



**M'Arimi v Mukira & 2 others (Environment and Land Appeal
E075 of 2022) [2024] KEELC 3690 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3690 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E075 OF 2022
CK YANO, J
FEBRUARY 1, 2024**

BETWEEN

GEORGE M'ARIMI APPELLANT

AND

ZACHARIA KAARIA MUKIRA 1ST RESPONDENT

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER 2ND
RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated 21st September 2016, the Appellant sued the respondents, for an order of a declaration that the Appellant is the rightful owner of L.R 180 Mweru 111 Adjudication section and general damages against the 1st, 2nd and 3rd respondents jointly and severally, an order directing the 2nd respondent to rectify the register by removing the name of the 1st respondent and inserting the appellant's name, costs of the suit with interests thereon at court rate and any other relief the honourable court may deem fit and just to grant.
2. The Appellant pleaded that he is and was the registered and beneficial owner of L.R No. 180 Mweru 11 Adjudication Section and the said parcel of Land was confirmed as his per the Court Judgement dated 8th July 1993.
3. The Appellant pleaded that the first and second respondents conspired and fraudulently deprived the Appellant the said parcel of Land.
4. The Appellant enumerated particulars of fraud by the first and second respondents as preparing a fraudulent judgement dated 2nd November 1993 without the knowledge of the Appellant and without



- his participation in the proceedings, declaring the first respondent as the owner of L.R No. 180 Mweru 111 Adjudication section, presenting forged documents for registration, depriving the Appellant his land without hearing him and evicting the Appellant from his land unceremoniously.
5. The 1st Respondent filed his statement of defence dated 1st November 2017, denying all the allegations by the Appellant and that the disputed land is situated in Land Adjudication Section for which consent must be obtained prior to filing suit. That in the absence of such consent, the appellant was non-suited and the action should be struck off.
 6. The 2nd and 3rd respondents filed their statement of defence dated 18th January 2022 and a Notice of preliminary objection dated 16th August 2021 wherein they stated that the suit offends the provisions of section 7 of the Limitations of Action Act(Cap.22 Laws of Kenya),that the court could not grant the nature of relief being sought in the application dated 17th November 2020 subject to order 10 rule 4 to 7 of the Civil Procedure Rules and that the suit offends the provisions of section 26 of the [Land Adjudication Act](#) (Cap 284) and/or the [Land Consolidation Act](#)(Cap.283).
 7. After hearing the parties, on the said Preliminary Objection, the trial court on 16th November 2022 found in favour of the respondents and held that the court had no jurisdiction to entertain the suit as the appellant had not exhausted the mechanisms provided under the [Land Adjudication Act](#) and therefore dismissed the suit with costs for want of jurisdiction.
 8. The appellant was aggrieved by the said ruling and filed the present appeal citing the following grounds:-
 1. That the Learned Principal Magistrate erred in Law and in fact in entertaining the Notice of Preliminary objection based on Section 7 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya, Order 10 Rule 4-7 of the Civil Procedure Rules and Section 26 of the Land Adjudication (Cap. 284) and or the [Land Consolidation Act](#) (Cap 283) which enactments have no relevance to the issues before the court.
 2. That The learned Principal Magistrate erred in Law and in fact in holding that the Court had no jurisdiction to hear and determine the suit when there was consent from the Land Adjudication Officer to entertain the suit as pleaded in paragraph 9 of the plaint dated 21st September 2016 and filed in court on 10th October 2016.
 3. The Learned Principal Magistrate erred in Law and fact in entertaining the Notice of Preliminary Objection which was not based on points of Law only but contained serious issues of facts which needed to be resolved in terms of the celebrated case of Mukisa Biscuits versus West End Distributors (1969) EA 696.
 4. The learned Principal Magistrate erred in Law and in fact in dismissing the appellants suit without following the mandatory provision of order 18 Rules 1 and 2 of the [Civil Procedure Act](#).
 5. The ruling of the Principal Magistrate is against the weight of evidence and the Law.
 9. The appellant prayed that the appeal be allowed and the costs of the appeal be awarded to the Appellant.
 10. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 9th December 2023 through the firm of M/s B.G Kariuki & Company Advocates while the 1st respondent filed his dated 23rd November 2023 through the firm of Gichunge Muthuri & co. advocates and the



Honourable Attorney General filed submissions for the 2nd and 3rd respondent's dated 17th November 2023.

Appellant's Submissions

11. The Appellant gave brief facts of the case and proceeded to submit on ground 1 & 2. It is the Appellant's submission that he had obtained the relevant consent from the Land Adjudication Officer before instituting the suit in the lower court dated 8th July 2016 issued by one Eric.K.Korir –the District land adjudication officer Imenti North /Imenti South/Meru central &Buuri. That the respondents herein attacked the proceedings on the basis that the area in question was under adjudication and that the Appellant had no consent to institute the proceedings before the lower court. The Appellant relied on Section 8(1) ,8 (2) of the *Land Consolidation Act*, Cap. 283, Laws of Kenya and Section 30(1) of the *Land Adjudication Act*, Cap. 284.
12. The Appellant submitted that Section 30 of the *Land Adjudication Act* requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. That the consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section, and specifically require the suits to be discontinued if started without consent. That Section 30, therefore affects the power and jurisdiction of courts to hear and, determine such disputes.
13. The Appellant submitted that he sought and obtained the relevant consent in July 2016 before instituting the suit in September 2016. The Appellant argued that the inescapable conclusion was that proof of obtainance of the consent must be furnished at the time the suit is being instituted. The appellant further submitted that the court had jurisdiction as the consent was obtained prior to filing the suit and was produced and attached at inception of the suit and therefore it erred in law in declining that it did not have jurisdiction.
14. The Appellant further submitted that the trial court misapplied the law by holding that it had no jurisdiction to entertain the suit by virtue of Section 26 (3) of the *Land Control Act* and the *Land Adjudication Act*. It is the appellant's submission that he was not challenging the merits of the decision of the Land Adjudication Officer in the objection proceedings and that the claim was simply based upon fraud and having obtained a letter of consent from the Land Adjudication Officer to file suit, the trial court could not find that it had no jurisdiction to entertain the claim. The Appellant relied on the Court of Appeal decision of Stephen Kungutia&2 Others -vs- Severina Nchulubi Nyeri Civil Appeal No. 221 of 2010 and Maingi Peter Stanley & Another v Juda K.M. Imunya& 2 others [2022] Eklr and the case of Benedict Kilemi M'ithinyai v Joseph Ngituyu& another [2021] eKLR. The appellant's counsel urged the court to hold that the trial court had jurisdiction since a consent had been issued and presented at the inception of the suit by the 2nd Respondent who is also a party to the suit and order that the file be taken back for trial on merits.
15. Regarding grounds 3 and 4, the appellant submitted that the Notice of preliminary objection was not based on points of law but contained serious issues of facts which needed to be resolved in terms of the celebrated case of Mukisa Biscuits Manufacturing Company Limited Versus West End Distributors Limited (1969) EA.
16. It is the Appellant submission that where facts are not contested, the court is able to decide on the preliminary objection, but where facts are contested, then automatically the issue falls out of the ambit of a preliminary objection.
17. The Appellant submitted that in the present appeal it was a contested fact whether or not consent of the land adjudication officer was obtained and the proper procedure would have been to file an



application to strike out the suit. The Appellant relied on the case of Lemitei Ole Koros & Another v Attorney General & 3 others [2016] eKLR.

18. The Appellant submitted that the learned magistrate engaged himself in the process of searching for evidence of consent while the law on preliminary objections is quite clear that a preliminary objection is a legal objection and not evidential objection. Learned counsel for the appellant submitted that the search for evidence of filing of the consent showed that this was not an issue of law of fact which could not be raised by way of a preliminary objection but by way of interlocutory application and the evidence tendered by affidavit.
19. The Appellant relied on case of M'Imanyara M'Atunga v Jenaro Lumiri Nabea, Land Adjudication and Settlement Officer Tigania & another [2021] eKLR and urged the court to allow the appeal herein with costs to the Appellant and the matter be referred back to the trial court for a full hearing on merits.

1st Respondent Submission.

20. The 1st respondent gave a background of the matter and identified three issues for determination, Whether or not the trial court had jurisdiction to hear and determine the suit, whether or not the Appeal has merits and who pays the costs of the appeal.
21. On the first issue the 1st respondent submitted that a Court can only exercise the jurisdiction that has been donated to it by either *the Constitution* or legislation or both and therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law. It is the 1st respondent's submission that jurisdiction is in the end everything since it goes to the very heart of a dispute and without it the court cannot entertain any proceedings and must down its tools. The 1st respondent's counsel relied on the case of Adero & Another v Ulinzi Sacco Society Limited (2002)1 KLR 577 and submitted that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal though it is always prudent to raise it as soon as the occasion arises. The 1st respondent relied on section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya and submitted that from the Appellant's own pleadings parcel of land No.180 MWERU III Adjudication section was firstly registered in the name of the 1st Respondent's father MUKIRA MBURUGU (now deceased) where he filed a case before the Land Adjudication Committee but the 1st respondent's father won against him in the year 1993.
22. It is the 1st respondent's submission that the Appellant approached the trial Court over twenty-three (23) years later which is against the mandatory provisions of sections 7 of the Limitations of Actions Act. The 1st respondent's counsel relied on the cases of Edward Moonge Lengusuranga v James Lanaiyara & Another (2019)eKLR , Mehta v Shah (1965) E.A 321, Gathoni v Kenya Co-operative Creameries Ltd (1982) KLR 104 and Iga v Makerere University (1972) EA. The 1st respondent submitted that from the above legal authorities, it was clear that the learned Magistrate did not err in Law in dismissing the Appellant's suit as the same was statute barred in the first instance.
23. The 1st respondent cited the provisions of sections 29 and 30 of the *Land Adjudication Act*, Cap 284 Laws of Kenya and submitted that from the onset it is clear that no appeal has ever been preferred by the Appellant since the decision of the 2nd respondent of 3rd May 2016 but instead instituted a suit before the trial court. It is the 1st respondent's submission that the Appellant failed to exhaust all statutory obligations and remedies before filing the suit before the trial court. The 1st respondent submitted that under the *Land Adjudication Act* any person who has an objection to the adjudication register ought to appeal within 60 days to the Minister and whose decision was final under section 30 of the Act and that those provisions of the aforementioned statutes were intended to limit unnecessary litigation resulting from the adjudication process.



24. The 1st respondent also cited section 30 of the *Land Consolidation Act* Cap 283 and submitted that in ascertaining the rights and interests in the land, The Land Adjudication Officer has been given powers to determine any disputes that arise as a result of the adjudication register and his powers are enshrined in section 26 (1) of the *Land Adjudication Act* (Cap 284). It was the 1st respondent's submission that if parliament intended for the courts to deal with disputes arising out of the land under adjudication it would not have set up the land adjudication office. The 1st respondent submitted that the adjudication office is not an optional forum for determining disputes but is the right forum to determine disputes. The 1st respondent further submitted that the court only has a supervisory role to play in as anyone aggrieved with the manner in which the decision was arrived at is at liberty to file a judicial review application to quash the said decision.
25. The 1st respondent's counsel submitted that the Appellant in this case did not exhaust all the procedures laid down in the aforesaid Act before coming for redress.
26. It is the 1st respondent's submission that the trial court could not take over the role of the land Adjudication Officer as it does not even have the necessary machinery to enable it effectively to resolve such a dispute. That by entertaining the Appellants claim the Court will not only be usurping the role of the land adjudication officer but duplicating its roles and the Courts should not be subjected to those kinds of claims otherwise by entertaining such dispute the Court will in effect be rendering the said office useless and therefore submitted that the Learned Magistrate was right in dismissing the suit. The 1st respondent relied on the case of *Morris Kirema M'I turu v James M'Amanja M'Rukunga & 2 others* (2018)eKLR.
27. On whether or not the appeal has merit, it is the 1st respondent's submission that the issues in the preliminary objection were all pure point of Law that did not require scrutiny of the evidence and cited the case of *Mukisa Biscuit Manufacturing Co.Ltd v West End Distributors Ltd* (1969)EA 696. The 1st respondent submitted that the Learned Magistrate never made any mistake in dismissing the Appellants' suit with costs.
28. On the issue of costs, the 1st respondent submitted that it is a well-established principle that costs follow events so as to compensate the Successful party. The 1st respondent submitted that the Appeal ought to be dismissed with costs.

2nd and 3rd Respondents' Submissions

29. In their submissions, learned counsel for the 2nd and 3rd respondents gave a synopsis of the grounds of the Appeal and background of the case and submitted that the substantive issues in the appeal are whether the learned Principal Magistrate erred in Law and in fact in entertaining the Notice of Preliminary objection based on section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, whether the learned Principal Magistrate erred in Law and in fact in entertaining the Notice of Preliminary objection based on order 10 Rule 4-7 of the Civil Procedure Rules, whether the learned Principal Magistrate erred in Law and in fact in entertaining the Notice of preliminary objection based on section 26 of the Land Adjudication (Cap.284),whether the learned trial magistrate erred in Law and fact by holding that the Court had no jurisdiction to hear and determine the suit, whether the learned trial magistrate erred in Law and fact by entertaining the Notice of Preliminary objection which was not based on points of law only but contained serious issues of facts which needed to be resolved and whether the learned trial magistrate erred in Law and fact by dismissing the Appellant's suit without following the mandatory provisions of order 18 rule 1 and 2 of the Civil Procedure Rules 2010.



30. The 2nd and 3rd respondents submitted on the first issue and stated that the learned principal magistrate made a determination that the provisions of sections 7 of the *Limitation of Actions Act* did not apply in the suit. It is the 2nd and 3rd respondent's submission that it was erroneous for the Appellant to state that the trial magistrate entertained the matter based on section 7 of the Limitations of Actions Act the same having been dismissed by the trial Magistrate who ruled that, that section did not apply to the suit. The 2nd and 3rd respondents submitted that the Appellant is seeking an appeal where none lies adding that it was a waste of judicial time for the court to sit and determine a matter based on incorrect assertions.
31. With regard to the second issue, counsel for the 2nd and 3rd respondents submitted that the Learned Trial Magistrate made a correct determination in finding that order 10 rule 6 only applied where the claim is for pecuniary damages or detention of goods.
32. The 2nd and 3rd respondents submitted further that the Appellant filed a Chamber Summons Application dated 17th November 2020 praying that the trial court enter an interlocutory judgement against the defendants and since the claim was not one seeking pecuniary damages and neither was it one of detained goods, the trial court correctly found that order 10 Rule 6 of the Civil Procedure Rules was not applicable. The 2nd and 3rd respondent relied on the cases of Josphat Muthuri Kinyua & 5 others vs Fabiano Kamanga M'etirikia(2021)eKLR and Apollo Muinde & 2 others v Earnest Oyaya Okemba (2019)eKLR.
33. The 2nd and 3rd respondents submitted on the third issue and stated that the Appellant did not follow the due process as provided for under the *Land Adjudication Act*. The 2nd and 3rd respondents cited Section 26 of the *Land Adjudication Act* and submitted that the Appellant did not tender any evidence to show that he raised an objection with the 2nd respondent. It is submitted further that the Appellant ignored all the mechanisms provided for under the *Land Adjudication Act* including appeal to the Minister. The 2nd and 3rd respondents submitted that the Learned Trial Magistrate made a correct determination in finding that the dispute resolution mechanisms were not adhered to and as such the Court did not have jurisdiction to entertain such a suit. The 2nd and 3rd respondents relied on the case of the Speaker of the National Assembly vs James Njenga Karume (1992)eKLR and Mutanga Tea & Coffee Company Ltd vs Shikara Ltd & Another (2015)eKLR.
34. On the issue whether the Learned Trial Magistrate erred in law and fact by holding that the court had no jurisdiction to hear and determine the suit when there was consent from the Land Adjudication Officer, the 2nd and 3rd respondents submitted that the trial magistrate made a correct determination that the court did not have jurisdiction to determine the matter. The 2nd and 3rd respondents relied in the case of Owners of Motor Vessel Lilian S V Caltex Oil Kenya Ltd (1989)KLR1. It is the 2nd and 3rd respondents submission that the Appellant having failed to exhaust the mechanisms provided in the *Land Adjudication Act*, the court correctly determined that it did not have the jurisdiction to determine the matter.
35. The 2nd and 3rd respondents submitted that the Appellant did not make an objection to the Land Adjudication Officer nor did he appeal to the Minister as provided for under section 29 (1) of the *Land Adjudication Act* and based on that the Court made a determination that the Appellant had failed to exhaust the mechanisms under the *Land Adjudication Act* and therefore had no jurisdiction. The 2nd and 3rd respondents relied in the case of Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others (2015)eKLR and submitted that a consent from the Land Adjudication Officer does not cloth the court with jurisdiction to determine adjudication matters and that neither does the Land Adjudication Officer transfer his jurisdiction to the Court. That the consent is authorization to file a



suit and not to transfer jurisdiction. The 2nd and 3rd respondents relied in the case of Tobias Achola Osindi & 13 Others v Cyprian Otieno Ogalo & 6 others (2013)Eklr, Joseph Kiruja Maingi v Rose Nambura & 2 others (2021)eKLR, Stephen Kungutia & 2 others v Severina Nchulubi Nyeri Civil Appeal No.221 of 2010 (unreported)and Nyeri Civil Appeal 340 of 2002 Julia Kaburia v Kabeera & 5 Others.

36. On the issue as to whether trial court erred by entertaining the notice of preliminary Objection which was not based on points of law only but contained issues of fact, the 2nd and 3rd respondents submitted that their objection only raised pure points of law and not facts. That an objection of a court's jurisdiction is a point of law. The 2nd and 3rd respondents submitted that the learned trial magistrate correctly determined the objection and relied on the case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969)EA 696 to explain what constitutes a preliminary objection.
37. On whether the learned trial magistrate erred in law and fact by dismissing the appellant's suit without following the mandatory provision of order 18 rules 1 & 2 of the Civil Procedure Rules, the 2nd and 3rd respondents submitted that the said provisions do not apply in this case and that the suit was dismissed for lack of jurisdiction as the suit was dismissed for lack of jurisdiction as the court could not continue with the matter as reiterated in the case of Owners of Motor Vessel "Lilians" – Vs- Caltex (Kenya (Limited) (1989) KLR and Almer Farm Limited Versus National Land Commission & 2 Others (Sued as Executrix of the estate of the late David Rono [2021] eKLR. The 2nd and 3rd respondents submitted that the suit is a non-starter, frivolous, vexatious and an abuse of the court process and should be dismissed.

Analysis And Determination

38. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on by the advocates for the parties to buttress their rival positions. This being a first appeal, it is trite law that this court has the duty and obligation to reconsider the evidence, evaluate it and draw its own conclusions. There are only four issues I find call for my consideration –whether the trial court addressed its mind on the issue on section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, whether or not the trial court had jurisdiction to hear and determine the suit, whether the notice of preliminary objection had merits and who pays the costs of the Appeal.

Whether the trial court addressed its mind on the issue on section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya

39. In the impugned ruling, the trial court stated;
- “Apparently ground number 2 was particularly raised against an Application by way of Chamber Summons dated 17th November,2020 for which a ruling was delivered on 17th November, 2021.In the said ruling, the court also dealt with ground number 1 thus what is left for consideration is ground number 3”.
40. Therefore, the trial court did not address the issue of limitation as stated above. I see no need to address the same since that decision was addressed by a ruling dated 17/11/2020 subject of this appeal and not the ruling by Hon. S. K Ngetich – PM. If the Appellant was dissatisfied with the outcome he should have Appealed on the same.



Whether the Magistrate had no jurisdiction to hear and determine the suit.

41. The appellant's claim was for a declaration that he is the rightful owner of LR. NO. 180 MWERU III Adjudication Section, general damages and rectification of the register by removing the name of the 1st respondent herein and inserting the appellant's name. It is clear therefore that the claim was one of ownership over land in an adjudication section.
42. I have perused the record of Appeal. The main objection that was raised by the 2nd and 3rd respondents herein was that the appellant's suit offended the provisions of Section 26 of the [Land Adjudication Act](#), Cap 284 laws of Kenya. The said Section provides the mechanism of lodging objection by a party who is aggrieved by an adjudication register.
43. While determining the objection the trial court correctly noted that Section 26 of Cap 284 provides the mechanism of lodging Objection to the adjudication officer by a party who is aggrieved by an adjudication register. The learned trial magistrate further stated that the adjudication officer is then granted jurisdiction to determine such an objection and that a process of appeal is also provided under Section 29(1) where a party is aggrieved by the determination of the adjudication officer. Under Section 29(1), any person who is aggrieved by the determination of an objection under section 26 may, within 60 days after the date of determination appeal against the determination to the Minister whose order shall be final.
44. As rightly observed by the trial court, the appellant did not plead that he had complied with the above provisions of law. What the appellant did and as rightly observed by the learned trial magistrate, was to rush to court and file suit in what seems like an appeal against the decision of the Land Adjudication Officer. In my considered view, the trial court was justified in holding that the court had no jurisdiction to entertain the suit since the appellant had not exhausted the mechanisms under the [Land Adjudication Act](#).
45. The appellant has submitted that he sought and obtained consent in July 2016 before instituting the suit and that the consent is a condition precedent to a valid suit concerning disputes of land in an adjudication Section, and requires that suit be discontinued if started without consent. I have perused the consent in question, I note that the consent given was restricted to an application for injunction any encroachment within Parcel No. 180. There was no consent to institute a suit over ownership of the land. Moreover, the issue for determination was not about the consent, but rather the failure by the appellant to exhaust the mechanisms provided under the [Land Adjudication Act](#). It is quite evident that the suit property was land under an adjudication section and the provisions of the [Land Adjudication Act](#) applied and therefore the appellant had to exhaust the mechanisms provided under the said Act before moving to court.
46. I am therefore in agreement with the trial court wherein it declared it did not have the requisite jurisdiction to deal with the case and downed its tools as held by Justice Nyarangi in the case of Owners of the Motor Vessel "Lillian S' V Caltex Oil (Kenya)Ltd (1989)KLR1.
47. I am also guided by the case of Speaker of National Assembly Versus Karume [1992] KLR 425 in which it was held that:-

“... where there was a clear procedure for the redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed”.



48. I am also guided by the decision of Court of Appeal when it dealt with the exhaustion theory in Geoffrey Muthinja Kabiru & 2 others vs. Samuel Munga Henry & 1756 others [2015] eKLR and held;
- “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”.
49. Further, the Court of Appeal in Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015]eKLR, *made the following remarks:
- “We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the constitution* or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that *the constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of *the constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms”.
50. As such the trial court had no jurisdiction to deal with the matter and had no option other than down its tools.

Whether the notice of preliminary objection as filed had merits.

51. The Appellant raised the issue that the learned Principal Magistrate erred in Law and fact in entertaining the Notice of Preliminary Objection which was not based on points of Law only but contained serious issues of facts which needed to be resolved in terms of the celebrated case of Mukisa Biscuits versus West End Distributors (1969) EA 696. In that case, the issue of what constitutes a preliminary objection was held as follows:-

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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 a contract giving rise to the suit to refer the dispute to arbitration...

... 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 has to be ascertained or if what is sought is the exercise of Judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion confuse the issue, and this improper practice should stop...”



52. The issue raised in the preliminary objection dated 16th August, 2021 was that the suit inter alia, offended the provisions of section 7 of the Limitations of Actions Act (Cap 22) Laws of Kenya, and Section 26 of the Land Adjudication Act. No doubt, this went to the jurisdiction of the court and I opine that the trial court was right to hold that objection raised pure points of law.

53. In the case of Owners of Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Limited 1989 1 KLR Nyarangi JA held as follows-;

“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 downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction.”

54. Similarly, in the case of Samuel Kamau Macharia & another Vs Kenya Commercial Bank Ltd & 2 others (2012) eKLR, the Supreme Court of Kenya held as follows-;

“68. A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law ... where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through Judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

55. Consequently, I find no merit in this appeal and the same is dismissed with costs to the respondents.

56. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF FEBRUARY, 2024.

C.K YANO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Court Assistant – Kiragu

Ms. Mbubuya for Appellant

Mageria holding brief for Gichunge for 1st Respondent

No appearance for 2nd and 3rd respondents

