondents contend that halting the ongoing exercise will affect other Kenyans who also have a legitimate expectation to own the land.

12. The interested parties have identified themselves as the true residents of Ngaremara/Gambella adjudication section. They are opposing the present application and in doing so they have relied on the affidavit of one Peter Losu filed on 15/5/2019. It is contended by the interested parties that the petitioners and the 1st respondent are entities not recognized under the Land Adjudication Act cap 284 of the laws of Kenya and as such, they cannot advance the interest of individuals.

13. The interested parties aver that the area being referred to as Amuthambi/Ngaremara ranching area is not a ranching area at all and that the same is occupied by thousands of families including the interested parties. They also aver that for the area mentioned in the corrigendum, there was public participation as detailed in paragraph 9 of the affidavit of Peter Losu.

14. The interested parties also contend that the land adjudication act provides an elaborate dispute resolution mechanism where an aggrieved person seeks redress, and that this is provided for under section 12 and 26 of the said act. The maxim "**Equity follows the law**", has been invoked by the interested parties who aver that the petitioners are seeking equity yet the law has provided a remedy for the dispute at hand.

15. The interested parties further state that under section 30 of the Land Adjudication Act, all suits are stayed when adjudication process is ongoing.

16. I find that this is a hotly contested matter. The petitioners are asking "*who are these interested parties?*", while the interested parties are asking the same question "*who are these petitioners?*" I find that the dispute is at the infancy stage and therefore the question as to who is the rightful owner of the land or who is in occupation of the land cannot be determined at this stage of the trial. These questions including the issue of locus can be raised at a later stage of the trial.

17. Another issue that has come up is whether the dispute at hand ought to be resolved using the dispute resolution mechanisms set out in the Act (the Land Adjudication Act). Further it is contended that pursuant to section 30 of the Land Adjudication Act, this dispute should not be before this court.

18. I have keenly analyzed the argument touching on the dispute resolution mechanism anchored in the Land Adjudication Act. The bone of contention is the corrigendum notice issued on 29.6.2018. There appears to be no dispute regarding the earlier notice of 11/3/2016. The petitioners have questioned the basis upon which the corrigendum notice of 29/6/2018 was issued.

19. I find it necessary to pose the question; "Where in the Land Adjudication Act, Cap 284 laws of Kenya is there a provision for resolving a dispute touching on the legitimacy of a notice as the one referred to in section 5 of the Land Adjudication Act?"

20. The preamble of the Land Adjudication 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",

21. Thus the dispute resolution mechanisms provided for under this act are geared towards meeting the objectives and goals set out in the

preamble. The issue as to whether the corrigendum notice was issued in accordance with the law is one that cannot be resolved within the laid down dispute resolution mechanisms set out in the act.

22. In the case, **Nakuru ELC Judicial Review case No. 13 of 2014, Republic vs Musanka Ole Runkes Tarakwa Lempaso Ole Kuyioni & 2 others and Joseph Lesalol Lekitio & Others (exparte applicants)**, it was held that;

“A suit that questions the process of land adjudication, rather than the determination of interests, would not be a suit concerning an interest in land, and would therefore not require the consent of the land adjudication officer. Thus, where the adjudication officer, does not for example, appoint an adjudication committee, as provided by section 6 of the land adjudication act, a person may be perfectly entitled to institute proceedings in the nature of mandamus, to compel him to appoint the said committee. That would not be a determination of interests in land but would be a proceeding aimed at giving legitimacy to the adjudication process. In such an instance, the consent of the land adjudication officer would not be needed, for the proceeding would not be one concerning an interest in land”.

23. In **Meru ELC Petition 7 of 2017 County government of Meru and another vs the DLASO Tigania East sub county and others**, I held as follows;

“I find that the proceedings herein do not just touch on the land adjudication act. Constitutional issues have been raised and other statutes have been referred to including the community land act. It was therefore not necessary for the petitioners to get the consent under section 30 of the land adjudication act. It therefore follows that the petition is properly before this court and petitioners have locus standi to institute these proceedings”.

24. The present dispute is challenging the legitimacy of the Adjudication process though there is also a question for determination touching on the rights and interests of the parties. I therefore make a finding that the suit is properly filed before this court and that it was not necessary for the Petitioners to obtain the consent of the Land Adjudication Officer as the dispute is not purely that of ascertainment of rights and interest in land.

25. I now come to the question as to whether adjudication notices issued herein were issued in blatant violation of the laws. It is not in dispute that there are two notices. For the notice of 11/3/2016, the one that declared Ngaremara/Gambella as an adjudication section, no one seems to have an issue with it. The problem lies in the Corrigendum notice issued on 29/6/2018. It is alleged by the petitioners and not denied by the 2nd and 3rd respondents that the corrigendum notice had the effect of adding more areas in the adjudication process. The petitioners and the 1st respondent contend that the initial notice did not include the Amuthumba region.

26. I have keenly looked at the replying affidavit of Eliab Kamaru filed on 7/5/2019 where he has availed the two notices as ‘EMK’ 1 as the notice of 11.3.2016 and EMK 2, the corrigendum notice of 29.6.2019. The two documents are quite technical and extremely difficult to interpret. I have therefore endeavored to discern the fundamental difference between the two notices as seen from the EYE of an ordinary person. I must confess that I have struggled to discern the contents therein. My observations are that the two notices are only similar from the beginning counting 9 lines up the 9th line which mentions the ***“intersection of Modogashi – Isiolo road near Gadissa Lodge and the corner of 78 Battalion coordinates of which E0344560 N 040225”***. After that sentence, the notice of 11/3/2016 continues as follows; ***“The boundary then turns easterly along the Garbatulla -Modogashi road***”. For the corrigendum notice of 29.6.2018, the continuation is as follows; ***“THE BOUNDARY CROSSES THE TARMAC and runs north westerly to Ekolois’ corner***”.

27. Another observation is that the entire content as contained in the notice of 11/3/2016 is to be found in 17 lines while the content in the notice of 29/6/2018 is to be found in 40 lines! The foregoing is a clear indication that notice of 29/6/2018 did include more areas than the areas which were contained in the initial notice.

28. Section 5 (1) of the Land Adjudication Act provides that;

“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.

Sub section (2) provides that;

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;

(b) shall declare that interests in land within the adjudication section will be ascertained and recorded in accordance with this Act;

(c) shall fix a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer, either in writing or in person or by his agent duly authorized according to law (including recognized customary law); and

(d) may require any person making a claim to point out to the demarcation officer or to demarcate or assist in the demarcation of the boundaries of the land in which he claims to be interested or to clear any such boundaries or any other line in the manner and before a date fixed by the demarcation officer”.

29. Eliab Kamaru the deponent of the affidavit of 7th May 2019 has introduced himself as the sub-county Land Adjudication and Settlement Officer of Tigania East sub-county. He is therefore the person who is mandated by the statute to ensure compliance with section 5 of the Land Adjudication Act. Nowhere in his affidavit has this officer given any explanation as to how and why the corrigendum notice of 29/6/2018 came to be. He has not defined the area that was to be covered by the corrigendum in the manner envisaged by the statute under section 5 (2) (a) of the Land Adjudication Act. If anything it is Miss Kungu representing the 2nd and 3rd respondent who has attempted to give an explanation from the bar where she stated that the areas which were not covered by the initial notice needed to be incorporated in the corrigendum of 29/6/2018. The said counsel has also given an explanation which at least can be understood by an ordinary person and she has stated that the area which has been affected by the corrigendum notice includes an area below Modogashi – Isiolo road and an area south of Karama adjudication section, which areas were previously known as Isiolo River and Mula. The DLASO has not bothered to explain in simple terms the areas that have been covered by the corrigendum. He has simply stated that there is no defined area known as Muthara Amuthumba/Ngaremara ranching within the area of concern, yet as we have seen, section 5 (2) (a) which is couched in mandatory language requires this officer to give a definition as clearly as possible the area of the adjudication section. If I am having such difficulties trying to make sense of the notice of 29.6.2018, then what of the residents, the ones in the village!.

30. It has also been claimed by the 2nd and 3rd respondents as well as the interested party that there was public participation regarding the declaration of the area in question as an adjudication section. To this end the court has been urged to make reference to its own decision in Meru ELC Petition 7 of 2017. I have looked at the decision in the aforementioned petition where in paragraph 220, I had made a finding that the allegation to the effect that there was no public participation was unfounded. However, this was certainly in so far as the notice of 11/3/2016 is concerned. This court was not dealing with the issue of the notice of 29/6/2018 in petition 7 of 2017.

31. I have looked at the annexures availed by the DLASO whereby the documents running from EMK 3 to EMK 6 are pre-dated the issuance of the corrigendum of 29th June 2018. The said documents make reference to the adjudication section known as Ngaremara/Gambella adjudication section, and they have nothing to do with the corrigendum notice of 29/6/2018.

32. The documents EMK 7 and 8 are in reference to disputes of the committee and again have nothing to do with public participation.

33. The **Black's Law Dictionary** has given a definition of what a corrigendum is, as follows: ***"An error in a printed work discovered after the work has gone to press"***. If that be the case, then it means that there was an error which needed to be corrected in the notice of 11/3/2016. One wonders what error was contained in the notice of 11/3/2016. The DLASO has not offered any explanation.

34. The 2nd and 3rd respondents have questioned why this suit was filed in April 2019, 10 months after the notice of 29.6.2018. however, the said respondents ought to first explain why the corrigendum notice was issued 2 years and 3 months after the notice of 11.3.2016.

35. In **Petition no. 87 of 2017 Nairobi constitution and human rights division, Kenya Human rights commission vs A.G and another** the court while dealing with the issue of public participation made reference to the case of **Robert N. Gakuru & others vs Kiambu County Government & 3 others (20140 eKLR** where the court observed;

"Public participation ought to be real and not illusory and not to be treated as a mere formality for the purposes of fulfillment of the constitutional dictates".

36. On appeal against the above decision, the court of appeal affirmed the decision in **Kiambu County Government & 3 others vs Robert N. Gakuru & others (2017) eKLR** stating;

".....The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The constitution in article 10 which binds all the state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation....."

37. The National values and principles of governance enshrined in **Article 10 the constitution** stipulates as follows;

"The national values and principles of governance in this article bind all state organs, state officers, public officers and all persons whenever any of them- (a) applies or interprets this constitution, enacts, applies or interprets any law; or makes or implements public policy decisions. The national values and principles of governance include – patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability and sustainable development".

38. It is clear that the 2nd and 3rd respondents have failed to give a plausible explanation on the factual and legal basis of the corrigendum notice of 29/6/2018. I'm therefore inclined to believe that the applicants have laid a basis to warrant the issuance of the orders sought for to a certain extent. I therefore proceed to grant the following orders;

1) The adjudication process is to continue in Ngaremara/Gambella adjudication section but only in respect of the areas which were covered in the initial notice issued on 11/3/2016.

2) A conservatory order is hereby issued restraining the respondents from continuing with adjudication process in the areas which were added in the corrigendum notice of 29/6/2018 until further directions are given by the court or until the suit is heard and determined.

3) The parties herein are directed to file all their compliance documents pursuant to order 11 of the civil procedure rules to facilitate the expeditious disposal of this case.

4) In the intervening period the 2nd and 3rd respondents are at liberty to undertake any mitigation measures geared towards compliance with the applicable law.

5) This suit is to be heard on priority basis.

6) The costs of this application shall be determined in the main trial.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 24TH MAY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mutuma for applicant/petitioners

Kimaita holding brief for Ayub Anampiu for 1st respondent

Miss Kungu for 2nd and 3rd respondents

Muriera holding brief for Mr. Anyiega for interested parties

HON. LUCY. N. MBUGUA

ELC JUDGE