



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbatha v Director of Land Adjudication & 4 others (Petition  
1 of 2022) [2022] KEELC 3290 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3290 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
PETITION 1 OF 2022  
LG KIMANI, J  
JULY 28, 2022**

**BETWEEN**

**MUTUA MBATHA ..... PLAINTIFF**

**AND**

**DIRECTOR OF LAND ADJUDICATION ..... 1<sup>ST</sup> RESPONDENT**

**LAND ADJUDICATION AND SETTLEMENT OFFICER KITUI .... 2<sup>ND</sup>  
RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**LANDS REGISTRAR KITUI ..... 4<sup>TH</sup> RESPONDENT**

**SIMON MUTUKU KYALO ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court for determination is the 5<sup>th</sup> respondent's notice of preliminary objection dated March 14, 2022 on the following points:
  1. The petition is bad in law and incompetent in that the honourable court lacks the jurisdiction to adjudicate on the petition as presented.
  2. The notice of motion is bad in law and incompetent in that the honourable court lacks the jurisdiction to adjudicate on the petition as presented.
  3. The petition dated February 21, 2022 be struck out with costs to the 5<sup>th</sup> respondent.
  4. The notice of motion application dated February 21, 2022 be struck out with costs to the 5<sup>th</sup> respondent.



2. The background to the petition herein is the petitioner claims that he acquired land in Ikanga, Kitui County that is adjacent to the 5<sup>th</sup> respondent's land which in total measured 53 hectares. That the area was subsequently declared an Adjudication Section named Ikanga/Ithumula Adjudication Section. During the adjudication process, the petitioner stated that he produced and supplied all documents and information required and he retained (at a fee) the 5<sup>th</sup> respondent to take care of his property and to make follow up of the registration and issuance of the title deed.
3. In October 2009, the petitioner learned that the 5<sup>th</sup> respondent had conspired with the 1<sup>st</sup> and 2<sup>nd</sup> respondent's officers to have the petitioner's land merged into his land and the same was registered as one parcel in his name. The petitioner avers that he was then advised by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent's to subdivide the land since adjudication was already completed and the 5<sup>th</sup> respondent was to execute transfer of parcel number Ikanga/Ithumula/1696 in his favour. The 5<sup>th</sup> respondent declined alleging that the process was fraudulent and made against his will.
4. The petitioner filed this petition claiming praying for various reliefs including an order directing the 5<sup>th</sup> respondent to execute the transfer instrument of the suit property in favour of the petitioner herein. The petitioner also filed a notice of motion application dated February 21, 2022 seeking a conservatory order restraining the respondents from interfering in any way with the petitioner's quiet possession of the suit property.
5. The 5<sup>th</sup> respondent on his part filed the notice of preliminary objection dated March 14, 2022.

#### **5<sup>th</sup> Respondent's Submissions**

6. The counsel for the 5<sup>th</sup> respondent filed submissions in support of the preliminary objection and stated that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. He relied on the holding by the Supreme Court in [\*Samuel Kamau Macharia & another v The Official Receiver and 2 others\*](#). He also submitted that the jurisdiction of the Environment and Land Court is not exercisable through a constitutional petition except in the proceeding of the nature provided for under section 13(3) of the [\*Environment and Land Court Act, 2011\*](#).
7. It is the 5<sup>th</sup> respondent's counsel's contention that the Environment and Land Court can only exercise jurisdiction where it relates to rights to clean and healthy environment as under article 42 of the [\*Constitution\*](#), protection of the Environment and equitable sharing of the exploits of natural resources under article 69 and the right to redress under article 70. The 5<sup>th</sup> respondent concluded by submitting that the petition before the court has no merit as the court lacks jurisdiction and that the petitioner has to move the court in the ordinary manner, either by way of judicial review or ordinary suit.

#### **The Petitioner's Submissions**

8. The petitioner, in rebuttal filed written submissions and stated that this court has the jurisdiction to determine issues related to ownership, use, occupation and title to land and those claims do not have to be done in a certain way unless stated by the law.
9. Section 13 (7) (e) of the [\*Environment and Land Court Act\*](#) relied upon by the petitioner gives the court powers to make any orders including declarations. The petitioner added that the [\*Constitution\*](#) provides that the Environment and Land Court is of the same status as the High Court meaning that a constitutional petition can be brought as long as it is on matters falling under article 162 (2) (b) and section 13 of the [\*Environment and Land Court Act\*](#).



10. The petitioner cited the authority of *West Kenya Sugar Company Limited v Busia Sugar Industries Limited & 2 others* [2017] eKLR where the court held that the mandate to deal with constitutional violations that relate to the environment is a preserve of the Environment and Land Court. The petitioner also added that this court is not restricted to any other rights provided in the *Constitution*. According to the above authority, it is proper to approach an Environment and Land Court through a constitutional petition.
11. The petitioner further relied on is *Paolo Di Maria & 5 others v Alice M Kuria & 5 others* [2021] eKLR where the court dismissed the preliminary objection and held that the *Constitution* gave a wide mandate to hear and determine matters related to the environment and land.
12. In conclusion, the petitioner submitted that the issues raised in the petition are inseparable and ought to be handled by this court, therefore prayed that the objection be dismissed with costs.

### **Analysis and Determination**

13. I have considered the petition herein, the application dated February 21, 2022 and the preliminary objection filed. I have also considered the written submissions and authorities cited and note that the only issue raised is one of the court's jurisdiction to hear the petition herein. According to the *Black Law Dictionary* a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

14. The above legal preposition has been cemented in the now famous case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. The court then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

15. The issue of jurisdiction is certainly a preliminary point since jurisdiction is everything and the court cannot make any further steps if it lacks the requisite jurisdiction. The often-cited case on jurisdiction is *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where the court held that:

“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.”

16. The preliminary objection is premised on the interpretation given to the provisions of section 13 (3) of the *ELC Act* with regard to the jurisdiction of the ELC to hear and determine disputes involving redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom. The interpretation by the 5<sup>th</sup> respondent is that the jurisdiction is limited only to disputes relating to a clean



and healthy environment under articles 42, 69 and 70 of the Constitution. Conversely counsel for the 5<sup>th</sup> respondents submits that by virtue of that section the ELC has no jurisdiction to hear and determine disputes arising from or involving redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom if it involves any other right and in this particular case if it involves right to land. The said section provides that:-

“Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution”

17. However, as opposed to the interpretation given by counsel for the 5<sup>th</sup> respondent this court is of the view that section 13 (3) does not preclude the ELC from hearing disputes involving redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom arising outside of articles 42, 69 and 70 of the Constitution. That interpretation of the section fails to take into account the general provisions of the entire section on jurisdiction of the ELC which provides that:-

“The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land”

18. Article 162(2)(b) of the Constitution of Kenya established the Environment and Land Court was and the same provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— the environment and the use and occupation of, and title to, land.”

19. The bill of rights under chapter 4 of the Constitution of Kenya, 2010 is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies Under article 22 of the Constitution

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.”

20. Under article 22 (3) the Chief Justice is mandated to make rules providing for the court proceedings referred to in the said article. Constitutional petitions are premised on article 23 of the Constitution of Kenya and the said article confers on the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights. The article provides as follows:

“The High court has jurisdiction in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights.

Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redness of a denial, violation or infringements of or threat to a right or fundamental freedom in the bill of rights.

In any proceedings brought under article 22, a court may grant appropriate relief including -

- (a) A declaration of rights



- (b) An injunction
- (c) A conservatory order
- (d) A declaration of an invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the bill of rights and is not justified under article 24.
- (e) An order for compensation
- (f) An order of judicial review."

Further to this, article 165(3) provides as follows:

“Subject to clause (5) the High court shall have –

- (a) Unlimited original jurisdiction in criminal and civil matters.
- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.

21. However the power of the High Court to hear and determine disputes is limited under article 165 (5) which provides that “The High Court shall not have jurisdiction in respect of matters

- a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b) Falling within the jurisdiction of the courts contemplated in article 162 (2).

22. Then the question arises of where a person goes who wishes to make an applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights relating to a right falling within the within the jurisdiction of the courts contemplated in article 162 (2). In my view the answer to this question is provided by the Rules anticipated under article 22 (3) are the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013 (Mutunga Rules) which under rule 2 on interpretations gives the definition of the

“High Court” “means the High Court of Kenya established by article 165 of the Constitution and includes courts with the status of a High Court established under article 162(2) of the Constitution;

23. Rule 4 provides for contravention of rights or fundamental freedoms and states that:-

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules”

Rule 10 provides for the form of petition and states that

- (1) An application under rule 4 shall be made by way of a petition as set out in form A in the Schedule with such alterations as may be necessary.

24. From the above provisions of both the Constitution and the rules made there under, the Environment and Land Court has the requisite jurisdiction to hear and determine the current petition which arises from complaints of alleged denial, violation or infringement of fundamental rights and freedoms under article 40 of the Constitution.



25. This question was under consideration by the High Court in the case of Omar Tahir Said v Registrar of Titles & another [2013] eKLR and the court held that:

“The E and L Court has juridical likeness or similarity with the High Court. In this juridical likeness, the E and L Court would have authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the bill of rights in matters falling under its jurisdiction. It is in acknowledgement of this, I suggest, that the Legislature, by section 13(3) of the E and L Court Act, expressly recognized the authority of the Court to enforce the fundamental rights under articles 42, 69 and 70 of the Constitution. Yet to limit the court's authority to the fundamental rights specified in section 13(3) would be to unduly constrict the constitutional intent of establishing a court under article 162(2) (b) that would determine disputes relating to the environment and the use and occupation of, and title to, land.”

26. This position was reiterated in the case of Mohammed Said v County Council of Nandi [2013] eKLR

“The general jurisdiction is set out in section 13 (1) which emphasizes that the E&LC has both original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution and with the provisions of the Environment & Land Court Act, or any other law applicable in Kenya relating to environment and land. Section 13 (2) clarifies the general jurisdiction in section 13 (1), probably to avoid ambiguity as to what a matter touching on land and environment is. Section 13 (3) emphatically states that nothing is to preclude the jurisdiction of the Environment & Land Court to hear applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution. A plain reading of section 13 (3) will demonstrate that the jurisdiction of the court is not limited only to hearing matters touching on violations of articles 42, 69, and 70 of the Constitution. That section does not state that the E&LC is only to hear the matters set out in articles 42, 69 and 70 of the Constitution. The section for whatever reason, is emphasizes the jurisdiction of the court to hear petitions touching on the environment. There is no preclusion to hear any other petition, grounded on any other article of the Constitution, so long as it falls within the purview of land and environment.”

The court further stated that:

“I do not agree with counsel for the 2nd respondent that the Environment and Land Court can only hear petitions touching on articles 42, 69 and 70 of the Constitution. The jurisdiction of the court is not restricted only to hearing petitions falling under articles 42, 69 and 70. It can hear any constitutional petition under any provision of the Constitution so long as the matter relates to the environment and the use and occupation of, and title to, land.”

27. For the foregoing reasons I hold that the preliminary objection lacks merit and I find that the Environment and Land Court has the jurisdiction to hear and determine constitutional petitions that relate to the Environment and use and occupation of and title to land which includes article 40. The preliminary objection is hereby dismissed with costs to the petitioner to be paid by the 5<sup>th</sup> respondent.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 28<sup>TH</sup> DAY OF JULY 2022**

**HON LG KIMANI**



**ENVIRONMENT AND LAND COURT JUDGE**

**Judgment read in open court in the presence of-**

C. Musyoki Court Assistant.

K Musyoki Advocate for the 5<sup>th</sup> respondent.

BM Musyoki Advocate for the petitioner.

