



Ndurya & another v and Adjudication and Settlement Officer Kinango Sub County & 2 others; Idi & 2 others (Interested Parties) (Environment & Land Petition E005 of 2023) [2024] KEELC 4183 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEELC 4183 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION E005 OF 2023**

AE DENA, J

APRIL 26, 2024

BETWEEN

KAEMA SAID NDURYA 1ST PETITIONER

SAID KAEMA 2ND PETITIONER

AND

LAND ADJUDICATION AND SETTLEMENT OFFICER KINANGO SUB COUNTY 1ST RESPONDENT

CABINET SECRETARY OF LANDS & SETTLEMENT 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

MWAKA JUMA IDI INTERESTED PARTY

HALIMA NZZIJE NZAI INTERESTED PARTY

CHONDO JUMA IDI (THE ADMINISTRATOR OF THE ESTATE OF THE LATE NZARA JUMA) INTERESTED PARTY

JUDGMENT

1. The Petitioners case as contained in the petition dated 9/3/2023 and the supporting affidavit accompanying the same sworn by Kaema Said Ndurya is that they are members of Mwamkala Clan whose members include the Petitioners, the interested parties herein and further the successors of one Juma Idd. It is stated that the said Juma Idd settled in Dzivani from Mwaro. That sometime in the year 1988 a land dispute arose between Juma Idd and Ndurya Said Ndurya at the Kinango District Office the same being award No 24 of 1988. The matter was later brought before the magistrate's court in



Mombasa and the judgement adjudicated upon at the district office was adopted as an order of the court vide Mombasa CMCC No 24 of 1988 on 3/3/2004.

2. That pursuant to the Judgement, the Petitioners forwarded their names to the Land Adjudication and Settlement Officer to be allocated land parcels with the Ref. Nos 792,937 and 1369 as successors of the late Ndurya Said Ndurya but instead they discovered that the interested parties had been registered in their place. The Petitioners claim that their rights to legitimate expectation have been violated as the parcels are their ancestral land. They state that they are entitled to protection of their rights as envisaged under articles 27, 40, 23 and 47 of the Constitution and hence the instant petition. At paragraph 21 of the petition, the Petitioners outline the articles of the Constitution that have allegedly been violated against them as Articles 10,20,21,22,47 and 159. The Petitioners pray for; -
 - a. A declaration that the Land Adjudication Officer had no power in law to review, alter and/or set aside a finding of any court of law.
 - b. A declaration that the finding and the judgment in the tribunal case no 24 of 1988 Ndurya Said Ndurya Versus Juma Idd as upheld by the Chief Magistrate at Mombasa Civil Suit No 24 of 1988 is binding on the Kinango Land Adjudication and Settlement Officer and the same remains in force unless set aside and or reviewed by a court of competent jurisdiction.
 - c. A declaration that the Petitioners are entitled to be allocated/registered as the legitimate and/or beneficial owners of their ancestral land known and demarcated as Land Reference Nos 792,937 and 1369
 - d. A permanent injunction issued restraining the 1st and 2nd Respondents by themselves, agents, servants, employees or otherwise howsoever from effecting registration and/or issuing title deeds in respect to the land herein to the interested parties and/or any other person other than the petitioners
 - e. An order of injunction be issued compelling the respondents to allocate/register the Petitioners as the beneficial and/or legitimate owners of the subject ancestral land originally demarcated as land reference no's 792,937 and 1369 respectively.
 - f. Costs of the petition be borne by the respondent
 - g. Any other relief that the honourable court may deem fit and expedient to grant.
3. Further to the petition, the Petitioners filed a list of documents containing the following documents; letters requesting for consent dated 31/1/2023, consent to institute proceedings dated 1/2/2023, Letter dated 18/1/2006, Letter dated 20/1/2010, Beacon certificate dated 23/2/2010 and Court order.

Response to the Petition

4. The Attorney General filed a Memorandum of Appearance on 7/6/2023 on behalf of the Respondents herein. Subsequently a replying affidavit in response to the petition was filed. The same is sworn by Ahmed Hidi Jilo a Demarcation Officer working under the Ministry of Lands Department of Land Adjudication and Settlement. It is confirmed and admitted that indeed the suit properties were adjudicated over by the District Officer Kinango Division but judgement was entered in favour of the Interested Parties herein and not the Petitioners as alleged.
5. That the said judgement was adopted as an order of the court and the same was adhered to by the Gandini Adjudication Section and demarcated as follows; -
 1. Parcel 792- Mwaka Jumaa



2. Parcel 937- Halima Nzije Nzai
3. Parcel 1369- Nzara Jumaa
6. The deponent stated that the Petitioners have misstated the facts to court and not as per the orders issued by the court on 3/10/2004. That the Petitioners have not demonstrated any sufficient reason to warrant grant of the orders sought and as such the petition ought to be dismissed with costs.
7. The Interested Parties did not participate in this petition. On 18/9/2023 the court informed the petitioners counsel on its dissatisfaction on the manner in which service had been effected upon the Interested Parties. Counsel agreed to effecting service for a second time. The court confirms that service was effected upon the Interested Parties as per the affidavit of service filed before court on 5/10/2023 sworn by Ochieng Maurice Odongo. The failure to participate therefore is not occasioned by failure of service and as such the court duly takes note of the fact that the Interested Parties were aware of the petition being before court.

Submissions

8. It was further ordered and agreed that the petition would be dispensed off by way of written submissions. The Petitioners submissions are dated 24/10/2023 and were filed before court on 14/11/2023. They highlight two issues for determination being; Whether the land adjudication and settlement officer has jurisdiction to vary and/or review final orders issued by a court of law and whether this court can issue orders sought by the Petitioner?
9. On the first issue for determination it is submitted that Section 10 of the *Land Adjudication Act* sets ought the powers of a land adjudication officer. That under section 9 of the said Act the adjudication officer is empowered to hear and determine any objection to the adjudication register submitted under section 26 of the Act. The Petitioners state that the land was registered under the Interested Parties names as confirmed by the adjudication officer Gandini as opposed to the order which entailed the registration of the suit properties in the names of the Petitioners. The Petitioners submit that the adjudication officer acted ultra vires and had no powers to review, alter or set aside the orders earlier issued by the court.
10. The Petitioners refer the court to the provisions of Section 30 and 12 of the *Land Adjudication Act* on how suits falling under the adjudication section should be dealt with. That from the said provisions the settlement officer is devoid of powers to vary a court order.
11. On the second issue for determination it is submitted that the petitioners are entitled to protection of their rights as envisaged under Article 40 of *the Constitution*. The Petitioners refer to the principle of exhaustion as was stated in the case of Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 Others [2015] eKLR. It is stated that the Petitioners had exhausted the dispute resolution mechanism provided for under the *Land Adjudication Act* before seeking the courts intervention and as such the orders sought should be granted.
12. The 1st, 2nd and 3rd Respondents' submissions are filed before court on 29/2/2024 and addressed two issues namely; Whether the court has jurisdiction to hear and determine this matter and Whether the petition has any merit.
13. On the 1st issue for determination, it is submitted that this court has no jurisdiction to determine the petition pursuant to the provisions of section 7 of the *Civil Procedure Act*. This is for the reason that the issues raised in the petition were directly and substantially in issue and concluded in Chief Magistrate Mombasa Civil Suit No 24 of 1988 on 3/3/2004.



14. On the second issue for determination it is submitted that under the provisions of Order 2 rule 15 on striking out and amendment of pleadings that raise no reasonable cause of action, are frivolous, vexatious, an embarrassment to the court and abuse of the court process. According to the Respondents, the petition herein is scandalous and ought to be dismissed. The Respondents argument is based on the findings in County Council of Nandi V Ezekiel Kibet Ruto & 6 Others [2013] eKLR. That the petition consists of inaccurate facts and the petitioners have failed to demonstrate sufficient cause as to why they should be granted the orders sought.

Determination

15. Based on the pleadings and the submissions by both parties for and against the petition, the court has identified the following issues for determination;
1. Whether the Land Adjudication and Settlement Officer in charge of Gandini had jurisdiction to adjudicate and register the Interested Parties as owners of the suit parcels 792,937 and 1369 contrary to final orders issued by the court
 2. Whether the Decision of the Land Adjudication and Settlement Officer contravened the Petitioners rights to use and ownership of the suit property.
 3. Whether the Petitioners are entitled to the orders sought
 4. Who bears the costs of the petition.
16. Before delving into the main issues for determination, I must address the issue of this court's jurisdiction as raised by the Respondents. I will however not belabour much into the issue of jurisdiction as raised by the Respondents. This is for the simple reason that the issue of *res judicata* which informs the basis upon which the Respondents claim that this court is devoid of jurisdiction, has been raised in the submissions and not in the response to the Petition. Submissions I must say do not form part of pleadings and hence do not contain evidence.
17. The court cannot rely upon the submissions in making a conscious decision as to whether indeed the issues raised in the petition have been previously litigated upon. I am guided by several authorities and which include in the case of *Ngang'a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

18. Similarly, in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR: Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is



the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

19. Having the above in mind, it is my finding that the issue of jurisdiction was never properly pleaded before court as an issue for determination. But having said that I am of the opinion that the Petitioners are before this court with the main aim of challenging the decision of the Land Settlement and Adjudication Officer Gandini to register the Interested Parties as the proprietors of the suit properties mentioned herein. For the court, that is the main issue in dispute. And it is rather obvious that this court is clothed with the requisite jurisdiction to make a determination on the same. Once it is settled as to whether or not the adjudication officer acted within his/her powers, what will follow is whether grant of the rest of the prayers as sought in the petition is merited.

20. On the first issue for determination, it is not in dispute that issues concerning the suit properties herein were raised before the District Land Adjudication Committee headed by the then District Officer Kinango Division one E N Ndirangu. A copy of the proceedings is attached to the affidavit in support of the petition which this court has perused. At the tail end of the proceedings is the verdict by the tribunal and which I reproduce here below;-

Verdict; the plot belongs to Jumaa Idd and [the Defendant] Ndurya Said Ndurya has no right whatsoever over that plot”.

21. It is trite that in the event that Ndurya Said Ndurya was aggrieved by the above decision, it was imperative of him to appeal against the same by filing first a complaint to the committee within 14 days of its decision as provided for under Section 21[3] of the [Land Adjudication Act](#) and which is later referred to the board of the committee. The court record does not bear any evidence of Ndurya Said Ndurya having pursued this procedure. Instead, the orders granted at the tribunal were subsequently adopted by the Magistrate’s court in MOMBASA CMCC 24 of 1988 on 3/8/2004. Surprising to say the least, these orders and proceedings have been filed before this court as evidence. This has led the court into believing that it is not the contents of the said orders that are in dispute but the fact that the same were perfected by the Land Settlement and Adjudication Officer Gandini.

22. Did the said officer act beyond the scope of his limit/jurisdiction? The answer is in the negative. This is for the simple reason that the duty of the adjudication officer was to simply perfect that which had been declared by the court. As per the court order, it is Juma Idd that had been awarded the land, his successors are the Interested Parties herein. There is no science here, the Petitioners were never awarded the land and that’s just it. On the other hand, having been aggrieved by the decision of the Land Adjudication Officer to register the land in the names of the Interested Parties, the Petitioners should have filed an objection over the same.

23. In the event that the adjudication officer failed to have the objection considered it would behove the Petitioners to thereafter file an objection to the Minister of Lands. This they did not do. This is well provided for under Section 29 (1) of the [Land Adjudication Act](#) Cap 284 Laws of Kenya which thus provides:

Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(1)

(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.

24. I think I have said enough to demonstrate that the suit properties were firstly, never allocated to the Petitioners vide the decision they have relied upon and secondly, the Petitioners failed to pursue the laid down procedures in disputing the said award. The Land Adjudication and Settlement Officer in charge of Gandini therefore had the jurisdiction to adjudicate and register the Interested Parties as owners of the suit parcels 792,937 and 1369 his actions were not contrary to the final orders issued by the court.
25. Having not clearly elaborated how the said rights were abused, the courts hands are tied in making a finding that the said rights were abused as alleged. It is a principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272 where the court stated: -
- Constitutional violations must be pleaded with a reasonable degree of precision.
26. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings. The Petitioners have in my view failed to prove the violations alluded to by way of evidence. It has not been demonstrated how the provisions under Article 10 on the national principles have been violated and all the listed articles which include Articles 20, 21, 22 and 47 on Fair Administrative Action and Article 159.
27. The above discourse is enough to demonstrate that the Petitioners have failed to prove their case as expected, in summary, the orders sought in the petition cannot therefore be granted.
28. The upshot is I find that the Petition dated 9/3/2023 lacks merit and the same is dismissed with costs to the Respondents. The Interested Parties having not participated in the Petition and are not entitled to any costs.

JUDGEMENT READ, DATED AND DELIVERED THIS 26TH DAY OF APRIL 2024.

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A.E DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Otieno for the Petitioner

Ms. Kagoi holding brief for Ms. Lenjo

No appearance for the Interested Parties

Mr. Daniel Disii – Court Assistant

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