



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO. 22 OF 2021**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES**

**40, 47 & 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ADJUDICATION COMMITTEE AND**

**ARBITRATION BOARD AND OBJECTION IN LAND COMMITTEE CASE NO. 125**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**(SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL**

**RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES AND 2013**

**AND**

**IN THE MATTER OF: PLOT NO. S. 2147 AND 3016 MWANDA**

**/MBALAMWENI ADJUDICATION SECTION**

**AND**

**IN THE MATTER OF: ARTICLES 20, 21, 22 & 23 OF THE KENYA**

**CONSTITUTION OF KENYA, THE ENVIRONMENT & LAND COURT**

**ACT NO. 19 OF 2011, SECTIONS 13, 19, 20, 21, 22, 26, 27, 28, AND 29 OF**

**THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA, THE LAND**

**ACT NO. 6 OF 2021 AND THE LAND REGISTRATION ACT NO. 3 OF 2012**

**BETWEEN**

**1. SAMMY ALEX MUSYEMI**

**2. DANIEL MUSYEMI ALEX**

**3. WAMBUA MUMO MUSYEMI**

4. ROBERT MUSYOKA MWAMBUA.....PETITIONERS

- VERSUS -

1. MASHA MRAMBA MWAROGO

2. LAND ADJUDICATION OFFICER, KILIFI COUNTY

3. THE LAND REGISTRATION OFFICER, KILIFI COUNTY

4. ATTORNEY GENERAL.....RESPONDENT

### RULING

1. What is before the Honorable Court is a Notice of Preliminary objection dated 6<sup>th</sup> July, 2021 by the 1<sup>st</sup> Respondent. It was filed on 7<sup>th</sup> July, 2021. The said preliminary objection is against the Notice of Motion application dated 25<sup>th</sup> May, 2021 filed by the Petitioners and the entire Petition on the following grounds:-

(a) *That the Petition is filed contrary to the provisions of Section 30 of “The Land Adjudication Act Cap 284 of Laws of Kenya.*

(b) *That the Petition is filed contrary to Section 7 of the Civil Procedure Act Cap 21 of Laws of Kenya and offends the doctrine of “Res Judicata” for reasons that the issues raised in the petition were canvassed and/or determined in the following cases.*

(i) *Kaloleni District Magistrate land cases No. 15 of 1968 – Muchioki Chela –VS- Sofa Mwarogo*

(ii) *Mombasa Resident Magistrate Land Case No. 19 of 1086 Chemu Tsobnga –VS- Kuluwa Chelo*

(iii) *Kaloleni Resident Magistrate Land Award No. 23 of 1997 Kulwa Chelo – VS - Masha M. Mwarogo.*

(c) *That the Applicant have no Locus Standi or capacity to institute proceedings on behalf of the late Chale Musyimi Mbumbu and no Letters of Administration or Grant has been issued to the Applicants to enable them to commence this proceedings.*

(d) *That the issues pleaded in the Petition if any, and the reliefs sought do not disclose any constitutional issue and the Petition as filed is therefore misconceived vexatious, frivolous, bad in law, fatally defective and amounts to gross abuse of the court process and hence seeks for the entire Petition to be struck out with costs.*

### II. SUBMISSIONS

2. On 5<sup>th</sup> October, 2021, in the presence of court all the parties by consent agreed to dispose off the preliminary objection by way of written submissions.

#### A. THE 1<sup>ST</sup> RESPONDENT’S SUBMISSIONS

3. On 22<sup>nd</sup> October, 2021 the Advocates for the 1<sup>st</sup> Respondent the Law firm of Messrs. Shermom Nyongesa & Mutubia filed their written submissions dated 15<sup>th</sup> October, 2021. They submitted by framing up several issues which they urged court to consider. Essentially, they held that the Petition and the reliefs sought violated the provisions of Section 30 (1) (2) & (3) of The Land Adjudication Act which barred any proceedings concerning land in adjudication section being instituted in court except with the consent in writing by the Land Adjudication officer. To them, the land adjudication process became final as provided for under the pursuant of the provisions of Section 29 (3) of the said Act.

4. Accordingly, the Learned Counsel for the 1<sup>st</sup> Defendant/Respondent argued that this Court had no Jurisdiction to entertain the Petition. Furthermore, they held that on 15<sup>th</sup> November, 2015 this dispute had been canvassed before the Adjudication committee and a decision rendered. From the said decision, they contended that any aggrieved party had been granted a right to appeal within 60 days. The Petitioners never appealed. Instead, the Petitioner, on 25<sup>th</sup> May, 2021 filed this appeal. The Learned Counsel submitted that, clearly, the Petitioners challenged the outcome of the adjudication process and determination of the rights. Therefore, they needed to have obtained the consent from the Land Adjudication Officer which they had not done, On this point, they relied on the decision of the cases of **Joseph S. Tootio & 12 Others –VS- District Land Adjudication Section and Settlement Officer (DCAO), Narok Smith & 24 Others (2021)eKLR** where the court dismissed a Petition and upheld the Respondent’s preliminary objection on the grounds that the Petition had violated the provisions of Section 30 of the Land Adjudication Act Cap 284 of Laws of Kenya.

5. Further the Learned Counsels Submitted the Petition violated the provisions of Section 7 of the Civil Procedure Act, Cap, 21. Hence, it was a breach to the principles of “**Res Judicata**” where there were other cases with similar and identical claims, same parties as in the instant case and where judgment had been delivered. These were:-

(i) *Kaloleni District Magistrate land cases No. 15 of 1968 – Muchioki Chela –VS- Sofa Mwarogo*

*(ii) Mombasa Resident Magistrate Land Case No. 19 of 1086 Chemu Tsobnga –VS- Kuluwa Chelo*

*(iii) Kaloleni Resident Magistrate Land Award No. 23 of 1997 Kulwa Chelo –VS- Masha M. Mwarogo.*

On this particular point, they relied on the case of *Naitore M’iburi & Another – VS - Attorney General & 2 others, Sebastian Kaaria (Interested Party)*.

6. Thirdly, the Learned Counsel submitted that the Petitioners were not the legal owners of the suit land and therefore they lacked the capacity to institute this instant Petition. The suit land was owned by the late father – Cholu Musyemi Mbumbu whose certificate of death was annexed for ease of reference. Ideally, they argued that there were no Grant Letters of Administration issued allowing the Petitioners institute any proceedings on behalf of the deceased; - as the legal representation or with *Locus Standi* to commence the proceedings. They relied on the decision of *Sisilia Nyaoko & Another –VS- Attorney General & 4 Others (2021) eKLR* Where a Petition was dismissed in similar manner.

7. Lastly, the Advocates for the 1<sup>st</sup> Respondent held that the Petition failed to meet the threshold for filing a Constitutional Petition whose standards are much higher than an ordinary suit. This was an ordinary suit to be determined by an Adjudication Officer now clothed as a Constitution Petition. A party ought to specifically state how his rights and freedom have been violated with evidentially support. They pray the Preliminary Objection to be allowed and Petition struck out with costs.

## **B. THE SUBMISSIONS BY THE PETITIONER**

8. On the 15<sup>th</sup> November, 2021, the Advocates for the Petitioners, the law firm of Messers. Odhiambo S. E & Company Advocates filed their written submissions dated 5<sup>th</sup> November, 2021. They submitted that in as far as the provisions of Section 30 of the land Adjudication Act Cap. 284 was concerned, so long as the whole land adjudication was process was complete as in this case, that provision was not applicable.

In this case they argued that the Petitioners had not contravened any law at all. Furthermore, this being a Constitutional Petition, that provisions of the law was inapplicable as it never barred the Petitioners from instituting the Petition.

9. With reference to the provisions of Section 7 of the Civil Procedure Act, and the principles of “*Res Judicata*” the Learned Advocates for the Petitioners argued that the Petitioners filed the Petition in their own rights as persons who had interest in the parcels of the land. They held that refuted ever having any cases heard and determined before the Land adjudication committees, Boards or courts as alleged by the Respondents. They denied being the same parties as the ones cited by the Respondents and challenged them to produce that evidence here. Hence, they contended that their case was not *Res judicata* as argued by the Respondents.

10. On the issue of the Petitioners lacking the legal capacity or “*Locus Standi*” to institute this Petition, the Learned Advocates argued that they Petitioners did not require to have obtained any Letters of Administration in a Constitution Petition. Instead, this being a Public interest Litigation they only needed to invoke the provisions of Articles 40, 47, 50 of the Constitution of Kenya and the supervisory jurisdiction and protection of Fundamental Rights and Freedoms of Individual) High Court Practice Rules of 2013 as well as the provisions of Articles 20, 21 and 23 of the Constitution of Kenya.

## **II. ANALYSIS AND DETERMINATION**

11. In order to arrive at an informed decision this court has considered all the filed pleadings and the written submissions and cited authorities and relevant provisions of law with reference to the filed preliminary Objection by the 1<sup>st</sup> Respondent dated 6<sup>th</sup> July 2021 – Court has framed the following three (3) issues to be considered:-

*(a) Whether the Preliminary Objection meets the threshold required for being a Preliminary Objection*

*(b) Whether this court has jurisdiction to hear and determine the Petition dated 25<sup>th</sup> May, 2021 on the basis of (i) does it offend the provisions of Sections 30 (1) (2) and (3) of The Land Adjudication Act Cap 284 of Laws of Kenya and (ii) Section 7 of the CPA – or offends the doctrine of the “The Res Judicata”*

*(c) Who will bear the costs*

### **ISSUE NO. a). Whether the Preliminary Objection meets the threshold required for being a Preliminary Objection**

12. According to the Black Law Dictionary a Preliminary Objection is defined as being:

**“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”**

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held *that a proper preliminary objection constitutes a pure points of law*. The Learned Judge then held that:-

**“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”***

13. In reference to the case of *Attorney General & Another –VS- Andrew Mwaura Githinji & another [2016] eKLR:-* as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

***(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.***

***(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and***

***(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.***

14. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. In this case the Preliminary Objection by the Respondent is appropriately brought and makes a lot of logical sense from a legal view point.

***ISSUE No. b). Whether this court has jurisdiction to hear and determine the Petition dated 25<sup>th</sup> May, 2021 on the basis of (i) does it offend the provisions of Sections 30 (1) (2) and (3) of The Land Adjudication Act Cap 284 of Laws of Kenya and (ii) Section 7 of the CPA – or offends the doctrine of the “The Res Judicata”***

15. Additionally the two (2) issues raised by the 1<sup>st</sup> Respondent herein to the effect that there were in breach of the Provision of Section 7 – *Res Judicata* and the lack of *Locus Standi* while instituting the Petition. Section 7 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 or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.***

From the above provisions of the law, for the doctrine of *Res Judicata* to be achievable, the following the ingredients must to be fulfilled:-

- a) The suit or issue was directly and substantially in issue in the former case
- b) The former suit was between the same parties or parties under whom they or any of them claim;
- c) Those parties were litigating under the same title;
- d) The issue was heard and finally determined in the former suit.
- e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

Expounding on the essence of the doctrine of *Res Judicata*, the court in *John Florence Maritime Services Limited & Another – Vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR* pronounced itself as follows:

***“The rationale behind Res Judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter, Res Judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgements by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, very essence of the rule of law would be in danger of unravelling uncontrollably”***

16. Indeed, the above are matters of pure law from a face value but nonetheless, the 1<sup>st</sup> Respondent has referred this court to a series of court cases where it is stated that these matters similar to the ne before this court were heard and finally determined. These are *Kaloleni District Magistrate land cases No. 15 of 1968 – Muchioki Chela –VS- Sofa Mwarogo; Mombasa Resident Magistrate Land Case No. 19 of 1086 Chemu Tsobnga –VS- Kuluwa Chelo and Kaloleni Resident Magistrate Land Award No. 23 of 1997 Kulwa Chelo – VS - Masha M.*

**Mwarogo.**

17. In all fairness, it calls for adducing of empirical oral and documentary evidence on facts. To me these can only be possible during a full trial and not from an interlocutory stage. In other words, the said objections under these sub heading are purely not matters of law stand alone. They are a mixture of law and facts in total contradiction the legal parameters envisaged under the ambit of the **Mukisa Biscuits case (Supra)**.

**ISSUE No. 2 - Whether this court has jurisdiction to hear and determine the Petition dated 25<sup>th</sup> May, 2021 on the basis of (i) does it offend the provisions of Sections 30 (1) (2) and (3) of The Land Adjudication Act Cap 284 of Laws of Kenya and (ii) Section 7 of the CPA – or offends the doctrine of the “The Res Judicata”**

18. Under this Sub – heading, I fully concur with the Learned Advocates for the Respondents to the effect that the Provisions of Sections 30 (1) of the Land Adjudication Act are couched in mandatory terms. It holds *Inter alia* :-

**“30 (1) except with the consent in writing of the Adjudicating 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 Sections 29 (1) of this Act.**

Nonetheless, the land adjudication process for Plot No. 2147 and 3016 Mwanda/Mbalamweni Adjudication section seem to have been undertaken and completed. But be that as it may, the contents and the reliefs sought from the filed Petition by the Petitioner is certainly broader than mere issues of the land adjudication process which the unfortunately the 1<sup>st</sup> Respondent seem to have narrowed down to.

19. Based on the principles set out in the edit of The Court of appeal case of **the Mumo Matemu – Vs – Trusted Society of Human Rights Alliance & Another (2013)eKLR** provided the standards of proof in the Constitutional Petitions as founded in the case of **Anarita Karimi Njeru –VS- Republic [1980]KLR 154** where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

**“Constitutional violations must be pleaded with a reasonable degree of precision.....”**

Further, in the **“Thorp – Vs – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR** said in the year 1876 and which hold true today:

**“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”**

20. In application of these set out principles for filing a Constitutional Petition to this case, the honorable court is fully satisfied that the Petitioner has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought.

Indeed from the filed Petition and the prayers sought touches the expansive administrative process pertaining to the management and operation of the Land Adjudication process. They have raised issues on the process being bias, capricious, unreasonable and lacking to adhere legitimate expectation with the Principles of natural justice as breaching the several provisions of the Laws of Kenya – Articles 47 and the Fair Administrative Act, of 2012. The Petitioner has sought for :-

**a. Declaration that the decision by the 2<sup>nd</sup> Respondent to allow the 1<sup>st</sup> Respondent’s case on extraneous evidence not adduced by either party is against the just expedition of the Petitioner and amounts to a denial of the Petitioner rights to a fair hearing and a reasonable and procedurally fair administrative action as enshrined in Articles 47 & 50 of the Constitution of Kenya.**

**b. A declaration that the action of the 2<sup>nd</sup> Respondent in not recording all the evidence tendered by the Petitioner’s father is an infringement of the Petitioner’s rights to a fair hearing and to a reasonable and procedurally fair administration action as enshrined in Articles 46 & 50 of the Laws of Kenya.**

**c. A declaration that the issuance of the title deed to the 1<sup>st</sup> Respondent for the Suit Property pursuant to a flawed decision will further violate the Petitioner’s right to fair hearing and a fair administration action as enshrined Under Articles 47 and 50 of the Laws of Kenya.**

**d. An order of Certiorari quashing the decision of the 2<sup>nd</sup> Respondent made on 12<sup>th</sup> November, 2015 that allowed the 1<sup>st</sup> Respondent’s case to the Land Committee Plot No. Mwanda/Mbalamweni and also quashing the order of even date that Plot No. 3016 Mwanda/Mbalamweni Adjudication Section be registered in the name of the 1<sup>st</sup> Respondent.**

**e. An order substituting the decision of the 2<sup>nd</sup> Respondent with a judgment of this Court in favour of the Petitioner and against the 1<sup>st</sup> Respondent with an order directing the 3<sup>rd</sup> Respondent to register the Petitioner as the Proprietor of Parcel No. 3016 Mwanda/Mbalamweni Adjudication Section.**

These are extremely serious and weighty issues on the process and this court has the supervising jurisdiction to deal with them. Under the Provisions of Article 165 (6) of the Laws of Kenya holds as follows:-

***“The High Court has supervisory Jurisdiction over the sub-ordinate Courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a Superior Court”***

**DETERMINATION**

21. In view of the foregoing therefor the Preliminary Objection dated 6<sup>th</sup> July, 2021 and filed in court on 7<sup>th</sup> July, 2021 is found to be bereft of any merit and hence dismissed with costs and I direct as follows:-

- a) **THAT the Preliminary Objection by the Respondent dated 6<sup>th</sup> July, 2021 is dismissed for lack of merit.**
- b) **THAT the Petition dated 25<sup>th</sup> May, 2021 by the Petitioner be fixed for hearing within the next ninety (90) days from today.**
- c) **THAT the Petition to be mentioned on 1<sup>st</sup> February, 2021 for purposes of holding a pre-trial conference session and in particular taking direction on how to dispose it by both *Viva Voce* means and written submissions.**
- d) **THAT the Costs of the Preliminary Objection to be borne by the 1<sup>st</sup> Respondent.**

**IT IS SO ORDERED.**

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 8<sup>TH</sup> DAY OF DECEMBER , 2021.**

**HON. JUSTICE L.L. NAIKUNI**

**JUDGE**

**(ELC- MOMBASA)**

***In the presence of:-***

*M/s. Yumna – the Court Assistant*

*M/s. Shisia holding brief for Mr.Mutubia for the Petitioners/Respondent.*

*Mr. Obara holding brief for the 1<sup>st</sup> Petitioners.*