



Mbumbui & another v Giaka & 5 others (Constitutional Petition E004 of 2022) [2024] KEELC 1455 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
CONSTITUTIONAL PETITION E004 OF 2022
A KANIARU, J
FEBRUARY 28, 2024**

BETWEEN

**NYAGA MBUMBUI 1ST PETITIONER
SILAS NGUNGI IVAKA 2ND PETITIONER**

AND

**JONAH IRERI GIAKA 1ST RESPONDENT
PETER MUGAMBI GIAKA 2ND RESPONDENT
MINISTER FOR LANDS & PHYSICAL PLANNING 3RD RESPONDENT
DEPUTY COUNTY COMMISSIONER MBEERE NORTH 4TH RESPONDENT
CHIEF LAND REGISTRAR 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**

RULING

1. This is a ruling on a Preliminary objection dated 07.03.2023 and filed on 08.03.2023. The objection has been brought by the 3rd, 4th, 5th & 6th Respondents being the Minister for Lands and Physical Planning, Deputy County Commissioner - Mbeere North, Chief Land Registrar & the Attorney General respectively. The objection is on the ground that this honorable Court has no jurisdiction to hear and determine the petition herein.
2. It was agreed that the Preliminary Objection be disposed of by way of written submissions. The Respondents filed their submissions on 27.09.2023 while the Petitioners filed their submissions on 11.10.2023.
3. The Respondents gave a background to the suit herein, which is that the suit is about ownership of Land Parcel Mbeere/Mutitu/16 measuring 27.48Ha. That according to the Petitioners, the land



- originally belonged to the 1st Petitioner, Nyaga Mbumbui, Ibaka Nyaga (deceased), Joseph Giaka Mbenji (deceased), Njiri Marumbu and Nyaga Mbenje who acquired the same in 1999 through adjudication. That Ibaka Nyaga (deceased) was the father to the 2nd Petitioner, Silas Ngungi Ivaka.
4. That after the registration, Ibaka Nyaga opposed the registration of Joseph Giaka Mbenji as a proprietor of the suit property and he filed an appeal to the Minister, the same being appeal no. 280 of 2011, which was heard before the Adjudication Officer. That before the matter could be determined, both Ibaka Nyaga and Joseph Giaka passed on and their sons took over conduct of the matters, with Ibaka Nyaga being represented by the 2nd Petitioner, Silas Ngungi, while Joseph Giaka was represented by his son, Jonah Ileri. That on the hearing date, both sons informed the Deputy County Commissioner that they wished to withdraw the matter, which they did.
 5. That the Deputy County Commissioner thus marked the matter as withdrawn and finalized and ordered that both families benefit from the suit property. That this is the impugned decision that led to the instant petition since the petitioners contend that the decision of the Deputy County Commissioner disinherited other beneficiaries of Ibaka Nyaga's estate.
 6. The Respondents then submitted that, the preliminary objection meets the legal threshold laid down in the *Mukisa Biscuits Manufacturing Co Ltd V West End Distributors Ltd* (1969) EA 1969. That jurisdiction is a pure point of law that can be raised through a preliminary objection and which should be resolved on a priority basis as set out in the Supreme Court case of *Mary Wambui Munene v Peter Gichuki Kingara & 6 Others* (2014) eKLR as well as in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* (1989) KLR 1.
 7. That the substance of the current suit falls beyond the purview of a constitutional petition because the petitioners have not exhausted all other available mechanisms laid down by statute before they could finally move the constitutional court hence this court lacks the jurisdiction to hear the suit. They submitted further that the petition does not meet the threshold of a constitutional petition as it seeks to enforce rights that can be enforced through other statutory means hence offends the doctrine of exhaustion/avoidance. That the said doctrine demands that a litigant must exhaust all other mechanisms of settling a claim or resolving a dispute before instituting a constitutional petition.
 8. That the said doctrine is also known as the doctrine of avoidance which was recognized in the supreme court case of *Communications Commission of Kenya and 5 Others v Royal Media Services Ltd and 5 Others* (2014) eKLR, *KKB v SCM & 5 Others* (2022) KEHC 289, *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 others (Interested Parties)* 2020 eKLR.
 9. That the petition herein does not meet the threshold of a constitutional petition as it seeks to enforce rights that should be enforced through seeking orders of judicial review hence offends the doctrine of exhaustion. That the jurisdiction of courts to entertain matters challenging the exercise of executive authority is restricted merely to the decision making process and not the decision itself which is what the petitioners are seeking in the instant petition. That the finality of the decision by the Minister is provided for under the *Land Adjudication Act* which ousts the jurisdiction of this court to consider the merits and demerits of that decision.
 10. That the only recourse that the petitioners have and the proper forum where their grievances can be heard is through judicial review proceedings challenging the process through which the Ministers decision was arrived at. They cited the cases of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR citing the case *Democratic Alliance v The President of the Republic*



of South Africa & 3 others: CCT 122/11 (2012) ZACC 24, *Philmark Systems Co Ltd v Andermore Enterprises* (2018) eKLR to support their position.

11. The Petitioners on the other hand in their submissions, denied the facts of the case as presented by the Respondents in as far as the Petitioners were ordered to share land. They submitted that the Respondents argument that they should have filed for judicial review cannot be sustained as it is said that the 1st Petitioner was not a party to the proceedings that deprived him of the suit land. That the 1st petitioner is before court since the 4th Respondent gave away his land without hearing him which is a violation of Article 40 & 50 of *the Constitution*.
12. That other than the 1st Petitioner, all other proprietors were dead when the alleged proceedings were being done by the 4th Respondent. That neither the 2nd petitioner nor the 1st and 2nd respondents are administrators of their father's respective estates. That there is no such thing as representation of a dead person without letters of administration hence the proceedings before the 4th respondent were a nullity. That administrative decisions are now subject to *the Constitution* and specifically article 47 where courts have been granted power to interfere with unreasonable decisions. They cite the case of *Muka & Anor Malala 7 12 others* (2022) KEHC 1031 and *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested parties)* (2020) eKLR to support their position.
13. I have considered the preliminary objection as well as the party's submissions. I find the issue for determination is whether the preliminary objection has merit. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors Ltd* (1969) EA 696, as follows:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
14. It therefore follows that for a ground to suffice as a preliminary objection then it ought to be one that raises a pure point of law as in the Mukhisa case. The preliminary objection should also be one that if argued is capable of disposing off the suit.
15. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu* HCCC No.22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
16. The Respondents ground of objection is that this court lacks the jurisdiction to hear the petition herein. As has been rightly submitted by the Respondents, jurisdiction is a pure point of law that can be raised in a preliminary objection.



17. I have looked at the impugned petition which was filed on 11.10.2022. The same is seeking the following reliefs:
- a. A declaration be and is hereby issued that the registration of Jonah Ireri Giaka and Peter Mugambi Giaka as the proprietors of land parcel no. Mbeere/Mutitu/16 on 01.08.2022 is illegal, unconstitutional, null and void and the land registrar is hereby ordered to cancel entry (6) of the register of Mbeere/Mutitu/16.
 - b. A declaration that the decision of the 4th respondent giving the land parcel no. Mbeere/Mutitu/16 to the 1st & 2nd Respondent only after withdrawal of the appeal filed by the 2nd petitioner's father is illegal, unconstitutional, null and void and the same amounts to intermeddling with an estate of the deceased proprietors.
 - c. An order be issued directing the administration or further dealings of land parcel no. Mbeere/Mutitu/16 be conducted as per the law of succession Act cap 160 laws of Kenya and the Land Registration Act 2012.
18. It is said that the suit land herein being Mbeere/Mutitu/16 was acquired after adjudication by the 1st Petitioner, the 2nd petitioner's deceased father), Joseph Giaka Mbenji (deceased) and the 1st Respondents father, Njiri Marumbu and Nyaga Mbenje. It is said that the 2nd petitioner's father thereafter filed an appeal challenging the registration of the 1st Respondents father as a co-proprietor of the suit land which appeal was withdrawn. The petitioners are now complaining that the Deputy County Commissioner, Mbeere North acting on behalf of the Minister for Lands and Physical Planning effected the withdrawal of the case and misrepresented the same as if the 2nd Petitioner (who had filed the appeal to the Minister) was giving land to the 1st & 2nd respondents by withdrawing the appeal. They complain further that the Deputy County Commissioner as result of his decision, directed the Chief Land Registrar to order the Land Registrar Siakago to register the 1st & 2nd respondents as the only proprietors of the suit land which was erroneous. It is on this basis that they are challenging the decision by the Deputy County Commissioner and seeking to have the same declared illegal, unconstitutional and null and void.
19. The Respondents in the suit are challenging the manner in which this suit was filed, as according to them, the plaintiff ought to have approached the court by way of judicial review. The petitioner's on the other hand contend that the constitution has empowered the courts to interfere with administrative decisions that are unreasonable. This court does not disagree with the Petitioners in that regard. But the petitioners cite Article 47 of the Constitution for this proposition but fail to appreciate that Article 47 is operationalized by or through the Fair Administrative Actions Act. The approach by any Litigant to the court on issues falling under that Constitutional provision should be as provided for in the ACT.
20. The law under the *Fair Administrative Action Act* under Section 7 provides for the procedure of challenging an administrative decision as follows;
- Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–
- (a) a court in accordance with section 8; or
 - (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
21. Section 9 of the same Act provides Procedure for judicial review



- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
 - (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 - (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
22. From the above, it is clear that the decision of the Deputy County Commissioner acting on behalf of the Minister being an administrative decision can only be challenged by way of judicial review which only examines the decision making process and not the merits or demerits of the decision. I agree with the Respondents that the correct approach that should have been followed by the petitioners in challenging the said decision ought to have been by way of judicial review which is not the case herein.
23. I am therefore inclined to find that the preliminary objection dated 07.03.2023 has merit and consequently dismiss the petition herein with costs to the Respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28TH DAY OF FEBRUARY, 2024.

In the presence of Mr. Gitonga J. G for Mr. Muriuki Muriithi for petitioners, Mr. Mogusu for Momanyi for 1st and 2nd respondents and Mutua for Kiongo for 3rd and 6th respondents.

Court assistant: Leadys

A. KANIARU

JUDGE –ELC, EMBU

28.2.2024

