



REPUBLIC OF KENYA



KENYA LAW

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**Charo & another v Nzaro & 6 others (Environment & Land Petition
E007 of 2024) [2025] KEELC 1123 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1123 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION E007 OF 2024

EK MAKORI, J

MARCH 6, 2025

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 1, 2, 3, 10, 23, 40,
60, 67, 159 AND 258 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 7 OF THE LAND ACT NO. 6 OF 2012

AND

**IN THE MATTER OF THE SECTION 24(1), 94(1) OF THE LAND
REGISTRATION GENERAL REGULATIONS 2017 ACT NO. 3 OF 2012**

AND

**IN THE MATTER OF SECTION 80, 81(1) OF THE LAND REGISTRATION ACT
NO. 3 OF 2012**

AND

**IN THE MATTER OF SECTIONS 26A, 27 & 165 OF THE LAND ADJUDICATION ACT
CAP. 284 LAWS OF KENYA**

AND

IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT 2011

BETWEEN

KARISA BAYA CHARO 1ST APPLICANT

**CHARO BAYA CHARO (INTERIM ADMINISTRATORS OF THE ESTATE OF
THE LATE CHARO BAYA MWAROGO) 2ND APPLICANT**

AND

NZARO KARISA NZARO 1ST RESPONDENT



MARY MUTETI	2 ND RESPONDENT
LAND ADJUDICATION & SETTLEMENT OFFICER KILIFI COUNTY	3 RD RESPONDENT
DIRECTOR OF LAND ADJUDICATION	4 TH RESPONDENT
LAND REGISTRAR KILIFI	5 TH RESPONDENT
CHIEF LAND REGISTRAR	6 TH RESPONDENT
ATTORNEY GENERAL	7 TH RESPONDENT

RULING

1. A preliminary objection notice was submitted by the 1st respondent on 24th June 2024, addressing the notice of motion application dated 19th May 2024. This objection seeks to have the application, which requested injunctive reliefs and the entire petition, struck out on the following grounds:
 - a. This court lacks jurisdiction to hear the application dated 9th May 2024 and the petition filed herein.
 - b. the petition is time barred.
 - c. the petition is res judicata.
 - d. The petitioners lack the necessary locus standi to institute and prosecute this petition.
 - e. The petition is malicious, misconceived, lacking in merit and an abuse of the court process.
2. The court directed that the preliminary objection and the pending application be canvassed through written submissions.
3. From the materials and submissions placed before me, the court has conducted a thorough review. The issues that this court must determine are whether this court lacks jurisdiction to hear the application dated 9th May 2024 and the petition filed herein on grounds that the petition is time barred, res judicata, the petitioners lack the necessary locus standi to institute and prosecute this petition, the petition is malicious, misconceived, lacking in merit and an abuse of the court process and who should bear the costs of these proceedings.
4. For order, the court will start with the preliminary objection, the principles upon which this court is invited to determine the merit of a notice of preliminary objection were set out in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. This case established the criteria for a preliminary objection, stating that it consists of a point of law that may dispose of the suit if argued as a preliminary point. Examples are an objection to the jurisdiction of the court, 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.
5. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 (KLR), reiterated the same position on what would constitute a preliminary objection and held as follows:

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (supra).



That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

6. The 1st respondent submits that the trust of a preliminary objection in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A, in *Owners of the motor vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR*:

“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.”

7. The 1st respondent avers – correctly so - that a preliminary objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent time management as a court resource by summarily flagging frail and hopeless suits that, if admitted to full trial, will be a waste of judicial time and not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a preliminary objection is sustainable or not but look at the pleadings and discover that the suit is a none starter – see *Ogola J. in DJC v BKL (Civil suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling)*:

8. The 1st respondent submits that the petitioners have listed the reliefs they seek from this court in the petition. In summary, they seek an injunction, declaration of ownership, and judicial review orders. The 1st respondent aver that an injunction may be sought with declaratory orders in a civil suit relating to land ownership. The judicial review orders can be sought in an appropriate review application. The petitioner is well aware that if they could have gone the two routes, either by filing a civil suit or judicial review proceedings, the same would have been time-barred, hence the choice to file the present petition seeking orders in the nature of the judicial review and those in the nature of a civil suit. In the petition, the petitioner states as follows:

“It is important to note that the court of appeal, in the said ruling, confirmed that one of the clear ways of challenging the decision of the Minister under section 29 of the *Land Adjudication Act* was through the judicial review process, which process can also be invoked through a constitutional petition process, as is sought in this petition”

9. The 1st respondent opines that the averment cannot be accurate. The same is misleading; judicial review is not concerned with the merits of a process, while a constitutional petition looks at its merits. The reliefs can be seen through the same lens as the current petition. They seek quashing of a decision by the District Commissioner, Kilifi. The court is reminded of the wise saying – “If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck”. *Moeli J. in Malindi High Court civil suit No. 39 of 2006: Chembe Katana Changi v Minister for Land and Settlement & 4 others [2013] eKLR* stated:

“Even assuming a normal suit was referred or applicable, the period for filing the proceedings challenging the Minister’s decision should have been brought within twelve months in compliance with the *Government Proceedings Act*.”



10. The 1st respondent believes this multifaceted petition is also time-barred. As held in the above case, the decision of the Minister could not have been challenged in 2013. A question is posed as to whether it can be challenged now. The decision in *Njue Ngai v Ephantus Ngai & another* [2016] eKLR is quoted as applied with approval by Yano J. in the case of *Kefa Were v Benedict Chepkering* [2018] eKLR, where it was held that when a suit is time-bared, in whichever form it is renewed, it remains defeated by the operations of the Statute of Limitations.
11. The 1st respondent asserts that a perusal of the annexed reveals the main issue therein was on the decision of the District Commissioner, Kilifi regarding land adjudication regarding the plots. The parties in the said case are the same as the parties herein.
12. The 1st respondent affirms, from the foregoing, it is clear that the suit properties belonged to the 1st respondent's grandfather.
13. The petitioners aver that they seek to enforce their fundamental constitutional rights over the suit properties, which were taken away by flagrant abuse of *the Constitution*. Several authorities from the superior courts opine that when one seeks to enforce a fundamental right, there is no limitation period—see, for example, *Safepak Limited v Wambega & 11 Others* [2019] eKLR.
14. The petitioners further aver that Article 22 of *the Constitution* confers:
 - “(1) 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.”
15. Article 23 of *the Constitution* clothes this court with jurisdiction to grant appropriate reliefs to include:
 - a. A declaration of rights;
 - b. An injunction;
 - c. A conservatory order;
 - d. A declaration of 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 and;
 - f. And order of judicial review.
16. According to the petitioners, they seek expensive orders as of right – as they do from this court, including the grant of judicial review orders.
17. As submitted by the 1st respondent and apparent on the face of the petition, this court is being asked to reverse the registration of the 1st respondent's suit properties, created by virtue of the adjudication process.
18. Precedents from this court and the Superior Courts indicate that the manner provided in law to address grievances emanating from the adjudication process is via Judicial Review - see for example the decision in *Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 others* (Civil



Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment), the Court of Appeal held:

“The prayers sought, among others, included the prayer for the setting aside of the Ministerial decision. Even though the Appellant denies that the suit was an appeal, we are convinced that it was one for all practical purposes.

20. In regards to whether the ELC had the requisite jurisdiction to entertain the suit, there is no dispute that the suit was challenging the decision of the Minister made pursuant to Section 29 of the Act. That Section, under Section 29(1) (b) provides:

“(b) and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

21. In addition to declaring that the decision of the Minister is final, Section 30 of the Act all together ousts the jurisdiction of the Courts, providing as follows:

“30. Staying of land suits

(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

22. The Act is clear that any person aggrieved by a decision made under Section 26 of the Act must follow the process under Section 29 and appeal to the Minister. Once the Minister, or the panel delegated to, makes a determination, his order is final. That means the Minister’s decision cannot be appealed, whether under the Act or in Court. The option the Appellant had was to pursue the Judicial Review process provided under Article 47 of *the Constitution*, and the *Fair Administrative Action Act*, 2015, a statute enacted pursuant to Article 47 of *the Constitution*. He could not re-open the case and challenge it except through Judicial Review. The Appellant was attempting to undo the process he participated in using a process that is not provided for, and that is not allowed.

23. In *Julia Kaburia vs. Kabeera & 5 Others* [2007] eKLR, this Court commenting on Section 30 of the Act, held:

“The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather, the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication.



This protection was availed to the parties herein by the appellate process which culminates with Section 29 of the Act;

- “(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.”

24. The ELC commenting on the role of the Court vis-a-vis that of the adjudicating bodies under the Act in the persuasive authority of Tobias Achola Osindi & 13 Others vs. Cyprian Otieno Ogalo & 6 Others [2013] eKLR by Okongo J., as follows:

“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act... The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land...”

25. Having carefully considered this appeal, we find no fault with the finding and holding of the ELC Judge that it had no jurisdiction to entertain the Appellant’s suit. The process of land adjudication had effectively come to its logical conclusion and could not be re-opened otherwise than in the manner contemplated by the law. In the circumstances, the ELC properly struck out the Appellant’s suit. The Appellant did not have any separate cause of action against the 1st Respondent other than the matters which were adjudicated upon and determined by the Ministerial Appeals Committee during the appeal to the decision of the objection proceedings. That decision was final.”



19. The sale agreement disclosed in the Petition was discussed in the objections filed during the adjudication process and found to be irregular in both form and authenticity.
20. I need not belabour to discuss the other grounds raised in the preliminary objection. I down tools. The court's jurisdiction has been invoked wrongly.
21. The upshot is that the pending application and the entire Petition is hereby struck out with costs

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 6TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Angima, for the Petitioners

Mr. Ondieki H/B for Shimaka for the 1st and 2nd Respondents

Happy: Court Assistant

In the Absence of:

Mr. Munga for the 3rd – 7th Respondents

