



**Mutungu (The Administrator of the Estate of Mutungu Kimeu Makau - Deceased) v
Adjudication Officer, Ndiani Adjudication Section & 7 others (Environment and Land
Judicial Review Case E002 of 2022) [2022] KEELC 14603 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2022
TW MURIGI, J
NOVEMBER 2, 2022**

BETWEEN

**PATRICK MWANGANGI MUTUNGI (THE ADMINISTRATOR OF THE
ESTATE OF MUTUNGI KIMEU MAKAU - DECEASED) APPLICANT**

AND

**ADJUDICATION OFFICER, NDIANI ADJUDICATION SECTION 1ST
RESPONDENT**

**THE CHAIRMAN, NDIANI ADJUDICATION BOARD MAKUENI 2ND
RESPONDENT**

NDIANI ADJUDICATION BOARD 3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION 4TH RESPONDENT

CHIEF LAND REGISTRAR 5TH RESPONDENT

JACKSON MUIA MUTISO 6TH RESPONDENT

SIMON WAMBUA MUTISO 7TH RESPONDENT

ISAAC MUOKI MUTISO 8TH RESPONDENT

RULING

1. By a Chamber Summons application dated 22nd of February, 2022, the *ex parte* applicant seeks the following orders: -
 1. Spent.
 2. That leave be granted for the Applicant to apply for the following orders: -



- a. An order of *certiorari* to bring into this court the decision of the Adjudication Officer for Ndiani Adjudication Section Makueni, Chairman for Ndiani Adjudication Board Makueni and the Adjudication Board for Ndiani Adjudication Section Makueni dated November 10, 2016 for failure to comply with the Court decision issued in Case Nos 102/1947 and L 33 of 1962 issued by Kilungu Courts as it then was Civil Appeal No 170 of 1965 dated the 17th of January, 1966 by the Appeals Magistrate's Court in Machakos as it then was and Civil Appeal No 163 of 1967 dated 27th of September, 1968 by the Appellate Court in Nairobi for parcels numbers 1275, 1371, 1372, 1373 and 1374 Ndiani Adjudication Section and for failure to consider the said Court decisions and pass the aforementioned land parcels to the Estate of Mutungi Kimeu Makau by conducting surveys, land demarcation and processing of the said adjudication section numbers against the said court decisions.
 - b. An order of *mandamus* to compel the Adjudication Officer Ndiani Adjudication Section, Chairman for Ndiani Adjudication Board and the members of the Ndiani Adjudication Board to comply with the last court orders issued in the Appellate Court in Nairobi Civil Appeal No. 163 of 1967 by Honourable Justice B Trevelyan after taking into consideration all lower courts decisions in Kilungu and Machakos as earlier stated and to conduct fresh surveys, enter corrections necessary in the demarcation map and adjudication records prepared while issuing the said land parcels to the 6th, 7th and 8th Respondents and also to validate the properties belonging to the Estate as was ordered by the Courts.
 - c. An order of prohibition against the Chief Land Registrar Makueni the 5th Respondent to processing of any title deeds for land parcel numbers 1275, 1371, 1372, 1373 and 1374 for Ndiani Adjudication Section as per the adjudication records forwarded to him/her after the decision made by the Ndiani Adjudication Board on the 10th of November, 2016.
3. That the costs of and incidental to the application be in the cause.
- The application is supported the statement and verifying affidavit sworn by the Applicant on February 2, 2022.
2. In response to the application, the 1st - 5th Respondents filed a Notice of Preliminary objection dated 20th of May, 2022 on the following grounds: -
1. That the *Land Adjudication Act* Cap 284 provides an elaborate procedure of handling disputes emanating from the adjudication process which the Applicant has not exhausted and as such this Honourable Court does not have jurisdiction to entertain this application.
 2. That this suit contravenes the provisions of Section 29 of the *Land Adjudication Act* Cap 284 as the Applicant did not file any appeal to the decision of the Land Adjudication officer.
 3. The Respondents urged the Court to dismiss the application with costs.

Applicant's Case

4. In opposing the Preliminary Objection, the ex parte Applicant vide his replying affidavit sworn on 15th of June, 2022 averred that he had exhausted the dispute resolution mechanisms provided for under the *Land Adjudication Act*. The Applicant further averred that on 1st of July, 2021 he filed an appeal to the Minister but was yet to receive any response on the same.



5. He went on to state that his late father John Mutungi Kimeu Makau, one of the Plaintiff's in the land adjudication board meeting held on 10th of November, 2016, fell ill immediately after the board made its decision on November 10, 2016 and was therefore unable to initiate the appeal against the Board's decision to the Minister.
6. The Applicant further averred that after the demise of his father, he obtained a grant of letters of administration ad litem which enabled him to file the appeal to the Minister. He asserts that justice should be administered without undue regard to technicalities as stipulated in Article 159(2)(d) of the Constitution.
7. The Preliminary objection was canvassed by way of written submissions.

The 1st - 5th Respondents' Submissions

8. The 1st - 5th Respondents submissions were filed on 30th of June, 2022.
9. The Attorney General raised the following issues for the Court's determination: -
 - i. Whether the application contravenes the provisions of Section 29 of the Land Adjudication Act Cap 284.
 - ii. Whether the Applicant has exhausted the procedure for redress provided under the Land Adjudication Act Cap 284.
 - iii. Whether this Honourable Court has jurisdiction to entertain this matter.
10. With regards to the issue of whether the application contravenes the provisions of Section 29 of the Land Adjudication Act, the Attorney General submitted that the Applicant has not exhausted the dispute resolution mechanism provided for under Section 29 of the Land Adjudication Act since he had lodged an appeal with the Minister on July 1, 2021 which was yet to be heard and determined. The Attorney General argued that the subject matter in the appeal before the Minister is similar to subject matter in the present application. To buttress their submissions on this point, the Honourable Attorney General relied on the following authorities: -
 1. Speaker of National Assembly vs James Njenga Karume (1992) KLR.
 2. Reuben Mwongela M'itelekwa (Suing as the Legal Representative of the Estate of MiItelekwa Mubeke) vs Paul Kigea Nabea & 2 others (2019) eKLR.
 3. Samuel Kamau & Another v Kenya Commercial Bank and 2 others (2012) eKLR
11. With regards to the issue of whether this court has jurisdiction to entertain this matter, the Attorney General submitted that the court does not have jurisdiction to hear an appeal emanating from the decisions made by the land adjudication officer. The Attorney General went on to submit that the jurisdiction of the Court can only be invoked once the Minister has rendered a decision on the Applicant's Appeal. The Attorney General argued that the Court has no jurisdiction to entertain this matter and urged the Court to dismiss it with costs. To buttress their argument, they relied on the case of Samuel Kamau & Another vs Kenya Commercial Bank and 2 others (2012) eKLR.

The Applicant's Submissions

12. The Applicant's submissions were filed on 5th of July, 2022.
13. Counsel for the Applicant raised the following issues for the Court's determination: -



- i. Whether the Applicant has complied with the provisions of Section 29 of the [Land Adjudication Act](#) Cap 284 of the Laws of Kenya.
 - ii. Whether this Honourable Court has jurisdiction to hear and determine the Judicial Review application filed by the Applicant.
14. Counsel for the Applicant gave an elaborate background on the dispute revolving around land parcel number 1273 Ndiani Adjudication Section filed before the Ndiani Adjudication Committee up to the time when the appeal was filed to the Minister on 1st of July, 2021. Counsel submitted that the main reason for delay in filing the appeal within the prescribed time was because the Applicant's father who was the only person who could file the appeal fell ill and was in and out of hospital until his demise on 11th of February, 2019. To buttress his submission on the issue of inordinate delay, Counsel placed reliance on the case of [Agip \(K\) Ltd vs Highlands Tyres Ltd](#) (2001) KLR 630.
 15. Counsel went on to submit that after the applicant filed the appeal to minister, no response on the proceedings had been made for over one year which is prejudicial to the applicant as justice delayed is justice denied. he went on to submit that the applicant did not pay the filing fees for the appeal as the same had been waived.
 16. With regards to the issue of whether this court has jurisdiction to hear and determine the Judicial Review application, Counsel submitted that Article 165(6) of [the Constitution](#) vests in the High Court supervisory jurisdiction over Subordinate Courts and any other person, body or authority exercising a judicial or quasi-judicial function but not over a superior court while Article 165(7) gives the High Court powers to call for the record of any proceedings before the said Courts for direction.
 17. Counsel contends that the issue for determination before the Court is whether the Ndiani Adjudication Officer and his Committee acted within the powers conferred upon them by the Act or whether they exceeded their powers and not an appeal against the decision by the Minister. Learned Counsel contends that the [Land Adjudication Act](#) does not confer powers upon the High Court to receive appeals from the decision of the Minister. Counsel argued that the main issue for determination before the Court, is the Board's decision made on November 10, 2016 which is also the subject matter in the appeal before the Minister. Counsel submitted that under the [Fair Administrative Act](#), the Court has jurisdiction to review the decision of the Tribunal, the Board or the Minister on whether they acted in excess of their powers. To buttress this argument, Counsel relied on the following cases: -
 - a. [Sunchan Investments vs the Ministry of National Heritage and Culture](#) (2016) eKLR.
 - b. [Council of Civil Service Unions vs Minister for the Civil Service](#) (AC) 374.
 18. Counsel submitted that Applicant has the right to seek the intervention of the Court since the entire decision by the Ndiani Adjudication officer and the Committee was a nullity.

Analysis and Determination

19. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law.
20. In [Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd](#) (1969) EA 696, Law JA stated;

“So far as I'm aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of 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 the contract giving rise to the suit to refer the dispute to arbitration.”

21. Further on Sir Charlse Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issue. The improper practice should stop.”

22. In *Oraro vs Mbaja* (2005) eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A preliminary objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a preliminary objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

23. Having carefully considered the pleadings, the Notice of Preliminary Objection, the replying affidavit and the rival submissions filed by the respective parties in this case, the Court is of the opinion that the following issues arise for determination: -

- i. Whether the Applicant has exhausted the dispute resolution mechanisms provided under the *Land Adjudication Act*.
- ii. Whether the Applicant has complied with the provisions of Section 29 of the *Land Adjudication Act*.
- iii. Whether this Honourable Court has the requisite jurisdiction to hear and determine the Judicial Review Application.

24. The first and second issues for determination are closely intertwined. The *Land Adjudication Act* deals with all matters pertaining to adjudication. In its preamble it states that;

“It is an Act of Parliament to provide for the ascertainment and recording of rights and interest in Trust Land, and for purposes connected therewith and purposes incidental thereto.”

25. The 1st - 5th Respondents argued that the present application offends the provisions of section 29 of the *Land Adjudication Act*. It is the respondents case that the applicant has not exhausted the dispute resolution mechanism provided under the *Land Adjudication Act* before approaching this court. the respondents argued that the applicant has lodged an appeal to the minister which is yet to be heard and determined.

26. the applicant on the other hand averred that he had exhausted the dispute resolution mechanism provided under the act before he approached the court. he maintains that he filed an appeal to the minister but was yet to receive any response on the same.



27. Section 26 and 29 of the *Land Adjudication Act* provides for an elaborate dispute resolution mechanism for solving any dispute arising from the adjudication process.
28. Section 26 of the *Land Adjudication Act* provides as follows: -
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 consultations and inquiries as he thinks fit, he shall determine the objection.
29. Section 29 of the *Land Adjudication Act* provides that;
1. Any person who is aggrieved by the determination of an objection under section 26 of this Act may within sixty days after the date of the determination, appeal against the determination to the minister by;
 - a. Delivering to the minister an appeal in writing specifying the grounds of appeal; and
 - b. Sending a copy of the appeal to the Director of Land Adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the orders shall be final.
 2. The Minister shall cause copies of the order to be sent to the director of Lands Adjudication and to the Chief Lands Registrar.
 3. When the appeals have been determined, the Director of Lands Adjudication shall: -
 - a. Alter the duplicate adjudication register to conform with the determinations; and
 - b. Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alteration and a copy of the certificate to the Chief Lands Registrar, who shall alter the adjudication register accordingly.
30. The Applicant produced the proceedings that were before the Adjudication Board. Looking at the proceedings before the Adjudication Board it is not in dispute that the plaintiff's Mutungi Kimeu Makau and Patrick Mwangangi Mutungi filed Case number 18, 19, 20, 21 and 22 of 2016 before the Adjudication Board Ndiani Adjudication Section against the decision by the Ndiani Adjudication Committee made on 31st of August, 2016. The powers of the Committee to determine disputes under the Act is donated under section 20 which provides as follows: -
- The committee appointed for an adjudication section shall;
- a. Adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer.
 - b. Advise the adjudication officer or any officer subordinate to him upon any question of recognized customary law as to which he has sought its guidance
 - c. Safeguard the interest of absent persons and persons under disability



- d. Bring to the attention of officers engaged in the adjudication any interest of which for any reason no claim has been made
- e. Assist generally in the adjudication process.

A person who is aggrieved by the decision of the committee then files it before the board.

In the event of inability of the committee to make a decision, the following procedure would apply: -

- a. If a committee is unable to make a decision on a matter before it, it shall refer the matter to the arbitration board.
- b. The adjudication officer may require the committee to reconsider any decision which it has made.
- c. Any person named in or affected by the decision of the committee who considers the decision to be incorrect may within 14 days after the decision complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.

Upon the receipt of a complaint under subsection (3) of this section, the executive officer of the committee shall refer it with all the particulars of the case to the executive office of the board who shall submit it to the board.

- 31. In accordance with the provisions of Section 22 of the Act, the Applicant being aggrieved with the findings of the Adjudication Committee Ndiani Adjudication Section, filed an appeal before the Arbitration Board.
- 32. The Board in its decision made on 10th of November, 2016 stated as follows: -
 - “So due to the above facts the A/Board has confirmed that Nairobi High Court decision which was confirmed by the Committee members and has dismissed all the cases the lands in dispute were to remain the property of the Defendants.”
- 33. The Applicant submitted that his late father was unable to file the appeal within the prescribed time due to his illness. That after the demise of his father, he obtained a grant of letters of administration and proceeded to file the appeal to the Minister.
- 34. The 1st – 5th Respondents submitted that the Applicant has not exhausted the dispute resolution mechanisms provided under the Act since the Appeal before the Minister was yet to be heard and determined.
- 35. It is not in dispute that the Applicant lodged an appeal to the Minister on 1st of July, 2021. The Applicant submitted that he was aggrieved by the decision of the Board. The Applicant asserts that the issue for determination before the Court is whether the Board exceeded its powers conferred upon it by the Act.
- 36. As earlier stated, Section 26 and 29 of the *Land Adjudication Act* provides for the statutory dispute resolution mechanisms for parties aggrieved with any of the adjudication processed. It is not in dispute that the Applicant filed an appeal to the Minister against the decision of the Board. The same is yet to be heard and determined.
- 37. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the Courts. The principle has been expressed and



upheld in several decisions. In the case of *Secretary, County Public Service Board & Another vs Hulbbai Gedi Abdille* [2017] eKLR the doctrine was expressed by the Court of Appeal as follows;

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

38. In *National Assembly vs James Njenga Karume* (1992) 3KLR the Court of Appeal stated as follows;

“...where there is a clear procedure for the redress of any particular grievance prescribed by *the constitution* or an Act of Parliament that procedure should strictly be followed.”

39. The purpose of the principle was earlier stated by the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others* [2015] eKLR as follows:

“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.”

40. I am of the view that the Court ought not to intervene until it is satisfied that the dispute resolution mechanisms provided in law have all been exhausted. I find that the *ex parte* Applicant ought to have exhausted the dispute resolution avenues available in the *Land Adjudication Act* before approaching the Court.

Whether this Court has Jurisdiction to hear and Determine this Matter

41. The 1st - 5th Respondents contended that the Applicant has invoked the jurisdiction of this Court prematurely because he has not exhausted the dispute resolution mechanisms provided under the *Land Adjudication Act*.

42. The question of jurisdiction was discussed in the celebrated case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held 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. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



43. Similarly, the Supreme Court in [*Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 others*](#) (2012) eKLR.

“...the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

44. It is trite that the Court must determine whether it has jurisdiction to hear and determine the matter before it. The Respondents submitted that the [*Land Adjudication Act*](#) provides for dispute resolution mechanisms to redress grievances regarding the adjudication process. They argued that the present application was a preserve of the Minister and not for the Court. The Applicant submitted that the issue for determination is whether the Ndiani Adjudication Board in arriving at its decision exceeded the powers conferred upon it by the Act. It is evident that the Applicant has filed an appeal against the decision of the Ndiani Adjudication Board to the Minister which is yet to be heard and determined.

45. The *ex parte* applicant has filed a judicial review application seeking an order of certiorari to quash the decision of the 1st, 2nd and 3rd Respondents delivered on 10th November, 2016, an order of *mandamus* seeking to compel the 1st, 2nd and 3rd Respondents to comply with the last Court Orders issued in Nairobi Civil Appeal No. 163 of 1967 by Justice B. Trevelyn and an order of prohibition prohibiting the 5th Respondent from processing any title deeds for land parcels number 1275, 1371, 1372, 1373 and 1374 as per the aforementioned decision.

46. It is clear that the *Ex Parte* Applicant is in essence challenging the decision of the Respondents, rather than the decision making process, without first obtaining consent as required under Section 30 of the [*Land Adjudication Act*](#) which provides as follows;

“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.”

47. Section 29(3) of the [*Land Adjudication Act*](#) provides as follows:

“When the appeals have been determined, the Director of Land Adjudication shall;

- (a) alter the duplicate adjudication register to conform with the determinations; and
- (b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

48. The *ex parte* Applicant did not obtain the mandatory consent that would cloth this Court with the requisite jurisdiction to hear and determine a matter that touches on interest and right to the land that is part of an adjudication section.

49. The *ex parte* applicant has clearly not exhausted the laid down procedures in the aforementioned statute before filing the present Judicial Review Application hence, the jurisdiction of this Court had been invoked prematurely.

50. In the end, I find that in the absence of the consent as stipulated by Section 30(1) of the [*Land Adjudication Act*](#), and the *ex parte* applicant’s failure to exhaust all the dispute resolution avenues



provided in section 26 and 29 of the [land adjudication act](#), the respondents' preliminary objection has merit.

51. Accordingly, the *ex parte* Applicant's Judicial Review application for certiorari, mandamus and prohibition dated 22nd of February 2022 is struck out with costs to the Respondents.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF NOVEMBER, 2022.

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Ms Mumo for the Applicant.

