



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ELC PETITION NO.7 OF 2021

IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 10, 40, 43 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LAND ADJUDICATION ACT CHAPTER 284 LAWS OF

KENYA, THE LAND REGISTRATION ACT NO 3 OF 2012, AND THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF ENFORCEMENT OF THE FINDINGS OF THE COURT BY

THE KITUI LAND AND ADJUDICATION OFFICE THE MINISTERS APPEAL UNDER

SECTION 29 OF THE LAND ADJUDICATION ACT AND ARTICLE 159 OF THE CONSTITUTION

BETWEEN

DANIEL MUSILI NYEKI & 49 OTHERS.....PETITIONERS

-VERSUS-

CABINET SECRETARY OF LANDS & SETTLEMEN.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

BERNARD MALONZA MUSYA & 30 OTHERS.....INTERESTED PARTIES

JUDGEMENT

1. The Plaintiff herein filed a Petition dated 5th March 2015 seeking:

- a) A declaration that a Land Adjudication Officer has no power in law to review, alter and/or set aside a finding of any court of Law.
- b) A declaration that the finding and the judgment in the Residents Magistrate's Court at Kitui, Civil Case No. L11 of 1986(DO); DANIEL M. NYEKI & 3 OTHERS -VS- MASULUU KATOTO & 3 OTHERS as upheld by the High Court at Nairobi Judicial Review Application No.701 of 1987, 340 of 1992 and 844 of 1992 is binding on the Kitui Land Adjudication and Settlement Officer and the same remains in force unless set aside and/or reviewed by a Court of competent jurisdiction.
- c) A Declaration that the Petitioners are entitled to be registered as the legitimate and beneficial owners of their ancestral land herein as originally demarcated to them as Land Reference No.1414 and 1233.

d) A Permanent Injunction be issued restraining the 1st and 2nd Respondent by themselves, agents, servants employees or otherwise howsoever from effecting registration and/or issuing Title Deeds in respect to the Land herein to the Interested Parties and/or any other person other than the Petitioners.

e) An Order of Injunction be issued compelling the Respondents to register the Petitioners as the beneficial and legitimate owners of the subject ancestral land originally demarcated to them as Land Reference No.1414 and 1233.

f) In the alternative and without prejudice to the foregoing, the respondents be ordered to justly and adequately compensate the Petitioner's Clan for their ancestral land originally demarcated to them as Land Reference No.1414 and 1233.

g) Costs.

h) Any other reliefs that the Honourable Court may deem fit an expedite to grant.

2. The Petition was supported by the affidavit of Daniel Musili Nyeki sworn on 5th March 2015. The Respondents did not file any reply to the Petition while the Interested Parties filed Grounds of Opposition, a Replying Affidavit sworn by **Joseph Kilonzi Kaula**, one of the Interested Parties and written submissions. The Interested Parties' Grounds of Opposition stated that:

A) The Petition herein is unmeritorious as the Petitioners' rights were waived and the adjudication process cannot be reopened through this constitutional petition.

B) An adjudication register once declared complete, cannot be reopened.

C) That court rulings and judgments are matters of evidence during land adjudication process.

D) The petition is otherwise misconceived and only a waste of the court's time.

3. On 12th March 2019 the Court gave directions that the Petition would be heard by way of written submissions and the parties were directed on timelines for filing submissions. The Petitioners and the Respondents did not file their submissions.

The Petitioners' case

4. The Petitioners claim to be members of the Indu Family of the Mbaa Mbua Clan while the Respondents are said to be members, representatives and/or successors of the Katoto family of the Mbaa Ndewa clan. The land in dispute is located in Musukini Sub-Location, Mutitu Location of Mutitu Division Kitui District. Sometime between 1979 and 1981, the government of Kenya diverted the road from Mutito Town towards Mui Location and a new road was designed which passed through portions of the Petitioner's ancestral land as well as the Interested Parties' ancestral land. The Petitioners claim that each family was compensated for the land acquired.

5. The Petitioners claim that the Interested Parties irregularly shifted from their ancestral land at Kaliani Village and trespassed onto and forcefully occupied the Petitioners' land and even irregularly sold portions thereof to third parties. Some members of the Petitioners clan subsequently filed on behalf of the clan Land Case No.52 of 1981 at the Kitui Magistrates Court against some of the Interested Parties as member of their Clan. The Court referred the suit to a Panel of Elders under the then Magistrates Jurisdiction (Amendment) Act no. 14 of 1981 chaired by the District Officer of the Area.

6. The Panel of Elders set and determined the boundaries of the disputed land upon finding that the said land was a small piece of land given as compensation by Mbaa -Mbua clan when a member of Mbaa-Ndewa clan was burnt there. This award of the Panel of Elders was adopted as a judgment of the Court as the Resident Magistrate's Court at Kitui Civil Case L. 11 of 1986 (DO): Daniel M. Nyeki & 3 others vs Masuluu Katoto & 3 others.

7. The Interested Parties challenged the judgement through the High Court at Nairobi Judicial Review Application No.701 of 1987, Nairobi High Court Misc. Application No.340 of 1992 which applications were dismissed.

8. The Petitioners moved to the Kitui Law Courts and obtained eviction orders dated 17th September 1993 and 28th October 1994 which they state were not enforced due to collusion of the Interested Parties with the area administration and Police.

9. By a notice of establishment of an adjudication section issued by the District Land Adjudication and Settlement Officer-Kitui dated 6th August 1996, Musukini Adjudication section, - Mutito location, Mutitu division, Kitui District was declared an Adjudication Section pursuant to the provisions of the Land Adjudication Act CAP 284. The suit land was part of the land in the said adjudication section.

10. The Adjudication Officers issued the suit land with Reference No. 1414 and 1233 wherein the names of the 1st Petitioner appeared together with four other Petitioners to hold in trust for members of the Indu Family of the Mbaa Mbua Clan. The Petitioners exhibited a letter dated 22nd June 1999 from the District Land and Adjudication Officer Kitui confirming that the land parcel number 1233 was demarcated on 4th November 1998 and recorded in the names of the four.

11. The Petitioners claim that the Interested Parties did not challenge the registration and demarcation of the land as they did not file any appeal, review or objection with the adjudication Committee or with any relevant body. They claim that the adjudication process went on and was concluded in the year 2000 after which they were advised to wait for title deeds.

12. The Petitioners state that on 24th October 2006 or thereabouts, they were summoned to the Chief's camp for a meeting with the Land Adjudication and Settlement Officer known as Mr.Mureithi. That the said officer claimed that he intended to hear and determine the long-standing dispute concerning the suit land once and for all. The said Mr.Mureithi proceeded to hear the dispute and on 4th November 2006 he delivered an unsigned and undated ruling wherein he faulted the various court decisions that had led to the land being adjudicated in favour of the Petitioners stating that the decisions were biased against the Interested parties. He finally directed that the land in dispute be registered in the name of the Interested Parties.

13. The ruling and findings by the Land Adjudication and Settlement Officer, Mr.Mureithi form the basis upon which the Petitioners filed this Petition. The said decision is challenged on the grounds inter alia that;

A) That the actions of Mr.Mureithi were patently corrupt, irregular, illegal, unlawful, fraudulent and unconstitutional. That the said Mr.Mureithi was not a judicial officer or a settlement officer based in Kitui and he had no powers to act as an appellate court against the judgement of the Court in Kitui Civil Case L. 11 of 1986 (DO): Daniel M. Nyeki & 3 others vs Masululu Katoto & 3 others and the various High Court decisions upholding the same.

A) The adjudication process had been completed over ten years and the same could not be reopened. Further a matter already heard and determined by a court of law is not open for fresh hearing and determination by any other body unless directed by a court of competent jurisdiction.

B) Deliberately flouting the express requirements of Section 30 (4) of the Land Adjudication Act with the objective of unjustly and illegally reviewing the findings of the court to suit his interest

C) Acting in breach of Article 10, 47, and 50 of the Constitution by failing to uphold the rule of law which requires all public officers to abide by the decisions of any court of law.

14. The Petitioners subsequently filed Machakos High Court Judicial Review Application No. 279 of 2006 Republic versus Kitui Land Adjudication Officer and 46 Others seeking to quash, nullify and/or declare void the decision of Mr.Mureithi. The said application was dismissed.

15. The Petitioners claim that the Respondents actions have resulted in deprivation of their legitimate ancestral land and the same is oppressive, unjust and violates their rights under Articles 27, 40, 43 and 47 of the Constitution.

16. Subsequent to the decision of the above-mentioned Mr.Mureithi the adjudication process was completed and the Respondents were issued with title deeds whose copies were exhibited by the said Respondents.

The Interested Parties' Case.

17. In response to the Petition, the Interested Parties stated that once the Adjudication Area was declared, they presented their papers to the adjudication officer for registration of their land and it was registered as Parcels No.1414 and 1233-Musukini Adjudication Section. They claimed that once the Petitioners interest in the land was registered, they were told to wait for the time to lodge an appeal. They eventually filed objections on the grounds that the land registered to the Petitioner was not precisely the land that they were awarded in court. Upon hearing of the objections, the subject land was given to them.

18. The Interested Parties attached to their replying affidavit title deeds that were subsequently issued to them. They submitted that the land adjudication officer offered the Petitioners a right to Appeal which they failed to take up. They claim that the process of adjudication is now complete and the same cannot be revived.

19. The Interested Parties also submitted that Articles 27, 40, 43, 47 of the Constitution were not breached since the Land Adjudication Officer did what he was required to do and that the Petitioners did not tender evidence to show how damage was suffered as a result of the Respondents Actions.

20. Finally, the Interested Parties submitted that the orders sought cannot be enforced through this court.

Issues for Determination

21. Having considered the Petition, the supporting affidavit, the Grounds of Opposition and replying affidavit together with all attached documents, I am of the opinion that the following issues arise for determination in this matter:

A) Whether the Land Adjudication and Settlement Officer had jurisdiction to make a decision concerning the suit land that was contrary to final orders issued by a court of law

B) Whether the Decision of the Land Adjudication and Settlement Officer contravened the provisions of Articles 10, 27, 40, 43, 47 and 50 of the Constitution?

C) Can this Court issue the orders sought by the Petitioner?

A) Whether the Land Adjudication and Settlement Officer had jurisdiction to make a decision concerning the suit land that was contrary to final orders issued by a court of law

22. The jurisdiction of the Land Adjudication Officer is set out under Section 10 of the Land Adjudication Act the same provides that;

“The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connection with such claims....”

23. Under Section 9 (1), the Adjudication Officer is in charge of and also exercises general supervision and control over the adjudication. The said officer hears and determines petitions respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer. Under Section 9 (2) (b) The Adjudication Officer hears and determines any objection to the adjudication register which is submitted in accordance with Section 26 of the Act.

Section 26 referred to above provides that;

“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.

The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection

24. In the present case the Petitioners claim that by a letter dated 22nd June 1999 the District Land Adjudication and Settlement Officer- Kitui confirmed that land parcel P/No. 1233 of Musukini adjudication Section was recorded in the names of Daniel Musili Nyeki, John Kimotho Mulatya, Peter Kilonzi Muli, Joseph Musyoka Kimanzi and Damaris Musali Malonza to hold on behalf of their clan who included all the Petitioners. The Petitioners confirm that the land was demarcated in their favour on the strength of the court order. The decision to award them the land was not appealed against and/or in any way challenged.

25. The Petitioners claim that they were not aware that the said decision had been challenged until 24th October 2006 or thereabouts when the proceeding before the Land Adjudication Officer Mr. Mureithi occurred as alluded to earlier. The said Mr. Mureithi proceeded to hear the dispute undelivered a ruling on 4th November 2006 essentially setting aside the decision of the court and directing that the subject land be registered in the name of the Interested Parties.

26. According to the record of the proceedings before Mr. Mureithi there were 42 objection proceedings relating to plot numbers 1414 and 1233 at Musukini Adjudication Section, Mutito Division, Kitui District. In total there were 48 Objectors and 5 Respondents. The hearing proceeded on 31st October 2006 and the findings and judgement are dated 4th November 2006. The findings were as follows;

“Owing to the fact that

- 1) The Objectors have fully developed the land in dispute and that they are settled there,***
- 2) The Respondents have also given themselves their respective shares (plot Nos.),***
- 3) The Respondents were unable to evict the Objectors from this land even after an eviction order was issued under Civil Suit No. L11 of 1986,***
- 4) The District Court was biased***

This court therefore finds no good grounds not to allow the Objectors cases.

It was ordered that “All the mentioned objections in these proceedings are allowed, Land parcel No. 1233 and 1414 to be subdivided and the objectors who have filed objections against them be issued with their own separate numbers following the boundaries which they have set on the ground.....”

27. It is this decision by Mr. Mureithi that forms the basis of the Petition herein and the issue for determination as to whether the Land Adjudication and Settlement Officer had jurisdiction to make a final decision on the suit land that was contrary to final orders issued by a court of law. The Petitioners have taken the position that the decision of the Land Adjudication Officer was wrong as he had no power in law to review, alter and/or set aside a finding of any court of law and that such a judgement is binding on the Land Adjudication and Settlement Officer and the same remains in force unless set aside and/or reviewed by a Court of competent jurisdiction.

28. Section 30 of The Land Adjudication Act deals extensively with suits relating to land that falls within a land adjudication section. Section 30(4) makes provision for matters that have already been concluded and final judgment entered essentially providing that a final judgement of the court entered before the area in question is declared a land adjudication area is recognized by the Land Adjudication Act and the same can be enforced or executed within the land adjudication process;

“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.”

29. The Land Adjudication Act confers the adjudication process the same status as a judicial process. Section 12(1) provides the Procedure for conduct of hearings before adjudication officer is provided for and states that;

“(1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.”

at Section 12(2) it states that;

Any proceeding conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of Chapters XI and XVIII of the Penal Code (Cap. 63).

30. One of the important procedures observed in hearing of civil suits is that of *Res Judicata* under Section 7 of the Civil Procedure Act which provides that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

31. In dealing with the question of whether *res judicata* is applicable to proceedings under the Land Adjudication Act, the Court of Appeal in **Timotheo Makenge v Manunga Ngochi [1979] eKLR** held that;

“As regards res judicata, section 12(1) of the Act imposes on the adjudication officer a duty, when hearing an objection, “so far as is practicable” to follow the procedure directed to be observed in the hearing of civil suits. Section 7 of the Civil Procedure Act precludes any Court from trying an issue which has been heard and finally decided by another Court. Order XX, rule 4, of the Civil Procedure Rules lays down that a judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

32. However, the Court noted limitations in the applicability of the doctrine and stated that it is arguable if the doctrine of *Res Judicata* is applicable to proceedings under the Land Adjudication Act;

“It is also arguable that the principles of res judicata have no bearing on disputes under the Act, except to the extent of showing whether a claimant has a bona fide claim or not. Section 18 of the Act makes it clear that existing boundaries can be altered and adjusted. This would not be possible if the rules of res judicata were strictly applied. In my view, interests in land within an adjudication area previously recognised by Courts are not binding in land adjudication proceedings, and are only relevant as a factor to be taken into account. Where the interest relates to disputed clan land, the question of the over-riding interest in that land is in my view an open question,”

33. I am bound by the above finding of the Court of Appeal that interests in land within an adjudication area previously recognised by Courts are not binding in land adjudication proceedings, and are only relevant as a factor to be taken into account. I find that the Land Adjudication Officer did consider the judgement of the court while rendering a detailed judgement in which he referred to the judgement and rulings of the court both in the Magistrates Court and the High Court.

34. It is my view that the Land Adjudication Officer may have been right or wrong or in arriving at his findings and making his final Orders but I am not persuaded that the decision arrived at was irregular, illegal, fraudulent or unconstitutional as claimed by the Petitioners. Further, I do not agree that the said decision was patently corrupt as claimed. he had the jurisdiction and powers to deal with the matters before him being objections filed under Section 26 of the Land Adjudication Act. I will thus make the same observation the Court of Appeal made in the **Timotheo Makenge**;

“the Minister’s decision was a harsh one, so far as the respondent is concerned, and may have been a wrong one. This case has many features in common with Bisuche v Barasa (unreported) in which the appellant, whose right to ownership of certain land in an adjudication area had been recognised by the adjudication committee, by the arbitration board and by the adjudication officer, yet on an appeal to the Minister, he lost everything. The High Court refused to issue certiorari, and this Court’s predecessor agreed, on the basis that no want or excess of jurisdiction had been established.”

B) Whether the Decision of the Land Adjudication and Settlement Officer contravened the provisions of Articles 10, 27, 40, 43, 47 and 50 of the Constitution?

35. The constitutional rights of the Petitioners as occupants of trust land at the time of the adjudication process were protected and provided for under the repealed Constitution of Kenya. The said Constitution articulated and gave details of what lands constituted trust land and went on to state as follows under Section 115 (1)

“All Trust land shall vest in the county council within whose area of jurisdiction it is situated: Subsection 2 provides that

(2) Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and

shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual: Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law.

36. Section 116 of the repealed Constitution makes provision for the application of the LAA to any specific area of trust land. The same provided that;

“(1) A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land. (2) The laws to which subsection (1) applies are –

(a) the Land Consolidation Act and the Land Adjudication Act; and

37. From the above provisions of the repealed constitution, it is clear that the provisions of the Land Adjudication Act have constitutional underpinnings. The manner in which the individual rights to trust land are ascertained was provided for by the above constitutional provisions and by the entire Chapter IX of the repealed Constitution. The said part declares the laws applicable in ascertaining and registering the individual rights one of which is the Land Adjudication Act.

38. The Land Adjudication Act is described as **“An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto.”** The act has a detailed dispute resolution mechanism from the time of inception of claims to the final decision of the minister under Section 29. If followed through to its conclusion, the dispute resolution mechanism is supposed to deliver Constitutional protection and just determination of rights. 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.

39. For reasons not explained to the Court, the Petitioners, being dissatisfied by the decision of the Land Adjudication Officer, failed to lodge an appeal to the Minister even after the Land Adjudication Officer indicated at the end of his judgement that they had a right to do so within sixty days. Instead they chose to file Machakos High Court Judicial Review Application No. 279 of 2006 Republic versus Kitui Land Adjudication Officer and 46 Others. The Judicial Review Notice of Motion was dated 11th July 2007 outside of the sixty-day period given for appealing to the Minister. The said application was dismissed on 29th November 2012. The present Constitutional Petition was filed on 6th March 2015.

40. It is also the Courts finding that the declarations the Petitioners seek are declarations that an appeal to the Minister under Section 29 would have dealt with, heard and determined since the Minister’s powers are wide to **“determine appeals and make such order thereon as he thinks just.”**

5) It is further observed that in the proceedings before the Land Adjudication Officer, all parties were given an opportunity to be heard. The Objectors gave evidence and the Respondents were given an opportunity to cross-examine them. The Respondents were also heard and cross-examined. The Land Adjudication Officer made a site visit to the suit land. Out of the site visit the Land Adjudication Officer concluded that the Objectors had fully developed and settled on the land in dispute, and the Respondents had also given themselves their respective shares (plot Nos.). He further observed that the Respondents were unable to evict the Objectors from the land even after an eviction order was issued under Civil Suit No. L11 of 1986. At the end of the proceedings the Land Adjudication Officer made a detailed judgement referring to the judgement and rulings of the court both in the Magistrates Court and the High Court. He faulted the award of the elders under the Chairmanship of the District Officer especially for allowing the use of sketch maps drawn by the parties and leaning towards the sketch map drawn by the Petitioners. He concluded that the panel of elders was biased and the subsequent orders of the Courts only confirmed the said award. In my view the decision of the Land Adjudication Officer did not violate the Constitutional rights of the Petitioners.

41. Having failed to challenge the above-mentioned decision of the Land Adjudication Officer through the process provided by the law the Petitioners cannot be heard to say that their Constitutional rights were violated.

42. In any event, it was incumbent upon the Petitioners to demonstrate how their Constitutional rights have been infringed upon by the Respondents which they have unfortunately failed to do.

43. I find that the Petitioners have not shown the particulars of the national values and principles of governance under Article 10 of the Constitution were violated. Equally the Petitioners have not shown how their right to Equality and freedom from discrimination, Protection of right to property, Economic and social rights, their right to Fair administrative action and their right to a Fair hearing under Article 27, 40, 43, 47 and 50 have been violated.

C) Can this Court issue the orders sought by the Petitioners?

44. As stated earlier the Petitioners had a right of appeal to the Minister under Section 29 of Land Adjudication Act. They failed to file the appeal and instead filed judicial review proceedings and the present Constitutional Petition. I find that the Petitioners were wrong in doing so. I am guided by the many decisions where Courts have held that *where a specific dispute resolution mechanism is prescribed by the constitution or a statute, parties need to resort to that mechanism first before resorting to Court action.* In the case of **Mohamed Ahmed Khalid (Chairman) and 10 Others –vs- Director of Land Adjudication & 2 Others [2013] eKLR** Angote J. held: -

“Considering that the Land Adjudication Act, Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The Petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the Land Adjudication Act, Cap 284, I find that the petition was prematurely filed.”

45. I also hold that the rights of the Petitioners would not have crystalized into rights capable of being protected under Article 40 of the constitution of Kenya 2010 since the process of appeal within the adjudication process had not been exhausted. In **ELC(Meru) Petition 7B of 2013 Justus Mugaa M’Impwi v District Land Adjudication & Settlement Officer, Tigania West/East District & another [2018] eKLR** the court was dealing with a similar matter and stated that:

“The most obvious remedy available to the petitioner after the objection was allowed by the adjudication officer was lodge an appeal to the minister pursuant to Section 29 of the Land Adjudication Act cap 284 laws of Kenya. Having failed to exercise his right of appeal within the stipulated period, the petitioner avoided Judicial Review process to escape the limitation imposed by the statute and is now seeking an escape route through the constitution. It is imperative to note that not all grievances should warrant the filing of a petition. Constitutional jurisdiction must not be trivialized as by so doing, the value of the constitution would be diminished if it is allowed to be used as a general substitute for the normal proceedings for invoking judicial and constitutional rights. It is my view that the subject of this petition being a parcel of land which was undergoing adjudication process, the petitioner’s rights and interest would not have crystalized into rights capable of being protected under article 40 of the constitution of Kenya 2010. The process of appeal had not been exhausted and those rights are registered under the land registration act of 2011. In the upshot, this petition lacks merit premature and an abuse of the due process.’

46. Similarly, 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** the court was of the opinion that all available remedies under the Land Adjudication Act had not been exhausted when it upheld the Preliminary Objection and struck out the constitutional petition. The Court further found that ***“the dispute concerns ascertainment of rights and interest in land which dispute was last decided through Objection Proceedings. These proceedings are anchored under the statutes which are still in force. The dispute therefore does not raise any constitutional issue. I therefore agree that the petition is incompetent.”***

47. I agree with the Court of Appeal when it dealt with the exhaustion theory in **GEOFFREY MUTHINJA KABIRU & 2 OTHERS VS. SAMUEL MUNGA HENRY & 1756 OTHERS [2015] eKLR** which held;

“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”.

48. Further, the Court of Appeal decision in **MUTANGA TEA & COFFEE COMPANY LTD V SHIKARA LIMITED & ANOTHER [2015] eKLR**, *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”.

49. Based on the above authorities, I hold that the Petitioners ought to have exhausted the dispute resolution mechanisms provided for under the Land Adjudication Act before seeking the courts intervention.

Final Orders

For the foregoing reasons I find that the Petition dated 5th March 2015 lacks merit and the same is dismissed with costs to the Interested Parties.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF NOVEMBER 2021.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A C Nzioka

Mr.Obok..... for the Petitioners

No attendance..... for Respondents

No attendance for the Interested Parties