



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 22 OF 2012

JOHNSON MITHIKA M'IKIAO alias

JOSPHAT KABUTHIA APPELLANT

VERSUS

ROSE MUKIRI THAITUMU 1ST RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT

OFFICER TIGANIA WEST 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction.

1. The petitioner filed a petition dated 3/10/2012 in which he sought the following prayers:-

(a) That this Honourable court do declare that the petitioner's land as gathered, surveyed and registered before 1968 as URINGU 1 Adjudication Section parcel NO. 1104 and meaning (sic) 21.64 acres is legally the plaintiff's.

(b) That this Honourable court do declare the 2nd respondent's actions of subdividing the petitioner's land on 23.03.1989 and giving a portion thereof to the 1st respondent was illegal and unconstitutional.

(c) That this Honourable court do declare that the 2nd respondent's actions of de-registering the petitioners parcels URINGU 1 Adjudication Section 1104, 656 and 686 was illegally criminal and unconstitutional.

(d) That the Honourable court do declare that all rulings, findings and/or decisions by the 2nd respondent touching on the ownership and/or registration of the petitioner's URINGU 1 Adjudication Section land parcel no. 1104 between the petitioner and/or his family on one hand and the 1st respondent and/or her family on the other hand, made after 23/03/1989 are illegal and unconstitutional.

(e) That this Honourable court do order that all future registration of land parcels shall be accompanied with a sketch plan for the said parcels and a constitute (sic) too to discourage secret interference with registration.

(f) That this Honourable court do make any further and/or better orders that shall protect the petitioner and the adjudication process in general.

(g) That the petitioner be paid costs of this petition.

2. The petition is supported by the sworn affidavit of the one **Joshua Mithika M'ikiao** who describes himself as the petitioner. I believe this to be a typographical error and I will take it that the supporting affidavit is sworn by the petitioner himself, who appears to be going by more than one name.

The Petitioner's Case

3. According to the petition, the petitioner's case is that his fundamental rights and freedoms to own property and to protection by fair administrative action were contravened and grossly violated by the 2nd respondent, that is, the District Land Adjudication and Settlement Officer, Tigania West between the years 2011 and 2012 and that these rights continue to be violated.

4. The petitioner avers that having gathered his ancestral parcels of land and having been registered in the 1960s as owner thereof and having been utilizing and living openly thereon since then, the 1st respondent subsequently laid claim to those parcels, leading to proceedings before a number of panels of elders and the 2nd respondent.

5. On the **23/3/1989** the 2nd respondent ordered the petitioner's land **Parcel No 1104** to be subdivided into two equal parts and one part thereof was awarded to the 1st respondent's family and registered in the name of one Amwira Kaibi who was the 1st respondent's relative, which subdivision award and registration the petitioner terms as illegal and *ultra vires* and against the allegedly overwhelming evidence of the petitioner.

6. Further the petitioner subdivided the land into several parcels and shared it out among his kin. He gave parcel, number **686** to **David Muriuki M'Ikiao**, parcel number **656** to **Silas Mithika M'Ikiao**, and parcel number **682** to Joseph **Mugambi M'Ikiao**. It is notable that the subdivision affected parcel number **1104** which the petitioner has already indicated, had been ordered by the 2nd respondent to be subdivided into two parts, one for the petitioner and one for the 1st respondent.

7. The 1st respondent with consent from the 2nd respondent unsuccessfully sued the petitioner in the Magistrate's Court for an order of eviction from the petitioner's lands. That suit was dismissed.

8. However, after the suit was dismissed the petitioner went to the 2nd respondent's office and found that the lands comprised in the former parcels Nos. **1104,656,682**, and **686** had been withdrawn and allocated to other individuals and that the said numbers are no longer related to him or his family.

9. The petitioner expresses his belief that the 1st respondent and the 2nd respondent have fraudulently conspired to meddle with the lands records so as to grab his land and that they may collude to evict him and his family therefrom. He avers that as at now his land is not registered or plotted on any map and there is no evidence that he has ever had any proprietary interest in the land.

10. He accuses the 2nd respondent of failing to keep proper records of land ownership and refusing to date any transaction which omissions are calculated to aid the corrupt in depriving people in the adjudication section of their land. The withdrawal of the numbers earlier allocated to his land, it is pleaded, is a blatant attempt to destroy any chances the petitioner would have to legally and procedurally follow up his claim, and may lead to registration of his land in the name of strangers.

11. For those reasons the petitioner avers that all protection accorded to the petitioner is "*abused*" by the 2nd respondent whom he accuses of breaching the national values and principles of governance in **Article 10** and the petitioner's right to fair administrative action under **Article 47** of the constitution. He also avers that his rights to protection to ownership of private property under **Articles 40** and **60** has been abrogated. The petitioner avers that the 2nd respondent is by virtue of his office legally and constitutionally bound and mandated to operate legally and fairly and he had no power to deregister the petitioner and his family.

12. It is on the basis of the above that the prayers set out at the beginning of this judgment are sought.

The 1st Respondent's Response

13. The 1st respondent has filed her replying affidavit sworn on **27th March 2013** in opposition to the petition.

14. In that affidavit she denies that the suit land has ever been ancestral land of the petitioner and also that by an arbitration decision dated **23/3/1989** the suit land was properly allocated to her by the 2nd respondent; she avers that the 2nd respondent did not act *ultra vires*. She accuses the petitioner of being a vexatious litigant who jumps from one forum to another after losing in cases citing the fact that he has been the complainant in all the three cases lodged at the lands office. She states that the committee's decision in **Case No. 314/67** was never confirmed by the Land Adjudication Officer and the same was reversed vide **Objection No. 793** in **Arbitration Board Case No. 1/89**.

15. The first respondent avers that the petitioner could not subdivide Plot No. 1104 because the land was never his. She denies ever fraudulently conspiring with the 2nd respondent to meddle with the records. She avers further that the decision in **Objection No. 891 A & B** lodged by the petitioner was a confirmation what had already passed. She says that if there is any claim the same should be directed to the respondent and not at her.

Submissions of the Petitioner

16. The petitioner filed his brief submissions on 29th November 2017 he reiterates his case as contained in the petition and the supporting affidavit. He cites **Articles 40, 47** and **60** of the Constitution of Kenya and avers that the 2nd respondent acted unfairly, arbitrarily and that his conduct should be treated as abuse of power.

Submissions of the Respondent

17. The 2nd and 3rd respondents filed their submissions on the 27th February, 2018. They submit that the petition lacks merits and is an abuse

of the court process as the petitioner has admitted at **paragraph 6** of his supporting affidavit that by way of a decision dated **23rd May 1989** the first respondent was awarded portions of the suit land. They argue that that decision by a properly constituted body has never been challenged in any court of law and that by being asked to declare the petitioner as owner of those parcels of land this court is being asked to substitute the decision of the arbitration board mandated by law to adjudicate customary land rights under the Land Adjudication Act. The respondents submit that the arbitration board reversed the decision of the committee that had found in favour of the petitioner in the earlier instance.

18. The 2nd and 3rd respondents also decry the delay in bringing these proceedings and aver that it is not in the public interest to invoke the constitutional jurisdiction to revive a stale claim in respect of a decision made *29 years* ago. Further it is argued that the petitioner enjoys more identifiable rights under the constitution and that the Land Adjudication Act is merely a transitional statute which deals with the process of converting Trust Land into registered land and that till that process comes to an end no person can purport to enjoy any exclusive right against other persons; only after the land is registered can a person enjoy complete and exclusive interest in the land.

19. Thirdly the **Land Adjudication Act** provides a mechanism for redress and legal protection in the intervening period **Article 61 (2)** identifies land rights that can be protected as public land, community land and private land. **Article 64** describes private land. It is argued that since the present petition relates to interest under customary law and has the requisite legal protection, such interest is not protectable under the constitution as it has not fully crystalized to enjoy the superior status of rights under **Article 40**.

20. The prayers are said to be untenable for the reason that the respondent's decision was made pursuant to the Land Adjudication Act and the same has not been quashed and the petition is merely collateral attack on a final decision by a body empowered by laws to adjudicate land claims under customary law.

21. Finally, it is submitted that the petitioner has not invoked the judicial view jurisdiction of this court to review the integrity of this court and process followed by the 2nd respondent and this is attributed to his having been granted an opportunity to be heard in an objection under the Land Adjudication Act. On that basis the respondents have asked the court to dismiss the petition.

Determination

Issues for Determination

22. The following are the salient issues for determination in this petition.

(a) Whether the petitioner has established any violation of rights under the constitution;

(b) What orders should issue.

The issues are discussed hereunder.

(a) Whether The Petitioner Has Established Any Violation Of Rights Under The Constitution By The Respondents.

23. It has already been held in the celebrated case of **Anarita Karimi Njeru (No.1) [1979] 1 KLR 154** that a person alleging a violation of a constitutional right must set out with specificity the particular provisions of the constitution which he alleges have been contravened, the rights contravened and the manner in which those rights have been contravened. Also, in the case of **AKMM -vs- EMKK & 2 Others 2014 eKLR Nbi Petition No. 37 of 2014**, the court stated as follows:

“Article 22 of the Constitution grants every person the right to move the High Court to enforce fundamental rights and freedoms contained in the Bill of Rights. These rights are very specific and a petitioner who comes before the court must set out with some level of particularity the specific right and how it is violated. This principle was established in the case of Anarita Karimi Njeru -vs- Republic (No. 1) [1979] 1 KLR 154 and augmented by the Court of Appeal recently in the case of Mumo Matemu -vs- Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR.” (emphasis mine.)

24. I have perused through the instant petition and found it wanting in that the particular rights and the particular clauses under **Articles 40, 47 and 60** have not either been stated or linked as required by the principle in the two cases cited above.

25. In the case of **ELC. Petition NO. 5 of 2014 Mary Jemutai Tonje vs Raphael Chebii and 5 Others** the court had this to say:

“Setting out facts and proving those facts is a burden that falls squarely upon on the shoulders of a petitioner. Where a petitioner, like in the present instant, does not clearly state the facts he relies on and also fails to demonstrate any nexus between those facts and certain clauses of the Constitution that petitioner may not succeed in his petition.”

26. It is clear that the land in the section under which the petitioner's land fell was placed under the process of adjudication. It is also clear that the petitioner's claim to land was subjected to the adjudication process and the various dispute resolution mechanisms that are availed under the Land Adjudication Act, leading to the division of that land into two equal portions, one of which was given to the 1st respondent whose husband had laid claim to it beforehand.

27. The petitioner's submission is that his fundamental rights and freedoms to own property and to protection by fair administrative actions have been grossly violated. The right to own property is protected under **Article 40** of the constitution. **Article 40** which the petitioner relies

on states as follows:

28. The 2nd respondent is a central player in this process. It is the rival submission of the 2nd and 3rd respondents that the rights of the petitioner to the property in question have not attained the status of property to be protected under **Article 40** for the reason that until the adjudication process comes to an end and the land becomes registered the petitioner (and others in the adjudication section) can not enjoy complete and exclusive interest in a parcel of land. I find merit in this argument.

29. In my view the very existence of a land adjudication statutory framework in Kenya necessarily precludes the application of **Article 40** to property rights to land which is still under adjudication for no property undergoing adjudication can be said can be held sacrosanct and immune from being affected by the decisions of the bodies and persons so appointed to deal with the adjudication process under that statutory framework, otherwise it would be pointless to have an adjudication process applied to the land in the first place. For that reason a declaration by this court before the finality of the adjudication process that land in an adjudication section belongs to a certain individual would be improper.

30. **Article 40** is tailored to protect the citizens from any arbitrary denial of the right to acquire and own property in any part of Kenya as well as prohibit arbitrary deprivation of any person of his property by the state or by any other person.

31. **Exhibit “JM 1”** in the petitioner’s supporting affidavit is evidence that his claim of 21.64 acres was recognized and recorded. **Exhibit “JM 3”** is evidence that an objection was lodged and decided by the Arbitration Board sitting with the Land Adjudication Officer; the land the petitioner had claimed and won vide **Land Adjudication Committee Case Number 314/67** was, on an objection being heard by the Board, ordered to be split into two because the petitioner and the objector were members of the same family.

32. The decision to have the land split must have been based on the evidence available as to what each party was entitled to under customary law. No Appeal to the Minister has been shown to have been lodged.

33. When the petitioner approaches this court vide this petition and asks for orders that would, if issued declare parties rights in respect of the entire parcel number **1104** while the same has been the subject of substantive adjudication through a process of adjudication that is recognized by the law and it has been shared out between him and the 1st respondent, his claim has to be scrutinized thoroughly, for issuance of those orders may finally dethrone the very mechanisms set for processing of each individual’s right to land and shake public confidence in the adjudication process and the offices vested with the duties of adjudication.

34. In my view it is not at this stage that a claim of violation of substantive rights to property may be lodged by the plaintiff. This court can only pronounce itself on the issue of whether the rights to due process under the constitution and the law have been followed by the proper authorities with regard to adjudication of his rights to land.

35. For the above reasons I find that none of the rights under **Article 40** of the constitution have been established to have been violated by the respondents.

36. On the issue of whether the right under **Article 47(1)** has been infringed, the main complaint of the petitioner is that the 2nd respondent acted unfairly and arbitrarily and in a manner that amounts to abuse of power.

37. Under **Article 47(1)** every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 47(2)** provides that if a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action the person has the right to be given written reasons for the action.

38. However the record that the petitioner relies on in the Committee case demonstrates that his grievance went through the proper process and that he was heard.

39. In the Land Adjudication Committee stage the petitioner was the plaintiff and the Committee ruled in his favour. However when the matter went before the Arbitration Board, the Board decided against him and the land was split into two equal portions. A look at the Arbitration Board proceedings shows that the Board members sat with Land Adjudication Officer while hearing and determining the Arbitration Board Case **No 1/89** which reversed the Committee decision in Committee Case No **314/68**.

40. Under section **21(3)** of the **Land Adjudication Act** any person who considers the decision of the Committee to be incorrect may within 14 days of the decision have the matter referred to the Arbitration Board for determination.

41. Whereas the Committee decision was made in the year 1968, the Arbitration Board proceedings appear to have been brought in the year 1989. However in this regard I have noted that the Committee decision bears the handwritten words at the end “*not confirmed by the LAO*” and the Arbitration Board case record still names the plaintiff as the complainant at the Board. This is contrary to what the petitioner states in his affidavits, that is, that the 1st respondent’s husband was the complainant.

42. The decisions of these two bodies are on the record. Whatever the position as regards capacity in which the parties appeared before them, I find that what matters is that the dispute came before them and that the petitioner was granted an opportunity to present his case before them and call his witnesses. In that regard I must state that I do not find any violation of the provisions of **Article 47**.

43. At this juncture it is therefore sufficient to state that there is no material on the record by which the petitioner has demonstrated any infringement of any of the petitioner’s rights under any of the mentioned articles of the constitution. The claim for violation of rights must therefore fail.

(b) What orders should issue.

44. I have already found that the petitioner has not established that any right under the provisions of the constitution which he has cited has been infringed upon. The only consequence of this finding is that the petition herein has no merit and the same ought to be dismissed.

45. I hereby dismiss the entire petition. However as the petitioner and the 1st respondent are related by way of family ties, each party in this petition shall bear their own costs.

Dated, and signed at Kitale on this 1st day of August, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August, 2018 in open court in the presence of:

N/A for the appellant

Kiongo for 2nd and 3rd respondents

C/A: Mutua

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.