



**Lorunyei & another v Attorney General & others (Constitutional Petition E105 of 2021)
[2023] KEHC 1611 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E105 OF 2021**

AC MRIMA, J

MARCH 10, 2023

BETWEEN

HON. LAWRENCE LORUNYEI & ANOTHER PETITIONER

AND

HON. ATTORNEY GENERAL & OTHERS RESPONDENT

RULING

1. This ruling relates to the Notice of Preliminary Objection dated November 1, 2021 filed by the National Land Commission, the 2nd Respondent herein.
2. The objection challenges the jurisdiction of this Court on the basis of Section 30 of *Land Adjudication Act*, Cap 284 of the Laws of Kenya. In essence, the 2nd Respondent contended that since the adjudication process was still on-going in respect of the parcels of land in issue in this Petition, then this Court ought to decline jurisdiction accordingly.
3. On this Court's directions, the objection was heard by way of oral submissions. The parties were duly represented by Counsel.
4. The objection was supported by the rest of the Respondents (save the 1st Respondent who did not take part in the objection hearing). It was also opposed by the Petitioners.
5. Having carefully considered the objection and the submissions on record, two issues arise for consideration. They are: -
 - i. Whether the Preliminary Objection is proper in law.
 - ii. Depending on (i) above, the merits of the Preliminary Objection
6. I will deal with the issues in seriatim.



i. Whether the Preliminary Objection is proper in law:

7. The validity of any preliminary objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

8. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd - vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 when the Court observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

9. In Civil Suit No 85 of 1992, *Oraro vs Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors (supra)* and stated as follows on the operation of preliminary objection: -

... 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 processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears 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.

10. In *Omondi vs National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

11. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, when



the Learned Judges stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.

12. The Apex Court had earlier on in Constitutional Application No 2 of 2011, In the *Matter of Interim Independent Electoral Commission* (2011) eKLR observed as follows in regard to jurisdiction and its source: -

... Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent

13. Deriving from the above discussion, there is no doubt that Section 30 of the Land Adjudication Act, Cap 284 of the Laws of Kenya, is capable of disposing the entire Petition if the Respondents’ arguments are upheld. The objection is well mounted on a pure point of law as it does not call for the interrogation of the facts. It is a proper objection in law.
14. It is, therefore, this Court’s finding that the Objection passes the propriety test and is for consideration.

ii. Whether the Preliminary Objection is merited:

15. This Court has previously rendered itself on the constitutionality of Section 30 of the Land Adjudication Act and the applicability of the said provision in respect to Petitions contending infringement of the Bill of Rights in the Constitution. That was in the High Court of Kenya at Nairobi Petition No E232 of 2022 Patrick Peniki Ole Twala vs The Hon Attorney General & Others. The judgment was rendered on December 16, 2022.

16. In the said matter, this Court made the following findings: -

- a. A declaration do hereby issue that Section 30 of the Land Adjudication Act, Cap 284 of the Laws of Kenya is constitutional.
- b. A declaration do hereby issue that the limitation to instituting civil proceedings imposed under Section 30 of the Land Adjudication Act is not applicable where an aggrieved person pleads violation of the Bill of Rights under the Constitution.

17. A look at the instant Petition reveal that the Petitioners are variously challenging the actions of the Respondents contending that such infringed and continue to infringe upon their rights and fundamental freedoms as guaranteed in the Bill of Rights enshrined in the Constitution.

18. The second finding in the *Patrick Peniki Ole Twala vs. The Hon. Attorney General & Others* case (*supra*), therefore, settles the objection in this matter. Given the nature of the Petition before Court and the prayers sought, Section 30 of the Land Adjudication Act does not, hence, apply.

19. The upshot is that the objection suffers a false start.

20. Consequently, the following final orders do hereby issue: -

- a. The Notice of Preliminary Objection dated November 1, 2021 is unsuccessful and is hereby dismissed.
- b. Costs shall be in the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 10TH DAY OF MARCH, 2023.

A. C. MRIMA



JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Kosgey, Counsel for the Petitioners.

Miss Khaosa, Counsel for the 2nd Respondent.

Mr. Ouma, Counsel for the 3rd Respondent.

Miss. Mujomba, Counsel for the 4th Respondent

