



**REPUBLIC OF KENYA**

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

**PETITION NO. 6 OF 2017**

**REUBEN MWONGELA M'ITELEKWA**

**(suing as the Legal Representative of the estate of M'ITELEKWA M'MUCHEKE**

**NAITURI alias M'ITELEKWA MUCHEKE).....PETITIONER**

**AND**

**PAUL KIGEA NABEA.....1<sup>ST</sup> RESPONDENT**

**THE LAND ADJUDICATION OFFICER ANTUAMBURI ADJUDICATION SECTION,**

**TIGANIA EAST SUB-COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Petitioners **Notice of Motion filed on 27.11.2018** seeking for amendment of the Petition, and the 1<sup>st</sup> respondent's **Preliminary Objection filed on 24.10.2018**, where this court has been urged to dismiss the entire petition filed on 30<sup>th</sup> March 2017. The 1<sup>st</sup> respondent has stated that in the event the Preliminary Objection is found to have no merits, then the application can be allowed. It follows that the determination herein is on the Preliminary Objection.

**Case for 1<sup>st</sup> respondent**

2. The grounds raised in the preliminary objection are that:

**(i) The petitioner did not exhaust the remedies provided for in law before filing this petition, because he did not file an appeal to the minister whose decision shall be final, under section 29 of the Land Adjudication Act, Cap 284 after dismissal of his A/R objection Nos. 859, 860, 861 and 862 which he had filed against the 1<sup>st</sup> respondent and others and so, the court has no jurisdiction to entertain this petition.**

**(ii) Under section 30 (1) of the Land Adjudication Act, Cap 284, statutory consent cannot be relied upon to institute any court proceedings to challenge a Land Adjudication officer's decision, as held by the court of appeal in Julia Kaburia vs Manene Kabeere & 5 others, civil appeal No. 340 of 2002 quoted by the court of appeal on page 11 in Nyeri Civil Appeal No. 221 of 2010: Stephen Kungutia & 2 others vs Severina Nchulubi.**

**(iii) For want of specificity of the alleged violations, the entire petition is legally incompetent, fatally defective and an epitome of abuse of the due process of the court.**

3. The Preliminary Objection was argued orally on 7.3.2019. The 1<sup>st</sup> respondent submitted that the petitioner had filed A/R Objection Nos 859,860,861 and 862 which were dismissed and he then failed to file an appeal to the minister whose decision is final, under section 29 of the land adjudication act.

4. The 1<sup>st</sup> respondent therefore contends that the court has no jurisdiction to entertain this petition. On this point, the 1<sup>st</sup> respondent has relied on the following authorities;

**I. MERU ELC Petition No. 2 of 2012 Zipporah Nkoyai vs James Kaberia M. & 2 others**

II. Meru H.C Petition No. 2 of 2012 Stephen Michuki Kiunga vs Nkuni M'Turuchiu & 2 others

III. Anne Wawuda & 3 others vs Kenya Railways Corporation & another (2015) eKLR which quotes;

a) Speaker of National Assembly vs Karume (1992) KLR 425,

b) South African case of Andrew Lionel Philips & 15 others vs National Direction of Public prosecutions (CC. 55 of 2004),

c) Abdallah Mangi Mohammed vs Laazarus & 5 Others (2012)eKLR.

IV. Meru ELC case no. 167 of 2011 Nicholas Mugambi & others vs Zachary Baariu & 6 others.

V. Meru HCCA No. 306 of 2013; Samuel Kilemi & another vs Festus Gituma Kuthuka which quotes:-

a) Supreme Court of Kenya in civil application no. 11 of 2016 Hon. (lady) Justice Kalpana H. Rawal vs Judicial Service Commission & others.

b) The court of appeal decision in the owners of motor vessel "Lilians" vs Caltex Oil Kenya Ltd (1989) 1 KLR 1.

c) The court of Appeal decision in Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others (2013) eKLR.

5. Secondly, it is submitted that the statutory consent cannot be relied upon to institute any court proceedings to challenge a Land adjudication officer's decision. On this point, the case relied on is: **Nyeri Court of Appeal, Civil Appeal No.221 of 2010: Stephen Kungutia & 2 Others Vs Severina Nchulubi.**

6. Finally, the 1<sup>st</sup> respondent has averred that the petition does not contain particulars of violations capable of being addressed by the court.

7. The 1<sup>st</sup> respondent has relied on the following provisions of law to support the grounds raised in the Preliminary Objection:

(i) Section 29 of the Land Adjudication Act cap 284 Laws of Kenya.

(ii) Section 26 of the Land Consolidation Act Cap 283 Laws of Kenya.

(iii) The preamble to the Land Adjudication Act

(iv) The preamble to the Land Consolidation Act.

(v) Order 53 rule 2 of the Civil Procedure Rules.

(vi) Section 8 & 9 of the Law Reform Act cap 26 Laws of Kenya

#### **Case for petitioners**

8. For the petitioners, it was submitted that the constitutional petition is properly before this court as it is challenging the quasi-judicial decision making process and hence this court must exercise what it has been asked to do. It is further averred that in the draft amended petition, orders of judicial review have been sought. Finally, it was submitted that striking out the suit ought to be done in extreme cases and that no suit should be summarily dismissed unless it is very hopeless, beyond rectification and incurable by way of amendment.

9. In support of petitioner's arguments, the case of **Mungai vs Council of Legal Education & Others East Africa Law Reports [2015] 2EA** was cited where the court held that;

*"The court had jurisdiction to grant the orders sought as the limitation provisions in the law reform act and the civil Procedure Act cannot override the provisions of the constitution."*

10. Petitioner also cited the case of **DT Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another [1980] eKLR** where it was stated that:

*"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. .... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment"*

#### **Case for 2<sup>nd</sup> and 3<sup>rd</sup> respondents**

11. It was argued for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that **section 30 of the Land Adjudication Act and section 8 of the Land Consolidation**

Act apply in civil cases only. The court was urged to clarify whether a petition is subject to the aforementioned provisions of law. On the issue of dispute resolution mechanisms, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred that a party ought to exhaust all available remedies, unless the laid down procedures have been declared unconstitutional.

### Determination

12. I have carefully examined the pleadings, the submissions and the authorities proffered by the parties in support of their respective arguments. The issues to determine are:

- (i) **Whether petitioner failed to exhaust available remedies,**
- (ii) **Whether a consent under section 30 of the Land Adjudication Act is required in the filing of petitions.**
- (iii) **Whether the consent under the Land Adjudication Act, section 30 (1) can be relied upon to institute any court proceedings to challenge the decision of the Land adjudication officer,**
- (iv) **Whether the petition is incompetent for failure to specify the alleged violations.**

### Dispute Resolution Mechanisms

13. Did the petitioner exhaust all available remedies? To answer this question, the court has to determine which law is applicable as far as the dispute is (was) concerned. None of the parties is clear on this point. In the Preliminary Objection, the 1<sup>st</sup> respondent has made reference to application of the Land Adjudication Act while in the submissions, reference has been made to both the Land Adjudication Act and the Land Consolidation Act. The 2<sup>nd</sup> respondent too has made reference to the two aforementioned statutes. As for the petitioner, he avers that he is seeking Judicial Review remedies hence the issue of exhausting remedies does not arise.

14. It is quite apparent that the petitioner had filed **Objection Case** no **859, 862, 861** and **860** against the 1<sup>st</sup> respondent and 3 others on **11.11.2010**, which proceedings he has availed in hand written photo-copied format. There is no indication under which statute the proceedings were conducted under, but there is no doubt that such objection proceedings were conducted under **section 26** of either the **Land Adjudication Act or the Land Consolidation Act (Cap 284 and 283** of the laws of Kenya respectively), where the Adjudication section was **ANTUAMBURI**

15. **Section 29 of the Land Adjudication Act** provides that;

***“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by— (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.***

16. Thus a person aggrieved by the decision of the adjudication officer is required by law to seek redress before the minister whose decision is final.

17. **Section 26 of the Land Consolidation Act** provides that;

***“Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act. (2) If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate. (3) No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.***

18. Therefore, under the **Land Consolidation Act**, the decision of the adjudication officer is final unless the minister can intervene on issues of compensation.

19. A perusal of the petition reveals that the petitioner is agitating for his rights and interests in land within Antuamburi adjudication section. He had filed the cases in the objection proceedings where he lost in the decision dated **10.02.2011**. The petitioner ought to have lodged an appeal to the minister within 60 days of the challenged decision as per **section 29 of the Land Adjudication Act** in the event that the proceedings were conducted under the **Land Adjudication Act**. If the law applied was the **Land Consolidation Act**, then the decision in the objection proceedings was final unless the issue of compensation was raised.

20. I find that the authorities proffered by 1<sup>st</sup> respondent on the issue of Dispute Resolution Mechanism in adjudication process are very

resourceful. In particular, I do make reference to the case; Meru ELC NO 167 of 2011 Nicholas Mugambi and Others vs. Zachary Baariu & Others where Judge P.M. Njoroge made reference to the case of Abdallah Mangi Mohamed Versus Lazarus & 5 Others [2012] eKLR where Muriithi J stated that :-

*“.....Where there is a dispute as to the applicant's entitlement to property and where there exists a Statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicant's claim to the property.”.*

21. Further 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”.*

22. In the case of Kanampiu M'Rimberia vs. Julius Kathane and 3 Others, Meru H.C.C. no. 6 of 2009, I was dealing with a land dispute spanning decades from 1965 where the matter had gone through committee stage, arbitration, objection stage and even an appeal to the minister had apparently been lodged, though not determined, but still the claimant opted to file a suit in court. I dismissed that case on the basis that it was not open for the claimant to seek redress before the court and I went ahead to state as follows:

*“The Land Adjudication Act is a self-contained statute that has detailed procedures of how matters are to be conducted and at what point the jurisdiction of the court is to be invoked.”*

23. The Supreme Court Case of Samuel Kamau & Another v. Kenya Commercial Bank and two others – Sup. Ct. Civil Application No. 2 of 2011 aptly captures the issue of jurisdiction

*“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”*

24. In the case of Speaker of National Assembly Versus Karume [1992] KLR 425 the Court held that;

*“.....where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”.* This position was adopted with approval by Hon. Justice. M.J. Anyara Emukule, J, in Mombasa High Court Petition NO. 18 of 2013: Anne Wamuda & 3 Others Versus Kenya Railways Corporation & Another [2015] eKLR.

25. In Petition 77 of 2014, Mombasa, David Mtawali Kazungu Yaa vs. NLC and 3 Others, Komingoi J dismissed the petition after recognizing that the petitioner had fully participated in the objection proceedings before the Land adjudication officer. The court found that petitioner ought to have exhausted available remedies.

26. In petition 6 of 2016 Kisii, John Masiantet Saeni vs. Daniel Aramat Lolungiro & 3 Others, Mutungi J while upholding a Preliminary Objection challenging the competency of the Petition had this to say on matters adjudication;

*“I do not agree that the provisions of the Land Adjudication Act that deal with the process and procedure of adjudication would constitute procedural technicalities. The Act sets out in considerable detail the process of adjudicating people's interests and rights over land the subject of adjudication before such land is demarcated for issuance of individual titles on registration. The Act equally sets out a dispute resolution mechanism during the process of land adjudication. The petitioner participated in the adjudication process and invoked the dispute resolution mechanism up to the end resulting in the decision of the Minister on the appeal where the petitioner's appeal was rejected”.*

27. Alternative Dispute Resolution Mechanism are anchored in the Kenyan 2010 constitution. In the case of Mutanga Tea & Coffee Company Ltd vs Shikara Limited and Municipal Council of Mombasa, COA Civil Appeal No. 54 of 2014 the court stated as follows:

*“We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the constitution or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that article 159 (2) (c) is not a closed catalogue. To the extent that the constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by article 165 (3) (a) of the constitution in a way that will accommodate the alternative dispute resolution mechanisms”.*

28. My conclusion on this point is that though courts can grant judicial review orders in constitutional petitions, parties must show that they have exhausted all available remedies. Further, parties must follow the laid down Dispute Resolution Mechanism provided for under the relevant laws, in this case, the **Land Adjudication Act or the Land Consolidation Act**. The Preliminary Objection succeeds on this 1<sup>st</sup> limb.

**Whether a consent under section 30 of the Land Adjudication Act is required in the filing of petitions**

29. Section 30 (1) of the **Land Adjudication Act** provides that;

***“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.....”***. The proviso is similar to **section 8 of the Land Consolidation Act**.

30. Mr. B. Kimathi, counsel appearing for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (attorney General) has urged this court to clarify whether the consent under **section 30 of the Land Adjudication Act (also section 8 of the Land Consolidation Act)** is required when filing a petition. Is a petition a suit for purposes of the aforementioned provisions of law? The answer which I would say is yes and no depends on the nature of the dispute. The answer also lies in the preamble of the two statutes.

31. The preamble of the **Land Adjudication Act** provides as follows:

***“An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto”***

32. The preamble of the **Land Consolidation Act** provides that;

***“An Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto”***.

33. The main objectives in the two statutes is to deal with ascertainment of and recording of rights and interests in land.

34. In **Meru Petition 5 of 2019, The Muthaara Njuri Ncheke Council of Elders & Another vs. The Committee Ngare Mara/Gambella Adjudication section and 2 others**, I held that a consent was not required under the **Land Adjudication Act** as the dispute concerned the legitimacy of a corrigendum notice issued pursuant to **section 5 of the Land Adjudication Act**. In that case I had made reference to 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)**, where Munyao J 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”***. Emphasis added.

35. Thus as long as a claimant desires that there be a determination regarding a right and interest in land, **YES** a consent would certainly be required even in the filing of petitions, but in other disputes, the consent is not required. In the present dispute, such a consent would certainly be required. I have however not seen the consent though the petitioner has made reference to the same in **paragraph 18** of his petition.

***Whether the consent cited under Section 30 of Land Adjudication Act can be used to challenge the decision of the land adjudication officer?***

36. In the case of **Tobias Achola Osindi & 13 others versus Cypriano Otieno Ogalo & 6 Others, H.C.CNO 4 OF 2011 KISII, Okongo J** held that;

***“The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act..... The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. Emphasis added. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. Emphasis added. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and***

*determine any point or issue of law that may arise in the course of the adjudication process. The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land. Due to the foregoing, a consent issued by the Land Adjudication Officer under section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to court for determination issues which should be determined by the adjudication officer or through the dispute resolution machinery laid out in the Act”.* Emphasis added.

- Also see Timothy Makenge vs Maruga Ngochi COA, Civil Appeal No. 25 of 1978.

37. From the analysis in the aforementioned authority, it is clear that even if petitioner has the aforementioned consent, he cannot use it to challenge the decision of 11.11.2010 in the **objection proceedings**.

**Is the petition legally incompetent for failure to specify the alleged violations?**

38. It is submitted by the 1<sup>st</sup> respondent that the petition does not contain any particular violations.

39. In the case of David Gitahi Suing as the Chairman of Othaya Resident’s Foundation vs Attorney General (2014 eKLR, Justice Majanja held as follows:

*“It is well established that a petitioner who seeks redress under the constitution must state his claim with precision by reference to the provisions of the constitution violated and how they are violated. This principle has been established since the case of Annarita Karimi Njeru vs Attorney General (1979) KLR 54 and was recently re-stated by the court of appeal in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance and others Nairobi C.A civil Appeal No. 290 of 2013 (2013) eKLR. I would also add what was stated in Meme vs Republic (204) 1 EA 124 that where a person is seeking redress from the high court on a matter which involves a reference to the constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant’s instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complains without any focus on fact, law or constitution, hence it had nothing to do with the constitutional rights of the appellants”.*

40. In the present dispute petitioner is asserting a claim of ownership of the land where he avers that his father’s land was moved from one area to another. As already stated in this ruling, **the dispute concerns ascertainment of rights and interest in land** which dispute was last decided through **Objection Proceedings**. These proceedings are anchored under the statutes which are still in force. The dispute therefore does not raise any constitutional issue. I therefore agree that the petition is incompetent.

41. The petitioner has submitted that no suit should be dismissed unless it is very hopeless, weak and beyond redemption. However, it is a principle tenet of law that a court has to down its tools if it has no jurisdiction to determine a dispute. As long as the dispute falls under the realm of ascertainment of rights and interests in land, then the dispute falls under the statutory provided mechanisms of resolving such disputes. In the case of Silverio Akubu & 4 Others vs. Charles Baariu Salasio & 3 others, Meru ELC petition 29 of 2018, I held as follows:

*“This court cannot apply judge craft to bypass the spirit and the letter of the law”. The spirit and the letter of the law on matters adjudication are clearly set out in black and white in the preamble of the two statutes, the Land Adjudication Act and The Land Consolidation Act. Thus the petitioner cannot litigate on issues of ascertainment of his rights and interest in the suit parcels before this court.*

## **Conclusion**

42. I therefore find that the **Preliminary Objection** filed by the 1<sup>st</sup> respondent is merited. The same is allowed. The import thereof is that this petition is hereby struck out with costs to 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 31<sup>ST</sup> DAY OF JULY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Kiome for C.P Mbaabu for 1<sup>st</sup> respondent

Miss Njenga for petitioner

B. Kimathi for 2<sup>nd</sup> and 3<sup>rd</sup> respondent

Petitioner

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**