



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 08 OF 2018

WILLIAM MUTUURA KAIRIBA.....PLAINTIFF

VERSUS

SAMUEL NKARI.....1ST DEFENDANT

SAMUEL KATHIGA.....2ND DEFENDANT

DANIEL MUGAO.....3RD DEFENDANT

RULING

This ruling concerns a Notice of Preliminary Objection filed by the advocate of the 1st, 2nd and 3rd defendants on 18th September, 2018. The said Notice reads:

NOTICE OF PRELIMINARY OBJECTIONS

TAKE NOTICE that the 1st, 2nd and 3rd defendants shall on 24th September, 2018 or so soon thereafter when this suit shall come up for any hearing raise preliminary objections on points of law persuading this honourable court to dismiss the entire suit with costs to them on the grounds that:-

1. The honourable court lacks jurisdiction to hear this case for lack of the mandatory statutory consent to file this case by dint of section 8 of the Land Consolidation Act, Cap 283 and section 30 of the Land Adjudication Act, Cap 284, Laws of Kenya.
2. The plaintiff did not exhaust the remedies set out at sections 13, 14 and 26 of the land Consolidation Act, Cap 283 and section 26 and 29 of the Land Adjudication Act, Cap 284 Laws of Kenya.

DATED AT MERU THIS 18TH DAY OF SEPTEMBER, 2018.

FOR: THURANIRA ATHERU & co.

ADVOCATES FOR THE 1ST, 2ND & 3RD DEFENDANTS

2. The application was canvassed by way of written submissions.
3. The defendants submissions state as follows:

1ST TO 3RD DEFENDANTS' SUBMISSIONS IN SUPPORT OF THE NOTICE OF PRELIMINARY OBJECTION DATED 18.9.2018 AND FILED IN COURT ON 19.09.2018

May it please Your Lordship, we hereby submit as follows.

On 24.09.2018, you directed that the afore-stated preliminary objection be disposed of first, through written submissions, hence our so doing herein.

GROUND No.1 of the said preliminary objection seeks dismissal of this suit since the **honourable court lacks jurisdiction** to hear this case, for want of the **mandatory statutory consent** to file the case, under **Section 8 of The Land Consolidation Act, Cap. 283 and Section 30 of The Land Adjudication Act, cap. 284, Law of Kenya.**

When this suit was filed on **11.09.2018** vide a plaint dated **11.09.2018** , it was **not accompanied** by the mandatory statutory consent, issuable by the relevant Land Adjudication Officer in charge of **Mukothima “A” Adjudication Section**, wherein the suit land named at **paragraphs 3,4 and 7 and prayer (a) and (b)** of the plaint, are situated.

Section 8(1) of the Land Consolidation Act, Cap. 283, Laws of Kenya provides inter alia:-

“...no person shall institute and no court whatsoever 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 an 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 has been given.”

Section 8(2) of the afore-said Act provides thus:-

“No officer of any court whatsoever shall issue any plaint or other legal process for the institution or continuance of any proceedings which by virtue of the provisions of sub-section (1) of this section are for the time being prohibited, except upon being satisfied that the consent required by those Provisions has been given.”

That consent is a mandatory requirement under **Section 30(1) of the Land Adjudication Act Cap 484.”**

A similar case **filed without the afore-said mandatory consent was dismissed** in the case of **STANLEY LEZEN MLIWA VS. LEONARD KAPALA MAKANGALU & 2 OTHERS (2007) eKLR**. At **page 2** of that decision (a copy annexed), the honourable Justice Maraga (as he then was) held as hereunder:

‘I do not accept Mr Gichana’s argument that by dint of section 60(1) of the Constitution I should ignore section 30(1) of the Land Adjudication Act and entertain this suit. In my view the two sections are not in conflict. Section 30(1) of the Land Adjudication Act does not oust the court’s jurisdiction. All it does is stop the parties from rushing to court on any and every disagreement ...’

The same position was upheld in NTHIGA NKANGA VS. CHARLES NYAGA (2008) Eklr where Honourable Justice ANYARA EMUKULE while dismissing an appeal stated at page 5:

“whether or not the consent in writing of the Land Adjudication Officer had been obtained, is a question of fact which or could only be ascertained by the plaintiff then, or his counsel, producing it at the time of filing the suit. It is not merely adequate to merely plead its existence in the plaint. Its existence must be specifically endorsed by way of attachment to the plaint.

Section 30(1) of the Land Adjudication Act, Cap. 284 is in the following terms:-

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.(underlining mine).

Your Lordship it is now settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost.

Still on the question of want of jurisdiction, we rely on the **Court of Appeal** decision in **The Owners of Motor vessel “LILIAN “S” Vs. Caltex Oil Kenya Ltd (1989) 1 KLR 1**, as follows:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and court of law downs it tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings are concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

The afore-quoted provisions of **Section 8(1) & (2) of the Land Consolidation Act, Cap.283 and Section 30(1) of the Land Adjudication Act, Cap. 284** are couched in mandatory terms by usage of the words **“No court shall...”**. Having ably demonstrated that this court is not seized of the indispensable jurisdiction to hear this case, we implore Your Lordship to **uphold ground No. 1 of the preliminary objection** and proceed to dismiss the suit, with proper costs to the 1st to 3rd defendants.

On GROUND No. 2 of the said preliminary objection, this suit must fall en masse because the plaintiff did not exhaust all the remedies set out at sections 13, 14 and 26 of the Land Consolidation Act, Cap. 183 and Sections 26 and 29 of The Land Adjudication Act, Cap. 284.

The subject matter ownership and occupation which the plaintiff purport to challenge through this case relate to **Mukothima “A” Adjudication Section.**

Section 11(2) of the Land Consolidation Act, Cap. 284 requires that if a committee is unable to reach a decision the Arbitration Board shall decide the matter. If the plaintiff was genuinely aggrieved in any way he ought to have filed an objection in an adjudication committee to determine his dispute as the adjudication process is still ongoing in the area. If dissatisfied with the said decision of the land committee for Adjudication Section, he ought to have referred the dispute to the Arbitration Board. Inexplicably, he did not explore that remedy.

Section 26(1) of Land Consolidation Act, Cap. 283 enjoins the **plaintiff to file an A/R Objection case before the Land Adjudication Officer,** to be heard by him, assisted by the committee, if they got aggrieved by the committee’s verdict which allocated the suit lands to the 1st to 3rd defendants, but he has opted to start the process here, a shortcut unknown in law.

Section 26(1) & (2) of the Land Adjudication Act, cap.284 gives the plaintiff the right to file an A/R objection case to be heard by the Land Adjudication officer alone, but he did not explore that avenue, unexplainably.

Section 29 of the same Land Adjudication Act, Cap. 284 provides another avenue to lodge an appeal to the minister within sixty (60) days from the date of the decision in an A/R Objection.

The plaintiff, having **failed to start and or exhaust the remedies laid down** in the afore-sated two Acts of parliament, is estopped from pursuing any perceived interest in the suit land through this case.

Consequently, we submit that this court has no jurisdiction to entertain this frivolous and vexatious civil case.

Your Lordship the issue as to whether a court has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.

Even the overriding objective of dispensing justice and/or the “O₂” principle do not salvage this case because, without jurisdiction, the overriding objective and/or the “O₂” principle cannot breath life to a legally dead matter like this one. In **MALINDI COURT OF APPEAL CIVIL APPEAL NO. 46 OF 2014: RANSA CO. LTD. & 2 OTHERS VS. MANCA FRANCESCO (2015) Eklr,** it was held on **pages 8 and 11 thus:-**

Page 8: **“while the overriding principle ...will serve the administration of justice well, it is not a panacea for all ills and in every situation. A foundation must be properly laid for its application.... The “O₂ principle” must not be applied arbitrarily and its application must not create uncertainty. It must be guided by sound judicial foundation. If improperly invoked, the principle could become unruly horse..... The overriding principle has not uprooted well established principles, precedent or rules of procedure.....**

Failure to comply with Rules....is so grave and renders the notice and record of appeal incompetent as it goes to the jurisdiction of the court that renders the overriding principle inapplicable.....”

Page 11: **“with the introduction of these principles parties can no longer hide their failures behind abstract excuses that their advocates’ mistakes cannot be visited upon them. Article 159 and Section 3A and 3B have clearly replaced Section 3A of the civil procedure Act which was, before the enactment of Article 159 and the “O₂ principle”, the most misapplied provision, where advocates and parties took refuge in whenever they were not certain. These inherent powers are to be resorted to only in situations where there are no specific or alternative of the law.**

we come to the conclusion that both the notice of appeal and the record of appeal are incompetent and accordingly strike them out with costs.”

The Court of Appeal at NAIROBI IN CIVIL APPL. NO. 6 OF 2010: HUNKER TRADING COMPANY LIMITED VS. ELF OIL KENYA LIMITED (2010) eKLR held as follows on **page 6 and 7** regarding the application of the overriding objective/double “O” principle /O₂ principle:-

Page 6: **... the principal aim is for the court to act justly in every situation either when interpreting the law or exercising its power....**

...O₂ principal” which must of necessity turn on the facts of each case is double-faced, and for litigants to thrive under its shadow, they must place themselves on the “right side”. In the circumstances of this matter, the applicant is clearly on the wrong side and for this reason, the principal must work against it.

Page 7:**....in the exercise of our powers under the “O₂ principle”, what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are “O₂” compliant so as to maintain consistency and certainty.**

Accordingly the same is dismissed with costs to the respondents.”

CONCLUSION

May your Lordship find and hold that since the plaintiff filed this suit without the mandatory statutory consent as ordained in law and deliberately refused to exhaust all available remedies and appeal processes as laid down in law, then, the court lacks jurisdiction to hear this matter, whose consequence is to uphold the subject preliminary objection dated **18.9.2018** and filed in court on 19.09.2018, proceed to dismiss this case and award costs thereof and of the said P.O to 1st to 3rd Defendants.

This Your Lordship, is our humble submission and innocuous prayer, for and on behalf of the 1st to 3rd Defendants.

DATED MERU THIS28THDAY OF.....SEPTEMBER,.....2018

FOR: THURANIRA ATHERU & CO.

ADVOCATES FOR THE 1ST TO 3RD DFENDANTS.

4. The plaintiff's written submissions state as follows:

Plaintiff/Applicant's submissions in opposition to the Defendants' Notice of Preliminary Objection dated 18th September , 2018 and the submissions dated 28th September, 2018

INTRODUCTION

This matter was filed on 12th September, 2018 vide Plaint dated 11th September , 2018 together with Notice of Motion dated 11th September, 2018 Supported by the Affidavit of the Plaintiff.

In the said application was founded on the fact that an adjudication process was commenced on 28th May, 1996 and concluded by issuance of a Certificate on 12th February, 2001 in respect of MUKOTHIMA "A" ADJUDICATION SECTION GIKINGO LOCATION P 150 pursuant to Section 30(5) , the Land Adjudication Act, Cap 284 of the Laws of Kenya which certificate has remained unchallenged.

MY LORDSHIP we turn to the issues for determination by this Honourable Court to dispense with the Preliminary objection filed on 19th September, 2018.

- a. Does the Preliminary Objection meet the Criteria set out in MUKISA BISCUIT CASE
- b. The Adjudication process and whether the Defendants and/or any person claiming through them laid a claim and/or interest to MUKOTHIMA "A" ADJUDICATION SECTION GIKINGO LOCATION P 150 during the Adjudication process or at all save for the current acts of trespass which the Plaintiff is challenging
- c. The place of Certificate of ownership issued by the land Adjudication Officer pursuant to Section 30(5), the Land Adjudication Act
- d. Has interest and/or claims over MUKOTHIMA "A" ADJUDICATION SECTION GIKINGO LOCATION, P 150 (herein referred to as P150 or suit property) been determined with finality
- e. Section 30(1) was Consent of Land Adjudication Officer Mandatory for commencement of suit and/or could a suit be commenced and consent issue during the life of the suit
- f. Does Section 30 (1) bar a party from seeking injunction Orders
- g. Where does the interest of justice lie
- h. Is this Court bound by the decisions cited by the Defendants in their submissions and/or can they be distinguished

a. WHAT IS A PRELIMINARY OBJECTION- MUKISA BISCUIT

MAY IT PLEASE YOUR LORDSHIP we submit ,the Notice of Preliminary Objection is defective as it does not meet the criteria set out in MUKISA BISCUIT.

WE SUBMIT the that for a Preliminary Objection to meet the Criteria set out in MUKISA BISCUIT CASE there should be no contest on facts and the issue raised is not at the discretion of the court. It is an issue which is a pure point of law capable of determining the suit with finality.

Law JA as he then was pronounced himself in MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD (1969) EA 696 . At page 700 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.”

Sir Charles Newbold, P.; on the other hand at pg.701 paragraph B-C added the following:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

(emphasis ours)

In the present case , WE SUBMIT, the Defendants have not filed a Statement of Defence or Replying Affidavit , the facts that the Plaintiff was issued with a Certificate of ownership which is unchallenged and there is no evidence on where the Defendants drew their right to trespass on the land of the Plaintiff.

Thus , for a Preliminary Objection to be sustainable there must be on **clear points of law** and should as much as possible not entail the delving into contested facts and/or the investigation of any set of facts and/or evidence in order to establish the facts or evidence in support of the objection.

This Honourable court must determine certain facts for it to dispense with the preliminary objection filed on the 19th day of September, 2018, which issues include where the Defendants draw their rights over the subject parcel of land and whether the said rights will fall within the Land Adjudication Act and/or will be superior and/or inferior to the rights of the Plaintiff given that the Plaintiff was issued with a Certificate of Ownership, whether adjudication process was concluded in respect of P150 and whether there was any objection and/or appeal thereof. These issues will require the court to delve into contested facts and/or to make an investigation on facts and/or evidence in order to determine the Preliminary Objection. This will clearly contravene the Rule in MUKISA BISCUIT case.

Consequently, we submit, what is before Court is not a Preliminary Objection, it is a counter application, which would best be determined if the court was to be allowed to investigate facts at the hearing of the application for injunction dated 11th September, 2018 . Its not a pure point of law .

b. THE LEGAL UNDERPINNING OF ADJUDICATION

We submit that whereas consent would be required if land and/or interest have not been determined, we submit the subject parcel of land was adjudicated and ownership determined by issuance of certificate pursuant to Section 30(5) Land Adjudication Act. See annexure **WMK2**

Whereas, it is admitted that the area where the subject parcel of land is situated is an adjudication section pursuant to the notice issued on 28th May 1996 by the District Land Adjudication Settlement Officer, Tharaka Nithi District, (See **Annexure WMK1**) the said process for P150 was completed when the Plaintiff was issued with a Certificate pursuant to Section 30 (5) and 6 of Land Adjudication Act, (herein after referred to as Cap 284).

MY LORD we submit the land adjudication officer determined that the land exists and to whom it belongs to. This is the conclusion of adjudication process. This certificate was issued to the Plaintiff on 12th February 2001.

MY LORD, we submit, in order for this Honourable court to determine whether consent must be obtained before commencing suit, We shall describe the adjudication path the suit parcel went through before the Plaintiff was issued with a Certificate of Ownership on 12th February, 2001.

Any person who had a claim in respect to the subject parcel of land had a chance and/or opportunity pursuant to Section 13 read with Section 26 to make an objection and if not satisfied with the decision in respect of the objection must have filed an appeal with the Minister pursuant to Section 29 of Cap 284. This court does not have before it any evidence that the Defendants exercised the right to objection or appeal hence can at best be deemed pure trespassers against whom a remedy of injunction and/or preservation orders must be available to the Plaintiff to preserve and protect his property and his rights thereof .

The Adjudication Act, Cap 284 provides for the process of adjudication. Some of the relevant provisions are set out and explained herein under.

For avoidance of doubt we refer YOUR LORDSHIP to Sections 13 which refers to the process followed to ascertain interest.

THE SECTION PROVIDES AS FOLLOWS:

13. (1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.

(2) Every person whose presence is required by the adjudication officer, demarcation officer, recording officer, committee or

board shall attend in person or by a duly authorized agent at the time and place ordered.

(3) If any person who is ordered to attend fails to attend in person or by a duly authorized agent, the demarcation, recording, adjudication or arbitration, as the same case may be, may proceed in his absence.

(4) If the demarcation officer or the recording officer considers that a person who has not made a claim has an interest in land within the adjudication section, he may, but is not bound to, proceed as if that person had made a claim.

(5) where several persons claim separately as successors of a deceased person, and one or more of those persons attends, his or their attendance shall be taken to be the attendance of all the successors, unless the adjudication officer otherwise directs.

Section 14 on its part require the demarcation officer to give warning of the intended demarcation and recording of claims and of the time and place at which it well begun to notify all persons who will be affected by the demarcation and recording.

Section 17 refers to general power of demarcation and survey officers to enter land within the adjudication area for purposes of demarcating or surveying any parcel therein and may summon any person who can give information regarding the boundaries of a parcel to point out the boundaries.

We also refer to court to the duties of officers involved in demarcation (section 15 on Duties of demarcation officer), Section 16- Duties of survey officers, Section 19 duties of recording officer.

Section 20 functions of committee section 21 decision of committee section 22 functions of arbitration board.

Section 23 refer to the preparation of adjudication record which record shall contain information of

- a. Member of the parcel of land as shown on the demarcation map and its approximate area.
- b. A record of
 - i. Name and description of the owner with particulars of restriction of his power of dealing with it.
 - ii. Where the land has been set apart, the year and number of Gazette Notice by when and the purpose for which the land was set.
 - iii. When land is recorded under section 23(2)(e)

As being the ownership of the county council, the fact that land shall remain Trust Land.

- c. Particulars of rights under Section 23(2) (e)
- d. Name of guardian, nature of disability if a minor the age of any owner or person under a disability
- e. The date on which the form is completed.

After the form is signed by chairman and the executive officer of the committee and by the owner of each interest in the parcel of his authorized agent, no alteration shall be made in it except as provided by Section 27(1) or section 29(3) of the Act

Section 24 refer the demarcation map and the adjudication record as the ADJUDICATION REGISTER

On completion of adjudication record,

- a. A duplicate of the same shall be delivered to Director of Land Adjudication
- b. Display of the original adjudication register for inspection at a convenient place within the adjudication Section and giving notice that the adjudication register has been completed and may be inspected at that place during a period of 60 days from date of notice pursuant to Section 26 any person aggrieved by the contents of the adjudication register within 60 days of the date upon which the notice of completion of the adjudication register is published shall object to the adjudication officer in writing saying the respect in which the adjudication register is incorrect or incomplete.

Section 26A the Adjudication officer shall prepare a No Objection register in respect of any land not **section 28**subject to objection upon expiring of time for lodging objection

The No objection register and a copy of the duplicate adjudication register shall then be forwarded to the chief land registrar for purposes of registration under.

Section 27 provides for alteration of register on finalizing of objection and appeal

Section 28 provides that the chief land registrar shall cause registrations to be effected in accordance with the adjudication register

Section 29 provides that an appeal to the determination of objection shall be lodged within 60 days after date of determination. The appeal shall be done to the minister.

Then is no evidence that the process stated and/or described above did not complete and/or that the interests over the subject land was not established and time lines for objection or appeal have not lapsed and register has not become final

c. THE ADJUDICATION PATH IN RESPECT OF P150

The adjudication process in respect of **P150** commenced with the establishment of **MUKOTHIMA “A” ADJUDICATION SECTION vide notice of 28th May, 1996**. MY LORD when the adjudication officer issued notice on 28/5/1996 members of the public who had a claim or interest in land within **MUKOTHIMA “A” ADJUDICATION SECTION** were required to present their claim to the recording officer either in person or duly authorized agent not later than 30th September 1996.

The plaintiff/Applicant who has occupied and used the land since 1978 laid a claim to the said land and his interest were recorded. The land was adjudicated and no objection was laid by the Defendants/ Respondents, or any other person.

The notice of 28th May 1996 was published and availed to all provincial administration officers and all officers representing the government in the area. All members of the public were also notified as required by the Act.

The right to record a claim could only be done by 30th September 1996 and any objection lodged with the adjudication officer pursuant to Section 26 of the Adjudication Act.

WE SUBMIT MY LORD that the issue raised by the preliminary objection requires the court to establish the stage at which adjudication has reached. This court cannot dispense with the preliminary objection unless the court determines whether or not the adjudication register for MUKOTHIMA “A” Adjudication Section has become final in all respects under section 29(3).

WE SUBMIT that the mere fact that the land is located within an adjudication section does not necessarily prohibit filing of suit without consent of Adjudication Officer.

The court in STANLEY LEZEN (Authority NO 1 in Defendants submissions)clearly held that Section 30 does not oust the courts jurisdiction. **The Purpose of Section 30 is to ensure that adjudication process is not hampered by parties rushing to court on any and every disagreement in the adjudication process.**

We submit that the question to be answered in determining whether consent is necessary under section 30(1) is whether adjudication in respect of a parcel of land had become final. Has the adjudication process for the land in question completed.

MY LORD, we submit that issuance of a plot ownership certificate pursuant to Section 30(5) was a confirmation by the adjudication officer that as at 12th February 2001 the adjudication process had become complete in respect of P150.

The subsection 30(5) read with (6) provides thus;

5. a certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

6. every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.

WE SUBMIT that since evidence must be led on the place of the certificate issued to the Plaintiff on 12th February 2001 (Annexure “WMK2”), this is an issue which can only determine by evidence being tendered and proof of the status of adjudication process of P150 which was determined to exist as at 12th February 2001 and the same found to belong to the Plaintiff/Applicant

WE submit that the adjudication process having ended in respect of MUKOTHIMA “A” ADJUDICATION SECTION GIKINGO LOCATION P 150, and with no objection or appeal against determination of objection having being filed by Defendants as envisaged under sections 26 and 29 of Cap 284, the certificate issued pursuant to Section 30(5) on 22nd February 1996 was a confirmation of finalization of adjudication process as envisaged under section 30 (5) hence removed any dispute over P150 from the conditions of consent. The rights and interests of the Plaintiff over the suit property was established with finality hence it was not necessary to obtain consent of land adjudication officer.

MY LORD, this court sitting at Eldoret in **E&L NO. 471 OF 2013, MARTHA KIGEN VS**

JOHANA TIBINO held that where interest of a land owner have been determined through an adjudication process and the right to object to the adjudication in favour of a particular person or appeal against the decision in respect of the objection filed with the Minister has not been exercised within the time lines set out under the law, the adjudication process is deemed to have determined rights/interest in finalized and it is not mandatory to obtain consent. Justice Munyao Sila pronounced himself as follows:

“In my view, Section 30 is to be applied when the rights of the parties are still the subject of determination in the adjudication process. The reasoning behind Section 30 is so that the process of determining rights of people in an adjudication area is left to the mechanism set out in the Land Adjudication Act and not to the courts. It is the people on the ground who best know who is entitled to what area of land that is the subject of an adjudication process. The effect of Section 30 is to remove that determination from the jurisdiction of the court, so that the court does not determine any conflicts touching on interest over the land without the party aggrieved first seeking the permission of the Adjudication Officer. But where the Adjudication process has already determined the rights of the parties, I do not see any bar to a person filing a claim in court, alleging an interference in the property, without the need of consulting the Adjudication Officer. In my view, the case of R v The Chief Land Adjudication and Settlement Officer -Keiyo District cited by counsel for the defendant is distinguishable. In that case, a suit was filed when the Land Adjudication Officer was still in the process of determining the persons who were entitled to the land in dispute, and in fact, the applicants had raised objections to the register. Before the objections could be heard, they filed suit. The court, Ochieng' J, held that the case could not be sustained as their objections were still pending determination.

In this case, the rights of the parties have already been determined by the Adjudication Officer. The case of the plaintiff, in my view, is not a case seeking a determination of rights of ownership over the suit land during an adjudication process; her case is that the adjudication process has already determined that they own the land, but that a third party, who has no proprietary interests, has interfered with their quiet possession, of what has already been demarcated to them, and has trespassed into their land. In my view, I do not think that there was a violation of Section 30 of the Land Adjudication Act in the circumstances of this case.

This was a Ruling delivered in year 2014 and the court distinguished cases in which consent would be necessary. We pray and urge this Honourable Court to uphold the decision of Justice Munyao in the **KIGEN CASE** cited hereinabove.

MY LORD, the case for the Plaintiff is not a determination of his rights by an Adjudication officer, the case for the Plaintiff is that the Adjudication Officer established the land and the Plaintiff was the owner thereof and issued the Plaintiff with a Certificate confirming the Plaintiff's right and/or interest over P150 and that, just like in the **KIGEN CASE** hereinabove, a third party, who has no proprietary right and/or interests, has interfered with their quiet possession, of what has already been demarcated to them, he has a trespasser in his land and is seeking to protect his interest over the land.

The case before this Honourable Court can clearly be distinguished from the case of **STANLEY LEZEN MLIWA VS. LEONARD KAPALA MAKANGALU & 2 OTHERS**. In that case, Justice D.K Maraga, (as he then was) at page 2 of his Ruling delivered on 6th December, 2007 referred to in the Defendants submissions held rightly that

“Section 30(1) of the Land Adjudication Act, does not oust the courts jurisdiction. All it does is to stop parties from rushing to court on any and every disagreement in the adjudication process until it is complete. If it were to be ignored, I do not think any adjudication process will be completed..... That would be disastrous and definitely not in the interest of public interest..... it is a common principle of our law that where the constitution or an act of parliament makes a provision for the resolution of any grievances that provision should not be circumvented.....”

The Court in **MLIWA** case was dealing with a case in which there was an appeal pending before the Minister and the adjudication Officer had requested the area chief to prevail upon the parties to maintain status quo pending determination of the Appeal. The adjudication process was still ongoing as dispute had not been determined Under Section 29 of Cap 284.

MY LORD, we urge this Honourable court to find that the case before this Honourable Court is a case of trespass and no consent would be necessary as it does not amount to interference with adjudication process. There would be no contravention of Section 30(1) if none was sought and/or obtained. My Lord the steps taken by the Plaintiff to obtain a consent are just superfluous and/or unnecessary in the circumstances of this case.

Further, Consent, if necessary, can be obtained even when proceedings are on going and once the said consent is granted it takes effect retrospectively to the filing of the suit. See **GEDION WATHE MUTISYA & ANOTHER V 1. MUTHUI MBULU & ANOTHER [2013] EKLR where at page 2** that with the Land adjudication Officer having granted consent for continuation of suit the court would have jurisdiction to continue hearing the suit even if consent had not been granted before suit was commenced.

FURTHER AND WITHOUT PREJUDICE TO THE FOREGOING, we submit that it will not be a contravention of Section 30(1) if a party filed suit to preserve the property. A reading of the entire Cap 284 does not seem to provide for a process of preserving property under an adjudication Section. We submit, MY LORD this Honourable court has inherent jurisdiction to issue conservatory reliefs to protect property. The Land and Environment Court is established pursuant to the provisions of Article 162(2)(b) of the Constitution, 2010. **The Court is established to hear and determine disputes relating to the environment and the use and occupation of land, and title to, land.** Under Section 13(2)(d) this Honourable Court has jurisdiction to hear and determine disputes relating to **“public land, private and community land and contracts, choses in action or any other instruments granting any enforceable interest in land.....”**

(e) on its part grants the Court jurisdiction to hear and determine any disputes “relating to environment and land”

Section 13(7) of Land and Environment Act provides that this Honourable Court has the power to “grant any relief as the Court may deem fit and just including –

a. Interim or permanent preservation orders including injunction

The Land and Environment Court Act was enacted when the Land Adjudication Act was in force. If Parliament wanted to limit the court's

jurisdiction in respect to conservatory orders in respect to land which has been determined under Cap 284 nothing would have stopped it from making the proviso thereof. This jurisdiction which is entrenched in the constitution cannot be extinguished by SECTION 30(1) Cap 284. In fact, the Constitution is the supreme law in Kenya and Acts of parliament enacted even before 2010 are subject to the 2010 Constitution. In the event of any conflict the Act is unconstitutional to the extent of the conflict.

We submit and pray this court finds that the jurisdiction of this Honourable Court, a court established pursuant to the supreme law of this land to hear and determine disputes in relation to land and/or title to land, contract or other choses in action. We refer the court to the decision in **HIGH COURT OF KENYA, MUNYITHYA MUCYOKA NZAVI VS THE LAND ADJUDICATION OFFICER KYUSO ADJUDICATION AREA AND 2 OTHERS**[2017] eKLR.

We submit and agree that jurisdiction is everything and any limitation of jurisdiction of a court must be so stated in the Act establishing the Court. This Court was established under the Constitution, 2010 and a specific Act of Parliament, Chapter 12A which commenced on 30th August, 2011 was enacted to give the scope and objectives. There was no limitation on the land disputes the court can deal with and in respect of which it can issue injunction orders. Hence section 30(1) Cap 284 cannot be said to ouster this court's jurisdiction to preserve and protect the suit property.

c. EXHAUSTING OF REMEDIES SET OUT IN THE LAND ADJUDICATION ACT

We reiterate our submissions on the legal underpinning of adjudication process and the adjudication path of P150 and submit that the Plaintiff's rights over the land has already been determined and a certificate issued. The time for filing objection lapsed and there was no appeal thereof within the stipulated timelines of 60days.

The Plaintiff laid their Claim before a recording Officer as required under Section 13 of Cap 284 and demarcation was made in favor of the Plaintiff, the Public were given notice of completion of an adjudication register and they could inspect the register. Upon lapsing of time for filing objection thereof and any appeal the adjudication Officer issued the Plaintiff with a Certificate pursuant to Section 30(5) confirming that P150 was determined to exist and was determined by the adjudication process in favour of the Plaintiff. The Plaintiff followed all processes and he adhered to the outcome. He is seeking to protect his rights pursuant to the outcome of the adjudication process.

If anything, we submit, it is the Defendants who slept on any alleged and/or purported rights to challenge the demarcation of P150 in favour of the Plaintiff and they cannot turn around and say he never extinguished remedies under Section 13,14,26 or 29 of Cap 284 or at all. The Plaintiff did exhaust remedies under Cap 284 and the process was finalized in his favour.

OVERRIDING OBJECTIVE OF ELC COURT – JUSTICE, FAIRNESS AND EXPEDITIOUS DISPOSAL OF MATTERS

MY LORD, we submit Sections 12 and 15 of the Civil Procedure Act and the ELC Practice Directions, which governs the practice in the ELC Courts, guide it to achieve the overriding objective of this court of ensuring efficient disposal of matters and timely disposal of matters at a cost which affordable to the parties.

Since the Plaintiff has sought and was granted consent, it is only fair and in the interest of justice that the matter proceeds for determination on merit. Requiring the Plaintiff to file a fresh suit will not only be costly to the Plaintiff but will not be economical use of court resources.

The **Hangzhou** decision was cited and upheld in the recent case of **NGURUMAN LIMITED V DAVID NKEDIANYE & 6 OTHERS** [2018] ECLR. **The court held**

“In the case of **HANGZHOU AGROCHEMICAL INDUSTRIES LTD V PANDA FLOWERS LIMITED**[2012] eKLR Justice G V Odunga held that: ‘**The Court is therefore under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain this objective the court must strive towards ensuring the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Efficient disposal of the business of the court and efficient use of available judicial and administrative resources would necessary demand that as much as possible cases be filed within the jurisdiction of the subject matter so as not to clog other registries while others remain unutilised. As for the timely disposal of the proceedings, again it would be prudent that the cases which have been instituted and are already being processed should not be unduly interrupted. The need to have the cases disposed of at a cost affordable to the respective parties on the other hand would call for the court to examine the costs implications involved in carrying out the trial at one place and not another. It is clear therefore that it is a matter of balancing the interests of the parties with the ultimate aim of doing justice.**’

The Plaintiff herein has placed himself in the “right side” of the overriding principle as stated in HUNKER CASE, cited by the Defendants by making an request for consent from the land adjudication officer which was forwarded to court on 19th September, 2018 and we pray that this Honourable Court hears the application for injunction on merit. This will ensure justice for all and timely disposal of the matters raised in the application for injunction and the suit. No prejudice will be suffered by the Defendants.

CONCLUSION

The document filed before this Court on 19th September, 2018 does not meet the criteria set out in **MUKISA BISCUIT**. It does not raise pure points of law which can be determined without the court investigating into the facts. In fact this court cannot determine the issues raised unless it delves into the facts of this matter. It would be necessary for this Honourable Court to establish the status of adjudication of P150 in order to determine the issues raised by the Defendants.

For the record, the Defendant's have not set their defence or filed a replying affidavit. The Only evidence before this Honourable Court is that the Plaintiff went through adjudication process which process was finalized and culminated in issuance of a certificate on 12th February, 2001. This has not been challenged.

MY LORD, we urge this Honourable Court to find that the adjudication determined the interests of the Plaintiff over P150 in finality, the Plaintiff complied with the provisions of Cap 284 and what he is seeking before this court is to protect his interest and/or rights over P150 against a mere trespasser who did not object to demarcation of the land in favour of the Plaintiff. The period set under the law for filing objection and appeal under section 26 and Section 29 , respectively lapsed and the certificate issued on 12th February, 2001 was confirmation of finalization of adjudication process.

MY LORD, with the adjudication process having completed with finality in respect of P150, there is no room for the Adjudication Officer to reopen the issue and establish the land and/or ownership hence he has no further jurisdiction over the land save ensuring registration is effected by the registrar under the provisions of Section 28 Cap 284. Since he is *functus officio* on demarcation and adjudication thereof, his consent would not be necessary to protect the land against a trespasser.

The fact that the Plaintiff sought consent which was granted does not make it a necessary prerequisite for the filing of the present case. It was superfluous .

For the record and without prejudice to the submissions herein, the Land Adjudication Officer was informed of the dispute herein and consent was sought to file suit (as a formality but not because it was necessary in the case before court) . We understand that the adjudication Officer upon carrying out their investigations wrote to this Honourable Court on 19th September, 2018 which was before the Notice of Preliminary was filed and served upon us in court on 24th September, 2018.

Consent can be obtained even when proceedings are on going. See **GEDION WATHE MUTISYA & ANOTHER V 1. MUTHUI MBULU & ANOTHER [2013] ECLR where at page 2** that with the Land adjudication Officer having granted consent for continuation of suit the court would have jurisdiction to continue hearing the suit even if consent had not been granted before suit was commenced.

WE PRAY that the Notice of Preliminary Objection be dismissed with costs to the Plaintiff

Dated at Nairobi this 8th day of October, 2018.

Zipporah Mwau & Company

Advocates for the Plaintiff/Applicant

5. The defendants proffered the following cases to buttress their assertions:

- a. STANLEY LEZEN MULWA VERSUS LEONARD KAPALA MAKANGALU & 2 OTHERS [2007] eKLR
- b. NTHIGA NKANGA VERSUS CHARLES NYAGA [2008] eKLR.
- c. The Owners of Motor Vessel "LILIAN 'S'" VERSUS CALTEX OIL KENYA LTD [1989] 1 KLR 1.
- d. RANSA CO LTD & 2 OTHERS VERSUS MANCA FRANCESCO [2015] eKLR.
- e. HUNKER TRADING COMPANY LIMITED [APPLICANT] AND ELF KENYA LIMITED (Respondent)) [2010] eKLR.

6. The above authorities are all good law and precedents in the facts and circumstances they consider. I hasten to add that no one case is congruent to another in its facts and circumstances to a degree of mathematical exactitude. In making my determination, I will take into account, where relevant, the principles enunciated and elaborated by these authorities. I need not restate those principles as they have been explained in the submissions (*supra*).

7. The plaintiff proffered the following authorities:

- a. Martha Kigen versus Johana Kigen – Eldoret ELC 471 of 2013 [2014] eKLR.
- b. Munytha Musyoka Nzavi (petitioner) AND DLASO, Kyuso Adjudication Area & 2 Others (Respondents) AND Manzi Kavoi Ngulu & Another (Interested Parties)
- c. Ngurumani Limited Versus David Nkedianye & 6 Others (Defendants).

8. The above authorities are all good law and precedents in the facts and circumstances they consider. However, as I have already stated, no two cases are completely congruent in their facts and circumstances. I have taken into account the legal principles contained in these cases when making my determination in this matter. I need not restate those principles as this has already been done in the submissions (*supra*).

9. I have carefully considered the authorities proffered by the parties in support of their diametrically incongruent assertions.

10. At the outset, I find that this preliminary objection raises important pure points of law. The first ground concerns filing of suits without the consent of District Adjudication Officers as required by the law. The second ground concerns the non-exhaustion of legal stipulations.

11. Section 30 (1) of the Land Adjudication Act states as follows:

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.

12. The effect of section 30(1) is that unless the register has become final under section 29(3) of the Act, all courts are mandatorily prohibited from entertaining disputes concerning land falling within adjudication areas.

13. I note that the District Lands and Settlement Officer, one Zablon M. Mwangi on **26th October, 2018**, surreptitiously and unorthodoxically filed a consent in terms of section 30 and 8(1) of the Land Adjudication Act which is dated **19th September, 2018**. This suit was filed on **12th September, 2018**. All that this irregular act on the part of the Land Adjudication Officer did was to confirm that this suit was filed without the apposite consent.

14. What the plaintiff has annexed as exhibit WMK1 in his supporting affidavit is Notice announcing the establishment of the adjudication section covering the area where the land in dispute is situated.

15. The plaintiff in paragraph 4 of his supporting affidavit avers that his exhibit WMK2 is a copy of a certificate from the "Land Adjudication Officer and demarcation (sic) confirming completion of adjudication and my land to have become on or about 12th February, 2001". WMK 2 is a copy of a handwritten document mentioning the plaintiff, the adjudication section and P/No 50. If this document can be called a certificate, then it can only confirm that the land in question is land within an adjudication section. And no more. It is not a certification that the apposite adjudication register for the apposite section has become final in all respects under section 29(3) of the Land Adjudication Act. Consent is required even under the provisions of section 8 of the Land Consolidation Act.

16. The plaintiff has not controverted in any way that the disputed land is within an adjudication section. It is also not controverted that the plaintiff did not exhaust the procedures laid down in the relevant law.

17. In the circumstances, I uphold the Preliminary Objection filed by the 1st, 2nd and 3rd defendants.

18. Therefore, this suit is dismissed.

19. Costs shall follow the event and are awarded to the defendants.

20. It is so ordered.

Delivered in open Court at Chuka this 12th day of November, 2018 in the presence of:

CA: Ndegwa

Miss Mwau present for the plaintiff

Atheru present for defendant/respondent

P.M. NJOROGI

JUDGE