



**Kibii v Baringo County Government (Environment and Land Appeal E008 of 2022) [2023] KEELC 18032 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18032 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E008 OF 2022**

**L WAITHAKA, J  
JUNE 5, 2023**

**BETWEEN**

**SAMUEL KIPRUGUT KIBII ..... APPELLANT**

**AND**

**BARINGO COUNTY GOVERNMENT ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. C. R. T Ateya SRM delivered on 29th June, 2021 in Kabarnet SPM E& LC NO. 13 of 2021)*

**JUDGMENT**

**Background**

1. By a plaint dated 10<sup>th</sup> May, 2021 and filed on 17<sup>th</sup> May 2021, the appellant herein instituted a suit in the lower court to wit Kabarnet SPMC ELC Case No.13 of 2021 seeking judgment against the respondent for a declaration that he, the appellant, is the owner of the parcels of land known as LR Nos. 314, 315 and 316 (suit lands) within Sagasak Adjudication Section in Baringo county measuring approximately 20 acres; an eviction order against the defendant, its agents and/or representatives from the suit lands; costs of the suit and any other or further relief the court may deem fit and just to grant.
2. Vide paragraph three (3) of the plaint, the appellant pleaded that at all times material to the suit, he was the owner of the suit lands having inherited them from his father, mzee Ruto Cherutich (deceased). The appellant accused the respondent of trespassing into the suit lands thereby causing him and his family great loss and damage.
3. The respondent filed a statement of defence through which it denied the allegations levelled against it and inter alia contended that the appellant's suit is bad in law, fatally defective and mala fides. The respondent intimated its intention to raise a preliminary objection challenging the appellant's suit on those grounds.



4. In keeping with its notified intention of challenging the appellant's suit, the respondent filed the notice of preliminary objection dated 30<sup>th</sup> November, 2011 challenging the appellant's suit on the grounds that it offended the provisions of Sections 21, 22, 26 and 29 of the [Land Adjudication Act](#), Cap 284 laws of Kenya; that the suit is frivolous; vexatious, fatally defective and an abuse of the process of the court.
5. Upon hearing and considering the cases/submissions urged by the parties in respect of the preliminary objection, the learned trial magistrate *inter alia* held:-

“Before seeking recourse from the court, a party ought to exhaust all available remedies provided for in the Act unless the laid down procedures have been declared unconstitutional. Section 29 of [Land Adjudication Act](#) provides-

1. Any person who is aggrieved by the determination of an objection under Section 26 of this Act may within 60 days after the date of determination appeal against the determination to the Minister.

It is clear that the plaintiff had recourse under Section 29 to appeal to the Minister. He has not given any reason why he could not pursue this avenue before coming to court. The letter attached by the plaintiff is clear that the plaintiff did not pursue that course... There is nothing to show that Section 29 of the [Land Adjudication Act](#) has been declared unconstitutional. The plaintiff's counsel submitted that the provisions of Section 29 of the [Land Adjudication Act](#) were not followed.

I am persuaded by the authorities of the superior courts I have cited above. In view of the foregoing, the preliminary objection has merits. I proceed to strike the suit with costs to the respondent.”

6. Dissatisfied with the decision of the learned trial magistrate, the appellant appealed to this court on four (4) grounds which can be reduced to one broad ground namely, the learned trial magistrate erred by upholding the preliminary objection.
7. Pursuant to directions given on 28<sup>th</sup> February 2023, to the effect that the appeal be disposed off by way of written submissions, parties filed submissions which I have read and considered.
8. The sole issue arising from the appeal and the submissions is whether the learned trial magistrate erred by upholding the respondent's preliminary objection.
9. Concerning that issue, the appellant has submitted that the issues raised in the preliminary objection were not pure issues of law. Terming the issues raised in the preliminary objection mere legal technicalities, the appellant claims that the learned trial magistrate failed to appreciate that he had obtained the consent required under Section 30(1) and (2) of the [Land Adjudication Act](#) before instituting the suit.
10. In reply, the respondent submits that the appellant improperly invoked the jurisdiction of the court by filing a suit in court before exhausting the dispute resolution mechanisms provided for under the [Land Adjudication Act](#). In that regard reliance is placed on the case of [Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others](#) (2015)eKLR where it was held:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court 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 purposes 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.”

11. The appellant is also said to have approached the court through a mechanism which is not contemplated under the Land Adjudication Act, a civil suit (plaint) as opposed to an application for judicial review.

### **Analysis and determination**

12. As pointed out above, the appellant instituted this suit seeking to be declared the lawful owner of the parcels of land known as LR Nos. 314, 315 and 316 (suit lands) within Sagasak Adjudication Section in Baringo county measuring approximately 20 acres and an eviction order against the respondent.
13. It is not in dispute or even controverted that the appellant obtained the consent required under Section 30 of Land Adjudication Act, Cap 84 Laws of Kenya, before instituting the suit hereto; what is in issue is whether, in the circumstances of this case, where the dispute concerns ownership of land that has been subject of the process of ascertaining rights over it under the Land adjudication Act, the court was properly seized of the dispute brought before it.
14. Faced with an appeal arises from circumstances similar to those leading to the instant appeal, in the case of David Mwithirwa M'Ibaya v. Geoffrey Kibaara M'Ibaya (2021) eKLR Cheron J held:-

“Turning to the Appeal before me, the appellant is challenging the decision by the trial magistrate to dismiss his claim for want of jurisdiction when he had sought and obtained consent in writing from the Land Adjudication officer as required by law. From the plaint presented to the Court in the primary suit being HCCC No. 86 of 2012, the plaintiff/appellant indicated that the suit was filed pursuant to consent by the District Land Adjudication officer, Tigania West District dated 20th March 2012. At paragraph 5 of the plaint, the appellant/plaintiff averred as follows:-

“ That the grandfather owned a parcel of land situated at Kianjai which parcel was later demarcated and registered as parcel number Kianjai Adjudication Section 1838, 4301 and 4403 respectively after the demise of M’ Maitai M’ Laibichia in 1974”.

My understanding of the claim by the plaintiff/appellant from his pleading is that the subject parcels of land in dispute before the trial Court and the subject of this Appeal are matters under Adjudication Section. That would explain why the appellant/plaintiff had to seek and obtain consent pursuant to the provisions of Sections 8 (1) of the Land Consolidation Act Cap. 283 and Section 30 of the Land Adjudication Act Cap. 284 Laws of Kenya. In fact, the letter from the District Land Adjudication officer, Tigania West District contained in the plaintiff/appellant’s list of document dated 10<sup>th</sup> May 2012 Item No. 2 is instructive on the issue. The said letter confirms that the parcels of land are indeed situate at Kianjai Adjudication Section. It is instructive that the Land Consolidation Act, Cap. 283 and the Land Adjudication Act, Cap. 284 which are the applicable law provide an elaborate procedure where a claimant has an interest in land situated within an Adjudication Section and also provide avenues for aggrieved parties such as the dispute between the appellant and the respondent in the primary suit. Section 9, 10 and 11 of the Land Adjudication Act sets out the powers and duties of a Land Adjudication officer.



Section 9 provides as follows:-

9

- (1) The Adjudication officer shall be in charge of and shall exercise general supervision and control over the adjudication.
- (2) The Adjudication officer shall hear and determine:-
  - (a) Any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer; and
  - (b) Any objection to the adjudication register which is submitted in accordance with Section 26 of the Act.

Section 10 sets out the general powers of an Adjudication officer as follows:-

(10)

- (1) The Adjudication officer shall have jurisdiction in all claims made under this Act relating to interest in land in the adjudication area, with power to determine any question that needs to be determined in connection with such claims. And for that purpose he shall be legally competent to administer oaths and to issue summonses, notice or orders requiring the attendance of such persons or the production of such documents as he may consider necessary for the carrying out of the adjudication.
- (2) The Adjudication officer may himself exercise all or any of the powers which are given by this Act to officers subordinate to him.

Section II provides:-

In the course of the adjudication, the Adjudication officer shall have the following powers:-

- (a) He may issue to the officers subordinate to him and to committees and boards such general or particular directions as he thinks necessary for carrying out the provisions of the Act which relate to the procedure of demarcation, recording of title and survey within the adjudication area.
- (b) At any time before the adjudication register is completed, he may correct any error or supply any omission occurring in the adjudication register;
- (c) He may make a claim or otherwise act on behalf of a person who is absent or under disability if he considers it necessary to avoid injustice”.

My discernment of the appellant’s claim as contained in the primary suit is that he was dissatisfied in the manner in which his grandfather’s land was demarcated and registered as parcels No. 1838, 4301 and 4403 in favour of the respondent/defendant.



Section 26 of the [Land Adjudication Act](#) Cap. 284 Laws of Kenya deals with any party aggrieved with an adjudication register and states as follows:-

26

- (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 consultation and inquiries as he thinks fit, he shall determine the objection”.

It is instructive from the above provisions of the law that If the appellant/plaintiff thought or believed that the adjudication register in respect of the disputed parcels of land No. 1838, 4301 and 4403 were incorrect or incomplete, he was to lodge his complaint to the Adjudication officer under the Internal Mechanisms provided under Section 26 of the [Act](#) within sixty (60) days from the date of such publication. There is no indication that the appellant/plaintiff exhausted the internal mechanism of resolving the dispute before filing the primary suit. In the case of *Stanley Thiaine Mbui & Another v the Land Adjudication officer, Tigania West & Another*, HC ELC Misc. Application No. 93 of 2010 (Meru) (unreported), the Court held as follows:-

“I have examined all the averments of the parties. I have also considered their submissions. I have looked at the operative law. Section 26 (1) of the [Land Adjudication Act](#) says:-

Any person named 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 is incorrect or incomplete. I find that the wording of the above Section allows the interested party to have capacity as an affected party to file an objection.

Section 29 allows any person aggrieved by the determination of an objection under Section 26 to appeal to the Minister within sixty days after the date of the determination. The Minister is mandated to determine the appeal and his order therein is final. There is no evidence that the applicants appealed to the Minister and if they did, there is no evidence of the Minister’s order.

It is clear that the interested party had the capacity to file an objection before the District Land and Adjudication officer. There is no claim by the ex-parte applicant that the register had been closed at the time the objection was lodged. The only recourse which the applicants had was to appeal to the Minister in accordance with Section 29 of the [Land Adjudication Act](#)”.



Again in the case of *Tobias Achola Osindi & 13 Others v Cypriano Otieno Ogalo & 6 Others* HCC No. 4 of 2011, Justice Okongo held as follows:-

“The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within, the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act ... The Act has given full power and authority to the Land Adjudication officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. (Emphasis added).

In my view, the role of the Courts is supposed to be supervisory only of the adjudication process. The Court can come in to ensure that the process is being carried out in accordance with the law. The Court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The Court cannot however usurp the functions and powers of the Land Adjudication officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land. Due to the foregoing, a consent issued by the Land Adjudication under Section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to Court for determination issues which should be determined by the Adjudication officer or through the dispute resolution machinery laid out in the Act”. (Emphasis added)

I totally agree with the reasoning of the learned Judge in the above decision which I hereby apply to the instant case mutatis mutandis. The consent issued by the Land Adjudication officer under Section 30 of the Land Adjudication Act Cap. 284 cannot confer jurisdiction to the Courts to perform functions and duties that the statute has clearly spelt out as belonging to other bodies.

In a more recent case of *Savraj Singh Chana V Diamond Trust Bank (Kenya) Limited & Another* (2020) eKLR Weldon Korir J. observed as follows:-

“It is appreciated that the cited decision does not indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165 (3) (b) of the Constitution to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the Courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the Constitutional jurisdiction of this Court. What it simple does is to provide the parties with a faster and more efficient mechanism



for the resolution of their disputes. The Courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute”.

I agree with the decision by the Judge in the above decision on the jurisdiction of the Courts and the statutory mandate given to tribunals and quasi-judicial bodies in the dispute resolution mechanisms. These tribunals and quasi-judicial bodies are skilled and have the technical knowledge on the issues in which they are mandated to handle. The subject of this Appeal relate to determination of rights and interest on land under Adjudication Section as spelt out under the Land Consolidation and Cap. 283 Laws of Kenya and the Land Adjudication Act Cap. 284 Laws of Kenya respectively. Section 4, 5, 6, 7, 8, 9, 10, 11, 12,13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 gives an elaborate structure of the office of the Adjudication officer and his officers who assist in determining rights and interests in land under Adjudication. The Land Adjudication Act also provides an elaborate mechanism of addressing internal disputes. Parliament did not establish these statutory provisions in vain. It was meant to be exhausted before a party seeks alternative mechanisms including moving to the High Court and Courts of equal status ... ”

15. A similar holding was made in the case of Daniel Musili Nyeki & 49 others v Cabinet Secretary of Lands & Settlement & another; Benard Malonza Musya & 30 Others (Interested Parties) (2021) eKLR where the court *inter alia* held:-

“The Land Adjudication Act is described as

“ An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto.”

The act has a detailed dispute resolution mechanism from the time of inception of claims to the final decision of the minister under Section 29. If followed through to its conclusion, the dispute resolution mechanism is supposed to deliver Constitutional protection and just determination of rights. This protection was availed to the parties herein by the appellate process which culminates with Section 29 of the Act..... Having failed to challenge the above-mentioned decision of the Land Adjudication Officer through the process provided by the law the Petitioners cannot be heard to say that their Constitutional rights were violated..... As stated earlier the Petitioners had a right of appeal to the Minister under Section 29 of Land Adjudication Act. They failed to file the appeal and instead filed judicial review proceedings and the present Constitutional Petition. I find that the Petitioners were wrong in doing so. I am guided by the many decisions where Courts have held that where a specific dispute resolution mechanism is prescribed by the constitution or a statute, parties need to resort to that mechanism first before resorting to Court action ...”

16. In Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019) [2022] KECA 119 (KLR) (18 February 2022) (Judgment), it was held:-

“Section 30 of the Land Adjudication Act required consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. The consent was a condition precedent to a valid suit concerning disputes of land in an adjudication section, and specifically required the suits to be discontinued if started without consent. Section 30 therefore affected the power and jurisdiction of courts to hear and determine such disputes.



The rationale for Section 30 of the [Land Adjudication Act](#) was that there was an elaborate process that was laid down by the [Land Adjudication Act](#), on how to determine which persons were, and the extent to which, they were entitled to interests in the land under adjudication. It was therefore necessary that section 30 was first employed before resort was made to the courts, and also shielded from unnecessary and unjustified abuses. Where a dispute resolution mechanism existed outside courts, it had to be exhausted before the jurisdiction of the courts was invoked.”

17. In applying the principles enunciated in the cases cited above to the circumstances of this case where the suit was not dismissed for failure to obtain the consent required under Section 30 of the [Land Adjudication Act](#) but for failure to exhaust the dispute resolution mechanism provided for in the [Land Adjudication Act](#); in particular, on account of the appellant’s failure to challenge the decision of the Land Adjudication Officer if aggrieved by it, I find and hold that the learned trial magistrate did not err by upholding the preliminary objection on account of the appellant’s failure to exhaust the dispute resolution mechanism provided under the [Land Adjudication Act](#). It is the considering view of this court that the action of the appellant of filing a suit to raise issues that had being determined by the Land Adjudication Officer was tantamount to appealing or challenging the decision of the Land Adjudication Officer in respect of the suit properties through the back door hence an abuse of the process of the court.
18. The upshot of the foregoing is that the appeal is found to be lacking in merits and dismissed it with costs to the respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 5<sup>TH</sup> DAY OF JUNE, 2023.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:-**

N/A for the Appellant

Ms. Chepngetich for the Respondents

Court Asst.: Christine

