



Ochieng (Suing as the Legal Administrator of the Estate of the late Elkanah Ochieng Wire) v Oduor & 2 others (Environment & Land Case 17 of 2021) [2022] KEELC 2198 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 17 OF 2021**

AY KOROSS, J

JUNE 2, 2022

BETWEEN

ALFRED VICTOR OCHIENG (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE ELKANA OCHIENG WIRE) PLAINTIFF

AND

HESBON ODUOR 1ST DEFENDANT

LUCAS ONYANGO OTIENO 2ND DEFENDANT

AGGREY WIRE ODUOR 3RD DEFENDANT

RULING

1. The plaintiff's claim was founded on customary trust, fraud and illegality over land parcel number Siaya/Yenga/1539 ("the suit property"). After the plaintiff testified as PW1, the 2nd defendant raised a notice of preliminary objection on the following grounds that is now the subject of this ruling;
 - a. By dint of Section 8 of the *Land Consolidation Act*, Cap 283 and section 30 of the *Land Adjudication Act* Cap 284, the court lacked jurisdiction to hear the suit for lack of statutory consent to file the suit; and
 - b. As set out in Sections 12, 14 and 26 of the *Land Consolidation Act* and Sections 26 and 29 of the *Land Adjudication Act*, the plaintiff did not exhaust all the remedies.
2. As directed by the court, parties disposed of the preliminary objection by way of written submissions.

The 2nd defendant's submissions

3. The 2nd defendant filed written submissions dated 21/03/2022. On the 1st ground, it was his position that the suit property fell within a land adjudication section and the plaintiff had failed to obtain



consent from the land adjudication officer prior to filing suit as required by Section 30 of the [Land Adjudication Act](#). Consequently, the court was bereft of jurisdiction. He relied on the locus classicus case of [Owners of the Motor Vessel 'Lilian S' v Caltex Oil \(Kenya\) Limited](#) [1989] eKLR where the court stated that jurisdiction is everything and [Hassan Ngoka Dzombo v Ruwa Kope & Another](#) [2021] eKLR where the court found that in an adjudication section, consent was mandatory.

4. The 2nd ground follows the positive conclusion of the 1st ground. He submitted that the plaintiff had not exhausted the dispute resolution mechanisms envisaged under Sections 26 and 29 of the [Land Adjudication Act](#) prior to approaching the court. The 2nd Defendant relied on the authority of [Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others](#) [2015] eKLR where the court stated that it was imperative that where a dispute resolution mechanism existed outside courts, the same must be exhausted before the jurisdiction of the courts was invoked.

The plaintiff's submissions

5. The plaintiff filed his written submissions dated 01/04/2022. In it, he contended that there was already a title deed in existence in respect of the suit property and therefore, the suit property was no longer governed by either the [Land Consolidation Act](#) or the [Land Adjudication Act](#). He relied on the case of [Japhet Muriungi Rukunga \(suing as the legal representative of the estate of M'itiri Mbirithi \(deceased\) v Stephen Muriuki Baibaya](#) [2021] eKLR which stated that once a title deed was issued, the land fell within the Land Registration Act and the Environment and Land Court Act. It was his conclusion that the court had jurisdiction to hear and determine the instant suit.

Analysis and determination

6. Before considering the merits of the objection, I have observed that the 2nd defendant has unprocedurally attached an annexure to his submissions; In legal proceedings, evidence cannot be introduced by way of submissions and the annexure is hereby struck off the record. [See [East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro](#) [2019] eKLR]. Further, the 1st ground was bereft of specificity. Which land regime applied to the suit property? Was it the [Land Consolidation Act](#) or [Land Adjudication Act](#)? Finally, in his submissions, the 2nd defendant had also drawn our attention to page 65 of the [Land Adjudication Act](#); which page does not exist. I will now proceed with the legal and jurisprudential framework on the preliminary objection.
7. The locus classicus case of [Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd](#) (1969) EA 696 has long settled the principle of a preliminary objection and this court need not reinvent the wheel. The import of this decision is that such preliminary objections can be raised when they relate to pure points of law, on uncontested facts or if it is capable of disposing off a suit preliminarily without the court being forced to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.
8. The Supreme Court of Kenya in the case of [Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others](#) [2015] eKLR took a more liberal approach on the parameters to be used in determining whether or not a preliminary objection could stand when it stated thus;

“The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party



to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

9. With that in mind, by juxtaposing the issues raised in the preliminary objection against the contents of the plaint and the law on preliminary objections, I find that the preliminary objection had attained the required threshold and was well founded on a point of law. The objection, if successful, was capable of determining the claim at once.
10. The objection is to the effect that this court lacked jurisdiction over the dispute. A contest on jurisdiction must be addressed at the earliest opportunity since it goes to the root of the court’s competence in the matter. The Court of Appeal in the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (Supra) succinctly settled the issue of jurisdiction as follows;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it”.
11. It was the 2nd defendant’s position that this court lacked jurisdiction because the plaintiff did not comply with section 30 of the *Land Adjudication Act* which stated that;

“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.”
12. It is paramount for this court to elaborate on the land adjudication process. Once an area has been declared an adjudication section by the section adjudicating officer, the adjudicating officer fixes a period within which one can make a claim over her piece of land to a recording officer. The person making the claim points out which piece of land is hers so that the specific boundaries are demarcated by the demarcation officer. If anyone has an issue regarding her piece of land, she can take it up with the adjudication committee. If she is dissatisfied with the decision of the committee, she can escalate her case to the arbitration board. Once adjudication is complete, the adjudication officer prepares the adjudication register and forwards it to the director of land adjudication and gives notice that the adjudication register is complete. At this point, anyone aggrieved with the adjudication register still has leeway to bring a case to the adjudication officer stating that there is an issue with the register. If there is no objection or the objection has been settled, the adjudication officer creates a no objection register which he then forwards to the director of land adjudication who forwards the same, together with a copy of the duplicate adjudication register to the Chief Land Registrar for purposes of registration under Section 28 of the *Land Adjudication Act*. Any person aggrieved with the decision of the adjudication officer on the adjudication register has the right to appeal to the minister for recourse. Once the appeal is determined, the director for land adjudication will send the latest particulars to the chief land registrar for registration. This final registration brings an end to the adjudication process and any issues raised thereafter falls under the jurisdiction of the courts. To put it in other words; in land falling within an adjudication section, rights and interests in the suit land crystallize in the form of registration and issuance of the title deed to a person. In the instant case, the suit property was duly registered. The authority cited by the 2nd defendant of *Hassan Ngoka Dzombo* (Supra) is distinguishable from this case because it dealt with land that fell within an adjudication section. The 1st ground of the preliminary objection is misplaced and it is my finding that it is unmeritorious. The 2nd ground which was hinged on the 2nd ground fails. I need not say more.



13. The upshot is that I find the preliminary objection not merited and because costs follow the event, I award costs to the plaintiff and issue the following disposal orders;
- a. The preliminary objection dated 8/03/2022 is hereby dismissed with costs to the plaintiff.
 - b. Matter to proceed for hearing on 21/09/2022.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF JUNE 2022.

HON. A. Y. KOROSS

JUDGE

2/6/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Wagumba h/b for Ms Imbaya for the plaintiff

N/A for defendants

Court assistant: Ishmael Orwa

