



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mburugi & another (Legal Representative of Samuel Mugambi Mburugu and M'mbui M'rithaa, Respectively – Deceased) v Sub-County Land Adjudication & Settlement Officer [Imenti North/Imenti South/Meru Central & Buuri] & another (Judicial Review E006 of 2025) [2025] KEELC 6096 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6096 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW E006 OF 2025

JO MBOYA, J
SEPTEMBER 18, 2025

BETWEEN

AUGUSTINE MUTUA MBURUGI 1ST APPLICANT

JOSHUA MATHONGA M'MBUI 2ND APPLICANT

**LEGAL REPRESENTATIVE OF SAMUEL MUGAMBI MBURUGU AND
M'MBUI M'RITHAA, RESPECTIVELY – DECEASED**

AND

**SUB-COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER [IMENTI
NORTH/IMENTI SOUTH/MERU CENTRAL & BUURI] 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Applicants herein [who should basically be the Ex-parte Applicants] have approached the court vide the Notice of Motion Application dated 17th June 2025 and wherein the Applicants have sought the following reliefs:
 - i. That an order of Certiorari to remove into the Honourable court and quash the decision of the 1st Respondent, Sub-County Land Adjudication & Settlement Officer, refusal to give consent to file a suit as required under Section 30 (1) of the [Land Adjudication Act](#) Cap 284.
 - ii. That an order of Mandamus directed to the sub-county land adjudication & settlement officer to compel them to issue consent to the applicants to file a suit as required under Section 30 (1) of the [Land Adjudication Act](#), Cap 284 to enable them to file a suit in court.
 - iii. That costs of the Application be provided for.



2. The Notice of Motion Application [the Substantive Application] is premised on the grounds contained in the statutory statement of facts; the affidavit in verification of the statement of facts and the annexures attached thereto, including the letter by the 1st respondent dated 26th November 2024; being the letter that declined to issue the consent to commence civil proceedings.
3. The Respondents duly entered appearance; filed a replying affidavit sworn on 11th July 2025; and the grounds of opposition dated 11th July 2025 and wherein the respondents have contended that the application beforehand is premature, misconceived and legally untenable. Furthermore, the respondents have also posited that this court is divested of the requisite jurisdiction to entertain and adjudicate upon the subject application by dint of the provisions of section 30 (3) of the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
4. The subject application came up for hearing on 14th July 2025 and whereupon the advocate for the parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the court proceeded to and gave direction[s] pertaining to the filing and exchange of the submissions. Moreover, the court also circumscribed the timelines for the filing and exchange of the Written submission[s].
5. The Applicants filed written submissions and wherein same have raised and highlighted two [2] key issues for consideration by the court. The issues raised by the applicants are namely; the 1st respondent has declined to issue the consent to file suit without lawful cause; and the refusal by the 1st respondent to issue the consent has breached and or infringed upon the Applicants' right of access to justice in terms of article 48 of [the Constitution](#) 2010.
6. The respondents filed written submissions dated 29th July 2025 and wherein same have raised and canvassed one salutary issue, namely; that the court is divested of the requisite jurisdiction to entertain and adjudicate upon the subject application. Moreover, the respondents have cited and referenced the provisions of Section 30 (3) of the [Land Adjudication Act](#) Cap 284, Laws of Kenya.
7. Having reviewed the substantive application dated 17th June 2025; the grounds of opposition dated 11th July 2025; the replying affidavit sworn by the 1st respondent on the 11th of July 2025; and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject application turns on two [2] key issues, namely; whether the substantive application is competent or otherwise; and whether this Honourable court is devoid of the requisite jurisdiction to entertain and adjudicate upon the application beforehand.
8. Regarding the first issue, namely; whether the substantive notice of motion application is competent or otherwise, it is imperative to highlight and underscore that judicial review proceedings are ordinarily taken in the name of the republic [formerly, the Crown] albeit on behalf of the subject [citizen] whose rights have been breached and or violated. For good measure, the traditional judicial review proceedings are governed by the provisions of sections 8 and 9 of the [Law Reform Act](#), cap 26 laws of Kenya; as read together with order 53 of the Civil Procedure Rules 2010.
9. It is also important to highlight that where the judicial review proceedings are underpinned by the provisions of Article 47 of [the Constitution](#) 2010 and the Fair Administrative Actions Act [FAAA] 2015, then the procedure to be deployed is by way of a Constitutional Petition. Instructively, judicial review under Article 47 of [the Constitution](#) does not require leave in the manner prescribed under Order 53 of the Civil Procedure Rules. [See County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR.



10. Back to the issue at hand. The Applicants herein sought and obtained leave to file judicial review proceedings in the nature of certiorari and mandamus. Instructively, leave was granted on 16th June 2025. Having sought for and obtained leave, it was incumbent upon the applicants herein to file the substantive notice of motion in line with the prescribed procedure. Notably, the applicant[s] ought to have originated the substantive application in the name of the republic versus the public bodies or authorities complained against [the respondents] and thereafter, the applicants herein ought to have been described as Ex-parte Applicants. The connotation is to the effect that the real applicant in judicial review proceedings is the Republic [State] and not the person whose rights have [sic] been breached, namely; the affected Person. In this regard, I am afraid that the current application is not properly titled/ intituled.

11. In the case of Jotham Mulati Welamondi v Chairman, Electoral Commission of Kenya [2002] KEHC 1123 (KLR), the court [Hon. Justice A. Ringera, Judge [as he then was] stated as hereunder;

Last, but not least, the objection that the application is made in the name of the wrong person is well merited. In *Farmers Bus Service and others V The Transport Licensing Appeal Tribunal (1959) E.A. 779*, the East African Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled. On Kenya's assumption of Republican status on 12th December 1964, the place of the crown in all legal proceedings was taken by the Republic. Accordingly, the orders of Certiorari, Mandamus or Prohibition now issue in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue. In the premises, the proper format of the substantive motion for Mandamus would have been

"Republic Applicant

v

The Electoral Commission Of Kenya.....respondent

Ex Parte

Jotham Mulati Welamondi"

12. To my mind, the failure to bring the application for judicial review in the name of the Republic [as prescribed under the law] renders the entire proceedings before the court fatally incompetent and thus a nullity ab initio.

13. Moreover, I hold the view that the defect under reference does not relate to a procedural technicality. On the contrary, the defect highlighted goes to the root of the jurisdiction and thus vitiates the entire proceedings.

14. To buttress the foregoing reasoning, namely; that the manner of approaching the court goes to the root of the dispute, it suffices to reference and take cognizance of the holding in the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] KECA 545 (KLR)*, where the Court of Appeal stated thus;

It must be borne in mind that the substantive provision that the 1st respondent invoked was Section 7 of the Act. The 1st respondent was seeing an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the



redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Ors [2010] eKLR).

15. Though the Court of Appeal was dealing with the provisions of section 7 of the *Arbitration Act* 1995 and Rule 2 of the Arbitration Rules 1997, the bottom line is to the effect that the manner of approaching the court or better still, the vehicle deployed in approaching the seat of justice, determines the validity of the suit or otherwise.
16. Finally, I beg to highlight that whereas article 159 [2] [d] of *the Constitution* 2010 frowns upon undue regard to procedural technicalities, the said provision, however, does not denote that claimants and or litigants must disregard the rules of procedure with abandon. Further and in any event, my understanding of the said provision is that Due regard of the rules of procedure has not been negated. [See the Five-Judge bench decision of the Court of Appeal in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance 2013 eKLR; Kakuta Maimai Hamisi vs Peris Pessi Tobiko (2014) eKLR, respectively].
17. Simply put, I come to the conclusion that the application beforehand is improperly before the court. Furthermore, the applicants are non- suited for non-compliance with the mandatory prescriptions of the law.
18. Turning to the second issue, namely; whether the court is divested of the requisite jurisdiction to entertain and adjudicate upon the subject application, it is imperative to recall that the applicants herein had sought a consent from the 1st respondent to file a civil suit in accordance with the provisions of section 30 (1) of the *land adjudication act* cap 284 laws of Kenya. In addition, it was contended that the request for consent to file civil proceedings was declined vide the 1st respondent's letter dated 26th November 2024.
19. It is the said letter which has aggrieved the applicants and thus culminating into the filing of the substantive notice of motion application. Nevertheless, it is instructive to observe that where a request for consent to file civil proceedings is made to the land adjudication officer [the 1st respondent herein] and same is declined, the applicant is statutorily obligated to file/lodge an appeal to the Cabinet Secretary for lands.
20. The requirement that an Applicant who is declined consent to file a suit is obliged to file an appeal to the Cabinet Secretary is underpinned by the provisions of Section 30 (3) of the *Land Adjudication Act*.
21. The said provision states as hereunder:

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 had become final in all respects under section 29(3) of this Act.

- (2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
- (3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister, whose decision shall be final.

22. My reading of the foregoing provisions of the law drives me to the conclusion that the applicants herein were enjoined to file/mount an appeal to the Cabinet Secretary within the prescribed timeline. It is only the Cabinet Secretary who could consider the appeal and thereafter ascertain whether to grant the consent or affirm the refusal by the land adjudication officer.
23. Additionally, I hold the view that where no appeal is filed in the manner prescribed vide section 30 (3) of the *Land Adjudication Act*, Chapter 284, Laws of Kenya; the decision of the land adjudication officer [which is not appealed against] becomes final. However, where there is an appeal, the decision of the Cabinet Secretary is final and can only be impugned, [if at all] vide Judicial review.
24. Be that as it may, the applicants herein did not exhaust the statutory mechanism provided for under the law. Instructively, the applicants ought to have filed the appeal to the Cabinet Secretary. The failure to file the appeal, divests the applicant of the right to access the court; and hence the Applicants have only themselves[s] to blame.
25. The significance of the doctrine of exhaustion has been highlighted and expounded upon by the Supreme Court of Kenya. In the case of *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment)*, the court stated thus;

The foregoing verdict also finds support in an adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. see *Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd [2008] eKLR Narok County Council case v Trans Mara County Council [2000] 1 EA 161 Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008)1 KLR (EP) 425*, *Francis Mutuku vs Wiper Democratic Movement - Kenya & others [2015] eKLR David Ochieng Babu v Lorna Achieng Ochieng & 2 others [2017] eKLR* among other cases not referred to.



The Court of Appeal in *Geoffrey Muthinja & another vs Emanuel Muguna Henry & 1756 others* [2015] eKLR held that:

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with article 159 of *the constitution* which commands Courts to encourage alternative means of dispute resolution.”

117. Of precise relevance to this case is *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR. In that case, the appellants who were former employees of Telkom (K) Ltd felt aggrieved and discriminated against following the implementation of what was referred to as “Trivial Pension Payout”, by the Authority which they accused of fraud, corruption and mismanagement and for paying some categories of retirees less increments in their pension payments than others. The trial court made a finding that since the complaints were against the Authority, that there were other statutory inbuilt administrative dispute resolution mechanisms under the RBA Act that ought to have been followed before recourse to the High Court. He opined that any dispute should have been referred to arbitration in the first instance pursuant to Rule 36 of the Consolidated Deed of Trust and Rules, made under the RBA Act and that if the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Retirement Benefits Appeals Tribunal established under the RBA Act. On Appeal, the Court of Appeal dismissed the appeal stating that: “The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See *International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others*, Petition No 552 of 2012, and *Speaker of National Assembly v Njenga Karume* [2008] 1KLR 425. We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”
118. In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals



or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

26. The Court of Appeal on its part has also reiterated the significance of the doctrine of exhaustion. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] KECA 304 (KLR), the Court stated as hereunder;

We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

27. Flowing from the foregoing, I come to the conclusion that the application beforehand is premature, misconceived and legally untenable on the face of section 30 (3) of the *Land Adjudication Act*, Chapter 284, Laws of Kenya; which deprives this court of the requisite jurisdiction. Absent jurisdiction, a court of law is commanded to down its tools at the very earliest. [See; In the matter of Interim Independent Electoral Commission 2011 eKLR; *S.K Macharia vs Kenya Commercial Bank & another* (2012) eKLR; *Phoenix of East Africa Assurance Ltd vs S.M Thiga T/A Newspaper Services* (2019) eKLR; and *Owners of Motor Vessels Lilian "S" vs Caltex (K) Oil Ltd* (1989) eKLR, respectively.
28. Finally, I beg to state that the order of mandamus which was sought by the applicants herein cannot also issue where the body or authority has already performed the statutory obligations. In respect of the matter, there is no doubt that the First Respondent had already performed its mandate and declined to issue the Consent. On the contrary, an order of mandamus can only issue where there is default, failure, neglect and or refusal by the public body and or authority. [See *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] KECA 58 (KLR)].

Final Disposition

29. Having analyzed the two [2] thematic issues that were highlighted in the body of the Judgment, it must have become apparent that the Judicial review application beforehand is not only premature and misconceived, but same is also legally untenable. In this regard, the application courts dismissal.
30. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;
- i. The Substantive Notice of Motion dated 17th June 2025; be and is hereby struck out.
 - ii. Costs of the Application be and are hereby awarded to the respondents.
 - iii. The Costs in terms of clause [ii] shall be agreed upon and in default, the same shall be taxed by the Deputy Registrar of the Court in the conventional manner.
31. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF SEPTEMBER, 2025
OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].



JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Muriungi for the Applicants

Ms. Miranda [Senior Litigation Counsel] for the Respondent

