



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**CONSTITUTIONAL PETITION NO. 5 OF 2017**

**ANN KATHANGA DANIEL.....1<sup>ST</sup> PETITIONER**

**SARAH KARAMBU M'MUGAMBI.....2<sup>ND</sup> PETITIONER**

**M'AMANJA M'IKIARA.....3<sup>RD</sup> PETITIONER**

**JACKSON GITONGA & OTHERS.....4<sup>TH</sup> PETITIONER**

**FESTUS MWENDA BARIU.....5<sup>TH</sup> PETITIONER**

**JULIUS KIMATHI BARIU.....6<sup>TH</sup> PETITIONER**

**VERSUS**

**THE DISTRICT LAND ADJUDICATION &**

**SETTLEMENT OFFICER - IGEMBE.....1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. The Petitioners filed this petition contemporaneously with an affidavit in support sworn by the 1<sup>st</sup> petitioner on 29<sup>th</sup> March 2017.
2. The petition was also filed simultaneously with a Notice of Motion under certificate of urgency dated the same day.
3. In the petition, the petitioners are seeking the following six (6) orders:

*(i) That this Honourable Court do declare that the actions and/or intended actions by the 1<sup>st</sup> respondent to demarcate and sub-divide land parcel No. 716, 717, 718, 719 and 720 AMUNG'ENTI 'B' ADJUDICATION SECTION registered in the names of the late DANIEL BARIU and subsequently transfer ownership to strangers to the family of the deceased DANIEL BARIU is unconstitutional and nullify in law.*

*(ii) That this Honourable Court do declare that the implementation decision of LAND ARBITRATION BOARD CASE NO. 899/90-91 that was delivered on 07/10/1992 is legal and binding.*

*(iii) That this Honourable Court do declare that a legal and valid decision of an ARBITRATION BOARD can only be set aside and/or altered vide an appeal to the Minister or vide a decision of the High Court.*

*(iv) That the Honourable Court do direct the 1<sup>st</sup> and 2<sup>nd</sup> respondents to demarcate and register the land parcels No. 716, 717, 718, 719 and 720 AMUNG'ENTI 'B' ADJUCATION that are situated at AKINYO/VILLAGE of KANUNI DIVISION and now currently fall under AMUNG'ENI 'C' ADJUDICATION SECTION as per the directions of the petitioners and/or the Administrators of the Estate of the late DANIEL BARIU.*

*(v) That this Honourable Court be pleased to make any further and/or better declarations orders and/or directions as shall promote and border the rule of law and Constitutionalism in the protection of the rights of the petitioners and those of the Estate of the late DANIEL BARIU.*

***(vi) That costs of this petition be paid to the petitioners.***

4. In the notice of Motion filed under certificate of urgency, the petitioners sought an equitable injunction restraining the 1<sup>st</sup> respondent whether by himself and/or through his agents, servants, assignees and/or anyone acting under his behest and/or authority from in any way whatsoever demarcating and/or interfering with land parcels No. 716, 717, 718, 719 and 720 AMUNG'ENTI 'B' ADJUDICATION SECTION situated at AKINYO AREA within KIANDA SUB-LOCATION of KIGURU LOCATION of IGEMBE SOUTH DISTRICT as were mapped in implementation of Arbitration Board of 07/10/1992 in Inhibition Board Case No. 809/90-91 pending the hearing and determination of the said application.

5. On 3<sup>rd</sup> April 2017, the parties filed a consent order restraining the 1<sup>st</sup> respondent by himself and/or through his agents, servants, assignees and/or anyone acting under his behest and/or authority from in any way whatsoever demarcating and/or interfering with land parcels No. 716, 717, 718, 719 and 720 AMUNG'ENTI 'B' ADJUDICATION SECTION situated at AKINYO AREA within KIANDA SUB-LOCATION of KIGURU LOCATION of IGEMBE SOUTH DISTRICT as were mapped in implementation of Arbitration Board decision of 07/10/1992 in Arbitration Board Case No. 809/90-91 pending the hearing and determination of this application and/or until further directions of this Court.

6. On 25<sup>th</sup> September 2017, a group of people sought to be enjoined to this petition as interested parties.

7. Again on 13<sup>th</sup> November, one James Mpekethu Ithai also sought leave to be enjoined as an interested party in this petition.

8. On 13<sup>th</sup> November, the said James Mpekethu Ithai filed a replying affidavit.

9. On 14<sup>th</sup> November 2017, the parties agreed by consent to have the Preliminary Objection by the 2<sup>nd</sup> respondent canvassed by written submissions.

10. ATTORNEY GENERAL'S CASE

The Hon. Attorney General through his Notice of Preliminary Objection dated 10<sup>th</sup> November 2017 and filed on 13<sup>th</sup> the same month raised the following grounds:

***(i) That the petitioners herein lack the requisite locus in terms of Article 23 of the Constitution.***

***(ii) That there is no identifiable right in terms of Article 40 of the Constitution capable of being enforced***

***(iii) That in the absence of the required locus and any identifiable right Article 23, 165 (3) (b) & 258 have not been properly invoked.***

***(iv) The jurisdiction of the Honourable Court is limited/ousted by the Land Adjudication Act Chapter 284 Laws of Kenya.***

***(v) The responsibilities of the 1<sup>st</sup> respondent are exhaustively set out in the Land Adjudication Act, Cap 289 Laws of Kenya.***

***(vi) The Notice of Motion dated 29<sup>th</sup> March 2017 and the petition dated 29<sup>th</sup> March 2017 are pre-mature, are not well grounded and are an abuse of Court process.***

***(vii) Article 68 (2) (e) of the Constitution created the proper forum for ventilating the petitioners grievances.***

11. RESPONDENTS SUBMISSIONS

The respondents submissions are that according to the long title of the Land Adjudication Act, its purpose is set out as the ascertainment and recording of rights and interests in Trust Land upon setting out the manner in which that elaborate process is carried out, the Act concludes in terms of **Section 28** by setting out the action to be taken out by the Chief Land Registrar who shall cause registration to be effected in accordance with the adjudication register.

12. Before the actions of the registrar are triggered, that Act provides for the finalization of the adjudication register.

13. The main trust of these provisions is that the Land Adjudication process is carried at converting trust land into registered land.

14. The effect, it is submitted, is that until the process is complete through finalization of the register, no person can claim full ownership to the exclusion of others of any parcel under adjudication.

15. It is further submitted that until the process is finalized, the adjudication area remains communally owned.

16. The respondent also submitted that there is no identifiable rights in terms of **Article 40 of the Constitution of Kenya** capable of being enforced.

17. The Land Adjudication Act is a transitional statute dealing with the process of converting trust land into registered land.
18. Until that process comes to an end, a person cannot purport to enjoy any exclusive right as against the whole world.
19. It is only, after the parcel of land is finally registered that a person's right is crystallized and therefore enjoys a complete and exclusive interest in a parcel of land.
20. The Land Adjudication Act provides the machinery for seeking redress and legal protection during the intervening period. This position is reinforced by **Article 61 of the Constitution** that identifies protectable land rights.
21. Thus since the present dispute relates to interests under African Customary Land, with the requisite legal protection, such interests are not protectable under the Constitution.
22. The interests have not fully crystallized to enjoy the superior status of rights under **Article 40**.
23. In the absence of the requisite locus and any identifiable right, **Article 23, 165 (2) (b) and 258** have not been properly invoked. Consequently, in the absence of an identifiable right capable of being protected under the Constitution, then no right can be argued to have been violated.
24. The jurisdiction of the Honourable Court is limited/ousted by the Land Adjudication Act - until the procedure provided for under the Act has been exhausted, a party cannot invoke the jurisdiction of the Court as provided for under **Section 30** thereof.
25. The respondents submitted that the petitioners in paragraphs 26-28 of the petition concede to the incomplete status of the suit lands. By their own admissions, the 1<sup>st</sup> respondent is seeking to demarcate the suit land. According to **Section 16 of the Land Adjudication Act**, the product of this process is the demarcation map which together with the adjudication record are collectively known as the Adjudication register.
26. What would then follow is the filling of objection to the adjudication register in terms of **Section 26** of the Act.
27. The respondents submit that it is these processes that the petitioners are trying to pre-empt under the guise of Constitutional rights.
28. In the conclusion, the respondents submitted that the Preliminary Objection has been well taken and sought to have the Notice of Motion dated 29<sup>th</sup> March 2017 together with the petition dated the same date struck out for being pre-mature, bad in law and an abuse of the Court process.
29. The respondents relied on the following case law:

**(1) Kilisu Julius Mutungi Sile & S. & 60 others Vs Chairperson, Florlen Adjudication Section 'B' Committee & 3 others (2016) e K.L.R.**

**(2) George & Onyango Vs Board of Directors Numerical Machinery Complex Ltd.**

#### 30. PETITIONERS SUBMISSIONS

The petitioners submitted that the rights to the ownership of the suit property and the dealing and/or interference with the same by the 1<sup>st</sup> respondent is absolutely identifiable. **Article 40 (2) of the Constitution of Kenya 2010** the right to own property is codified while **Article 40 (2)** deals with protection of ownership of property.

31. The petitioner also submitted that **Article 165 (3) (a) of the Constitution** clothed the Court with unlimited original jurisdiction which cannot be ousted and/or limited by a statute while **Article 165 (3) (b)** empowers the Court to determine whether a right has been denied, violated, infringed or threaded.

32. It is also submitted that the question whether the 1<sup>st</sup> respondent's actions and/or intended actions are inimical to the dictates of the Constitution and the provisions of Cap 284 is moot.

33. The petitioner argued that the establishment of the National Land Commission has not ousted the jurisdiction of the Court and that since the lands subject of the petition are in the final stages of demarcation, it would be unconstitutional and illegal to disfranchise the Estate of the deceased DANIEL BARIU.

34. In conclusion, the petitioner stated that the decision of the Arbitration Board which is quasi judicial cannot be ignored and/or short circuited by the 1<sup>st</sup> respondent without infringing on the rights of the successful litigant.

#### 35. INTERESTED PARTIES SUBMISSIONS

The interested parties submitted that the **Land Adjudication Act Cap 284 Laws of Kenya** is self-regulating in as far as the parcels of land are under the said processes.

36. The interested parties further stated that the petitioners have put the cart before the horse. Their rights are yet to be ascertained, verified and registered. The Act provides for objections, arbitration procedures in case a party has been aggrieved and further gives leeway to go to Court with the leave of the Adjudication officer under **Section 30** of the Act.

37. In conclusion, the interested parties submitted that by this petition, this Court is being asked to enter into the arena and usurp the powers of the Adjudication officer without seeking consent under **Section 30 of the Land Adjudication Act Cap 284 Laws of Kenya**.

#### ANALYSIS AND DECISION

38. I have considered with anxious care the Preliminary Objection and the submissions by the parties both in support and in opposition thereto.

39. The petitioners filed this petition simultaneously with a Notice of Motion dated 29<sup>th</sup> March 2017.

40. The petition and indeed the Notice of Motion seek to stop the adjudication process on grounds that by proceeding with the adjudication of the suit lands, the 1<sup>st</sup> respondent will be infringing the rights of the petitioners under **Articles 2, 10, 40, 47, and 159 of the Constitution of Kenya, 2010**.

41. In order to put the issues into perspective, it is important to understand the purpose and operation of the **Land Adjudication Act Cap 284 Laws of Kenya**. The long title of the said Act is the ascertainment and recording of rights and interest in Trust Land (read Community Land).

42. The application of this Act begins with the concerned Minister (read Cabinet Secretary) appointing the Adjudication officer who will oversee the operationalization of the Act. The Adjudication officer will then appoint other officers to assist him which include demarcation officers, survey officers and recording officers. The Adjudication officer will thereafter establish through a notice an adjudication section.

43. The Adjudication officer will also appoint adjudication committee, adjudication officer and an Arbitration Board to assist in his duties.

44. The Act under **Section 24** contemplates the adjudication register which comprises the demarcation map and the Adjudication record which shall be displayed for inspection at a convenient place within the adjudication section.

45. Any person who is affected by the Adjudication register may within sixty days under **Section 26** thereof object to the adjudication officer in writing.

46. Upon setting out the manner in which that elaborate process is carried out, the Act concludes in terms of **Section 26** by setting out the action to be taken out by the Chief Land Registrar who shall then cause registration to be effected in accordance with the adjudication register.

47. Before the actions of the Registrar are triggered, **Section 27 (3)** provides as follows:

***“27 (3) When all objections have been determined and the time for appeal under Section 29 of this Act has expired, the Adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determination of objections and the Director shall .....”***

Until the process of adjudication, registration of interest and rights in land are complete, no person can claim full ownership of land. I agree with the respondents on the first ground of objection that the petitioners lack the locus standi under **Article 23 of the Constitution of Kenya, 2010**.

48. The second ground of the Preliminary Objection is that there is no identifiable right in terms of **Article 40 of the Constitution** capable of being enforced. It is not disputed that the **Land Adjudication Act Cap 284** is a transitional statute. It only deals with the process of converting trust land (read Community Land) into registered land. Until that transitional process comes to an end, a person cannot purport to enjoy a greater right exclusive to the whole world. It is only after the whole process has been undertaken and individual rights identified and registered that such rights crystallize and become enforceable. The Land Adjudication Act provides for mechanisms for seeking redress and legal protection during the transitional period. The long short of it is that the present dispute disguised as violation of the petitioner’s rights is not protectable under the Constitution since such interests have not fully crystallized to enjoy superior status of rights recognized under **Article 40**.

49. The third ground of Preliminary Objection is that **Article 23, 165 (2) (b) and 258** have not been properly invoked. It goes without saying that this Court established under **Article 165 (2) (b)** has unlimited jurisdiction to determine the question whether a right or fundamental freedom in the bill of right has been denied, violated, infringed or threatened. However, that right must be recognized under the Constitution. In the instant case, what the petitioners are calling rights has not crystallized as such. In the result, the objection on that ground is merited.

50. The fourth ground in the notice of Preliminary Objection is that the jurisdiction of the Court is limited/ousted by the Land Adjudication Act Cap 284 Laws of Kenya. **Section 30 of the Act** reads as follows:

***“30. 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 on land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29 (3) of the Act”.***

51. The Land Adjudication Act Cap 284 has ousted the jurisdiction of any Court including a Constitutional Court in matters relating to interests within an Adjudication section unless consent is given by the Adjudication officer in writing. I also find that objection well founded.

52. In the case of *Kilisu Julius Sile & 6 others Vs Chairperson, Olorien Adjudication Section 'B' Committee & 3 others (2016) e K.L.R. J.M. Mutungi J.* held as follows:

*“From the above judicial pronouncement I have referred to, it is patently clear that the Courts have held they have no jurisdiction to deal with a dispute where the process of adjudication is ongoing unless the adjudication officer has under Section 30 (1) of the Act given his consent for the party to institute Court proceedings to be brought. In the present matter there is no doubt that the process of adjudication is ongoing and that the adjudication register has not been closed and/or published. The Court in the premises cannot properly get seized of this matter. It lacks the jurisdiction to deal with the matter”.*

53. I find the position obtained in this case in all fours with that obtained in the cited case.

54. In the final analysis, I find and hold that the Preliminary Objection raised by the 1<sup>st</sup> respondent is merited and I hereby uphold the same. Consequently, the petition and the Notice of Motion dated 29<sup>th</sup> March 2017 are hereby struck out.

55. Having regard to the circumstances of this matter, I order each party to bear their own costs. It is so ordered.

***READ and SIGNED in open Court at Meru this 3<sup>rd</sup> day of June 2019.***

**E.C. CHERONO**

**ELC JUDGE**

**3<sup>RD</sup> JUNE, 2019**

***In the presence of:***

- 1. M/S Njenga for Interested parties***
- 2. Mr. Muchiri Ngunja for Intended Interested party***
- 3. Mr. Mbogo for Petitioners***
- 4. Respondents/Advocate – absent***