



**Mbiti v Kwasa (Environment and Land Appeal E004 of 2022)
[2024] KEELC 3832 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3832 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

LG KIMANI, J

MAY 14, 2024

BETWEEN

KATHINI MBITI APPELLANT

AND

GEOFFREY MATI KWASA RESPONDENT

(An appeal from the judgment of Honourable Mercy Nasimiyu, Principal Magistrate-Kyuso delivered on the 10th February 2022 at Kyuso Law Courts in ELC Case No. 4 of 2019)

JUDGMENT

1. The Appellant appeals from the judgment of Honourable Mercy Nasimiyu, Principal Magistrate-Kyuso delivered on the 10th February 2022 at Kyuso Law Courts in ELC Case No.4 of 2019 through the Memorandum of Appeal dated 10th March 2022 and sets forth the following Grounds of Appeal:
 1. That the Learned Resident Magistrate erred and misdirected herself both in law and facts by failing to note that under the [Land Adjudication Act](#) CAP 284, it is only the Land adjudication officer or tribunals with powers to ascertain and record rights and interests over trust land under adjudication process.
 2. That the Learned Resident Magistrate erred and misdirected herself both in law and facts by failing to note that under S.30(1) of the [Land Adjudication Act](#) CAP 284, the court has no jurisdiction to entertain proceedings relating to ownership of land in the adjudication section.
 3. That the Learned Resident Magistrate erred and misdirected herself both in law and facts by failing to take notice that, the respondent was guilty of violating the doctrine of exhaustion of the available dispute resolution mechanism under the [Land Adjudication Act](#) CAP 284.
 4. That the Learned Resident Magistrate erred and misdirected herself both in law and facts by failing to notice that the consent issued under S.30(1) of [Land Adjudication Act](#) Cap 284, did



not confer upon the court jurisdiction to determine the issue of ownership, jurisdiction or powers which are the preserve of the land adjudication tribunals or officers.

5. That the Learned Resident Magistrate erred and misdirected herself both in law and facts by failing to notice that the adjudication officers and tribunals had powers to ascertain and determine and register the prescriptive rights or interests if any existed, affected the disputed land.
 6. That the Learned Resident Magistrate erred and misdirected herself both in law and facts by failing to notice that, the respondent was out for forum shopping, and so, dismiss the suit as an abuse of the due process of court.
 7. That the Learned Resident Magistrate erred and misdirected herself both in law and facts by failing to exercise the judicial restraint doctrine.
2. The Appellant prays that the appeal be allowed and the judgment of the lower court be set aside and substituted with an order dismissing the plaintiff's case with costs.
 3. The suit before the trial court was instituted by the Respondent herein vide Plaint dated 15th February 2019 where he sued the appellant and included 5 interested parties who are not parties to this appeal. The plaintiff averred that he is the nephew of the defendant and their relation is that his father was a brother to the defendant's husband.
 4. The plaintiff claimed that in 2016 Kyuso C was declared an adjudication section and that he sent his mother to participate in the adjudication but she was sent away due to a pending case being Kyuso Resident Magistrate's court case number 35 of 2015 between himself and the defendant which case was terminated on 5th April 2018. Thereafter the defendant is accused of causing the land to be demarcated and the plaintiff awarded number 1370 and the defendant 1390 without the involvement of the rest of his family.
 5. The plaintiff stated that on or about 15th December 2018 he was prevented from interring his son Ben Mwandikwa by police officers led by the OCPD Kyuso Division and the Assistant chief based on a demand letter issued by advocates for the defendant claiming ownership of the land.
 6. The plaintiff claims to have been in occupation of the land for over thirty years and constructed 8 residential houses, a granary, a toilet and a cattle boma with the defendant having been aware of his occupation and never objected.
 7. He also stated that the land is ancestral land occupied by the 1st interested party who is to hold the land in trust for herself and for her children and the demarcation maps do not reflect what is currently on the ground. He claims that the demarcation was fraudulent, suspect and illegal and there was collusion.
 8. The plaintiff averred that he incurred expenses in delaying the burial such as mortuary fees, funeral charges and legal costs and prayed for a declaration that he has acquired prescriptive rights over land parcel 1390 and should be recorded as the bonafide owner of the land and more particularly the portion occupied by his homestead alongside third parties and a permanent injunction barring and restraining the defendant from interfering with the plaintiff's quiet occupation, use and enjoyment of his homestead and interment of his son, the late Ben Mwandikwa at parcel 1390.
 9. The defendant filed a statement of defence where she claimed that there was a criminal case between herself and the plaintiff's children. She admitted that land parcel 1390 was given to her and 1370 to the plaintiff but since his homestead was on her land he was told to migrate but failed to do so and that



he was about to inter his son on her property. She also claims that the plaintiff had filed many cases against her in Kyuso law courts.

Evidence at the Trial Court

10. During the trial, PW 1 Geoffrey Mati Kwasa, the Plaintiff adopted his two witness statements and a bundle of documents as evidence. In his witness statement, his testimony was that he is the son of Kwasa Mulatya (Deceased) and they live on the suit land with several family members who have homesteads and that he lives with his mother.
11. The plaintiff states that in 1986, there were no complaints about the suit land until 5th December 2018 when the defendant started complaining. He stated that he inherited the land from his late grandfather who had sub-divided his land among his children. He stated that the defendant's late husband Mbiti Mulatya had sold all his land and left for Nairobi with the defendant until 1995 when he came back and incited some of the family members to give him a share of their land. The defendant's late husband passed on in 2003 and the plaintiff agreed that he be buried in his land upon which the defendant started claiming the land. In 2015, the Plaintiff stated that he filed a case against the defendant to evict her from his land, which he did.
12. In the year 2016, the area was declared an adjudication area and the defendant was issued with parcel No.1370 under his name. She lodged a case which was scheduled for hearing on 10th May 2017 and because he had no witness, the land was subdivided by the lands office and the defendant was given parcel number 1390. The plaintiff stated that he appealed to the arbitration board and the case was to be heard on 13th September 2017, unfortunately, he was admitted at Kenyatta National Hospital and he did not attend. The hearing proceeded in his absence and the land was given to the defendant without his knowledge.
13. He visited the lands office and later learnt that the case had been determined on 18th September 2018 and a verdict given. He sought consent to sue from the Adjudication officer which was denied. His son died in the process and he was served with a letter not to bury him on the land.
14. On cross-examination, Plaintiff denied that the defendant's land was given to him during adjudication and that instead, parcel 1390 was excised from parcel 1370 without his consent and given to the defendant. He denied chasing the defendant from her husband's land. He stated that the land is ancestral inherited from his grandfather and that the defendant's husband had sold his land.
15. Teresia Mwinza Mwasi (PW 2) the 1st interested party testified and adopted her witness statement. She stated that the defendant's husband passed away while in Nairobi and the family members decided to bury him in her late husband's land and she gave the defendant a portion of her land to build a house near her husband's grave. The defendant later started cultivating a portion of her land and started claiming that the land was hers.
16. After the area was declared an adjudication section she visited the lands office and was not issued with a number but later learnt that the land was surveyed in her son's name and the defendant herein when she has other children who have a share in the land. She therefore states that the defendant has no share in the suit land.
17. In cross-examination, she stated that the land in question belonged to her late husband which he had inherited from his father Mulatya Katumo. After the land portions were distributed to the family, the defendant's husband sold his portion and went away to stay in Nairobi with his family. She stated that the defendant's husband had another wife with whom they stayed on the suit land and that the



- defendant's mother-in-law also used to live on the suit land. She testified that they did not attend adjudication proceedings because they were not aware of them.
18. Rhoda Kwasa Kimothi (PW 3) testified that the suit land had belonged to their late Dad and that she grew up on the land and the defendant's husband was her uncle. Around 1970-1973 when their grandfather was giving out land, the defendant's husband was given his land separate from the rest of their land but he went to live in Mombasa then in Nairobi. When he died, the family agreed that since he did not have land, he could be buried on the plaintiff's land. She noted that their father died before their grandfather.
 19. On cross-examination, she told the court that the defendant's deceased husband sold his land because he wanted to acquire a driving license and went ahead despite his grandfather's advice. She confirmed that the defendant had been given some land to cultivate to fend for her children.
 20. Joseph Musyimi Muthengi (PW 4) adopted his witness statement as his evidence before the court where he stated that around February of the year 2016, the area was declared an adjudication section and he was elected as chairman of the committee. The plaintiff and the defendant started having differences and as leaders, they held a meeting to discuss the issues, they drew sketch maps and gave them their numbers. The land in question was known as 1370 but after sub-division, the defendant got 1390 and the plaintiff 1370.
 21. In 2018, the Plaintiff's son passed away but he was stopped in the process of burial by the defendant, claiming that the land belonged to her. After visiting the lands office at Kyuso to confirm if there were any changes, the plaintiff said to him that the map was changed without his consent. He noted that after the subdivision, the defendant never appealed against this ruling.
 22. Upon cross-examination, PW 4 stated that he was not present when the final decision to subdivide was made. He informed the defendant that he should have appealed to the board during the survey. He was present as a member of the committee during adjudication and confirmed from the map that the plaintiff's land is on parcel 1370.
 23. David Muunga (PW 5) also adopted his witness statement as evidence in which he stated that he had known the plaintiff for more than 30 years as his neighbour. Before the death of his father, he had been living on the suit land together with his parents and brothers. He stated that he is not aware of any clan decision that would have gone contrary to what is on the ground.
 24. On cross-examination, he stated that the defendant's husband used to reside in Nairobi and only used to come back to collect cash from the people who purchased land from him.
 25. The defence case began on 3rd August 2021 when Josephine Kathini Mbiti (DW 1), the defendant testified and adopted her witness statement and bundle of documents as evidence. She stated that the plaintiff is the son of his brother-in-law and that she has been a widow since 2003 when her husband died and left her with 5 children. Before her husband died, he had already subdivided the land and left her on his own land. After 5 years, she averred that the plaintiff started claiming that the whole land belonged to him and chased her and her children from the land and she had to go somewhere to settle for her safety.
 26. She reported the matter to the area assistant chief, D.O, D.C and finally to survey and the verdict was that the land belonged to her husband Mbiti Mulatya (Deceased) who was issued Land Parcel 1390. When the Plaintiff's son died, he insisted on burying his body in her land contrary to all verdicts given. She therefore wrote a demand letter through her lawyer cautioning him not to bury his son there. She claims that the plaintiff wishes to grab her land.



27. Upon cross-examination, she stated that the plaintiff's father had been invited to the Auwani clan meeting but he failed to attend. She insisted that the land is hers hence why she stopped the plaintiff from burying his son there.
28. Samson Kilonzi Nzuki (DW 2) gave his testimony, adopting his witness statement in which he had stated in Kiswahili that he had known the plaintiff and the defendant since birth. That Mulatya Katumo had 2 wives Syomwene Mulatya and Ngoki Mulatya. Mulatya distributed his land between his wives before his death and the portion in dispute is the one for Ngoki Mulatya the 2nd wife. Ngoki had two sons both deceased Kwasa (who died in 1970) and Mbiti (the defendant's husband who died in 2003). He testified that there was a family meeting on 10th January 1995 to distribute the land and the plaintiff was present and the reason was to distribute the land left to the family of Ngoki.
29. The family divided the land into two equal parts, with one being his on the west side belonging to Mbiti, the late husband of the defendant and the other being the Plaintiff's on the east side. The plaintiff later built his house on his uncle's side and farmed on his side of the land and he later chased the defendant from the land, stating that she has no land there. In a second meeting on 12th January 1995, the plaintiff refused to attend and the meeting was postponed. Another meeting was set for 15th January 1995 and the plaintiff refused to attend despite persuasion by family members sent to him. When the clan realised that the plaintiff did not wish to attend they decided to go with Mbiti Mulatya who was the only surviving child of Mulatya Katumo who was alive. The house of Kwasa was given the eastern side while Mbiti was given the western side. Instead of the plaintiff building on the side that was allocated to him, he made a shamba on the land allocated to him and built his homestead on the land allocated to his uncle.
30. The case was reported to the chief by the defendant and it was decided that the land was hers but was later threatened by the Plaintiff's family. She therefore reported the matter to the D.C and a clan meeting was called on 26/10/2012. When land adjudication started the land adjudication committee gave the defendant plot no.1390 while the plaintiff was given 1370 and the decision was upheld before the land adjudication board.
31. On cross-examination, DW 2 stated that he belongs to the Auwani clan and that he was the chairman of the clan in 1995.
32. Muneeni Mvinga (DW 3), stated that the defendant is his sister in law and he adopted his witness statement as evidence. He stated that he has known the plaintiff and defendant since birth and that he has known the plaintiff and the defendant since birth. He reiterated that the land in dispute was divided into two by the family meetings between Mbiti (Deceased) and the plaintiff, which meetings the plaintiff refused to attend. The plaintiff then deliberately erected temporary structures on his uncle Mbiti's side, where he was buried.
33. When land adjudication was done in the area, the committee decided to give the defendant plot 1390 and the plaintiff was given plot 1370, which decision was upheld on appeal to the land adjudication board. He stated that he was present during all the clan meetings on cross-examination.
34. Judgment was delivered by the trial court on 10th February 2022 and she found that the minutes of the clan meeting held in 1995 were not signed by any of the members present therefore were not admissible as evidence. She noted that there was a sale agreement produced by the plaintiff which showed that the defendant's husband had sold land to one Mwikali Muunga, which evidence was not challenged, leading her to conclude that the land that was sold was family land and therefore the defendant's husband had no interest in his brother's share of land. She also concluded that since the evidence that the plaintiff's occupation on the suit land was uncontroverted nor challenged, the plaintiff has proved



his case and awarded him prescriptive rights over Land Parcel 1390 and a permanent injunction against the defendant to restrain her from interfering with the plaintiff's quiet occupation and interment of his son on the suit land.

The Appellants' Submissions

35. Counsel for the Appellant submitted that the land adjudication for Land Parcel 1390 Kyuso Adjudication Section followed due process as per the [Land Adjudication Act](#) but the plaintiff filed the case in court which had no jurisdiction to handle the case as per section 30(1) instead of appealing within the adjudication process.
36. They therefore submit that the respondent failed to exhaust all available legal mechanisms before rushing to court and the court had no jurisdiction to entertain the proceedings relating to the ownership of land in an adjudication section before the register of the adjudication area was declared completed.
37. On the above points, counsel relied on the authorities in the cases of Republic vs Commissioner of Co-operative Development Transline Savings and Credit Co-operative Society Ltd and Owners of the Motor Vessel Lilian 'S' Caltex Oil Kenya Ltd 1989eKLR on lack of jurisdiction and Robert Khamala Situma vs James Macharia Mwangi on the doctrine of exhaustion.
38. The Appellant submits that jurisdiction is primordial in every suit and has to be there when the suit is filed in the first instance as captured in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR and that by dint of sections 30(1),(2) of the [Land Adjudication Act](#), the jurisdiction of the court is ousted once the process of adjudication has started until the register has been made final, relying on the holding in the case of Kitui Robert Kilingi Mulwa vs Musembi Mutunga & others and this court's holding in the case of R vs Hon. Attorney General and Julius Wambu Kanyenze; Dominic Mwendwa.
39. The appellant concludes that the trial court failed to notice that the respondent was forum shopping and that the court overstepped its mandate as it violated the spirit and dictates of section 30 of the [Land Adjudication Act](#) CAP 284. Counsel urged the court to find that the appeal has merit and requested that the court do interfere with the trial court verdict.

The Respondent's Submissions

40. Counsel for the Respondent who was the Plaintiff before the trial court gave a summary of the case before the trial court. It is their submission that the Respondent obtained consent dated 7th February 2019 from the Lands Adjudication Officer Kyuso to institute civil proceedings after the Appellant disrupted the burial of his son.
41. On the issue of the trial court's jurisdiction under section 30, noting that the respondent had earlier filed Kyuso ELC Case 3. Of 2019 which was struck out for lack of obtaining consent from the land adjudication officer and Senior Resident Magistrate Case No.35 of 2015 which was terminated on 5th April 2018, but submitted they were still within their rights to file another suit after obtaining consent as was held by the court in the decision of Makau Muliko Kivinda & 2 others vs. Musyoki Mutuku (2017) eKLR.
42. Counsel for the Respondent also noted that the Appellant did not raise the issue of jurisdiction in the trial court and therefore submitted to the court's jurisdiction until full hearing.
43. It is their submission that the register need not be made final before filing such a suit as was held in the cases of Mike Mbevi Ndambuki v Thomas Mwaka Kamuna & 8 others (2022) eKLR, Stanley Gitonga



- v. Gerald Mwithia(2013)eKLR, Mugere Kamotho v. James Muchiri Ndegwa & 13 others(2021)eKLR, and Rionlima v. Paul(2023) KEELC 15697(KLR) (23RD February 2023 (Judgment)).
44. Having obtained the consent as required by Section 30 of the [Land Adjudication Act](#), and there being no pending appeal before the Minister, the Respondent submits that they had complied with the said provision.
 45. Regarding the doctrine of exhaustion, the Respondent submitted a two-fold argument. One is that the consent from the land adjudication officer enabled him to opt out of the dispute resolution mechanisms provided for under the act and two, that he brought himself within the recognized exceptions of the doctrine of exhaustion, relying on the cases of R. vs Independent Electoral and Boundaries Commission(I.E.B.C) ex parte National Super Alliance (NASA) Kenya & 6 others(2017) eKLR, Mohammed Ali Baadi and others v The Hon Attorney General and 11 others (2018) eKLR, CA Fleur Investments Limited v. Commissioner of Domestic Taxes & another (2018) eKLR and Republic v Firearms Licencing Board & another ex parte Boniface Mwaura (2019)
 46. In the first instance, the Respondent submits that the dispute resolution mechanisms under the [Land Adjudication Act](#) were not suitable, accessible, available, effective and timely since the dispute was never decided on merit by both the committee and the arbitration board and the matter proceeded ex-parte. He therefore submits he could not have exhausted the adjudication process when he was denied the right to be heard.
 47. The Respondent also states that he became aware of the decision of the arbitration board 1 year after the decision had already been made meaning that he could not have appealed to the Minister within the 60 days required by the Act.
 48. It is therefore their submission that where the Appeal to the Minister is no longer available, the avenues under the adjudication process stand exhausted as it was held in the cases of Mugere Kamotho v. James Muchiri Ndegwa & 13 others (2021) eKLR, John Kariri Mucheke v. M’itabari M’arunga (2008) eKLR Stanley Gitonga v. Gerald Mwithia (2013) eKLR.
 49. The respondent also relied on the court’s holding in the case of Stephen Kirimi M’Rinturi v. Land Adjudication and Settlements Officer-Igembe District & 3 others; Peter Kumbu Kimunya & Another (Interested parties) (2020) eKLR that courts have jurisdiction to determine some disputes arising out of the adjudication process as well as the case of Daniel Murungi Mwirabua Anampiu v. Jeremiah John alias Jeremia Guantai (2019) eKLR.
 50. The circumstances the Respondent faces made it impossible for him to pursue the dispute resolution mechanisms under the Act to conclusion since at the time of filing the case, he had to apply under a Certificate of urgency dated 15th February 2019, since the body of his son had been lying in the mortuary since 26th November 2018.

Analysis and Determination

51. As a first appellate court, this court must approach the whole of the evidence on record from a fresh perspective and with an open mind and to evaluate and re-examine the evidence adduced in the trial court, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified. This duty was succinctly stated in the case of Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, where the Court of Appeal held that;

“ An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that



this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

52. It is also the legal position that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

53. The Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

54. Having considered the Memorandum of Appeal, the trial court file and the rival submissions of each party, the court is of the view that the 7 grounds of appeal may be consolidated and determined as issues for determination with grounds 1, 2, 4 and 5 as the first issue herein while grounds 3, 6 and 7 as the second issue:

1. Whether the trial court had the jurisdiction to determine the suit before it?
2. Whether the suit was filed in contravention of the doctrine of exhaustion?
 1. Whether the trial court had the jurisdiction to determine the suit before it?

55. The Appellant argues that the trial court did not have the requisite jurisdiction to hear and determine the suit before it due to the provisions of the [Land Adjudication Act](#) CAP 284 and in particular section 30. They submitted that the Act ousts the court’s jurisdiction once the process of adjudication starts until the register is made final.

56. The often-cited case on jurisdiction is *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* [1989] eKLR where the Court held that:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

57. In the case of *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others* (2012) eKLR it was held that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that jurisdiction is not a mere technicality but goes to the very heart of the matter. The court pronounced itself as follows:-

“A Court’s jurisdiction flows from either [the Constitution](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by [the Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”



58. The Environment and Land Court was established under Article 162 (2) (b) of *the Constitution* of Kenya 2010;
- “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— (b) the environment and the use and occupation of, and title to, land.”
59. The Magistrate’s Court’s jurisdiction to hear and determine environment and land cases is established under Section 26 (3) and (4) of the ELC Act and states that;
- “The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
4. subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle
 - a. disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - b. matters of a civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates’ Courts Act.
 4. Appeals on matters from the designated magistrate’s courts shall lie with the Environment and Land Court.”
60. Section 9 of the *Magistrates’ Courts Act* CAP 8D stipulates the particulars of the said jurisdiction and states that: “A magistrate’s court shall—
- a. in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 8D) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to—
 - i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - ii. compulsory acquisition of land;
 - iii. land administration and management;
 - iv. public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - v. environment and land generally.”
61. However, when it comes to land under adjudication, jurisdiction is stipulated under the *Land Adjudication Act* CAP 284. As rightly submitted by Counsel for the appellant, the duty to hear and determine disputes arising out of the process of ascertainment of rights and interests in community land are to be dealt with as provided under the said Act.
62. Land Adjudication is a process where rights and interests in land are ascertained and recorded before registration. The preamble to the *Land Adjudication Act* CAP 284 states that it is “An Act of



Parliament to provide for the ascertainment and recording of rights and interests in community land (formerly Trust land), and for purposes connected therewith and purposes incidental thereto.”

63. When land is under adjudication, persons with rights and interests go through the process of adjudication which includes ascertainment and registration of the said rights and interests. The process also includes an elaborate dispute resolution mechanism which culminates in issuance of the title deed.

64. The Act provides for lodging of complaints where more than one person lays a claim to a specific parcel of land. The Act goes further and sets up a dispute resolution mechanism starting with the appointment of the adjudication committee and the arbitration board. Section 19 (2) and (3) state as follows;

“(2) If there are two or more conflicting claims to an interest in land and the recording officer is unable to resolve the conflict, he shall submit the dispute to the committee to decide.

(3) The recording officer shall rectify the forms in accordance with any decision which the adjudication officer, the committee or the board may make in accordance with this Act.”

65. A party dissatisfied with the decision of the adjudication committee can take the dispute to the arbitration board as the respondent did in this case for determination under Section 21 (3) of the Act which provides that;

“Any person named in or affected by a decision of the committee who considers the decision to be incorrect may, within fourteen days after the decision, complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.”

66. In the present case, the dispute seems to have started with the filing of committee case number LCCC NO. 40 relating to land parcel number 1370 between Kathini Mbiti (appellant herein) and Geoffrey Mati Kwasa (Respondent herein). The case was heard on 16.5.2017 and the Committee arrived at a verdict allowing the appeal and directed that land parcel number 1370 be subdivided creating a new parcel number 1390 to be issued to Kathini Mbiti, the Appellant herein while 1370 remained with Geoffrey Mati Kwasa. The committee noted that the appeal proceeded ex-parte because the Respondent refused to speak at the hearing because he was not ready to proceed. The committee stated that they were left with no other choice but to go ahead and determine the case.

67. Geoffrey Mati was dissatisfied with the findings of the committee and appealed to the arbitration board in case number 28 relating to land parcel 1390. The case was heard and a decision was rendered on 13th September 2017 when the appeal was dismissed and the land ordered to remain recorded to the defendant Kathini Mbiti.

68. In the normal course of the dispute resolution mechanism under the [Land Adjudication Act](#), the adjudication register is prepared and closed under Section 25. After the adjudication register is closed, the Act provides under Section 26 for filing objections to the register and states that;

“If any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.”



69. No evidence was given on whether the adjudication register in respect of the adjudication section herein was closed and no party has alluded to such closure. The record shows that the Respondent herein filed Kyuso PMCC NO. 3 of 2019 with an application under certificate of urgency seeking to bury his son on the suit parcel of land. The said suit was on 7th February 2019 struck out for the reason that the court lacked jurisdiction for want of consent to file the suit.
70. Consequently, the Respondent obtained the letter dated 7th February 2019 from Mr John M. Karanja, the Land Adjudication and Settlement Officer, Kyuso Adjudication Area, addressed to the Principal Resident Magistrates Court Kyuso giving consent under section 30 of the [Land Adjudication Act](#) to institute or continuation of civil proceedings relating to land parcels 1390 and 1370 within the Kyuso "C" Adjudication Section between Geoffrey Mati Kwasa and Kathini Mbiti. Consequently, the Respondent filed Civil suit number 4 of 2019 before the trial court which is the subject matter of this appeal.
71. The Appellant argues that Section 30 of the [Land Adjudication Act](#) under which the consent to file the suit was obtained, does not confer on the court jurisdiction to ascertain and determine rights and interests in community land and indeed, he argues that the said section ousts such jurisdiction. He concludes that the trial court misdirected itself when it exercised jurisdiction.
72. Sections 30(1) and (2) of the [Land Adjudication Act](#) provide that:
- “(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.
- (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.”
73. The Court of Appeal interpreted the provisions of the said Section 30 in [Bhaijee & another v Nondi & another \(Civil Appeal 139 of 2019\)](#) [2022] KECA 119 (KLR) (18 February 2022) (Judgment) found that:
- “Section 30 of the [Land Adjudication Act](#) required consent to be given before the institution of civil proceedings concerning an interest in land in an adjudication section. The consent was a condition precedent to a valid suit concerning disputes of land in an adjudication section and specifically required the suits to be discontinued if started without consent. Section 30 therefore affected the power and jurisdiction of courts to hear and determine such disputes.
- The rationale for section 30 of the [Land Adjudication Act](#) was that there was an elaborate process that was laid down by the [Land Adjudication Act](#), on how to determine which persons were, and the extent to which, they were entitled to interests in the land under adjudication. It was therefore necessary that section 30 was first employed before resort was made to the courts, and also shielded from unnecessary and unjustified abuses. Where a dispute resolution mechanism existed outside courts, it had to be exhausted before the jurisdiction of the courts was invoked.



74. Further, the Court of Appeal at Nyeri in the case of Stanley Gitonga V. Gerald Mwithia (2013) eKLR confirmed the court's jurisdiction under Section 30 of the Act and stated as follows;

“The provisions of the [Land Adjudication Act](#) set out an elaborate procedure for dispute settlement. The disputes were supposed to be settled by the Adjudication Committees complete with objection proceedings and even an appeals mechanism. The dispute over the suit land seems to have gone back and forth before the committees and the respondent sought the requisite consent of the Land Adjudication Officer which was granted pursuant to the provisions of Section 30 of the Act.

We agree with the Judge that after the consent to file suit was given, that shifted the jurisdiction to court.

to determine the dispute. The trial magistrate had jurisdiction to determine the suit and thus far we agree with the Judge, where we part company is the manner in which the evidence was analyzed leaving out pertinent matters and the fact that the defence evidence was not at all considered and this led to a wrong conclusion.”

75. The Respondent also relied on the holding in case of Mugere Kamotho v James Muchiri Ndegwa & 13 others [2021] eKLR where the court held that:

“....The upshot of the above finding is that once consent to file a suit claiming an interest in land falling within an adjudication section has been obtained from the land adjudication officer; the Court is vested with jurisdiction to determine the claim on a balance of probabilities.....”

79. From the foregoing authorities, it is clear that there is great emphasis on following the elaborate dispute resolution mechanism set out under the [Land Adjudication Act](#) and persons with disputes arising out of the adjudication process are prohibited from instituting, and the court is prohibited from entertaining 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.

80. However, there are exceptions to the prohibition and the same are set out under the same Section 30. The prohibition is stated to be subject to the giving of consent to institute court proceedings and gives particular requirements essential to make the consent valid stating that the consent must be by the adjudication officer and must be written.

81. The other stipulation is that the prohibition lasts until the adjudication register for that adjudication section has become final in all respects under section 29(3) of the Act and thereafter parties can file suits in court. The said Section 29 (3) states as follows;

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

3. When the appeals have been determined, the Director of Land Adjudication shall—
 - a. alter the duplicate adjudication register to conform with the determinations;
and



- b. certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”
82. The Court notes that Section 30 of the Act does not state the nature and extent of the disputes the court can entertain. Further, the said section does not provide the circumstances under which the consent may be given.
83. In the present case, the appellant has not shown that the adjudication register for the subject adjudication section has become final as provided under Section 29(3) of the *Land Adjudication Act*. The Appellant did not dispute that the signatory of the consent letter dated 7th February 2019 was the Land Adjudication Officer for the Kyuso Adjudication area. In the court’s view, the consent letter presented to the trial court passed the test of Section 30 of the Act and thus the present case falls within the class of disputes that the trial court had jurisdiction to entertain notwithstanding that the dispute involved ascertainment of rights and interests to land in an adjudication section.
84. The court is of the view that in the circumstances of this case, the trial court was entitled to revert to the jurisdiction given to it by *the constitution* of Kenya under Article 162 (2), Section 13 of the Environment and *Land Act* and Section 9 of the *Magistrates’ Courts Act* No.26 of 2015 in hearing a dispute on ascertainment of rights and interest in land.
85. The court finds that the trial court did not err in entertaining the dispute herein which involved ascertainment of rights and interests in land in an adjudication section.
2. Did the Appellant offend the doctrine of exhaustion or did he have the right to have his suit heard and determined before the trial court?
86. The *Land Adjudication Act* has such an elaborate dispute resolution mechanism that courts have found that they cannot substitute their own decision for that of the established bodies which are mandated to deal with complaints under the *Land Adjudication Act* as discussed above.
87. The Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR explained it in the following words: -
- “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 adhered to since there are good reasons for such special procedures.”
88. The Respondent argued that there are exceptions to this doctrine when one is unable to exhaust the available dispute-resolution mechanism. He stated that he was unable to file his appeal to the Objection Board due to his non-attendance of the Arbitration Board hearing and his late knowledge of the final decision of the board. He relied on the holding in the case of *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR where the court held that:
- “What emerges from our jurisprudence in these cases are at least two principles: while exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception



applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation, especially in virgin areas or where an important constitutional value is at stake.”

89. In the present case, the court has earlier on shown that the same Act that sets out the dispute resolution mechanisms and makes specific prohibitions to parties to file suits in court and further prohibits courts from entertaining the suit also gives exceptions that have been set out above in this judgement.
90. The court thus finds that under the *Land Adjudication Act* Section 30, there are exceptions to the requirement for exhaustion of the dispute resolution mechanisms set out under the Act where parties obtain written consent from the adjudication officer and the trial court did not err in proceeding to hear and determine the suit even though the dispute resolution process had not been completed.
91. It is noted that the appellant did not set out any grounds of appeal challenging the factual findings of the trial court but only challenged the jurisdiction of the trial court. Under Order 42, rule 4 of the Civil Procedure Rules it is provided that;

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

92. From the foregoing, the court finds that the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

Delivered, dated and signed at Kitui on this 14th day of May, 2024.

HON. L. G. KIMANI

.....

ENVIRONMENT AND LAND COURT JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgement read in open court and virtually in the presence of-

J. Musyoki - Court Assistant

N/A for the appellant

Mwendwa for the Respondent

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