



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC PET NO. 19 OF 2018

IN THE MATTER OF: ARTICLES 10, 19, 20, 22, 23, 35, 40, 48, 50, 60

AND 232 OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF: THE LAND ADJUDICATION ACT (CAP
284 LAWS OF KENYA-REPEALED)**

IN THE MATTER OF: NAIKARRA ADJUDICATION SECTION

BETWEEN

MUSANA OLE PERE & ANO.....PETITIONERS

-VERSUS-

DISTRICT LAND ADJUDICATION

SECTION AND SETTLEMENT

OFFICER-NAROK SOUTH & 23 OTHERS.....RESPONDENTS

AND

PARAMALAI PERE & ANO.....INTERESTED PARTIES

RULING

The Petitioners herein filed a Constitutional Petition dated 28th November, 2018 seeking the following orders: -

- (a) A declaration that the actions of the private surveyor who did the survey works in Naikarra Adjudication Section is null and void and the survey of Naikarra Adjudication Section be undertaken afresh by a survey officer who is a public officer.
- (b) A declaration that the actions of the 1st Respondent in Naikarra Adjudication Section are unconstitutional, arbitrary, wrongful, null and void and should be stopped forthwith.
- (c) A permanent injunction restraining the Respondents and the Interested parties, their servants, agents, representatives and or/ anyone else acting for and/or their behalf from continuing with the said adjudication process in Naikarra Adjudication Section unless and until the rights of the Petitioners and the Residents Land Owners of Naikarra Adjudication Section are duly respected.
- (d) An order that the Land Adjudication Officer do hold a Public Baraza in Naikarra Area within twenty-one (21) days from the date of judgement with an agenda of sensitizing the Land Owners on the adjudication process.
- (e) An order that the current Land Adjudication Committee, being the Interested Parties herein, be disbanded forthwith and a Public Baraza be held in Naikarra area where the Land Adjudication Officers shall appoint a new Land Adjudication Committee with the approval of the Land Owners.
- (f) That this court be pleased to order that fresh adjudication process be undertaken in Naikarra Adjudication Section taking into

account public participation as required by the Constitution and the relevant statutes including Land Adjudication Act and that process be undertaken by any other Land Adjudication Officer other than the current Adjudication Officers in conduct of the adjudication process and whose actions has precipitated this petition.

(g) The costs of the application be borne by the Respondents.

And together with the petition was a Notice of Motion dated on even date seeking temporary orders of injunction.

The Respondents filed their joint Replying Affidavits in opposition to the Notice of Motion and together with the same they also filed a Notice of Preliminary Objection on point of law dated 6th December, 2018 on the jurisdiction of the court on the following items.

1. That the suit(Petition) offends the provisions of sections 30(1) of the Land Adjudication Act.
2. That the Application is grossly incompetent, misconceived a non-stator and abuse of the court process.

When the Notice of Motion and the Preliminary Objection came up for hearing the court directed that the preliminary objection be disposed off by way of written submissions and hence it is the aforesaid preliminary objection that is the subject of this ruling.

The 4th-25th Respondents in their submissions in support of the preliminary objection are challenging the Jurisdiction of the court to hear and determine the Petition and the Application accompanied the same.

The 4th-25th Respondents argue that a Court cannot entertain a claim or interest in land where the said land is still under adjudication without the consent of the Adjudication officers pursuant to the provision of section 30 of the Land Adjudication Act.

In support of the Preliminary Objection the Respondents relied on the provisions of the aforesaid section and the case of Owners of the **Motor Vessel "Lilian S"-versus-Caltex Oil Kenya Ltd (1989)KLR** where the court held:-

"Jurisdiction is everything without it a court has no powers and where the court has no jurisdiction there is no need to continue the proceedings."

It is the Respondents contention that under the provisions of Section 29 and 30 of the Land Adjudication Act no person shall institute any proceedings and no court shall entertain a case where the interested in the land is subject to adjudication process.

It is the Respondents contention that the adjudication process is ongoing within the Naikarra Adjudication Section and the Petitioners have not obtained the consent of the Adjudication Officer and cannot commence the proceedings herein and/or any other processes and they have cited the case of **Justus Ntuiti –Versus- Mwirichia Kaumbuthu (2004)eKLR** Onyancha J. considered the application of Sections 29 and 30 of the land Adjudication Act and observed as follows:-

"The way I understand (section 30) is that no person shall institute a Civil Case in court and no court shall entertain a case with an interest in a place of land in a section which has been declared an adjudication section under section 5 of the Act Except with the consent of the adjudication officer or until the adjudication record has been declared finalized."

Kilusi Julius Sile & 60 others versus Chairperson, Oloirien Adjudication section "B" Committee & 3 Others (2016)Eklr Mutungi J held that:-

"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. No such consent was granted by the Adjudication Officer to the petitioners to enable these 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 jurisdiction to deal with the matter."

The Respondents contends that the Land Adjudication sets out and elaborate a comprehensive procedure to address any dispute that may arise during the Adjudication process vide the provisions of section 29 and 30 and hence the Jurisdiction of the court is ousted without first exhausting the process contained under section 29 and 30.

The 1st-3rd Respondents supported the objections taken by the 4th-25th Respondents and in their submissions they argued that the petitioners should have first obtained the consent of the Land Adjudication Officer before filing the instant Application as provided for under Section 30 of the Land Adjudication Act.

The 1st-3rd Respondents further averred that the Petitioners have failed to pursue the procedures set out in the Land Adjudication Act but opted to come to court directly which was improper and hence the petition before the court is thus premature.

The 1st-3rd Respondents have relied on the case of **Speaker of National Assembly –Versus- Karume(1992)KLR 21** where the court held:-

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament,

that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”.

And from the above it is their contention that where a procedure exists a party ought to exhaust that procedure first under the doctrine of exhaustion.

The petitioner in opposition contrary to the court's direction on 13th December, 2018 filed a Replying Affidavit and submissions on the same. In the Replying Affidavit the Petitioners averred that since the commencement of the demarcation and adjudication exercise there were numerous irregularities which were committed by the Land Adjudication Officer and that the process has been undertaken without the involvement of the Respective Land Owners and the Survey was being undertaken by a Private Surveyor.

It is the Petitioners contention that they demanded the Land Adjudication Officer to avail to them copies of the Adjudication Notice, Maps and Report on the process but all were denied. They further stated that vide two letters dated 16th October, 2018 and 12th November, 2018 they reiterated their complaints and sought for consent however, they said letters never elicited any response and thus their request to get consent was denied.

In their submissions the Petitioners submitted that the provisions of Section 30 of the Land Adjudication Act is not applicable in a constitutional petition as the aforesaid section envisages Civil Proceedings where the Plaintiff claims an interest in land whereas the Petitioners are praying an interest in land but one that is challenging the process of adjudication and therefore Section 30 bars a party from instituting a constitutional petition and that the same cannot be subjected to legal technicalities provided under a statutes.

The petitioners have relied on the case of **ATTORNEY GENERAL-VERSUS-ISAIAH MUTURI MUSEE(2018)EKLR** where the court held that where a party is seeking a redress for breach of a constitutional petition the provisions of section 30 do not apply.

The Petitioners also submitted that the Preliminary Objection which is raised by the 4th-25th Respondents do not hold the threshold required of a preliminary objection they state they sought the consent but were denied and subsequently raised complaint that were not addressed and since the petition raises constitutional issues touching on the adjudication processes and public participation in the said process and aggrieved by the manner they were dealt with they were forced to file the instant petition.

I have carefully read the Petition that is the subject of the Petition herein and the subsequent preliminary objection raised by the 4th-25th Respondents and the submissions made by the parties herein. From the petition and the preliminary objection, it is not disputed that the Naikarra Adjudication process is an ongoing exercise that was only stopped at the instant of this court when the Petition herein was filed on the basis that all parties do maintain the status quo.

The 4th-25th Respondents' preliminary objection is based on the fact that the provisions of Section 30 of the Land Adjudication Act was not met by the Petitioners prior to instituting the Petition **Section 30 provides: -**

“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.”

The Preliminary objection is thus hinged on the lack of consent by the Land Adjudication officer to the Petitioners to file the Petition invalidates the process by which the petition was filed. It is the Respondents contention that the court lacks jurisdiction to entertain the petition as the same was ousted by the dint of the provisions of Section 29 and 30 of the Adjudication Act.

The Petitioners on their part submit that they had requested for the consent and other details relating to the suit land but they were denied the same and further that the Petition is not a Civil Proceeding as the provisions of section 30 are inapplicable.

The above being the issues between the parties and having read the Preliminary objection and the submissions, the matter for determination is:-

1. Whether the Petitioners have obtained consent under Section 30 of the Land Adjudication Act prior to the filing of the Petition.
2. Whether the Provisions of Section 30 are applicable where a party raises constitutional issues.

From the pleadings it is the petitioners' contention that they have requested for the consent but were out rightly denied for no apparent reasons and it is because of the denials that they filed the petition.

I have referred to the two letters annexed to the 1st Respondent's Affidavit filed in opposition to the Preliminary Objection dated 16th October, 2018 and 12th November, 2018 both addressed to the District Land Adjudication Officer Narok South both the aforesaid letters are titled **“Complaints of lack of public participation on the demarcation of Naikarra Adjudication Area and**

“Complaints of lack of public participation and Commissions on irregularities on the demarcation and Adjudication of Naikarra Adjudication Section.”

Both the letters hereinabove referred to address a litany of complaints in respect of the adjudication process. I have not seen any paragraph or statement where the Petitioners have sought for the grant of the consent of land Adjudication Officer and any follow up to request for the

same. Where the consent was unreasonably denied it is my view that filing the petition would not have been a wise decision as the petitioners had recourse to compel the Land Adjudication Officer to avail the consent to them and for the above reasons, I find that the Petitioners have not obtained the said consent and hence the lack of it is fatal to the entire petition.

By virtue of the provisions of section 30 of the Land Adjudication Act the Petitioners were under a mandatory obligation to seek for the consent of the Land Adjudication Officer.

The Petitioners have asked the court to disregard the provisions of section 30 as what is before court is a constitutional petition and not a civil suit as envisaged under section 30 of the Land Adjudication Act. I have read the petition and the Affidavits filed by the petitioners and one thread that runs through them is that the Petitioners are aggrieved by the process by which the entire Adjudication process is undertaken. Under the provisions of the Land Adjudication Act the Objective of the court was to clearly provide for the ascertainment and recording of rights and interest and a reading of this Act shows the legislature wanted ascertainment of rights under the Act and the address of all complaints under the process to be free from other process and hence the enactment of section 29 and 30 of the Act which provided for resolution and as such I find that the petition before the court is one which the petitioners want to seek their rights and hence the same cannot escape the provisions of the Land Adjudication Act.

I have carefully considered the preliminary objection raised by the 4th-25th Petitioners and the submissions filed to buttress their points. I find that the preliminary objection raised by the respondents is merited and that I will uphold the preliminary objection dated 6th December, 2018 and strike out the petition for non-compliance with the provisions of section 30 of the Land Adjudication Act. Each party shall bear their own cost.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **16th** day of **July, 2019**

Mohammed Noor Kullow

Judge

16/7/19

In the presence of:

Mr Kamwaro for the 4th to 25th Respondents

Ms Ndundu holding brief for Fatma for the 1st, 2nd and 3rd Respondents

Ms Thiongo for the Petitioners.