Dofu & 3 others v Ngome & 7 others (Constitutional Petition E021 of 2024) [2025] KEELC 3896 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3896 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION E021 OF 2024

EK MAKORI, J

MAY 15, 2025

IN THE MATTER OF MIYUNI/MLEJI "B" ADJUDICATION SECTION

AND

IN THE MATTER OF THE MWAMUMBA FAMILY

AND

IN THE MATTER OF ARTICLE 20(2), 21, 22, 23, 24, 25(C), 27, 40, 47, 48, 60 (1)(B), 63(2)(A)

AND

IN THE MATTER OF APPEAL TO THE MINISTER, APPEAL NOS. 581 AND 583 ALL OF 2022

AND

IN THE MATTER OF PARCELS NOS. 162 AND 169 MIYUNI /MULEJI "B" ADJUDICATION SECTION

BETWEEN

DOFU MUMBA DOFU ..... 1ST PETITIONER

ABDALLAH MKOBA GWASHE ..... 2ND PETITIONER

HASSAN KESI MUMBA ..... 3RD PETITIONER

SAFU MAJALIWA GWASHE ..... 4TH PETITIONER

AND

DAVID MBAJI NGOME ..... 1ST RESPONDENT

SANTA KADOSHO KATANA ..... 2ND RESPONDENT

SHIDA KADOSHO KATANA ..... 3RD RESPONDENT

KHAMISI TUMU ..... 4TH RESPONDENT

DONNEX M KATANA ..... 5TH RESPONDENT

CHAIRMAN MIYUNI/MULEJI "B" ADJUDICATION COMMITTEE .... 6TH RESPONDENT

DIRECTOR OF LAND AND ADJUDICATION ..... 7TH RESPONDENT

LAND REGISTRAR KILIFI COUNTY ..... 8TH RESPONDENT

RULING

1. The applicants submitted a Notice of Motion dated 10 December 2024, seeking, among other things, to:

    a. Expended

    b. A temporary conservatory order be issued to restrain the Respondents, by themselves, their agents, or any individuals claiming interest through them, from alienating, registering, issuing title, and/or implementing the decision regarding the Minister's appeal in Appeal Numbers 581 and 583 of 2022, about land parcels known as MIYUNI/MLEJI "B"/196 and 162, respectively, pending the hearing and determination of this application inter partes.

    c. upon the inter partes hearing, a conservatory order be issued to restrain the Respondents, by themselves, their agents, or any individuals claiming interest through them, from alienating, registering, issuing title, and/or implementing the decision regarding the Minister's appeal in Appeal Numbers 581 and 583 of 2022, about land parcels known as MIYUNI/MLEJI "B"/196 and 162, respectively, pending the hearing and determination of this Petition.

    d. The costs associated with this application be provided for.

2. The 1st respondent, in contrast, submitted a notice of preliminary objection dated 4 February 2025, accompanied by a comprehensive replying affidavit sworn on the same date, vehemently contesting the applicants' Notice of Motion application. The preliminary objection is based on the following grounds:

    a. Pursuant to Section 29 of the Land Adjudication, Cap 284, Laws of Kenya, the decision of the appeal to the Ministerial Panel is final.

    b. The Ministerial Panel has determined this matter; to quash the decision, it may only be brought before this court through Judicial Review.

    c. The suit herein has been misrepresented as a constitutional petition, while the issues raised fall within the parameters of an ordinary suit.

    d. The petitioners fail to disclose any reasonable cause of action.

3. The court instructed the parties to canvass the issues presented in the preliminary objection and the application for temporary conservatory orders through written submissions. The 1st respondents complied accordingly, while the petitioners restricted their submissions solely to the pending application for conservatory orders.

4. Based on the materials presented and the parties' submissions, I identify the key issues for this court's determination: the merit of the preliminary objection, which could potentially dismiss the entire

petition due to lack of jurisdiction. I also consider whether temporary conservatory orders should be issued pending the petition's determination, and who should bear the costs.

5. Recognizing the potential of a preliminary objection to resolve the entire suit and for the sake of maintaining order, I will begin this ruling by addressing the preliminary objection first.

6. The principles upon which this court is invited to determine the merit of a notice of PO were set out in the oft-cited case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696. This case established the criteria for a PO, which include raising a pure point of law, demonstrating the correctness of all the facts pleaded by the other side, and the absence of any fact that needs to be ascertained. The court will consistently adhere to these principles in its ruling.

7. The Court of Appeal in Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR) reiterated the same position on what would constitute a PO and held as follows:

> " The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained."

8. The thrust of a PO in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A. in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR:

> " 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

9. A PO rests on the proposition that when raised, its fundamental achievement will influence the disposition of a matter because it raises pure points of law. It also underscores the need for prudent time management as a court resource by summarily flagging weak and hopeless cases that, if allowed to proceed to full trial, would waste judicial time and not serve the interests of justice. This highlights the importance of judicial efficiency in our proceedings.

10. The petitioners assert that, in the petition, they intend to challenge the Minister's decision in accordance with the powers conferred on the Minister under the *Land Adjudication Act* in the manner in which the appeal process was heard. Notably, they argue that all objections raised were duly heard and resolved in favor of the Petitioners. Consequently, the case ultimately progressed to the final appeal stage to the Minister, initiated by the 1st Respondent regarding land parcels identified as numbers 162 and 169, corresponding to appeal case numbers 581 of 2022 and 583 of 2022.

11. The petitioners express concerns about constitutional rights allegedly violated during the appeal process, stating their rights were egregiously infringed upon under questionable circumstances. The 1st Respondent had two and a half hours for his appeal, considered sufficient for all arguments, while the Petitioners received only five (5) minutes to respond. This discrepancy significantly compromised their rights to a fair hearing under Article 25(c). Allocating five minutes for a submission of two and a half hours does not equate to fairness as stipulated in Article 25(c). Additionally, the five minutes were accompanied by threats of arrest, endangering the petitioners' rights under Article 27(1), which

guarantees equal protection under the law. The minister's decision to dispossess the petitioners of their land seriously infringed their fundamental rights under Article 40(1) in conjunction with Article 65, which states every person has the right to acquire and own property. Despite having lived on and cultivated their properties and interring relatives on plots 162 and 169, the petitioners are now landless. Their rights under Article 47(1) were violated during the ministerial trial, which lacked procedural fairness. Article 47(1) guarantees the right to expeditious, lawful, and fair administrative action. Furthermore, the petitioners' rights under Article 48 were significantly transgressed during the ministerial trial, which should ensure access to justice without unreasonable fees.

12. The petitioners argue that ministerial proceedings obstructed justice and resulted in unfair treatment. Their rights under Article 60(1)(b) were also infringed, stripping them of land rights. Article 60(1)(b) emphasizes that land must be held equitably and sustainably. Moreover, their rights under Article 63 have also been eroded, leaving the Mwamumba clan homeless, despite being recognized as occupants of plots 162 and 169. Article 63 states that community land vests in communities based on ethnicity or shared interests.

13. Conversely, the 1st respondent asserts that the matter in question arises from an Appeal to the Minister case No. 581 of 2022 about parcel 162 and case No. 583 of 2022 concerning parcel number 169, respectively, which the 1st respondent had initiated against the 1st petitioner. In this regard, the 2nd, 3rd, and 4th petitioners/applicants are unrelated parties; they have not been involved in the matter at hand, and thus, there is no connection between them and the issue in question. The 2nd, 3rd, 4th, and 5th respondents have never disputed with the 1st petitioner and/or the 1st respondent, noting that this is an appeal, not a new suit. The inclusion of these parties in this petition appears to be solely intended to obfuscate the proceedings of this court.

14. The appeals to the Minister were concluded by the appeal to the Minister's panel, which rendered a decision in the 1st respondent's favor. According to Section 29 of the Land Adjudication Cap 284 Laws of Kenya, the decision of the Appeal to the Minister panel is final. The petition seeks to contest the legality and fairness of the process leading to the final decision.

15. While I concur with the Petitioners that there constitutional rights could have been infringed during the appeal before the Minister and that that the court's authority to review administrative actions is now derived from the *Fair Administrative Action Act*, as interpreted in conjunction with Article 47 of the *Constitution*, the Petitioners have improperly invoked this court's jurisdiction by submitting this Petition instead of pursuing a Judicial Review action, as will be illustrated below, by legal provisions and judicial precedents.

16. In Speaker of National Assembly v Karume(1992)KLR 21 the court held:

> "Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

17. The procedure to question the decisions of quasi-judicial bodies under the *Land Adjudication Act*, Cap 284, is outlined in the Act. Significantly, and relevant to the issue raised in the PO, Section 29 of the Act states 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.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) 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.

(4) Notwithstanding the provisions of section 38(2) of the *Interpretation and General Provisions Act* (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister. "

18. Section 30 of the *Land Adjudication Act* provides as follows:

" Staying of land suits

(1) 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.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.

(4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land

the order or decision is not the subject of an appeal and the time for appeal has expired.

(5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown."

19. Sections 29 and 30 of the Act have been interpreted through judicial decisions, as exemplified in the case of Robert Kulinga Nyamu v Musembi Mutunga & another [2022] eKLR, with which I agree; the court determined:

> "The Appellant submitted that there is no provision that limits the Appellant right after exhausting the adjudication mechanisms from filing a suit before the Magistrate's Court for determination. However, it is the Courts view that the above provision of Section 29 of the *Land Adjudication Act* that the Ministers decision is final is couched in mandatory terms. If the legislature meant to give the right to a party to re-litigate a dispute which had been heard through the entire dispute resolution process provided under the *Land Adjudication Act*, nothing would have been easier than to state so clearly."

20. Regarding the conclusiveness of the Minister's decision, the court additionally pronounced:

> "In addition to this, Section 29 (3) of the *Land Adjudication Act* provides that after the decision in the appeal to the Minister is made, the register will become final in all respects. This means that one cannot re-open an adjudication process that has been completed."

21. The entities established by the *Land Adjudication Act*, Cap 284, to determine rights and interests in land within an Adjudication Section hold quasi-judicial authority; the court may only contest the decisions of these bodies under its supervisory jurisdiction, specifically through Judicial Review Proceedings. In this case, the Petitioners have bypassed the proper channels by submitting the current Petition to challenge the Minister's decision – an appeal through the back door.

22. This position is substantiated by precedents set forth by this court and the Superior Courts, illustrating that the appropriate legal procedure for addressing grievances arising from the adjudication process is through Judicial Review. For instance, in Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 others (Civil Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment), the Court of Appeal determined:

> "The prayers sought, among others, included the prayer for the setting aside of the Ministerial decision. Even though the Appellant denies that the suit was an appeal, we are convinced that it was one for all practical purposes.
>
> 20. In regards to whether the ELC had the requisite jurisdiction to entertain the suit, there is no dispute that the suit was challenging the decision of the

Minister made pursuant to Section 29 of the Act. That Section, under Section 29(1) (b) provides:

> " (b) and the Minister shall determine the appeal and make such order thereon as he thinks just, and the order shall be final."

21. In addition to declaring that the decision of the Minister is final, Section 30 of the Act all together ousts the jurisdiction of the Courts, providing as follows:

> " 30. Staying of land suits
>
> (1) 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."

22. The Act is clear that any person aggrieved by a decision made under Section 26 of the Act must follow the process under Section 29 and appeal to the Minister. Once the Minister, or the panel delegated to, makes a determination, his order is final. That means the Minister's decision cannot be appealed, whether under the Act or in Court. The option the Appellant had was to pursue the Judicial Review process provided under Article 47 of the *Constitution*, and the *Fair Administrative Action Act*, 2015, a statute enacted pursuant to Article 47 of the *Constitution*. He could not re-open the case and challenge it except through Judicial Review. The Appellant was attempting to undo the process he participated in using a process that is not provided for, and that is not allowed.

23. In Julia Kaburia vs. Kabeera & 5 Others [2007] eKLR, this Court commenting on Section 30 of the Act, held:

> " The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather, the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication. This protection

was availed to the parties herein by the appellate process, which culminates with Section 29 of the Act.

> "(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."

24. The ELC commenting on the role of the Court vis-a-vis that of the adjudicating bodies under the Act in the persuasive authority of Tobias Achola Osindi & 13 Others vs. Cyprian Otieno Ogalo & 6 Others [2013] eKLR by Okongo J., as follows:

> " The whole process leading up to the registration 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 interests 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. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court 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..."

> 25. Having carefully considered this appeal, we find no fault with the finding and holding of the ELC Judge that it had no jurisdiction to entertain the Appellant's suit. The process of land adjudication had effectively come to its logical conclusion and could not be re-opened otherwise than in the manner contemplated by the law. In the circumstances, the ELC properly struck out the Appellant's suit. The Appellant did not have any separate cause of action against the 1st Respondent other than the matters which were adjudicated upon and determined by the Ministerial Appeals Committee during the appeal to the decision of the objection proceedings. That decision was final."

23. The same position was reaffirmed in the matter of John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others [2017] eKLR, wherein the court, upon dismissing a petition, articulated the following:

> " In the matter before court, the Petitioner did not move the court by way of Judicial Review but rather opted to file a petition albeit after the lapse of 13 years from the decision of the Minister was given. In my view, the Petition is tantamount to seeking to appeal the decision of the Minister through the back door..... The Kenyan Constitution cannot be invoked to resurrect matter that had been duly resolved through due process such as the matter the Petitioner wishes to revive through the Instant Petition."

24. Consequently, the Petition submitted to this court against the Respondents is incompetent and is therefore struck out in its entirety with costs based solely on the aforementioned ground.

25. Since I have downed judicial tools, discussing the application dated December 10, 2024, will be an academic exercise.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 15TH DAY OF MAY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Otara for the Petitioners

Ms. Garama for the 1st Respondent

Happy: Court Assistant