



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC PETITION CASE NO. 2 OF 2018

IN THE MATTER OF ARTICLES 20, 21, 22, 13 AND 165 (3) (B) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 1 (1), 40, 42, 53 AND 156(6) OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF SECTIONS 3, 4 (3) AND 13 OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

BETWEEN

THE HON. ATTORNEY GENERAL.....PETITIONER/APPLICANT

VERSUS

ISAIAH MUTURI MUCEE.....RESPONDENT

RULING

1. This ruling concerns a preliminary objection filed by the respondent which is in the following form:

NOTICE OF PRELIMINARY OBJECTION

Take notice that the respondent herein shall before the hearing of this suit raise and argue a notice of preliminary objection on point of law that:

1. This suit offends the provisions of section 8 of Land Consolidation Act Cap 283 Laws of Kenya.
2. This suit offends the provisions of section 30(1) of Land Adjudication Act Cap 284 Laws of Kenya.

DATED AT MERU THIS 10TH DAY OF APRIL, 2018

FOR: HOPE LEGAL AID NETWORK

ADVOCATES FOR THE RESPONDENT

2. The Preliminary Objection was canvassed by way of written submissions.
3. The respondent/proponent's written submissions are reproduced in full herebelow:

APPLICANT'S SUBMISSIONS ON THE NOTICE OF PRELIMINARY OBJECTION DATED 10TH APRIL, 2018

1. BACKGROUND

Your Lordship,

The following submissions are presented to this court pursuant to direction given by this Honourable court on the 24th of April, 2018 to the effect that parties do file written submissions on the applicant's notice of preliminary objection dated 10th April.

2. PLEADING FILED IN COURT

The petitioner/respondent filed a notice of motion application dated 19th March, supported by an affidavit dated the same. The petitioner also filed a petition dated 19th March, 2018.

The respondent/applicant filed a replying affidavit in response to both the application and the petition dated **9th April, 2018**.

The respondent/applicant further filed a notice of preliminary objection, the purpose of this submissions, dated 10th April, 2018 in which he was arguing on a point of law that:-

1. This suit offends the provisions of section 8 of Land Consolidation Act Cap 283 Laws of Kenya.
2. This suit offends the provisions of section 30(1) of Land Adjudication Act Cap 284 Laws of Kenya.

The petitioner has not filed any reply to the preliminary objection.

3. FACTUAL SYNOPSIS

Your Lordship, a rehash of the facts to the present suit is that petitioner; the honourable Attorney General represents Riamikuu Primary School, who obtained the subject matter in dispute from the respondent's father in 1977 having been granted 6 Acres in total.

There is a stream that acts as a border between the respondent's land and the school and planted along the stream was euphorbia grass to act as boundary.

The demarcation process in Ntoroni location, Tharaka North sub-county has never concluded and therefore impossible that any parcel has a number in that area, your lordship. If at all, the petitioner's annexure marked "JMK-1" clearly shows that the area is still undergoing through land adjudication process.

Prior to this petition your lordship, the respondent had instituted a suit in the Chief Magistrate's Court a Meru, Civil Suit No. 164 of 2015 against the school, which was dismissed for lack of consent from the land adjudication officer as evidenced by the respondent's annexure "IMC – 1"

When the respondent at the time sort (sic) a consent letter he was categorically told that one cannot be issued consent for undemarcated land.

It is therefore absurd your lordship, that the petitioner new (sic) connivance with the land adjudication and settlement officer Tharaka South/North sub counties wishes to disenfranchise the respondent even without proper records and consent to institute the petition.

There is no clear demarcation capable of ensuring this court becomes a just arbiter as the demarcation process is yet to commence, let alone conclude as is seemingly sort (sic) to be alleged by the petitioner. Hence the basis for the preliminary objection.

4. ISSUES FOR DETERMINATION

- i) Is the area, whose jurisdiction the subject matter is on demarcated?
- ii) Was a consent letter ever issued to the petitioner?
- iii) Does the respondent's parcel of land have a number?
- iv) Are there laid down mechanisms for disputes pertaining land under adjudication process?
- v) If the preliminary objection succeeds, does it discuss the entire petition together with the Notice of Motion?

5. LEGAL BASIS

Your Lordship, section 8 Cap 283 of the Land Consolidation Act, laws of Kenya provides inter alia that:

"Subject to the provisions of this section, no person shall institute and no court whatever shall take cognizance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest

whatsoever in, to or over any land in any adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the adjudication officer to the institution or continuance of such proceedings have been given. No officer of any court whatever shall issue any plaint or other legal process for the institution or continuance of any proceedings which by virtue of the provisions of subsection (1) of this section are for the time being prohibited, except upon being satisfied that the consent required by those provisions has been given. Nothing in the foregoing provisions of this section shall prevent the enforcement or execution of any final order or decision given or made in any proceedings in respect of any land in any an adjudication area, where such order or decision is not the subject of a pending appeal at the time of the application of this Act to such land. A certificate signed by an adjudication officer certifying any parcel of land to be, or to have become on a specified date, land within an adjudication area shall be conclusive evidence that the land is such land. Every certificate purporting to be signed by an adjudication officer shall be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown.”

Further your lordship, Section 30 (1) of the Land Adjudication Act, Cap 284 Laws of Kenya provides as follows:- “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.”

There is no doubt or dispute that the subject matter herein your lordship is under adjudication and the petitioner has not shown that he obtained consent of the land adjudication officer before filing the suit herein as required by law; none has been annexed either on the supporting affidavit to the Notice of Motion or the petition itself.

It is trite law that preliminary objection should be based on pure points of law. Law JA in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) ea 696 rendered himself thus:

“So far as I’m aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In *Ororo vs Mbaja (2005) 1 KLR 141 Ojwang, J* (as he then was) expressed himself as follows:

“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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter related to 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 pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stoop... The principle is abundantly clear. 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 provided 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...”

Your lordship, thus clearly, the respondent’s preliminary objection only consists of points of law which has been pleaded arising from the Notice of motion and petition filed herein and which, if it succeeds, may dispose of this suit.

We therefore wish to quote the honourable H. Ndung’u wherein the respondent was a party in *Civil Suit No. 164 of 2015; Isaiah Muturi Mucee vs Lucy Chabari and 2 others* (unreported) where she pronounced herself to the effect that;

“The final notes under section 30 of land adjudication act are “staying land suits” it is clear from provisions of sections of Land Adjudication Act as read with the objects of the Act that the legislature wanted ascertainment of interest in land ascertained in an orderly manner without interruption by suits.”

“That is why it was deemed necessary for consent to be sought from the adjudication officer who will then give consent for further suit to proceed under consent depending on the nature of the suit.”

“This important requirement cannot amount to a procedural technically which the court can ignore. As such despite the plaintiff’s pleas in his submission that the court hear this mater I find that the P. O is well founded. The same is upheld and the suit herein is struck out with cost to the defendants.”

Further your lordship, we quote Justice Obaga in the case of *HC Civil Suit No. 90/2012 (Kitale) Nicholas Tukei vs Chepocheptang Loynek & 2 Others*; where he clearly pronounced himself that

“By virtue of section 30(10) of the land adjudication act, the plaintiff was under obligation to seek consent of the adjudication officer before bringing this suit. It is conceded by the plaintiff that he did not seek the consent of the adjudication officer before filing the suit. The plaintiff urges the court to disregard this citing the provisions of Article 159 2 (d) of the constitution which

provides that justice shall be administered without undue regard to procedural technicalities. The object of the land adjudication act states that it is an act of parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto. The marginal notes under section 30 of the land adjudication act are “staying of land suits.” It is clear from the provisions of section 30 of the land adjudication act as read with the marginal notes and the objects of the act that the legislature wanted ascertainment of interests in land ascertained in an orderly manner without interruptions by suits. This is why it was deemed necessary for consent to be sought from the adjudication officer who will then give consent for the suit to proceed or deny consent depending on the nature of the suit land. This was a very important requirement which cannot amount to just procedural technicality which the court can ignore. I therefore find that the preliminary objection is well found (sic). The same is hereby upheld with the result that the suit herein is hereby struck out with costs to the defendants.”

If at all your lordship, the land adjudication act clearly stipulates the mechanisms to follow if any party is aggrieved in an adjudication process.

Section 26 provides thus;

1. Any person named in or affected by the adjudication register who considers it to be incorrect or incompetent in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

The DLASO clearly avers to the area whose jurisdiction the subject matter falls is still being demarcated. The petitioner your lordship has not shown that any disputed mechanisms clearly stipulated in law have been exhausted before the petition herein being filed. No objection was raised and determined by the adjudication officer or his committee.

Much as this is a petition filed under the ambit of the constitution, the same cuts both ways your lordship. Article 159 is not a cure for all technicalities.

We wish to address the same by quoting the words of *Kiage JA in Nicholas Kiptoo Arap Korir vs Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR that:*

“I am not in the least persuaded that Article 159 of the constitution and the oxygen principles which both command court to seek to do substantial justice in an efficient, proportionate and cost effective manner.....were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of Justice....it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.

CONCLUSION

Your lordship, the preliminary objection is well founded as clearly enunciated above and should be allowed as prayed.

We so pray.

DATED AT MERU THIS 2ND DAY OF MAY, 2018

FOR: HOPE LEGAL AID NETWORK

ADVOCATES FOR THE RESPONDENT

4. For the respondent/applicant, the following authorities have been proffered:-

- a) J. N. M .VERSUS J.N.M, Nairobi Family Divison Civl Suit No. 4270 of 1991 [2015] eklr
- b) Isaiah Muturi Mucee versus Lucy Chabari and 3 Others, Meru CM’s Civil Suit No. 164 of 2015.

5. The petitioner/opposer’s written submissions are reproduced herebelow:

PETITIONER’S SUBMISSIONS ON THE NOTICE OF PRELIMINARY OBJECTION DATED 10TH APRIL, 2018

May it please your Lordship, we submit for the petitioner on the Notice of Preliminary Objection dated **10th April, 2018** as herein under.

Your Lordship the respondents filed the Notice of Preliminary Objection against the Constitution petition filed by the petitioner dated **19th March, 2018**. The preliminary objection by the respondent is anchored on Section 8 Cap 284 Laws of Kenya and Section 30(1) Cap 284 Laws of Kenya. The respondent’s argument is that the petitioner did not obtain the consent of the District Land Adjudication Officer before filing this petition.

Your lordship, we submit that the petitioner brought this petition for declaration that, public interest are (sic) threatened and violated by the actions of the respondent. Your lordship on the face of the articles under which this petition is brought are very categorical. To mention but a few article 156 (6) of the constitution gives the petitioner the mandate and obligation to protect and defend public interest. Article 1 (1) of the constitution under which this petition is also brought clearly shows that all sovereign power belongs to the people of Kenya and that the same shall be exercised in accordance to the constitution. We submit the people of Kenya through the constitution have mandated the petitioner herein to defend their interest.

Your lordship in his submissions the respondent submits that his father gave a portion of land to the Riamikuu Primary School. We deny this allegation. However we submit that by making such submissions the respondent is agreeing that the public school owns a parcel of land which the respondent alleges to be 6 acres. Having confirmed even the size, the respondent confirms the petitioners claim that he is trespassing on their land.

Your lordship we submit that a constitution petition for declaration that fundamental rights and freedoms as provided for by the constitution cannot be limited by the provisions of a statute especially when public interest is at stake. In the case of **Kenya National Highway Authority VS Shalien Masood Mughal & 5 Others [2017] eKLR** (copy annexed) P.N WAKI J. A. in his judgment he referred to the case of **Republic VS Minister for Transport & Communication & 5 Others** where Maraga J (now Chief Justice) held inter alia that..... “ the constitution is supreme Law and a party cannot plead the principle of indefeasibility which is a statutory concept.” He further held that alienation of land that defeats the public interest goes against the letter and spirit of the constitution.

Your lordship P. N. WAKI J.A. in the case of Kenya National Highway Authority (SUPRA) further referred himself to the judgment of Nyamu, J (as he then was) in Mureithi &2 others (For Mbari ya Murathimi Clan) VS Attorney General & 5 Others where it was held that alienation of land that defeats public interest goes against the letter and spirit of the constitution. Your lordship P. N. WAKI J.A. in the Kenya Highway Authority case (supra) referred himself to the case of Chemei Investment limited VS The Attorney General & Others where the court held *inter alia* that the constitution protects a higher value, that of integrity and the rule of law.

Your lordship we submit that having brought this petition under constitution provisions the same cannot be subjected to the technicalities that are brought by statute. The constitution is supreme and hence statutory provisions cannot bar a party from having his/her constitutional rights protected one they are violated. The protection is in the constitution. We further submit that where public interest is at stake against private interest, the public interest takes precedence over private interest. This is also part of the judgment by P. N WAKI, J. A. in the Kenya National Highway Authority case (supra) where he was correcting counsel who had submitted that courts have ruled that private interests can outweigh public interest. WAKI J.A. corrected that proposition very clearly and held public interest outweighs private interest. This is our submission too. The public interests of the pupils at Riamikuu Primary School have been threatened by the acts of the respondent. Right to Education and Right to own property.

Your Lordship we submit that this is a constitution petition, it is not just a mere civil suit. It is anchored on constitutional provisions. The constitution is Supreme Law and all statutes derive their authority from it. We submit that Article 24 1 (d) of the constitution provides inter alia that when enjoying constitutional rights a person should not infringe on the rights of others. We submit that as much as the respondent has rights, as well the same should not infringe on other rights, in this case, the public interest.

Your lordship we submit that the preliminary objection by the respondent is unmerited and the same should be disallowed and be dismissed with costs. This honourable court has jurisdiction to protect the public interests which are being violated by the respondent. The petitioner also is constitutionally mandated to protect public interest.

Your lordship we submit that the petitioner, defender of public interest, moves this honourable court on those grounds and therefore the court should also take cognizance of the interests at stake: Public versus private interest.

Your lordship we submit that this petition is well founded and the same should be allowed to be heard on merits to its conclusion so that public interest can be protected.

We pray that you dismiss the Preliminary Objection with costs to the petitioner.

We so pray.

DATED AT MERU THIS 10TH DAY MAY, 2018

J. M. KIONGO

SENIOR LITIGATION COUNSEL.

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE.

6. The petitioner/opposer has proffered the following authority:

- a) Kenya National Highway Authority (Appellant AND Shalien Masood Mughal & 5 Others, Nairobi Court of Appeal No. 327 of 2014.

7. I opine that the issue to be determined in this Preliminary Objection is rather straight forward and is:

1. Does the respondent merit an order for dismissal of this suit on the ground that this petition was filed in contravention of section 8 of the Land Consolidation Act and Section 30(1) of the Land Adjudication Act?

8. To buttress his assertion that this suit merits dismissal, the respondent has highlighted the opinion of Obaga J in *Nicholas Tukei versus Chepohepkatug Loyeruk & 2 others*, Kitale HCCC 90 of 2012 [2013] eKLR where the learned Judge states as follows:-

“By virtue of section 30(1) of the Land Adjudication Act, the plaintiff was under obligation to seek consent of the adjudication officer before bringing the suit. It is conceded by the plaintiff that he did not seek the consent of the adjudication officer before filing this suit. The plaintiff urges the court to disregard this citing the provisions of Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. The object of the Land Adjudication Act states that it is an Act of parliament to provide for ascertainment and recording of rights and interests in Trust Land, and for purposes connected therewith and purposes incidental thereto. The marginal notes under section 30 of the Land Adjudication Act are “Staying of Land Adjudication Suits”. It is clear from the provisions of Section 30 of the Land Adjudication Act as read with the marginal notes and the objects of the Act that the legislature wanted ascertainment of interests in land ascertained in an orderly manner without interruptions by suits. This is why it was deemed necessary for consent to be sought from the adjudication officer who will then give consent for the suit to proceed or deny consent depending on the nature of the suit. This was a very important requirement which cannot amount to just procedural technicality which the court can ignore. I therefore find that the Preliminary Objection is well founded. The same is hereby upheld with the result that the suit herein is struck out with costs to the defendants.”

9. The case of *J.N.M. Versus J.N.M (op.cit)* is a good authority that where a court is satisfied that a proper Preliminary Objection has been raised or argued before it, it would be upheld and lead to summary disposal of the apposite suit. *Meru CM’s Civil Suit No. 164 of 2015* holds the same position enunciated in *Nicholas Tukei versus Loyeruk & 2 Others, op.cit*.

10. The petitioner/opposer submits that this is a constitutional petition and not an ordinary civil suit. He says that the respondent has the liberty to enjoy constitutional rights but not to trample other people rights. He asserts that the petitioner is a public school whose land should be protected from the respondent’s attempts to encroach upon it. He asserts that in the case of *Kenya National Highway Authority versus Shalien Masood Mughal & 5 Others [2017] eKLR, Waki JA*, in his judgment referred to the case of *Republic versus Minister for Transport & Communications & 5 Others* where Maraga J (now Chief Justice) held, inter alia, that **“... the constitution is Supreme Law and a party cannot plead the principle of indefeasibility which is a statutory concept.”** He asserts that Justice Maraga (now Chief Justice) also held that alienation of public land that defeats the public interest goes against the letter and spirit of the constitution.

11. I have considered the parties’ pleadings and their respective submissions which they have proffered to buttress their diametrically opposed submissions.

12. All the authorities they have proffered are good authorities in their circumstances and facts. However, no one case is congruent to another to a degree of mathematical certitude. The cases proffered by the proponent of the Preliminary Objection, the respondent, are ordinary suits. This suit, however, is a constitutional Petition. Whereas the strictures imposed by section 8 of the Land Consolidation Act and Section 30 (1) of the Land Adjudication Act, are not merely procedural technicalities ONE should not conflate ordinary Civil Suits and Constitutional Petitions. The two must be bifurcated.

13. Whereas there is need to ascertain interests in land expeditiously, where a party feels that his/her/its constitutional rights have been infringed upon, the aggrieved party has a right to seek constitutional remedies. Indeed Article 24 (1) (d) of the Constitution decrees that there is need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. Determination regarding if or if not such rights have been infringed upon fall within the hallowed ambit and precincts of courts of law.

14. Both parties agree that their parcels of land have not been adjudicated. Before the adjudication process is completed, both of them have constitutional rights not to have the portions they occupy trespassed upon. School pupils, in the public interest, have a right to have the school property protected, pending ascertainment of land rights as provided for in the Land Consolidation Act and in the Land Adjudication Act.

15. I find that this being a Constitutional Petition, the strictures imposed by section 8 of the Land Consolidation Act and section 30 (1) of the Land Adjudication Act are not applicable.

16. The Notice of Preliminary Objection dated **10th April, 2018** filed by the respondent is hereby dismissed.

17. Costs will be in the cause.

18. It is so ordered.

Delivered in open Court at Chuka this 27th day of June, 2018 in the presence of:

CA: Ndegwa

Miss Kaaria h/b Mutuma for the Respondent

AG absent for the Respondent

P.M. NJORGE

JUDGE