

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
VOI

ELC APPEAL NO. E016 OF 2025

JOSEPH KYALO MATIKELA

.....
APPELLANT

VERSUS

WASYA MAKATO

.....
RESPONDENT

*(Appeal from the Ruling of Hon. C.K. Kithinji SPM delivered on
19th June 2025 at Taveta Magistrate Court ELC Case No. E029
of 2024)*

JUDGMENT

1. The salient and singular issue before this Court sitting on appeal is whether the Appellant's preliminary objection before the trial court was merited.
2. The Learned Magistrate upon considering the Appellant's preliminary objection dated 24th February 2025 which sought for dismissal of the Respondent's suit pronounced herself as follows;

“9... The issues raised are questions of fact which the court

needs to hear and determine.

10. The issue of whether the Plaintiff is a legal representative and her authority to bring the suit is an issue in dispute not having been pleaded that the Plaintiff inherited the land. Adjudication was long after the demise of her husband and they had a joint interest in the matter, it is pleaded. This issue can also not be determined in a preliminary objection in the circumstances of the present suit.

11. In the end, it is my finding that the objection raised is not a proper preliminary objection. The same is dismissed...”

3. Dissatisfied with the outcome, the Appellant filed this appeal through a Memorandum of Appeal dated 18th July 2025. The following are the grounds of Appeal as listed on the face of the Memorandum of Appeal;

1) THAT the Learned trial magistrate erred in law and in fact in dismissing the 2nd Defendant’s preliminary objection dated 24th February 2025 on the basis that it was not a proper preliminary objection.

2) THAT the Learned Magistrate erred in law and in fact by failing to appreciate the doctrine of exhaustion is a bar to any litigant who refuses, fails and neglects to exhaust

all disputes resolution mechanisms provided by statute before filing a suit.

4. On the basis of those grounds, the Appellant sought the following reliefs: -

a) The appeal be allowed with costs.

b) The ruling of the lower court delivered on 19th June 2025 dismissing the 2nd Defendant's preliminary objection be set aside and the Respondent's suit be struck out/dismissed with costs.

5. The Appeal was canvassed by way of written submissions pursuant to the directions issued by this court. The Appellant filed his written submissions dated 29th October 2025. The Respondent in contesting the Appeal filed written submissions dated 6th November 2025.

6. The Appellant submitted on the following issues:-

i. Whether the Learned Magistrate erred in law and fact in dismissing the 2nd Defendant's preliminary objection dated 24th February 2025 on the basis that it was not a proper objection.

ii. Whether the Learned Magistrate erred in law and in fact by failing to appreciate that the doctrine of

*exhaustion is a bar to any litigant who refuses, fails
and or neglects to exhaust all*

*dispute resolution mechanisms provided by statute
before filing a suit.*

7. Citing the case of *Mukisa Biscuit vs West End Distributors (1969) E.A 696*, it was argued that the preliminary objection was properly before court. The court was invited to note that at paragraph 21 of the plaint the Respondent admits that the title No. Taita/Taveta/Challa Njukini/8244 which is the suit property arose directly from a land adjudication process and that the suit property is a first registration from the Challa/Njukini adjudication area. Challa/Njukini area was declared an adjudication section on 24th March 2025 pursuant to the provisions of section 5 of the Land Adjudication Act and further all disputes arising from the adjudication process ought to be handled under the provisions of the Land Adjudication Act.
8. It was further submitted that the main purposes of land adjudication is inter - alia ascertainment and registration of land rights and interests in community or trust land and that the process also includes an elaborate dispute resolution mechanism which culminates in issuance of the

title deed.

9. For those reasons the court was urged to find that the preliminary objection was proper and allow the same.
10. On the doctrine of exhaustion, it was submitted that the Respondent failed to refer the dispute to the dispute resolution mechanism provided for under the Act and she is now barred from filing this suit and it matters not what excuses are given. Reliance was made to the cases of Mutanga Tea & Co. Ltd vs Shikara Limited & Anor [2015] eKLR, Mwasighwa & 55 Others vs Mbulia Community Land & 3 Others [2024] eKLR, Tobias Achola Osindi & 13 Others vs Cyprian Otieno Ogallo & 6 Others [2013] eKLR and the provisions of Section 19(2) and (3), Section 21 (3), Section 25, Section 26 and Section 29 (3) of the Land Adjudication Act.
11. The Court was urged to allow the Appeal and grant the reliefs sought.
12. The Respondent submitted on the following three issues; whether the preliminary objection has met the threshold in law, whether the court erred in not appreciating the doctrine of exhaustion and who should bear the costs of the suit.

13. On the threshold of the preliminary objection, it was submitted that the objection raised by the Appellant did not meet the threshold set

in law. The Respondent's suit is for recovery of land illegally and fraudulently registered in the Appellant's name and further particulars of fraud had been pleaded which could not be determined by way of a preliminary objection. Reliance was placed on the cases of John Njoroge Gitau & Others vs George Mwangi Gitau & 3 Others [2020] eKLR, George Oraro vs Baraka Mbaja [2005] eKLR and Mukisa Biscuits (Supra).

14. On the doctrine of exhaustion, it was submitted that the Respondent had stated in her pleadings that she discovered about the illegal registration of the property long after the adjudication process had long been completed and register closed. It was also submitted that the law is very clear that, once a title deed has been issued and the Land Adjudication Process finalised the land adjudication officials have no powers to reopen the disputes. Reliance was made to the case of Samuel Mulinge Kyalo & 2 others Ad Director of Land & Others (2025) eKLR

15. The Court was urged to uphold the decision of the Learned

Magistrate and dismiss the Appeal with costs.

16. Having considered the appeal and bearing in mind the salient issue arising for determination as aforementioned at the opening

paragraph of this judgment, this court refers to the often-cited case of Mukisa Biscuit case (Supra) which has been the watershed as to what constitutes preliminary objections. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection 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...”

17. This statement of the law has been echoed time and again by the courts: see for example, Oraro -v- Mbaja [2007] KLR 141.

18. In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that;-

“.... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

[emphasis added]

19. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis added]

20. The Appellant’s Preliminary objection dated 24th February 2025 was to the effect that the suit is

misconceived, bad in law and an abuse of the due process of the court and further that the Respondent has no locus standi to bring the suit and the same is defective and ought to be dismissed with costs.

21. In arguing the preliminary objection before the trial court, the Appellant submitted that the suit was misconceived and abuse of the court process because the Respondent had not gone through the elaborate dispute resolution mechanisms provided for under the Land Adjudication Act before filing of the suit.
22. On the aspect of locus, it was argued that the Respondent was claiming land belonging to her deceased husband and she had not claimed to be the legal representative of her deceased husband and hence she had no locus.
23. The Respondent on the other hand argued that the objection had not met the threshold because issues of fraud had been pleaded and further that the Respondent had locus to institute the suit.
24. In the instant case, I have painstakingly perused the entire record of appeal together with the pleadings filed herein and it is evident that the Preliminary objection raised by the Appellant sought to challenge facts which are disputed.
25. If the court will have to find which facts are true,

then it is not a matter of law. On the other hand, where the court decides a case by ignoring pleadings or admissions made, then ipso facto, that is a question of law. The court also cannot decide on whims or arbitrarily

or in fact manufacture facts. This court will deal with question of making a decision on no evidence, which is a matter of law.

26. A preliminary objection has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer.

27. To this end, the court agrees with the submissions made by the Respondent on that issue and as such the said Preliminary Objection raised by the Appellant does not meet the threshold. As was stated in the Oraro vs Mbaja Case (supra), a preliminary objection must not be blurred with factual details liable to be contested. This court is also guided by the cases of Kenneth Shitsugane versus County Government of Kakamega & Another [2021] eKLR and George Kamau Kimani & 4 Others versus County Government of Trans-Nzoia & Another [2014] eKLR.

28. From the analysis of this court, it is sufficient to state that the Learned Magistrate did not err in law and fact in dismissing the

Appellant's objection and hence there is no basis for this court to

interfere with her decision.

29. In view of the foregoing, it is the finding of this court that the Appeal lacks merit and the same is dismissed in its entirety.

30. On the issue of costs, the principles for awarding costs are governed by section 27(1) of the Civil Procedure Act, which grants the court full discretion, with the proviso that costs shall follow the event unless the court, for good reason orders otherwise. Having found that the appeal lacks merit, it therefore follows that the Respondent being the successful party is entitled to costs of defending the Appeal. The Respondent in submitting on costs urged the court to award a sum of Ksh 50,000/ as costs of defending the Appeal.

Considering that the appeal emanated from the ruling made by the trial magistrate on the Appellant's preliminary objection, this court in doing the best it can shall award a sum of Ksh 30,000/- as costs of the Appeal to the Respondent.

31. In the premises, and for the reasons alluded to;

the final orders that commend themselves to the court are
as hereunder;

- i. The Appeal be and is hereby dismissed.*

ii. The costs of the Appeal are awarded to the Respondent and assessed at Kshs 30,000/=

Dated, Signed and Delivered Virtually this 14th day of January 2026.

E. K. WABWOTO
JUDGE

ORIGINAL