



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 28 OF 2015

ARITHI SELFHELP GRAZING GROUP THRO'

M'INOTI M'RUKARIA (Chairman)

JAMES MBOGO MIRURI (Secretary).....PLAINTIFF

MARTHA KOOME (Treasurer)

VERSUS

THE LAND ADJUDICATION OFFICER

IMENTI NORTH/SOUTH/MERU CENTRAL &

BUURI DEFENDANT/RESPONDENT1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Background:

1. The petitioners have described themselves as a community self-help group which is registered in the department of social services. The 1st Respondent is the district Land Adjudication and Settlement officer (DLASO) Imenti – North/Imenti – South/Imenti – Central and Buuri Sub County, whereas the 2nd respondent is the Attorney General of the Republic of Kenya.

2. At the heart of the dispute is an expansive area of land measuring about 1000 acres in Ruiru/Rwarera adjudication section of Buuri Sub County within Meru County, which land the petitioners claim it is theirs.

Petitioner's case

3. The Petition was filed on 27/10/15, whereby Petitioners claim that they are the rightful owners of the 1000 acres of land bordering Laikipia County and the Islamic foundation having been allocated this land by the defunct Meru County Council in 1982.

4. Petitioners' further claim that during the demarcation of Ruiru – Rwarera section, the rights and interests of Arithi self-help group were brought to the attention of the relevant authorities but those rights and interest were not considered. Petitioners contend that their fundamental rights and freedoms as guaranteed under article 40 of the constitution have been violated.

5. The orders sought by the Petitioners are as follows:

(a) A declaration that the petitioner's fundamental rights and freedoms as guaranteed under article 40 of the constitution of Kenya 2010 were contravened by the respondents and consequently grant a permanent injunction restraining the 1st respondent by themselves, their agents, employees, servants, assigns or anyone else claiming on their behalf from alienating, allocating the suit land to other parties or interfering with the said land in any way.

(b) A declaration that the petitioners are the sole and rightful legitimate owners of all that parcel of land measuring approximately 1,000 acres Kiirua/Kisima bordering Laikipia and Islamic foundation.

(c) Costs of the petition.

Respondent's case

6. Respondents case is contained in the Replying affidavit of one Erick Korir filed on 11/2/2016. He introduces himself as the Land Adjudication and Settlement Officer (DLASO), Imenti North/ /Imenti South /Imenti Central and Buuri District. He states that the suit land Ruiru/Rwarera Adjudication section of Buuri sub-county was declared as an **adjudication section in 1983**. The process of ascertainment of rights and interest in land progressed well and in 2003, the adjudicating register was completed in accordance with the land adjudication Act.

7. According to Mr. Korir, (the DLASO), a tussle cropped up between the Imenti community of Buuri sub-county and Tigania Community of Tigania East sub-county over their common boundary. However, an amicable solution was arrived at and upheld by the court of Appeal in Civil Appeal case No. 129 of 2005 on 30.10.2014.

Determination

8. This suit was heard by way of written submissions which submissions were duly filed by the petitioners but not respondents.

9. It has emerged that the dispute here in came to be during the adjudication process in the Ruiru/Rwarera adjudication section. The process has however been put on hold vide court orders to await the determination of this petition.

10. Petitioners are claiming that they are the ones who are legally entitled to the suit land and that they were not to be subjected to the vigorous of contestation with any other claimants. The court has to analyze the material presented before it to determine if the claim lodged herein is merited. A perusal of the record reveals that the issues to determine concern the **Litigation History and Applicable Law**.

Litigation History

11. Despite the fact that no proceedings and /or Judgments have been availed in respect of previous litigation regarding the dispute at hand, I am convinced that this is a dispute which has been handled by other courts before. In Paragraph 2 of the affidavit of Erick Korir, he has made reference to a consent which was arrived at in the **COURT OF APPEAL CASE 129 OF 2005** on 30/10/2014. In response to this averment, one Martha Koome an official of the Petitioner, in her further affidavit of 12/10/2017 has stated that Petitioners were not parties to the Civil Appeal case No. 129/2005 and were therefore not in any way subject to the said consent order. Nothing however can be further from the truth since there is evidence emanating from petitioners documents contradicting the averments of Martha Koome.

12. Firstly, I find that in the supporting affidavit of one M'Inoti M'Rukaria filed on 27/10/2015, in paragraph 7 thereof, petitioners had sought redress to the National Land Commission regarding their claim to the suit land vide their letter which is annexure "ASG5". The National Land commission had responded vide their letter of 1.8.2013 (annexure ASG 3(b)) whose contents are as follows:

"NATIONAL LAND COMMISSION"

Ardhi House

1st Ngong Avenue

Off Ngong Road

P.O Box 44417

Nairobi

1st August, 2013

The Chairman,

Arithi Self Help Grazing Group

P.O Box 2907 – 60200

MERU

This is to acknowledge receipt of your complaint through your letter dated 14th May 2013 in which you sought assistance of the commission on behalf of your members. Records at the commission indicate that the area in which the Arithi Self Help Grazing group was allocated land is the subject of a case at the court of appeal (civil application no. 129/2005) copy attached for ease of reference. It is therefore recommended that you await the determination of this case after which the adjudication process will resume and you will be able to challenge the outcome at that point. In the meantime, you are advised to identify the parcels of land taken away from your group by individuals during the adjudication process to enable you file the objection cases on the parcels.

Yours Sincerely

Dr. S.K Tororei

Commissioner – NLC”

13. This document has been availed by the petitioners. It clearly shows that petitioners had sought redress from the National Land Commission and were told to await the decision of the court of appeal. They cannot now feign ignorance of the existence of the same.

14. The second document availed by the petitioners which I have taken into account is titled **“The resolution of the overseer land adjudication committee”** in the case **Court of Appeal civil case No. 129 of 2005 Nairobi** where the mentioned committee purported to make and adopt the following resolution;

“That the appeal herein and the Judgment of the Honorable Justice Fred Ochieng of 29/3/2004 and the decree obtained on 7/7/2004 be and is hereby set aside”.

15. Why was there an attempt to set aside the court of appeal decision if the same did not concern the suit land and the petitioners? How comes that there exists a decree of the High court but the petitioners have not availed particulars thereof?

16. The third document is the **Notice of intention to institute proceedings against the Attorney General dated 17/7/2015** issued by the Petitioners in this case. The Notice partly reads as follows **“Now that an amicable solution between the parties was upheld by the court of appeal vide civil appeal no. 129 of 2005 order dated 30th October 2014 and in adherence to the principle of peaceful dispute resolutions, it is the wish of the one hundred and fifty (150) members of Arithi self Help Group to be allocated the one thousand acres (1000) initially allocated to them by the default Meru County Council.....”.**

17. Against this background, it is quite clear that the dispute in respect of the suit land was before other courts and a consent was apparently arrived at in the court of appeal case. The need to make full disclosure was aptly captured by Justice Gikonyo J in **Meru Succession cause no 720/13, Priscilla Ndubi vs. Gerishon Gatobu Mbui** where it was stated that **“in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law”.**

18. I have not seen any verifying affidavit from the Petitioners to confirm that no other suits have ever been filed in respect of the dispute herein. The Petition is wanting for non-disclosure. The petitioners ought to have been candid in availing particulars of the litigation history instead of filing this suit as if it is a fresh dispute. I would therefore be reluctant to determine the dispute at hand less I contradict the decisions of parallel and superior courts.

Applicable law

19. The other issue that is of concern is with regard to the applicable law. Land in Kenya is categorized in three tiers; Public land, Community land and Private Land – see article 61 (2) of the constitution of Kenya 2010.

20. According to the Respondent, the suit land falls under Ruiru/Rwarera Adjudication section of Buuri Sub County and was declared as an adjudication section in 1983 under the Land Adjudication Act cap 284 laws of Kenya. According to the DLASO, there were two groups staking a claim on the suit land, but they reached an amicable solution via the court of appeal case no.129/2005. This would imply that the land falls under unregistered Community Land. The petitioners are not clear on which category the land falls under. What they say is that they are the ones in occupation of the suit land and that they own the same. The petitioners have however availed some documents particularly the ones from the county council of Meru which clearly indicates that the suit land was Ruiru Rwarera Adjudication Section which was undergoing adjudication processes under the land adjudication act cap 284 laws of Kenya.

21. I find that the Petitioners have no titles to the suit land. The land is expansive, about 1000 acres. I am of the view that this is unregistered community land whereby the process of changing the tenure system from community land ownership to individual tenure system was under way through the adjudication process but this process has stalled due to unending litigation.

22. The preamble to the Land Adjudication Act provides that **“It is 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”.**

23. Adjudication is a very important process. This I stated in **Meru ELC petition NO.7 OF 2017, County Government of Meru vs District Land Adjudication and Settlement Officer Tigania East Sub County and others** where I quoted an article **“Land Tenure Reform and changes in land use by “Thomas Smucker”**, where it was stated as follows; **“The objective of the individualization of tenure is to increase tenure security through the state-sponsored adjudication of rights, thereby creating incentives for improved land management and increased productivity... The current process of reform entails the adjudication of land rights to individuals... and the registration and titling of adjudicated parcels. The implications of these reforms for individual households and for changes in land-use systems continue to be of central importance to rural development in Kenya”.** Regarding this article, I had commented that **“This write up aptly captures the impact of the adjudication process. The individualization of land tenure is something held dear by Kenyans, where the ultimate goal is for one to hold on to a document known as a title deed. This certainly brings about social economic dynamics in terms of increased security, easier and greater land productivity, certainty in inheritance**

rights and it generally reduces land conflicts”.

24. In the case of **Tobias Achola Osindi vs. Cyprianus Otieno Ogola HCC.NO. 4 OF 2011 KISII**, the court had this to say regarding the role of courts in adjudication processes; **“The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. 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..... As I have stated above, the process of ascertainment of rights and interests in land is completed with the registration of such interests. That process had not been completed when this suit was brought. The Plaintiffs herein who are subject to the said process are now asking this court to declare them as the lawful proprietors of the suit properties which are still under adjudication. I don’t think that this court can do that. Title to land within an adjudication area is obtained by operation of law after the completion of the adjudication process”**

25. In the case of **John Mukora Wachihi vs Minister for lands and 6 others Petition no. 82 of 2010** it was held; **“The right to property as recognized in article 40 of the constitution of Kenya 2010, and section 75 of the repealed constitution of Kenya, as concerns right to land, could only be enjoyed by registered proprietors of land. The petitioners only held allotment letters and were not the registered owners of the land that they claimed to own and therefore could not enforce the right to property”**. Likewise in the present case the rights and interests of the people claiming the land have not been ascertained and have not crystalized into rights of proprietorship as registered owners.

26. I am emphasizing that Adjudication is a very important process and ought to be given a chance to be finalized so that the community members can have identifiable rights and interests in land. It follows that the dispute resolution mechanism provided under the applicable statute ought to be followed.

27. All in all, I find that this Petition is not merited and the same is dismissed. Parties to bear their own costs of the suit. Any subsisting orders of injunction are hereby lifted.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

G. Kaume for petitioners

B. Kimathi for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE