Kimetto v County Government of Baringo (Environment and Land Constitutional Petition 15 of 2022) [2023] KEELC 822 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 822 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 15 OF 2022

L WAITHAKA, J

FEBRUARY 15, 2023

IN THE MATTER OF ARTICLES 22(1)(3)(B), 23(1), (2), 27, 40, 47, 48, 50, 159(1), 165(3)(A)(B) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4, 8, 10, 11, 13, 14, 20, 21 AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 4 OF 2015

AND

IN THE MATTER OF RULE 8, 9, 10, 19, 27 NATIONAL LAND COMMISSION (REVIEW) OF GRANTS AND DISPOSITIONS OF PUBLIC LAND REGULATIONS, 2017

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(1), 3(1), 10, 27, 40, 50(1) AND 157(1) & (2) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOHN KIBET KIMETTO ..... PETITIONER

AND

COUNTY GOVERNMENT OF BARINGO ..... RESPONDENT

JUDGMENT

The facts giving rise to this Petition can be summarized as follows:-

1. Sometime on or about 3rd January 2009, Martin Kipturgut Kimeto (deceased), lodged a complaint at the office of the District Commissioner Baringo, concerning allocation of plots No. 2764 and 2918 (suit lands) to Full Gospel Church of Kenya and National Government of Kenya respectively. The District Commissioner advised the deceased to file objection proceedings to Baringo Adjudication area, Salawa Adjudication Section.

2. Following that advice, the deceased filed two objection cases before the Land Adjudication Officer (LAO) namely objection Nos. 1129 and 1130 of April 2009.

3. The LAO heard the objections and dismissed them on the grounds that the deceased did not file a case at the Land Committee and failed to involve the beneficiaries of the suit lands as parties to the objection.

4. Aggrieved by the decision of LAO, the deceased appealed to the Minister vide Appeal to the Minister Case No.263 of 2009.

5. The Minister, through the Deputy County Commissioner (DCC) Baringo Central, heard the Appeals and on 11th June, 2019 dismissed the Appeal on the grounds that the appellants were not forced to leave their land when the disputed parcels were set aside as public utilities; that the appellant's claim for compensation was not valid as their witnesses stated that there were other people whose land was demarcated for public use yet they were not compensated and that the beneficiaries of the suit lands had developed their land.

6. Dissatisfied with the decision of the Minister, the petitioner herein, who is the legal representative of the estate of the deceased, filed the instant Petition claiming that the decision to alienate their land without compensation was unconstitutional, unlawful and unreasonable.

7. The petitioner claims that the decision was made without giving them prior notice of the nature and reasons for the alienation and allocation of their ancestral land; that they were not heard before the impugned decision was made and that the decision was prejudicial to their rights.

8. The petitioner further claims that the decision of LAO and the Minister were made without jurisdiction; that the respondent failed to take into account relevant considerations like the fact that the petitioner's ancestors are buried in the suit land and violated their legitimate expectation that they would be given first priority to be resettled elsewhere.

9. The petitioner has also pleaded that they have exhausted the mechanisms of Appeal available before filing the instant Petition. In effect, the petitioner claims that their constitutional rights guaranteed under articles 40(1), (4), 43(1)(b)(c)(d) & (e) and 47 of *the Constitution* of Kenya 2010 were violated by the respondent.

10. On account of the foregoing reasons, the petitioner prays for the following reliefs:-

    a. A declaration that his constitutional rights guaranteed under articles 40(1), (4), 43(1)(b)(c)(d) & (e); 47(1) & (2) and 50 of *the Constitution* have been violated;

b. An order for review and setting aside the decision of the DCC, Baringo Central acting by virtue of the delegated powers of the Minister of Lands & Settlement in Appeal No. 263 of 2009 delivered on 11th June 2019;

c. An order remitting the dispute for reconsideration to the National Land Commission under section 1(e) and 14 of the *National Land Commission Act*, No.5 of 2012 (revised 2018) and part 11 of the National Land Commission (Review of Grants & Disposition of Public Land Regulations 2017);

d. Alternatively, compensation for the loss of their ancestral land and developments as provided under article 40 rule 4 of the Kenya Constitution;

e. Costs of the petition be paid by the respondent.

11. The petition is unopposed.

12. Pursuant to directions given on 25th July 2022, the Petition was disposed of by way of written submissions.

Petitioner's submissions

13. In his submissions filed on 4th October, 2022 the petitioner makes reference to Articles 22(3), 23(1), (3)(a) & (f); 47 of *the Constitution*; Section 9 of Fair Administrative Actions Act, 2015 and Section 13(1)(6) & (7) of the *Environment and Land Court Act* and submits that this court has jurisdiction to admit, determine the suit and to grant the reliefs sought.

14. Reliance is also placed on the decision in the case of *Suchan Investment Ltd vs. Ministry of National Heritage & Culture & 3 Others* (2019) eKLR.

15. On whether the petitioner has made up a case for being granted the orders sought, the petitioner reiterates his claim that prior to allotment of the suit lands, the respondent failed to comply with the legal processes laid down under Part 11 and 111 of *Land Adjudication Act* (LAA), Cap 284 Laws of Kenya and contends that there is no evidence that the LAO complied with Section 5(2)(e) of LAA or even afforded the petitioner an opportunity to be heard before the decision to take away their land was reached.

16. It is contended that the respondent argued that the suit lands were trust land held under the defunct County Council of Baringo and based on the decision in the case of *Adan Abdirahani Hassan & 2 Others v Registrar of Titles & Others* [2013] eKLR submitted that the argument/defence by the respondent is outrageous, unlawful and out rightly unconstitutional.

17. With regard to the plea for the dispute to be remitted to the National Land Commission, it is submitted that the allotment of the petitioner's ancestral land without due process without compensation or resettlement amounts to historical land injustice under Article 67(2)(e) of *the Constitution* and based on Article 67(2) (e) which clothes the National Land Commission (NLC) with powers to initiate investigations into present land injustice and recommend appropriate redress, it is submitted that the instant case meets the criteria for present historical land injustices under Section 38 of the *Land Laws* (Amendment Act No. 28 of 2016 and Section 4(a) of the *National Land Commission Act*.

18. In support of the proposal for remittance of the matter to NLC reference is made to the case of Suchan Investment (supra).

Analysis and determination

19. From the pleadings, affidavit evidence and submissions, it is clear that the petitioner is challenging the decision of the Minister made in Appeal to the Minister Case No. 263 of 2009.

20. The proceedings attached to the affidavit sworn in support to the Petition, marked J.K.K.4 show that the appellant was heard in the appeal by himself and his witness, John Komen Tuitoek. He was also accorded opportunity to cross examine the respondent's witness/representative in the appeal. The proceedings also show that the Minister considered the cases presented before him before he arrived at the impugned decision. In that regard see the following excerpts of the proceedings that attest to that fact:-

> "……
>
> Findings
>
> The appellant filed a claim against parcel No.2918 and 2764 on grounds that the disputed parcels were their ancestral land but were demarcated by the then county council of Baringo without their consent or compensation. They even went ahead to state that some of their relatives were buried in the disputed land. However, during cross-examination, the appellant said they were not forced out of their land. It also came out clearly that his brother who has currently constructed a house in parcel no.2918 did so long ago but four years back meaning he developed the land knowing well that there was a pending appeal to the Minister case.
>
> The appellant witness negated his claim that they were supposed to be compensated. During cross examination, he admitted that those who donated land for public utilities were not entitled to any form of compensation. This includes the appellant because his case is not any special. The respondent on his part believes that public utilities are set aside by land owners without any coercion from the county government and that is what transpired. This is the same position held by the complainant because he admitted that no one forced them out of their land. The beneficiaries of the two parcels have developed their respective parcels. The church has constructed a permanent building on parcel no.2764. The other parcel of land, 2918, was set aside for D.O's office and the offices exist on the ground.
>
> I therefore strongly feel that the appellant has no basis claiming the parcels because:-
>
> a. No one has forced them to leave their land when the disputed parcels were set aside as public utilities
>
> b. Their claim of compensation is not valid. Their witnesses stated clearly that there were other people whose land was demarcated for public use and none has complained.
>
> c. The beneficiaries of plot No. 2918 and 2764 have developed their land.
>
> Decision
>
> Appeal to the Minister case No.263 of 2009 and 129 of 2008 on parcels Nos. 2918 and 2764 is dismissed."

21. It is clear that the Minister/his representative in discharge of the mandate vested on him under Section 29 of the LAA Act, heard and determined the case presented before him.

22. Under section 29(4) of LAA the decision of the Minister is final.

23. It has been held in many cases that a person aggrieved by the decision of the Minister should file a judicial review application to challenge the legality of the decision or process leading to making of the decision and not Constitutional Petition as the petitioner has done. In that regard see the case of *Robert Kulinga Nyamu v Musembi Mutunga & another* [2022] eKLR where it was held:-

> " ...The quasi-judicial institutions referred to are established under the *Land Adjudication Act* whose purpose is to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto. The dispute resolution mechanism provided under the said Act is elaborate...., The elaborate dispute resolution process culminates with the appeal to the Minister under Section 29 which provides that;
>
> 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— delivering to the Minister an appeal in writing specifying the grounds of appeal; and 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.
>
> ..... The Appellant submitted that there is no provision that limits the Appellant right after exhausting the adjudication mechanisms from filing a suit before the Magistrate's Court for determination. However, it is the Courts view that the above provision of Section 29 of the *Land Adjudication Act* that the Ministers decision is final is couched in mandatory terms. If the legislature meant to give the right to a party to re-litigate a dispute which had been heard through the entire dispute resolution process provided under the *Land Adjudication Act*, nothing would have been easier than to state so clearly.
>
> 22. The provision in law that empowers Magistrates Courts to hear and determine environment and land cases is section 26 (3) of the *Environment and Land Court Act* which provides that "The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country" In my understanding such an appointment does not give power to the Magistrates Courts to hear cases whose specific mandate lies with other institutions and in this case the officers and quasi-judicial institutions under the *Land Adjudication Act*. This position is reiterated by Okongo Jin Tobias Achola Osidi & 13 Others v Cyprianus Otieno Ogalo & 6 others [2013] Eklr where the court held as follows;

> " It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act. It is for this reason that, there is injunction under section 30 of the Act to any civil suit being instituted over an interest in land in an adjudication area save with leave of the Land Adjudication Officer. The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. (Emphasize added). As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come

in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. (Emphasize added). The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land".

23. I agree with the findings of the Court in the above case that the court has no jurisdiction to ascertain and determine interests in land in an adjudication area and that the role of the court is supposed to be supervisory only of the adjudication process. The Appellant ought to have filed his claim invoking the Courts supervisory jurisdiction if what he wished to challenge was the decision-making process that he claimed was marred by irregularities....."

24. In *John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others* [2017] eKLR, Mutungi J in a similar case where the respondents raised a preliminary objection to the court for being res judicata held as follows:

> " 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.....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. I accordingly uphold the preliminary objection taken by the 2nd, 3rd and 4th respondents and I order the petition to be struck out in its entirety against all the respondents"

25. Concerning the plea by the petitioner for the case to be referred to NLC, being of the view that the petitioner does not require an order of this court to institute a claim before the National Land Commission based on the alleged historical injustice, I decline the invitation to refer the suit as the petitioner has not satisfied the court where he did not institute the claim in the Commission.

26. The upshot of the foregoing is that the petitioner has not made up a case of being granted the orders sought or any one of them. Consequently, I dismiss the Petition with no order as to costs as it is undefended.

JUDGMENT READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 15TH DAY OF FEBRUARY, 2023.

L. N. WAITHAKA

JUDGE

In the presence of:-

Mr. Mureithi holding brief for Mr. Ndolo for the petitioner

N/A for the respondent

COURT

Judgment delivered virtually.

L. N. WAITHAKA

JUDGE

15.2.2023