

**IN THE COURT OF APPEAL  
AT NAKURU**

**(CORAM: WARSAME, MATIVO & GACHOKA,**

**JJ.A.) CIVIL APPEAL NO. E014 OF 2021**

**BETWEEN**

**KIROKET OLE PUNYUA.....APPELLANT**

**AND**

**UMASH OLE MWANIK.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY DIRECTOR OF ADJUDICATION**

**AND SETTLEMENT, NAROK.....2<sup>ND</sup>**

**RESPONDENT THE HON. ATTORNEY GENERAL.....**

**3<sup>RD</sup> RESPONDENT**

*(An appeal from the Ruling and Order of the Environment  
and Land Court at Narok (Mohammed Noor Kullow, J.)  
delivered on 16<sup>th</sup> February 2021*

***in***

***ELC Petition No. 24 of  
2017)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The dispute giving rise to this appeal centres on two parcels of land known as Plot No. Narok CIS/Mara-Kojong'a/471 and Plot No. Narok CIS/Mara-Kojong'a/472, situated within the Kojong'a Adjudication Section in Narok County (hereinafter referred to as "the suit property").

2. The appellant (**Kiroket Ole Punyua**) challenges the validity of objection proceedings conducted in 2009 before the District Land Adjudication Officer, Narok, which resulted in the suit property being registered in the name of the 1<sup>st</sup> respondent (**Umash Ole Mwanik**). The central legal question before this Court is whether the appellant was entitled to invoke the constitutional jurisdiction of the Environment and Land Court directly, without first exhausting the statutory dispute resolution mechanism prescribed under the Land Adjudication Act, Cap. 284 of the Laws of Kenya.
3. The appellant, contends that he purchased the suit land from two persons whose names appeared in the original Kojong'a Adjudication Register, namely Virginia Njeri and Estri Wangari Njoroge, while the land was still under the adjudication exercise. Following the purchase, the sellers migrated from the area and could not be traced. The appellant moved onto the land, and remained in an uninterrupted occupation for over thirty years. Unknown to him, however, the 1<sup>st</sup> respondent, Umash Ole Mwanik, had in 2009 lodged objection proceedings

before the County Director of Land Adjudication and Settlement (the 2nd respondent) in respect of the suit land.

4. In 2009, the 1<sup>st</sup> respondent, lodged objection proceedings before the County Director of Land Adjudication and Settlement (the 2<sup>nd</sup> respondent) in respect of the suit property under Objection Nos. 587 and 588, Kojong'a Adjudication Section. On 18<sup>th</sup> September 2009, the District Land Adjudication Officer ruled in favour of the 1<sup>st</sup> respondent. Pursuant to that ruling, the 1<sup>st</sup> respondent obtained certificates of title to the suit properties in the year 2013. The appellant contends that neither he nor the original registered owners were served with notice of the objection proceedings or afforded any opportunity to participate in the hearing, and that the presiding officer proceeded solely on the testimony of the 1<sup>st</sup> respondent, the record reflecting merely that "both defendants are absent."
5. In 2014, the applicant was served with a criminal charge of trespass in Narok Criminal case No. 197 of 2014. He alleges that that charge was his first intimation that, there was dispute over the suit property which had already been

resolved against

his interest and that a title had issued in consequence. The statutory framework under the Land Adjudication Act prescribed a mechanism for a person aggrieved by such a determination to seek redress through a ministerial appeal under section 29 of the Act. The record is conspicuously silent as to why that avenue was not explored.

6. Instead, in October 2015, the appellant, acting through counsel, filed an Originating Summons in E.L.C.C No. 822 of 2015 (O.S) in the High Court of Kenya at Nakuru, claiming adverse possession of the suit property against the 1<sup>st</sup> respondent. That filing is significant for two reasons. First, it demonstrates that the appellant was legally represented and fully seized of the dispute as early as 2015. Second, by framing the claim as one of adverse possession, the appellant was himself acknowledging that the title to the land had vested in the 1<sup>st</sup> respondent and that the route to disturbing it lay through a substantive challenge precisely the kind of challenge that the statutory framework required him to pursue through the prescribed mechanisms before approaching a court.

7. Thereafter, in 2017, the appellant filed Narok E.L.C No. 130 of 2017 against the 1<sup>st</sup> respondent. Those proceedings were withdrawn with costs on 23<sup>rd</sup> October 2017. One month later, in November 2017, the appellant filed ELC Petition No. 24 of 2017; the proceedings from which this appeal arises; this time invoking Articles 22, 40 and 50(1) of the Constitution of Kenya, 2010. The gravamen of the petition was that the 2<sup>nd</sup> respondent had conducted and concluded the 2009 objection proceedings without notifying him, without according him a hearing, and on the unchallenged testimony of the 1<sup>st</sup> respondent alone, in alleged violation of his right to a fair hearing under Article 50(1) and his right to protection of private property under Article 40. The appellant further alleged that the 1<sup>st</sup> respondent had benefited from those proceedings in circumstances amounting to fraud.

8. The appellant accordingly prayed for: a declaration that the proceedings and ruling of the District Land Adjudication Officer of 18<sup>th</sup> September 2009 in Objection Nos. 587 and 588 were contrary to Article 50(1) of the Constitution; an order cancelling

the registration of the suit property in the name of the 1<sup>st</sup> respondent and the consequent cancellation of the title deeds; and costs.

9. Contemporaneously with the petition, the appellant filed a Notice of Motion dated 7<sup>th</sup> November 2017 under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking, inter alia, a temporary injunction restraining the 1<sup>st</sup> respondent from entering upon, dealing with, charging, subdividing or transferring the suit land pending the hearing and determination of the petition.
10. The 1<sup>st</sup> respondent promptly filed a Preliminary Objection in response on three grounds: first, that the Environment and Land Court lacked jurisdiction to entertain the petition given that the appellant's complaint being a challenge to an administrative decision of the Land Adjudication Officer, ought to have been brought by way of judicial review under Order 53 of the Civil Procedure Rules, 2010; second, that the petition was frivolous and an abuse of the court process since the appellant was seeking his reliefs through a wrong forum; and

third, that the appellant had failed to exhaust the statutory right of appeal to the Minister under section 29 of the Land Adjudication Act, Chapter 284 of the Laws of Kenya, before approaching the court.

11. In a ruling delivered on 16<sup>th</sup> February 2021, the Environment and Land Court (Kullow J. upheld the Preliminary Objection and struck out the petition with no order as to costs.
12. The court found that the appellant had recourse under section 30(3) of the Land Adjudication Act to appeal to the Minister against the denial of a fair hearing, and that the appellant had not furnished any reasons why he had failed to pursue that avenue before approaching the court. The court further held that that section 30(1) of the Land Adjudication Act precluded any person from instituting, and any court from entertaining, civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that section had become final in all respects under section 29(3) of the Act. The learned Judge stated:

*“There is nothing to show that the provisions of the Land Adjudication Act which deal with dispute resolution mechanisms 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.”*

13. Dissatisfied with that ruling, the appellant filed the present appeal to this court on the following grounds: that the learned judge erred:

- a. in dismissing the petition without affording the 2<sup>nd</sup> and 3<sup>rd</sup> respondents an opportunity to be heard;*
- b. in denying the appellant a full hearing on a matter involving land;*
- c. in failing to find that the statutory remedy was effectively unavailable to the appellant, given that the 1<sup>st</sup> respondent had already obtained title through proceedings conducted entirely behind his back;*
- d. in condemning the appellant to a forum that is, in the circumstances, unconstitutional;*
- e. in dismissing the petition in total disregard of the appellant's submissions; and*
- f. in dismissing the petition when no defence had been filed..*

14. When the appeal came up for hearing on 3<sup>rd</sup> February 2026, learned counsel Mr. Oguso appeared for the appellant and relied on written submissions. The respondents, though

served

through their counsel Meingati & Co. Advocates at meingaticoadvocates@gmail.com, did not appear and failed to file submissions. The Court noted the service on record and proceeded to hear the matter.

15. The appellant contended that the preliminary objection was raised solely by the 1<sup>st</sup> respondent but the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were never served and never participated, yet the ruling bound them as though they had been heard. The appellant further contends that the objection raised by the 1<sup>st</sup> respondent was not a proper preliminary objection within the meaning of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, because it required factual interrogation including whether fraud had occurred, whether the appellant had been served, and whether he was in occupation and therefore could not be disposed of summarily on a pure point of law.

16. On the question of exhaustion of statutory remedies, the appellant acknowledged the general rule stated in **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others**

**[2015] eKLR**; that courts ought ordinarily to be fora of last resort and that prescribed dispute resolution mechanisms should first be exhausted. However, he submitted that the doctrine is not absolute and that exceptions apply: first, where the statutory remedy has been rendered illusory or ineffective; and second, where constitutional rights are directly implicated in a manner that a statutory forum is not competent to address. In the circumstances of this case, the appellant averred that both conditions were met. The allegations of fraud and denial of fair hearing raised constitutional questions that exceeded the competence of a ministerial appeal. Moreover, the statutory remedy under section 29 of the Land Adjudication Act had been overtaken by the 1<sup>st</sup> respondent's procurement of certificates of title through the impugned proceedings, rendering any appeal to the Minister futile.

17. Citing **Arthi Highway Developers Ltd v West End Butchery Ltd & 6 Others [2015] eKLR**, the appellant emphasised that once the 1<sup>st</sup> respondent had already fraudulently procured title deeds, any appeal to the Minister

was overtaken and futile as titles obtained through fraud cannot be protected under section

26 of the Land Registration Act. To insist that the appellant pursue an administrative avenue in the face of a fraudulent and subsisting title was, in the appellant's submission, to elevate form over substance in a manner repugnant to Article 159(2)(d) of the Constitution.

18. The appellant further contended that the learned judge erred in dismissing the petition in its entirety despite the absence of any defence by the respondents, and that uncontroverted evidence must be accepted as true unless inherently incredible. Relying on **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] eKLR**, the appellant submitted that dismissal of a petition raising serious factual questions of fraud, occupation, and service, without any defence having been filed, contravened the audi alteram partem principle and denied the appellant access to justice under Article 48 of the Constitution.

19. The appellant accordingly prayed that the appeal be allowed, the ruling of the Environment and Land Court set aside, and

ELC Petition No. 24 of 2017 reinstated for hearing and determination on its merits.

20. As this is a first appeal, our mandate, by dint of Rule 29 (1) of the Court of Appeal Rules, requires a fresh and exhaustive examination, re-evaluation and re-analysis of the entire record with a view to drawing our own inferences and making our own independent conclusion, on all the material before us. We pay a measure of deference to the findings of the first instance Court but are free to depart from them in appropriate cases, where they are founded on no evidence, constitute a misapprehension of the law or are plainly wrong.

21. The sole issue that fell for determination before the learned judge, and which now falls for determination before this Court, is whether the appellant was entitled to approach the Environment and Land Court by way of constitutional petition without first exhausting the dispute resolution mechanism prescribed under the Land Adjudication Act, Chapter 284 of the Laws of Kenya. The resolution of that issue requires an examination of the nature and character of the Act, the scope of

the exhaustion doctrine, and the relationship between statutory procedure and constitutional jurisdiction.

22. The Land Adjudication Act is a self-contained and comprehensive legislative scheme for the ascertainment and recording of rights and interests in land within adjudication sections. This Court, in **Julia Kaburia v Kabeera & 5 Others [2007] eKLR**, examined the character of the Act with clarity and held:

*"The Land Adjudication Act provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By section 30(1) and (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final."*

23. Within that scheme, section 26 of the Act provides a mechanism for objection before the adjudication officer. Section 29 provides that any person aggrieved by the determination of an objection may, within sixty days of the date of determination, appeal to the Minister, whose order shall be

final. Section 30(1) then erects the jurisdictional bar in express terms: *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 section has become final.* The architecture is deliberate. Parliament designed a tiered process: objection, ministerial appeal, and only thereafter the possibility of court intervention, and assigned to each tier its proper role and mandate which does not overlap.

24. This Court in **Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 Others (Civil Appeal E033 of 2021) [2023] KECA 1280**, this court held:

*"The Act is clear that any person aggrieved by a decision made under section 26 of the Act must follow the process under section 29 and appeal to the Minister. Once the Minister, or the panel delegated, makes a determination, his order is final. The option the Appellant had was to pursue Judicial Review process provided under Article 47 of the Constitution, and the Fair Administrative Action Act, 2015. He could not re-open the case and challenge it except through Judicial Review.*

*The Appellant was*

*attempting to undo the process he participated in using a process that is not provided for, and that is not allowed."*

25. In **Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019) [2022] KECA 119**, this Court held that

*"there is an elaborate process that is laid down by the Land Adjudication Act, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication, and it is therefore necessary that it is first employed before resort is made to the Courts, and also shielded from unnecessary and unjustified abuses. Indeed, it has been severally held by this Court that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the courts is invoked."*

26. The principle invoked in Bhaijee is not isolated. It is an expression of a doctrine firmly embedded in our jurisprudence and grounded in Article 159(2)(c) of the Constitution, which commands courts to promote alternative forms of dispute resolution. The locus classicus is **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**. There, following Kenya's return to multiparty politics, Karume crossed the floor and the Speaker declared his parliamentary seat vacant. Instead of challenging that declaration by election petition before an Election Court as Parliament

had prescribed, Karume

sought judicial review by certiorari in the High Court under Order 53. This Court granted a stay and held:

*"In our view, there is considerable merit in the submission that where there is 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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."*

27. This Court gave that principle its post-2010 constitutional foundation in **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** and stated:

*"Courts ought to be fora of last resort and not the first port of call the moment a storm brews... 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 mechanisms in place for resolution outside the Courts."*

28. The appellant raises two reasons why section 29 was not pursued: that he was unaware of the objection proceedings because they were conducted without notice, and that by the time he discovered what had occurred the fraud had

produced

a registered title, rendering the ministerial appeal futile.  
Neither

reason withstands scrutiny. If the proceedings were indeed conducted without notice, the grievance was one of procedural unfairness amenable to judicial review of the officer's conduct. As for fraud, it is an averment that has never been tested before any tribunal. The proper statutory vehicle for raising that averment was the ministerial appeal under section 29, and thereafter, if necessary, judicial review of the Minister's decision. The existence of an unresolved allegation of fraud does not, without more, displace the statutory architecture, and neither does framing that allegation in constitutional language. To hold otherwise would mean that any litigant who appends the word 'fraud' or invokes the constitution to an adjudication complaint is entitled to bypass the Act entirely. The Act would be rendered a dead letter. That cannot be the law.

29. The appellant urged that Article 159(2)(d) of the Constitution, which commands courts to administer justice without undue regard to procedural technicalities, saves his petition from the jurisdictional bar. We firmly reject that argument. The section

29 ministerial appeal is not a procedural technicality in any sense recognised by law. A procedural technicality is a formality

of pleading or filing, a defect of form that can be cured without going to the root of jurisdiction. The section 29 requirement is nothing of the sort. It is the substantive condition precedent that Parliament expressly enacted to govern when a court may entertain civil proceedings concerning land in an adjudication section. It is a jurisdictional gateway, constructed deliberately, for identifiable reasons of policy to ensure that the internal mechanisms of the Act are first employed, and that land rights in adjudication sections are resolved with certainty and finality through the prescribed process. To characterise Section 29 as a "procedural technicality" is to misunderstand both the provision and the phrase. Article 159(2)(d) was designed to liberate courts from the tyranny of form over substance not to dissolve statutory jurisdiction clauses whenever they stand in a litigant's way.

30. In the end, the appellant's contention that the preliminary objection filed by the 1<sup>st</sup> respondent did not meet the threshold established in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** does not hold. The Mukisa Biscuit test requires that a preliminary

objection

consist of a point of law which has been pleaded or arises by clear implication, and which, if determined as a preliminary point, may dispose of the suit. The objection raised by the 1<sup>st</sup> respondent was simply this: the Environment and Land Court lacked jurisdiction to entertain the petition because the appellant had not exhausted the statutory mechanism under section 29 of the Land Adjudication Act, and because the express bar in section 30(1) had not been lifted. That is a pure point of law. Whether the appellant was served with notice of the 2009 adjudication proceedings, whether fraud occurred, and whether he was in occupation are all irrelevant to the threshold jurisdictional question. The section 30(1) bar turns on one inquiry alone: has the adjudication register become final under section 29(3)? That question admits of a clear answer that requires no evidence. In our view, the preliminary objection was properly constituted, and the learned judge was correct to hear and sustain it.

31. Again, the appellant's contention that the learned judge erred in striking out the petition without affording the 2<sup>nd</sup> and 3<sup>rd</sup> respondents an opportunity to be heard, thereby condemning

them unheard has no merit. No finding was made against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; no order was made against them. The striking out of the petition was the direct consequence of the appellant's own failure to exhaust the prescribed statutory process. That fact that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents chose not to participate does not render the ruling that dismissed the petition against them a nullity, nor does it constitute a breach of any right that those parties themselves could assert.

32. We are satisfied that the learned judge was correct in sustaining the preliminary objection. The Land Adjudication Act prescribed a clear, exclusive, and exhaustive dispute resolution mechanism. The appellant did not exhaust that mechanism. He sought instead to invoke the constitutional jurisdiction of the Environment and Land Court without traversing the statutory path that Parliament required him to follow.

33. It must be stated plainly: the Constitution does not override procedures that Parliament has lawfully prescribed and that have not been declared unconstitutional. Nor does it empower courts to conjure a parallel jurisdiction that does not

otherwise

exist or a construct of convenience dressed in constitutional language to circumvent statutory architecture. We decline that invitation.

34. The appeal accordingly fails and is dismissed. Having regard to the respondents' non-appearance and non-participation before this Court, each party shall bear its own costs.

**Dated and delivered at Nakuru this 17<sup>th</sup> day of March, 2026.**

**M. WARSAME**

.....  
**JUDGE OF  
APPEAL J.**

**MATIVO**

.....  
**JUDGE OF APPEAL**

**M. GACHOKA, C.Arb, FCIArb**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original.*

*Signed*

DEPUTY REGISTRAR