



REPUBLIC OF KENYA



KENYA LAW
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**Ndambuki & another v Ndungi (Environment and Land Appeal
E005 of 2023) [2025] KEELC 1172 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

**EO OBAGA, J
MARCH 13, 2025**

BETWEEN

PATRICK NZIOKA NDAMBUKI 1ST APPELLANT

MAGDALENE MUMO 2ND APPELLANT

AND

MEUMA NDUNGI RESPONDENT

*(Being an Appeal against the ruling of Hon. B. N. Ireri, Senior Principal
Magistrate delivered on 27th February, 2023 in ELC Cause No. E011 of 2022)*

JUDGMENT

1. The Appellants had been sued by the Respondent in Makindu Senior Principal Magistrates court in ELC Cause No. E011 of 2022. The Respondent contemporaneously filed an application for injunction in which he sought to restrain the Appellants from interfering with the suit properties.
2. Before the application could be heard, the Appellants raised a Preliminary Objection on the following grounds;
 - a. That the application together with suit are fatally and incurably defective.
 - b. That the application together with the suit offend the provisos of Section 30 of *Land Adjudication Act*, CAP 284
 - c. That the application together with suit lacks merit and legal leg and such ought to be dismissed with costs to the Defendants.
 - d. That the application together with suit are an abuse of the process of the court.



3. The Appellants' Preliminary Objection was disposed of through written submissions. The Preliminary Objection was dismissed with costs on 27th February, 2023.
4. The Appellants preferred an appeal to this court and raised the following grounds.
 1. That the learned Magistrate erred in law and in fact by delivering a ruling that was inconsistent with the law, the pleadings and the facts put forth for consideration leading to an erroneous conclusion and occasioning a serious misinterpretation of the law.
 2. That the learned Magistrate erred in law and in fact by making an assumption that the land, subject matter of the above suit does not constitute an adjudication area based on the allegation by the Respondent that he is the bonafide legal owner of the parcel of land, subject matter of this suit.
 3. That the learned Magistrate erred in law and in facts by failing to take into consideration the mandatory nature of the provisions of Section 30 of the Land Adjudication Act.
 4. That the learned Magistrate erred in fact and in law and further misdirected himself by failing to appreciate the fact that the Respondent admitted in his pleadings the fact that the parcel of land, subject matter to the above suit is unregistered and isolated, and thus the same falls under the ambit of adjudication.
 5. That the learned Magistrate erred in fact and in law by failing to appreciate the fact that the Respondent despite the allegation that he is the lawful owner of the parcel of land, subject matter of this suit, admitted the fact that his rights and interest in the parcel of land had not been ascertained and registered and so he had not been issued with a certificate of title.
 6. That the learned Magistrate erred in law and in fact by misinterpreting the law and the evidence on record by failing to appreciate the fact that the Appellants' Preliminary Objection was anchored on matters of law as opposed to matters of fact as alluded to in the said ruling.
 7. That the learned Magistrate erred in law and in fact by holding that the question as to whether the parcel of land, subject matter of the suit lies under the adjudication area was an issue that had to be ascertained despite that fact that Section 3 (1) of the [Land Adjudication Act](#) give a clear definition of what constitutes an Adjudication area.
 8. That the learned Magistrate erred in law and in fact by failing to appreciate the principle of "Exhaustion of Remedies" which requires the Respondent to diligently exhaust all the available and laid down mechanisms for dispute resolution before approaching the court, which is trite law.
 9. That the learned Magistrate erred in fact and in law by failing to allow the Appellant's Preliminary Objection by dismissing the Respondent's Application based on the provisions of Section 30 of the [Land Adjudication Act](#) Cap 284 laws of Kenya.
 10. That in the foregoing, the entire ruling and Order of the learned Magistrate made on 13th March, 2023 in regard to ELC Cause No. E001 of 2022 between the parties herein, and the entire reasoning was fatally flawed and/or erroneous.
5. The parties were directed to dispose of the appeal by way of written submissions. The Appellants filed their submissions dated 10th July, 2024. The Respondent filed his submissions dated 21st January, 2025.
6. The Appellants submit that the Respondent in his pleadings indicated that the 8 plots the subject of the suit are unregistered. The Appellants therefore conclude that as the plots are unregistered, then



they fall under an adjudication section hence no suit could have been filed without the consent of an adjudication Officer as provided for under Section 30 of the [Land Adjudication Act](#).

7. The Appellants relied on the case of Cheraik Management Limited -vs- National Social Security Services Fund Board of Trustees & Another (2012) eKLR where Justice Odunga (as he then was) stated as follows:

“Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the Defendant and denied by the Plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof.”

8. The Respondent submitted that the Preliminary Objection which was raised by the Appellants did not meet the threshold set out in the case of Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors Limited (1969) EA 696.
9. I have considered the grounds of Appeal, the Appellants’ submissions as well as the Respondent’s submissions and the authorities cited. The only issue for determination is whether the trial magistrate properly applied the law in dismissing the Appellants’ Preliminary Objection.
10. The duty of this court as a first Appellate court is to re-evaluate the evidence given before the lower court and reach its own conclusion. See *Selle & Another -vs- Associated Motor Boat Co. Ltd & others* (1969) EA 123.
11. I have gone through the ruling of the trial magistrate and the grounds upon which he dismissed the Preliminary Objection. He correctly applied the principles in *Mukisa Biscuit Manufacturing Company Limited (Supra)* where it was stated as follows:

“Preliminary objection is in the nature of what used to be a demurer, it raises a pure point of law which is usually on the assumption that 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.”

12. There was no admission in the Respondent’s pleadings that the suit properties fell in an adjudication section. The trial magistrate correctly observed that there was need to ascertain whether the suit properties fell under an adjudication area. On the authority of the *Mukisa Biscuit manufacturing Co. Ltd (Supra)*, a Preliminary Objection cannot be raised where certain facts are to be ascertained.
13. The Appellants seem to assume that as the suit properties are unregistered, it therefore means that the parcels fall under an adjudication area. This is a wrong assumption. An adjudication section has to be declared and once the process is over including appeals under Section 29(3) of the [Land Adjudication Act](#), the Adjudication Officer has to certify that the duplicate adjudication register is complete and final. All these are facts which needed to be ascertained. I therefore find that this Appeal is devoid of merit. The same is dismissed with costs to the Respondent.

JUDGEMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH, 2025.

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HON. E. O. OBAGA

JUDGE

In The Presence Of:

Mr. Lusyola for Appellant.

Court assistant - Steve Musyoki

