



County Government of Kajiado & 3 others v Muthoni & 412 others; National Land Commission & 3 others (Interested Parties) (Environment & Land Petition 5 of 2020 & Petition 11 & 8 of 2018 & 7 of 2017 (Consolidated)) [2023] KEELC 21385 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND PETITION 5 OF 2020 &
PETITION 11 & 8 OF 2018 & 7 OF 2017 (CONSOLIDATED)**

LC KOMINGOI, J

NOVEMBER 9, 2023

BETWEEN

**COUNTY GOVERNMENT OF KAJIADO 1ST PETITIONER
HON. PETER TIRISHE 2ND PETITIONER
PARIKEN OLE NGURR- INKOBE 3RD PETITIONER
MBUNGA OLE SALAO 4TH PETITIONER**

AND

JOYCE MUTHONI & 412 OTHERS RESPONDENT

AND

**NATIONAL LAND COMMISSION INTERESTED PARTY
CHIEF LAND REGISTRAR INTERESTED PARTY
HON. ATTORNEY GENERAL INTERESTED PARTY
DIRECTOR LAND ADJUDICATION AND SETTLEMENT INTERESTED
PARTY**

RULING

1. Coming up for determination are Preliminary Objections dated 18th January 2021 and 16th March 2021 by Twenty One (21) of the Respondents.
2. The objections are on the grounds that:



- i. The Hon. Court does not have jurisdiction on account of Section 15 of the [National Land Commission Act](#).
 - ii. The Petition as presented is statute barred under Section 7 of [Limitation of Actions Act](#).
 - iii. The Petition as presented is contrary to Section 80(2) of the [Land Registration Act](#).
3. The objection was canvassed by way of written submissions

The Objectors' submissions

4. In the submissions dated 9th April 2021, counsel submitted that the Petition was statute barred and offended provisions of the [Land Adjudication Act](#), [Limitation of Actions Act](#),
5. Reference was made to *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 which outlined that a Preliminary Objection should be on a point of law. Counsel submitted that the Mosorio Section Land Adjudication process was finalised on 20th December 1990 and thus the Petition offended the [Land Adjudication Act](#) which has an elaborate dispute resolution mechanism. The outlined process ought to have been exhausted before resolving to file the instant petition. Counsel cited Angote J. in [Mohamed Ahmed Khalid \(Chairman\) & 10 others vs Director of Land Adjudication & 2 others](#) [2013] eKLR and Supreme Court of Kenya in [Sammy Ndung'u Waity vs IEBC & 3 others](#) [2019] eKLR which held that where the [Constitution](#) or any other law establishes an organ with a clear mandate for the dispute resolution, no other body should usurp such power.
6. Counsel submitted that the suit was guised as a Petition but sought prerogative writs orders which could not be granted without a party first seeking leave of court as set out by the [Fair Administrative Action Act](#) and outlined in Order 53 of the [Civil Procedure Rules](#). Moreover, the sought orders were statute barred by Section 9(3) of the [Law Reform Act](#) which ought to have been filed within 6 months after issuance of the said orders. But in this case, the decision was issued on 20th December 1990. Counsel also pointed out that the Petitioners made reference to the [Constitution](#)'s Articles but stated that the law does not act retrospectively and the Petitioners could not invoke provisions of the current Constitution to address a process that took place between 1986 and 1990. Reference was made to [Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR.
7. Counsel also submitted that the Petition which was a suit to recover land was equally statute barred by Section 7 of the [Limitation of Actions Act](#). Counsel submitted that the suit land was no longer trust land because it was converted, declared an adjudication section and persons issued title deeds which took place over 12 years.
8. Counsel went on to submit that the Petition did not concisely outlined which Constitutional provisions had been infringed as was declared in the [Annarita Karimi Njeru vs AG](#) (1979) KLR 154 case adding that this was an ordinary suit filed as a Constitutional Petition which should not be entertained as was held by Onguto J. in [Peter Mungai Ngengi vs Mama Ngina Kenyatta & Another](#) [2015] eKLR and Lenaola J. (as he then was) in Hon. [Uhuru Kenyatta vs The Nairobi Star Ltd](#) [2013] eKLR.

The Petitioners Submissions

9. In their submissions dated 9th December 2022, counsel made reference to the following cases that discussed principles of a preliminary objection *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, [Hassan Joho Ali & another vs Suleiman Shabal & 2 others](#) [2014] eKLR, [Hassan Nyanje Charo vs Khatib Mwashetani & 3 others](#) [2014] eKLR, [Aviation Allied Union](#)



Workers Kenya vs Kenya Airways Ltd & 3 others [2015] eKLR and IEBC vs Jane Cheprenger & 2 others [2015] eKLR with emphasis being, a preliminary objection should be raised on a pure point of law which has no contests as to facts which are agreed as *prima facie* presented on the pleadings. Counsel submitted that the facts in issue had never been settled and the said adjudication process was conducted in secrecy and the land was still community land. Therefore, with the contested facts, the preliminary objection could not be sustained.

10. On whether Sections 13, 21, 22, 26 and 29 of the Land Adjudication Act ousted jurisdiction of this court, counsel submitted that there have been several disputes over the years regarding the alleged adjudication of the suit land but they all had the same verdict that the adjudication process was null. Adding that the Petitioners were unaware of the process and could not have invoked the set out dispute resolution mechanism. It was thus imperative for the court to determine the issue.
11. On the Petition being statute barred by Section 7 of the Limitation of Actions Act, counsel submitted that the land in dispute was excluded from the application of that section by Section 42(c) of Limitation of Actions Act by dint of being trust land.
12. On the issue of the Petition being contrary to Section 9(3) of the Law Reform Act and Order 53(2) of the Civil Procedure Rules, counsel submitted that the Petition was in accordance with Article 22 and 23(3) of the Constitution and not within the purview of Fair Administrative Actions Act or Order 53 of the Civil Procedure Rules. Adding that the Petition met the Constitutional threshold and should be determined on merit.
13. On whether the petition was retrospective, counsel submitted that the alleged adjudication did not adhere to the set out rules, laws and governing structures at the time and the Respondents could thus not claim that Constitution provisions were being applied retrospectively but the provisions were to guide court in showing that due process was not followed citing Angote J. in Mohamed Ahmed Khalid (Chairman) & 10 others vs Director of Land Adjudication & 2 others [2013] eKLR. Counsel also pointed out that whereas the National Land Commission had a mandate to determine historical land injustices under Section 15, it was this court's duty to determine whether its recommendations were lawful.
14. As such, the Preliminary Objection ought to be dismissed with costs to the Petitioner.

Analysis and Determination

15. I have considered the Preliminary Objection's, the rival submissions, the authorities cited. The issue for determination is:
 - i. Whether the Preliminary Objections dated 18th January 2021 and 16th March 2021 are merited.
16. A preliminary objection should be brought on a point of law and not on contested facts as was pronounced in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696. This legal foundation has comprehensively been submitted upon by the parties. Additionally, the Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR pronounced:
 - (78) The Joho decision has been subsequently cited by this Court in Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014; and in Aviation & Allied



Workers Union Kenya vs. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, in which the Court further stated at paragraph 15;

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

- (16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).
17. The objection presented is rooted in legal principles and is based on the premise that the petition is time-barred in accordance with Section 7 of the *Limitation of Actions Act*, and the *Land Adjudication Act*, in conjunction with Section 15 of the *National Land Commission Act*, divests this court of its jurisdiction to adjudicate upon the dispute. The objectors assert that the subject land underwent an adjudication process in the year 1990, and subsequently, titles were issued by the Respondents, thereby transforming the land from community land to private land. Consequently, any grievances regarding the land should have been raised before the expiration of 12 years. The Petitioners, however, contest this objection by asserting that the alleged adjudication was conducted covertly and had been declared null and void, thus rendering the land’s status as community land unchanged, and thereby making Section 7 inapplicable.
18. Further, the Objectors argue that since the suit land has undergone adjudication, any grievances should follow the procedures set forth within the adjudication framework, thereby stripping this court of its jurisdiction to entertain the dispute. They also contend that the National Land Commission is vested with the authority to address historical land injustices, not this court. In response, the Petitioners counter these objections by asserting that they were not part of the adjudication process and, therefore, are not barred from initiating legal proceedings to safeguard the community’s interests. They further contend that the court possesses the jurisdiction to assess the legality of the Commission’s recommendations.
19. In light of the aforementioned, the court recognizes that the legal issue in question requires an adjudication and determination, and it is inherently intertwined with disputed and contested facts, which do not meet the threshold for a preliminary objection.
20. Consequently, the preliminary objections are hereby dismissed.
21. Costs shall abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF NOVEMBER 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. R. Ngola for Grace Katasi for the Petitioners.

Ms. Sharamo for Mr. Gikonyo for 1-18 Respondents.



Mr. Kimani for 16th Respondent.

Ms. Sharon for Mr. Gatumuta for the 331 Respondents.

Mr. Githuka for 24 Respondents.

