



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MERU**

**JUDICIAL REVIEW NO. 2 & 6 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND ADJUDICATION OFFICER**

**TIGANIA EAST/WEST.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR LAND ADJUDICATION AND**

**SETTLEMENT OFFICER.....2<sup>ND</sup> RESPONDENT**

**SIMON M'ITILI IRWARE.....INTERESTED PARTY**

**JUDGMENT**

**INTRODUCTION**

The brief history of this case is that the Exparte Applicant first filed a Miscellaneous Application No. 2 of 2014 on 11<sup>th</sup> February, 2014 seeking leave to apply for orders of prohibition to stop the Land Adjudication Officer, Tigania East/West from referring dispute over land parcels No. 5827, 8511, 8921 and 8427 Akaiga Adjudication Section for determination via “Nthenge” (goat) oath to the Njuri Ncheke (2<sup>nd</sup> Interested Party). The Exparte Applicant also wanted the leave so granted to operate as a stay over the objections and parcels of land named herein above pending the filing and hearing of the substantive motion. That application which was filed under certificate of urgency was placed before the duty court on 13<sup>th</sup> February, 2014 who granted orders in terms of prayers 2, 3 and 4 thereof.

The said orders were served on 27<sup>th</sup> March, 2014 as shown by an affidavit of service on record. The Exparte Applicant submitted that despite service of the said orders, the Respondent went ahead and proceeded to order the matter to be heard by the Njuri Ncheke Elders (2<sup>nd</sup> Interested Party). When the matter was heard by the Njuri Ncheke, the Exparte Applicant failed to attend the oathing ceremony. According to him, the said Judicial Review application No. 2 of 2014 was automatically overtaken by events. The Exparte Applicant therefore abandoned the same and filed Judicial Review case No. 6 of 2014.

The Applicant has moved this Honourable Court vide a Notice of Motion seeking an order of prohibition to stop the 1<sup>st</sup> Respondent from referring dispute over Parcel No. 5827, 5811, 8921 and 8427 Akaiga Adjudication Section for determination via Nthenge (Goat) Oath to the 2<sup>nd</sup> Interested Party.

In the subsequent Judicial Review Case No. 6 of 2014, the Applicant was granted leave to institute this Judicial Review vide an Order of this court issued on 25/03/2014. The said order granting leave to the Applicant to institute these Judicial Review proceedings was also to operate as a stay of the implementation of the award in Objections Numbers 1228, 1229, 1230 and 1231, Akaiga Adjudication Section Tigania East/West District made on 12/2/2014.

**APPLICANT'S CASE**

The Applicants in their statement of facts averred that they are owners of the parcels of land registered as LR Nos. 5827, 8511, 8921, and 8427 Akaiga Adjudication Section, Tigania East District. The applicants also averred that they have a dispute with the interested party who filed Objections Nos. 1228, 1229, 1230 and 1231. The Applicant further contend that instead of hearing and making a determination, the Respondent referred the matter to the 2<sup>nd</sup> Interested Party (Njuri Ncheke Elders) through “Nthenge” (goat) Oath which they allege is an

abdication of his jurisdiction and lawful duty as enshrined under the Land Consolidation Act Cap. 283 Laws of Kenya.

The Applicants also contend that the Respondent heard the objections and instead of making a decision on the same, he referred the matter to the said Njuri Ncheke for "Nthenge" (goat) Oath at the request of the 1<sup>st</sup> Interested Party. The Applicant further averred that they are Christians who do not proscribe to the illegal oath which are backward, barbaric, uncouth, and contrary to their religious belief.

Following the referral order by the 1<sup>st</sup> Respondent, the Applicants filed these Judicial Review case No. 6 of 2014 where they obtained orders staying the decision by the 1<sup>st</sup> Respondent. The Applicants had been served with summons by the Nchuri Ncheke to appear before them on 11/2/2014 for the hearing of the oath taking which they attended but sought an adjournment which was allowed and told they would be informed of the next hearing date. On 13/2/2014, they served the orders of stay issued in Judicial Review No. 2 of 2014 upon all the parties.

Thereafter they proceeded to file and serve the substantive motion upon the parties. To their surprise, they learned that the Njuri Ncheke Elders proceeded to conduct Oath on the 12<sup>th</sup> February, 2014 and forwarded the report to the 1<sup>st</sup> Respondent on 13/02/2014 who in turn purported to have made an award on the 12/2/2014 relying on Elders determination.

### **RESPONDENT'S CASE**

Neither the first nor the second Respondents filed any replying affidavit or grounds of opposition to this Application.

### **1<sup>ST</sup> INTERESTED PARTY'S CASE**

The first Interested Party filed replying affidavits to the Judicial Review applications dated 03/03/2014 and 09/04/2014 respectively. The 1<sup>st</sup> Interested Party stated that he is aware of the stay orders made by this court under parcel Nos. 5827, 8511, 8921, 8427 and the sub-division of 8427 and that he has always obeyed the court's orders.

### **DECISION**

I have looked at the objection proceedings and the impugned decision of the 1<sup>st</sup> Respondent. I have also considered the material placed before me both in support and opposition of the application. I have also taken into consideration the submissions by the counsels and the applicable law. From the heading of the hand written proceedings attached to this application, it indicates Tigania East District Akaiga Adjudication Section Cap. 283 LOK. It therefore shows that the applicable law governing this case is the Land Consolidation Act Cap 283 Laws of Kenya. Having said that, it is imperative to reproduce relevant sections which guide the procedural resolution of objections raised before the Adjudication Officers. These are Sections 9, 11, 17, 18 and 26. The Sections state as follows;

#### **"9 Committee**

**(1) The Adjudication Officer within whose district an adjudication section is situate shall appoint a committee for each adjudication section from amongst persons resident in the adjudication section and each committee shall consist of not less than twenty five members.**

**(2) The Adjudication Officer shall appoint an Executive Officer for each committee within the District and such Executive Officer shall attend, and may speak at any meeting of the committee but shall not vote."**

#### **11 Committee to adjudicate**

**(1) The committee appointed for an adjudication section shall adjudicate upon and determine in accordance with African Customary Law the claim of any individual person to any right or interest in any land within the adjudication section.**

**(2) If a committee is unable to reach a decision in accordance with African Customary Law it shall refer the matter to the Arbitration Board who shall decide the matter and shall inform the committee of its decision.**

#### **17 Objection to Record of Existing Rights**

**Any person named in or affected by part 1 of the Record of Existing Rights who considers the record to be inaccurate or incomplete in any respect may, within sixty days of the date upon which the notice mentioned in Section 16 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which the record relates is situate lodge an objection with the executive officer of the committee concerned stating in what respect the record is alleged to be in accurate or incomplete.**

#### **18 Procedure with regard to objections**

**(1) The executive officer with whom an objection is lodged in accordance with the provisions of Section 17 of this Act, shall either;**

***(a) refer the objection to the committee, if it appears to him that the inaccuracy or incompleteness alleged is a consequence of any decision of the committee; or***

*(b) Submit the objection to the Adjudication Officer, if it appears to the executive officer that the inaccuracy or completeness alleged is a consequence of any decision of an Arbitration Board.*

**(2) Any objection referred to a committee under subsection (1) of this Section shall be considered by the committee and the committee shall make a finding thereon; every such finding shall be submitted to the Adjudication Officer.**

**(3) The Adjudication Officer, to whom an objection or the finding of a committee is submitted under Sub-section (1) or Sub-section (2) of this Section shall, in the case of an objection so submitted to him, consider the matter with the Arbitration Board and, after making such further inquiries as he may think fit, determine the matter, and shall, in the case of a finding so submitted to him either;-**

*(a) Confirm the finding of the committee; or*

*(b) Consider the matter with the Arbitration Board and, after making such further inquiries as he may think fit, determine the matter.”*

The Land Consolidation Act Cap. 283 which is the applicable law provide the procedure where an objection is raised under Section 18 of the said Act. Upon perusal of the objection proceedings and the impugned decision, it does not show the names of the twenty five committee members who sat during the deliberation and decision making process. The names of not less than twenty five committee members should have been reflected from the proceedings. The objection proceedings and the decision was made by the 1<sup>st</sup> Respondent alone contrary to Section 18 of Cap 283 Laws of Kenya.

The objection proceedings held on 23/1/2014 indicates that the 1<sup>st</sup> Respondent adjourned the hearing of the objection to 6/2/2014. When the matter came up on 6/2/2014, the record indicates as follows;

**“Both parties are present before me and the Land Committee members. I then held a meeting with the Land Committee members to discuss this matter. The Land Committee members resolved that this matter be referred to the Council of Elders being a gathering matter to decide exactly who to be awarded the oath to go and prove whose land or parcels of land these are, even though the objector had requested for the same and yet the Respondents.....had actually gathered the parcels of land in dispute.....”**

The 1<sup>st</sup> Respondent has not named the Land Committee members who sat to make the decision to refer the matter to the Njuri Ncheke Council of Elders. It is not also reflected that all the parties to the objection herein agreed to refer the matter to the said “Njuri Ncheke” (goat) Oathing ceremony. The 1<sup>st</sup> Interested Party in his reply has stated that the 1<sup>st</sup> Respondent was right in referring the dispute to the “Njuri Ncheke” in accordance with Section 11 of the Land Consolidation Act Cap 283 Laws of Kenya. In my view, the Land Committee appointed for an Adjudication Section are to be guided by African Customary Law regarding disputes relating to land rights and interests. According to the Black’s Law Dictionary Tenth Edition, Customary Law is defined as follows;

**“Laws consisting of customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic and part of a social and economic system that they are treated as if they were laws.”**

This court takes Judicial Notice that “Njuri Ncheke” is a Council of Elders charged with conducting a cultic oathing ceremony (goat) otherwise known as “Nthenge”. Those cultic beliefs and practices are not legal requirements or obligatory rules of conduct practice or beliefs among the Meru community. The cultic oathing rituals conducted by the said Council of Elders cannot by any stretch of imagination be regarded as a Customary Law of the Meru people. The Respondent could not therefore have referred the objection to an entity who practices cultic oathing ceremonies without the consent of the Applicant. The Respondent also breached the legal requirement that any objection referred to a committee shall be considered by the committee who shall make a determination thereon. By referring the dispute to “Njuri Ncheke” to conduct some cultic oathing ceremony without the direction and control of the committee, the Respondent was abdicating his responsibilities and violating the law. All evidence and any other persons required by the committee to shed light to the objection shall give their evidence on oath administered under the direction and control of the committee so appointed.

In the case of Mwachupa & 2 others –Vs- R [1989] KLR 477, Githinji J. (As he then was) sitting in an Appeal in Mombasa and faced with evidence of a traditional oath held as follows;

**“The traditional oath was taken extra judicially. It was not administered in the presence or under the supervision of the court and the trial magistrate could not know if the traditional oath had a mechanism for proving guilty beyond reasonable doubt. The taking of a traditional oath smacks of trial by ordeal. It is not recognized evidence in Criminal trials.....”**

I associate myself with the reasoning and finding of my Learned Judge. The referral of the objection dispute to “Njuri Ncheke” for the cultic oathing ceremony was not administered in the presence of the appointed committee members who were authorized under the law to hear and determine the objection. The Applicant did not also consent to the matter being referred to the said “Njuri Ncheke” Council of Elders. In the upshot, I find the Notice of Motion dated 9<sup>th</sup> April, 2014 merited and the same is allowed on the following terms:-

1. An order of certiorari be and is hereby issued quashing the proceedings and award of the 1<sup>st</sup> Respondent made on 12/2/20114 in objection numbers 1228, 1229, 1230 and 1231 AKAIGA ADJUDICATION SECTION, TIGANIA EAST/WEST DISTRICT.

2. The objection is remitted back to the 2<sup>nd</sup> Respondent to be decided in accordance with the law.

3. The Respondent to pay the costs of this case.

**DATED AND SIGNED IN THIS 18<sup>TH</sup> DAY OF OCTOBER, 2018.**

**E. C. CHERONO**

**ELC JUDGE - KERUGOYA**

**DELIVERED IN OPEN COURT AT MERU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2018**

**LUCY N. MBUGUA**

**ELC JUDGE - MERU**

**In the presence of:**

C/A: Janet/Galgalo

Materi H/B for Kiome for Exparte Applicant

Mutuma for Interested party