



Birika & 3 others v Seme & another (Environment and Land Miscellaneous Application E008 of 2022) [2023] KEELC 16986 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16986 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2022
EM WASHE, J
APRIL 27, 2023

BETWEEN

SARUNI MOKITA OLE BIRIKA 1ST APPLICANT
SAMSON MORONGO 2ND APPLICANT
KATETO KEKO JOHN 3RD APPLICANT
MOYOI DEVELOPMENT COMMITTEE 4TH APPLICANT

AND

MICHAEL O.SEME 1ST RESPONDENT
DEPUTY COUNTY COMMISSIONER TRANSMARA WEST 2ND RESPONDENT

RULING

1. The 1st respondent (hereinafter referred to as “the applicant”) filed a preliminary objection dated January 6, 2023 (hereinafter referred to as “the present P.O”) seeking for an Order that this Honourable Court does not jurisdiction to entertain and/or determine the 1st to 4th applicants (hereinafter referred to as “the 1st -4th respondents”) dispute for the following grounds; -
 - i. The 1st to 4th respondents application is incompetent, lacks merit, violative of infallible constitutional principles and should be dismissed in limine.
 - ii. The 1st to 4th respondents application usurps the alternative dispute jurisdiction and the requirement under section 39 of the *Community Land Act*, No. 27 of 2016 that disputes between members of a registered community is to be resolved in the first instance using the internal dispute resolution mechanisms of the respective community’s by-law; and



- iii. The 1st to 4th respondents application irks and offends the doctrine of constitutional avoidance rule which is instructive that a court of law prescribed from assuming jurisdiction of a matter where the Constitution or an Act of Parliament delineates a specific clear procedure for ventilating and canvassing a dispute.
2. The present P.O. was duly served on the 1st to 4th respondent and thereafter the Honourable Court directed that it be canvassed by way of written submissions.
 3. The applicant herein filed his submissions on the 2nd of February 2023 while the 1st to 4th Respondents filed their submissions on March 7, 2023.
 4. The Honourable Court has perused the present P.O together with the submissions of the Applicant and the 1st to 4th respondent and in its considered view, the main issue is whether or not this Honourable Court has jurisdiction to entertain and determine the proceedings filed on the November 21, 2022.
 5. The applicant's main ground of raising the present P.O is that the dispute in the proceedings filed by the 1st to 4th respondents relates to a dispute between members of a registered Community Group.
 6. Consequently therefore, section 39 of the Community Land Act, No. 27 of 2016 requires that such disputes be resolved through internal dispute resolution mechanisms and not brought to this Court in the first instance.
 7. The applicant therefore is of the view that this court should desist and/or lacks the original jurisdiction to entertain and determine the issues raised in the proceedings filed by the 1st to the 4th respondent.
 8. In support of this submissions, the applicant has relied on the authority of The Speaker of National Assembly-versus- James Njenga Karume (1992) eKLR.
 9. The 1st to 4th respondents on the other hand has submitted that this Honourable Court has jurisdiction to entertain and determine the proceedings filed herein based on the provisions article 162 (2) of the Kenyan Constitution, 2010.
 10. In the celebrated case of Mukbisa Biscuit Manufacturing Co. Ltd-versus- West End Distributors Ltd (1969) EA 696, the court made the following finding; -

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
 11. In another case of Avtar Singh Bhamra & Another -versus- Oriental Commercial Bank, KSM HCCC No. 53 of 2004, the Court made the following observation; -

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
 12. Turning to these proceedings, the applicant's facts giving raise to the present P.O is that the dispute in issue is one between members of a registered Community under the Community Land Act, No. 27 of 2016.
 13. Consequently therefore, any dispute between such members is to be resolved as provided under section 39 of the Community Land Act, No. 27 of 2016.



14. However, a close perusal of the replying affidavit sworn by the applicant in response to the notice of motion application dated November 21, 2022, there is no evidence placed before this Honourable Court relating to the existence of a registered community.
15. Section 7 of the *Community Land Act*, No. 27 of 2016 provides for the procedure for registration of communities under the said Act.
16. Further to that, section 9 of the *Community Land Act*, No. 27 of 2016 requires that all communities must be registered with the office of the Community Land Registrar and further to that section 10 makes it mandatory that such communities must be entered into the Register of Community land.
17. According to the *Community Land Act*, No. 27 of 2016, the management of the Community is usually undertaken by the Community Land Management Committee as provided under section 15 thereof.
18. It is only when there is an existence of a registered Community that the provisions of section 39 of the *Community Land Act*, No. 27 of 2016 can be invoked.
19. The Honourable Court in this proceeding has perused the pleadings and note a different structure relating to the dispute at hand.
20. The first fact which has not been disputed by either of the parties is that there is a property registered in the name of Moyoi Group Ranch whose financial benefits are for its members thereof.
21. The members of Moyoi Group Ranch then proceeded to elect a number of their members to receive and manage the financial proceedings that accrued from the property.
22. The elected members then registered themselves as a Self-Help Group under the Ministry of Gender, Children and Social Development on 12/01/2012.
23. The Self- Help Group registered is known as Moyoi Ward Development Committee and whose officials are the 1st, 2nd and 3rd respondent.
24. Clearly therefore, there is no proof of a registered Community as alleged by the Applicant under the *Community Land Act*, No. 27 of 2016.
25. What is actually in existence is the Self-Help Group registered in the Ministry of Gender, Children & Social Development to manage and handle the proceeds of the property belonging to Moyoi Group Ranch.
26. In essence, the dispute presented by the 1st to 4th Respondent does not relate to members of a registered community but the alleged election of new members of Moyoi Group Ranch to replace the 1st to 3rd respondents who insist are still the lawful officials of the Self-Help Group known as Moyoi Ward Development Committee.
27. Consequently therefore, the present P.O which is based on the provisions of section 39 of the *Community Land Act*, No. 27 of 2016 cannot stand.

Conclusion.

28. In conclusion thereof, the Honourable Court hereby makes the following orders as appertains the preliminary objection dated January 6, 2023.
 - A. The preliminary objection dated January 6, 2023 be and is hereby dismissed.
 - B. Costs of the preliminary objection will be borne by the applicant.



**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON DAY OF 27TH
APRIL, 2023.**

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: NGENO/MEMPE

ADVOCATE FOR THE APPLICANT: MS. BOSIBORI

ADVOCATE FOR THE RESPONDENT: MR. MARETE

