

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ELC LAND PETITION NO. E003 OF 2024

**IN THE MATTER OF LAND PARCEL NO. 1783 KYATUNE LAND
SECTION**

AND

IN THE MATTER OF VIOLATION OF ARTICLES

**2, 3, 10, 19, 20, 22, 23, 24, 27, 28, 40, 48, 60, 63, Article
162 92) (b) AND 258 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF SECTION 23 OF THE LAND
ADJUDICATION ACT**

AND

**IN THE MATTER OF ARTICLES 6, 9 & 10 OF THE
INTERNATIONAL CONVENTION ON CIVIL & POLITICAL
RIGHTS**

AND

**IN THE MATTER OF ARTICLES 11 & 13 OF THE
INTERNATIONAL CONVENTION OF ECONOMIC, SOCIAL &
CULTURAL RIGHTS**

AND

**IN THE MATTER OF ARTICLES 3, 4, 14, 17, 19 & 22 OF THE
AFRICAN CHARTER ON HUMAN & PEOPLES' RIGHTS**

BETWEEN

ZAKAYA KIMILI BEKE	1ST
PETITIONER	
JACKSON KALUNGU MAKAU	2ND
PETITIONER	
JOSEPH MUTINDA NGEMU	3RD
PETITIONER	
MUTIE MWANGANGI	4TH
PETITIONER	
MUEMA MWANGANGI	5TH
PETITIONER	
FRANCIS MUTISO	6TH
PETITIONER	
MBEKE MUSEMBI	7TH
PETITIONER	
PATRICK MAKAU	8TH
PETITIONER	
MWANGANGI MAKAU	9TH
PETITIONER	
KATISYA MAKAU	10TH
PETITIONER	
BONIFACE NGILA	11TH
PETITIONER	
SUSAN TITUS	12TH
PETITIONER	
MUSANGO MULATYA	13TH
PETITIONER	

**JAMES MULWA NGILA 14TH
PETITIONER**

**TERESIA NGILA 15TH
PETITIONER**

AND

**JONATHAN MWANTHI THOMAS 1ST
RESPONDENT**

**JULIUS MUMO THOMAS 2ND
RESPONDENT**

**EUNICE MULEWA THOMAS 3RD
RESPONDENT**

THE CHIEF MAGISTRATE,

**KITUI LAW COURTS 4TH
RESPONDENT**

LAND ADJUDICATION & SETTLEMENT

**OFFICER MUTOMO 5TH
RESPONDENT**

**ATTORNEY GENERAL 6TH
RESPONDENT**

**LAND REGISTRAR, KITUI 7TH
RESPONDENT**

RULING

Introduction

1. This Ruling is on a preliminary objection filed here by a notice to raise the same dated 30/9/2024. The objection was raised by ZAKAYA KIMILI BEKE (1st Respondent) and JACKSON

KALUNGU MAKAU (2nd Respondent) and is based on three (3) points as follows:

- (1) *That this honourable court lacks jurisdiction to hear and determine this matter in so far as the petitioners have not exhausted litigation under the procedure provided for under Chapter 284 Laws of Kenya.*
- (2) *That there is in place Minister's decision against 1st petitioner - ZAKAYO KIMILI BEKE, the 9th petitioner, MWANGANGI MAKAU, and the 14th petitioner, JAMES MULWA NGILA and in so far as such decisions have not been challenged, this honourable court lacks the jurisdiction to hear and determine any fresh matter preferred by such petitioners.*
- (3) *That, in totality, the petition lacks merit and ought to be dismissed in limine.*

Some Background

2. What is before the court is a Constitutional Petition filed by some 15 petitioners challenging adjudicated ownership of land parcel No. 1782 KYATUNE LAND ADJUDICATION area by 1st, 2nd and 3rd respondents. The 4th, 5th, 6th and 7th respondents are brought on board for the actual and/or perceived roles they played in ensuring that the ownership is as it is.
3. The 1st and 2nd respondents replied to the petition by way of grounds of opposition dated 30/9/2024 and a replying affidavit

of even date. They also filed the preliminary objection now under consideration. The responses of the 1st and 2nd respondents are essentially detailed rebuttals of the substance of the petitioner's petition. The responses of the other respondents are also rebuttals based on points of law and fact.

Submissions

4. The objection was canvassed by way of submissions. The 1st and 2nd respondents' submissions are dated 25/10/2024. It was submitted, *inter alia*, that the dispute between the parties relating to the land parcel in dispute was handled at various stages of dispute resolution including the objection stage. The 1st, 2nd and 3rd respondents won in all these stages. There was the final stage of appeals to the Minister which the petitioners skipped and instead decided to file this petition. To the extent that the petitioners didn't make use of that final stage, then their petition is said to be improper before this court as the doctrine of exhaustion would de-legitimise it.
5. It was also submitted that the decision of the adjudication office to award the disputed land to the 1st, 2nd, and 3rd respondents was based on the outcome of an earlier dispute

namely: L. 20 of 1990. That outcome was never appealed against. Instead of appealing, the petitioners are said to have filed several fresh cases in court and they lost in all of them. In view of all this, the petitioners are said to be misleading the court. Their petition was said to be an afterthought and also an abuse of the court process.

6. The petitioners' submissions are dated 8/3/2025. In their submissions the petitioners stated that there is no proper preliminary objection as envisaged by law. The case of **Hassan Ali Joho & Another -vs- Suleiman Said Shahbal & 2 Others: [Petition 10 of 2013] [2014] KESC 34 (KLR)** which cited the *locus classicus* case of **Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd. [1969] EA 696** was cited and quoted to drive the point home. In Joho's case (supra), Mukisa's case (supra) was quoted for the legal proposition that a preliminary objection in the nature of demurrer and it raises a pure point of law argued on the assumption that the facts pleaded by the other side are correct. It was emphasized that an objection cannot be raised

if any facts are to be ascertained or if what is being sought is the exercise of judicial discretion.

7. The petitioners were said to be properly before the court. Their right to file the petition was said to be guaranteed under Articles 22 and 23 of the Constitution. The petitioners said that their problem squarely relates to the outcome of Land Case No. 7 of 1990, which affected them yet they were not parties to the dispute. The 5th respondent was said to be bound by that decision and even if the petitioners had appealed to the Minister as their final option at the adjudication stage, the outcome would have been the same as the Minister too would have been bound by that decision.
8. The 1st and 2nd respondents were also faulted for focussing on issues that are not directly related to the points they have raised in their preliminary objection.

Analysis & Disposition

9. I have considered the objection as raised and the rival submissions filed. The issue to be decided is whether the objection should be allowed. My first problem with the objection as formulated relates to its meaning and/or purport.

The first point raised in the objection is that the petitioners have not exhausted all the processes available under the Land Adjudication Act. It seems clear to me that the first point refers to all the petitioners. That point does not talk of SOME petitioners. It makes reference to the petitioners, meaning in essence all of them. The truth is: Some petitioners exhausted the process and point No. 2 in the objection is clear on this. The 1st, 9th and 14th petitioners are said to have appealed to the Minister. Therefore, to include these three in the first point was wrong.

10. Then there is the last point – point No. 3 – which the petitioners alleged is not a pure point of law. That point states that the petition lacks merit. In my view, that point is not one of law. It is a factual point that can suitably be raised in an application to dismiss or strike out the petition or in any of the other responses that the respondents filed. It cannot be urged before court as a pure point of law. Moreover, the merits of any given case, including those of a petition like the one herein, can only be assessed after trial.

11. More crucially however is the observation made by the petitioners that the objection as raised is not a proper objection as envisaged by the law. As pointed out by the petitioners, Mukisa's case (supra) is authority for the legal position that a proper preliminary objection is in the nature of what used to be a demurrer. It is supposed to be one raised only when the facts pleaded by the other side are admitted or deemed to be correct. Where the facts are disputed in a manner that appears to the court to be reasonable, then it would be improper to entertain a preliminary objection. This is precisely what has happened in this matter. The respondents have made strong rebuttals based on both facts and law. All the material averments in the petition necessary for determination of crucial issues are denied. Everything is denied. Nothing is deemed to be correct. Why then raise a preliminary objection?

12. In **Oraro - vs- Mbaja [2005] KLR 141** Ojwang, J. (as he then was) observed thus:

“A preliminary objection correctly understood is now well defined as, and declared to be, a point of law which must not be blurred by factual

details liable to be contested, and in any event to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seek 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.”

13. The preliminary objection before me is not based on uncontested or admitted facts. It is certainly not in the nature of what used to be a demurrer. For a demurrer in the olden days was used to challenge the legal sufficiency of another party's complaint or claim. That was always done on the assumption of the correctness of what had been pleaded. That is not the position I find here. The points raised are appropriate for consideration during trial but they certainly fall short of the requirements for a proper preliminary objection. Even the issue of jurisdiction as raised is hinged on contested facts. In **Peter Ngugi Kabiri -vs- Esther Wangari Githinji & Another [2015] eKLR and Kutima Investments Ltd. - vs- Muthoni Kihara & Another [2015] eKLR** the Court of

Appeal was emphatic that it is a fundamental right of a party to be heard.

14. In this matter itself, the responses filed to the petition seem to me not only detailed but also weighty. They in fact seem to cover more areas of law than the issues raised in the objection. The respondents are not admitting any of the crucial averments made by the petitioners. That is why it is necessary to hear all the parties in this matter. That way, the court will then pronounce itself on all the issues, including that of jurisdiction, at one go.

15. Bearing all this in mind, my finding is that the preliminary objection as raised is for dismissal and I hereby dismiss it. Costs in the cause.

RULING on preliminary objection dated 30th September, 2024,
DATED, SIGNED and **DELIVERED** in open court at **KITUI** this
16TH day of **DECEMBER, 2025**.

In the presence of;

Court Assistant - Musyoki

Muide for Respondents – present

Respondents - present

Kilonzi for M/S Kiama for Petitioners

Kuria (AG’s office) – absent

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI