



**Nyale & 49 others v Mwero & 7 others (Environment & Land Case E043 of 2022) [2023] KEELC 18750 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18750 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E043 OF 2022**

**AE DENA, J**

**JULY 17, 2023**

**BETWEEN**

**NYAWA NYALE & 49 OTHERS ..... PLAINTIFF**

**AND**

**BEJA NGOJA MWERO ..... 1<sup>ST</sup> DEFENDANT**

**JUMA NGOJA MWERO ..... 2<sup>ND</sup> DEFENDANT**

**SALIM NGOJA MWERO ..... 3<sup>RD</sup> DEFENDANT**

**NGOME MEJA MWERO ..... 4<sup>TH</sup> DEFENDANT**

**MBARUKU NGOJA MWERO ..... 5<sup>TH</sup> DEFENDANT**

**DISTRICT SURVEYOR KWALE ..... 6<sup>TH</sup> DEFENDANT**

**DISTRICT LAND ADJUDICATION & SETTLEMENT KWALE .... 7<sup>TH</sup>  
DEFENDANT**

**LAND REGISTRAR KWALE ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiffs claim to be the rightful/beneficial owners of the land measuring approximately 3,500 acres situated at Kinango, Banga area (herein suit property). They filed this suit against the 1-5<sup>th</sup> defendants claiming that the said defendants who are members of the same family allegedly fraudulently obtained an order before the Kadhi's Court in Succession Suit No 132 of 2018 confirming them to be heirs of the suit property without the plaintiff's knowledge. Further the 1<sup>st</sup> defendant who was the petitioner in the said suit did not profess the Muslim faith. Upon grant of the said orders it is alleged that the said defendants caused the 6<sup>th</sup> defendant to survey and apportion the suit property to them and title processing was underway. The plaintiffs seek orders of permanent injunction restraining



the 1<sup>st</sup> to 5<sup>th</sup> defendants from interfering with their peaceful enjoyment of the suit properties. They also want the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants restrained from registering or issuing ownership documents to the other defendants.

2. The suit is defended. The 1<sup>st</sup> – 5<sup>th</sup> defendants through the firm of Chebukaka & Associates have filed a notice of preliminary objection – dated 9/2/23 on the basis of jurisdiction and incompetency of the suit.
3. Ms Kiti for the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents supports the preliminary objection herein.

### **Submissions**

4. The preliminary objection was heard by way of written submissions.

### **The 1<sup>st</sup> -5<sup>th</sup> Respondents' Submissions**

5. The 1<sup>st</sup> -5<sup>th</sup> respondents' submissions were filed on 13/2/23. It is submitted that the court lacks jurisdiction to hear and determine this matter by dint of section 30(1) of the [Land Adjudication Act](#) chapter 284 of the laws of Kenya (herein the Act), as the dispute is over land which is under adjudication. That the dispute is exclusively vested in the hands of the Adjudication officer. Further that the suit is resjudicata having been heard by a quasi-judicial institution.
6. The 1-5<sup>th</sup> defendants state that the 7<sup>th</sup> respondent does not have capacity to sue or be sued by dint of section 34 of the Act. That as such there was no competent suit before the court. The court is urged to dismiss the suit with costs to the defendants.
7. Reliance is placed on Civil appeal No 244 of 2010 [Phoenix of E A Assurance Company Limited Vs SM Thiga T/A Newspaper Service](#) and ELC Appeal No 11 of 2021 [Nyamu Musembi Mutunga & Another](#) (2022)eKLR

### **The Plaintiffs Submissions**

8. The plaintiff's submissions were filed on 27/02/23. It is submitted that no notice has been issued by the Adjudication Officer under the provisions of section 5(1) of the Act to warrant the invocation of section 30(1) of the Act. That adjudication had not commenced at the time of filing these proceedings. That the 7<sup>th</sup> respondent had not furnished the court with a detailed definition of the adjudication area as required by section 5(2)(a)(b) of the Act. Further that section 34 of the [Land Adjudication Act](#) does not offer protection to the Adjudication Officer as the area was not under adjudication.

### **Analysis and Determination**

9. It is now established that a preliminary objection must be raised and determined at the earliest opportunity for it goes to the very root of the courts power to adjudicate and determine on a matter. Without jurisdiction the court cannot move one step. See *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd* (1969) EA 696.
10. The issue that arises for determination is whether the preliminary objection as raised has merit and should be sustained.
11. The main objection is based on the provisions of section 30 (1) of the Act and which stipulates that; -  
"Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an



adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act."

12. The effect of the above provisions is the staying of land suits until the dispute resolution mechanisms laid out under the Act are exhausted to the level of determination by the Minister responsible for land, presently the Cabinet secretary in charge of land.
13. It is imperative to determine first if the Act applies to the suit property. Section 3 of the Act is to the effect inter alia that the Act will apply to any area of community land if the county government in whom the land is vested so requests and the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered. Firstly, the plaintiffs plead in paragraph 12 of the plaint that the land is community land with over 100 families living in it, this is reiterated in paragraph 3 of the supporting affidavit sworn by Nyawa Nyale Nyawa on 3/10/22. Davis M Njeru the Sub-County Land Adjudication & Settlement Officer, Kinango confirms that Bang'a area is within Mazola adjudication section Puma Location and attaches a letter dated September 22, 2014 issued pursuant to section 5 of the Act. The said letter further refers to the provisions of section 30(1) set out earlier in this ruling. Beja Mweja Mwero at paragraph 13 confirms taking part in the demarcation exercise where he pointed out his boundaries.
14. Additionally, this court has noted the averments in the replying affidavit sworn on 27/6/22 wherein Nyawa Nyale depones at paragraph 5 that the Act allows any aggrieved party to seek remedy through appeal to the Minister before the adjudication register is closed and faults the defendants from failing to exhaust all legal procedure as outlined under section 26 and 29 of the Act. Clearly this is an admission that the land is under adjudication. He also wants the matter referred back to the Land Adjudication Officer.
15. From the foregoing, it is clear that the Act applies to the suit property in dispute. The plaintiffs were required by section 30(1) to obtain the consent of the Land Adjudication officer to bring this suit. No evidence was availed of such consent having been obtained or requested for. It is now established that where there is a special procedure for redress of grievance set under the *Constitution* or an Act of parliament the same must be strictly adhered to. This is the principle of exhaustion. See *Republic Vs Commissioner General Kenya Revenue Authority Ex-parte Sanofi Aventis Kenya Limited* (2019)eKLR and ELC Appeal No 11 of 2021 *Nyamu Musembi Mutunga & Another (supra)*.
16. The second objection raised is on the basis of section 34 of the *Land Adjudication Act* which section is on protection of officers and provides; -

"Any officer appointed under this Act, and any other person appointed for the purpose of adjudication proceedings under this Act, shall not be liable to any action, suit or proceedings for or in respect of any act or matter in good faith done or omitted to be done in exercise or supposed exercise of the powers given by this Act or any regulations made under it."
17. It is urged that the adjudication officer is named as the 7<sup>th</sup> respondent ought not to have been sued as he draws protection from the above provisions. My understanding of the above provision is that it is conditional upon it being proved that the actions for which such officer is called to answer upon were done or omitted in good faith and this can only be undertaken during proceedings where the officer is given an opportunity to satisfy the court of the same. To me the provisions are meant to guide the court and not to stop the officers from being joined in proceedings or actions filed before court.
18. The upshot of the foregoing is that the preliminary objection is merited and this court must down its tools. The plaintiffs suit is hereby struck out with no orders as to costs. The notice of motion application dated June 22, 2023 collapses with the suit.



**DELIVERED AND DATED AT KWALE THIS 17<sup>TH</sup> DAY OF JULY 2023**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Nyawa Nyale on behalf of the Plaintiffs

Mr. Chebukaka for the 1<sup>st</sup> – 5<sup>th</sup> defendants

Mr. Waga holding brief for Ms Kiti for the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants

Mr. Disii - Court Assistant.

