



Swalehe & another v Land Registrar Kwale & 2 others (Environment and Land Appeal E003 of 2022) [2025] KEELC 4187 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

AE DENA, J

MAY 29, 2025

BETWEEN

MWERO SWALEHE 1ST APPELLANT

ATHUMANI RAJIMBO MGALA 2ND APPELLANT

AND

LAND REGISTRAR KWALE 1ST RESPONDENT

LAND ADJUDICATION OFFICER KINANGO 2ND RESPONDENT

MWAMVUA SAIDI BAKARI 3RD RESPONDENT

JUDGMENT

1. The subject of this judgement is the ruling of and order of Senior Resident Magistrate (Omido M.) as he then was delivered on 11/05/2022 in Kwale CMCC No. 63 of 2018. The appellants were the plaintiff in the matter.
2. The ruling was in respect of a preliminary objection raised by the 1st and 2nd defendant. The jurisdiction of the trial court was questioned on the basis of the provisions of section 9(2)(3) of the Fair Administrative Action Act 2015 and Article 159(2) (c) of the Constitution of Kenya 2010. That the plaintiff had failed to exhaust the mandatory internal dispute resolution mechanism available under section 29 and 30(3) of the Land Adjudication Act Cap 284 (herein the Act) and the Land Consolidation Act.
3. The preliminary objection was heard by way of written submissions in the trial court. The Hon learned Magistrate upheld the objection. The plaintiff being aggrieved lodged an appeal against the decision vide a Memorandum of Appeal dated 10/6/2022. The following grounds were raised;-



1. The learned Senior Principal Magistrate erred in law and fact holding that section 30 of the Land Adjudication Act applies to land which has been registered under the Registered Land Act (repealed) or as the case may be the Land Registration Act 2012.
 2. The learned Senior Principal Magistrate erred in law and fact in considering issues which were never raised in the preliminary objection dated 2nd June 2022 thereby constructively condemning the appellants unheard
 3. The learned Senior Principal Magistrate erred in law and fact in resorting to speculations rather than directing his mind to the points of law raised by the preliminary objection.
 4. The learned Senior Principal Magistrate erred in law and fact in failing to consider that the appellants are only legal representatives of their deceased father, the late Salehe Mgala Rajimbo who before his death had applied for the land subject of these proceedings and there was no objection
 5. The learned Senior Principal Magistrate erred in law and fact in failing to consider that the appellants had closed their case and were very clear on the remedy they were seeking.
 6. The learned Senior Principal Magistrate erred in law and fact in holding that the court had no jurisdiction over the dispute contrary to section 80 of the Land Registration Act.
4. The appellants propose to this court that the appeal is allowed and the order upholding the preliminary objection be set aside in place thereof dismiss it with costs.

Submissions

5. The appeal was canvassed by way of written submissions. The appellants submissions are dated 14/5/2024 and 30/07/2024. The Respondents submissions are dated 15/07/2024. The court has considered these submissions.

Analysis And Determination

6. The preliminary objection was raised on the basis of failure to exhaust the mandatory internal dispute resolution mechanism available under section 29 and 30(3) of the Land Adjudication Act Cap 284 (herein the Act) and the Land Consolidation Act. This is buttressed by the submissions filed by Njau M.E Mvoi (page 113 – 116) of the record of appeal. According to counsel upon the discovery of objection proceedings as pleaded in paragraph 9 of the Plaint, the Plaintiff ought to have adhered to the provisions of section 30 of the Act. The submissions set out in detail the dispute resolution mechanism and the steps to be taken. It was urged that the court could only proceed after mechanisms under section 12 – 26 of the Act were exhausted.
7. I also took time to review the submissions raised by the plaintiff in the lower court dated 21/9/2021 (page 111-112). It was submitted that the preliminary objection was based on assumption that there were some necessary dispute resolution mechanisms which were never exhausted before the suit was instituted. That the said objection therefore required the plaintiffs to produce evidence that they exhausted the available remedies removing the objection from the realm of a pure point of law. That the objection was an abuse of process as the matter was partly heard.
8. It was further contended that the plaintiffs suit was on rectification of the register under section 80 of the Land Registration Act which the court had jurisdiction. That the matter was a suit within the meaning of section 2 of the Civil Procedure Act and not a judicial review contemplated under section 9



of the Fair Administrative Action Act 2015. It was urged that section 29 of the Act deals with Appeals to the Minister yet no decision had been made or annexed.

9. The trial court identified one issue of determination- whether this court has jurisdiction to determine the matter in light of section 26 of the Land Adjudication Act. The trial court noted that an objection lodged under this provision is to be considered by the Adjudication officer and the Committee that is created under the said Act. Having reviewed paragraphs 7 – 13 of the plaint the trial court observed that although not specifically stated, wheat (sic) is being challenged is the name of the 3rd defendant as appearing in the Adjudication Register and finally on the title of the property Kwale/Tsunza/409. The trial court further cited the provisions of section 30 of the Act read together with section 29(3) held that since there was no final determination on appeal the matter was filed before a court with no jurisdiction.
10. Having considered all the above, the grounds of appeal raised in the Memorandum of Appeal herein and the totality of the proceedings in the trial court, I will now as a first appellate court review the decision of the trial court on the preliminary objection.
 - a. Whether the preliminary objection was properly raised and
 - b. If yes whether the court lacked jurisdiction by dint of section 9(2) (3) of the Fair Administration Action Act and section 29 and 30(3) of the Land Adjudication Act
 - c. Whether the court draws jurisdiction from section 80 of the Land Registration Act.

Whether the preliminary objection is on a pure point of law.

11. The threshold of a preliminary objection was set out by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696 where Sir Charles Newbold, 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. ‘

12. According to the Black Law Dictionary a Preliminary Objection is defined as:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
13. My review of the Plaint (see page 7-12 of the record of appeal) clearly shows that the matter of process is highly contested by the Plaintiffs themselves. At paragraph 7 they allege they are not aware of the exact stage where the entire process went wrong. That they were in doubt as to which office removed their fathers name and replaced it and or solely retained the 3rd defendant. Even the objection itself is contested at paragraph 9 in terms of its legality as having been filed out of time or even whether it was heard in the first place and the decisions thereto. In my view there are issues of fact including fraud which would require further evidence to enable the court arrive at the determination whether the process was exhausted.
14. It is the finding of this court that the preliminary objection was not a pure point of law.
15. Ordinarily the practice is that where the court finds that a preliminary objection has not been properly raised the trajectory would be to dismiss the same and proceed to hear the dispute and making a decision



based on the merits of the suit. But there a number of issues that emerged that I find necessary to lay to rest. This will become clear in the next issue.

Whether the court lacked jurisdiction by dint of section 9(2) (3) of the Fair Administration Action Act and section 29 and 30(3) of the Land Adjudication Act

16. Let me first deal with the provisions of section 9(2)(3) of the Fair Administration Action Act which appear to have been cited in the objection but did not feature in either the respondents' submissions or the ruling herein.
17. Section 9(2) of the Fair Administrative Action Act, provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Sub-section (3) provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
18. It would appear that the above provisions were cited to buttress the objection on the need to exhaust the process outlined under the Land Adjudication Act. The appellant took the position that the present proceedings are not judicial review proceedings. For me I think it is the principle of exhaustion that we need to focus on and not the manner in which the proceedings are brought. There is no need to belabour this issue.
19. I think this entire issue can be adequately addressed in the question whether the provisions of the Land Adjudication Act apply in the circumstances of this dispute. The plaintiffs contend that the Act may not be applicable for the reason that the suit property was now registered under the Land Registration Act. I think this was a point that commended consideration from the outset.
20. A title deed has been provided (see page 49 of the Record of Appeal) showing that the Mwamvua Said Bakari the 3rd defendant/respondent is now registered as the absolute proprietor. This has been pleaded by both parties in their pleadings and it is not in dispute. Effectively the suit property is now governed under the regime of the Land Registration Act and I respectfully agree with the appellant in this regard. The vessel has left the port.
21. Moreover, what is now emerging is that the process of the acquisition of the title is being challenged by the Plaintiff. The plaintiff wants the title impeached which is also the essence of the proceedings.
22. I have noted the argument regarding the provisions of section 80 of the Land Registration Act. Section 80 of the Land Registration Act provides that

'(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'
23. I think the above provisions are clear and I need not belabour the point. The suit property is now registered and can only be rectified by an order of the court. I can only say much for the reason that I wish to leave this matter to the substantive outcome of the matter once it is heard on merit.
24. I think I have said enough to demonstrate why this appeal is merited.



25. The following orders hereby issue to dispose of the appeal; -

1. The appeal is hereby allowed
2. The order upholding the preliminary objection be and is hereby set aside and replaced with an order dismissing the preliminary objection dated 2nd June 2021.
3. The lower court file will be returned appropriately
4. Each party to bear their own costs.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 29TH DAY OF MAY 2025

HON. LADY JUSTICE A. E. DENA

JUDGE

29/5/2025

Mr. Odongo for the Appellants

Mr. Kiprono Holding Brief for Mwanazumba for the 1st and 2nd Respondent

No appearance for the 3rd Respondent

Ms Asmaa Maftah – Court Assistant

