



Mdoe & 11 others v Export Processing Zone & 2 others (Environment & Land Case E022 of 2022) [2022] KEELC 14595 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E022 OF 2022**

AE DENA, J

OCTOBER 21, 2022

BETWEEN

DZIVO MDOE & 11 OTHERS PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

EXPORT PROCESSING ZONE 2ND DEFENDANT

LAND REGISTRAR KWALE 3RD DEFENDANT

RULING

1. The firm of Sherman Nyongesa & Mutubia Advocates for the Plaintiffs instituted this suit by way of a plaint dated 6/5/2022, accompanied by a Notice of Motion filed on even date under certificate of urgency. The application sought for orders of injunction restraining the defendants from dealing and interfering in any manner with land parcel no Kwale/South Samburu/64 pending the hearing and determination of the said Notice of Motion and suit.
2. The Plaintiffs case is that they are members of the South Samburu group ranch and which is registered under the Land [Group Representative] Act. That they are also the registered proprietors of the suit land Kwale/South Samburu/62 and which has been irregularly subdivided leading to creation of plot number Kwale/South Samburu/64 and transferred to the 1st Defendant. It is pleaded the subdivision and transfer is illegal and contrary to the law governing group ranches and community land.
3. The plaintiffs state that sometime in 2011 the 1st defendant applied to the defunct County Council of Kwale for allocation of land within Kwale County. That in 2013 a meeting was held between the 1st defendant and persons who purported to be owners of a portion of land belonging to the South Samburu group ranch and obtained consent to acquire the land. In 2013 a meeting was again convened outside a general meeting of the group ranch and a decision ratified to excise 200 acres from the group ranch.



4. That in October 2014 the 1st defendant registered a transfer in its favour over the plaintiff's land and without involvement of members of the Samburu Group Ranch. A complaint was lodged to the National Land Commission and whereby the 2nd defendant decided to revoke the title which decision the 3rd defendant has failed to comply with. The plaintiffs also allege the 1st defendant has appealed the said decision but has never served the members of the group ranch.
5. Through the replying affidavit sworn by its Corporate Secretary & Manager Legal services the 1st Defendant's averred that they duly acquired the suit property from the Samburu Group Ranch as a gift donation in exchange for construction of an industrial park, which would create economic opportunities for members of the ranch.
6. She deponed that the necessary consent from the group ranch was acquired and lawful procedures observed. That a letter was written to the defunct county government of Kwale seeking allocation of land who confirmed availability of land for allocation. That meetings were held with the local community who agreed to allocate the 1st defendant 116 acres. That in March 2013 following resolutions of meetings held on 14th and March 15, 2013 between the 1st defendant's officials, Kwale County Council and the group ranch, the group ranch wrote to the 1st defendant confirming donation of 200 acres of land. That the necessary procedures for registration into the 1st defendant's name were carried out and a title deed issued on 31/10/2014. This precipitated a complaint by some members of the group ranch over compensation to National Land Commission which rendered a decision in 2019 but which the 1st defendant appealed against and it was agreed that the land be restricted until the dispute is resolved. That the appeal is pending determination and hence the suit was premature.
7. The 1st defendant raised a notice of preliminary objection based on two main grounds which canvassed in the submissions.

Submissions

1st defendant's Submissions

8. 1st defendant's submissions were filed before court on 28/7/2022 and state that the Plaintiffs have not exhausted internal dispute resolution mechanisms as envisaged under the section 39[3] of the *Community Land Act*. That the suit property by dint of its registration under the said Act the Group Ranch Representative Act applied. That as per section 42[1] it is only upon failure of the alternative dispute resolution mechanism including appeal under Land Acquisition Tribunal that a matter can then be referred to court. Counsel relied on the holdings in *Karaini Investments Versus National Land Commission & another* [2018] eKLR and *Giciri Thuo & 5 others Versus National Land Commission & 4 others; Kenya National Human Rights Commission [Interested Party] Dorcas Wairimu Kamau & 154 others [intended interested parties]* 2022 eKLR.
9. On whether the plaintiffs have capacity to sue in their own name or on behalf of Samburu group ranch, it is submitted that under section 7[3] of the *Land [Group Representative] Act* repealed it is a group in its corporate name that has the capacity to sue and be sued. That the Samburu group ranch is still in existence and has not been dissolved and hence the plaintiffs have no capacity to sue or be sued in their own names as they are not the group representatives contemplated in law. That even though the land was transferred by the plaintiffs before the commencement of the *Community Land Act*, the Samburu group ranch is still existing and has not been registered as a community as stipulated under the Act, reliance is placed on the holding in *Daniel Momanyi Kandeji & 2 others Versus Kamanga Holdings Limited & 44 others* [2017] eKLR. The court is urged to dismiss the suit with costs for being incompetent.



Plaintiffs Submissions

10. The plaintiffs submit that the preliminary objection by the 1st defendant does not meet the threshold of what constitutes one as was set out in *Mukisa Biscuits Manufacturing Co Ltd Versus West End Distributors Limited* [1969] EA 696. That the 1st ground of the preliminary objection is purely a matter of fact and not the law. That plaintiffs' averments that they had lodged a complaint before the 2nd defendant, which was heard and determined in their favour was indeed alternative dispute resolution.
11. It is also submitted that the land in question has been removed from the application of community land as the same has been transferred to the 2nd defendant which is a corporate person and a claim for cancellation of the title cannot be adjudicated upon under the *Community Land Act*. That under section 42[1] of the *Community Land Act* where efforts to resolve a dispute fail, parties may move to the court. That it has been demonstrated that the plaintiffs lodged a complaint at the National Land Commission which was successful and no appeal has been filed within the required time to the land acquisition tribunal and which is the only tribunal dealing with appeals arising from compulsory land acquisition procedures and not illegal and forceful acquisitions of land as done by the 1st defendant.
12. It is submitted that the plaintiffs are members of the Samburu group ranch and bring the suit as members and also in their individual capacity as residents and owners of their ancestral land. As to whether they are members of the group ranch is a matter that will be determined by the court through viva voce evidence and cannot be determined through a preliminary objection. That the 1st plaintiff is the chairman of the group ranch and has authority to sue together with the members. That membership of the group ranch is not through registration but by occupation of ancestral land within the group ranch area.
13. It is further submitted that the land sought to be recovered has since been transferred to the 1st defendant and members of the group ranch retain their corporate and individual constitutional right to approach this court for a claim against a state corporation that has illegally and fraudulently acquired community land and the suit herein cannot therefore be dismissed on technicalities as sought by the 1st defendant. That sections 18 and 19 of the *Environment & Land Court Act* amplify the principle under article 159[d] requires the court to resolve all land disputes before it on merit and without undue regard to technicalities. Under section 20[2] of the Act this court is empowered to stay proceedings and refer parties to alternative dispute resolution but not to dismiss or strike out any claim or suit filed before it. Reliance was placed in *Wachira Karani Versus Bildad Wachira* [2016] eKLR. The court is urged to dismiss the preliminary objection with costs to the plaintiffs.

Analysis And Determination

14. I have carefully read and considered the grounds raised in the preliminary objection, the pleadings and the written submissions filed herein. Indeed, this court recognizes that a preliminary objection must be raised on a pure point of law and any assertions which claims to be preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principles, a true preliminary objection which the court should allow to proceed. That where a court needs to investigate facts, a matter cannot be raised as a preliminary point, see JB Ojwang J Dictum in *Anoro verses Mbajja* (2005) eKLR. Be that as it may the issues that have been raised touch on the jurisdiction of this court and it is imperative that the same is dealt with as early as possible in these proceedings for jurisdiction is everything, without it a court cannot move one more step as enunciated in *Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited* [1989] KLR 1. I will with the material placed before this court endeavor to determine if the grounds raised by the defendants are sustainable and therefore if the preliminary objection is merited.



15. The objection is raised on three issues. Firstly, it is contended that the suit is premature as the internal dispute resolution mechanisms provided under sections 39[3],42[1] of the Community Land Act No 27 of 2016 have not been exhausted. Section 39(3) is to the effect that where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative methods of dispute resolution. Section 42(1) provides that where efforts of resolving a dispute under this Act fail a party may refer the matter to court. It is not in dispute that the plaintiff's lodged a complaint with the 2nd defendant (the Commission) over the donation of Kwale/South Samburu/64 to the 1st defendant claiming ownership of the said land. The defendants on the other hand contend that even though the dispute was filed with the 2nd defendant, an appeal over the decision of the 2nd defendant has been preferred and the same is yet to be determined. It has been submitted on behalf of the 1st defendant that this court lacks jurisdiction to determine this matter for the reasons that the suit is premature as the grievances raised should be ventilated as contemplated under section 133A of the Land Act. That thereafter appeal should lie to this court on issues of law.
16. It is not in dispute that the plaintiffs lodged a complaint with the 2nd defendant over the alienation of the suit property to the 1st defendant. In a matrix attached to the report the determination of the dispute between the parties herein the 2nd defendant rendered itself thus; -
- ‘EPZA is a public institution. They cannot take over private land without compensation. This title should be restricted until the parties agree and the committee and the sellers are satisfied’
- At paragraph 9 of the plaint, the plaintiffs translate the above determination as meaning that the subdivision, registration and transfer of title No. Kwale South Samburu/64 was illegal and contrary to the law and that the 2nd defendant was under obligation to compensate the plaintiffs for the land.
17. It is the above determination that has allegedly been appealed by the 1st defendant through their letter dated 23/10/2019 (HAM -11) on the basis that the land was not compulsorily acquired but donated therefore not warranting compensation. Additionally, the assertion that a public institution cannot acquire land without compensation was not anchored in any law. It is the defendant's case that the appeal lodged with the 2nd defendant (herein the Commission) has not been determined and they have annexed correspondence in this regard. A look at the correspondence reveals that since the determination herein the 2nd defendant has held two public hearings on 1st to December 4, 2021 and 17th to January 22, 2022 and was in the process of calling for another on 23/2/22 at Samburu Social hall EPZA. Prima facie from a look at the proceedings it is clear that a fresh inquiry was being undertaken on the issue with a view to determining the appeal lodged by the 1st defendant. My understanding from the pleadings and specifically paragraphs 11 and 12 of the plaint is that their efforts to resolve the dispute through the 2nd defendant have been frustrated after they were denied a chance to be heard and that the 2nd defendant attempt to overturn the earlier determination is illegal and against the rules of natural justice. Clearly the process has not been completed it is ongoing. The plaintiffs seem to me to have jumped the gun and have concluded that the earlier decision will be overturned yet no decision has been rendered on the appeal. Secondly, they have raised issues of process which ought to be a preserve of judicial review proceedings. This court must actualize the aspirations in article 159(2) of the Constitution geared towards promotion of alternative forms of dispute resolution and the overriding objectives of the Civil Procedure Act. I'm also guided by the case of National Land Commission Vs. Attorney General & 6 others (2014) eKLR .
18. Additionally, public resources must have been expended to call for the public hearings and this in my view should not be let to go down the drain simply for the fear that a decision will be overturned. In my view the Commission is still best placed to try and resolve the dispute and if all else fails then the



parties can move this court or if a decision is rendered then an aggrieved party should subject to the law move this court on appeal.

19. It has been further submitted by the 1st defendant that the grievances raised should be ventilated as contemplated under section 133A of the *Land Act*. That thereafter appeal should lie to this court on issues of law. I have already observed from the plaint that issues of compensation have come into play (see paragraph 9). Paragraph 8(b) alludes to appropriation of land belonging to the plaintiffs without payment of compensation and or sufficient consideration and ultimately the plaintiffs also pray as an alternative prayer relief that the transfer herein without compensation/consideration to the plaintiffs is illegal, null and void. Section 133A establishes the Land Acquisition Tribunal and whose jurisdiction is stipulated as follows; -

133C. Jurisdiction of the Tribunal

1. The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
2. A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.
3. Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.
4. Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient:
5. If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
6. Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
7. Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
8. The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under articles 23 (2) and 47 (3) of *the Constitution*, using the framework set out under the *Fair Administrative Action Act* or any other law.

Section 133D further stipulates;

133D. Appeals

1. A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court on any of the following grounds—
 - a. the decision of the Tribunal was contrary to law or to some usage having the force of law;
 - b. the Tribunal failed to determine some material issue of law or usage having the force of law; or
 - c. a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.
2. An appeal from the decision of the Tribunal may be made on a question of law only.



20. From the foregoing I agree with the 1st defendant counsels' submissions that the jurisdiction of this court has been prematurely invoked and the doctrine of exhaustion must be upheld. 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.”

21. In my view it is not enough for the plaintiffs to submit that the matter before the court is on forceful and fraudulent acquisition of land or make his claim a mixed grill. I find support in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR [the Kibos Distillers case] wherein the Court of Appeal [Makhandia J] emphasized this principle and stated the following regarding multifaceted pleadings:-

“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.”

22. The upshot of the foregoing is that this court finds that the jurisdiction of this court has been prematurely called into play, the preliminary objection is sustained and I must down my tools. The parties herein shall be at liberty to pursue and exhaust appropriate redress as provided under the law.

23. This suit shall therefore be stayed awaiting the above.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 21 DAY OF OCTOBER, 2022

A.E. DENA

JUDGE

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

Ms. Asewe holding brief for Mr. Mutubia for the Plaintiff

No appearance for the 1st Defendants.

No appearance for the 2nd Defendants



No appearance for the AG.

Mr. Denis Mwakina- Court Assistant.

