



**Rarin & others v Attorney General & others (Constitutional Petition
7 of 2019) [2023] KEELC 16750 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
CONSTITUTIONAL PETITION 7 OF 2019
MN KULLOW, J
FEBRUARY 22, 2023**

BETWEEN

NTERERE OLE RARIN & OTHERS PETITIONER

AND

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA &
OTHERS RESPONDENT**

RULING

1. That court do order that the Order of the Court made on 11/4/2019 and all other consequential orders, Notices and processers issued or made in purported execution of the said order be set aside, varied discharged;
2. That stay of execution of the said order, notices and other process issued or made in purported execution of the said order be granted pending the hearing and determination of the instant applicant.
3. The Application was based on the grounds that the petitioners had obtained orders unprocedurally on 11/4/2019 as there Application of 10/4/2019 was subjudice as there already existed another Application dated 15/3/2019 filed in respect of the same subject matter. The Applicants further contended that there existed an error apparent on the face of the record as the Respondents rights have not crystalized into rights capable of being protected under Article 40 of *the Constitution* of Kenya as the Petitioners / Respondents have used the Order granted on 11/4/2019 to bar the Respondent from carrying on there duties as mandated by a statute. Since all the process of Land Adjudication had come to halt within the Oldeskesi Land Adjudication Section and disenfranchised over 6,500 residents of Oldeskesi Adjudication Sections.
4. The Application was supported by the Affidavit of Kingorosh Ole Mpatiany in which he contends that they learnt that the Petitioner had obtained an exparte order barring the Respondents from carrying



- on with the Land Adjudication processes within the Oldeskesi Adjudication Section which he avers were unprocedural.
5. The Applicants contend that the issuance of the said orders had disenfranchised about 6,500 residents of the Oldeskesi Adjudication Section who were in the process of ascertaining their Land rights within the Adjudication Section despite the government making heavy investment of deploying 33 Surveyors to carry on with the said exercise.
 6. The Applicant further stated that the Court Order issued on 2/4/2019 for inter parties hearing slated for 18/6/2019 was made in the presence of all the parties and was a Consent Order binding on all the parties.
 7. The Petitioners as the Respondents in the instant Application opposed by the Application way of grounds of opposition asserting that the Application is misconceived, incompetent and bad in law and an abuse of the Court process, the Respondents contend that the Applicant rights have not crystallized is misdirected since *the Constitution* of Kenya 2010 gives rights to a Citizen to institute Court proceedings to claim that their rights or fundamental freedom has been denied or violated, infringed or threatened and as such *the Constitution* of Kenya 2010 prevails and overrides the *Land Adjudication Act*.
 8. The Respondents further contended that the assertion of subjudice as having arisen is misdirected as the instant situation does not amount to subjudice.
 9. The Respondent also filed a Replying Affidavit sworn by Dan Koimeren Ntaiyaho is the 2nd Petitioner to oppose the Application in which he asserted that the Order by the court on 11/4/2019 were in their favour and the same was served upon the Applicants and despite the existence of the order, they proceeded and continued with the Demarcation exercise and therefore he opposes the order to vacate and / or vary the same.
 10. The Respondent further contended that Dispute Resolution Mechanism contemplated in the *Land Adjudication Act*, has not been possible because the entire Adjudication process has not been transparent.
 11. I have considered the Application, the grounds and Replying Affidavit in opposition to the same and submissions made by consent for the parties and I find that there are only two twin issues for determination.
 1. Whether the Order of 10/4/2019 were subjudice;
 2. Whether the Petitioners offends the Dispute Resolution Mediation contained in the Land Adjudication.
 12. On the first issue, the Order the Applicants are challenging the order that were issued by a Court of contempt Jurisdiction which vacated the hearing date of 18/6/2019 and directed that the Chamber Summons dated 15/3/2019 and further issued conservatory orders pending the hearing of Chamber Summons on 30/4/2019, the Applicant has not demonstrated how the issuance of the Order hearing of the Application would have been prejudicial as the same would amount to everyday Directions and/ or orders issued by courts in the dispensation of Justice. Furthermore the grant of the Conservatory Order by the Court was in my opinion to preserve the subject matter of the Petition which would otherwise go to waste in the event that such orders to preserve the same is not granted and in view of the above it is my considered view that the Application does not meet the threshold for me to vacate, and/or vary said order.



13. On whether the Petition offends the provisions of the *Land Adjudication Act*, it is Applicants contention that the Petitioners have no rights capable of infringement as their rights have not crystallized into rights capable of being protected under Article 40 of *the Constitution* of Kenya and that they have not obtained the mandatory consent of the Land Adjudication Officer to institute the Petition.
14. I have considered the Petitioner and I find that it relates to an ongoing Adjudication exercises within the Oldesikesi Adjudication Sections, the process of Land Adjudication is essentially to determine the Rights of individuals over Land with the Adjudication Section each person right and entitlement is ascertained upon conclusion of he Adjudication exercise.
15. The *Land Adjudication Act* pursuant to Section 26 do provide for a Dispute Resolution Mediation to Settle claims, in the instant matter I find that whilst the Adjudication exercise is ongoing no rights capable of protection shall have crystallized until the conclusion of the exercise and a party aggrieved during the exercise is bound to lodge his grievances to the Land Adjudication Officer as envisaged under Section 26 of the *Land Adjudication Act* rather than file a Petition.
16. In the case of *Justus Musaa Mpiwa vs. the District Land Adjudication Officer, Tisaria West East* the court held:-

it is imperative to note that not all grievances should warrant the filing of a Petition, Constitutional Jurisdiction and used a general substitution for normal proceedings for invoking Judicial and Constituted Rights. In my view, that the subject of the Petition being a parcel of Land which is undergoing Adjudication process, the Petitioners rights and interest would not have crystallized into right capable of being protected under Article 40 of *the Constitution* of Kenya”.
17. It is imperative to note that where an Adjudication Process is ongoing an Aggrieved person must first exhaust the Dispute Resolution Mediation contained under Section 29 of the *Land Adjudication Act*. In the instant Petition I note that the Petition have note invoked there rights as contemplated under Sections 29 of the *Land Adjudication Act*.
18. The Court of Appeal in *Chembe Katana Chargi vs. Minster of Land and Settlement & 4 others* (2015) eKLR held:-

There is an elaborate Dispute Resolution Mediation laid out under the *Land Adjudication Act* of particular importance is that according to Section 29 of the Act, the last line of recourse under this process is an Appeal to the Minister for the time being responsible for Land whose decision is final this is an established position in law..... it would appear that beyond the Minister order neither this Court nor any Superior court has the jurisdiction to entertain the issue further”.
19. The upshot of the above decision which is binding on this court is that a party must exhaust the provisions of *Land Adjudication Act* to settle any dispute arising prior to invoking the powers of the courts. Further to the above I find that the Petitioners have also not obtained the mandatory consent of the Land Adjudication officer before filing of the instant Petition.
20. The upshot of the above is that I find the Petition herein is premature as the petitioners have not exhausted the Dispute Resolution Mediation of the *Land Adjudication Act* and I thus struck out the petition in its entirety.

Each party shall bear their own costs.



Dated, Signed and Delivered virtually at Migori this 22nd day of February, 2023

MOHAMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Mukeli for 6th – 8th Respondents

No appearance for the Petitioners

Tom Court Assistant

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