



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**PETITION NO. 6 OF 2016**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 19, 20, 21, 22, 23, 27, 40, 43, 47 AND 60 OF THE CONSTITUTION OF KENYA 2010 AND SECTIONS 75 AND 82(2) OF THE REPEALED CONSTITUTION**

**AND**

**IN THE MATTER OF THE DEMARCATION OF NKARARO ADJUDICATION SECTION**

**BETWEEN**

**JOHN MASIANTET SAENI.....PETITIONER**

**AND**

**DANIEL ARAMAT LOLUNGIRO.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETIRARY, LANDS, HOUSING AND URBAN DEVELOPMENT...2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**THE LAND ADJUDICATION OFFICER, TRANS MARA.....4<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. Arising from an adjudication process respecting Transmara Adjudication Area, Nkararo Adjudication Section, the 1<sup>st</sup> respondent was awarded Plot No. 323 after a successful appeal to the Minister under Section 29 of the **Land Adjudication Act**, Cap 284 Laws of Kenya.
2. The petitioner in the petition dated 9<sup>th</sup> March 2016 avers that he and the 1<sup>st</sup> respondent had filed objections Nos. 101/90 and 213/90 claiming the lower and upper portions of **Plot No. 323** respectively after the plot had been awarded to other people. The adjudication officer dismissed both objections prompting the petitioner and the 1<sup>st</sup> respondent to appeal to the Minister. The petitioner states that the 1<sup>st</sup> respondent's appeal to the Minister was successful and he was awarded the whole of **Plot No. 323** although he had only claimed the lower portion of the plot.
3. The 1<sup>st</sup> respondent in his replying affidavit sworn on 5<sup>th</sup> May 2016 states that after his and the

petitioner's objections were dismissed by the adjudication officer, they filed separate appeals to the Minister. The 1<sup>st</sup> respondent filed appeal No. 299/2003 and the petitioner filed appeal No. 300/2003 which were heard and determined separately as per the proceedings and ruling on the appeals annexed as **"DA0 2(a) and (b)"**. The 1<sup>st</sup> respondent states that his appeal was allowed as per the ruling delivered on 11<sup>th</sup> November 2003 while that of the petitioner was dismissed. The 1<sup>st</sup> respondent further states that following the determination of appeal, the Director of Land Adjudication communicated the decision to the chief land registrar for implementation of the same.

4. The Attorney General acting on behalf of the 4<sup>th</sup> respondent on 2<sup>nd</sup> December 2016 filed a notice of preliminary objection dated 1<sup>st</sup> December 2016 on the following grounds seeking that the petition be struck out:-

**1. The matter is res judicata and an abuse of the court process as it had been determined by the Minister in Appeal Case 299/03.**

**2. The petition is brought in bad faith and ought to be struck out as it violates the provisions of Section 29(1) of the Land Adjudication Act Cap 284, thus the court is bereft of jurisdiction to entertain this petition.**

5. The court on 8<sup>th</sup> December 2016 directed that the preliminary objection be disposed of first and the parties were directed to canvass the preliminary objection by way of written submissions. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their written submissions dated on 1<sup>st</sup> February 2017 on 6<sup>th</sup> February 2017 while the petitioners submissions dated 21<sup>st</sup> March 2017 were filed on 22<sup>nd</sup> March 2017.

6. It is not disputed that the land the subject of this petition was within the Nkararo Adjudication Section and that following adjudication the land was awarded to one, Leah Cherono which prompted objections by both the petitioner and the 1<sup>st</sup> respondent to the Land Adjudication Officer but which objections were dismissed. The petitioner and the 1<sup>st</sup> respondent separately appealed the dismissal of their objections to the Minister. Following the hearing of the appeals and a visit to the disputed parcel of land by the panel hearing the appeals the panel made findings that:-

**(i) It was only the 1<sup>st</sup> respondent (Daniel Aramat) who had erected a home on the land parcel that was in dispute and that he was the only person who had been living on the suit land.**

**(ii) That the said Leah Cherono and the petitioner had never resided on the disputed land and that the petitioner resided on his own parcel of land near the disputed property and that it was unclear why the petitioner was laying claim to a portion of the land in dispute.**

Based on their findings they awarded the disputed land to the 1<sup>st</sup> respondent and disallowed the appeal by the petitioner.

7. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents submit that the decision made by the Minister on appeal was final and that the Minister's decision made pursuant to Section 29(1)(b) of the **Land Adjudication Act** could only be challenged by way of judicial review which the petitioner did not do and further contends that the petitioner cannot after a period of 13 years seek to challenge the decision of the 4<sup>th</sup> respondent. The respondents argue that the court lacks the jurisdiction to entertain the instant petition as it is infact a challenge to the decision of the Minister after the expiry of 13 years and yet it is not by way of a judicial review which empowers the court to exercise its supervisory jurisdiction. The respondents in support of their submissions rely on the case of Speaker of the **National Assembly –vs- Karume [1992] eKLR** where the court observed as follows:-

**"...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed."**

8. The respondents have further submitted that the Minister having made a decision on appeal as provided under Section 29 of the **Land Adjudication Act** and there having been no challenge to the decision of the Minister by way of judicial review, the Minister's decision was final and that the matter was now *res judicata*. The respondents rely on the decision of **Mwangi Njangu –vs- Meshack Mbogo Wambugu & Another, HCC No. 234 of 1991 (unreported)** where **Kuloba J.** stated thus:

**“If a litigant were to go on forever re-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face lift on every occasion he comes to a court, then I cannot see what use the doctrine of *res judicata* plays.”**

9. The petitioner's and the 1<sup>st</sup> respondent's claims before the Adjudication officer during the hearing of the objection in regard to the suit property were separate and distinct as each of them was claiming the suit property which had been awarded to one, Leah Cherono Sile. Further each of them made separate and distinct appeals to the Minister against the dismissal of their respective objections. The respondent in both appeals was again Leah Cherono Sile. Although the subject matter in respect of the objections and the appeals was the same, the petitioner and the respondents in this petition were not in the objections and the appeals litigating against each other but against the said Leah Cherono Sile. In those circumstances, the doctrine of *res judicata* would not be applicable as the objections and the resultant appeals were not against each other but rather a third party.

10. The petitioner in his submissions has contended that it is his constitutional rights as enshrined under Articles 27, 40, 43 and 47 of the Constitution which have been violated. The petitioner further argues that Section 29(1)(b) of the Land Adjudication Act would not bar this court from entertaining the present petition as the court has power to exercise supervisory jurisdiction over tribunals and quasi judicial bodies to correct any excesses or illegalities committed by such inferior bodies while exercising their jurisdiction. The petitioner has placed reliance on the case of **Republic –vs- Judges and Magistrates Vetting Board – ex parte Lady Justice Joyce Khaminwa [2013] eKLR**, where the court considered the phrase '**final**' in some of the statutes as relates to ouster of jurisdiction of the courts and the court took the position that where it is shown that the impugned decision is tainted with illegality, irrationality and/or procedural impropriety or is made in excess of jurisdiction the court would intervene to correct the excesses or illegalities committed by the inferior tribunals. That however would be possible if the action is instituted by way of judicial review which goes into inquiring whether or not the decision making process was fair and just.

11. In the case of **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd CACA No. 185 of 2001** the Court of Appeal stated thus:-

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...”**

12. In the matter before the court the petitioner did not move the court by way of judicial review but rather opted to file a petition albeit after lapse of 13 years from the time the decision of the Minister was given. In my view the petition is tantamount to seeking to appeal the decision of the Minister through the back door. It is an attempt on the part of the petitioner to have a second bite of the cherry. There is no explanation why the petitioner did not exhaust the process/procedure established under the **Land Adjudication Act** by challenging the decision of the Minister by way of judicial review and/or why it took the petitioner a whole 13 years from the time the decision was rendered to bring these proceedings.

13. While the petitioner in his submissions acknowledges Judicial Review is the only option available to challenge a decision of the Minister rendered under Section 29(1)(b) of the **Land Adjudication Act**, he on the same breath argues that a petition anchored under the Constitution would nonetheless be sustainable as the provisions of the statute cannot override the Constitution. The petitioner further argued

that Section 29(1)(b) of the Land Adjudication Act constituted a procedural technicality which would not stand in the face of Article 159(2)(d) of the Constitution which enjoins the court to administer justice without undue regard to procedural technicalities. I do not agree that the provisions of the Land Adjudication Act that deal with the process and procedure of adjudication would constitute procedural technicalities. The Act sets out in considerable detail the process of adjudicating people's interests and rights over land the subject of adjudication before such land is demarcated for issuance of individual titles on registration. The Act equally sets out a dispute resolution mechanism during the process of land adjudication. The petitioner participated in the adjudication process and invoked the dispute resolution mechanism up to the end resulting in the decision of the Minister on the appeal where the petitioner's appeal was rejected.

14. In recent judgment of this court in the case of **Lepore Ole Maito –vs- Letwat Kortom & 2 Others [2016] eKLR** the court considered the application of the provisions of the Land Adjudication Act with particular regard to the dispute resolution mechanism. In the case, the court stated:-

**“The Land Adjudication Act, sets an elaborate procedure through which the rights and interests of all persons is to be established and once that process and procedure is followed and completed the determination of such rights and interests is final. The Act provides an appropriate mechanism for resolution of any disputes. The Minister is the apex in that dispute resolution mechanism and once an appeal is made to the Minister and determined under the provisions of Section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister's decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction.”**

15. The petitioner in the present case had his dispute dealt with in accordance with the provisions of the Land Adjudication Act and his appeal to the Minister was determined albeit against him. The Minister's decision in terms of Section 29(1)(b) was final. The Director of Land Adjudication and Settlement conveyed the decision of the Minister to the Chief Land Registrar as required under Section 29(3)(b) of the Act for implementation. The instant petition is an attempt at reversing what had properly and validly been done pursuant to the provisions of the Land Adjudication Act. The petition is misconceived having been brought in total disregard of the law and in my view the same constitutes abuse of the court process. The Kenya Constitution, 2010 cannot be invoked to resurrect matters that had been duly resolved through due process such as the matter that the petitioner wishes to revive through the instant petition.

16. I accordingly uphold the preliminary objection taken by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and I order the petition to be struck out in its entirety against all the respondents. I make no order for costs for the petition and each party will bear their own costs of the petition.

17. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 28<sup>th</sup> day of April, 2017.**

**J. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the petitioner

Mr. Ayienda for the 1<sup>st</sup> respondent

Ms. Mireri for Ochwal for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents

Milcent court assistant

**J. MUTUNGI**

**JUDGE**