



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC NO. 30 OF 2019**

**STRINGER MUZUNGU LUMWE**

**TSUMA TUJI TSUMA.....PLAINTIFFS**

**VERSUS**

**SHIDA TUJI TSUMA**

**KARISA TUJI TSUMA**

**KAHINDI TUJI TSUMA.....DEFENDANTS**

**RULING**

This ruling is in respect of a notice of preliminary objection dated 24<sup>th</sup> February 2021, by the defendant/applicants on the grounds that:

***a) The Plaintiffs did not exhaust all the remedies as set out in Section 13, 14 and 26 of the Land Consolidation Act CAP 283 and Section 26 and 29 of the and Adjudication Act, CAP 284 of the laws of Kenya.***

***b) This Honourable Court lacks jurisdiction to hear and determine this suit by dint of the provisions of Section 8(1) of the Land Consolidation Act, CAP 283 laws of Kenya***

Counsel agreed to canvas the preliminary objection by way of written submissions which were duly filed.

**DEFENDANT/APPLICANTS' SUBMISSIONS**

Counsel filed submissions and gave a brief background to the suit where he submitted that the plaintiffs filed a plaint dated 16<sup>th</sup> May 2019 seeking for judgment be entered that the defendants hold the parcel of land Title Number Mwapula/Magogoni/690 measuring approximately 68.22 acres in trust for the Plaintiffs and an order inhibiting the registration of any dealings on the suit property without the prior written consent of the Plaintiffs.

Further that the suit property was originally owned by the late Lumwe Tuji Tsuma and Tsuma Tuji Tsuma. That during the land adjudication exercise, the defendants caused the suit property to be registered in their names at the exclusion of the Plaintiffs and other family members. That the defendants ought to have registered the suit property in trust for the plaintiffs and other family members subject to the overriding interest of a customary trust.

Counsel submitted that the suit property is situate within a land adjudication area and as such the provisions of the Land Adjudication Act should prevail as opposed to the Land Registration Act, 2012.

It was counsel's submission that the Plaintiffs have put much reliance on the provisions of Section 26 of the Land Registration Act, 2012 but where there is a specific law and general law, the provisions of the general laws become subsidiary to the provisions of the specific law.

Similarly, counsel submitted that the suit property in contention is situate within a Land Adjudication area and as such the provisions of the ADJUDICATION ACT, CAP 284 and LAND CONSOLIDATION ACT, CAP 283 (by dint of the fact that the Plaintiffs are purportedly claiming Customary rights) takes precedence over all other laws including the provisions of LAND REGISTRATION ACT, 2012 as is being advanced by the Plaintiffs. That the plaintiffs' claim on customary rights should be anchored on the Land Consolidation Act as the two statutes provide specific law on the issues raised in the plaint.

Counsel also submitted that the Plaintiffs ought to have sought the Consent of Land Adjudication Officer where the suit land is situate as per the provisions of Section 8(1) of the Land Consolidation Act, Cap 283 which states that:

**" ... Subject to the provisions of this section, no person shall institute and no Court whatever shall take cognizance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given ..."**

i. Failure to exhaust all the remedies as provided by both the Land Consolidation Act, Cap 283 and Land Adjudication Act, Cap 284

Counsel submitted that the plaintiff had objected to the Defendants names appearing on the Certificate of Title and excluding their names which matter was determined by the Acting Assistant Chief of Mwapula Sub location. That the Plaintiffs never appealed this decision to the Cabinet Secretary of Lands within 60 days as envisaged by the provisions of the LAND ADJUDICATION ACT, CAP 284 which states expressly that any person who is dissatisfied with an objection under Section 26 may within 60 days after the determination, appeal against the determination to the Minister by sending grounds of appeal and a copy of the appeal to the director of Land Adjudication which decision shall be final.

Mr. Mutungi submitted that this Court lacks the requisite jurisdiction to hear and determine this matter by dint of the said Section as it 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 order shall be final.**

Counsel relied on the case of **William Mutuura Kairibia Versus Samuel Nkari & 2 Others (2018) eKLR** where P. M. Njoroge J. held inter alia that:

**".. .at the outset, I find that the Preliminary Objection raises important pure points of Law. The first ground concerns filing of suits without the consent of the District Adjudication Officers as required by Law the second ground concerns the non - exhaustion of Legal stipulations ... Section 30 (1) of the Land Adjudication Act states 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 ...**

**.. ..the Plaintiff has not controverted in any way that the disputed Land is within an adjudication section. It is also not controverted that the Plaintiff did not exhaust the procedures Laid down in the relevant Law ... in the circumstances, I uphold the Preliminary Objection filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants ... therefore, this Suit is dismissed ... "**

Counsel therefore urged the court to find that the preliminary objection has merit and allow it as prayed.

## **PLAINTIFFS'SUBMISSIONS**

Counsel opposed the preliminary objection and submitted that the Land Consolidation Act did not apply to the suit property at the time of the adjudication exercise as the Preamble to the Land Consolidation Act Chapter 283 of the Laws of Kenya provides as follows;

**'An Act of Parliament to provide for the ascertainment of the rights and interests in and for the consolidation of, land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special arrears, and for purposes connected therewith and incidental thereto.'**

Mr. Shujaa submitted that statute only applied to land in the special areas and as such to establish whether the suit property was within the special areas referred to in the Land Consolidation Act, evidence has to be adduced hence the objection does not meet the threshold required as per the **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] EA 696**.

Counsel further stated that from the pleadings of the parties it is manifest that the ascertainment of the rights and interests over the suit property were undertaken under the provisions of the Land Adjudication Act and not under the Land Consolidation Act as such the Defendants submissions that the Plaintiffs did not exhaust all remedies set out in Sections 13, 14 and 26 of the said Act is therefore without basis and is misconceived.

Mr. Shujaa also argued that the plaintiff's claim is that there was an omission during the registration of the title and not during the adjudication exercise hence the plaintiffs could not appeal the outcome as envisaged under section 26 of the Land Adjudication Act. Further

that the claim was not on the adjudication register but the registration at the lands registry which was effected under the Registered Land Act, Cap 300 and urged the court to dismiss the preliminary objection, with costs.

## ANALYSIS AND DETERMINATION

The issues for determination are whether the grounds in the preliminary objection are pure points of law, whether the suit property is under an adjudication section, whether the consent of the Land Adjudication Officer was required prior to filing this suit and whether this court has jurisdiction to hear and determine this suit.

Preliminary objections should be on pure points of law which can be raised at any time before the hearing of the suit. The ingredients of preliminary objections are as were stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, where it was held that:

***“a Preliminary Objection consists of a point of law which has 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... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure 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.”***

When a preliminary objection is raised on the jurisdiction of a court to hear and determine a matter, then the same must be heard and determined first as it might have the effect of determining the same by striking out leaving no suit to be heard. The issue of jurisdiction is a pure point of law and if successfully raised it has the potential of disposing of the suit at a preliminary stage.

On the issue whether the suit land is under an adjudication section, from the plaint it is on record that the process of adjudication was completed and titles issued to the defendants as per the official search dated 3<sup>rd</sup> April 2019.

The plaintiffs are seeking for orders that the defendants hold the title in trust for them and not a claim against the Land Adjudication Officer. The plaintiffs further claim for an order of inhibition inhibiting the registration of any dealings in the suit land. I find that the process of adjudication was completed and titles issued hence it does not fall under an adjudication section.

Having found that the adjudication process was complete, I also hold that the consent of the Land Adjudication Officer was not required before filing of this suit.

Section 8 (1) Land Consolidation Act provides as follows:

### *8. Staying of land suits*

***(1) Subject to the provisions of this section, no person shall institute and no court whatever shall take cognizance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given.***

The above section together with section 30(1) of the Land Adjudication Act which requires that a consent of the Land Adjudication Officer must be first sought and obtained before filing a suit do not apply to this suit and it was not a requirement in this case. Section 30 (1) provides that :

### *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.***

The adjudication register was finalized and titles issued hence section 30 (1) does not apply to this case.

On the issue whether this court has jurisdiction to hear and determine this matter, I have alluded to the prayers that the plaintiffs are seeking for and there is no other alternative dispute mechanism which has been put in place for the resolution of this dispute unless the parties agree to mediation. The processes under the Land Adjudication Act have since been overtaken by the fact that the process was finalized and titles issued.

The court is cognizant of the fact that where there is prescribed procedures for redress by an Act of Parliament of the Constitution then such procedures must be exhausted first. As was held in the case of **Samson Chembe Vuko v Nelson Kilumo & 2 Others [2016] e KLR**, where the Court of Appeal cited with approval the decision in **Speaker of the National Assembly vs Karume[2008] 1 KLR 425** where **the Court of Appeal held inter alia:**

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

Similarly in the **International Centre of Policy and Conflict & 5 Others vs The Attorney General & 4 Others**[201 3] e KLR as was cited in the case of **Diana Kethi Kilonzo & Another v IEBC & 10 Others** [2013] e KLR it was stated:

**“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state of organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. ...Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted....”**

I find that the issue of exhaustion of dispute mechanisms does not apply in this case because the adjudication was finalized with titles being issued

Section 13 (1) and (2) of the Environment and Land Court Act confers upon this court jurisdiction to adjudicate all disputes relating to land. It provides thus:

**13. Jurisdiction of the Court**

**1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-**

**a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**b) relating to land administration and management;**

**c) relating to land administration and management;**

**d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**e) any other dispute relating to environment and land**

I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiffs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021.**

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**M.A. ODENY**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.