



Mbeere Elders Welfare Advisory Group (Ngome) & 4 others v Attorney General & 7 others; Njeru & 233 others & 2 others (Interested Parties) (Environment & Land Petition 1 of 2014) [2024] KEELC 968 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND PETITION 1 OF 2014
A KANIARU, J
JANUARY 30, 2024**

BETWEEN

**MBEERE ELDERS WELFARE ADVISORY GROUP (NGOME) . 1ST PETITIONER
DAVID NJUKI 2ND PETITIONER
NJERU MBANDA 3RD PETITIONER
ESTON NYAGA NTHIGA 4TH PETITIONER
SERAPHINO NGARI 5TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
COMMISSIONER OF LANDS 2ND RESPONDENT
DIRECTOR OF LAND ADJUDICATION 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
DISTRICT LAND REGISTRAR MBEERE 5TH RESPONDENT
THE COUNTY COUNCIL OF MBEERE 6TH RESPONDENT
THE NATIONAL LAND COMMISSION 7TH RESPONDENT
THE COUNTY SECRETARY LAND AND PHYSICAL PLANNING EMBU
COUNTY 8TH RESPONDENT**

AND

**AMBROSE KITHAKA NJERU & 233 OTHERS INTERESTED PARTY
JUSTIN NYAKI NGURE & 249 OTHERS INTERESTED PARTY
BENSON MUTHIKE WARUI & 5799 OTHERS INTERESTED PARTY**



RULING

1. The focus of this ruling is a preliminary objection raised vide a notice dated 20/3/2023 filed in court on the same date. The objection was raised by 2250th to 6049th interested parties through their counsel, Nzioki Muthini. The target of the objection is the petition filed on 5/9/2021 and the application dated 15/12/2022. The objection is four-pronged and its written substance is as follows:
 1. That this honourable court lacks jurisdiction to hear this petition filed on 5th September, 2011 together with the instant application dated 15th December 2022 for lack of the mandatory statutory consent under Section 8 of the Land Consolidated Act (Cap 283) and Section 30 of the [Land Adjudication Act](#) (Cap 284) Laws of Kenya.
 2. That the Lands the subject matter of this petition fall within Riakanau, Karaba, Gategi, and Makima adjudication sections which lands have been adjudicated and therefore this court cannot entertain the matter.
 3. The petitioners herein did not exhaust the remedies set out under Sections 13, 14, and 26 of the [Land Consolidation Act](#), Cap 283 and Sections 26 and 29 of the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
 4. The petition herein filed on 5th September 2011, amended on 21st September 2011 and 17th February 2015 together with the instant application dated 15th December, 2022 lack merit and should be struck out with costs.
2. The objection was canvassed via written submissions. Nzioki for 250th to 6049th interested parties and Khaminwa for the same parties filed their submissions on 17/5/2023 and 20/5/2023 respectively. Counsel on record for petitioners, Kamunda and M/s Emies Mutegi filed submissions on 2/11/2023 and 3/11/2023. The submissions of the respondents were filed in court on 1/11/2023 and 8/11/2023.
3. Nzioki's submissions commenced with a highlight of the background and noted that the prayers sought in the petition are as follows:
 - a. A declaration that the demarcation, alienation and/or allocation of the said Mwea Land Adjudication areas, and the issuance of titles thereof by the 2nd, 3rd, 4th, and 5th and 8th respondents is unconstitutional irregular, illegal and indeed null and void ab-initio.
 - b. A declaration that such demarcations, alienations and/or allocations and issuance of titles of the said Mwea Land Adjudication areas must be done for and by the Mbeere people represented by 39 clans, after due consultations and agreement with Mbeere people as represented by the petitioners herein.
 - c. A declaration that demarcation, alienation and/or allocation of Mwea Land (settlement and Ranching Scheme), be done for, with, and by the Mbeere people representing the 39 clans as the rightful members of the Mbeere Community after due consultations and agreement with the Mbeere people as represented by the petitioners herein.
 - d. A declaration that Mwea Game Reserve (which was given out to the government for management by the County Council without consultations with the Mbeere Community) be managed in a sustainable manner and tangible benefits realized be ploughed back to support community development projects as identified by Mbeere Community.



- e. Any further orders, directions, declarations and remedies as this honourable court may deem fit and just in the circumstances.
4. Counsel then noted the issues for determination to be:
 1. Whether the mandatory consent was sought before the petition was filed as required under Section 8 of the [Land Consolidation Act](#) Cap 283 and Section 30 of the [Land Adjudication Act](#) Cap 284, Laws of Kenya.
 2. That the Lands subject matter of this petition fall within Riakanau, Karaba, Gategi and Makima Adjudication Sections which lands have been adjudicated and therefore this honourable court can not entertain this matter.
 3. The petitioners herein did not exhaust the remedies set out under Sections 13, 14, and 26 of the [Land Consolidation Act](#), Cap 283 and Sections 26 and 29 of the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
 5. There was then an analysis by counsel, with the case *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors* [1969] EA 696 cited and quoted to show what a preliminary objection is, or should be. Counsel thereafter emphasized that there was need for petitioners to obtain the necessary consent as required under Section 8(1) and (2) of [Land Consolidation Act](#), Cap 283, and [Land Adjudication Act](#), Cap 284. The petitioners were faulted for not obtaining the consents before filing their petition. To drive the point home, the cases of *Robert Kinyua Nabea vs Kobia Kiringo & 3 others* [2018] eKLR and *Jackson Koome vs M'limongi M'ikuamba & 2 others* [2018] eKLR were cited and quoted. It was pointed out that adjudication in the area was completed on 15/9/2011. While the petition herein was filed on 5/9/2011, meaning that consents should have been obtained first as the area was still officially under adjudication.
 6. The petitioners counsel postulated that because of lack of consents as required by law, this court is bereft of jurisdiction to entertain the petition. The cases of *Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* C A No. 50 of 1989, Mombasa [1989] eKLR, and *Samuel Kamau & Another Vs Kenya Commercial Bank and two others*: Civil Application No. 2 of 2011, Supreme Court of Kenya, were cited and quoted for guidance and effect.
 7. Counsel also further submitted on the issue of the alleged non-exhaustion of the available remedies by the petitioners before they came to court. It was submitted in this regard that both [Land Adjudication Act](#) and [Land Consolidation Act](#) provide for dispute resolution mechanisms to be followed in areas under adjudication before a party comes to court. Citations and quotations from decided cases and other sources were proffered to make the point. In this regard, counsel made reference to *Tobias Achola Osindi & 13 others vs Cyprian Otieno Ogalo & 6 others*: HCC No. 4 of 2011, Kanampiu M'rimberia vs Julius Kathame & 3 others: HCC No. 6 of 2009, Meru, *Speaker of National Assembly vs Karume* CA 092 of 1992 Silverio Akubu & 4 others Vs Charles Baariu Salasio & 3 others: ELC PET. No. 29 of 2018, MERU, Section 26 of [Land Consolidation Act](#) (Cap 283) and the preambles of both [Land Consolidation Act](#) (supra) and [Land Adjudication Act](#) (Cap 284).
 8. Finally, the court was urged to be guided by Section 27 of [Civil Procedure Act](#) on the issue of costs and award the same to the interested parties.
 9. The submissions of counsel Nzioki found back-up in the supplementary submissions brought by counsel Khaminwa and filed on 20/5/2023. The submissions also fault the petitioners for not first exhausting the dispute resolution mechanisms provided for in laws that apply in an adjudication area. The court was told not to entertain the petition as it would be "usurping jurisdiction" because the



- petitioners had not first exhausted the other mechanisms provided for by law. For guidance and/or tenor, Khaminwa cited and quoted the cases of *Mutanga Tea and Coffee Company Vs Shikara Limited & Another*: [2015] eKLR, *Reuben Mwongela vs Paul Kigea Nabeathe [2021] eKLR and Justus Mugaa vs District Adjudication & Settlement Officer, Tigania West District & Another*: [2018] eKLR.
10. Kamunda for the petitioners on the other hand submitted that this court has jurisdiction to handle the matter before it because the “action consequently denies the said deserving members of their constitutional rights to ownership, use and management of their property” (paragraph 12 of the submissions). This averment came after some prefatory remarks during which the essence of a preliminary objection and the critical aspects of the concept of jurisdiction were highlighted, with the case of *Martha Akinyi Migwambo vs Susan Ongoro Ogendo [2022] eKLR* cited and quoted while John Beecroft’s treatise in “words and phrases legally defined” Volume 3: I-N, page 113 was outlined *ipsis* verba to bring out the quintessence of the concept of jurisdiction.
 11. The petitioners also submitted that the consents they are being faulted for not obtaining were actually not necessary for their matter here. According to them, they are challenging the legality of the whole process of adjudication “rather than the determination of interests in the land” (paragraph 17 of the submissions). To drive their point home, the cases of *Rhoda S. Kiilu Vs Jiangxi Water and Hydropower Construction Kenya Limited [2021] eKLR* and *Martha Kigen Vs Johana Tibino [2014] eKLR* were proffered for guidance.
 12. As to whether the petitioners were duty-bound to exhaust first the processes provided for in the two statutes governing processes of ascertaining ownership in a Land Adjudication area, it was reiterated that the petitioner’s challenge focuses on the legality of the whole process and recourse to these other processes was therefore not necessary. The cases of *Republic vs Musanka Ole Runkes Tarakwa Lempaso Ole Kuyoni & 2 others*: JR No. 13 of 2014, ELC Nakuru *Evans Ladtema Muswabili vs Vibiga Country Public Service Board & 2 others; Marley Ezekiel Ayiego (interested party) [2021] eKLR* and *Republic Service Board & 2 others; Marley Ezekiel Ayiego (interested party) [2021] eKLR and republic vs INdependent Electoral and Boundaries Commission & Another, Exparte coalition for Reform and Democracy & 2 others [2017] eKLR* were cited as suitable guides and reinforcements.
 13. Kamunda got a shot in the arm from M/s Mutege’s submissions where it was asserted that “No consent is required to be sought in a constitutional petition where the petitioners are claiming infringement of their rights”. The petitioners were said to be entitled to come to court directly to urge for their rights as mandated under Article 22(1) of *the Constitution*. The case of *Moses Barkutwo & 3 others Vs District Land Adjudication & Settlement Officer, Elgeyo Marakwet County & Another* (2021) eKLR was cited and quoted as an apt guide.
 14. There is, finally, the respondents submissions. The thrust of the submissions by both learned counsel for respondents show that they are willing to proceed with the petition and they therefore urge for the dismissal of the objection. Kiongo for 1st to 5th respondents cited various constitutional and statutory provisions – more specifically Article 162(2) and 3 of *the Constitution*, Section 13(1), (2) and (7) of the *Environment and Land Court Act*, Section 27 and 28 of *Land Adjudication Act* and Section 27 of the *Land Consolidation Act*, among others – to posit that the court has jurisdiction to entertain the matter before it. Further, and as a measure of further reinforcement, the cases of Owners of the Motor Vessel “Lillian R. v. Karisa Chengo [2017] eKLR, *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others* (supra) and *Nickson Mutinda Musyoki & 9 others vs National Land Commission & 24 others [2018] eKLR* were cited and quoted as deemed necessary.
 15. Momanyi for some of the other respondents added his voice by submitting, *inter alia*, that the interested parties have admitted jurisdiction in the past and are therefore estopped from objecting to it via their



belated preliminary objection. Momanyi also averred that the interested parties seem to be arguing the merits of the petition rather than the objection. According to counsel, “A party cannot be allowed to blow both hot and cold at the same time”.

16. A common thread in the submissions filed by both learned counsel for respondents is that the adjudication process is complete and title deeds have been issued and therefore, the submissions by the interested parties that consents should be obtained is fallacious.

17. I have read and considered the rival and concurring submissions filed and I have had a look into the court record generally. The crucial issue to consider is whether the merits of the preliminary objection have been demonstrated. The true character of a preliminary objection is to be found in the Locus classicus case of *Mukisa Bisquit* (supra) which all sides sought to rely on in this matter. In the case, Sir Charles Newbold P observed thus:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law as argued on the assumption that all the facts pleaded by the other side are correct. It can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

Law J A in the same case expressed himself thus:

“So far as I am aware, a preliminary objection consists of a pure 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 ...”.

18. A more contemporary definition of a preliminary objection is to be found in the case of *Oraro Vs Mbaja* [2005] KLR 141, where Ojwang J (as he then was) expressed himself thus:

“A preliminary objection correctly understood is now well defined, and declared to be, a point of law which must not be blurred by factual details, liable to be contested, and in any event to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seek 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.”

19. From the foregoing, it is clear that a preliminary objection should be hinged on admitted, unopposed and/or solid incontrovertible facts. In this regard, one is bound to ask whether the preliminary objection before this court is based on uncontested or admitted facts. The answer to this obviously No. The interested parties have opposed the entire petition as filed. Given the nature of a preliminary objection, it would be expected that the interested parties would be treating the petition filed as correct or right but faulting it on the ground that the requisite consents required to be obtained under the applicable statutes in an area under adjudication have not been obtained. But this is not the case. Nothing is admitted by the interested parties. From the responses filed to the petition, it is crystal clear that evidence is required to be made available to ascertain facts. It is abundantly clear therefore that there is no proper preliminary objection before this court. It is wrong for the interested parties to treat it as axiomatic that the facts they base their objection on are solid and true.

20. It is important also to consider whether the interested parties have the right in law to ask, as they have done here, that the petition be struck out or dismissed. It seems to me that they mis-apprehended the scope of their participation in the matter. In *Methodist Church of Kenya Vs Mohamed Fugicha and 3 others* [2019] eKLR the Supreme court was emphatic that an interested party can neither



raise a preliminary objection on a point of law or file a counter-claim. The circumscribed nature of participation of interested parties is also to be found in *Kariuki Muruatetu & Another Vs Republic & 5 others: sup. Ct. Pet. 15 and 16 of 2015 (consolidated)*; [2016] eKLR where the court expressed itself thus:

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of Primary Principal parties before the court.

The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. This is true more so, in proceedings that were not commenced as public interest Litigation (PIL), like the proceedings before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by court will always be the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admissions of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake can not take the form of an altogether new issues to be introduced before the court.” (emphasis: mine)

21. Further, in *Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others*: Civil Appeal NO. 290 of 2012, the Supreme Court remarked

“Consequently, where a person not initially a party to a suit is enjoined as an interested party, this party can not be heard to seek to strike out the suit, on the ground of defective pleadings.”

From all this, it is clear that an interested party has only a limited space or room to wiggle in a given case. In particular, such a party can not seek to end the suit. And all this is because the case has its owners, who are the primary/principal parties. Any interested parties entertaining the notion or belief that they can join a case and ask that it be struck out or dismissed would obviously be laboring under a serious misdirection in law. It is plain to me that the option of raising a preliminary objection seeking to strike out the suit herein was not available to the interested parties. They are only peripheral parties in the matter. They have no right in law to seek to end it.

22. Lastly, an aspect of submissions by the petitioners is that as the matter involves a constitutional petition touching on or involving fundamental freedoms, the consents therefore required under both the *Land Adjudication Act* and *Land Consolidation Act* were not necessary. The position of the interested parties is that such consents are mandatory and ought to have been obtained first. The submissions of the interested parties contain case law pointing to the need to obtain the consents. Between these two positions, this court has to make a choice. The court chooses to go with the petitioners and here is why:

23. Article 19(3)(a) and (c) states as follows:

- (3) The rights and fundamental freedoms in the Bill of rights –
 - a. belong to each individual and are not granted by the state.
 - c) are subject only to the limitations contemplated in this constitution.



Article 22(1) of *the Constitution* further provides:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

My understanding of these constitutional provisions is that fundamental freedoms are an inherent possession and/or entitlement that an individual freely has and is always at liberty to exercise or enjoy. They are not granted by any king or kingdom, parliament or parliamentarian, or by any human constituted entity by whatever name called. Nor are they granted by any statute, edict, decree, code, or any state pronouncements clothed in some legal garb. It seems clear that the rights can be construed to emanate from the supreme deity whose eminence and prominence is acknowledged at the beginning of the preamble to *the constitution* itself.

24. But even without invoking the divine, the right to a fair trial particularly in matters involving fundamental freedoms should obviously not be trifled with. It is good to appreciate that even in the pre-2010 constitutional dispensation when the Bill of Rights did not seem to occupy the exalted place that it has in the current dispensation, fundamental freedoms still enjoyed a pride of place. Chunga CJ (as he then was) at the time had this to say in the case of *Kibunja vs Attorney & 12 others*: HCC Misc Appl. No. 259 of 1998 [2002] eKLR, where some of the applicants had gone directly to court raising constitutional issues instead of first exhausting the machinery provided by the applicable statute:

“I have taken into account the submissions of Mr. Gichuru on behalf of 2nd and 8th respondents that the applicant should avail himself of the machinery given to him by the Co-operatives *Societies Act*. While I recognize the weight of the submissions, at the same time though, constitutional matters take precedent over any other matters.

Where a party alleges infringement of constitutional rights, in my opinion, he has the right to bring an application directly and speedily, irrespective of any other mode of action that may be available to him under the Law.”

25. That was then and the position taken at the time clearly reflects progressive jurisprudence. It should be more so now than then. I realize that the case I have cited was not dealing with land issues. But its importance consists in the fact that legal provisions in a statute – specifically in the *Co-operative Societies Act* – could not impede or obstruct a party’s undoubted right to seek redress in a court of law in constitutional matters. It is the same in this case. The petitioners are alleging violation of their constitutional rights. They want to be heard and that is why they have come to court. Under Article 25 (c) of *the Constitution*, the right to a fair trial is among the freedoms that can not be limited. My considered view is that requiring them to obtain consents before coming to court in a constitutional matter is actually limiting their right. I think I would be interfering or limiting that right if I insist that consents be obtained first.
26. The upshot, in light of the foregoing, is that the objection herein is for dismissal and I hereby dismiss it with costs to the petitioners and the respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF JANUARY, 2024.

In the presence of M/s Mutegi for 3rd & 7th petitioners; Mutua for Kiongo of AG’s office for 1st to 5th respondents. Nzioki for 250th to 6049th interested parties; M/s Shumila also for 250th to 6049th interested parties and Kamunda (absent) for petitioners.



Court assistant: Leadys

A.K. KANIARU

JUDGE

30.01.2024

