Basha & 2 others v Tungwa & 2 others (Environment and Land Appeal E023 of 2024) [2025] KEELC 4233 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4233 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND APPEAL E023 OF 2024

EK MAKORI, J

JUNE 5, 2025

BETWEEN

MORRIS MWALIMU BASHA ..... 1ST APPELLANT

WILLIAM CHIRAO BASHA ..... 2ND APPELLANT

ISMAEL MNYAMBU CHIRAO ..... 3RD APPELLANT

AND

MDOE TUNGWA ..... 1ST RESPONDENT

JIRA TSUMA JIRA ..... 2ND RESPONDENT

MANGO MWANGOLO ..... 3RD RESPONDENT

(Appeal arising from the Ruling delivered by Hon. N. Chepchirchir delivered on the 30th day of August 2023 in Marikani Principal Magistrate ELC No. E003 of 2021 – Mdoe Tungwa & 2 others v Morris Mwalimu & 2 others)

JUDGMENT

1. This is an interlocutory appeal that challenges the ruling delivered by the Hon. N. Chepchirchir on the 30th day of August 2023, which dismissed an application dated the 10th of May 2023.

2. The aforementioned application sought to include Mwavumbo Group Ranch as a party in the lawsuit currently before the Lower Court. The lawsuit is stayed pending the resolution of the appeal lodged by the Defendants/Appellants at Mwavumbo Group Ranch, with directives for Mwavumbo Group Ranch to expedite the scheduling of the pending appeal for hearing and determination. The Appellants' appeal is thus to be finalized there.

3. The appeal was argued through written submissions at the request of the Court.

4. This Court's role now, although stemming from interlocutory proceedings in the Lower Court, is to reassess evidence and reach an independent conclusion. In the case of Okeno v Republic [1972] EA 32 at 36, the East African Court of Appeal articulated the Court's responsibilities in a first appeal as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

5. The Appellants, in their submissions, believe that the Trial Court misdirected itself by failing to promote alternative dispute resolution mechanisms by diverting the matter to the Mwavumbo Group Ranch. They contend that the Trial Court failed to recognize that the suit property fell within an adjudication section and should have refrained from proceeding due to a lack of jurisdiction. I can see that this ground was abandoned in light of this court's ruling dated the 13th of November 2024, in which this court found that the said group ranch area had not been declared an adjudication area within the meaning of the *Land Adjudication Act*, Cap 284, Laws of Kenya. This is what the court said in that ruling:

> " I have evaluated the materials placed before the learned Magistrate and the conclusion and final verdict. In her decision after hearing parties and considering their submissions, the Magistrate concluded:
>
> "I have carefully considered the application dated 10th May 2023, together with the replying affidavit by the 1st Respondent and the submission by both parties. The applicant seeks to enjoin Mwavumbo Group Ranch as an Interested Party in the suit, as it is said to hold the title to the land in the trust of its members, and there is an appeal pending before them. The applicant also asked the court to down tools as the suit land is under adjudication, and Section 30 of the *Land Adjudication Act* was not complied with.
>
> I agree with counsel for the respondent that the grounds relied on by the applicant do not make out a case for a party to be enjoined in the suit. The issues sought to be clarified by the Interested Party can be ventilated if they are called as witnesses and not enjoined as an Interested Party. That prayer lacks merit and is dismissed.
>
> As to whether this suit should be stayed pending appeal before Mwavumbo Group Ranch, again, I agree with counsel for the Respondent that it is only the High Court that can stay a suit pending before a court.
>
> Does the court have jurisdiction to hear and determine this matter?
>
> The answer is in the affirmative. Nothing has been presented before the court to show that the suit land is under Adjudication. A group Ranch, under the law, is not mandated to conduct an adjudication process. There is a well laid down procedure on the same under the *Land Adjudication Act*.

The result is that application dated 10th May 2023 lacks merit and is dismissed. Costs shall abide in the outcome of the main suit."

6. I can see that in this main appeal(sic) the appellant emphasizes that the Magistrate ought to have referred the matter to the Mwavumbo Group Ranch for purposes of alternative dispute resolution in accordance with Article 159(2) (c) of *the Constitution* and under the doctrine of exhaustion of remedies. Furthermore, the Magistrate declined to stay the proceedings pending the decision of Mwavumbo Ranch, and the court stated that a stay of proceedings can only be granted by the High Court. Besides, the Magistrate erred in failing to join the said Mwavumbo Ranch as a party to the proceedings.

7. In my earlier ruling, I determined that the Mwavumbo Ranch area is not designated as an adjudication area; that finding alone was sufficient to resolve all the other issues raised in this appeal. The court in the ruling dated November 13, 2024, stated as follows:

> " Looking at the grounds of appeal and the reasoning by the learned Magistrate, I see nothing to warrant the stay of proceedings before the Lower Court. She directed herself well on the joinder of parties. She found that Mwavumbo Ranch was not a necessary party in the suit but could be called as a witness. She also correctly found that the appeal (sic), pending before a third party other than an adjudicative body, could not warrant a stay of proceedings before her. Besides, nothing shows that the matter was pending under Adjudication and that Section 30 of the *Land Adjudication Act* was applicable before her.
>
> The Appellants wanted the matter referred to a third party for adjudication. That is okay, but not in the manner sought in the application before the Magistrate."

8. The thrust of this appeal is to have the matter referred to an alternative dispute resolution mechanism. It was up to the appellant to apply for that option before the trial court; however, the appellant instead raised a Preliminary Objection based on a lack of legal foundation by introducing an entity that is not recognized under the *Land Adjudication Act*.

9. The recourse available to the appellant is to make an appropriate application before the Magistrate for referral of the matter to the AJS proposed. An appeal cannot resolve that. Furthermore, referral of a matter to an AJS is not forced on parties; it is voluntary, which is why it is called the Alternative Justice System (njia mbadala in Swahili).

10. The current appeal has no merit and is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 5TH DAY OF JUNE 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Anaya for the Appellants

Happy: Court Assistant

In the Absence of:

Mr. Kiseu for the Respondents