Ole Pere & another v District Land Adjudication and Settlement Officer, Narok South & 24 others; Pere & another (Interested Parties) (Civil Appeal 79 of 2019) [2025] KECA 113 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 113 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 79 OF 2019

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

JANUARY 24, 2025

BETWEEN

MUSANA OLE PERE ..... 1ST APPELLANT

FRANCIS PARIKEN NDOINYO ..... 2ND APPELLANT

AND

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, NAROK SOUTH ..... 1ST RESPONDENT

MINISTRY OF LAND AND PHYSICAL PLANNING ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

KAMAKEI OLE NYAKUNI ..... 4TH RESPONDENT

PETER KONANA SINTI ..... 5TH RESPONDENT

CHARLES NTINAI OLE MPOE ..... 6TH RESPONDENT

LEINA OLE MUSANKA ..... 7TH RESPONDENT

MUSANA OLE KOIRANG ..... 8TH RESPONDENT

KAANO OLE SAIPIRI ..... 9TH RESPONDENT

KINANTA OLE PING'WA ..... 10TH RESPONDENT

KERINGOT OLE KARIANKEI ..... 11TH RESPONDENT

PUSHATI OLE SAYIATON ..... 12TH RESPONDENT

AITAOS OLE MARPE ..... 13TH RESPONDENT

PATIO OLE NGOTIEK ..... 14TH RESPONDENT

DANIEL SEURI OLE MAKO ..... 15TH RESPONDENT

MOITALEL OLE ROTIKEN ..... 16TH RESPONDENT

TENTERE OLOLKIJAPE ..... 17TH RESPONDENT

DANIEL MEITUTUO OLE SAIGEU ..... 18TH RESPONDENT

MEISI OLE ROTIKEN ..... 19TH RESPONDENT

JUMA OLE SAMPU-ERRAP ..... 20TH RESPONDENT

PAUL OLE SENAH ..... 21ST RESPONDENT

MOKOLO OLE NKOYO ..... 22ND RESPONDENT

STANLEY OLE MPOE ..... 23RD RESPONDENT

JAMES MWANA KARIANKEI ..... 24TH RESPONDENT

KOTOINE OLE NCHUALA ..... 25TH RESPONDENT

AND

PARMALAI PERE ..... INTERESTED PARTY

PATRICK PENIKI OLE TWALA ..... INTERESTED PARTY

(Being an appeal from the ruling and orders of the Environment and Land Court of Kenya at Narok (M. Kullow, J.) dated 16th July 2019 in Constitutional Petition No. 19 of 2018)

JUDGMENT

1. The facts which triggered the litigation before the High Court culminating in this appeal are rather straight forward and essentially common ground or uncontroverted. On 14th October 2008, the Naikarra/Osarara sub-location in Naikarara Location, Narok South District was declared an adjudication Section. Pursuant to Section 6 of the *Land Adjudication Act* (the Act) the 1st to the 22nd respondents were appointed members of the Adjudication Committee. Musana Ole Pere and Francis Pariken Ndoinyo (the appellants) complained that their requests to the chairman of the Adjudication Committee for information regarding the adjudication process went unanswered.

2. As a result of the above, the appellants filed a Constitutional Petition No.19 of 2018 dated 28th November 2018 against the respondents at the Environment and Land Court (ELC) at Narok. Their contestation was that the survey work was being done by a private surveyor instead of a public officer contrary to the law, that the land adjudication process was flawed and marred by grave illegalities, that the process violated the land owners' rights, that no public participation was undertaken, that the process was not transparent and it violated the national values and principles of good governance, that the surveyor placed the beacons without involving the land owners and in total disregard of the landscape rendering some areas inhabitable. In a nutshell, the appellants were alleging lack of transparency in the adjudication and demarcation process.

3. In their petition, they prayed for the following orders: (a) that the survey be nullified and undertaken afresh by a government surveyor, (b) a declaration that the 1st respondent's actions were unconstitutional, null and void, (c) a permanent injunction stopping the adjudication process, (d) an

order directing the Land Adjudication Officer to hold a Public Baraza in Naikarra Area within 21 days from the date of the judgement to sensitize the land owners on the adjudication process, (e) an order directing that the Land Adjudication Committee comprising of the interested parties be disbanded and a new Land Adjudication Committee be appointed and the adjudication be undertaken afresh.

4. Concurrent with the petition, the appellants filed a notice of motion also dated 28th November 2018 seeking an injunction to restrain the 1st respondent or his agents from continuing with the adjudication process pending the hearing and determination of the petition, an order restraining the 4th to 25th respondents from performing the functions of the Adjudication Committee pending the hearing and determination of the petition, and costs.

5. In response to the petition and the application, the 5th to the 25th respondents filed a notice of preliminary objection dated 6th December 2018 contending that the suit offended the provisions of Section 30 (1) of the Act, that the appellants' application was grossly incompetent, misconceived a non- stator and abuse of the court process. They also filed a replying affidavit sworn by Kamakei Ole Nyakuni.

6. The gist of their objection was that the trial court lacked jurisdiction to hear and determine both the application and the petition before it because a court cannot entertain a claim or interest in land where the land is still under adjudication without the consent of the adjudication officers as provided by Section 30 of the Act. They contended that the adjudication was still on going and since the appellants had not obtained consent in terms of the above Section, the court was divested of its jurisdiction to entertain the case. It was their case that the Sections 29 and 30 of the Act provide an elaborate procedure which must be exhausted before approaching the court. They cited Owners of the Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd [1989] KLR in support of the proposition that without jurisdiction, a court has no power to entertain a case and where a court acts without jurisdiction, its decision is a nullity.

7. The 1st - 3rd respondents supported the preliminary objection arguing that the appellants should have first obtained the consent of the Land Adjudication Officer before approaching the Court as provided under Section 30 of the Act, hence their petition was premature.

8. In opposing the preliminary objection, the appellants filed a replying affidavit sworn on 2nd January 2019 by the 2nd appellant who averred that the demarcation and adjudication process of Naikarra/ Osarara Adjudication Section was marred by numerous irregularities committed by the Adjudication Officer and her subordinates including non-involvement of the land owners, that the survey was undertaken by a private surveyor contrary to the provisions of the Act and therefore the entire process was void ab initio. It was also the appellants' contention that they demanded the Land Adjudication Officer to avail to them copies of the adjudication notice, maps and report on the process but all were denied. They stated that vide two letters dated 16th October 2018 and 12th November 2018, they reiterated their complaints and sought for consent however, the said letters never elicited any response and thus their request to get consent was denied.

9. The appellants maintained that Section 30 of the Act was not applicable in constitutional petitions because the said Section only envisages Civil Proceedings claiming an interest in land. They argued that in addition to claiming an interest in land, they were also challenging the constitutionality of the adjudication process, therefore, Section 30 of the Act was inapplicable to their case.

10. After considering the petition and the preliminary objection, the learned judge framed two issues for determination, namely,

(a) whether the appellants had obtained consent under Section 30 of the Act prior to the filing of the petition, and

(b) whether the Provisions of Section 30 are applicable where a party raises constitutional issues.

11. In the impugned ruling delivered on 16th July 2019, the learned judge held that under Section 30 of the Act, the appellants were mandatorily required to seek and obtain the consent of the Land Adjudication Officer. Dismissing the argument that before the Court were constitutional questions, the learned judge stated that the petitioners' petition and their affidavits clearly showed that the petitioners are aggrieved by the process by which the entire adjudication was undertaken. Accordingly, the learned judge found that the preliminary objection was merited and allowed it and struck out the petition for failure to comply with Section 30 of the Act.

12. Aggrieved by the said verdict, by a memorandum of appeal dated 3rd September 2019, the appellants appealed to this Court citing 10 grounds which were rationalized into three main issues in the appellants' submissions dated 1st March 2024 as follows:

(a) whether Section 30 of the *Land Adjudication Act* is applicable in a petition seeking enforcement of constitutional rights and freedoms;

(b) whether the issues/dispute raised in the petition can be dealt with under Sections 29 and 30 of the Act; and

(c) whether the respondents' preliminary objection met the required threshold.

13. The appellants pray that this Court sets aside the said ruling in entirety and the 4th to 25th respondents' preliminary objection dated 6th December 2018 be dismissed for lack of merits, that their constitutional Petition dated 28th November 2018 be remitted back to the trial court for hearing and determination on merits, and that the costs of this appeal and the proceedings before the ELC be borne by the respondents.

14. At the hearing of this appeal on 12th November 2024, learned counsel Ms. Wanjiku Thiongo appeared for the appellant. Learned Counsel Mr. Eredi held brief for Ms. Fatma for the 1st 2nd and 3rd respondents while Mr. Ole Kamwaro appeared for the 4th to 25th respondents. The appellants' written submissions together with their case digest are dated 1st March 2024. The 1st, 2nd and 3rd respondents' submissions are dated 9th June 2024 while the 4th to 25th respondents' submissions together with their case digest are dated 25th April 2024.

15. In support of the appeal, regarding the first ground, M/s Wanjiku submitted that Section 30 of the Act does not apply to disputes questioning constitutionality of the adjudication process or breach of constitutional rights. She maintained that the appellants' petition before the trial court was challenging the constitutionality of the process followed by the respondents in undertaking the adjudication process. She cited the ELC decision in Republic vs. Musanka Ole Runkes Tarakwa & 5 Others Ex-parte Joseph Lesalol Lekitio & Others [2015] eKLR in support of the holding that a suit questioning the process of land adjudication as opposed to determination of interests in land does not require the consent of the Land Adjudication Officer.

16. Concerning the second ground, counsel maintained that there is no dispute resolution mechanism under Sections 29 and 30 of the Act for resolving disputes questioning the legitimacy and constitutionality of the adjudication process. Therefore, the appellants' grievances could not be adequately resolved under the said provisions. In support of this submission, she cited the High Court decision in Republic vs. Parliamentary Service Commission & 2 Others; Morris Kimuli & Another

(Interested Parties) [2021] eKLR that whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitize a patently illegal action just because there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial.

17. Lastly, on the third ground of appeal, Ms. Wanjiku submitted that the respondents' preliminary objection did not meet the threshold of a preliminary objection as was held in Lemitei Ole Koros & Another vs. Attorney General & 3 Others (2016) eKLR because there were contested facts as to whether or not the consent of the Land Adjudication Officer was obtained. Nevertheless, counsel argued that from the appellant's correspondence with the Office of the Director, Land Adjudication and Settlement as well as the Office of the Cabinet Secretary, Ministry of Lands which elicited no response, it is evident that the consent for filing the suit was sought from the Adjudication Officer, the Director of Land Adjudication and Settlement as well as the minister and the said officers were aware of the intended court proceedings.

18. In opposing the appeal, learned counsel for the 4th to 25th respondents Mr. Ole Kamwaro submitted that as pleaded in their petition dated 28th November 2018, the appellants' grievances did not raise constitutional issues but were basically allegations about interest in land which were essentially premised on misconception of the adjudication process.

19. Counsel argued that if the appellants honestly believed that their request for a consent had been denied, their recourse was not to file the petition but rather an appeal to the Cabinet Secretary in charge of Land within 28 days of such refusal as provided under Section 30 (3) of the Act. Counsel submitted that the appellants instituted court proceedings concerning their interest in land without obtaining consent from the Land Adjudication Officer as the law dictates. Therefore, the learned judge cannot be faulted for striking out their petition dated 28th November 2018.

20. Mr. Kamwaro submitted that the appellants' argument that the dispute could not be dealt with under Sections 26, 29 and 30 of the Act was predicated on woeful misconception of the imperatives that form the foundation of the dispute resolution mechanisms set out under the said provisions. Mr. Kamwaro cited the High Court decision in Mohamed Ahmed Khalid (Chairman) and 10 Others vs. Director of Land Adjudication & 2 Others [2013] eKLR that the *Land Adjudication Act* has an elaborate mechanism of appeal in the event an individual is aggrieved by its decision and that the court cannot substitute the established bodies which are supposed to deal with these complaints. In conclusion, counsel maintained the appellants failed to pursue their complaints within the mechanisms provided under the Act, therefore, the instant appeal ought to be dismissed with costs to the 4th – 25th respondents.

21. Learned counsel for the 1st, 2nd and 3rd respondents Mr. Eredi adopted Mr. Kamwaro's submissions and argued that an aggrieved person ought first to seek and obtain the consent as required by the Section 26 of the Act or alternatively await until the conclusion of the process and file a case, or use the mechanisms that are set out in the Act. Counsel argued that the appellants cannot invoke a blanket issue like public participation which in any event is inapplicable to the issues at hand.

22. Mr. Eredi also submitted that under the Act, once an adjudication process is issued, a gazette notice is issued notifying the public whose rights will be affected that the adjudication process has commenced.

23. Counsel maintained that Section 30 of the Act cannot be said to limit fundamental rights because it only requires an aggrieved person to seek consent before filing a suit. Further, the purpose of the Act is to ascertain a right in land, therefore, it does not bar a person from approaching the court. In conclusion, Mr. Eredi argued that the adjudication process having been concluded, and the rights of

the land owners in the adjudication section having been ascertained and registered, this appeal should be dismissed since no prejudice will be occasioned to the appellants because it is presumed that if they had any specific complaints, they ought to have addressed them as provided by the Act.

24. During the hearing of this appeal, Mr. Eredi drew this Court's attention to the fact that the adjudication process had been finalized and titles had already been issued to the individual land owners in the adjudication Section, therefore, this appeal had been spent. Asked by the Court whether this appeal had been overtaken by events, learned counsel for the appellants, Ms. Wanjiku conceded that indeed the adjudication process was finalized and the titles had been issued to the various land owners. However, counsel was adamant that there were cases of double allocation of land which could only be addressed by the trial court, therefore, the appellants' prayer "b" in the petition before the superior court would take care of the finalized process since it prays for the entire process to be declared unconstitutional, and if the said prayer is allowed, any consequential action will be rendered null and void. Counsel also stated that she will apply for amendment of the petition before the Superior Court to address the new developments.

25. We have carefully studied the entire record. The crux of the appellants' case as disclosed by their petition filed before the trial court is that the appellant sought to stop the adjudication process claiming that the survey work was done by a private surveyor as opposed to a public surveyor as required by Section 4 of the Act and thus the outcome thereof is null and void. Further, the survey was tainted by irregularities and illegalities. Hence, if the process of adjudication is allowed to continue uncorrected, the constitutional rights of the land owners in Naikarra/Osarara adjudication section will be violated and the damages suffered will be substantial.

26. It is common ground that the adjudication process was finalized and titles have since been issued to the various members. Ms. Wanjiku also alluded to the need to amend the petition before the Superior Court in order to reflect the situation obtaining at the moment. The question which begs for an answer is whether the appellants' petition and this appeal have been caught up by the doctrine of mootness.

27. The law of mootness inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use or when the cause of action has been lost or overtaken by intervening events. In such instance, there is no actual substantial relief which a litigant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.

28. The Supreme Court of Kenya Institute for Social Accountability & Another vs. National Assembly & 3 Others & 5 Others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment) after considering authorities on the doctrine of mootness held:

> " 47. The common thread from the above decisions is that a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events

occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot."

29. This Court in Okiya Omtatah Okoiti & 2 Others vs. Attorney General & 4 Others [2020] at paragraph 65, while citing the High Court decision in Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) vs. County Government of Nairobi [2019] eKLR that:

> "4. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact...
>
> 15. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. In the instant case, a consideration of the petition based on a press statement which was later followed by a legal notice which amended the provisions of the governing Regulations would become academic, cosmetic and of no utilitarian value or benefit as the aim of the petition has been overtaken by the amendments. See Oladipo vs. Oyelami [1989] 5 NWLR (Pt. 120) 210; Ukejianya vs. Uchendu [1950] 13 WACA 45
>
> 16. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations. See Plateau State vs. A.G.F. {2006} 3 NWLR (Pt. 967) 346 at 419 paras. F-G wherein the Nigerian Supreme Court defined an academic suit or petition the above terms..."

30. Similarly, the constitutional court of South African in Normandien Farms (Pty) Limited vs. South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others [2020] ZACC 5 discussing the doctrine of mootness stated as follows:

> "(47) Mootness is when a matter 'no longer presents an existing or live controversy'. The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are 'abstract, academic or hypothetical'.
>
> (48) This Court has held that it is axiomatic that 'mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require'. This Court 'has discretionary power to entertain even admittedly moot issues'.
>
> 50. Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter.
>
> These include:
>
> SUBPARA i.
>
> Whether any order which it may make will have some practical effect either on the parties or on others;
>
> SUBPARA ii.

The nature and extent of the practical effect that any possible order might have;

SUBPARA iii.

The importance of the issue;

SUBPARA iv.

The complexity of the issue;

SUBPARA v.

The fullness or otherwise of the arguments advanced; and

SUBPARA vi.

Resolving the disputes between different courts."

31. Determining whether an appeal is moot or not requires a two- step analysis. A court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (See the Supreme Court of Canada decision in Borowski vs. Canada (Attorney General) [1989] 1 SCR 342)

32. Evidently, with the conclusion of the adjudication process and issuance of title deeds to the land owners, all the prayers/reliefs sought in the petition dated 28th November 2018 were overtaken by events since they sought to injunct the adjudication process which had been finalized and titles issued to persons who are not parties to these proceedings. Applying the above cited time tested and refined principles of law to the instant case, we are persuaded that the issues pursued in this appeal are moot. No court of law can knowingly engage in an exercise of determining moot issues which present no live controversy. In the circumstances, the appeal is hereby dismissed with no orders as to costs.

33. Having concluded as herein above, we find no reason to determine the merits or otherwise of the appeal, save to underscore that the failure to obtain consent as required by Section 31 (1) of the *Land Adjudication Act* was fatal to the appellants' case because the mandatory requirements of the said Section cannot be cured by filing a constitutional petition as happened in this case.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2025.

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.