

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCLJR NO. E010 OF 2025

***IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND MANDAMUS***

-AND-

***IN THE MATTER OF THE LAW REFORM ACT CAP 26 THE LAWS OF
KENYA***

***AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT
2015***

-AND-

***IN THE MATTER OF ARTICLES 40, 47, 48, 50 AND 159 OF THE
CONSTITUTION OF KENYA 2010***

-AND-

***IN THE MATTER OF LAND REFERENCE NUMBER
MAKUENI/KYALUMA/57 AND IN THE MATTER OF THE LAND CONTROL
BOARD OF MAKUENI/KYALUMA***

-BETWEEN-

**BENARD KITUVA NGANGAEX-PARTE
APPLICANT**

-VERSUS-

**LAND CONTROL BOARD OF MAKUENI/KYALUMA ..1ST
RESPONDENT**

LAND REGISTRAR, MAKUENI2ND RESPONDENT

-AND-

**JACINTA MUTIO WAMBUAINTERESTED
PARTY**

JUDGMENT

1. The Ex-parte Applicant filed the Notice of Motion dated 29th August, 2025 under the provisions of Article 23(3) of the Constitution, Section 8 of the Law

Reform Act and Section 13(7) of the Environment and Land Court Act 2011. He seeks issuance of the following orders against the Respondents: -

- 1) THAT an Order of Certiorari to remove into this Honourable Court, the decision by Land Control Board, MAKUENI/KYALUMA to refuse to grant consent to the Applicant and have the same quashed.**
 - 2) THAT an order of Mandamus to be directed to the Respondents compelling them to cancel the consent clandestinely issued to the Interested Party and subsequent issue of the title deed of land Parcel MAKUENI/KYALUMA/57 to the Interested Party.**
 - 3) THAT an order of stay and that of the status quo be granted to the Ex-parte Applicant pending the hearing and determination of the judicial review application.**
 - 4) THAT costs of the application be provided for.**
 - 5) THAT this Honourable Court be pleased to issue any other or further consequential orders.**
2. The application is supported by the affidavit of Benard Kituva Nganga sworn on 29th August, 2025 together with the statement of facts of even date. It is his case that he is the lawful owner of land Parcel No. Makueni/Kyaluma/57 and that after making a request for the subdivision of the land to the 1st Respondent, he was verbally denied a consent without any justifiable reasons being given. He further averred that the refusal to grant consent was irregular and wrongful exercise of discretion by the 1st Respondent.
3. The Ex-parte Applicant contended that the 1st Respondent fraudulently transferred land Parcel No. Makueni/Kyaluma/57 without his consent which was a violation of constitutional rights as the registered proprietor. He further

contended that the actions of the 1st Respondent have occasioned irreparable loss upon him. He urged the court to allow the application.

4. The application is opposed by the Interested Party vide the preliminary objection dated 22nd September, 2025 on the basis of the following grounds: -

- 1) **THAT the present application is *res judicata* as the Ex-parte Applicant herein Benard Kituva Nganga filed Makueni ELC No. 89 of 2019 Benard Kituva Nganga v Jacinta Mutio Wambua involving the same subject matter, the same parties litigating under the same title and a judgment was duly delivered by Lady Justice T. Murigi sitting at the Makueni ELC Court on 20th November, 2024.**
- 2) **THAT the doctrine of *res judicata* under Section 7 of the Civil Procedure Act Cap 21 laws of Kenya squarely applies and bars the Applicant from re-litigating issues that were directly and substantially in issue in the former suit.**
- 3) **THAT the Applicant is estopped from re-litigating issues already determined with finality the court having become *functus officio* in respect of the subject matter.**
- 4) **THAT this Honourable Court lacks jurisdiction to entertain the present proceedings as it would amount to sitting on appeal over a decision already rendered by a court of concurrent jurisdiction.**
- 5) **THAT the present judicial review application is an abuse of the court process, is frivolous, vexatious and intended to circumvent the judgment of the Honourable Court in Makueni ELC No. 89 of 2019 Benard Kituva Nganga v Jacinta Mutio Wambua.**
- 6) **THAT the application therefore offends the doctrines of finality of litigation, *res judicata*, *functus officio* and abuse of process and should be struck out with costs.**

5. Both the application and the preliminary objection were disposed of by way of written submissions.
6. In the Ex-parte Applicant's submissions dated 15th October, 2025, Counsel contended that Section 6 of the Land Control Act provides that a party is required to obtain consent from the Land Control Board. Counsel further contended that the 1st Respondent failed to provide reasons for failure to grant the consent nor did it call upon the Ex-parte Applicant to provide any additional evidence if the same was insufficient. It was submitted that the transfer of the entire suit property to the Interested Party was irregular since it was only limited to 12 acres.
7. Submitting on whether the suit is *res judicata*, Counsel contended that the preliminary objection contains points of law and fact and the court would have to determine whether the issues herein are directly and substantially in issue in the other suit. Counsel faulted the Interested Party for not attaching the pleadings and the judgment of the previous case. Counsel urged the court to disallow the preliminary objection.
8. In the Interested Party's submissions dated 7th November, 2025, Counsel submitted that the present application amounts to a collateral attack on the final judgment delivered in **Makueni ELC No. 89 of 2019 Benard Kituva Nganga v Jacinta Mutio Wambua**. Counsel argued that the previous case involved the same parties litigating under the same title over the same subject matter. It was further argued that the matter was heard and determined on the merits.
9. Counsel submitted that the court is *functus officio* in respect of the subject matter as the dispute was determined with finality. It was argued that the present application amounts to a blatant abuse of court process and that it should be dismissed with costs accordingly.

10. Two issues for determination arise from the present application namely: -

a) *Whether the preliminary objection herein is merited?*

b) *Whether the Ex-parte Applicant has sufficiently demonstrated that judicial review orders of certiorari and mandamus ought to issue against the Respondents.*

11. The law on preliminary objections is settled. A preliminary objection must be on a pure point of law. Sir Charles Newbold, P. coined an apt description of what constitutes a preliminary objection in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** (at page 700) wherein the learned judge held as follows: -

“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 demurrer. It raises a 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 had to be ascertained or if what is sought is 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.”

12. In **Oraro v Mbaja [2005] eKLR**, J.B. Ojwang J. (as he then was) described it as follows: -

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears

“factual aspects calling for proof, or seeks 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 Respondent has sought that the instant application be struck out on the basis that the same is *res judicata* **Makueni ELC No. 89 of 2019 Benard Kituva Nganga v Jacinta Mutio Wambua** that was heard and determined on merit. In her submissions, she contended that parties as well as the subject matter are the same which offends Section 7 of the Civil Procedure Act.
14. As pointed out in *Oraro case (supra)*, a preliminary objection must not be clouded by factual details which are likely to be contested. The court has not had the benefit of perusing the pleadings filed in **Makueni ELC No. 89 of 2019 Benard Kituva Nganga v Jacinta Mutio Wambua** in order to ascertain that the parties therein, the subject matter and the issues raised are identical to those in the present suit. The court cannot speculate on the similarity of the both suits since the opposing sides have strenuously contested the factual issues being raised in the respective cases.
15. The preliminary objection herein fails to meet the threshold set out in the decision of **Mukisa Biscuit (supra)**. It does not raise a pure point of law.
16. Accordingly, the preliminary objection herein has been improperly raised as it is founded on disputed facts regarding the coincidence in the identity of the parties and the issues pertaining to the suit property. It does not pass the test of a valid preliminary objection.
17. The preliminary objection dated 22nd September, 2025 is devoid of merit and must accordingly be dismissed with costs.
18. Moving on to the second issue, it is the Ex-parte Applicant's case that he applied for consent for the subdivision of the suit property and that the 1st Respondent unjustifiably refused to grant him the said consent. He further

contended that Interested Party was clandestinely granted consent leading to an irregular transfer of the suit property.

19. Section 9 of the Land Control Act gives the Land Control Board of that particular area the mandate to grant or refuse consent in respect of a controlled transaction when an application thereof has been made.

20. Section 11 of the Land Control Act outlines the recourse that is available to a party once the Land Control Board refuses to grant consent. The law outlines as follows: -

(1) Where a land control board refuses to grant consent in respect of a controlled transaction, the applicant may, within thirty days of the copy of the board's decision being delivered or posted under section 16(2) of this Act, appeal to the provincial land control appeals board for the province in which the land in question is situated.

(2) A provincial land control appeals board shall, in its absolute discretion, hear and determine all appeals made to it under subsection (1), and, subject to the right of appeal conferred by section 13, the decision of a provincial land control appeals board shall be final and conclusive and shall not be questioned in any court.

21. In this instance, the Ex-parte Applicant did not adduce any evidence that he filed a formal appeal to the provincial land control appeals board as specified in the Land Control Act.

22. In the case of **Geoffrey Muthinja & another v Emanuel Muguna Henry & 1756 others [2015] eKLR**, the Court of Appeal held as follows: -

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is

invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. 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 mechanism in place for resolution outside of courts. This accords with article 159 of the constitution which commands Courts to encourage alternative means of dispute resolution.”

23. The Court of Appeal went on to reiterate the above position on the case of **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR**, where it aptly stated as follows: -

“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No 552 of 2012, and Speaker of National Assembly v Njenga Karume [2008] 1KLR 425. We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

24. The Supreme Court went on to underscore the principle of exhaustion of administrative remedies in the case of **Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors**

in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, wherein it authoritatively held as follows: -

“In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

25. Having failed to adduce evidence that he filed an appeal pursuant to Section 11 and the succeeding Section 13 of the Land Control Act, the Ex-parte Applicant has not proved that he fully exhausted the appeal mechanism on the refusal to grant him the appropriate consent.
26. On the basis of the foregoing, the application herein is devoid of merit and is dismissed with costs.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF FEBRUARY, 2026.

IN THE PRESENCE OF:

Mr. Mutinda fro Applicant.

Mr. Ngugi for Mr. Njagi for Interested Party.
Court assistant – Steve Musyoki

ORIGINAL