



Munga & another v Muganda & 9 others (Environment & Land Case E015 of 2022) [2022] KEELC 14588 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEELC 14588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E015 OF 2022**

**AE DENA, J
SEPTEMBER 28, 2022**

BETWEEN

MUNGA MWATSAHU MUNGA 1ST APPLICANT

DALU MWATSAHU MUNGA 2ND APPLICANT

AND

JAMES NYAWA MUGANDA 1ST RESPONDENT

AMOS NYAWA CHIKOZI 2ND RESPONDENT

SHABAN MWERO BOSO 3RD RESPONDENT

RAPHAEL NYOTA MWERO 4TH RESPONDENT

SALIM MWERO BOSO 5TH RESPONDENT

LUPHANDE BOSO 6TH RESPONDENT

**WILLIAM CHIMEGA-CHAIRMAN MWAVUMBO GROUP RANCH 7TH
RESPONDENT**

NATIONAL LAND COMMISSION 8TH RESPONDENT

AND

COUNTY GOVERNMENT OF KWALE 1ST DEFENDANT

FRONTMAN CONSULTANTS LIMITED 2ND DEFENDANT



RULING

Background

1. Vide a notice of motion application dated March 28, 2022 brought under order 40 rules 1,4 & 10, order 51 rule 1, sections 1A,1B and 3A of the [Civil Procedure Act](#), the plaintiff/applicant sought for the following prayers;
 - a. Spent
 - b. That this honourable court be pleased to issue a temporary injunction restraining the 8th,9th and 10th defendants/respondents by themselves their servants employees assignees and /or gents from compensating the 1st,2nd,3rd,4th,5th and 6th defendants/respondents for compulsorily acquiring plot number 794 pending hearing and determination of this application.
 - c. That this honourable court be pleased to issue a temporary injunction restraining the 8th,9th and 10th defendants/respondents by themselves their servants' employees assignees and /or gents from compensating the 1st,2nd,3rd,4th,5th and 6th defendants/respondents for compulsorily acquiring plot number 794 pending hearing and determination of this suit.
 - d. That this honourable court be pleased to issue a temporary injunction restraining the 8th,9th and 10th defendants/respondents by themselves their servants employees assignees and /or gents from compulsorily acquiring plot number 794 pending hearing and determination of this application.
 - e. That this honourable court be pleased to issue a temporary injunction restraining the defendants/respondents by themselves their servants' employees' assignees and /or gents from constructing on, disposing of, transferring, trespassing onto, advertising for sale or interfering in any way with plot number 794 pending hearing and determination of this application.
2. The application is premised on the grounds on its face as well as the affidavit of Munga Mwashau Munga where he deposed that the land was owned by him and his brother the 2nd plaintiff. That the land is within Mwatate Sub location identified by the government for the construction of a multi-purpose dam to supply water to Mombasa and Kwale Counties. That the land is estimated to be about 27 Acres and was held in trust by the Mwavumbo Group Ranch (herein the ranch) who were to ensure that its members got titles over the same.
3. The applicant state they inherited the land from their forefathers who had occupied it for ages. It is alleged that while the ranch officials and the county surveyors were tasked with ensuring proper demarcation of the land for everyone to be compensated they instead led by the 7th respondent misinformed the compensation team that the applicants land had a dispute with the family of one Luphande Boso Nyawa. The applicant annexed a copy of the minutes subject of the meeting where issues of the dispute were raised. It is further deponed that false evidence was given by one James Nyawa confirming the dispute, though he owned plot Nos 303 and 319 which the applicants had no claim over.
4. The applicant further states that the 7th respondents and members of the Mwavumbo Group Ranch advised the 8th,9th and 10th defendants/respondents and the surveyors to subdivide the applicants land parcel into four plots being 306,307,794 and 805 instead of two plots. That plot no 794 was then illegally allocated to James Nyawa who already had his own separate land parcel. The said plot was then



allocated to the 1st, 2nd, 3rd, 4th and 5th plaintiffs yet they are not the lawful owners of the said land. That upon inquiry from the 7th respondent on why their land had been allocated to someone else they were informed that it was because they were not farming on the same. The applicants now seek for orders of injunction to prevent the 8th, 9th and 10th respondents from compensating the 1st to 5th respondents who are not the owners of the suit parcel.

The response

5. The application is opposed. The 6th respondent filed a replying affidavit sworn on May 17, 2022. It is averred that the suit property was un-surveyed and made part of the larger Mwavumbo Group Ranch title no Kwale/Mwavumbo/1 measuring 24908.0HA. That the government acquired part of the plot for construction of the Mwache dam and initiated the process of acquisition of part of the land. That the same created issues between the plaintiffs and the respondents who are from two different clans and have a distinct boundary over the land. It is denied that the 7th respondent had any ulterior motive over the land and stated that James Nyawa appeared before the committee resolving the land dispute as an elder. The plot Nos 303 and 319 were not in the dispute. Further that the property was not at any time handed over to the said James Nyawa but to the entire family. That the respondents have continuously farmed on the land and that the same belongs to them too. The court is urged to dismiss the application with costs to the respondents.
6. The application was canvassed by way of written submissions. The applicant filed his submissions on June 20, 2022 while the 2nd to 7th respondents filed their submissions on June 29, 2022.

Plaintiff/applicants submissions

7. It is the applicant's submission that he has established the three conditions set out in the *Giella versus Cassman Brown* case on grant of interlocutory injunctions as stipulated under order 40 of the [Civil Procedure Rules](#). On establishment of a prima facie case, it is submitted that the land was wrongfully allocated to the 1st to 7th defendants who are undeserving of such allocation. That the plaintiffs have a right to ownership of property as envisaged under article 40 of the [Constitution](#) and the same includes ownership of plot no 794 which ought to be protected by this court pending the hearing and determination of this matter. It is submitted that the plaintiffs are bound to suffer irreparable injury if the defendants are not restrained. Reliance is placed in the case of [Pius Kipchirchir Kogo versus Frank Kimeli Tenia\[2018\] eKLR](#). That the 7th defendant and other members have fraudulently allocated plot no 794 to the 1st to 5th respondents who were awaiting compensation. That it is the plaintiffs who should receive the said compensation as the land belongs to them.
8. The applicants submit that the balance of convenience leans in their favour as they are bound to suffer much greater loss in the event that they fail to be compensated. That the defendants do not stand to suffer any prejudice in the event that the injunction is granted as the suit parcel does not belong to them.

Respondents submissions.

9. The firm of Oduor Simiyu filed submissions on behalf of the 2nd to 7th respondents. Counsel submitted that the applicants had not annexed any document of their ownership of the suit land. That the registered owner was the ranch who held it on behalf of its members in undivided shares. It was contended that the court lacked jurisdiction to handle the dispute herein by dint of section 30 of the [Land Adjudication Act](#). That on October 24, 2019 the applicant submitted to the jurisdiction of the group ranch dispute committee and appeal lay to the registrar of group representatives and thereafter to the resident magistrates court.



10. The respondents further submitted that the 7th respondent was a transitional chairman and hence the corporate veil had been lifted before a judgement thus a misjoinder. It was submitted that the applicants had not provided any evidence of ownership of the suit property. Moreover, section 116 of the Land Act 2012 provided for recall money wrongly compensated by the commission and therefore no irreparable loss. According to counsel the balance of convenience titled in favor of the 2nd to 6th defendants. The court was invited to dismiss the application with costs.

Analysis and determination

11. The jurisdiction of this court has been called into question by the respondents. Indeed, as stated in Owners of the Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1, the jurisdiction of the court is at the core of every matter as without it, the court has no authority to take any step in the suit. It is imperative that this is addressed at the earliest opportunity.

The respondents urge that the court is barred by section 30 of the Land Adjudication Act since the land was undergoing adjudication for registration to the names of the members and no person can institute any civil proceedings in court prior to completion of the adjudication process without the consent of the adjudication officer. Secondly having submitted to the jurisdiction of the group ranch dispute committee, appeal lay to the registrar of group representatives and then to the resident magistrates court. It is stated in the 1st -5th respondents supporting affidavit that the suit property was un-surveyed and made part of the larger Mwavumbo Group Ranch title Kwale/Mwavumbo/1 which title was annexed. This is also admitted in paragraph 3 of the applicants supporting affidavit except that according to them the land is held in trust. However, it is trite that such land is held on behalf and for the benefit of the members. It is also not in dispute that the land has been undergoing the process of subdivision which process culminated into the subdivision herein for purposes of titling and as well as ascertainment of claims for the compensation of project affected persons for the Mwache dam project. This being the case the legal regime applicable is the Land Adjudication Act cap 284 of the Laws of Kenya.

12. My understanding is that the applicants are aggrieved by the way the demarcation/subdivision was undertaken and their land given to other people. The grievance was placed before the Mwache dam dispute resolution committee on October 24, 2019 which rendered its decision which is sought to be impugned through these proceedings. In their plaint the applicants are seeking a declaration that the plaintiffs are the rightful owners of the suit property (plot 794). My reading of the decision reveals that (see last paragraph of last page of the decision) the proceedings were undertaken under the provisions of the 'group representative (sic) Cap 287'. This is the Land (Group Representative) Act. The proceedings state that the said Act gives the committee power to preside over disputes arising among its members. The committee further instructs an aggrieved party to complain to 'msajili wa' group ranches (director (sic) of group ranches (translated in english msajili is registrar not director) within 21 days of the date of the decision. The Land (Group Representatives) Act (repealed) made provision for the nomination and powers of the registrar of group representative. I think this is the one referred to as the director of group ranches in the proceedings of the Mwache dispute resolution committee. I came across a letter dated April 3, 2020 in the plaintiffs list of documents from the applicants to the purported director of group ranches which though faded appears to be their appeal as directed by the dispute resolution committee. It is only marked 'noted' I presume by the recipient addressee and no evidence has been annexed as to the outcome thereof. I will therefore draw a conclusion that the appeal or dispute resolution mechanisms have not been exhausted. Also see section 10 of the same Act as to disputes.



13. Assuming this court is wrong on the above, it is not in dispute that the land is undergoing subdivision and the process is still ongoing meaning that in the absence of the consent of the land adjudication officer as required under section 30 this court cannot determine this dispute. I respectfully agree with counsel for the respondents. The court should be the last resort after all else has failed. The intention of this section was to ensure that the robust grievance mechanisms given under the Act are exhausted.
14. Under the [Land Adjudication Act](#) at section 10, the adjudication officer is vested with the jurisdiction in claims relating to interest in land situated in land adjudication areas. Under section 9[1] they may also determine disputes arising from exercises carried out by survey officers, demarcation officers or recording officers. The proceedings before an adjudication officer are similar to the process as set out under section 12[1] and [2] of the [Land Adjudication Act](#).
15. The applicants have also approached this court seeking for orders to stop the National Land Commission from compulsorily acquiring the disputed land being the suit property and releasing the compensation amounts to the 1st – 7th defendants. Firstly, let me state that this court cannot stop the commission from compulsorily acquiring the suit property. The government has all the powers under the doctrine of eminent domain to acquire as long as there is compensation. From the material placed before me the process of acquiring is still underway and the dispute resolution mechanism must be exhausted as set out in the [Land Act](#) 2012 upto the Land Acquisition Tribunal established under section 133A of the [Land Act](#). I have no jurisdiction under this limb of the application.
16. Indeed, our courts have stated that where Parliament has provided a clear procedure for redress, the procedure must be followed. The Court of Appeal in [Speaker of the National Assembly v James Njenga Karume \[1992\] eKLR](#) put it in the following words; -

' In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed.'
17. The Supreme Court of Kenya rendered itself on this principle in the case of [Bernard Murage v Fine Serve Africa Limited & 3 others \[2015\] eKLR](#) as follows: -

' Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.'
18. Recently the Court of Appeal [Makhandia J] emphasized this principle and stated the following regarding multifaceted pleadings in [Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others \[2020\] eKLR](#) [the Kibos Distillers case]:

' To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the tribunal or national environmental complaints committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means



the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that is Speaker of the National Assembly v James Njenga Karume[1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.'

19. The upshot of the foregoing is that the jurisdiction of this court has been prematurely called into play and I must down my tools. The applicants shall be at liberty to pursue and exhaust appropriate redress as provided under the law.

20. The suit is hereby struck out with no orders as to costs.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 28TH DAY OF SEPTEMBER, 2022.**

AE DENA

JUDGE

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

Wangeci holding brief for Mr. Mung'oma for the Plaintiffs/Applicants

N/A for the Defendants.

Mr Denis Mwakina- Court Assistant.

