



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

PETITION NO. 47 OF 2015

**IN THE MATTER OF A PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION
OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF**

**THE PETITIONERS UNDER ARTICLES 35, 40 AND 47 OF THE CONSTITUTION OF KENYA
2010**

AND

**IN THE MATTER OF THE ACTIONS OF THE RESPONDENT IN UNFAIRLY AND
ARBITRARILY**

**EXCLUDING THE NAMES OF THE PETITIONERS FROM THE CONTINUATION SHEET
AND DENYING THEM ACCESS TO INFORMATION IN RESPECT OF ADJUDICATION
OF OLOIRIEN ADJUDICATION SECTION "B"**

BETWEEN

KILUSU JULIUS SILE AND 60 OTHERS.....PETITIONERS

AND

THE CHAIRPERSON,

OLOIRIEN ADJUDICATION SECTION "B" COMMITTEE....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION.....2ND RESPONDENT

THE LAND ADJUDICATION OFFICER, TRANSMARA.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The petitioner's Notice of Motion dated 15th October 2015 made under Rules 3, 4, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 Article 1, 3, 21, 23 and Article 165 (3) (b) of the Constitution of Kenya and all other enabling provisions of the law seeks inter alia the following orders:-

1. That the respondents herein be restrained by means of an interim conservatory order from registering new members or carrying out any further adjudication processes on Oloirien Adjudication Section "B" (hereinafter also known as suit land) pending the hearing of this application inter partes and or further orders of the honourable court.

2. THAT the respondents herein be restrained by means of an interim conservatory order from registering new members or carrying out any further adjudication processes on Oloirien Adjudication Section "B" pending the hearing of this petition inter partes and or further orders of the honourable court.

2. The application was supported on the grounds set out on the face of the application and on the supporting affidavit by Kilusu Julius Sile one of the petitioners in this case who had the authority of the other petitioners to swear the affidavit on their behalf. The grounds on which the application is premised are as follows:-

1. THAT the petitioners have at all material times been residents of Oloirien Group Ranch which is their ancestral land and which had never been adjudicated.

2. THAT sometimes in the year 2014, the Government, through the Trans Mara Land Adjudication Office and the residents proposed and agreed to adjudicate the subject land and it was agreed that person on the ground would be settled and registered as proprietors of the areas they occupied.

3. THAT the 1st respondent and members of his committee have fraudulently and irregularly removed names of the petitioners from the continuation sheet in respect of the adjudication process and have conducted a process which is shrouded in secrecy through concealing crucial information regarding the adjudication process from the petitioners.

4. THAT the actions of the 1st respondent and his committee are in violation of the rights of the petitioners to own property and ultra vires their mandate as the duly constituted committee to carry out an adjudication process within Oloirien Adjudication Section "B".

5. THAT the said actions of the respondents are illegal and unlawful and meant to deny petitioners a right to a fair process and the right to own and enjoy private property as guaranteed by the Constitution of Kenya, 2010.

6. That it is in the public interest and for ends of justice to be met for this application to be heard on priority basis.

3. The 1st respondent, the chairperson Olorien Adjudication Section "B" committee, entered appearance on the 2nd November 2015 and on the same date gave notice of preliminary objection to the petitioner's application challenging the competence of the application and listed the following grounds in support of the preliminary objection:-

1. That the application herein is fatally defective, incompetent and bad in law and the same ought to be struck out ex debito justitiae.

2. That no rights have been demonstrated to have been breached.

3. **Petitioners have a better alternative remedy that will deal with the issues raised.**

4. **That the application and the suit is legally untenable and incurably defective and no amount of amendments can cure the defect.**

i. **The honourable court's jurisdiction to deal with the claim herein has been expressly ousted by the mandatory and express clear provisions of section 30 of the Land Adjudication Act.**

ii. **The claim herein is prohibited by the express provisions of Section 26 of the Land Adjudication Act Cap 284 Laws of Kenya.**

iii. **That the land the subject of claim was finalized and the plaintiffs who claim to have an interest in the land, the same are bereft of the requisite locus standi to purport to lodge any claim touching on or relating to Olorien Adjudication Section.**

iv. **That the entire suit and the subject application are otherwise an abuse of the due process of court and the petitioners are guilty of lachness.**

v. **That the suit herein is otherwise non-starter.**

4. When the above matter came before me on 3rd November, 2015, I directed that the preliminary objection be disposed first and that the same be argued by way of written submissions. The 1st respondent filed submissions dated 4th February 2016 in support of the preliminary objection while the petitioners filed submissions in reply dated 19th April 2016 on 21st April 2016.

5. I have considered the petitioners Notice of Motion, supporting affidavit and annexures, the respondents' notice of preliminary objection and the written submissions filed by their respective advocates. The issue for determination by the court at this stage is whether the preliminary objection taken by the 1st respondent is sustainable or not. The court of appeal for **East Africa in the case of Mukisa Biscuit Co. –vs- West End Distributors [1969] E. A 696** considered what constitutes a preliminary objection. **Sir Charles Newbold, P** in the case stated thus:-

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Thus a preliminary objection to be sustainable must be on clear points of law and should as much as possible not entail the delving into contested facts and/or the investigation of any set of facts and/or evidence in order to establish the facts or evidence in support of the objection.

6. Does the respondents' preliminary objection satisfy the criteria of a preliminary objection? The petitioner's application is premised on allegations that the respondents have excluded them (petitioners) from the continuation sheet of the Olorien Adjudication Section and are seeking the intervention of this court to be included. Under the provisions of Land Adjudication Act, Cap 284 Laws of Kenya the court has no jurisdiction to entertain any dispute arising out of the adjudication process unless the adjudication process is completed and/or consent has been given by adjudication officer for the suit to be brought. The Land Adjudication Act sets out the procedure to be followed by parties in having their claims recorded whenever an adjudication section is declared and further also sets out the procedure to be followed by any party who has been or is aggrieved by the adjudication process.

Section 13 (1) provides thus:-

1) Every person who considers that he has an interest in land within an adjudication section

shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the Notice published under section 5 of this Act.

Following the adjudication of all claims by the adjudication officer and the adjudication committee, an adjudication register which comprises the demarcation map and the adjudication record is published and any person with an objection to the adjudication register under section 26 of the Land Adjudication Act has a period of sixty (60) days to make the objection.

Section 26 provides thus:-

1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

The Act further under section 29 provides an avenue of appeal to the Minister by any party aggrieved by the determination of the adjudication officer under Section 26 of the Act.

Section 29 provides as follows:-

1. Any person who is aggrieved by the determination of an objection under section 26 of the Act may, within sixty days after the date of the determination, appeal against the determination to the minister by:-

a. Delivering to the minister an appeal in writing specifying the grounds of appeal, and

b. Sending a copy of the appeal to the Director of Land Adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

7. In the instant case, upon the petitioners writing a letter inquiring whether their names appeared in the continuation register and receiving a response that their names were not there, the petitioners in terms of section 13 of the Act ought to have lodged a claim to the recording officer and/or if the adjudication register had been published to the adjudication officer. The Act as illustrated above sets out an elaborate and comprehensive procedure for dealing with any dispute that arise during the adjudication process. As is evident under section 30 of the Act, the decision of the minister is final. The jurisdiction of the court is clearly ousted and at any rate cannot be invoked unless the process set out under the Act has been exhausted.

8. In the case of **Mohamed Ahmed Khalid (Chairman) and 10 Others –vs- Director of Land Adjudication & 2 Others [2013] eKLR** Angote J. held:-

“47. The law that was applicable for the ascertainment of land rights and interests over trust land is the Land Adjudication Act Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the land adjudication and settlement officer, the land adjudication committee, the land arbitration board and the minister’s appeal committee

54. Indeed, before the Director signs the certificates of finality, the Land Adjudication Act provides that the adjudication register must be published which shall be followed with the

hearing, determination and implementation of objections in respect to the adjudication register.

57. The petitioners have not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the manner in which the adjudication process was carried out.”

“58. Considering that the Land Adjudication Act, Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the Land Adjudication Act, Cap 284, I find that the petition was prematurely filed.”

9. In the instant case there is no evidence that any objection was filed by the petitioners as provided for in the Act and that being the case the petitioners cannot demonstrate that their rights have been violated without having sought an opportunity to be heard in an objection as provided under the Land Adjudication Act. As far as the evidence on the petitioners’ application reveals, the suit land is still under adjudication since the register has not been shown to have been closed and published for scrutiny as provided under Section 25 of the Act. Under the Land Adjudication Act, a court cannot entertain a claim on interest in land which is still under adjudication without the consent of the adjudication officer as provided under section 30 of the Act.

Section 30 provides as follows:-

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 respects under Section 29 (3) of this Act.

2. Where any such proceedings were begun before the publication of the notice under section 5 of the Act, they shall be discontinued unless the adjudication officer having regard to the stage which the proceedings have reached, otherwise directs.

10. In the case of **Justus Ntuiti –vs- Mwirichia Kaumbuthu [2004]** eKLR Onyancha J. considered the application of sections 29 and 30 of the Act observed as follows:-

“The way I understand (section 30) is that no person shall institute a civil case in court and no court shall entertain a case with an interest in a place of land in a section which has been declared an adjudication section under section 5 of the Act except with the consent of the adjudication officer or until the adjudication record has been declared finalized as per the provisions of section 29 of the Act.”

11. Similar sentiments were also expressed in the case of **Benjamin Okwaro Estika –vs- Christopher Anthony Ouko & Another [2013]** eKLR where the Court of Appeal commenting on the application of section 29 and 30 of the Act stated:-

“That being so, the mandatory requirements of Section 30 (a) had to be complied with i.e consent of the land adjudication officer had to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it.

From what we have discussed above, it will clear that we are in full agreement with the learned judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained. We need to add that it was unfortunate that the

respondents, having observed that the suit was premature on grounds that certain adjudication processes had not been completed, did not prefer a preliminary objection on grounds that the court had no jurisdiction to entertain it as no consent had been obtained from the adjudication officer. Had that been done, perhaps a lot of court's time and parties resources would have been saved. It is equally unfortunate that both parties in a consent order we have reproduced above realized that in effect land adjudication process had not been completed and yet they proceeded with the hearing of the matter only leaving the judge to come up with the issue after full hearing.”

12. From the above judicial pronouncements I have referred to, it is patently clear that the courts have held they have no jurisdiction to deal with a dispute where the process of adjudication is ongoing unless the adjudication officer has under section 30 (1) of the Act given his consent for the party to institute court proceedings. No such consent was granted by the Adjudication officer to the petitioners to enable these proceedings to be brought. In the present matter there is no doubt that the process of adjudication is ongoing and that the adjudication register has not been closed and/or published. The court in the premises cannot properly get seized of this matter. It lacks the jurisdiction to deal with the matter.

13. I accordingly find and hold that the 1st respondent's preliminary objection has merit and I uphold the same. The petition by the petitioners is hereby ordered struck out. However having regard to the circumstances of this matter I make no orders for costs and each party will bear their own costs.

Ruling dated, signed and delivered at Kisii this 23rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the petitioners
..... for the respondents
..... for the Court Assistant

J. M MUTUNGI

JUDGE