



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC PETITION NO. 367 OF 2017

(FORMALLY NBI PETITION No. 264/2015, NBI 596/2015, MERU ELC 18/2015)

IN THE MATTER OF ARTICLES 2, 10(1) & (2), (a & b) 19,20,21,22,23,24,27,40,60,63,159(1)(2),165(3)(b), 258,260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

FELIX KAUNDA LENAMPARASIO.....1st PETITIONER

JAMES KUNTAI LESSOIPA.....2nd PETITIONER

TEERA SYLVESTER LALKALEPI.....3rd PETITIONER

PATRICK MAINA WAMAI.....4th PETITIONER

VERSUS

THE HON ATTORNEY GENERAL.....1st RESPONDENT

DIRECTOR LAND ADJUDICATION & SETTLEMENT.....2nd RESPONDENT

DIRECTOR OF SURVEY.....3rd RESPONDENT

THE CABINET SECRETARY MINISTRY OF LAND, HOUSING &

URBAN DEVELOPMENT.....4th RESPONDENT

THE NATIONAL LAND COMMISSION.....5th RESPONDENT

THE COUNTY GOVERNMENT OF SAMBURU.....6th RESPONDENT

JUDGEMENT

1. On the 26th June 2015, the Petitioners filed their Petition dated 25th June 2015 at the Milimani Law courts, Constitutional and Human Rights division, which they brought under a galaxy of provisions of the Constitution of Kenya. The said petition was filed together with an application by way of a Notice of Motion dated 25th June 2015 and filed on the 25th June 2015.

2. On the 26th June 2015, the matter was placed before the Hon Judge M. Ngugi who directed that the same be placed before the Environment and land court on the 29th June 2015, for directions, since the issues therein related to land.

3. On the 29th June 2015 the matter was placed before Hon judge Gitumbi who then directed that the matter be transferred to the Meru Land and Environment Court since the parcels of land therein were located in Samburu.

4. On the 30th July 2015, the matter was placed before Hon judge P.M Njoroge who certified the matter as not being urgent. However he issued interim orders of injunction prohibiting the 4th Respondent from issuing any titles under the Land Registration Act, 2012 or under any other legislation in respect of the parcels of land Numbers 08, 29, 28, 7, 26, 32, 25, 24, 12, 11, 07, 09, 10, 14 and 15 situate at Suguta Mar Mar B Adjudication Section 4 in Samburu County pending the hearing and determination of this application.

5. These orders were issued in terms of Section 63 of the Civil Procedure Act and were extended up to the 13th October 2015.

6. Parties appeared before the court on the 11th May 2016 when orders were issued to the effect that the Petitioners do ensure service upon all parties herein. Thereafter the matter was transferred to this court wherein on the 5th October 2017 only counsel for the Petitioner was present who then informed that court that although the Hon Attorney General was served, they were not present in court.

7. The Court was also informed that since the prayers in the Petitioners' Petition dated the 25th June 2015 had been overtaken by events, they had filed an application on the 6th October 2015 wherein they had sought to amend their Petition which application was not opposed and therefore they sought to have the same be allowed. They further abandoned their Application dated the 25th June 2015.

8. Orders were issued to the effect that the Application dated the 25th June 2015 stood abandoned while the application dated the 6th October 2015 to amend the Petition was allowed and that the Petitioner do effect service to all parties. The matter was scheduled for mention on the 11th December 2017.

9. On the day in question, only the Petitioners' Counsel were present, the court was informed that although the Hon Attorney General had entered appearance they were not present. The 2nd and 3rd Respondent were also not present.

10. The Petitioner informed the court that although they had served, the Respondents were not in court and sought that the amended Petition dated the 6th November 2017 be disposed of by way of written submissions. The court obliged them directing that the said submissions be filed and served within 21 days with a corresponding leave for the Respondents to file and serve their responses 21 days upon service. The matter was scheduled for highlighting on the 7th March 2018 on which day neither of the parties had filed their written submissions and an extension of time was sought for by the petitioner. The matter was re-scheduled for the 23rd May 2018.

11. On the 23rd May 2018, while the Petitioners had filed their written submissions, there was neither appearance nor filing of any response by the Respondents despite service.

12. Since the court had certified the petition ready of hearing on the 11th December 2017 and there having been no response nor presence of the Respondent despite numerous services of the hearing notices. I allowed the Petitioners to proceed and highlight their written submissions on their amended Petition dated the 6th November 2017 the absence of the Respondents notwithstanding.

The Petitioners' Case

13. The amended Petition was drawn and filed by MCM & Company Associates and is supported by an affidavit sworn on 25th June 2015 by Felix Kaunda Lenamparasio the 1st Petitioner herein and who was authorized by his Co-Petitioners to swear the same on their behalf vide an authority to swear affidavit signed and dated the 25th June 2015.

14. The Petitioners' written submission is to the effect that they are suing on behalf of all members of Tinga (B) Group Ranch (herein referred to as the Group Ranch which falls under the Suguta Mar Mar B adjudication Section Parcel No. 4. That this Group Ranch was originally part of the larger Tinga Group Ranch which is one of the five Group Ranches that make up Suguta Mar Mar B Adjudication Section.

15. That their main complaint was to the effect that in the year 2002, the committee members of the Group Ranch irregularly allocated to themselves and their cronies part of the land in the Group Ranch wherein the community through the Group Ranch secretary objected to the said allocations.

16. Later in the year 2014, the Petitioners learnt that the Group Ranch had been sub divided into sixteen (16) parcels of land, Fifteen (15) parcels which had been allocated to individual's majority whom were retired civil servants, while the Group was allocated the remaining parcel measuring 4951.59 Ha out of an acreage of 11,806.73 Hectares. The Petitioners wrote a complaint letter to the Director of Land adjudication and settlement Department raising the issue of land grabbing wherein they received a response to the effect that indeed the land had been sub-divided and that the individual titles were in the final stages of being processed.

17. On the 30th July 2015 the Petitioners learnt that the individual titles deeds had already been processed and were ready for collection at the Isiolo Lands offices, further that the group ranch had been allocated 4951.59 hectares while the remaining land had been allocated to individuals.

18. The Tinga B Community are apprehensive that they been disinherited by a group of people with selfish interests. That further the actions by the Respondents was unconstitutional, illegal, unlawful, capricious, unjustified, unreasonable, irrational, discriminatory, in bad faith and against the core values of national governance on the following grounds;

(a) The Respondents have failed to protect the rights of the marginalized people by failing to take into consideration the fact that the majority of the members of the Group Ranch are illiterate and unconscious of their right to participate in the land adjudication process.

(b) The Respondents, by allocating 4591.59 hectares of land to a whole community of more than 1,000 members while allocating 11,802.37 hectares of land to 15 individuals, denied the Petitioners their right to participate in the land adjudication process.

(c) The Respondents have purported to deny the Petitioners their right to information Contrary to Article 35 of the Constitution of Kenya, 2010.

(d) The Respondents have purported to deny the Petitioners their right to fair administrative action Contrary to Article 47 of the Constitution of Kenya, 2010 by failing to expeditiously, efficiently, lawfully, reasonably and procedurally undertaking a fair administrative action.

(e) The Respondents have purported to discriminate against the Petitioners on the grounds societal standing contrary to Article 27 (1) (2) and (3) of the Constitution of Kenya, 2010 because it is only the rich and educated who benefitted from the dubious allocation of community land

(f) The Respondents have abused and infringed the Petitioners ' right to protection of their property by failing to protect the community land rights which has left the entire population of Tinga "B" virtually landless.

(g) The Respondents' act perpetuate gross inequality in the resource allocation, are discriminatory on basis of social status and education in that the beneficiaries of the illegal allocations are the rich, educated and former civil servants who held positions of influence and they disregard community land rights.

19. The Petitioners averred that as a result of the Respondents' unconstitutional acts, the Petitioners and the community of the Group Ranch had been disinherited of their community land by a few individuals as the interest on the land has been registered following the adjudication process concluded by the Respondents which had caused suffering, grave loss and damage to them. They therefore sought for protection of the honorable Court and for the enforcement of the Provisions of the Constitution and for orders ensuring the Respondents compliance with the provisions contained therein.

20. The Petitioners submitted that the Respondents have a legal responsibility thrust upon them by virtue of the relevant Articles of the Constitution and of the other statutes to uphold the law and to protect the Petitioners ' enjoyment of their rights guaranteed by the Constitution and have a further duty to ensure all persons obey and abide by the law.

21. The Petitioners prayed that the court reverses the injustice suffered by the Group Ranch under the watch of the Respondents and to declare that the allocations and subsequent registration was unconstitutional, illegal, unlawful, capricious, unjustified, unreasonable, irrational, and discriminatory, in bad faith and against core values and the principles of good governance as enshrined in the Constitution.

The Petitioners thus prayed for orders that:-

i. A declaration that the whole adjudication process and the Certificate of Finality issued registration of interest in respect to Suguta Mar Mar B adjudication Section 4 are unconstitutional, illegal and unlawful and should the same be implemented shall be an infringement of the Petitioners ' constitutional rights.

ii. An order prohibiting the office of 4th Respondent from issuing any titles under the Land Registration Act, 2012 or under any other legislation in respect of to Suguta Mar Mar B adjudication Section No 4 in Samburu County.

iii. An order directing the 4th Respondent to cancel and/or revoke all the title deeds issued in respect to Land Parcels Numbers 08,29,28,27,26,32,25,24,12,11,09,10,14 and 15

iv. An order directing the 5th and 6th Respondents to initiate investigations into the land adjudication process in respect to Suguta Mar Mar B Adjudication Section No 4. And review the whole process to ensure equitable distribution of the land.

v. That this Honorable Court do grant any other appropriate relief and do make such further or other orders and to give such further or other directions as this Honorable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the Provisions of Articles 2,10,19,20,21,22,23,24,27,40,60,63,159(1) (2),165 (3) (b), 258 and 260 of the Constitution and any other Articles of the Constitution in relation to the Petitioners in this petition

vi. Costs of this petition be provided for.

22. The Petitioners submitted that it was the duty of the Respondents who represented the Government offices/Public offices to do public good and not to use their office to confer benefits to individuals by whims and/or arbitrarily.

23. The Petitioners' contention is that it was the duty of the local authority to hold the Ranch in trust for the whole community and therefore they did not understand how the 6th Respondent registered the Ranch in the name of only 15 people. They thus sought from the court to consider the provisions of Sections 8(1) and (2) of the Community land Act, Section 23 (2) (b) of the Land Adjudication Act, Article 40 of the Constitution as well as Article 63 of the Constitution to make a finding that the Petitioners and the group they represent had a right to

acquire land on behalf of themselves/Community.

24. The Respondents had a duty to consider the plight of the Petitioners and members of the group ranch majority of who are illiterate. They ought to have taken into account that members of the local community had grouped themselves into group ranches and owned the land collectively as group ranch. The Respondent while preparing the adjudication register ought to have been guided by **Section 23 (2) (b) of the Land Adjudication Act** which provides as follows:-

“In preparing the adjudication record, the recording officer, if he has satisfied that any group has, under recognized customary law, exercised rights in or over land which should be recognized as ownership, shall determine the group to be the owner of that land”.

25. That it was evident that the recording officer did not take into account the historical land ownership among the residents of the area. It was therefore apparent that the purported allocation and issuance of the titles to the alleged beneficiaries is tainted with fraud, did not emanate from a due process of the land and is therefore illegal, null and void and the titles emanating therefrom are for cancellation as the suit lands remains allocated to the Petitioners' group ranch and is for the benefit and/or the settlement.

26. That prior to the commencement of the adjudication process by the Respondents, the land was held in trust of the Petitioners' Group Ranch by the 6th Respondent and the Petitioners held a legitimate expectation that upon commencement of the adjudication proceed the 6th Respondent would ensure that that right was upheld.

27. That the Respondents, by allocating only 4951.59 Hectares of land to a whole community of more than 1,000 members while allocating 11,801.37 Hectares of land to 15 individuals, denied the Petitioners their right to own property Contrary to Article 40 of the constitution of Kenya, 2010.

28. **Section 20 of the Land Adjudication Act** provides that once the adjudication process is complete and a certificate of title issued, the Registrar shall register the interests as contained in the adjudication register. The 2nd Respondent was expected to issue a Certificate of finality before titles were registered, this was not done instead he chose to give the same to the individual owners who were representing the community thus discriminating against the other community members who are illiterate and were not conversant with the land processes, in further contravention of Article 27 (4) of the Constitution.

29. The Respondents thus denied the Petitioners their right to information Contrary to Article 35 of the Constitution of Kenya, 2010 because the whole process was shrouded in secrecy. The Respondents denied the Petitioners a chance to inspect the register and raise objections as required under the Land Adjudication Act.

30. That although the adjudication process required the Respondents to invite members of the community to inspect the register and resolve all disputes. However no such action was taken thus infringing on the Petitioners' right under Article 47 of the Constitution.

31. The Respondents also discriminated against the Petitioners on the grounds societal standing thereby contravening the provisions of Article 27(1) (2) and (3) of the Constitution of Kenya, 2010 because it is only the rich and educated who benefited from the dubious allocation of community land while the majority of the people were locked out.

32. The Petitioners submitted that the Respondents had abused and infringed on their right to protection of their property by failing to protect the community land rights which has left the entire population of Tinga “B” virtually landless. Additionally, the Respondents' acts perpetuated gross inequality in resource allocation, were discriminatory on basis of social status and education in that the beneficiaries of the illegal allocations are the rich, educated and former civil servants who held positions of influence, they disregard community land rights.

33. As a result of the Respondent's unconstitutional acts the Petitioners and the community of the Group Ranch have been disinherited of their community land by a few individuals as the interest on the land has been registered following the adjudication process concluded by the Respondents.

34. By reason of the foregoing matter the Petitioners had suffered grave loss and damage and thus sought the protection of this Honorable Court for the enforcement of the provisions of the Constitution and for orders ensuring that the Respondents complied with the provisions contained therein.

35. I have considered the Petitioners petition and submissions and also the fact that the same was unopposed. I note that the Tinga (B) Group Ranch was registered under the Land Group Representative Act and falls under the Suguta Mar Mar (B) adjudication Section No. 4 within Samburu County.

36. That the said, Suguta Mar Mar (B) adjudication Section consists of five (5) group ranches with each group ranch divided into Section (A) which belongs to the parents, and (B) which belongs to the children.

37. That in the 1960's the registered members of Tinga (A) group ranch allocated Tinga (B) Ranch measuring 11,860.73 hectares to their children but held the same in trust for them until they obtained the age of maturity.

38. Tinga (B) group adjudication section was declared so on the 24th January 1991 and published on the 3rd March 2002. The Petitioners' case is premised on allegations that the committee members of the Tinga (B) Group Ranch, which is herein referred to as the Group Ranch, have sub divided the Ranch, that had an acreage of 11,806.73 Hectares, into sixteen (16) parcels of land out of which they have irregularly allocated to themselves and their cronies Fifteen (15) parcels of land while allocating the remaining one (1) parcel measuring 4951.59 Hectares to the Group Ranch.

39. The Petitioners have thus put blame on the Respondents whom they claim have abused and infringed the Petitioners' right to protection of their property by failing to protect the community land rights which has left the entire population of Tinga "B" virtually landless.

40. Additionally, it is the Petitioners submission that the Respondents' acts have perpetuated gross inequality in resource allocation, are discriminatory on basis of social status and education in that the beneficiaries of the illegal allocations are the rich, educated and are civil servants who held positions of influence by which they have disregarded the community land rights.

41. That further, as a result of the Respondent's unconstitutional acts, the Petitioners and the community of the Group Ranch have been disinherited of their community land by a few individuals whose interests have been registered on the land, following the adjudication process concluded by the Respondents.

42. They thus seek the intervention of this court to declare that the whole adjudication process and the Certificate of Finality issued registration of interest in respect to Suguta Mar Mar B adjudication Section 4 is unconstitutional.

43. They also seek for the courts intervention to issue an order directing the 4th Respondent to cancel and/or revoke all the title deeds issued in respect to Land Parcels Numbers 08, 29, 28, 27, 26, 32, 25, 24, 12, 11, 09, 10, 14 and 15 and thereafter direct the 5th and 6th Respondents to initiate investigations into the land adjudication process in respect to Suguta Mar Mar B Adjudication Section No 4 so as to review the whole process to ensure equitable distribution of the land.

44. Having reviewed the submissions by counsel to the Applicants/Petitioners, the issues that arise for determination are as follows:-

(i) Whether the provisions of the Land Adjudication Act, were complied with before the filing of this petition.

(ii) who is to cater for the costs of the suit?

45. The Land Adjudication Act sets out the procedure to be followed by parties in having their claims recorded whenever an adjudication section is declared and further also sets out the procedure to be followed by any party who has been or is aggrieved by the adjudication process.

46. Section 13 (1) provides thus:-

1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the Notice published under section 5 of this Act.

47. Following the adjudication of all claims by the adjudication officer and the adjudication committee, an adjudication register which comprises the demarcation map and the adjudication record is published and any person with an objection to the adjudication register under Section 26 of the Land Adjudication Act has a period of sixty (60) days to make the objection.

48. Section 26 provides thus:-

1. 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.

2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

49. The Act further under section 29 provides an avenue of appeal to the Minister by any party aggrieved by the determination of the adjudication officer under Section 26 of the Act.

50. Section 29 provides as follows:-

(1) Any person who is aggrieved by the determination of an objection under section 26 of the 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.

(2) The Minister shall cause copies of the order to be sent to the Director of Adjudication and the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall:-

a) Alter the duplicate adjudication register to conform with the determination; and

b) Certify on the duplicate adjudication register that it has become final in all aspects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar who shall alter the adjudication register accordingly.

51. In the instant case, in the year 2002, when the committee members of the Group Ranch irregularly allocated to themselves and their cronies part of the land in the Group Ranch, the community through the Group Ranch secretary Mr. Esty Leaduma wrote a letter dated the 2nd March 2002 to the Director, land adjudication objecting to the said allocations.

52. The Petitioners have submitted that after they wrote to the Director, Land Adjudication, there was a notice issued by the Lands office in Samburu district assuring the community that no land would be allocated to individuals.

53. Under Section 29 of the Act, the Petitioners ought to have lodged within sixty days after the date of the determination, an appeal against the determination to the minister. The Act as illustrated above sets out an elaborate and comprehensive procedure for dealing with any dispute that arise during the adjudication process.

54. In the case of **Mohamed Ahmed Khalid (Chairman) and 10 Others –vs- Director of Land Adjudication & 2 Others [2013] eKLR** Angote J. held:-

“The law that was applicable for the ascertainment of land rights and interests over trust land is the Land Adjudication Act Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the land adjudication and settlement officer, the land adjudication committee, the land arbitration board and the minister’s appeal committee

Indeed, before the Director signs the certificates of finality, the Land Adjudication Act provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the Adjudication register

The Petitioners have not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the manner in which the adjudication process was carried out.”

Considering that the Land Adjudication Act, Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The Petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the Land Adjudication Act, Cap 284, I find that the petition was prematurely filed.”

55. In the instant case there is no evidence that any appeal was filed by the Petitioners as provided for in the Act and that being the case the Petitioners cannot demonstrate that their rights have been violated without having sought an opportunity to be heard as provided under the Land Adjudication Act.

56. Pursuant to the provisions of section 29(3) of the Land Adjudication Act, the Director is mandated to sign certificates of finality upon the completion of the adjudication process and forward the adjudication register to the Chief Land Registrar for registration.

57. Indeed, before the Director signs certificates of finality, the Land Adjudication Act provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the adjudication register. The manner in which such publication should be done is provided for at Section 31 of the Act.

58. As far as the evidence on the Petitioners’ application reveals, there is no evidence provided to show that the adjudication register was published and that they raised objections in respect to the manner in which the adjudication process was carried out following which there was a hearing, determination and implementation of objections in respect to the adjudication register.

59. I have however noted in one of the annexures marked as FK3, a letter dated the 2nd July 2014 from the Director Land Adjudication and settlement and addressed to the 2nd and 3rd Petitioners to the effect that after the section was published as complete on the 3rd March 2002, persons affected by the adjudication register were given 60 days to lodge their complaint/claims. That all the objections were heard and determined and a certificate was finally issued. Neither the parcel of land nor the Petitioners were on the list of persons who had lodged a complaint the manner in which the adjudication process was carried out. If the Petitioners felt that that decision by the Land adjudication officer was not proper, then they ought to have appealed to the Arbitration Board and to the Minister as noted in the Land Adjudication Act. I have no evidence that any such appeal was lodged.

60. I find that although the Constitution is the guardian of all other laws, it should be interpreted in a way that preserves statutes and ensures compliance with all existing laws.

61. Considering the fact that the Land Adjudication Act, has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of community land so as to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental, it is my view that this court will not interfere where there are clear and express provisions of the law otherwise if the procedures are not followed there will be anarchy and chaos in our courts.

62. The court cannot also substitute the established bodies which are supposed to deal with those complaints. The Petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the Land Adjudication Act, I find that the Petition was prematurely filed.

63. I therefore dismiss the Petition dated 25th June 2015 with no order as to costs.

Dated and delivered at Nyahururu this 31st day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE