Mwagona (Suing for and on behalf of the Estate of Mwagona Chotole Mbaji - Deceased) v Ngoa & 10 others (Petition E014 of 2024) [2025] KEELC 3508 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3508 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION E014 OF 2024

EK MAKORI, J

APRIL 30, 2025

(IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE RULES 2013 AND IN THE MATTER OF THE INFRINGEMENT OF FUNDAMENTAL RIGHTS & FREEDOM OF THE INDIVIDUAL UNDER ARTICLES 40, 47 & 50 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF THE ENVIRONMENT & LAND COURT ACT NO. 19 OF 2012. SECTION 13, ARTICLES 22 & 23 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF PLOT NO. 319/VYAMABNI ADJUDICATION SECTION BETWEEN KENNEDY SIMEON)

BETWEEN

KENNEDY SIMEON MWAGONA (SUING FOR AND ON BEHALF OF THE ESTATE OF MWAGONA CHOTOLE MBAJI - DECEASED) ..... APPLICANT

AND

EKRAPA MRABU NGOA ..... 1ST RESPONDENT

KAINGU LENGA MPEMBA ..... 2ND RESPONDENT

SHOKA MPE SHOKA ..... 3RD RESPONDENT

ISSA MWASAMBU KATANA ..... 4TH RESPONDENT

KESI MEADAI CHIHINDA ..... 5TH RESPONDENT

CHIRIBA MPEMBA ..... 6TH RESPONDENT

ELVIS LEWA KARISA ..... 7TH RESPONDENT

ALFRED JENO LENGO ..... 8TH RESPONDENT

BOSTONE CHIVATSI LENGA ..... 9TH RESPONDENT

PANEL CHAIRMAN DEPUTY COUNTY COMMISSIONER, GANZE SUB COUNTY ..... 10TH RESPONDENT

HON ATTORNEY GENERAL ..... 11TH RESPONDENT

RULING

1. The Preliminary Objection dated 2nd December 2024 (hereinafter the PO) seeks to strike out the Petition dated 2nd October 2024 (hereinafter the Petition).

2. The PO challenges the validity of the Petition, which will form the basis of the issues the court will determine, on two grounds:

    a. This court lacks jurisdiction as the Petition offends sections 29 and 30 of the *Land Adjudication Act*, Cap 284, Laws of Kenya.

    b. The Petition is res judicata, having been heard and determined by competent quasi-judicial institutions to finality.

3. Counsels for the parties submitted written submissions regarding the PO and the legal framework and judicial precedents the court will consider in addressing it.

4. The central issue of the Preliminary Objection is the court's jurisdiction to take further steps on the two issues raised by the 1st Respondent in paragraph *2* above. The court's jurisdiction is of utmost importance and must be carefully considered in this case.

5. As submitted by the 1st Respondent, the principles upon which this court is invited to determine the merit of a notice of PO were set out in the oft-cited case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696. This case established the criteria for a PO, which include raising a pure point of law, demonstrating the correctness of all the facts pleaded by the other side, and the absence of any fact that needs to be ascertained. The court will consistently adhere to these principles in its ruling.

6. The Court of Appeal in Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR) reiterated the same position on what would constitute a PO and held as follows:

> " The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained."

7. The thrust of a PO in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A. in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR:

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. A PO rests on the proposition that when raised, its fundamental achievement will influence the disposition of a matter because it raises pure points of law. It also underscores the need for prudent time management as a court resource by summarily flagging weak and hopeless cases that, if allowed to proceed to full trial, would waste judicial time and not serve the interests of justice. One does not need to look elsewhere to find an answer as to whether a PO is sustainable; instead, one should examine the pleadings and discover that the suit is a non-starter – see the works of Ogola J. in DJC v BKL (Civil suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling).

9. The 1st Respondent avers that the matter was rightfully placed before the Land Adjudication Committees as established under the *Land Adjudication Act*, Cap 284, Laws of Kenya, by the Petitioner, who was awarded the land in the first instance. The 1st Respondent exercised his right to appeal to the Minister, and the appeal was allowed as admitted by the Petitioner in paragraph 13 of the Affidavit in support of the Petition and the annexed exhibit 6, which was the Ruling from the Appeal to the Minister.

10. The 1st Respondent asserts that the Minister's decision is final under Section 29 of the *Land Adjudication Act*, Cap 284. This means that the Minister's decision cannot be appealed to a higher court, and the only way to challenge it is through Judicial Review instead of a Constitutional Petition.

11. Conversely, the Petitioner believes that the current Petition is sustainable. The Petitioner states that on 12th May 2000, the Respondents appealed to the Minister regarding the Adjudication Tribunal's findings that sought to register the Petitioner as the owner of Plot No. 319. Subsequently, on 29th September 2021, the 10th Respondent issued a decision recommending that Plot No. 319 Vyambani be reverted to the 1st to 9th Respondents. The decision was delayed from 29th September 2021 until 13th July 2022, when the 10th Respondent - the Deputy County Commissioner- called the Petitioner and their family to hear the Judgment. The Petitioner questions why it took the 10th Respondent over 10 months to inform the parties of the judgment resulting from the Appeal.

12. The Petitioner believes that the 10th Respondent's actions in delaying the judgment and notifying the Petitioners of the outcome were unconstitutional. Such delays hindered the Petitioners from pursuing other avenues promptly, thereby denying them an opportunity to be heard and violating their rights to a fair hearing and administrative action.

13. Despite the delay in delivering and notifying the Petitioners about the ruling's outcome, the 10th Respondent failed to explain the delay. The judgment was delivered on 29 September 2021, while the 10th Respondent only called the Petitioners to present the outcome on 13 July 2022. The Petitioner contends that this 10-month delay is unconstitutional, effectively denying the Petitioners the opportunity to pursue other avenues concerning the appeal ruling.

14. Petitioner asserts that Article 50(1) of *the Constitution* of Kenya 2010 mandates a fair hearing. The 9th Respondent failed to ensure that the Petitioners received a fair hearing. Even after announcing the ruling, he refused to provide copies to the Petitioners, preventing them from taking it to their counsel for advice and further action. The Petitioners had to travel to Nairobi to the Land Adjudication and Settlement Offices to obtain the ruling.

15. The Petitioner contends that the 9th Respondent violated the Petitioner's rights to fair administrative action and justice, as enshrined in Article 47 of *the Constitution*. In this regard, reliance was placed on the decision in Muigana & 16 others *v County Government of Nyandarua (Petition E007 of 2023*) [2024] KEHC 960 (KLR) (8 February 2024) (Judgment), the Court held that - This provision gives the court power to review administrative actions. Petitioner submits that this position was restated in the case of Suchan Investment Limited v Ministry of National Heritage and Culture, & 3 others, [2016]

KLR, where the court found that its power to review administrative action no longer statutorily flows directly from the common law, but inter alia from the constitutionally mandated *Fair Administrative Action Act* (see Section 12) as buttressed by Article 47 of *the Constitution* of Kenya 2010.

16. While I concur with the Petitioner that the court's authority to review administrative actions is now derived from the *Fair Administrative Action Act*, as interpreted in conjunction with Article 47 of *the Constitution*, the Petitioner has improperly invoked this court's jurisdiction by submitting this Petition instead of pursuing a Judicial Review action, as will be illustrated below, in accordance with legal provisions and judicial precedents.

17. In Speaker of National Assembly v Karume(1992)KLR 21 the court held:

> "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

18. The procedure to question the decisions of quasi-judicial bodies under the *Land Adjudication Act*, Cap 284, is outlined in the Act. Significantly, and relevant to the issue raised in the PO, Section 29 of the Act states as follows:

> "(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
>
> (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
>
> (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
>
> (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.
>
> (3) When the appeals have been determined, the Director of Land Adjudication shall—
>
> (a) alter the duplicate adjudication register to conform with the determinations; and
>
> (b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.
>
> (4) Notwithstanding the provisions of section 38(2) of the *Interpretation and General Provisions Act* (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the

determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister. "

19. Section 30 of the *Land Adjudication Act* provides as follows:

"Staying of land suits

(1) 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.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.

(4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.

(5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown."

20. Sections 29 and 30 of the Act have been interpreted through judicial decisions, as exemplified in the case of Robert Kulinga Nyamu v Musembi Mutunga & another [2022] eKLR, cited by the 1st Respondent, with which I agree; the court determined:

"The Appellant submitted that there is no provision that limits the Appellant right after exhausting the adjudication mechanisms from filing a suit before the Magistrate's Court for determination. However, it is the Courts view that the above provision of Section 29 of the *Land Adjudication Act* that the Ministers decision is final is couched in mandatory terms. If the legislature meant to give the right to a party to re-litigate a dispute which had been heard through the entire dispute resolution process provided under the *Land Adjudication Act*, nothing would have been easier than to state so clearly."

21. Regarding the conclusiveness of the Minister's decision, the court additionally pronounced:

> " In addition to this, Section 29 (3) of the *Land Adjudication Act* provides that after the decision in the appeal to the Minister is made, the register will become final in all respects. This means that one cannot re-open an adjudication process that has been completed."

22. The entities created by the *Land Adjudication Act*, Cap 284, to ascertain rights and interests in land within an Adjudication Section possess quasi-judicial authority; the court may only challenge the decisions of these bodies under its supervisory jurisdiction, specifically through Judicial Review Proceedings. In this case, the Petitioner has circumvented the proper channels by submitting the current Petition to contest the Minister's decision – it is an appeal through the back door.

23. This position is substantiated by precedents set forth by this court and the Superior Courts, which illustrate that the appropriate legal procedure for addressing grievances arising from the adjudication process is through Judicial Review. For instance, in Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 others (Civil Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment), the Court of Appeal determined:

> " The prayers sought, among others, included the prayer for the setting aside of the Ministerial decision. Even though the Appellant denies that the suit was an appeal, we are convinced that it was one for all practical purposes.
>
> 20. In regards to whether the ELC had the requisite jurisdiction to entertain the suit, there is no dispute that the suit was challenging the decision of the Minister made pursuant to Section 29 of the Act. That Section, under Section 29(1) (b) provides:
>
> "(b)and the Minister shall determine the appeal and make such order thereon as he thinks just, and the order shall be final."
>
> 21. In addition to declaring that the decision of the Minister is final, Section 30 of the Act all together ousts the jurisdiction of the Courts, providing as follows:
>
> "30. Staying of land suits
>
> (1) 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."
>
> 22. The Act is clear that any person aggrieved by a decision made under Section 26 of the Act must follow the process under Section 29 and appeal to the Minister. Once the Minister, or the panel delegated to, makes a determination, his order is final. That means the Minister's decision cannot be appealed, whether under the Act or in Court. The option the Appellant had was to pursue the Judicial Review process provided under Article 47 of *the Constitution*, and the *Fair Administrative Action Act*, 2015, a statute enacted pursuant to Article 47 of *the Constitution*. He could not re-open the case and challenge it except through Judicial Review. The Appellant was attempting to undo the process he participated in using a process that is not provided for, and that is not allowed.

23. In Julia Kaburia vs. Kabeera & 5 Others [2007] eKLR, this Court commenting on Section 30 of the Act, held:

"The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather, the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication. This protection was availed to the parties herein by the appellate process, which culminates with Section 29 of the Act.

"(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just, and the order shall be final."

24. The ELC commenting on the role of the Court vis-a-vis that of the adjudicating bodies under the Act in the persuasive authority of Tobias Achola Osindi & 13 Others vs. Cyprian Otieno Ogalo & 6 Others [2013] eKLR by Okongo J., as follows:

"The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land..."

25. Having carefully considered this appeal, we find no fault with the finding and holding of the ELC Judge that it had no jurisdiction to entertain the Appellant's suit. The process of land adjudication had effectively come to its logical conclusion and could not be re-opened otherwise than in the manner contemplated by the law. In the circumstances, the ELC properly struck out

the Appellant's suit. The Appellant did not have any separate cause of action against the 1st Respondent other than the matters which were adjudicated upon and determined by the Ministerial Appeals Committee during the appeal to the decision of the objection proceedings. That decision was final."

24. The same stance was reaffirmed in the case of John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others [2017] eKLR, where the court, in dismissing a Petition, stated the following:

> " In the matter before court, the Petitioner did not move the court by way of Judicial Review but rather opted to file a petition albeit after the lapse of 13 years from the decision of the Minister was given. In my view, the Petition is tantamount to seeking to appeal the decision of the Minister through the back door..... The Kenyan Constitution cannot be invoked to resurrect matter that had been duly resolved through due process such as the matter the Petitioner wishes to revive through the Instant Petition."

25. Consequently, the Petition submitted to this court against the Respondents is incompetent and is therefore struck out in its entirety with costs based solely on the aforementioned ground.

26. The second argument raised by the 1st Respondent regarding res judicata is theoretical. It's essential to remember that any party still has the opportunity to seek the court's assistance through Judicial Review Mechanisms to contest an administrative action by an entity, even when the statute suggests that an entity's decision is final (ouster clause). Therefore, there's really no need for this court to explore this issue further.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 30TH DAY OF APRIL 2025.

E. K. MAKORI

JUDGE