



REPUBLIC OF KENYA



**KENYA LAW**

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**Owinyo & 3 others (Appealing for and on behalf of the Communities of Alego and Yimbo) v National Land Commission & another; Lake Agro Limited & others (Interested Party) (Environment & Land Miscellaneous Case E019 of 2022) [2023] KEELC 16808 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16808 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E019 OF 2022**

**AY KOROSS, J**

**APRIL 13, 2023**

**BETWEEN**

**JUSTUS OUMA OWINYO ..... 1<sup>ST</sup> APPLICANT**

**CHARLES ONYANGO OKUOM ..... 2<sup>ND</sup> APPLICANT**

**GLADYS ADHIAMBO OKING ..... 3<sup>RD</sup> APPLICANT**

**ALFRED OTIENO AYIRO ..... 4<sup>TH</sup> APPLICANT**

**APPEALING FOR AND ON BEHALF OF THE COMMUNITIES OF ALEGO  
AND YIMBO**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**SIAYA COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**LAKE AGRO LIMITED & OTHERS ..... INTERESTED PARTY**

*((Being an appeal against the determination by the 1st Respondent's panel [Commissioner Reginald Okumu, Commissioner Professor James K. Tuitoek, Commissioner Honourable Esther Murugi Mathenge, Commissioner Honourable Tiyah Galgalo Ali] released on 24th November 2022 in public hearings of Objections relating to intention to allocate LR Numbers USONGA/USONGA/BLOCK 1/4, USONGA/USONGA/BLOCK 1/7 AND USONGA/USONGA/ BLOCK 1/8 TO LAKE AGRO LIMITED))*



## RULING

### Background

1. Before the notice of motion dated 19/12/2022 that is the subject of this ruling was filed before this court, a Constitution Petition no. 1 of 2021 had earlier been filed by Kennedy Omondi Ochieng' and Charles Odhiambo Oliech against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, 6<sup>th</sup> Interested Party and the Cabinet Secretary for Lands and Physical Planning (hereinafter 'Petition 1').
2. In accordance with the provisions of Article 159 (2)(c) of the Constitution, parties decided to amicably resolve their disputes through mediation. After parties had reached an agreement, a Notice of Withdrawal of Petition 1 and a Consent were filed. The Mediation Deputy Registrar-Kisumu adopted the Consent as a Mediation Agreement.
3. This paved way for the 1<sup>st</sup> Respondent to proceed with its mandate on allocation of Land Parcels no. Usonga/Usonga/Block 1/4, Usonga/Usonga/Block 1/7 and Usonga/Usonga/Block 1/8 ('suit properties') as per its notice dated 14/10/2021.
4. Due to administrative hiccups between the Mediation Registry in Kisumu and this Court's Registry, Petition no. 1's file never found its way to this court. It was only after the instant motion was filed that this file was presented to this court. Petition no. 1 has been slated for mention for purposes of adoption of the Consent and withdrawal of Petition 1 as orders of this Court.
5. In accordance with the provisions of Section 14 of the Land Act, the 1<sup>st</sup> Respondent commenced the process of allocation of the suit properties.
6. In its decision that was disseminated to the public on 24/11/2022, the 1<sup>st</sup> Respondent recommended the allocation of the suit properties as follows; Usonga/Usonga/ Block 1/7 and Usonga/Usonga/Block 1/8 be allocated to the 6<sup>th</sup> interested party while the subsisting lease on Usonga/Usonga/Block 1/4 be extended to it.
7. Dissatisfied, the Applicants, as representatives of the 16<sup>th</sup> Objector, filed the instant motion.
8. Some of Objectors and Interested Parties joined these proceedings either by merely filing notices of appointment of advocates or submissions.

### Introduction

9. This is a ruling in respect of a Notice of Motion by the Applicants dated 19/12/2022 and on Notices and Supplementary Notices of Preliminary Objections dated diverse dates of 16/01/2023, 26/01/2023 and 03/2/2023.
10. Apart from the Objections, some parties lodged Grounds of Opposition and Replying Affidavits in opposition to the motion.
11. As directed by the court, Parties' Counsels disposed of the pleadings by written submissions.

### 1<sup>st</sup> Respondent's Preliminary Objections

12. The 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection and a Supplementary dated the respective dates of 26/01/2023 and 03/2/2023. Some of the objections were repetitive and they can be summarized as follows;



- a. By dint of Sections 5 and 6 of the *National Land Commission Act*, Section 7 of the *Fair Administrative Action Act* and Sections 73 and 77 of the *Physical and Land Use Planning Act*, this court lacked jurisdiction to entertain the motion.
- b. The 1<sup>st</sup> Respondent acted under Section 14 of the *Land Act* upon receiving an approved plan from the 2<sup>nd</sup> Respondent.
- c. The 1<sup>st</sup> Respondent exercised its quasi-judicial mandate under Sections 5 and 6 of the *National Land Commission Act* and delivered its administrative decision on 24/11/2022.
- d. Rule 30 of the *National Land Commission (Investigation of historical land injustices) Regulations* 2017 which the Applicants had relied upon to move this court was inapplicable to this case.

### **2<sup>nd</sup> Respondent's Preliminary Objection**

13. The 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 03/02/2023 raised the following summarized grounds: -
  - a. The Applicants' pleadings offended the provisions of Order 1 Rule 13 as no written authority had been attached to the Appeal.
  - b. The Applicants lacked locus to institute this appeal as they were not parties to the initial proceedings.
  - c. The Applicants' pleadings offended the provision of Order 42 Rule 2 of the *Civil Procedure Rules* as no certified decree or order was attached to the Memorandum of Appeal.
  - d. The court lacked jurisdiction to hear and determine the matter as the Appeal had been filed without seeking leave of the court which offended the provisions of Order 53 Rule 1 of the *Civil Procedure Rules*.
  - e. An Appeal against the decision of the 1<sup>st</sup> Respondent lay by way of judicial review.

### **6<sup>th</sup> Interested Party's Preliminary Objection**

14. The 6<sup>th</sup> Interested Party's Preliminary Objection dated 16/01/2023 raised two grounds which can be condensed into one;
  - a. The Appeal offended Regulation 30 of the National Land Commission (Review of grants and dispositions of Public land) Regulations 2017, was time barred, incompetent and bad in law.

### **Notice of Motion**

15. The motion was moved pursuant to the provisions of Articles 10, 40, 63 & 159 of the *Constitution*, Section 13 of the *Environment and Land Court Act*, Regulation 30 of the *National Land Commission (Review of grants and dispositions of public land) Regulations* and Order 50 Rule 6 of the *Civil Procedure Rules*. Some of the prayers are spent and the residual reliefs pending determination are: -
  - a. Pending hearing and determination of the Appeal herein, conservatory orders be issued suspending the 1<sup>st</sup> Respondent's determination recommending the allocation of the suit properties or extending any lease in respect of the suit properties to the 6<sup>th</sup> Interested Party, its agents, representatives or any person claiming title under it.



b. Leave be granted for the Appeal to be admitted for hearing out of time.

16. The motion was based on grounds set out on its face and on the Supporting Affidavit of one of the Applicants Justus Ouma Owinyo sworn on 19/12/2022.
17. In brief, via a gazette notice no. 2570 of 25/08/1970, 3700 ha was set apart for organized settlement of communities which owned the suit properties; the gazette notice was still valid and enforceable. Gazette notices no.9819, 9820, 9821 and 9822 issued in 2006 which set apart 3200 ha of the suit properties for agricultural production were unlawful and unconstitutional. Even if the suit properties were purportedly public land, the process of allocating it for private purposes was against the provisions of the Land Act.
18. The Applicants submitted that before allocation, the suit properties were trust land, owned by the communities around Yala swamp and were central to the survival and livelihood of the local communities since they were their cultural, ancestral and grazing land. They were held under intergenerational trust for the present and future generations. The Applicants argued that the 1<sup>st</sup> Respondent did not take these matters into consideration when rendering the impugned decision.
19. The delay in filing the appeal was occasioned by negotiations between it and the 2<sup>nd</sup> Respondent. They had an arguable appeal with probability of success.

#### **1<sup>st</sup> Respondent's Replying Affidavit**

20. Mr. Brian Ikol, the 1<sup>st</sup> Respondent's Director of Legal Affairs and Dispute Resolution, deposed an affidavit dated 26/01/2023. He averred that the 1<sup>st</sup> Respondent's determination addressed all the issues raised by the Applicants. In addition, the allocation of the suit properties was done in accordance with the provisions of law.

#### **2<sup>nd</sup> Respondent's Replying Affidavit**

21. Mr. Jeconia Were, the 2<sup>nd</sup> Respondent's County Surveyor, swore a Replying Affidavit dated 24/01/2023. In summary, the delay in filing the motion outside the statutory period was inexcusable and the reasons given were implausible. The draft Memorandum of Appeal did not present an arguable appeal and new evidence were being introduced at an appellate stage.
22. In addition, the issue of ownership, occupation and the use of the 3700 ha of land known as Dominion farms was res judicata the same having been litigated in Kisumu Civil Appeal 40 of 2012.

#### **6<sup>th</sup> Interested Party's Grounds of Opposition and Replying Affidavit**

23. The 6<sup>th</sup> interested party filed Grounds of Opposition dated 16/01/2023. In brief, the motion sought omnibus prayers, cited improper provisions of law, was not anchored in law, sub judice to Petition 1 and res judicata.
24. Onkar Singh Rai, the 6<sup>th</sup> interested party's director, deposed a Replying Affidavit on 3/02/2023. In summary, all the Applicants except Gladys Adhiambo Oking were strangers and had no locus standi to institute an Appeal, the motion and intended appeal were defective, Justus Ouma Owinyo did not have authority to institute proceedings and the Motion should be struck out.

#### **Applicants' Supplementary Affidavit**

25. Justus Ouma Owinyo, one of the Applicants, filed a Supplementary Affidavit sworn on 07/02/2023.



26. In short, he averred some of the Preliminary Objections were misconceived. The Applicants were members of the 16<sup>th</sup> Objector and thus competent to sue the Respondents. The motion was premised on Section 16A of the *Environment and Land Court Act* and the *National Land Commission (Review of grants and dispositions of public land) Regulations*. He had tendered the impugned decision and redress could be sought by the parties within the provisions of Articles 22 and 258 of the *Constitution*.

### **Applicants' Submissions**

27. Mr. Wambola, Counsel for the Applicants, filed 3 sets of submissions dated 28/12/2022, 7/02/2023 and 13/02/2023.
28. In the submissions dated 28/12/2022, Counsel asserted the Applicants had met the principles for grant of conservatory orders that were laid down in *Board of Management of Uburu Secondary School v City County Director of Education & 2 Others* [2015] eKLR.
29. Counsel urged this court to admit the Appeal out of time and to buttress his position, he relied on *Silas Kanyolu Mwachia v Josephine Kavive James* [2021] eKLR where the Court set out the principles for extension of time.
30. In the submissions dated 07/02/2023, Counsel identified several issues for this Court's determination. Some of them were addressed in his submissions dated 28/12/2022 and in Justus Ouma Owinyo's Supplementary Affidavit and this Court will not rehash them. Counsel submitted that Petition 1 was never heard on merits hence the instant proceedings were not res judicata.
31. In his written submissions dated 13/02/2023, Counsel argued that the Applicants were challenging the outcome of the impugned decision and not the process. Counsel relied on the cases of *Praxidis Namoni Saisi & 7 others v DPP & 2 others* (SC Petitions 39 and 40 of 2019) and *SGS Kenya Limited v Energy Regulatory Commission & 2 others*.

### **1<sup>st</sup> Respondent's Submissions**

32. Its Counsel, Ms. Khasoa, filed her written submissions dated 26/01/2023. Counsel asserted *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 had settled the principles of Preliminary Objections.
33. Counsel submitted that by dint of Sections 5(2), 6 and 14 of the *National Land Commission Act*, Section 14 of the *Land Act*, Section 7 of the *Fair Administrative Action Act* and Sections 76 and 77 of the Physical Planning and Land use Act, this court lacked jurisdiction to hear this Appeal and the only recourse available to the Applicants was to institute judicial review proceedings.

### **2<sup>nd</sup> Respondent's Submissions**

34. Its Counsel, Mr Oruenjo, filed submissions dated 19/01/2023. Counsel identified 4 issues for determination; (a) whether the Applicants were required to obtain written authority to file the Motion (b) whether the Applicants had locus standi (c) whether the Applicants were required to tender a decree (d) whether the motion was incompetent and (e) whether the motion should be allowed.
35. The assertions made in the submissions were contained in its Grounds of Opposition and Replying Affidavit and this court will not reiterate them.
36. On the 1<sup>st</sup> and 2<sup>nd</sup> issues, Counsel relied on the case of *Apex Finance International Limited and another v Kenya Anti-corruption Commission* NKU HC JR No. 64 of 2011 [2012] eKLR which cited with



- approval the case of *Goodwill and Trust Investment Limited and another v Witt and Bush Limited* Nigerian SC 266/2005 which held that in instances of improper parties, courts lacked jurisdiction.
37. On 3<sup>rd</sup> issue, Counsel relied on the case of Kakamega Election Petition Appeal Number 3 of 2018 *Elvis Anyimbo Sichenga v ODM & others* [2016] eKLR where the court stated that failure to avail a decree was fatal.
  38. On the 4<sup>th</sup> issue, Counsel relied on *Municipal Council of Mombasa v Republic & another* [2002] eKLR where the court held that judicial review proceedings were concerned with the process of the decision and a court exerting its supervisory jurisdiction could never act as an appellate court.
  39. On the last issue, Counsel cited the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR and asserted there had been unexplained, inordinate and inexcusable delay in filing the Motion and the Appeal was not arguable.

### **The 1<sup>st</sup> to 5<sup>th</sup> Objectors' Submissions**

40. Their Counsel, Mr. Wambola, filed their submissions dated 25/01/2023. These submissions were in support of the Applicants case and were similar to the Applicants submissions. Counsel submitted the motion was filed merely 25 days after the decision was published.

### **6<sup>th</sup> Interested Party's submissions**

41. Its Counsel, Mr Ogola, filed submissions dated 08/02/2023. They repeated some of the depositions contained in its Replying Affidavit.
42. He identified several issues for determination; (a) whether the Applicants had locus standi, (b) whether the Applicants had the requisite authority (c) whether the motion was properly anchored in law, (d) whether the period for lodging the Appeal was limited, (e) whether the motion was merited, (f) whether the Applicants had met the threshold to warrant grant of conservatory orders, (g) whether the 1<sup>st</sup> to 5<sup>th</sup> Objectors were parties to these proceedings and, (h) whether pleadings should be struck out.
43. On the 1<sup>st</sup> and 2<sup>nd</sup> issues, Counsel relied on the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR which defined what locus standi was. He asserted Alego and Yimbo communities did not have legal personality and some of the Applicants were strangers and lacked requisite authorities.
44. On the 3<sup>rd</sup> issue, Counsel contended the Applicants ought to have moved the Court within the provisions of Order 50 Rule 5 of the *Civil Procedure Rules*, Section 16A of the *Environment and Land Court Act* and Rule 23 of the *Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules* 2013 and not otherwise. In that regard, Counsel cited the case of *Robinson Onyango Malombo t/a O. M. Robinson & Company Advocates v County Government of Mombasa* [2019] eKLR.
45. On the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> issues, Counsel submitted that the 1<sup>st</sup> Respondent did not fall within the definition of 'subordinate court or local tribunal' as envisaged by Section 16A of the *Environment and Land Court Act*. The Applicants ought to have filed their Appeal within 14 days as stipulated by the *National Land Commission (Review of Grants and Dispositions of Public land) Regulations* 2017.
46. On the final issue, Counsel submitted that the 1<sup>st</sup> to 5<sup>th</sup> objectors had no place in these proceedings.



## Analysis and determination

47. I have carefully considered Parties' Preliminary Objections, Motion, Affidavits, Grounds of Opposition, rival submissions together with provisions of law and judicial precedents cited. It is the considered view of this court that the following issues fall for determination: -
- a. Whether this court can exercise appellate jurisdiction over the impugned decision.
  - b. Whether the intended appeal was res judicata and sub judice.
  - c. Whether the Applicants had *locus standi* and authority to commence these proceedings.
  - d. Whether the Applicants had exhausted all legal avenues.
  - e. Whether improperly citing provisions of law was fatal.
  - f. Whether there was conflict of interest in the Applicants' advocate representing the 1<sup>st</sup> to 5<sup>th</sup> Objectors.
  - g. Whether the motion should be allowed.
  - h. What of costs?
48. I shall address the issues in a sequential manner.

### a. Whether this court can exercise appellate jurisdiction over the impugned decision.

49. As rightfully submitted by M/s Khasoa, the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (Supra) has long settled the principles of Preliminary Objections. A Preliminary Objection must be on a point of law and premised on the assumption that all the facts pleaded by the other side are correct. At page 700 paragraphs D-F Law JA had this to say:

‘...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the bound by the contract giving rise to the suit to refer the dispute to arbitration.’

50. The question of jurisdiction raises a pure point of law. Jurisdiction is everything and without it, a Court cannot move one step further. The jurisdiction of a court is laid out by the Constitution or Statutes. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated: -

‘A Court’s jurisdiction flows from either the Constitution or legislation or both... It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.’

51. In another decision of *In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution*- Constitutional Application No. 2 of 2011, the apex Court cited with approval the celebrated case of *Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited* [1989] eKLR which expressed itself as follows: -

‘Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.’



52. In their motion, the Applicants invoked the provisions of Regulation 30 of the [National Land Commission \(Review of Grants and Dispositions of Public Land\) Regulations](#), 2017 which was to give effect to Section 14 of the [National Land Commission Act](#). In their Further Affidavit, they averred that notwithstanding this Regulation limited the lodging of an Appeal to 14 days, Section 16A of the [Environment and Land Court Act](#) allowed them to file an Appeal to this court within 30 days.
53. From the impugned decision, it is not in dispute the 1<sup>st</sup> Respondent was exercising its mandate under Section 14 of the [Land Act](#). The Applicants were categorical they were not challenging the process by which the 1<sup>st</sup> Respondent carried out its mandate but rather were challenging the outcome of the decision; allocation of the suit properties to the 6<sup>th</sup> Interested Party. The Respondents arguments that they should have moved this court by judicial review mechanisms do not hold water.
54. The question that suffices is whether this court can exercise appellate jurisdiction over the decision of the 1<sup>st</sup> Respondent made pursuant to Section 14 of the [Land Act](#).
55. To answer this question, this court has to examine Section 14 of the [Land Act](#), the Land (Allocation of Public Land) Regulations, 2017 that gave effect to this Section, Section 14 of the [National Land Commission Act](#) and its Regulation 30 and, lastly, Section 16A of the [Environment and Land Court Act](#).
56. Article 162 (2) (b) of the [Constitution](#) establishes this court. The [Environment and Land Court Act](#) sets out the jurisdiction of this Court. Section 13 (4) of the same [Act](#) confers this Court with appellate jurisdiction against the decisions of Subordinate Courts and Tribunals while Section 16 (A) of the Act sets out the timelines for lodging an Appeal and admitting it out of time.
57. To breathe life into several provisions of the [Act](#) including Section 13 (4), the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts were enacted. It identified the Tribunals which this court exercises appellate jurisdiction. They are *inter alia*, Business Premises Rent Tribunal, Rent Tribunal and National Environment Tribunal. The Land Acquisition Tribunal which was to hear and determine Appeals from the decisions of the 1<sup>st</sup> Respondent on compulsory acquisition is yet to be created.
58. Bearing in mind Subordinate Courts are clearly established by Article 169 of the [Constitution](#), I agree with the 2<sup>nd</sup> Respondent that the 1<sup>st</sup> Respondent does not fall within the paradigm of Tribunals. It ensues the Applicants misapprehended the applicable provisions of law when they invoked Sections 13 (4) and 16 (A) of the [Environment and Land Court Act](#).
59. I agree with M/s Khasoa that Section 14 of the [National Land Commission Act](#) and its Regulation 30 were inapplicable. In the impugned decision, the 1<sup>st</sup> Respondent was exercising its mandate on an entirely different matter; allocation of land as espoused by Section 14 of the [Land Act](#) and review and dispositions of public land.
60. I must not hasten to add that even if Section 14 of the [National Land Commission Act](#) and Regulation 30 were applicable, which for the benefit of doubt they do not, Section 14 of the [National Land Commission Act](#) and its Regulation 30 have lapsed and currently, there is a bill pending in Parliament to extend their timelines.
61. The impugned decision was anchored on Section 14 of the [Land Act](#) and the [Land \(Allocation of Public Land\) Regulations](#), 2017. On scrutiny of these provisions of law, they are bereft of appellate mechanisms. It would appear Parliament never intended for this Court to hear appeals against decisions rendered by the 1<sup>st</sup> Respondent pursuant to Section 14 of the [Land Act](#).



62. It ensues the only way the jurisdiction of this Court can be invoked against such a decision is by way of original jurisdiction or judicial review and not otherwise. I need not say more.
63. It is therefore clear this court is bereft of jurisdiction to entertain the motion and intended appeal. I find the Notice of Motion dated 19/12/2022 not merited and it is hereby struck out. Bearing in mind the public interest nature of the Motion and alleged intended appeal, each party shall bear their respective costs.

**DELIVERED AND DATED AT SIAYA THIS 13<sup>TH</sup> DAY OF APRIL 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**13/04/2023**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

**Mr. Wambola for the Applicants and 1<sup>st</sup> to 5<sup>th</sup> Objectors**

**Mr. Olendo and with Mr. Oruenjo for 2<sup>nd</sup> Respondent**

**Mr. Ogola and Mr. Wachira for the 6<sup>th</sup> Interested Party\*\***

**Mr. Okumu for the intended Amicus Curiae**

**Court assistant: Ishmael Orwa**

