



**Mwake v Deputy County Commissioner, Masinga District & 2 others;
Katunge & 2 others (Interested Parties) (Environment and Land Petition
E011 of 2022) [2024] KEELC 375 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 375 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND PETITION E011 OF 2022
CA OCHIENG, J
JANUARY 31, 2024
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ARTICLES 47, 22, 23 AND 165 OF THE CONSTITUTION OF KENYA
AND
**IN THE MATTER OF SECTIONS 39(A) TO (G), 3(A) TO (D), 7, 9(1), (4),
11(1) A, E, H, I (2) (A) TO (D) OF THE FAIR ADMINISTRATIVE ACT 2015**
AND
IN THE MATTER OF MACHAKOS/KIVAA/2232
AND
IN THE MATTER OF MACHAKOS/ KIVAA/212

BETWEEN
NTHENYA WAMBUA MWAKE PETITIONER

AND
DEPUTY COUNTY COMMISSIONER, MASINGA DISTRICT 1ST
RESPONDENT
DISTRICT LANDS REGISTRAR, MACHAKOS 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

AND
ALEXANDER MUTISO KATUNGE INTERESTED PARTY
KATUNGE MULWA SIMBA INTERESTED PARTY



RULING

1. What is before Court for determination is the 3rd Interested Party's Notice of Preliminary Objection dated the 3rd March, 2023 against the Notice of Motion Application dated the 6th June, 2022 and Amended Petition dated the 25th July, 2022. The Notice of Preliminary Objection is premised on the following grounds:-
 1. That the Application and consequent Petition are fatally defective and an abuse of court process.
 2. That this court does not have jurisdiction to hear and determine the matter either at preliminary stage for the Petition offends Section 30(1) of the *Land Adjudication Act* as well as Section 8(1) and (2) of the *Land Consolidation Act*.
 3. That this suit must fall en masse since the Petitioner/Applicant did not exhaust all remedies as set out in Section 29 of the *Land Adjudication Act*.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

Submissions

3. The Petitioner in her submissions contend that she was aggrieved with the actions of the 1st Respondent culminating in its decision dated the 25th July, 2022. Further, that her Petition is not on the substantive rights and therefore the Interested Party cannot invoke Section 29 of the *Land Adjudication Act*. She made reference to the prayers sought in the Petition and insists that she is only challenging the legality of procedure employed by the 1st Respondent which violated her rights under *the Constitution* and the *Fair Administrative Action Act*. To support her arguments, she relied on the following decision: Nakuru ELC Judicial Review Case No. 13 of 2014 *Republic v Musanka Ole Runkes Tarakwa Lempasso Ole Kuyiani & 2 others and Joseph Lesalol Lekitio & Others (ex parte applicants)*.
4. The Respondents in their submissions provides a background of the dispute herein and contends that it was incumbent upon the Petitioner to get the consent of the Land Adjudication Officer to enable her institute these proceedings in accordance with Section 30 of the *Land Adjudication Act*. Further, that the Petitioner was expected to exhaust all laid down procedures before taking matters to court, which she has not done. They insist that this Court has no jurisdiction to deal with the dispute herein. They reiterate that the Petition offends the mandatory substantive requirement under Section 30(1) of the *Land Adjudication Act* and the Court ought to dismiss it. To support their averments, they relied on the following decisions: *Musana Ole Pere & Another v District Land Adjudication Section and Settlement Officer – Narok South & 23 Others: Paramal Pere & Another (Interested Party)* (2019) eKLR; *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR; *Republic v Land Adjudication Office Tukurung Adjudication Section Elgeyo Marakwet & Another Ex parte Biyaa Clan* (2021) eKLR; *Bhaijee & Another v Nondi & Another* (Civil Appeal 139 of 2019) (2022) KECA 119 (KLR) (18 February, 2022) and *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* (1989) KLR 1.



Analysis and Determination

5. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether this Court has jurisdiction to hear and determine the Notice of Motion Application dated the 6th June, 2022 and Amended Petition dated the 25th July, 2022.
6. The 3rd Interested Party contends that this Court has no jurisdiction to hear and determine the Notice of Motion Application dated the 6th June, 2022 and Amended Petition dated the 25th July, 2022 as the Petitioner had not complied with the requirements set out in Section 30(1) of the [Land Adjudication Act](#).
7. The Petitioner on the other hand insists that the Petition challenges the procedure used in the Appeal to the Minister in respect to the suit lands but not on the violation of her rights.
8. The Petitioner vide her Petition dated the 6th June, 2022 sought for the following Orders:-
 - i. A declaration that the proceedings and findings in Appeal to the Minister No. 258 of 2006 and 07 of 2007 in respect of Parcel Number 1152 and 1153 Masinga/Kangonde Adjudication Section is in breach of the Petitioner's Constitutional rights under Articles 47, 22, 23 and 165 of [the Constitution](#) and such proceedings are null and void for all intents and purposes.
 - ii. A declaration that the said proceeding are in breach of the Petitioner's constitutional rights as enshrined in Articles 27(1) (2) and 3, 28, 50 (1), 50 (2) (a), (h) (g) and (k) of [the Constitution](#).
 - iii. An order of judicial review in the nature of Certiorari to bring this court the proceedings and findings in Appeal to the Minister Nos. 207 of 2008 Section and quashing the same.
 - iv. Any other or better relief that this court may deem just to grant.
5. The Respondents and 3rd Interested Party insist the Petitioner who was the Appellant in the Appeal to the Minister being Land Appeal No. 227 of 2008 was accorded a fair hearing during the Appeal, as she never indicated if she intended to call a witness as she claims. They contend that the Petitioner ought to have sought leave in accordance with Section 30 of the [Land Adjudication Act](#) before filing the instant Petition including the Notice of Motion Application.
6. In this instance, the Petitioner filed the instant Petition claiming the actions of the 1st Respondent in the proceedings in Land Appeal No. 227 of 2008 was grossly unfair, against rules of natural justice and biased in favour of the Interested Party and was an affront to fair administration and contrary to [the Constitution](#). Further, that she was denied a right to call a witness and she was not informed of the visit to the locus in quo. She hence sought conservatory orders in the impugned Application as well as quashing of the decision from the aforementioned Appeal. The 1st Interested Party in his Replying Affidavit had provided highlights of the proceedings including decision in Land Appeal No. 227 of 2008 which I have had a chance to peruse and I note there is no indication as whether the Petitioner who was the Appellant therein sought to call a witness as claimed. From the Replying Affidavit filed by the Respondents, they deny violating the Petitioner's rights and insist they complied with Section 4(6) of the [Fair Administrative Action Act](#) including Section 27(3) of the [Land Adjudication Act](#) by altering, certifying and forwarding adjudication register to the Chief Land Registrar for purposes of issuing titles. Further, that the averments in the Notice of Motion Application are speculative, totally groundless and full of misleading as well as uncorroborated allegations meant to hoodwink the court.



7. On raising Preliminary Objection, in the case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that:-

" A preliminary objection is in the nature of what used to be a demurrer. It 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

8. On institution of proceedings in court, after an adjudication exercise, Section 30(1) of the [Land Adjudication Act](#) provides inter alia:-

(1) Except with the consent in writing of the adjudication officer, 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 adjudication section has become final in all respects under section 29(3) of this [Act](#)."

9. The Petitioner has relied on the case of Nakuru ELC Judicial Review Case No. 13 of 2014 [Republic v Musanka Ole Runkes Tarakwa Lempaso Ole Kuyiani & 2 others and Joseph Lesalol Lekitio & Others \(ex parte applicants\)](#) which I wish to distinguish from the circumstances at hand. In this instance, this is a Petition while the cited decision concerns a process of Judicial Review. It is trite that before filing the instant Petition, Petitioner was required to adhere to the procedure as set out in Section 30(1) of the [Land Adjudication Act](#).

10. On the issue of obtaining prior consent of the Land Adjudication Officer, before filing a suit, the Court of Appeal in [Bhaijee & another v Nondi & another](#) (Civil Appeal 139 of 2019) [2022] KECA 119 (KLR) (18 February 2022) (Judgment) held that:-

" We shall therefore proceed to consider the issues raised in this appeal by re-evaluating the evidence adduced in the ELC, and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the said Court if they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law, as held in [Jabane vs Olenja](#) [1986] KLR 661. In this respect we will first consider the issue of the jurisdiction of the ELC as a preliminary issue, since our findings in this respect will determine whether we can proceed to address the other issues raised by the appeal. In this regard, section 30 of the [Land Adjudication Act](#) provides as follows as regards institution of suits over land that is the subject of an adjudication process: 30 (1) Except with the consent in writing of the adjudication officer, 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 adjudication section has become final in all respects under section 29(3) of this [Act](#). (2) Where any such proceedings were begun before the publication of the notice under section 5 of this [Act](#), they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.....

The section therefore requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. The said consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section and specifically requires the suits to be discontinued if started without consent. The section therefore clearly affects the power and jurisdiction of courts to hear and determine such



disputes. The rationale for the said provisions is 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...In the present appeal, the ELC held as follows on the issue of consent to institute the proceedings towards the end of its judgment, and after addressing the merits of the respondents' case:"

44. The Defendants attacked these proceedings on the basis that the area in question was under adjudication and that the plaintiffs had no consent to institute these proceedings. I have perused the Letters dated April 24, 2010 and August 12, 2010 from the District Land Adjudication Officer (Pexh 4A and 4B) and I am satisfied that the Plaintiffs obtained the necessary consent under the [Land Adjudication Act](#) prior to the institution of this suit." ...The suit by the respondents was however instituted by a plaint lodged with the High Court on April 8, 2010, before the consent in the letter dated August 12, 2010 was granted. Therefore, at the time of inception of the suit, no consent had been granted by an adjudication officer, and the trial Judge erred in finding that such consent existed. The lack of consent rendered the said suit and the entire proceedings thereunder a nullity. It is also notable that under section 30(4) of the [Land Adjudication Act](#), the orders given in such proceedings are subject to any appeal process and determination, and we hereby find the said orders given by the ELC to be null and void *ab initio*. In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning held as follows as regards the effect of a null and void act; "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." It is our view that our holding hereinabove on the issue of the jurisdiction of the ELC is sufficient to dispose of this appeal, and in any event, we are also precluded by our findings from going into the merits of the parties' respective cases as urged in the ELC, having found that the said Court had no jurisdiction, and the proceedings before it were a nullity. We accordingly allow this appeal and set aside all the orders made by the Environment and Land Court in the judgment dated September 20, 2019 delivered in Mombasa ELC Case No. 7 of 2014 (formerly Mombasa High Court Civil Case No. 100 of 2010)."

11. Based on the facts as presented while relying on above cited decisions as well as the legal provisions quoted, I find that since the Petitioner failed to obtain consent of the Land Adjudication Officer before instituting this Petition, the said Petition was a nullity from the onset. In the circumstances, I find that this court is hence devoid of jurisdiction to deal with all the issues raised in the Petition dated the 6th June, 2022 including the Notice of Motion Application dated the 25th July, 2022.
12. In the foregoing, I find the instant Notice of Preliminary Objection merited and will proceed to dismiss the Petition including the Notice of Motion Application.



13. I make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF
JANUARY, 2024**

CHRISTINE OCHIENG

JUDGE

