



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MERU

CONSTITUTIONAL PETITION NO. 37 OF 2014

ROBERT KINYUA NABEA.....PETITIONER

VERSUS

KOBIA KIRINGO.....1ST RESPONDENT

JAMES M'ERURA ALIAS JAMES KILEMI MUKARI.....2ND RESPONDENT

LAND ADJUDICATION & SETTLEMENT OFFICER, TIGANIA EAST DISTRICT....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The petitioner, Robert Kinyua Nabea has instituted this petition seeking a declaration order that his fundamental rights and freedoms were contravened by the Respondents when they ordered that 0.31 points were hived off from his land Parcel No. 3193.
2. The Petitioner is also seeking an order of injunction to issue restraining the 1st, 2nd and 3rd Respondents from interfering with his land Parcel No. 3193 Athinga/Athanja Adjudication Section measuring 0.68 acres and to nullify the illegal sub-divisions of Numbers 9350 and 2959 Athinga/Athanja Adjudication Section.
3. The petitioner is also seeking an order in the alternative for Judicial Review removing to this Honourable Court by way of certiorari for purposes of quashing the decision of the 3rd Respondent to authorize the demarcation of No. 9350 Athinga/Athanja measuring 0.20 acres and No. 2959 measuring 0.11 points.
4. It is the petitioner's position that on diverse dates mid, 2014, the 1st, 2nd and 3rd Respondents fraudulently hived out two portions of his land Parcels Nos. 9350 and 2959 situate at Athinga/Athanja Adjudication Section.
5. The Petitioner also averred that after fraudulently sub-dividing his parcels of land, the Respondents gave new fake numbers and that the 2nd Respondent is dealing with said sub-divided portions purporting it to be his and attempting to sell to unsuspecting buyers.
6. The Petitioner filed this petition contemporaneously with a Notice of Motion under Certificate of Urgency seeking injunctive orders similar to those in the petition to remain in force pending hearing of that Motion and/or the main petition.
7. The Petitioner attached a copy of confirmation of ownership of plot No. 3193 from the 3rd Respondent's office and a copy of the record book maintained in the same office.
8. The petitioner also attached a copy of a sale agreement and objection proceedings.
9. The Respondents did not file any replying affidavit or grounds of opposition.
10. There is no Memorandum of appearance or Notice of Appointment filed on behalf of the Respondents.
11. I have carefully considered the averments contained in both this petition and the Notice of Motion dated 13th November, 2014 and filed on 14th November, 2014 respectively.

12. The Land Parcel No. 3193, 9350 and 2950 Athinga/Athanja Adjudication Section are all parcel of land under Adjudication under the Land Consolidation Act as read with the Land Adjudication Act Cap. 283 and 284 Laws of Kenya respectively. Under Section 8 of the Land Consolidation Act Cap. 283 Laws of Kenya, the law states as follows:

“Staying of Land Suits

1. Subject to the provisions of this Section, no person shall institute and no court whatever shall take cognizance of, or proceed with or continue to hear and determine any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given.”

13. Section 30 of the Land Adjudication Act Cap. 284 Laws of Kenya states as follows;

“30 Staying of Land Suits

1. Except with the consent in writing of the Adjudication Officer, no person shall institute and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respect under Section 29 (3) of this Act....”

14. The petitioner has not attached any consent in writing issued by the 3rd Respondent to institute this petition. The requirements to seek and obtain a consent in writing from the Adjudication Officer is couched in mandatory terms such that any suit instituted without such consent is rendered null and out for striking.

15. I also wish to point out that the Adjudication process in respect of the suit land has not been finalized. The documents attached to the Notice of Motion shows that the Adjudication process is at objection stage.

16. Ownership of land is a process which becomes complete once a certificate or title has been issued.

17. When the Adjudication Officer issued a certificate of record of existing rights and interest in respect of any Adjudication Section pursuant to Section 16 of the Land Consolidation Act Cap. 283 Laws of Kenya, those rights and interest could not have crystalized to become rights under Article 40 of the Constitution of Kenya 2010. They are provisional rights and interest subject to any objection(s) under Section 17 of the same Act.

18. It cannot therefore be said legally that the petitioner had acquired rights and interests capable of being protected in law under Article 40 of the Constitution.

19. Where a party is aggrieved by a notice of completion of Adjudication register, he may seek consent from the Adjudication Officer of the particular Adjudication Section to file a suit challenging the process in which any person was registered as owner of any particular parcel of land. Section 26 of the Land Consolidation Act provides as follows:

“26 Objection to Adjudication Register

1. Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may within sixty days of the date upon which the notice mentioned in Section 25 of this Act is published at the office of the Regional Government Agent within whose district the Adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the committee and may dismiss the objection, or if he thinks the objection to be valid order the committee to take such action as may be necessary to rectify the matter....”

20. The copy of objection proceedings attached to the Notice of Motion filed contemporaneously with this petition shows that the petitioner herein was aggrieved by a Notice issued by the Land Adjudication and Settlement Officer (3rd Respondent) regarding the allocation of land as entered in the Adjudication Register and exercised his right and filed objection No. 1162 which was deleted without countersigning and replaced with No.1491. That objection relates to land Parcel No. 1726. That objection is recorded to have been withdrawn with the objector to be compensated.

21. It is not clear whether the objector withdrew the objection or the 3rd Respondent sitting with the committee decided to withdraw the same.

22. If the 3rd Respondent decided to withdraw the objection unilaterally without the objector, then the objectors grievance should have been addressed through a Judicial Review mechanism within sixty days from the date of such decision.

23. The Petitioner’s remedy in my view lies elsewhere but not in a Constitutional Court.

24. It is generally accepted through a catena of judicial precedents that the Constitution should not be used for settlement of everyday

litigation. This court has pronounced itself time and again that courts must court against the distortion or manipulation of the Constitutional jurisdiction. In Uhuru Muigai Kenyatta –Vs- Nairobi Publications Limited [2013] eKLR, the court held thus:

“Where a fundamental right is regulated by registration such as the Employment Act, 2007 such legislation and not the underlying Constitutional right becomes the primary means of giving effect to the Constitutional right.”

25. Again in George S. Onyango –Vs- Numerical Machines Complex Ltd & 2 Others, Constitutional Petition No. 350 of 2012 (Nairobi), it was held as follows:

“If an employer adopts a labour practice thought to be unfair, an aggrieved employee would at first instance seek remedy under the relevant legislation. If the employee finds no remedy there, the legislation might come under scrutiny for not giving adequate protection to a Constitutional right. The dominant principle in cases where a wrong is thought to touch on the Constitution, common law and legislation, is that the remedy should be pursued from the first party of entry. The first impression to be made from these decisions is that, the Petitioner Mr. Onyango wrongly invoked the Constitutional jurisdiction, and should have searched for remedy from his contract of employment and the legislation governing that contract.”

26. In conclusion, I find this petition lacking merit and the same is hereby dismissed with no order as to costs.

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

C.P Mbaabu H/B for Kaume for petitioner