



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**CONSTITUTIONAL PETITION NO. 13A OF 2019**

**PRISCILLAR MINOO NGUNYU ..... PETITIONER**

**-VERSUS-**

**JAMES MAWEU MUTUNGI ..... 1<sup>ST</sup> RESPONDENT**

**LAND ADJ. OFFICER, NDUU ADJ. SECTION..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. What is before court for ruling is the notice of preliminary objection dated 21<sup>st</sup> November, 2019 and filed in court on 09<sup>th</sup> December, 2019 by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the grounds that: -

- 1) THAT the petition offends the provisions of section 30(1) of the Land Adjudication Act.**
- 2) THAT the petition offends the provisions of section 29 of the Land Adjudication Act.**

2. The Petitioner has opposed the Notice of Preliminary Objection vide her grounds of opposition dated 10<sup>th</sup> June, 2020 and filed in court on 12<sup>th</sup> June, 2020 where she has stated that: -

- 1) The P.O is misconceived and waste of courts time and aimed at misdirecting this court.**
- 2) The Petitioner sought for the consent from the 2<sup>nd</sup> Respondent through a letter dated 4/6/2019 (by her counsels) which was denied hence this constitutional petition.**
- 3) That this is a constitutional petition regarding the rights of the petitioner and it in no way offends the provisions of Land Adjudication Act.**

3. The notice of preliminary objection was canvassed by way of written submissions.

4. The 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents raised the following issues for determination: -

- i) Whether the Petitioner has exhausted the procedure for redress provided in the Land Adjudication Act?***
- ii) Whether the Court has jurisdiction to determine this matter?***

5. On the other hand, the Petitioner's Counsel framed three issues for determination namely: -

- 1) Whether this preliminary objection meets the required threshold.***
- 2) Whether this court has jurisdiction.***
- 3) Whether this Petition offends sections 29 and 30(1) of the Land Adjudication Act.***

6. With regard to the Respondents' first issue, their Counsel submitted that the Land Adjudication Act at sections 12 to 26 provides an

elaborate dispute resolution mechanism for an aggrieved person to seek redress such as lodging a complaint with the Adjudication Committee, Arbitration Board, an objection to the Adjudication officer and an appeal to the Minister. The Counsel went on to submit that before seeking recourse from the Court, a party ought to exhaust all available remedies provided for in the Act unless the laid down procedures have been declared unconstitutional. The Counsel cited **Section 29 of the Land Adjudication Act** which provides 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.”*

7. Arising from the above, the Counsel submitted that it is evident from the documents in support of the petition that the determination in dispute is that of the Land Adjudication Officer - Nduu Section emanating from Objection number 8. The Counsel pointed out that from the letter dated 23<sup>rd</sup> May, 2019, it is evident that the Petitioner has preferred an appeal against the determination and that the Petitioner has deliberately in her pleadings omitted to mention the existence of and/or status of that appeal.

8. The Counsel further submitted that despite lodging an appeal, the Petitioner has sought to invoke the intervention of the court before exhausting the avenues provided in the Land Adjudication Act.

9. In support of her submissions, the Counsel cited the case of **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR** where the Court of Appeal sitting in Nairobi held:-

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

10. The Counsel further cited the case of **Mutanga Tea & Coffee Company Ltd. vs. Shikara Ltd & Another [2015] eKLR** where the Court of Appeal sitting in Mombasa status thus;

*“...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 invoke 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.”*

11. Arising from the above, the Counsel submitted that the Petitioner ought to have followed the laid down Dispute Resolution mechanism provided for in the Land Adjudication Act and as such, she needed to await the determination of her appeal before the Minister.

12. On the issue of whether the court has jurisdiction to determine this matter, the Counsel cited **Section 30 of the Land Adjudication Act** which provides that: -

*“(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. [Rev. 2012] Land Adjudication CAP. 284 L5 - 17 [Issue 1].*

*(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.”*

13. Arising from the above, the Counsel submitted that even though the Petitioner alleges that she sought for a consent to institute this suit from the 2<sup>nd</sup> Respondent and relies on the letter marked a PMN3 annexed to the supporting affidavit to the petition, the same is denied. Relying on **section 30(3) of the Land Adjudication Act**, the Counsel submitted that the Petitioner has not provided evidence that she appealed to the Cabinet Secretary after she was denied consent to file a civil suit thus without a consent from the 2<sup>nd</sup> Respondent, this Court lacks jurisdiction to hear and determine this petition. The Counsel was of the view that a consent to institute this suit could not have reasonably been issued by the 2<sup>nd</sup> Respondent while there was a pending appeal to the Minister preferred by the Petitioner herein as per the documents in support of the petition and particularly the letter dated 23<sup>rd</sup> May, 2019 by the 1<sup>st</sup> Respondent. In addition, the Counsel submitted that the fact that the Petitioner has deliberately omitted to indicate the status of that appeal and has instead preferred to invoke the inherent jurisdiction of the court prematurely on allegations of breach of her constitutional rights which does not negate the correct procedure to be followed.

14. The Counsel went on to submit that as long as the Petitioner desires determination by the Court regarding a right and interest in land, (order iv in the petition), a consent is mandatory. The Counsel pointed out that this is so even when the Applicant approaches the Court through the filing of a constitutional petition.

15. On the other hand, the Counsel for the Petitioner cited the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd. [1969] EA 696** where Sir Charles Newbold defined a Preliminary Objection as: -

*“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 is the exercise of judicial discretion.”*

16. The Counsel went on to submit that the Respondents sole assumption on filing this preliminary objection is based on the fact that the Petitioner never obtained consent as required by section 30 of the Land Adjudication Act. The Counsel termed the assumption as not correct as it lies before this Court to determine this question. The Counsel went on to submit that the Petitioner sought consent and same was denied and same is pleaded in the petition and she has also attached the letter to the 2<sup>nd</sup> Respondent. The Counsel pointed out the 2<sup>nd</sup> Respondent cannot be allowed to turn around and use the denial of a consent to file a preliminary objection. The Counsel was of the view that it is up to this Court to ascertain through its judicial discretion whether consent was sought or not and thus this makes the question to cease from being a pure point of law until it is fully determined. The Counsel relied on the case of **Republic vs. District Commissioner Nyando and Another [2009] eKLR** where Ali Aroni J stated thus: -

*“the Applicants content that consent was sought and denied. This in my view is not strictly a preliminary point if the Court has to ascertain whether consent was sought or not.”*

17. On whether or not the court has jurisdiction, the Counsel submitted that the Petitioner is seeking to challenge the jurisdiction and the manner in which the 2<sup>nd</sup> Respondent conducted the case and that the Petitioner needs to acquire consent so as to file a suit before a court of law. The Counsel added that the petition is before the right Court. The Counsel relied on the case of **Patrick Musimba vs. National Land Commission & 4 others [2015] eKLR**. The Counsel further relied on the case of **Christopher Nguru Mulwa & 28 others vs. The County Government of Kitui & 2 others [2017]** where the Court held that:-

*“consequently, and considering that a dispute relating to land and/or environment can be commenced by way of a constitutional petition, it is only the Environment and Land Court that has jurisdiction to entertain such matters...”*

18. As to whether or not the petition offends **section 28 and 30(1) of the Land Adjudication Act chapter 284 of the Laws of Kenya**, the Counsel submitted that the question had been answered by his submissions touching on what constitutes a preliminary objection and the issue of jurisdiction. The Counsel was of the view that since the Respondents haven't met the threshold required of what constitutes a preliminary objection and also because it is for this court to determine this question, then there is no way the two sections have been offended. The Counsel added that even if it was so, the issue cannot be determined at this stage until the Court hears and determines the whole petition. The Counsel went on to submit that the section that the Respondents are relying on is section 30(1) which says *“Except with the consent in writing of the Adjudication Officer, no person shall institute, and no Court shall entertain, any civil proceedings concerning any 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 Counsel put his emphasis on the part of *“any proceedings.”* He said that before Court is a constitutional petition to address the issue of breach and infringement of rights, among them denial of consent and impartiality of the 2<sup>nd</sup> Respondent, not mentioning usurping of jurisdiction which the 2<sup>nd</sup> Respondent did not possess. He further pointed out that this is not a civil proceeding, but a petition which are two different things and therefore the Petitioner has not offended any of the sections as quoted in the preliminary objection. The Counsel cited the case of **Republic vs- District Commissioner, Nyando & Another [2010] eKLR**, where the court held that **sections 30 of the Land Adjudication Act** does not apply in a judicial Review since a judicial Review is neither a criminal or civil cause. The Counsel further stated that even though the above case law is slightly different from this one by fact that it was a Judicial Review and this one as Petition, the essence is the same on the aspect that this is not a civil proceeding hence the section does not apply here. The Counsel urged the Court to dismiss the preliminary objection.

19. Having read the notice of preliminary objection and the rival submissions filed by the Counsel on record for the parties herein, my finding is that the only issue for determination is whether the Petitioner has exhausted the procedure provided in the Land Adjudication Act, chapter 284 of the Laws of Kenya. Whereas I agree with the Counsel for the Petitioner that this is a constitutional suit and not civil proceedings, a perusal of the prayers sought in the petition dated 23<sup>rd</sup> September, 2019 clearly shows that the Petitioner sought to amongst others a declaration that the proceedings by the Land Adjudication Officer to be null and void. Those prayers go over and above the question of denial of consent by the 2<sup>nd</sup> Respondent to the Petitioner to file a civil suit in court which the Petitioner has not pleaded in her plaint. As was correctly submitted by the Respondent's Counsel, amongst the documents that the Petitioner relies on is a letter by the 2<sup>nd</sup> Respondent dated 23<sup>rd</sup> May, 2019 indicating that the Petitioner has filed an appeal before the Minister. The Petitioner has neither denied this fact nor has

she seen it fit to clarify the status of the said appeal. It is clear to me that the Petitioner had a recourse under section 30(3) of the Land Adjudication Act chapter 284 to appeal to the Minister over the denial of consent by the 2<sup>nd</sup> Respondent. The Petitioner has not given reasons why she could not pursue this avenue before coming to court. As was held by the Court of Appeal in the case of **Mutanga Tea & Coffee Company Ltd. vs. Shikara Ltd & Another [2015] eKLR**, Article 159(2)(c) of the Constitution has expressly recognized alternative forms of dispute resolution which in my view would include the dispute resolution mechanisms provided under the Land Adjudication Act. There is nothing to show that the provisions of the Land Adjudication Act which deal with dispute resolution mechanism have been declared unconstitutional. It would therefore be usurpation of the dispute resolution mechanisms provided under the Land Adjudication Act if this Court were to entertain this petition until the Petitioner has exhausted the clear provisions that have been provided for under sections 12 to 26 of the said Act.

20. I am persuaded by the authorities that were referred to me by the Respondents and which authorities are of superior court and which authorities take precedence over the authorities relied upon by the Petitioner.

21. The upshot of the foregoing is that the Preliminary Objection has merits and I proceed to strike out the petition with costs of the Respondents.

Signed, dated and delivered at Makueni via email this **02<sup>nd</sup>** day of **December, 2020**.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi