



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 7B OF 2013

IN THE MATTER OF ALLEGED THREATENED CONTRACENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA

JUSTUS MUGAA M'IMPWIPETITIONER

VERSUS

DISTRICT LAND ADJUDICATION & SETTLEMENT

OFFICER, TIGANIA WEST/EAST DISTRECT 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

REBECCA MWONJARU alias MWONJERU M'TUARA

alias MWONJARU M'TUTARA..... 1ST INTERESTED PARTY

ITUMBIRI MARANGU 2ND INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The petitioner, Justus Mugaa M'Impwi lodged this petition on 21st March 2013 alleging that there was a real threat for contravention of his fundamental rights and freedoms under article 40 of the constitution of Kenya.
2. In the said petition, the petitioner states that he was and still is the recorded owner of parcel no. 4810 Athinja/Athanja adjudication section area having brought the same from M'manguai 2 acres, M'Laikanya 2 acres and was bequeathed 1 acre by the clan.
3. The petitioner further states that he is entitled to five (5) acres which he has been in possession, user and enjoyment.
4. The petitioner also contends that the 1st respondent intends to swindle from this portion a parcel measuring ½ acre and thereafter give it to Rebecca Mwonjaru alias Anastacia Mwonjaru M'Tuara and M'Itumbiri without following due process laid down by law.
5. The petitioner therefore seeks the following orders:
 - (a) A declaration that the intended action by the 1st respondent of curving from the petitioner's parcel NO. 4810 Athinja/Athanja adjudication section ½ acre and giving it to Rebecca Mwonjaru alias Anastacia Mwonjaru M'tuara and Itumbiri Tharanju, is inequitable, uncalled for, unjustified unlawful, null and void ab initio.
 - (b) A permanent injunction restraining the respondents their employees assigns, servant, agents or whomsoever acting for, on behalf or through them from carrying out the intended action of curving out of the petitioner's parcel no. 4810 Athinja/Athanja adjudication section, ½ acre and giving it to Rebecca Mwonjaru alia Anastacia Mwonjaru M'Tuara and Itumbiri Tharanju or any other person whatsoever.
 - (c) Costs of the petition and interest thereon at court rates.
6. Filed simultaneously with that petition was a chamber summons brought under Article 22 and 23 (3) of the Constitution of Kenya Rules

20 and 21 of the Constitution of Kenya supervisory jurisdiction and protection of fundamental rights and freedoms of the individual (High Court Practice and Procedure Rules 2006).

7. The petitioner was seeking temporary injunction orders pending the hearing and determination of the main petition.

8. That chamber summons application was brought under certificate of urgency.

9. When the application was placed before the duty court the same was certified urgent.

10. The court granted the petitioner/applicant temporary injunction orders in terms of prayer number (b) thereof.

11. When the matter finally came up before me for directions on 12/2/2018, the parties agreed to dispose off the petition by way of written submissions.

PETITIONER'S SUBMISSIONS

12. The petitioner did not file any submission despite a consent by the parties through their legal representatives.

RESPONDENT'S SUBMISSIONS

13. The respondents through E.M Kieti senior litigation counsel submitted that the petition lacks merit and is an abuse of court process.

14. The learned counsel further submitted that the proceedings that spawned this petition related to objection no. (564) 940 in relation to parcel no. 4810 where the parties to the objection proceedings were Anastacia Mwonjaru and Justus Mugaa (Petitioner).

15. The respondent who is the petitioner herein was given an opportunity to be heard and even called witnesses on his behalf.

16. The outcome of the proceedings was that objection no. 940 was allowed pursuant to the land adjudication Act Cap 283 Laws of Kenya.

17. Following that decision made on 21/01/2000, there has been no challenge/Appeal by way of invoking the supervisory jurisdiction of the high court in the form of prerogative orders.

18. The learned counsel also stated that this petition is untenable as the same is merely a collateral attack on a body properly constituted by law.

19. The learned counsel further argued that the petitioner has not set out the particulars with regard to the manner extent and scope of the alleged breach. He stated that the pleadings are very general in nature and that it cannot aid the court in making an informed assessment of the issues in controversy.

20. Mr. Kieti also stated that there is no right under article 40 of the constitution capable of being enforced. He stated that the land adjudication act is a transitional statute which deals with the process of converting trust land into registered land.

21. Until that process of identifying individual interest in land is complete, a person cannot purport to enjoy any exclusive right as against the whole world.

22. It is further submitted that once the parcel of land is registered, that person enjoys a complete and exclusive interest in a parcel of land which is capable of being protected under article 40 of the constitution and other statutory laws.

23. Mr. Kieti further contends that the land adjudication Act provides for mechanism for seeking redress and legal protection during the adjudication process which the petitioner has not been able to exhaust fully and that the petition is therefore premature and not well grounded.

24. The learned counsel submitted that in the absence of compliance with that substantive statute, the court will be rehearing matters that have not been exhaustively determined. He cited the following case in support thereof;

- George S. Onyango vs Board of Directors Numerical/Maclining Complex Ltd

INTERESTED PARTY'S SUBMISSIONS

25. The interested parties through the firm of Muia Mwanzia & Co. advocates submitted that the petitioner was heard vide objection NO. 940 before the land adjudication offices one Athinja Athanja adjudication section where he was given an opportunity to be heard and even cross examined the witnesses.

26. Mr. Muia Mwanzia submitted that the only lawful way to challenge the decision of the adjudication and settlement officer was through the body mandated by statute to make the determination that was arrived at but not by way of this petition. He cited the following authorities in opposition thereto:

- Moses Nandalwe Wanjala vs. Kenyatta University (2015) eKLR

- Hohn Harun Mwau vs. Peter Gastrow & 3 others (2014) eKLR

ANALYSIS AND DETERMINATION

27. The petitioner has brought this petition to stop an intended action by the first respondent herein. The first respondent is the land adjudication officer mandated by statute to ascertain and record interests in an adjudication section. Section 10 of the land adjudication Act cap 283 laws of Kenya provides the General powers of adjudication officer as follows:

(i) The adjudication officers shall have jurisdiction in all claims made under this act relating to interests in land in the adjudication area with power to determine any question that needs to be determined in connection with such claims and for that purpose he shall legally competent to administer oaths and do issue summons, notices or orders requiring the attendance of such persons or the productions of such documents as he may consider necessary for the carrying out of the adjudication once the interests have been ascertained and the adjudication register completed, the adjudication office if required to perform the following duties under section 25 of the land adjudication Act;

(a) Deliver the duplicate adjudication record (bearing a copy of the certificate to the director of land adjudication.

(b) Display the original adjudication register for inspection at a convenient place within the adjudication section and

(c) Give notice that the adjudication register has been completed and may be inspected at that place during a period of sixty days from the date of the notice”.

28. Section 26 of the land adjudication Act (cap 283) provides as follows;

(i) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may within sixty days of the date upon which the notice of completion of the adjudication register is published object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(ii) The adjudication officer shall consider any objection made to him under subsection (s) of this section and after such further consultation and inquiries as he thinks fit he shall determine the objection.

29. Section 29 of the same act provides thus;

(i) 29 (1) 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 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.”

30. The issue in this petition arises from a dispute pending before the district land adjudication & settlement officer, Tigania West/East District where the land adjudication officer had issued notice to the effect that the adjudication register has been completed pursuant to section 24 and 25 of the land adjudication Act cap 283 Laws of Kenya.

31. Being aggrieved by the decision of the adjudication officer the petitioner lodged an objection no. 940 where he was given an opportunity to be heard and even cross examine witnesses pursuant to section 26 (1) and (2) of the said Act.

32. The outcome of those proceedings was that objection no. 940 was allowed.

33. That decision by the adjudication and settlement officer has not been challenged procedurally by invoking the supervisory jurisdiction of the ELC court in the form of prerogative orders (Judicial Review) or an appeal under section 29 of the Land adjudication Act cap 283 laws of Kenya. The interests which the petitioner is seeking protection from this Honourable court has not been exhaustively identified and registered. Those interest under African customary law have not fully crystallized to enjoy the superior status of rights to be protected under Article 40 of the constitution.

34. It appears to me that the petitioner seeks a review of the decision made by the first respondent. In that respect, I bear in mind that the role of a court exercising powers of review is limited to the process involved in arriving at a decision and does not require the court to enter into an inquiry on the merits or otherwise of a decision. In Isaack Ousman Sheikh vs. IEBC & others the court expressed itself in the following terms:

“A judicial review of administrative judicial and quasi-Judicial action and decisions of interior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from article 165 (6) of the constitution is not in the value of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High court a power to arrogate to itself the decision-making power resolved elsewhere.”

35. Again in Minister of Home Affairs vs Bicle & others (985) L.R.C cost 755 Georges CJ held as follows:

“It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so. Courts will normally consider a constitutional question unless the existence of a remedy, depends on it. If a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights”.

36. In *Geotgr S. Onyango vs Board of Directors Numerical/Machining Limited & 2 others* petition no. 35 of 2012 (Industrial court Nairobi) where Justice Riga (as he then was) held as follows; **“..... the courts must guard against the distortion of manipulation of the constitutional jurisdiction to characterize every dispute as a constitutional violation transforms the constitution from a blue print of fundamental freedoms and rights to a document for instigating everyday disputes. Its moral force is diminished”.**

37. This petition from the proceedings and decision attached to the replying affidavit by the first interested party shows that the petitioner is aggrieved by the decision of the adjudication on 21/01/2000 where together with Anastacia Mwonjaru had raised objection no. 940 in relation to parcel no. 4810. Instead of challenging that decision by invoking the supervisory jurisdiction of this court under order 53 CPR as read with section 8 and 9 of the law reform Act chapter 26 laws of Kenya the petitioner has disguised this as a breach of his fundamental freedoms and constitutional rights. The most obvious remedy available to the petitioner after the objection was allowed by the adjudication officer was lodge an appeal to the minister pursuant to Section 29 of the Land Adjudication Act cap 284 laws of Kenya. Having failed to exercise his right of appeal within the stipulated period, the petitioner avoided Judicial Review process to escape the limitation imposed by the statute and is now seeking an escape route through the constitution.

38. It is imperative to note that not all grievances should warrant the filing of a petition. Constitutional jurisdiction must not be trivialized as by so doing, the value of the constitution would be diminished if it is allowed to be used as a general substitute for the normal proceedings for invoking judicial and constitutional rights. It is my view that the subject of this petition being a parcel of land which was undergoing adjudication process, the petitioners rights and interest would not have crystallized into rights capable of being protected under article 40 of the constitution of Kenya 2010.

39. The process of appeal had not been exhausted and those rights are registered under the land registration act of 2011.

40. In the upshot, this petition lacks merit premature and an abuse of the due process. The same is hereby dismissed with costs to the respondents.

Read, delivered and signed in the open court this 14th day of June, 2018

MR. E. CHERONO

ELC JUDGE

In the presence of:

CC: Galgalo

Mr. Mwanzia for interested party present

Ms. Nyaga for petitioner – present

N/A for respondent