



**Zuma v Kumbo & 5 others (Environment & Land Case E032 of 2023) [2024] KEELC 4157 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4157 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E032 OF 2023**

**AE DENA, J**

**MAY 20, 2024**

**BETWEEN**

**HAMISI MKAHA ZUMA ..... PLAINTIFF**

**AND**

**EGA ZUMA KUMBO ..... 1<sup>ST</sup> DEFENDANT**

**NDARO ZUMA ..... 2<sup>ND</sup> DEFENDANT**

**PUNGA ZUMA ..... 3<sup>RD</sup> DEFENDANT**

**THE DIRECTOR OF PHYSICAL PLANNING, KWALE ..... 4<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER,  
KWALE ..... 5<sup>TH</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed the present suit on 20/12/2023. Accompanying the Plaintiff was a Notice of Motion seeking temporary orders of injunction to restrain the 1<sup>st</sup> to 3<sup>rd</sup> Defendants against any dealing whatsoever on land parcel Kwale/Mwavumbo/1 pending the hearing and determination of the said application and suit.
2. It is the Plaintiff's case that prior to this suit, members of the community [Kaphingo Village of Kalalani Sub Location Kwale County] had been burying their deceased at Kaphingo Community grave yard until July 2023 when the 1<sup>st</sup> to 3<sup>rd</sup> Defendants begun destroying the graves allegedly in preparation of claiming its ownership by adjudication. The Plaintiff states that the graveyard belongs to the Mkaha family and is within the Mwavumbo Group Ranch Plot 1 which was originally communal property. It is stated that the adjudication process is ongoing and the Plaintiff is apprehensive of the risk that



the communal land will be allocated to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants who are private individuals with no ownership rights over the same.

3. In opposing the application and suit, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants filed the preliminary objection herein on the following verbatim grounds;
  - a. The Plaintiff does not have locus standi/capacity to sue the Defendants herein.
  - b. The court lacks jurisdiction to hear and determine the suit.
  - c. The suit offends Sections 29 and 30 of the [Land Adjudication Act](#) Cap 284 laws of Kenya.
  - d. The suit herein offends the doctrine of exhaustion of remedies.
4. The preliminary objection has been canvassed by way of written submissions. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants filed their submissions on 28<sup>th</sup> January 2024 and which the court has considered. The Plaintiff's submissions are dated 4/03/24 and the court has duly considered the contents thereof.

### **Determination**

5. The main issues for determination are whether the grounds in the preliminary objection are pure points of law, and whether this court has jurisdiction to hear and determine this suit. Before embarking on determination of the preliminary objection, it is noted that the Plaintiff in the submissions filed before court addressed the issue of locus standi which was challenged by the Defendants in the preliminary objection. The Plaintiff avers that he has the capacity to institute the suit herein based on the fact that the issues raised are in relation to violation of rights to ownership of property.
6. The Plaintiff is adamant that the suit has public interest and hence the same can be filed on behalf of the community. The question therefore is whether the Plaintiff has the locus standi to institute the suit on behalf of the community. Locus standi is defined in [Black's Law Dictionary](#) as: -“The right to bring an action or to be heard in a given forum.”. The Plaintiff in the plaint instituting this suit stated that he is a native of Kaphingo Village of Kalalani Sub Location Kwale County where the suit property is located. That the said property was initially a graveyard for the community before the same was allegedly taken over by the Defendants who are keen on having the same adjudicated upon and allotted to them. He states that there is destruction of the graves and these actions have rendered the community destitute as the land has been in use by them.
7. To this point, I think enough has been said to demonstrate the Plaintiff's interest in the land. Does he have any right so far? The answer is in the affirmative, the Plaintiff has displayed his stake as a member of the Kiphingo Village community who feels the need to protect the land used by his community as a graveyard. The doubt over the Plaintiff's locus standi is therefore cleared. It is also important to clarify that locus standi is not the same as jurisdiction.
8. A Preliminary Objection, as stated in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696,

“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”
9. In the same case, Sir Charles Newbold said:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion”.

10. In the case of *Oraro v Mbajja* [2005] eKLR the court stated thus on ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and 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. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point”.

11. The issue as to whether or not this court lacks jurisdiction is therefore properly raised as a Preliminary Objection and the same will be considered by this court.

12. The *Land Adjudication Act* sets out an elaborate and comprehensive procedure for dealing with any dispute that arises during the adjudication process. Section 30 (1) of the *Land Adjudication Act* provides 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*. [Rev. 2012] *Land Adjudication* Cap. 284 L5 - 17 [Issue 1].

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.”

13. The said Section 29(3) referred to on the other hand states: -

“29

(3) when all the appeals have been determined, the Director of Land Adjudication shall: -

a. Alter the duplicate register to confirm with the determination; and

b. Certify on the duplicate adjudication register that it has become final in all respects and send details of the alterations and copies of certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”



14. I am in agreement and persuaded with the findings in *Mohamed Abamed Khalid (Chairman) and 10 others v Director of Land Adjudication & 2 others* [2013] eKLR where Angote J held: -

“The law that was applicable for the ascertainment of land rights and interests over trust land is the *Land Adjudication Act* Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the land adjudication and settlement officer, the land adjudication committee, the land arbitration board and the Minister’s appeal committee.

Indeed, before the Director signs the certificates of finality, the *Land Adjudication Act* provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the Adjudication register.

The petitioners have not shown by way of evidence that the adjudication register in respect of the suit property was ever published and that they raised objections in respect to the matter in which the adjudication process was carried out. Considering that the *Land Adjudication Act*, Cap 284 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust Land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place.”

15. From the above dictum, it is clear that there are clear mechanisms for the resolution of a dispute in the nature of the one before this court to be resolved before the court can be moved. It is uncontroverted evidence that issues relating to allocation of the suit property herein are still pending before the Land Adjudication and Settlement officer. As such in filing the present proceedings, the Plaintiff jumped the gun. The Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 held that: -

“i. Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly be adhered to since there are good reasons for such special procedures.”

16. Further, in *International Centre of Policy and Conflict & 5 Others v The Attorney General & 4 Others* [2013] eKLR as was cited in the case of *Diana Kethi Kilonzo & Another v IEBC & 10 Others* [2013] eKLR it was stated: -

“i. “An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the *Constitution* in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state of organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. ...Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted”



17. Based on the foregoing discussions, I find the preliminary objection has merit and the suit is hereby struck out. Each party shall bear its own costs.

It is so ordered.

**RULING SIGNED DATED AND DELIVERED THIS 20TH DAY OF MAY 2024.**

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**A.E DENA**

**JUDGE**

In the presence of: -

No appearance for Plaintiff

Ms. Gatimu Holding brief for Mwanzia for the 1<sup>st</sup> - 3<sup>rd</sup> Defendants

Mr. Daniel Disii – Court Assistant

