



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**CONSTITUTION PETITION NO. 38 OF 2014**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOM OF THE INDIVIDUALS**

**AND**

**IN THE MATTER OF LAND PARCEL NUMBERS 9889, 10016 & 10595 ANTUAMBURI**

**ADJUDICATION SECTION OF TIGANIA EAST DISTRICT MERU COUNTY**

**MORRIS BIRITHU.....1<sup>ST</sup> PETITIONER**

**JOSHUA KANAMPIU.....2<sup>ND</sup> PETITIONER**

**TARATISIO KAINDO.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**BENEDICT KARUTI.....1<sup>ST</sup> RESPONDENT**

**NAFTALY MUNGATHIA.....2<sup>ND</sup> RESPONDENT**

**LAND ADJUDICATION & SETTLEMENT**

**OFFICER TIGANIA EAST DISTRICT.....3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. This petition was filed contemporaneously with the notice of motion dated 13<sup>th</sup> November 2014 under certificate of urgency.
2. Though the notice of motion was certified by the court on 18/11/2014 the same was not prosecuted until 16<sup>th</sup> July 2018 when the parties by consent agreed to abandon all interlocutory applications and proceed with the main petition by way of written submissions.
3. It was also agreed that the replying affidavits by the 1<sup>st</sup> and 2<sup>nd</sup> respondents sworn by BENEDICT KARUTI and filed in court on 25<sup>th</sup> November 2014 be deemed as the replying affidavit to the petition herein with the 3<sup>rd</sup> and 4<sup>th</sup> respondents given 21 days to file and serve their replying affidavits to the petition herein.
4. On 14 September 2014, the 1<sup>st</sup> respondent filed a further replying affidavit.

**PETITIONER'S CASE**

5. The petitioners in this petition have stated that at all material times to this suit they were owners of parcels of land numbers 9889

measuring 368 acres which was later grabbed and given parcel numbers 9889, 10016, 10595 and parcel numbers from 12949 to 12960 and 12977 to 13039 Antuamburi adjudication section.

6. The petitioners further stated that the 1<sup>st</sup> and 2<sup>nd</sup> respondents fraudulently purported to be trustees of the petitioners and caused to be allocated to themselves 172 acres of the petitioners land vide numbers 9889 measuring 100 acres and numbers 10016 and 10595.

7. The petitioner further contend that the 1<sup>st</sup> and 2<sup>nd</sup> respondents unlawfully and illegally collided with the lands offices by allocating themselves the petitioners land in breach of their constitutional right to own property.

8. The petitioner also stated that the proceedings to revoke the allocation of the petitioners land already allocated to them albeit less in acreage is illegal and unconstitutional and criminally culpable and in contravention of their rights of natural justice to be heard and not condemned without a hearing.

9. The petitioners therefore pray for an order of declaration that their fundamental right and freedom as guaranteed under article 40 of the constitution were violated by the respondents and that the 368 acres under various numbers 9889, 10016,10595 parcel numbers from 12977 to 13039 and 12949 to 12960 Antuamburi Adjudication section be consolidated back to the original number 9889 to make it 368 acres and returned to petitioner and nullify all the other illegal new allocated numbers 9889, 10016 and 10595 and an order of permanent injunction restraining their agents, assigns, servants, employees or anyone else claiming on their behalf from interfering with the petitioners land above.

10. The petitioners are seeking an alternative order of Judicial review removing to the court and quashing the arbitrary decision of the 3<sup>rd</sup> respondent to authorize the demarcation of the petitioners land and allocating the 1<sup>st</sup> and 2<sup>nd</sup> respondent the petitioners 172 acres and revocation of the 176 already demarcated into their names and order the same to be returned back into the petitioners account having 368 acres as initially reflected.

### **RESPONDENTS CASE**

11. The respondent through their advocates M/s. CarlPeters Mbaabu & Co. Advocates submitted that this court has no jurisdiction since the petitioner did not exhaust available remedies in law. He submitted that the suit land is the subject matter in ELC case no. 144 of 2010 (Meru) and that the suit land is now registered in the name of the 1<sup>st</sup> respondent and that title has not been challenged. On the issue of jurisdiction, the respondent submitted that if the petitioners have a valid grievance against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the recorded owners of land parcel no. 9889, which measures 296 acres, they ought to have filed a committee case to be heard under section 9 and 11 of the land consolidation act, cap 283 or an objection to be heard under section 17, 18, 19 and 26 (1) of the same act.

12. The respondents cited the following cases:

**(1) STEPHEN MICHUKI KIUNGA VS NKUNI M'TURUCHIU & 2 OTHERS HC PET No. 21 of 2012 (MERU) (unreported).**

**(2) ABDALLA MANGI MOHAMMED VS LAZARUS & 5 OTHERS (2012) ECLR**

**(3) ANNE WAUDA & 3 OTHERS VS KENYA RAILWAYS CORPORATION & ANOTHER (2015) ECLR**

**(4) SPEAKER OF NATIONAL ASSEMBLY VS KARUME (1992) KLR 425**

**(5) KENYA BUS SERVICES LTD & 2 OTHERS VS ATTORNEY GENERAL (2005) ECLR 787**

**(6) ANDREW LIONER PHILIPS & 15 OTHERS VS NATIONAL DIRECTOR OF PUBLIC PROSECUTION (CC – 55 OF 2004)**

**(7) NARTOSA & OTHERS VS MINISTER OF EDUCATION FOR WESTERN CAPE & OTHERS**

13. The other point in which the learned counsel submitted on is that the subject land parcel no. 9889 is now registered in the name of the first respondent and that title has not been challenged.

14. It is further submitted that the issuance of title deeds is proof of closure of Antuamburi adjudication section and that the court cannot therefore issue the declaration sought at prayer (A) or the alternative prayer of an order of judicial review as such orders cannot cancel registration of land which is duly registered under sections 24 (a) and 25 (1) of the land registration Act no. 3 of 2012. The respondents finally submitted that not even the overriding objective and the O<sub>2</sub> principle can salvage this case. He stated that the overriding objective and/or "O<sub>2</sub>" principle cannot breathe life to such hopeless case such as this one. He cited the court of appeal case of **HUNKER TRADING COMPANY LIMITED VS ELF OIL KENYA LTD CA NO. 6 OF 2010 (NBI) reported in 2010 eCLR.**

15. In conclusion, the respondents submitted that the petitioners have failed to discharge the burden of proof placed on them by dint of section 107, 108, 109 and 112 of the evidence act cap 80 laws of Kenya. They urged the court to dismiss the petition with costs.

### **APPLICABLE LAW**

(1)The constitution of Kenya 2010

- (2)The civil procedure act cap 21 laws of Kenya
- (3)The evidence act cap 80 laws of Kenya
- (4)The land consolidation act cap 283 laws of Kenya
- (5)The land adjudication act cap 254 laws of Kenya

**ANALYSIS AND DECISION**

16. The issues for determination in this petition are fairly simple. First the 1<sup>st</sup> petitioner in paragraph 3 & 4 of the affidavit in support of the notice of motion dated 13<sup>th</sup> November 2014 admitted that the suit land was initially gathered under parcel no. 9889 Antuamburi Adjudication Section. The petitioners also contend that the 1<sup>st</sup> respondent Benedict Karuti lodged an A/R objection No. 2460 dated 28/1/2010 and a decision rendered on 11<sup>th</sup> June 2010. That decision allowed the objection and a new number was given as 9889 recorded under the name of Benedict Karuti and Mungathia.

17. That decision by the Adjudication officer to allow the said objection no. 2460 seemed to have rattled the petitioners who instead of exhausting the available remedies under the land consolidation Act as read with the land adjudication act cap 283 and 284 laws of Kenya respectively decided to rush to this Hon. Court for parallel alternative remedies.

18. The relevant sections applicable to the issues in this petition are sections 17, 18 and 26 of the land consolidation Act cap 283 Laws of Kenya which reads as follows:

**Section 17 – any person named in or affected by part of the record of existing rights may lodge an objection with the executive officer of the committee concerned, stating in what respect to be inaccurate or incomplete.**

**18 (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 incompleteness alleged is a consequence of any decision of an arbitration board.**
- (c) Section (2) any objection referred to a committee under sub-section (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.**

**Section 3 – the adjudication officer to whom an objection of the finding of a committee is submitted under sub section (1) or subsection (2) of this section (as the case may be) shall, in the case of an objection so submitted to him, consider the matter with the arbitration as he may think fit 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.**

**Section 19 – any confirmation or determination of an adjudication officer made under section 18 of this act shall be final .....**

**Section 26 (1) any person named in or affected by the adjudication register who considers such register to be inaccurate or incomplete in any respect ..... May inform the adjudication officer and the adjudication officer shall consider the matter with the committee and may dismiss the objection.....**

**Section 26 (2) if the adjudication officer considers that such rectification would incur unreasonable expense delay or inconvenience he may award such compensation in lieu of rectification as he may deem appropriate.**

**Section 26 (3) – no appeal shall lie against any decision by the adjudication office to dismiss an objection or order rectification or to award compensation in lieu of rectification ....."**

19. From my reading of the provisions of the statute law the petitioners had a right of appeal to the minister if they were dissatisfied with the decision of the adjudication officer in allowing the objection no. 2460. It was not open to the petitioners to institute these petition before exhausting the available remedies under statute. This court has pronounced itself more than once that it is not open to an aggrieved party to seek redress outside where the framework statute provides clear internal remedies.

20. In the case of ABDALLA MANGI MOHAMED VS LAZARUS & 5 OTHERS (2012) eKLR Muriithi J (as he then was) held as follows:

*“.....where there is a dispute as to the applicant’s entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicant’s claim to the property rather than clog the constitutional court with applications for enforcement of purported rights which require prior determination. The improper practice of making all private disputes as to ownership of property as applications for enforcement of constitutional rights to property should be discouraged”.*

21. Again in the case of KENYA BUS SERVICES LIMITED & 2 OTHERS VS ATTORNEY GENERAL (2005) eKLR 787 at page 799, following Trinidad & Tobacco case of Re-application by Bahaduri (1986) LRC (const) 297 at page 298 where the court said:

*“The constitution is not a general substitute for the normal procedure for invoking judicial control of administrative action. Where infringement of rights can find a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution”.*

22. The same reasoning was repeated in the case of NARTOSA & OTHERS VS MINISTER OF EDUCATION FOR WESTERN CAPE & OTHERS where it was held:

*“The court was concerned with the appropriateness or otherwise of granting relief under the constitution without a complaint that an Act of parliament was constitutionally deficient in the remedies it provides. The court could not conceive that it is permissible for an applicant save by attacking the constitutionality of the statute to go beyond the regulatory frameworks which is established”.*

23. I am of the same persuasion that where a statute provides a clear procedural framework for addressing grievance within a statutory provision, a party who is aggrieved is estopped for looking for remedies outside that framework.

24. Suffice to state that from the affidavit evidence and the attachments thereto, it is clear in my mind that the subject matter of this petition is a parcel of land which is still under adjudication and therefore subject to the consolidation and adjudication act cap 283 and 284 laws of Kenya which are the framework statutes, the two statutes have set out procedural mechanism in which all grievances are addressed. The two statutes have even prohibited the institution of suit without first seeking and obtaining consent from the adjudication officer concerned. That clearly demonstrates parliament intention to ensure that it is not open for parties to seek remedies for their grievance outside the statute.

25. I also hasten to say that an individual right to land under article 40 of the constitution of Kenya, 2010 only crystalizes upon such claims and interest have been identified under the land consolidation act, the land adjudication act or the community land act and registered under the land registration act. Before that is done a party is estopped from seeking protection in a constitutional court. They must have their interest crystalize under the applicable statutory law and have those interest registered under the registered land act before moving for protection in the constitutional court. Having said that I find and hold that this petition lack merit and the same is hereby dismissed.

**I order each party to bear her own costs.**

**READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 7<sup>TH</sup> DAY OF DECEMBER, 2018.**

.....

**In the presence of:**

Ms. Gitonga for 1<sup>st</sup> and 2<sup>nd</sup> respondent

Ms. Munga holding brief for Kaume for the applicant

C/A - Janet