



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC. PETITION NO. 5 OF 2014

BERANO M'MWITHIGA M'ARAUKI.....PETITIONER

VERSUS

DISTRICT LAND ADJUDICATION &

SETTLEMENT OFFICER TIGANIA

EAST AND WEST.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

PETER IMATHIU.....3RD RESPONDENT

RULING

1. The petitioner filed this Petition dated 29/3/2014 on 31/3/2014. I will set out the prayers that he seeks therein verbatim as herein below:-

(a) A declaration that the 1st respondent's purported acts of adopting a decision of strangers to the Adjudication Act Cap. 283 and 284 Laws of Kenya is arbitrary, unjustifiable, unconstitutional, null and void ab initio.

(b) An order restraining and prohibiting the 1st respondent from adopting any decision against the petitioner which is contrary to the provisions of Cap 283 and 284 Laws of Kenya and prohibiting him from changing the land records of the petitioner held by him.

(c) A permanent injunction restraining the 3rd respondent and his servants, agents, employees, representatives, relatives and/or whomsoever claiming or acting for, on behalf of or through him from entering into, assuming actual possession, user, cultivation and/or effecting any form of developments on any portion of, and/or whatsoever interfering with the petitioner's quiet, peaceful, undisturbed and uninterrupted actual possession, occupation, cultivation, user, development and enjoyment of the suit land.

(d) Costs of the petition and interests thereon at court rates.

2. The said petition is supported by the affidavit of the petitioner sworn on the 29th March, 2004. He filed his submissions on 2/8/2014.

3. The 3rd respondent filed his replying affidavit dated **19th December, 2014** on the same date. The 3rd respondent filed notice of preliminary objections dated **1/8/2014** on the same date.

4. I have looked at the court record and I have found that there are no replies or submissions filed by the 1st and 2nd respondents in this petition.

The Petitioner's Case

5. According to the petition his land case against the 3rd respondent was properly and adjudicated upon by the land committee which awarded the petitioner **Parcel No. 1472 Ankamia Adjudication Section**; that he shared his land among his sons and was left with **1.00 acre**; that he and his sons have extensively developed that land; that after the expiry of **60 days** window allocated for A/R objections the 3rd respondent sought to make an objection under **Section 26 of Cap 283** to the 1st respondent; that the 1st respondent finding that the 3rd respondent's objection was time barred directed the 3rd respondent to file a claim with Njuri Ncheke Council of Elders to claim the petitioner's land after which the 1st respondent would adopted the findings of the Njuri Ncheke as his own; that the action of referring the 3rd respondent to the Njuri Ncheke was illegal and against the provisions of the Land Adjudication Act and the Land Court Act; that further it amounts arbitrary deprivation of his land, blatant infringement of his constitutional right to acquire and own property enshrined under **Article 40** of the constitution, a denial of fair trial under **Article 50** of the Constitution, contravention to his right to property and fundamental freedom from deprivation of his property without commensurate compensation hence this petition.

The Reply of the 1st and the 2nd Respondent

6. I have looked at the court record and I found no replies filed the 1st and 2nd respondents in this petition.

The 3rd Respondent's Response

7. In the 3rd respondent's affidavit sworn **19/12/2014** he avers that the challenged objection was decided on **22/10/2013** and the decision was implemented promptly without any objection; that his complaint in the objection was against the petitioner, one Joel Ngorwe, Samuel Mutethia, Solomon Manyara, Jonah Mutegi, Isaiah Kiburi and Paul Kaunga and his objection was successful and the land which had been taken away from him was reverted back to his name; that in November, **2013** he shared out his land parcel to his sons and new numbers issued for the subdivisions so shared out. He therefore maintains that the decision of the 1st respondent dated **22/10/2013** is fully implemented and the petitioner, if he was aggrieved by that decision should have appealed to the minister within 60 days from the date of the decision as required by **Section 29** of the **Land Adjudication Act Cap 284** or challenged it by means of a judicial review application. It is averred that the petitioner was not condemned unheard or denied a fair hearing; that it is not true that the 1st respondent adopted the decision of the Njuri Ncheke council of elders without hearing the petitioner; that the 1st respondent sought the opinion of the Njuri Ncheke council of elders because in his testimony the petitioner alleged to have been taken through the "Nthenge Oath which is "predominantly and customarily administered by Njuri Ncheke council of elders"; that it was fair and right to refer the matter to the Njuri Ncheke to obtain the correct version as to who should be entitled to the suit land because the 1st respondent was not conversant with Meru customs on Nthenge Oath, he being not a Njuri Ncheke elder or a person of Meru original.

8. The 3rd respondent averred that the petitioner was unjustly awarded the 3rd respondent's land by the land committee members because most of them were from his clan and others were his close allies and confidants whom he easily influenced; it is alleged that there were even financial inducement by the petitioner whom the 3rd respondent terms as affluent man whereas the 3rd respondent is elderly illiterate and "economically humble". It is the 3rd respondent's case the land belongs to him; that it was taken away by the petitioner and his sons owing to its high value; that he filed his A/R Objections in April after the objections were allowed and that to date most of the objections are still pending. The 3rd respondent

denied that the 1st respondent advised him to lodge any claim with the Njuri Ncheke or that the 1st respondent spoke with the chairman or that he corruptly adopted the Njuri Ncheke decision. He avers that on **6/4/2013** the Tigania East Divisional Njuri Ncheke Council of Elders heard and determined the dispute in the presence and participation of the petitioner whereupon the Njuri Ncheke ruled in favour of the 3rd respondent; that even then the petitioner appealed to the same council of elders which returned a verdict in favour of the 3rd respondent. That the 3rd respondent was the first to gather the suit land having acquired it in or about **1972** and that the petitioner had admitted this fact.

9. As stated before, on the **1/8/2014** the 3rd respondent filed preliminary objection of the date stating as follows;

a. This matter offends **Section 29 (1) and 30** of the **Land Adjudication Act Cap 284** to the extent that no appeal is filed to the Minister within the statutorily required time frame and the indispensable statutory consent to sue herein was never sought obtained and filed together with the suit papers herein.

b. The proceedings herein glaringly fly in the face of the annexed decision by Hon. P.M.Njoroge in **Meru HC Pet. No. 21 of 2012 – Stephen Michuki Kiunga –vs- Nkuni M’Turuchiu and 2 others.**

c. The original chamber summons dated **29/3/2014** and the amended chamber summons application dated **17/4/2014** contravene **rule 19** of the **Constitution Of Kenya (Protection Of Right And Fundamental Freedoms)** practice and procedure rules of **28/6/2013** and **form D** thereto.

d. the entire suit is legally incompetent fatally defective frivolous vexatious scandalous and a paragon of abuse of the due process of this court and should be terminated *in limine* pursuant to **Order 2 rule 15(1) (a) (b) (c) and (d)** of the **Civil Procedure Rules 2010.**

Submissions of the 3rd respondent

10. The 3rd respondent filed his submissions on the Preliminary Objection on **4/7/2018.**

11. The 3rd respondent came out with all barrels blazing, citing numerous authorities in support of his preliminary objection those submissions.

12. In respect of **grounds 1 and 2** of the preliminary objection, his submission is that one cannot file a petition when an appeal under the **Land Adjudication Act Cap 284** has not been filed heard and determined; that the petitioner has not exhausted the appeal process under **Section 29 (1)** of **Cap 284.** The 3rd respondent relied on **Meru HC Pet. No. 21 of 2012 – Stephen Michuki Kiunga –vs- Nkuni M’Turuchiu and 2 others, Abdallah Mangi Mohammed -vs- Lazarus and 5 others 2012 eKLR per Mureithi J, Anne Wawuda and 3 others -vs- Kenya Railways Corporation and another 2015 eKLR per Justice Anyara Emukule, (in which he cited Speaker of National Assembly -vs- Karume (1992) KLR page 425, Kenya Bus Services Ltd and 2 Others –vs- Attorney General (2005) eKLR 787, Andrew Lionel Phillips and 15 Others -vs- National Director of Public Prosecution (CC-55 of 2004), and Nartosa and others -vs- Minister for Education for Westerncape And Others.**

13. The response of the petitioner to these submissions is that his recourse to the constitution and in particular under **Article 40 (2) (a)** does not offend **Section 29(1)** and **Section 40** of the **Land Adjudication Act.**

14. The petitioner avers that he was awarded the suit land by the Land Adjudication Committee which was satisfactory for him and that it was the 3rd respondent who, being dissatisfied with the award, should have sought redress under the provisions of **Sections 29 and 30** of the Act.

15. It is submitted on behalf of the petitioner that there is no provision in the Act empowering the Land Adjudication Officer to adopt the decision of strangers and reflect the same in the A/R records.
16. It is submitted that **Sections 29 (1) and 30** are not applicable in this suit as the petitioner was awarded the suit land and his name is reflected on the records as the owner of the “**land Parcel No. 14 72 Ankamia Adjudication Section**”.
17. It is further submitted that the 3rd respondent and 1st respondent want to alter the lands records in a manner not authorized by the law.
18. The petitioner relies on **Article 22** of the Constitution which provides that every person has a right to institute court proceedings claiming that a right or a fundamental freedom in the bill of rights has been denied violated infringed or threatened.
19. The petitioner also relies on **Articles 23 and 24** of the constitution. He submits that **Meru HC Pet. No. 21 of 2012 – Stephen Michuki Kiunga –vs- Nkuni M’Turuchiu and 2 others** is distinguishable from the case at hand in that the petitioner therein was denied consent to file suit and, instead exhausting the legal remedies under the Act, he filed the petition therein; he averred that in the present case, the land case against the 3rd respondent was properly adjudicated by a land committee which awarded the petitioner the land whereupon he shared it among his sons and was left with only one acre.
20. He submitted that it is the 3rd respondent who tried to make an objection under **Section 26 of Cap 283** after the expiry of the statutory 60 days.
21. I have considered the submissions of the parties on the first two grounds as above. I find that the argument of the petitioner is correct.
22. If the issues in the petition are whether the petitioner was awarded the land by a land committee and whether the 3rd respondent filed an objection, and if so whether it was filed after the expiry of the 60 days allowed to file such an objection then evidence is needed before those issues can be determined. The court cannot determine the preliminary objection without delving into the issue of what actually happened and who was the proper party to file an appeal without considering such evidence.
23. The evidence required to ascertain what actually happened and who was the proper party to file an appeal is in the affidavits of the parties which have been filed in court in readiness for the trial of the main petition on its merits.
24. Going by the decision of the Court Of Appeal in the renowned case of **Mukisa Biscuits Manufacturers Limited vs West End Distributors 1969 EA 696**, a preliminary objection cannot be properly raised when there are matters to be ascertained by way of evidence.
25. This is therefore not a matter that can be summarily determined at the preliminary stage on the ground that **Sections 29 (1) and 30** of the **Land Adjudication Act Cap 284** have not been observed by any of the parties.
26. In respect of **ground 3** of the preliminary objection the 3rd respondent submitted that the original chamber summons dated **29/3/2014** contravenes **rule 19** of the *Mutunga* rules which provides that a formal application under the rules shall be by way of notice of motion.
27. In response to this ground the petitioner cites **Article 159 2(d)** of the constitution. He submits rules of procedure have aptly been described as handmaidens of justice and cites the case of **Edward Steven Mwiti –vs Peter Irungu and 2 others (No.2) Nairobi HC ELC No. 105 of 2011 (2012) eKLR**. He also relies on **Section 1A 1B and 3A** of the **Civil procedure Act** and **Order 8 rule 5** of the **CPR**. He also cites the case of **Harit Sheth Advocate –vs- Shams Charania Nairobi, Court of Appeal Civil appeal No. 68 of 2008 (2010) eKLR and Dyson -vs- Attorney General (1911) 1KB410 and D.T. Dobie and**

Company Ltd -vs- Muchina (1982) KLR 1, Microsoft Corporation -vs- Mitsumi Computer Garage Limited and another (2010) KLR 470. The petitioner submits that striking out is a very serious matter, is draconian, and should only result when the cause filed is hopeless or meant to be an abuse of the process of the court.

28. I agree with the petitioner that **Article 159 2 (1) (d)** the constitution of Kenya emphasizes that the court shall, in exercising its judicial authority administer justice without undue regard to procedural technicalities.

29. For that reason I find that in comparison with the weight of the matters addressed by the petition before me the 3rd ground in the preliminary objection is frivolous and lacking in merit.

30. On the 4th ground the 3rd respondent submitted that owing to the previous objections from **ground 1 to ground 3** the entire petition is incurably defective to the extent that the “**oxygen principle**” cannot salvage it.

31. For this proposition the 3rd respondent relies on **Malindi Civil Appeal No. 46 of 2014 Ransa Company Limited and 2 others -vs- Manca Francisco (2015) eKLR** as well as **Nairobi Civil application No. 6 of 2010 Hunker trading Company Limited -vs- Elf Kenya Oil Limited.**

32. In response to this 4th ground the petitioner urges in his submissions that the provisions of **Order 2 rule 15 (i)** of the **CPR** provides for the grounds that should be satisfied in order for a suit to be stayed or dismissed or judgment entered; that **Order 2 rule 15(2)** provides that the fact that a pleading discloses no cause of action must be clear on its face and no evidence is admissible in this regard.

33. In addition the petitioner cites the **D.T Dobie case** again and urges that the power to strike out pleadings should be used sparingly and cautiously as it is exercised without the court being fully informed of the merits of the case and oral evidence. He cites **Madan J.A** in that decision as follows

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not act in darkness without the full facts of a case before it”.

34. He also relies on **Tulip Properties Limited -Vs- Mohamed Koriow Nor And 6 Others (2014) eKLR** and **Nyati (2002) Kenya Limited -vs- Kenya Revenue Authority (2009)** and states that the petition raises triable issues which should be heard and be determined in a full trial and urges this court to exercise restraint.

35. The Petitioner urges that pleadings to be struck out must be so useless that any reasonable or prudent man would confidently find the pleading to be baseless and waste of time.

36. Finally the petitioner cites **Geminia Insurance Company Limited -vs- Kennedy Otieno Onyango (2003) eKLR** and urges that the preliminary objection must fail.

37. This court has already found that **limbs 1, 2 and 3** of the notice of preliminary objection dated cannot stand. The last limb is built on the presupposition that those first three limbs would be successful. They have failed and so must it.

CONCLUSION

38. In the final analysis I find that the preliminary objection has no merits and the same is hereby dismissed with costs to the petitioner.

Dated, signed and delivered at Meru on this 20th day of December, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

In presence of

C/A: Janet

Ms. Gitonga for 3rd respondent

Mr. Muthomi holding brief for Rimita for petitioner

N/A for A.G for respondents