



Malonza & another v Ula (Sued as the Administrator of the Estate of Philip Ndolo Kilui-Deceased) & 5 others (Environment & Land Case 269 of 2017) [2024] KEELC 638 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEELC 638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 269 OF 2017**

**TW MURIGI, J
FEBRUARY 7, 2024**

BETWEEN

CHARLES KILUI MALONZA 1ST PLAINTIFF

PETER MALONZA KIMEU 2ND PLAINTIFF

AND

THOMAS MULWA NDOLO ULA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF PHILIP NDOLO KILUI-DECEASED) 1ST DEFENDANT

MARTIN MULALA KYENGO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF KANUKWA KYENGO MALAI- DECEASED) 2ND DEFENDANT

JAMES KIENDI LILI 3RD DEFENDANT

DAVID MALAI LILI 4TH DEFENDANT

ESTHER KAMAN THE MWINA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF MWINA MALAI-DECEASED) 5TH DEFENDANT

FLANCISCA NDANU ILUVE 6TH DEFENDANT

RULING

1. This ruling is in respect of a Preliminary objection raised by the 2nd Defendant vide the Notice of Preliminary Objection dated 5th December, 2020 on the following grounds: -
 - i. That this Honourable Court lacks the requisite jurisdiction to handle the matter herein on the following grounds: -
 - ii. That the Applicant has not exhausted the disputes mechanism provided for under the [Land Adjudication Act](#) Cap 284 of the Laws of Kenya.



- iii. That there are valid decisions vide Objections Nos. 74 of 1999 and 307 which have not been quashed.
 - iv. That the Plaintiff had a right to appeal to the Minister or file Judicial Review but not the current suit.
 - v. That there are valid Court decisions vide CC L. 41 of 1972 at Kilungu Law Courts and L. 2 of 1965 at Kilungu which have not been set aside.
2. The Preliminary objection was canvassed by way of written submissions.

The 2nd Defendant's Submissions

3. The 2nd Defendant's submissions were filed on 25th May, 2021. On his behalf, Counsel submitted that the suit property herein was the subject matter between the parties herein in the following cases:-
- i. Arbitration Board Case No. 74 of 1999
 - ii. Objection No. 307
 - iii. HCC No. 142 of 1967 at Machakos
 - iv. Land Case No. 2 of 1965 at Kilungu
 - v. Order in RMCC No. 14 of 1972 at Kilungu
4. Counsel submitted that the Plaintiffs have admitted the above cases in their pleadings in addition to admitting that they were parties to the said cases. It was submitted that the said cases were decided in favour of the 2nd Defendant and the said decisions remain unchallenged to date. Counsel contended that the suit herein is neither an appeal against the said decisions nor a judicial review application.
5. Counsel further submitted that the suit herein is an abuse of the court process since the Plaintiffs are seeking to appeal against the decision of the Adjudication Officer through the backdoor. Counsel contended that the Plaintiffs' recourse lies in filing an appeal to the Minister or instituting judicial review proceedings. None of the authorities cited by Counsel for the 2nd Defendant were annexed to the submissions.

The Plaintiffs Submissions

6. The Plaintiffs' submissions were filed on 27th October, 2023. On their behalf, Counsel submitted that the Plaintiffs were granted consent to file a civil suit by the Land Adjudication Officer on 08/02/2017. Counsel further submitted that the said consent was filed together with the Plaintiffs' list of documents dated 24/04/2017.
7. Counsel argued that on the basis of the said consent granted pursuant to the provisions of Section 30 of the [Land Adjudication Act](#), this court has the requisite jurisdiction to hear and determine this matter. Counsel argued that the consent of the Land Adjudication Officer is a statutory exception to the doctrine of exhaustion.
8. Counsel went on to submit that the Plaintiffs were not parties in Kilungu CC L. 41 of 1972 and Machakos L2 of 1965. Counsel argued that the Plaintiffs are disputing the validity of Machakos Magistrates Court Case L. 36/65 which the Judiciary has confirmed was not a record that was in the archives.



9. Counsel contended that the instant preliminary objection is based on disputed facts and as such, it does not qualify to be a preliminary objection. Counsel urged the court to dismiss the preliminary objection with costs. None of the authorities cited by Counsel for the Plaintiffs were annexed to the submissions ..

Analysis And Detemination

10. Having considered the pleadings, the Preliminary objection and the rival submissions, the only issue that arises for determination is whether this court has the requisite jurisdiction to hear and determine this suit.

11. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law. Justice Law coined an apt description of what constitutes a preliminary objection in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 (at page 700) wherein the learned judge held as follows: -

“In 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.”

12. In the same case, Sir Charles Newbold, P. held as follows: -

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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.”

13. In *Oraro v Mbaja* [2005] eKLR, J.B. Ojwang J. described it as follows: -

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

14. The Plaintiffs vide a further amended Plaint dated 3/4/2023, seek the following orders against the Defendants: -

- a. An order that registration and any resultant titles issued with respect to the new diminished parcel number Makueni/Kisekini/412 and hived off parcels of land numbers Makueni/Kisekini/3895 and Makueni/Kisekini/3896 be cancelled and the original parcel of land No. 412 Kisekini Adjudication Section (which now encompasses a new diminished parcel number Makueni/Kisekini/412 and hived off parcels of land numbers Makueni/Kisekini/3895 and 3896) be forthwith recorded in the names of Charles Kilui Malonza and Peter Malonza to hold



in trust on their behalf and for the beneficiaries of the estates of Mutheke Kilui – deceased, Malinda Kilui – deceased and Makanga Kilui – deceased.

- b. An order that a 5-acre parcel of land be excised from the said original plot 412 Kisekini Adjudication Section (which now encompasses a new diminished parcel number Makueni/Kisekini/412 and hived off parcels of land numbers Makueni/Kisekini/3895 and 3896) and the same be given a new number and be registered in the names of the 2nd, 3rd, 4th and 5th Defendants.
 - c. A permanent injunction restraining the 2nd, 3rd, 4th, 5th and 6th Defendants whether by themselves or through their servants, agents and/or employees or other person whomsoever claiming under them or through them from evicting, trespassing, subdividing, carrying out any land survey works, obtaining new land numbers, obtaining title deed or in any other manner whatsoever interfering with the Plaintiffs', their family's and their entire extended family's quiet possession of their share of the original suit parcel of land No. 412 Kisekini Adjudication Section (which now encompasses a new diminished parcel number Makueni/Kisekini/412 and hived off parcels of land numbers Makueni/Kisekini/3895 and 3896) or from doing any other prejudicial act.
 - d. Costs of this suit plus interest thereon at court rates.
15. The 2nd Defendant submitted that the Plaintiffs have not exhausted the dispute resolution mechanism provided under the [Land Adjudication Act](#) since the decisions in Objection No, 74 of 1999 and 307 have not been quashed. The 2nd Defendant contended that the Plaintiffs ought to have filed an Appeal to the Minister as opposed to filing the instant suit.
16. The [Land Adjudication Act](#) deals with all matters pertaining to adjudication. In its preamble it states that;
- “It is an Act of Parliament to provide for the ascertainment and recording of rights and interest in Trust Land, and for purposes connected therewith and purposes incidental thereto.”
17. The doctrine of exhaustion has been pronounced in multiple judicial precedents. In the case of [Speaker of National Assembly v Karume](#) [1992] KLR 21 the court of Appeal held as follows:-
- Where there is a clear procedure for redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
18. Similarly, in the case of [Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others](#) [2015] eKLR, the Court of Appeal stated that:
- “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 fora of last resort and not the first port of call the moment a storm brews...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 the Courts. The Ex Parte



Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

19. Section 26 and 29 of the Land Adjudication Act provides for an elaborate dispute resolution mechanism for solving any dispute arising from the adjudication process.
20. Section 26 of the Land Adjudication Act provides that;
 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 the 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 consultations and inquiries as he thinks fit, he shall determine the objection.
21. Section 29 of the Land Adjudication Act provides that;
 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 orders shall be final.
 2. The Minister shall cause copies of the order to be sent to the director of Lands Adjudication and to the Chief Lands Registrar.
 3. When the appeals have been determined, the Director of Lands Adjudication shall: -
 - a. Alter the duplicate adjudication register to conform with the determinations; and
 - b. Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alteration and a copy of the certificate to the Chief Lands Registrar, who shall alter the adjudication register accordingly.
22. Section 30 (1) of the Land Adjudication Act stipulates as follows: -
 - (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.
23. The wording in Section 30(1) of the Act is mandatory. It sets out the conditions under which a party can approach the court before the adjudication process is complete. The requirement for consent to be granted by the Land Adjudication Officer before a suit can be filed is a statutory requirement.



24. In the case of Benjamine Okwaro Estika v Christopher Anthony Ouko & Another the Court of Appeal held that: -

“That being so, the mandatory requirement of section 30(a) had to be complied with i.e. consent of the Land Adjudication Officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”

25. In the matter at hand, the record shows that the Plaintiffs obtained consent from the Land Adjudication Officer Makueni Adjudication Area to file a civil suit for the recovery of land Parcel No. 412 Kisekini Adjudication Area. The Plaintiffs attached the consent letter dated 8th February 2017 in their list of documents filed together with the Plaint. In the consent letter, the Land Adjudication Officer Makueni granted the Plaintiffs consent under Section 30(1) of the Land Adjudication Act to file a civil suit for recovery of part of P/No. 412 Kisekini Adjudication Section in Kilungu Sub County. The consent to file a civil suit was in writing. The letter indicates that the consent was valid for use within three months from the date of its issue. In the instant case, it is evident that the Plaintiffs obtained consent from the Land Adjudication Officer to file a civil suit claiming for an interest on land as required. The 2nd Defendant did not challenge its authenticity.

26. In the circumstances, this court finds and holds that the Plaintiffs have complied with the mandatory provisions of Section 30(1) of the Land Adjudication Act before approaching this court. Having complied with provisions of Section 30(1) of the Act, I find that the Plaintiffs are properly before the court. I also find that this court has jurisdiction to hear and determine this suit.

27. On whether the suit herein is barred by dint of various court decisions that were delivered earlier, the Plaintiffs in paragraphs 9, 10 and 11 of the further amended plaint have challenged the existence of those proceedings. This is compounded by the Plaintiffs’ document No. 4 in their bundle of documents which is a letter from the judiciary stating the unavailability of the alleged court record. It is crystal clear that the preliminary objection is based on contested facts which must be proved by evidence.

28. The upshot of the foregoing is that the preliminary objection dated 5th December 2020 is devoid of merit the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF FEBRUARY 2024

.....

HON. T. MURIGI
JUDGE

In The Presence of
Kwemboi court assistant
In the absence of the parties

