Mwasighwa & 55 others v Mbulia Community Land & 3 others (Environment & Land Petition E007 of 2024) [2024] KEELC 5866 (KLR) (Environment and Land) (11 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5866 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT & LAND PETITION E007 OF 2024

EK WABWOTO, J

SEPTEMBER 11, 2024

BETWEEN

GEORGE MWASIGHWA .... 1ST PETITIONER

GILBERT MGHANA .... 2ND PETITIONER

JOHANE KATEMBO & 53 OTHERS & 53 OTHERS .... 3RD PETITIONER

AND

MBULIA COMMUNITY LAND .... 1ST RESPONDENT

DEVKI STEEL MILLS LIMITED .... 2ND RESPONDENT

THE COMMUNITY LAND REGISTRAR, TAITA TAVETA COUNTY .... 3RD RESPONDENT

THE ATTORNEY GENERAL .... 4TH RESPONDENT

RULING

1. This ruling is in respect to the 1st and 2nd Respondent's Preliminary objections dated 12th August and 20th August 2024 respectively. The preliminary objections challenge the Petition on several legal grounds, including failure to exhaust local remedies, vagueness, lack of jurisdiction, ripeness and abuse of the court process.

2. Pursuant to the directions issued by this Court on 30th August 2024, the Court directed the preliminary objections to the canvassed by way of written submissions upon which the Court will render its ruling upon considering the said submissions. The 1st Respondent filed its written submissions dated 5th September 2024, the 2nd Respondent filed its written submissions dated 3rd September 2024 while the

petitioners filed two sets of written submissions dated 17th August 2024 and 9th September 2024. No written submissions were filed by the 3rd and 4th Respondents.

3. In its submissions dated 5th September 2024, the 1st Respondent was emphatic that this Court was not the appropriate forum for determination of this dispute. It was submitted that the prayers sought in the Petition clearly point out an attempt by the Petitioners to bypass the proper legal and administrative procedures established under the *Community Land Act* 2016, which governs disputes related to Community land management. It was also submitted that the issues raised by the Petitioners pertain to the internal operations of the 1st Respondent's management committee which the Court lacks jurisdiction to intervene and direct the affairs of the 1st Respondent as requested by the Petitioners.

4. Citing the cases of Geoffrey Muthinja & Another v Samuel Mugura Henry & 1756 others [2015] eKLR, Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR and Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR, it was argued that the Petitioners had failed to exhaust the local remedies provided under Section 39 of the *Community Land Act*. It was argued that while the Petitioners argue that they were not given access to the necessary documents, they have failed to prove evidence that these alternative dispute mechanisms were unavailable or that they attempted to engage them and hence they have not provided any evidence to show that these local remedies would be ineffective.

5. It was also submitted that the prayers sought in the Petition do not preset any constitutional remedy for the Court to address as they primarily concern matters that fall within the realm of constitutional litigation and that by seeking to frame these issues as constitutional violates, the Petitioners have misapplied the constitutional process thereby divesting the Court of its jurisdiction.

6. On the second limb of the 1st Respondent's submissions, it was submitted that the Petition is fatally defective for failing to meet the threshold in the locus classicus case of Anarita Karimi Njeru v Republic[1979] KLR 154. It was contended that the Petitioners have failed to demonstrate how the 1st Respondent has violated her rights and in what manner, nature or form and that the lack of clarity prejudices the Respondents by making it difficult for them to effectively respond to the Petition. Reliance was placed on the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2013] eKLR.

7. The 2nd Respondent equally submitted on the following issues; whether the Court has jurisdiction to hear and determine the Petition and whether the Petition is fatally defective and an abuse of the Court process.

8. Placing reliance on the case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, Samuel Macharia & Another vs Kenya Commercial Bank Limited & 2Others [2012] eKLR and William Odhiambo Ramogi & 3 Others v Attorney General & 4 others, Muslims for Human Rights & 2 others (Interested Parties)[2020] eKLR, it was contended that the Petition is premature and that the Petitioners ought to have exhausted the alternative dispute resolution mechanisms provided under Section 39 (1), (3) and (4) of the *Community Land Act* and further that he Petition relates to matters outside the jurisdiction of the Court provided in Section 13 of the Environment and *Land Act*.

9. It was also contended that Clause 27 of the Mbulia Community Constitution stipulated that all disputes arising among the Committee shall be resolved through other conflict resolution methods such as mediation and that the Court shall only be considered as a last resort. It was submitted that the significance of internal dispute resolution mechanism cannot be gainsaid since internal remedies are designed to provide immediate and cost effective relief giving the community the opportunity to

apply to own customs in resolving their disputes, rectifying irregularities first before aggrieved parties resort to litigation.

10. It was contended that the wording of Section 39(3) and (4) of the *Community Land Act*, Regulation 25 of the Community Land Regulations, 2017 and Clause 27 of the Mbulia Constitution is very clear and unambiguous and can have only one meaning wherein there is a dispute on community land between members, the community must first apply mediation to resolve the dispute before resorting to court process. Reliance was placed in the case of Geoffrey Muthinja (Supra) and Chief Justice and President of the Supreme Court of Kenya & Another vs Bryan Mandila Khaemba [2021] eKLR were cited in support.

11. As to whether the Petition is defective and an abuse of Court process, it was submitted that the Petitioners are members of the 1st Respondent and have no locus standi to bring this petition. The 2nd Respondent drew support from the decision of Langat v Langat (Chairman) & 2 others (sued as officials of Kosia Set Koboor self help Group)(Environment and Land Case 243 of 2017)[2024] KEELC 4216 (KLR)

12. The Petitioners submitted on the following issues in their submissions; whether the preliminary objections by the 1st and 2nd Respondents can be sustained and who should bear costs. Counsel submitted that the issue before court seeks to challenge how the decision was arrived at to sell 500 acres of land from the community land and further that before the land was sold the 1st Respondent's committee was illegally in office. It was also submitted that the Petitioners wrote letters to the lands offices so that the Community Land Registrar can take action.

13. It was further submitted that the existence of an alternative dispute resolution mechanism does not limit the Petitioners right to seek a constitutional relief and reliance was placed in the cases of Supreme Court of Kenya in Petiti*on No E007 of 2023* between Abicha Micholas v The A.G & Others and William Odhiambo Ramogi & 3 others v A.G. & 6 others, Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR.

14. On whether or not the Petition meets the threshold set out in Anarita Karimi Njeru case, it was submitted that the Petitioners have clearly stated that their constitutional rights were infringed for the benefit of few individuals. The Petition contains sufficient grounds to support the Petitioners claim as set out at Paragraph 12 of the Petition as well as the reliefs sought at Paragraph 16 of the Petition.

15. As to whether or not the Petition is justiciable and ripe, it was submitted that the Petition is justiciable and the matters therein are ripe for determination. Reliance was made to the case of Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR, Okiya Omutatah Okoiti v Communication Authority of Kenya & 8 others [2018] eKLR and Centre for Rights Education & Awareness(CREAW) v Attorney General & Another[2015] eKLR .

16. The Petitioners also submitted that Rule 20 of Mutunga Rules outlines how Petitions can be heard before this Court and that this Court is clothed with the relevant mechanisms on how to hear and determine the same. The Court was urged to dismiss the two preliminary objections with costs.

17. The Court has carefully considered the objections filed by the 1st and 2nd Respondents together with the written submissions filed by the parties and the main issue for determination is whether the objections are merited.

18. As the contention revolves on the issue of jurisdiction, it is imperative to briefly interrogate the concept and its significance.

19. Jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction:

> " 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..."

20. It is sufficiently settled that a Court's jurisdiction is derived from *the Constitution*, an Act of Parliament or a settled judicial precedent.

21. The 1st and 2nd Respondent sought to oust the jurisdiction of this Court at the first instance based on the arguments that Section 39 as read with Section 40 and 41 of the *Community Land Act* 2016, Regulation 25(1) of the Community Land Regulations 2017 and Clause 27 of the Mbulia Community Constitution provided avenues that ought to first address the issues before this Court assumes jurisdiction.

22. The main objection by the 1st and 2nd Respondents hinges on the doctrine of exhaustion. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution. In that constitutional spirit, laws have been developed to guide how such mechanisms are to be achieved. Likewise, Courts have developed jurisprudence in support of the position that Courts must be the final arbiter in instances where alternative dispute resolution avenues are provided for in law. As said earlier, one such avenue is the doctrine of exhaustion.

23. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petiti*on No. 159 of 2018* consolidated with Constitutional Petiti*on No. 201 of 2019* William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR. The Court stated as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
>
> This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
>
> 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.
>
> While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and

basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, where 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."

24. Section 39 of the *Community Land Act*, 2016 which deals with dispute resolution mechanisms under the said Act stipulates at its Section 39(2) as follows:

> " Any dispute arising between members of a registered community and another registered community shall at first instance, be resolved using any of the internal dispute resolution mechanism set out in the respective community by-laws."

25. Section 39 (3) also stipulates that where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative method of dispute resolution.

26. Section 42(1) stipulates as follows:

> " Where all efforts of resolving a dispute under this Act fail, a party to the dispute may refer the matter to Court."

27. Regulation 25(1) of the Community Land Regulations, 2017 and Clause 27 of the Mbulia Community Constitution equally provide that all disputes should be resolved through alternative dispute resolution mechanisms in the first instance.

28. In the instant case, the Petitioners have admitted at Paragraph *2* & 3 of their supporting affidavit dated 8th August 2024 being members of the 1st Respondent and as such they are bound by the applicable provisions of the law under the *Community Land Act* and the Mbulia Community Constitution. The said Petitioners ought to have demonstrated that they have complied with the applicable provisions of Section 39, 42 of the *Community Land Act* 2016, Regulation 25 of the Community Land Regulations 2017 and Clause 27 of the Mbulia Community constitution. It is with noting that the *Community Land Act* is a post- 2010 constitution statute which was enacted being alive to the applicable provisions of the Kenyan Constitution by requiring disputes between members of a registered community land under the Act to be resolved by alternative mechanisms before moving to this Court.

29. The court's jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute before approaching the court. Parties cannot veer off, waive or forfeit these dispute resolution mechanisms as they do not exist in vain. The Court cannot close its eye and overlook the undisputed fact that the dispute should be considered through the provided mechanisms in the first instance. The mere fact that a party pleads constitutional violation doesn't automatically imply that the Court should proceed and determine the Petition as it is in the first instance since the doctrine of exhaustion spells otherwise. The Petitioners cannot take advantage of the court's constitutional jurisdiction over the matter herein without applying the doctrine of exhaustion and adhered to the guiding principles therein.

30. Consequently, this Court finds merit in the 1st and 2nd Respondents' preliminary objections and proceeds to issue the following orders:

    a. The Petition and Notice of Motion both dated 8th August 2024 are hereby struck out.

    b. Each party to bear own costs.

    Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 11TH SEPTEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwazighe for the Petitioners.

Mr. Mburu for the 1st Respondent.

Mr. Mungai for the 2nd Respondent.

No Appearance for the 3rd and 4th Respondents.

Court Assistant: Patrick Maina and Mary Ngoira.