



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**JUDICIAL REVIEW APPLICATION NO. 8 OF 2019**

**IN THE MATTER OF AN APPLICATION BY BIYAA CLAN FOR JUDICIAL**

**REVIEW FOR AN ORDER OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF ORDER 53 RULE I OF THE CIVIL**

**PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF SECTION 5 AND 6 OF LAND ADJUDICATION**

**ACT CAP 284 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF DECISION OF SECTIONAL ADJUDICATION**

**COMMITTEE MARAKWET SUB-COUNTY DELIVERED ON THE**

**18<sup>TH</sup> SEPTEMBER 2019 WITH RESPECT TO THAT PARCEL OF**

**LAND KNOWN AS PARCEL NO. 3121**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND ADJUDICATION OFFICE**

**TUTURUNG ADJUDICATION**

**SECTION ELGEYO MARAKWET.....1<sup>ST</sup> RESPONDENT**

**ADJUDICATION COMMITTEE**

**TUTRUNG ADJUDICATION SECTION**

**SUB-COUNTY MARAKWET.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE BIYAA CLAN**

## RULING

### [RESPONDENTS PRELIMINARY OBJECTION DATED 2<sup>ND</sup> NOVEMBER 2020]

1. The Respondents filed a Notice of Preliminary Objection dated 2<sup>nd</sup> November, 2020 raising the following issues:
    - i. That the court lacks jurisdiction to hear and determine this suit as consent was never sought pursuant to section 30 of Land Adjudication Act.
    - ii. That the *ex parte* applicants are guilty of failure to exhaust all remedies available as provided by the Land Adjudication Act.
    - iii. That the court lacks jurisdiction as the suit lands fall within an ongoing adjudication process.
    - iv. That the suit is an abuse of the court process and as such should be dismissed with costs to the defendants.
  2. The court gave directions on filing and exchanging written submissions on the preliminary objections on the 16<sup>th</sup> November 2020.
    - (a) It was submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Court lacked jurisdiction to entertain the *Ex Parte* Applicant's application since the consent required under section 30 of the Land Adjudication Act was not obtained before moving the court. The Supreme Court decision in **SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR** was relied upon to support the argument that Courts can only exercise the jurisdiction conferred on them by the Constitution or by written law.
    - (b) The learned counsel for the respondents argued that it is only in proceedings where a party seeks to question the adjudication process or where a party seeks to question the legitimacy of the adjudication process that the consent provided in Section 30 of the Land Adjudication Act is not required as was held in **REPUBLIC V MUSANKA OLE RUNKES TARAKWA & 5 OTHERS EX-PARTE JOSEPH LESALOL LEKITIO & OTHERS [2015] eKLR**, where Munyao J, held;

*“A suit that questions the process of land adjudication, rather than the determination of interests would not be a suit concerning an interest in land, and would not require the consent of the land adjudication officer. Thus, where the adjudication officer does not for example appoint an adjudication committee, as provided by section 6 of the Land Adjudication Act, a person may be perfectly entitled to institute proceedings in the nature of mandamus to compel him to appoint the said committee. That would not be a determination of interests in land but would be a proceeding aimed at giving legitimacy to the adjudication process. In such an instance, the consent of the land adjudication officer would not be needed, for the proceeding would not be one concerning an interest in land”*
    - (c) The counsel further submitted that the subject matter of the Judicial Review application filed by the *Ex Parte* Applicant herein relates to an interest in land. The counsel cited the case of **REUBEN MWONGELA M'ITELEKWA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'ITELEKWA M'MUCHEKE NAITURI ALIAS M'ITELEKWA MUCHEKE) V PAUL KIGEA NABEA & 2 OTHERS [2019] eKLR**, in which Mbugua J, held that;

*“35. Thus, as long as a claimant desires that there be a determination regarding a right and interest in land, yes a consent would certainly be required even in filing of petitions, but in other disputes, the consent is not required.”*
- That a similar position was taken in the case of **MUSANA OLE PERE & ANOTHER V DISTRICT LAND ADJUDICATION SECTION AND SETTLEMENT OFFICER-NAROK SOUTH & 23 OTHERS; PARAMALAI PERE & ANOTHER (INTERESTED PARTY) [2019] eKLR**, where Kullow J, held that;
- “The petitioners have asked the court to disregard the provisions of section 30 as to what is before the court is a constitutional petition and not a civil suit as envisaged under section 30 of the Land Adjudication Act. I have read the petition and the affidavits filed by the petitioners and one thread that runs through them is that the petitioners are aggrieved by the process by which the entire Adjudication process is undertaken. Under the provisions of the Land Adjudication Act the objective of the court was to clearly provide the ascertainment and recording of rights and interest and a reading of this Act shows the legislature wanted the rights under the Act and the address of all complaints under the process to be free from other process and hence the enactment of section 29 and 30 of the Act which provided for resolution and as such I find that the petition before the court is one which the petitioners want to seek their rights and hence the same cannot escape the provisions of the Land Adjudication Act.”*
- (d) It was further submitted for the Respondents that the *Ex Parte* Applicant did not exhaust all the remedies available in section 26 and 29 of the Land Adjudication Act before coming to court, and that the applicant has not tendered any evidence to the contrary. That parties must exhaust the laid down dispute resolution mechanisms or avenues provided in the relevant laws before taking matters to Court. The following cases were relied upon in support of the aforementioned submission: **REUBEN MWONGELA M'ITELEKWA (SUPRA), SPEAKER OF THE NATIONAL ASSEMBLY V JAMES NJENGA KARUME [1992] eKLR**, **MERU ELC PETITION 21 OF 2012**, **STEPHEN MICHUKI KIUNGA VS. NKUNI M' RUCHIU AND 2 OTHERS** and **REPUBLIC V DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER KILIFI DISTRICT & 2 OTHERS EX PARTE KILIFI MUNGA ALFRED & ANOTHER [2013] eKLR**.
  - (e) The Respondents submitted that Court has no jurisdiction to deal with a dispute where the process of adjudication is ongoing unless the adjudication officer has given consent for the party to institute Court proceedings. The following cases were relied upon to

buttress the aforementioned submissions: **WILLIAM MUTUURA KAIRIBA V SAMUEL NKARI & 2 OTHERS [2018] eKLR**, **THOMAS KINYORI HUSSEIN & 3 OTHERS V MOKHA MGHANGA & 2 OTHERS [2018] eKLR**, **BENJAMIN OKWARO ESTIKA V CHRISTOPHER ANTONY OUKO & ANOTHER [2013] eKLR** and **KILUSU JULIUS SILE & 60 OTHERS V CHAIRPERSON, OLOIRIEN ADJUDICATION SECTION “B” COMMITTEE & 3 OTHERS [2016] eKLR**. The Respondents urged the Court to uphold their preliminary objection and to dismiss the Judicial Review motion.

3.(a) The learned counsel for the *Ex Parte* Applicant submitted that the jurisdiction of this Court flows from the Constitution, **{Article 162 (2)(b)}**, and Legislation, **{Section 13(2) of the Environment and Land Court Act No. 19 of 2011}**. The counsel cited the Supreme Court decision in **SAMUEL KAMAU MACHARIA & ANOTHER CASE (SUPRA)**, where it was held that;

*“A court jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law”.*

(b) It was further submitted that the land that is the subject of the Judicial Review application is no longer the subject of an adjudication process as the boundaries had already been set as **per Section 5 of the Land Adjudication Act**. That the adjudication process that was previously in place had come to its logical conclusion and therefore the provisions of **Section 30 of the Land Adjudication Act** are not applicable.

4. The issues for the determination of the court are first, whether the court has jurisdiction in this matter; secondly whether the application is an abuse of the court process and who pays the costs.

5. Then I have considered the grounds on the notice of preliminary objection filed by the respondents, written submissions by both learned counsel, the superior courts decisions cited therein, the pleadings filed and come to the following findings;

**[A]**. That it is apparent from prayers 1 and 2 of the Notice of Motion dated 22<sup>nd</sup> November 2019 and prayer 2 of the Chamber Summons for leave dated 14<sup>th</sup> November 2019, that commenced this judicial review proceedings that what the *Ex Parte* applicant seeks are orders of certiorari and prohibition in respect of the land known as 3121. That ground 7 in both the chamber summons and notice of motion, and paragraphs 15 and 16 of the verifying affidavit leaves no doubt that the applicant was aggrieved by the decision of the Adjudication officer to refer the matter to the Sectional Adjudication committee, and its determination thereof. That I take that to be an acknowledgement that the adjudication process in respect of the suit land was still ongoing. That in the case of **JOHN MASIANDET SAENI V DANIEL ARAMAT LOLUNGIRO & 3 OTHERS [2017] eKLR**, which cited with approval the decision in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, the court held as follows:

*“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was, or there was not, sufficient evidence to support the decision.”*

I agree with that position. The Respondents’ main contention in the preliminary objection raised herein is that the *Ex Parte* Applicant did not obtain the mandatory **Section 30(1)** 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. That **Section 30(1) of the Land Adjudication Act** 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”.*

That **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”.*

**[B]** The Court in **REPUBLIC V MUSANKA OLE RUNKES TARAKWA & 5 OTHERS EX-PARTE JOSEPH LESALOL LEKITIO & OTHERS [2015] eKLR** made the following observation as regards the requirement to obtain a consent before filing a claim in Court which is subject to an adjudication process:

*“In a situation regarding land under adjudication, there is an elaborate process that is laid down by the Land*

*Adjudication Act, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication. There would be no bar to instituting judicial review proceedings, to question the process being undertaken, and in my view, such proceedings, which go to question the process undertaken in the adjudication process would not require the consent of the Land Adjudication Officer. This is because such a dispute would not be a dispute "concerning an interest in land" which is what Section 30 (1) specifically bars. The term "interest", in relation to land under adjudication, as defined by Section 2 of the Land Adjudication Act, " ... includes absolute ownership of the land and any right or interest in or over the land which is capable of being registered under the Registered Land Act (Cap. 300) "*

*A suit that questions the process of land adjudication, rather than the determination of interests, would not be a suit concerning an interest in land, and would therefore not require the consent of the Land Adjudication Officer. Thus, where the Adjudication Officer, does not, for example, appoint an Adjudication Committee, as provided by Section 6 of the Land Adjudication Act, a person may be perfectly entitled to institute proceedings in the nature of mandamus, to compel him to appoint the said Committee. That would not be a determination of interests in land, but would be a proceeding aimed at giving legitimacy to the adjudication process. In such an instance, the consent of the Land Adjudication Officer would not be needed, for the proceeding would not be one "concerning an interest in land." But if a litigant wants to sue the Adjudication Officer, because the officer has decided that he is not entitled to the land in question, then in such a case, the litigant, must exhaust the appeal process provided in the Land Adjudication Act, or if he feels that the issue needs to be decided by the court, then he must seek the consent of the Land Adjudication Officer, for the litigation in this instance, would clearly be litigation "concerning an interest in land."*

[C] The *Ex Parte* Applicant has filed a Judicial Review Application seeking an order of certiorari to quash the decision of the 2<sup>nd</sup> Respondent delivered on 18<sup>th</sup> September, 2019 and an order of prohibition prohibiting the 1<sup>st</sup> Respondent from carrying out subdivision and registration of the new parcel numbers as per the aforementioned decision. That from the manner in which the aforementioned orders have been drafted, 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 to file the suit from the Land Adjudication officer as required under **Section 30 of the Act**. That it also means the land is not registered as the adjudication process in respect of that parcel is still ongoing.

[D] That it is also apparent that the *Ex Parte* Applicant did not exhaust all the dispute resolution avenues set out in **Section 26 and 29 of the Land Adjudication Act** before coming to Court. **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”.*

While **Section 29 of the Land Adjudication Act** provides as follows:

*“(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 order shall be final”.*

The Court of Appeal in **GEOFFREY MUTHINJA KABIRU & 2 OTHERS VS. SAMUEL MUNGA HENRY & 1756 OTHERS [2015] eKLR** held that;

*“It is imperative that where a dispute resolution mechanism exists outside courts, the same has to 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”.*

And in **REUBEN MWONGELA M’ITELEKWA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M’ITELEKWA M’MUCHEKE NAITURI ALIAS M’ITELEKWA MUCHEKE) V PAUL KIGEA NABEA & 2 OTHERS [2019] eKLR**, the Court cited with approval the Court of Appeal decision in **MUTANGA TEA & COFFEE COMPANY LTD V SHIKARA LIMITED & ANOTHER [2015] eKLR**, where the Court made the following remarks:

*“We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the constitution or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that **Article 159 (2) (c) of the Constitution** has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that **Article 159 (2) (c)** is not a closed catalogue. To the extent that the constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the constitution*

*would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms”.*

[E] That having considered the foregoing, I find that the *Ex Parte* Applicant ought to have exhausted the dispute resolution avenues available in the **Land Adjudication Act** before coming to Court. I find that the *Ex Parte* Applicant’s approached this Court prematurely. That this application is an abuse of the court process and the court is not clothed with the requisite jurisdiction to hear and determine the instant claim.

6. That 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. I hereby order that the *Ex Parte* Applicant’s Judicial Review Application by way of Notice of Motion dated the 22<sup>nd</sup> November 2019 for certiorari and prohibition orders be and is hereby struck out with costs to the Respondents.

Orders accordingly.

**DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 19<sup>TH</sup> DAY OF MAY, 2021.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Applicant: Absent.

Respondents: Absent.

Counsel: Mr. Odongo for Respondents.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.