



**Kailanya v Kaungu & 15 others (Environment & Land Petition
E008 of 2021) [2023] KEELC 16310 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E008 OF 2021**

CK NZILI, J

MARCH 15, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ARTICLES 22, 23 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 26(1) OF THE LAND CONSOLIDATION ACT

AND

IN THE MATTER OF SECTIONS 26, 27 AND 28 OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

PATRICK M KAILANYA PETITIONER

AND

ANNISIETA KAUNGU 1ST RESPONDENT

WILSON KABERIA 2ND RESPONDENT

DOMIANO MWENDA 3RD RESPONDENT

GABRIEL CHOKERA 4TH RESPONDENT

FESTUS MATHEW 5TH RESPONDENT

PAUL KIANJI THITWA 6TH RESPONDENT

ROSE KAGWIRIA 7TH RESPONDENT

SIMON WAWERU MBUGUA 8TH RESPONDENT



ISAACK MUCHENURA	9 TH RESPONDENT
PATRICK KUBAI	10 TH RESPONDENT
MOSES GICHURU	11 TH RESPONDENT
PETER NTONJIRA	12 TH RESPONDENT
WILLIAM MURIUNGI	13 TH RESPONDENT
DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, TIGANIA WEST DISTRICT	14 TH RESPONDENT
LAND REGISTRAR TIGANIA EAST/WEST	15 TH RESPONDENT
ATTORNEY GENERAL	16 TH RESPONDENT

RULING

1. Before the court is a preliminary objection dated January 27, 2023 by the respondents on the basis that the petition is incompetent and a nonstarter since the petitioner lacks the capacity to file it on behalf of the estate of the late Ambrose Kailanya
2. The applicants relies on written submissions filed with leave of court dated February 18, 2023 taking the view that a grant for letters of administration *ad litem* was not sought and or obtained before filing the case. Reliance is placed on [Isaya Masira Momanyi v Daniel Omwoyo & another](#) [2017] eKLR, [Sisilia Nyakoe & another v AG and others](#) [2021] eKLR, [Otolu Margaret Kanini & 16 others v AG and others](#) [2022] eKLR.
3. On the other hand, the petitioner submitted that he has rights and capacity to initiate and advance his claim. He relied on the holding in [Otolu](#) (*supra*), [LSK v Kinyua, Head of Public Service & 5 others](#) [2022] KELC (August 12, 2022), [Sammy Alex Musyimi & others v Masba Mramba Mwarogos & 3 others](#) [2021] eKLR, [Mumo Matemu v Trusted Societies](#) [2013] eKLR.
4. The basis of the petitioner's claim is found in paragraphs 6 & 7 of the petition where he described himself as having inherited land measuring 15.96 acres from his late father which was originally Parcel No 817 Antuamburi Adjudication Section. Further, he averred that he had filed objection No 1929 before the Land Adjudication Officer over the parcel number, which was ruled in his favor but whose decision was never implemented on time or at all, only for him to establish that there was an alleged collusion and fraud between the respondents. He blamed the respondents in failing to implement the decision, causing subdivisions to the parcel number without his knowledge, consent, or involvement, and proceeding to issue title deeds without due consideration of the said decision. He termed the said acts as infringing on his constitutional rights under Articles 40 and 47 of the [Constitution](#).
5. Article 22 (1) of the [Constitution](#) provides that every person acting in his own interest or on behalf of another person, or as a member of, or in the interest of a group or acting in the public interest, or in association acting in the interest of one or more of its members, may institute court proceedings claiming an infringement or breach or denial or threat to a right or freedom under the bill of rights.
6. Article 260 of the [Constitution](#) defines a person to include a Company, an Association, or another body of persons whether incorporated or unincorporated.



7. In this petition, the petitioner has averred that he is the beneficial owner of the subject land and to which he filed an objection before the Land Adjudication Officer, the 14th respondent, which was heard and determined but was not implemented as required in law.
8. After the court delivered its ruling dated October 26, 2022, the respondents were granted 45 days to respond to the petition. The petitioner pleaded to being a party and to the existence of the objection proceedings attached to his supporting affidavit as annexures as PK “1” the said proceedings, and an award, which was duly certified by the 14th respondent. As at the filing of the preliminary objection herein, the averments in the said petition remained uncontroverted.
9. The petitioner’s contention is the non-implementation of a decision that he was privy to, arising under the *Land Adjudication Act*. Courts have held that during the adjudication process, the issues revolve around the ascertainment of interests to land, which strictly speaking are not estates. In *John Wairimu Mathenge v AG* [2017] eKLR the court made a finding that the petitioner’s evidence remained uncontroverted and or unchallenged. Similarly, in Sisilia *Nyakoe & another v AG & others* [2021] eKLR, a preliminary objection had been raised on inter-alia lack of capacity. The court cited with approval *LSK v Commissioner of Lands* Nakuru HC No 464 of 2000, that locus standi signifies the right to be heard and sufficiency of interests to sustain a case. Further, the court cited with approval *Quick Enterprises Ltd v Kenya Railways* Kisumu HC CC 22 of 1999, where it was held that a preliminary objection should be capable of disposing of the matter preliminarily without the court having to ascertain the facts from elsewhere apart from looking at the pleadings alone. Further, the court cited with approval *Charles Ratemo Nyambati v Jackton Ocharo & others* [2016] eKLR, on who a legal representative is as well as *Hawo Shanko v Mohamed Uta Shanko* [2018] eKLR, *Troustik Union International v Mbeyu & another* [1993] eKLR, *Otieno v Ougo & another* [1987] eKLR. The court allowed the preliminary objection since the petitioner had failed to seek and obtain letters of administration before filing the petition.
10. In the case of *Otolo Kanini v AG* (*supra*) the court was faced with a preliminary objection on lack of letters of administration. The court cited with approval *Oraro v Mbaja* [2005] KLR 141, that a preliminary objection must not be blurred by factual details which are contested and, in any event, requiring to be proved through the process of evidence in an investigation to establish disputed facts. The court relied on Articles 22 and 258 of the *Constitution* and cited with approval the Supreme Court of Kenya Advisory Opinion Reference Number 1 of 2017, *KNHR v AG & IEBC & others* (2020) eKLR, where it was held that the court must always consider whether the party seeking to move it fell within the categories decreed as having such standi by the *Constitution*. Further, the court cited with approval *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, that a court should not place handles on the access to the courts unless the litigation was hypothetical, abstract, or an abuse of the court process. The court held that the bar on locus standi under the 2010 *Constitution* was not high but relaxed. Further, the court found the petition as founded by a live person who was seeking an alleged breach of individual rights and freedoms. The court found the preliminary objection as misconceived, unfounded, and ripe for rejection since the petitioners were alive and bringing their own claims and not for and on behalf of their deceased kins.
11. Additionally, in *Simon Masika Makokha v County Government of Bungoma & 4 others* [2022] eKLR, the court cited with approval *Kibet Mutai & others v AG* (2019) eKLR, that any facts averred on oath and not controverted by the respondents either through an affidavit or through cross-examination occupy a higher pedestal than grounds of opposition. Similarly, the court said that there was always an assumption that what is averred on an affidavit is factual evidence that is capable of proving a claim.



12. In the preliminary objection, before this court the respondents have tried to distinguish the holding in *Otolo* (*supra*). Unfortunately, written submissions however forceful cannot replace pleadings or amount to evidence. This court in *M'Thiringi v District Land and Settlement Officer* [2022] eKLR stated that Sections 3 & 15 of the *Land Consolidation Act* provide on who can represent provide under African Customary Law. The court cited with approval Odunga J as he then was in *Republic v D.C Machakos & another ex parte Kakui Mutiso* [2014] eKLR, who held that under the land adjudication statutes, determinations are based on interests in land rather than individual ownership since land tenure only comes into being upon registration, before which the strict succession legal regime does not apply. The court also cited with approval Angote J in *Peter N. Ngandi & 2 others v John Muthomi & another* [2022] eKLR, that proceedings under *Land Adjudication Act* (Cap 284) do not require a party to have letters of administration. The court rejected a preliminary objection based on lack of letters of administration before the applicant could bring the suit since she was a proper party in line with Articles 159 and 258 of the *Constitution*. This was the same position the court took in the case of *Frankline Mutwiri v Land Adjudication Officer Ruiru/Rwarera Adjudication Section & another* [2021] eKLR that Section 13 of the *Land Adjudication Act* talks of a guardian or a representative according to the African Customary law and not a legal representative.
13. Applying the foregoing principles, the petitioner pleaded that he filed an objection on his own right whose decision and an award was never implemented contrary to his rights to fair administrative action and ownership of property. That pleading alone grants him capacity under Article 22 as read together with article 258 of the *Constitution*. The said averment on oath stands uncontroverted.
14. The upshot is I find the preliminary objection lacking basis and falling short of a pure point of law. The same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 15TH DAY OF MARCH, 2023

In presence of:

C/A: John Paul

Mr. Mwanzia for respondents

Karatu for petitioners

HON. C.K. NZILI

ELC JUDGE

