



REPUBLIC OF KENYA



**Mutisya (Suing on his own behalf & as an Administrator of the Estate of Samuel Mutisya Somba) v Land Adjudication Officer, Makueni & 11 others; Mutisya & another (Interested Parties) (Environment & Land Petition 13 of 2020) [2022] KEELC 15501 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15501 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND PETITION 13 OF 2020**

**CG MBOGO, J**

**DECEMBER 21, 2022**

**BETWEEN**

**WILLIAM KIVUVA MUTISYA ..... PETITIONER  
SUING ON HIS OWN BEHALF & AS AN ADMINISTRATOR OF THE ESTATE  
OF SAMUEL MUTISYA SOMBA**

**AND**

**LAND ADJUDICATION OFFICER, MAKUENI ..... 1<sup>ST</sup> RESPONDENT  
DEMARCATION OFFICER ILIMA, KYAMUOSO ADJUDICATION  
SECTION ..... 2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY FOR LANDS & PHYSICAL PLANNING .... 3<sup>RD</sup>  
RESPONDENT  
HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
COUNTY LAND REGISTRAR MAKUENI ..... 5<sup>TH</sup> RESPONDENT  
BENJAMIN MUTUSE MUSAU ..... 6<sup>TH</sup> RESPONDENT  
MULI NGUI ..... 7<sup>TH</sup> RESPONDENT  
PATRICK MUNYAO KISASI ..... 8<sup>TH</sup> RESPONDENT  
HELLEN NDUKI KANZI ..... 9<sup>TH</sup> RESPONDENT  
LOICE KANAKA KIMUYA ..... 10<sup>TH</sup> RESPONDENT  
EDWARD KINYILI YULU ..... 11<sup>TH</sup> RESPONDENT  
FRANCIS MUIA YULU ..... 12<sup>TH</sup> RESPONDENT**



AND

**ALICE MUTETHYA MUTISYA ..... INTERESTED PARTY**

**KITUU NGULI (THE ADMINISTRATOR OF THE ESTATE OF WILSON  
NGULI SOMBA - DECEASED) ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is a notice of preliminary objection dated October 6, 2020 filed by the 1<sup>st</sup>-5<sup>th</sup> respondents challenging the entire suit on the grounds that: -
  1. That this court lacks jurisdiction to entertain the suit as the petitioner has lodged an objection which is still pending.
  2. That the entire suit offends section 26 & 29 of the [Land Adjudication Act](#), cap 284, laws of Kenya.
  3. That the entire suit is an abuse of the court process.
2. The notice of preliminary objection was disposed off by way of written submissions. The 1<sup>st</sup> to 5<sup>th</sup> respondents filed written submissions dated May 12, 2021. The 1<sup>st</sup> to 5<sup>th</sup> respondents raised two issues for determination as below:-
  - i. Whether the court has jurisdiction to entertain the suit.
  - ii. Whether the suit has been filed prematurely, contrary to section 26 and 29 of the [Land Adjudication Act](#).
3. The 1<sup>st</sup> to the 5<sup>th</sup> respondents submitted that this court lacks jurisdiction to entertain the suit as the adjudication involving the subject parcels of land herein is in the objection stage and the same has not been finalized. They relied on the cases of [Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service](#) [2019] eKLR and [Owners of the Motor Vessel "Lillian S" versus Caltex Oil \(Kenya\) Limited](#) [1989] eKLR.
4. On the second issue, the 1<sup>st</sup>-5<sup>th</sup> respondents submitted that the petitioner filed the suit prematurely contrary to section 26 and 29 of the [Land Adjudication Act](#) as they have not exhausted the process of objection. This can be seen from the prayers sought in the petition whereby the petitioner is seeking an order to quash the adjudication register of the adjudication section. The 1<sup>st</sup> to the 5<sup>th</sup> respondents submitted that this court should not interfere with the exercise of any power or discretion which has been conferred on a body unless it has been exercised in a way which is not within its jurisdiction or unreasonably. They relied on the case of [Speaker of the National Assembly v Njenga Karume](#) [1992] eKLR.
5. The petitioner filed written submissions dated June 9, 2021. The petitioner raised two issues for determination as follows: -
  - a. Whether the court has jurisdiction to hear and determine this suit.
  - b. Who should bear costs.
6. On the first issue, the petitioner submitted that this court has jurisdiction to hear and determine the instant suit for the reason that it challenges the legitimacy of the adjudication process and it also seeks



determination of interests and rights. The petitioner submitted that it is not in contention that he lodged an objection against the demarcation exercise which was not heard and determined for a period of fourteen years for the reason that the 6<sup>th</sup> and 12<sup>th</sup> respondents were members of the land adjudication committee. For this reason, the petitioner was legally and technically incapacitated from the remedies available under the [Land Adjudication Act](#).

7. The petitioner further submitted that of paramount significance is that an aggrieved party can only exhaust the avenues under the [Land Adjudication Act](#) when he is heard and that if an aggrieved party is never heard under the land adjudication process, his recourse lies before a court of law. The petitioner submitted that vide a judgment delivered on August 18, 2009 the trial court observed that the alleged boundary had not been established in accordance with the provisions of [Land Adjudication Act](#) and consequently acquitted the petitioner pursuant to section 215 of the [Criminal Procedure Code](#).
8. The petitioner further submitted that it is only a court of law which is clothed with the requisite jurisdiction to declare a process unconstitutional, null and void. He further submitted that following the unlawful demarcation of the suit properties in the year 2014, the land adjudication officials were duly charged, convicted and sentenced and that it is based on the foregoing that the flawed process can only be declared null and void by a competent court. Further, that before filing the present petition, the petitioner discovered that the whole adjudication section had been secretly opened and closed without an opportunity to inspect and object to the register.
9. The petitioner further submitted that he could not lodge an objection to the adjudication register because there was no notice of completion of the adjudication register as is by law required rendering the process a nullity. The petitioner relied on the case of [Macfoy v United Africa Co Limited](#) [1961] 3 ALL ER 1169.
10. On the preliminary objection, the petitioner submitted that it was blanketly and casually raised as it does not meet the threshold as contained in the cases of [Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited](#) [1969] EA 696. The petitioner further submitted that where a suit challenges the legitimacy of an adjudication process coupled with an issue of interests and rights to be determined, the proper forum to canvass the same is a court of law. The petitioner relied on the cases of [Moses Barkutwo & 3 others v District Land Adjudication & Settlement Officer Elgeyo Marakwet County & another; Moses Barmoto & 11 others \(Interested Parties\)](#) [2021] eKLR and [Muthara Njuri Ncheke Council of Elders & another v Committee of Ngare Mara/Gambella Adjudication section & 2 others](#) [2019] eKLR.
11. A preliminary objection was described in the [Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd](#) (1969) EA 696 to mean: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that: -

“A preliminary objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is 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”.

12. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. Further, in the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

13. It is this court’s opinion that in determining a preliminary objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, where the court held that: -

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

14. Based on the foregoing, I am satisfied that the preliminary objection raises a pure point of law.

15. Section 26 of the [Land Adjudication Act](#), which provides: -

“(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit, he shall determine the objection”.

16. Section 29 of the [Land Adjudication Act](#) provides 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”.

17. In this case, the petitioner filed a petition dated July 30, 2020. In his petition, the petitioner contended inter alia that the area was declared an adjudication section on or about the year 2007 and it was known as Kyamuoso Adjudication Section and the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> respondents



colluded and unlawfully subdivided the suit property to six portions of land. That on July 18, 2007, the petitioner filed an objection against the unlawful demarcation but the same was never heard nor determined for the reason that the 8<sup>th</sup> and 12<sup>th</sup> respondents were members of the land adjudication committee.

18. The petitioner further contended that upon enquiry, he was informed that there were no records of the purported Kyamuoso Adjudication Section and the petitioner discovered that the said section had been closed indefinitely owing to the unlawful actions. It is his position that Kyamuoso Adjudication Section was secretly and unlawfully opened and closed and he was not given an opportunity to inspect the register and to object to the adjudication register. As such, the adjudication process was not only flawed and irregular but also unlawful as the petitioner was not accorded the avenue to produce any documentation regarding the subject matter.
19. I have perused the documents relied on by the petitioner and the letter dated October 13, 2016 written by the District Land Adjudication and Settlement Officer, Makueni adjudication area which informs counsel for the petitioner that he was unable to issue consent for the reason that he does not have any records for the section.
20. On the other hand, the 1<sup>st</sup>-5<sup>th</sup> respondents filed grounds of opposition challenging the petition on the grounds that the same was prematurely filed.
21. Without pre-empting the petition, the 1<sup>st</sup>-5<sup>th</sup> respondents ought to show that indeed the adjudication process was/is still ongoing to confirm that the adjudication process is yet to be completed. The objection that was raised in the year 2007 has not been seen to be dealt with either.
22. I do agree with counsel for the petitioner that the petition herein raises issues with regards to the rights and interests of the petitioner challenging the adjudication process and more importantly the laid-out process as provided under the *Land Adjudication Act*. A party has all the right to challenge the legality or otherwise of a process which has been laid down by statute where he feels that his rights and fundamental freedoms have been violated, threatened or infringed. I say so because the petitioner in this case filed an objection in the year 2007 and no action has been taken so far. What other avenue or remedy was available to the petitioner if the office mandated to do so has not taken any action to address his claims? In my view, the petitioner is quite in order to file the instant petition.
23. Arising from the above, the notice of preliminary objection dated October 6, 2020 lacks merit and the same is dismissed. Costs shall abide the petition. Interim orders issued on October 15, 2020 are hereby extended. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 21<sup>ST</sup> DAY OF DECEMBER, 2022.**

**HON MBOGO CG**

**JUDGE**

**DECEMBER 21, 2022**

**In the presence of:**

CA:Chuma

