

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

SIMON MUTHIANI TAMA1ST
APPELLANT
MUSYOKA MBUNGUE2ND APPELLANT
MULI MBUNGUE3RD APPELLANT

-VERSUS-

SHADRACK MUTUKU MUTAVI1ST
RESPONDENT
MUTUKU KITUMA2ND
RESPONDENT

(Being an appeal from the ruling of Hon. P. N. Gesora, Chief Magistrate delivered on 24th April, 2025 in Makueni MCELC E023 of 2024)

JUDGMENT

1. The Appellants appeal from the Ruling and order of Hon. P.N. Gesora (CM) delivered on 24th April, 2025 in Makueni MCELC NO. E023 of 2024.
2. In the subordinate court, the Appellants were the 1st, 3rd and 4th Defendants respectively. They had raised a preliminary objection vide a notice dated 23rd July, 2024 which was dismissed with costs against them.
3. Dissatisfied with the outcome, the Appellants filed the Memorandum of Appeal herein dated 22nd May, 2025 on the basis of the following grounds: -
 - 1) THAT the Learned Magistrate erred in law and in fact, by holding that the cause of action and prayers sought in the plaint and notice of motion in the above elucidated suit, and the Preliminary Objection raised by the appellants can only be determined at the full hearing of the suit and yet the orders sought in the plaint and notice of motion relate to the boundary and ownership dispute of the land in issue between the parties and/or their predecessors which issues had already been fully heard and

conclusively determined through the adjudication process culminating in the Minister's Decision in Appeal No. 196 of 2012 which was upheld by this court in Makueni ELC Judicial Review (No. 3 of 2018) and further, whose implementation is currently ongoing and in the hands of The Director of Land Adjudication and settlement, The chief Land Registrar, Makueni and The Director Survey of Kenya who visited the land in dispute on 3rd April 2024 and pointed out and affirmed the boundaries of the area in dispute in relation to the three families who are parties to the suit and this appeal.

- 2) THAT the Learned Magistrate erred in law and in fact, in failing to appreciate that the matter before it is res judicata, as the cause of action was heard and dealt with conclusively by the competent authorities and this court hence addressing the core dispute of the ownership and boundaries of the area in dispute being the extent and boundaries of three properties owned by the parties herein and/or their predecessors that is Kibwezi/Mumela/1053, Kibwezi/Mumela/1054 and Kibwezi/Mumela/1509.
- 3) THAT the Learned Magistrate erred in law and in fact, in failing to appreciate that the court is functus officio, as the cause of action was heard and dealt with conclusively by the competent authorities and this court hence addressing the core dispute of the ownership and boundaries of the area in dispute being the extent and boundaries of three properties owned by the parties herein and/or their predecessors that is Kibwezi/Mumela/1053, Kibwezi/Mumela/1054 and Kibwezi/Mumela/1509.
- 4) THAT the Learned Magistrate erred in law and in fact, in failing to appreciate that the suit is premature as the Plaintiff has not exhausted all

statutory mechanisms as required by the doctrine of Exhaustion as the implementation of the decision of the Appeal to the Minister and Makueni ELC Judicial Review (No. 3 of 2018) is currently ongoing and in the hands of The Director of Land Adjudication and settlement, The chief Land Registrar, Makueni and The Director Survey of Kenya who visited the land in dispute on 3rd April 2024 and pointed out and affirmed the boundaries of the area in dispute in relation to the three families who are parties to this suit.

5) THAT the Learned Magistrate erred in law and in fact when it expressly acknowledged that the land in dispute and the same parties before it have been in previous litigation during the adjudication process leading to the Minister's Decision in Appeal No. 196 of 2012 and this court in Makueni ELC Judicial Review (No. 3 of 2018) and further whose implementation is currently ongoing and in the hands of The Director of Land Adjudication and settlement, The chief Land Registrar, Makueni and The Director Survey of Kenya who visited the land in dispute on 3rd April 2024, But still purported to have the powers/jurisdiction to hear and determine the suit whose final orders sought clearly seek to overturn those decisions including the decision of this court.

4. Based on the foregoing, the Appellants pray for the following orders to be made:-

- a) **The appeal herein be allowed and the ruling of the trial Court be set aside and this honourable court do find that the Preliminary Objection dated 23rd July 2024 is meritorious and allowed with costs to the appellants.**
- b) **The trial court has no jurisdiction to hear and determine the suit therein as the cause of action is res judicata.**

c) The trial court has no jurisdiction to hear and determine the suit therein as the court is functus officio.

d) That the Appeal herein be allowed and this honourable court do find that the decision delivered from the Adjudication process was final and conclusively dealt with the prayers sought in the trial court.

e) That the costs of this Appeal and the trial court be awarded to the Appellants with interest.

5. Parties agreed to dispose of the appeal by way of written submissions.

6. In the Appellants' submissions dated 1st November, 2025 Counsel contended that the present appeal challenges the lower court's finding that the issues raised in the Plaint, the Notice of Motion and the preliminary objection could only be determined at the full hearing of the suit. Counsel submitted that the trial court failed to appreciate that the dispute before it related to the ownership and boundaries of land and that the said issues had already been fully determined through the land adjudication process. That the subsequent appeal to the Minister Case No. 196 of 2012 was upheld by this Court in Makueni ELC Judicial Review No. 3 of 2018.

7. Counsel contended that the Respondent's suit before the trial court was an impermissible attempt to reopen matters conclusively determined by both the Minister and this Court rendering the lower court proceedings an abuse of court process. Counsel urged the court to allow the appeal with costs.

8. The Respondents filed their submissions on 23rd April, 2026. In no way did the Respondents address the court on the issues raised in the memorandum of appeal. Instead, Counsel took a completely different trajectory submitting on the threshold for granting an injunctive relief.

9. This being a first appeal, the court's duty is to re-examine the facts and the law in order to determine if the trial court fell into error. In the case of **MOHAMED MAHMOUD JABANE v HIGHSTONE BUTTY TONGOI OLENJA [1986] eKLR**, the Court of Appeal aptly held as follows: -

“More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who has had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu [1983] 2 KCA 100 at p 118 and Mwanasokoni v Kenya Bus Services and Others Civil Appeal 35 of 1985.”

10. The ten grounds supporting the memorandum of appeal can be summed up to one issue for determination as follows: -

*i) **Whether the learned magistrate erred in law and fact in dismissing the Appellants' preliminary objection dated 23rd July, 2024.***

11. It is the Appellants' case that the suit property was the subject of a dispute which was resolved within the purview of the Land Adjudication Act. It was further contended that the decision from the appeal to the Minister in Appeal No. 196 of 2012 was upheld by this court in Makueni ELC Judicial Review (No. 3 of 2018). The Appellants faulted the lower court for entertaining the suit which was in their view barred by the doctrine of *res judicata* and the doctrine of exhaustion.

12. On a keen perusal of the Record of Appeal, it is clear that the 1st Respondent filed a suit in the lower court vide Makueni MCELC e023 of 2024 against the Appellants for trespass into land Parcel No. KIBWEZI/MUMELA/1053 as pleaded in paragraphs 4 and 5 of the Plaint. Among the reliefs sought against the

Appellants in the suit are orders of eviction and damages for trespass. The land is registered in the name of Laban Mutavi Mbevi.

13. Delivering his ruling on the preliminary objection raised by the Appellants, the learned Magistrate observed as follows: -

“The reliefs sought from the body of the plaint specifically paragraphs 4 and 5 where he accuses the defendants having committed certain acts which have costed him not to enjoy the entire possession and use of the suit land namely Kibwezi/Mumela/1053. I note that there have been certain proceedings before other statutory bodies and even in the high court by way of judicial review proceedings. What the plaintiff is saying is that after all this was said and done certain atrocities have been committed by the objectors which ought to be adjudicated on.”

14. At paragraph 6 of their Statement of Defence, the Appellants pleaded that they hold a claim over the suit property land Parcel No. KIBWEZI/MUMELA/1053. Meanwhile, in the statement of defence, it has not been pleaded that the certificate of title was revoked and or cancelled by an order of the court.

15. In fairness, the Appellants could not fully demonstrate their claim over the suit property vide a preliminary objection when the title deed is in the name of the estate of Laban Mutavi Mbevi (Deceased) represented by the 1st Respondent.

16. In the case of **Jamii Bora Kenya Limited v Esther Wairimu Mbugua & another [2019] eKLR**, the court reiterated as follows: -

“A “preliminary objection” correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....”

17. In the case of David & 5 others v Muswii (Civil Appeal 525 of 2019) [2026] KECA 375 (KLR), the Court of Appeal aptly held as follows: -

“We think that if there ever was a case where the caution by the courts against frivolous preliminary objections should have been heeded, it is in this case. It is a classic case of attempting to use a preliminary objection as a sword to avoid resolution of the dispute through a proper hearing and on merits.

Nor do we not think that there is any merit or substance in the appellants’ submission that the ELC erred in holding that it had jurisdiction to hear and determine the respondent’s suit. A simple look at Article 162(2) (b) of the Constitution and section 13 of the Environment and Land Court Act, 2011 leaves no dispute that the ELC has jurisdiction to hear and determine cases of trespass to land.”

18. As correctly held by the learned Magistrate, the Appellants’ preliminary objection presented factual issues which were disputed and it was thus necessary that the dispute go to trial.

19. In the circumstances, the findings of the learned Magistrate precise and appropriate. This appeal is devoid of merit and is hereby dismissed with costs.

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HON. E. O. OBAGA

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 30TH DAY OF APRIL, 2026.**

IN THE PRESENCE OF:

Ms. Masheti for Mr. Wageni for Appellant

Ms. Kituri for Mr. Sang for Respondent.

Court assistant – Nyaaga & Musyoki

ORIGINAL