



**Tuya & 2 others v Saigura & 6 others (Environment & Land Petition  
E002 of 2024) [2024] KEELC 4555 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4555 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND PETITION E002 OF 2024**

**CG MBOGO, J**

**JUNE 5, 2024**

**BETWEEN**

**JOSEPH LERINDO TUYA ..... 1<sup>ST</sup> PETITIONER  
KOTOINE KISOTU ..... 2<sup>ND</sup> PETITIONER  
KOKYO NTARETO ..... 3<sup>RD</sup> PETITIONER**

**AND**

**MALANO SAIGURA ..... 1<sup>ST</sup> RESPONDENT  
THE LAND ADJUDICATION & SETTLEMENT OFFICER NAROK  
SOUTH ..... 2<sup>ND</sup> RESPONDENT  
THE DISTRICT LAND SURVEYOR, NAROK ..... 3<sup>RD</sup> RESPONDENT  
SAITOTI NDORKO ..... 4<sup>TH</sup> RESPONDENT  
THE DISTRICT LAND REGISTRAR, NAROK ..... 5<sup>TH</sup> RESPONDENT  
ZAKAYO NTIYANI (SUED IN THE RESPECTIVE POSITIONS AS  
CHAIRPERSON, SECRETARY & TREASURER OF MORIJO ADJUDICATION  
SECTION) ..... 6<sup>TH</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the Notice of Preliminary Objection dated 8<sup>th</sup> May, 2024 challenging the petitioners' application and petition both dated 12<sup>th</sup> April, 2024 on the following grounds: -

1. That the disputed land, the subject of this petition is located within an adjudication section.



2. That the area within the disputed land is located was declared an adjudication section by the adjudication officer in 2008, 4 years before the commencement of the *Community Land Act*. Therefore, the *Community Land Act* is not applicable in this present petition for reasons that no provisions of the Act have retrospective application, and it does not repeal or oust the application of the *Land Adjudication Act*.
  3. That the preamble of the *Land Adjudication Act*, Chapter 284, Laws of Kenya stipulates that the Act is to provide for the ascertainment and recording of rights and interest in community land, and for purposes connected therewith and purposes incidental thereto.
  4. That after the rights or interest in land within an adjudication section are ascertained, the recording officer prepares an adjudication register. In this matter, the petitioners and their community's rights or interest over the disputed land has neither been ascertained nor recorded in any adjudication register.
  5. That the petitioners have not exhausted the available dispute resolution mechanisms stipulated in the *Land Adjudication Act*, Chapter 284, Laws of Kenya.
  6. That additionally, Section 30 of the *Land Adjudication Act* bars the petitioners against instituting their application and petition dated 12<sup>th</sup> April, 2024 without the consent in writing from the adjudication officer concerning an interest in land in an adjudication section until the adjudication register has become final.
2. The notice of preliminary objection was canvassed by way of written submissions. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their written submissions dated 15<sup>th</sup> May, 2024 where they raised one issue for determination which is whether the Environment and Land Court has jurisdiction to hear and determine the petitioners' application and petition.
  3. On this issue, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that none of the parties have challenged the fact that the unregistered disputed land forms part of an adjudication section, and that the applicable law in this dispute is the *Land Adjudication Act*. They relied on the case of County Government of Meru & Another versus The District Land Adjudication and Settlement Officer Tigania East Sub County & Others, Meru High Court Petition No. 7 of 2017.
  4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the petitioners have not demonstrated that the residents of Naikarra location occupy or are using the disputed land. Further, they submitted that the communal rights of the members of Naikarra location have not been ascertained or recorded by the adjudication officer in accordance with the *Land Adjudication Act* or crystallized through any form of registration. Reliance was placed in Garissa Constitutional Petition No. E005 of 2021, Cheub Adan Ali & 3 Others versus Community Land Registrar, North Eastern Region & 2 Others.
  5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents further submitted that the petitioners' argument that the disputed land falls on the side of Naikarra location is inconsequential and it does not ascertain the communal rights of residents of Naikarra location. Further, they submitted that the adjudication process of the disputed land has not been completed and therefore, the application and petition is prematurely filled. They relied on the case of Martine Ole *Muntere & Others versus District Land Adjudication & Settlement Officer, Narok South & Others, Narok Environment & Land Petition No. 27 of 2019*.
  6. The petitioners filed their written submissions dated 20<sup>th</sup> May, 2024 where they raised one issue for determination which is whether the honourable court has jurisdiction to entertain the present petition and application.



7. On this issue, the petitioners submitted that their claim is based on the Naikarra-Loita boundary declaration of 6<sup>th</sup> December, 1988 which established the boundaries between the two locations. Further, they submitted that it was established and not disputed that the petitioners are members of Naikarra location and equally members of Leshuta adjudication section which falls within the boundaries of Naikarra location.
8. They also submitted that under the provisions of *the Constitution* under Articles 61 (1), 63 (1), (2)(d) (i), permits the members of Naikarra location which consists of people of the same ethnicity and of the same culture to hold community land. They agreed that the disputed land being unregistered and being part of an adjudication section is governed by the *Land Adjudication Act*. They submitted that they laid claim of the unregistered land by virtue of them having communal rights and interests on the same and which rights they wished to be ascertained by the 4<sup>th</sup> respondent who has the authority of ascertaining such communal rights.
9. The petitioners submitted that the 4<sup>th</sup> respondent even after receipt of their letters dated 18<sup>th</sup> March, 2020 and 26<sup>th</sup> June, 2020 did not address the issues raised, but instead continued with the adjudication process in favour of Morijo Adjudication Section occasioning the present petition and application. They relied on the case of Mohamed Ali Baadi & Others versus Attorney General & 11 Others [2018] eKLR.
10. The petitioners further submitted that they have moved the court seeking to protect their constitutional rights to ownership of community rights, which is at the verge of being infringed or in fact have been infringed. That as a constitutional court, constitutional issues have been raised and it was not necessary for them to seek consent of the adjudication officer, and they are therefore properly before the present court. Reliance was placed in the cases of Michael Osundwa Sakwa versus Chief Justice & President of The Supreme Court of Kenya & Another [2016] eKLR and County Government of Meru & Another versus District Land Adjudication & Settlement Officer Tigania East Sub-County & 18 Others [2018] eKLR.
11. I have considered the preliminary objection and the written submissions as well as the authorities cited by the petitioners and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In my view the issue for determination is whether this court has jurisdiction to hear and determine the present application and petition.
12. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696 to mean: -

Per law JA

“So far as I am aware, 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”.

Further Sir Charles Newbold, P stated that: -

“ 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. The improper raising of points by way of Preliminary Objection does



nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

13. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs 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.”

14. From the above authorities, I am satisfied that the preliminary objection raises a pure point of law as it challenges the jurisdiction of this court to hear and determine the instant application and the petition. The jurisdiction of this court was challenged primarily on the premise that the disputed land, is located within an adjudication section and therefore, the application and petition are prematurely filed. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents argued that the adjudication process is yet to be completed since the ascertainment of rights arising therefrom are yet to crystallize.

15. In *R versus Karisa Chengo [2017] eKLR*, the Supreme Court determined as follows;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

16. The petitioners filed an application dated 12<sup>th</sup> April, 2024 seeking orders inter alia that pending the hearing and determination of the petition, there be a temporary order of injunction restraining the respondents whether by themselves, their agents or servants from surveying, sub-dividing, partitioning, causing registration and or dealing in any other manner with the unregistered disputed land measuring approximately 1,700 hectares located within Naikarra location in Narok County.

17. The gist of the application is that the disputed land does not form part of Morijo Adjudication Section as described in the establishment notice, and that the petitioners asked the 5<sup>th</sup> respondent to stop the survey process, which fell on deaf ears. The petitioners claim that the disputed land which is currently unregistered forms part of Naikarra location community land which the members of Naikarra location risk losing if the survey process is completed. The 1<sup>st</sup> petitioner in his supporting affidavit contended that there is likelihood that the 6<sup>th</sup> respondent will issue title deeds to private persons which will extinguish the communal rights of the members of Naikarra location. Further, they contend that it is only this court that can restrain the 5<sup>th</sup> respondent from further survey and sub-division of the disputed land which belongs to the residents of Naikarra location.

18. As I have understood the petitioners, there seems to have been an endless boundary dispute between the residents of Naikarra location and Loita location. The petitioners described the boundaries of Leshuta adjudication section, and Morijo adjudication section as areas which border the disputed land and



which according to them, belong to the residents of Naikarra location which does not form Morijo adjudication Section.

19. The petitioners indeed admitted that they are members of Leshuta Adjudication section whose adjudication process is yet to be completed and they are apprehensive that if the 5<sup>th</sup> respondent is allowed to proceed with the exercise, their communal rights will be extinguished and which amounts to violation of ownership of property rights provided by Article 40 of *the Constitution*.
20. The petitioners further contended that they approached the office of the 4<sup>th</sup> respondent vide letters dated 18<sup>th</sup> March, 2020 and 26<sup>th</sup> June, 2020 to address these issues but the office ignored and refused to deal with the dispute.
21. On the other hand, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents agree that the disputed land is located within an adjudication section (ground one of the preliminary objection). However, the challenge here is that they do not state which adjudication section save the fact that the adjudication process is yet to be completed. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents having been sued as Chairperson, Secretary and Treasurer of Morijo Adjudication Section indicates their position in this matter as to say that the disputed land belongs to Morijo Adjudication Section. That in itself brings to fore the issue of a boundary dispute.
22. In that case, does this court have jurisdiction to hear and determine a boundary dispute in an area that is not registered and yet two adjudication sections lay claim over the same. In my view, this court has jurisdiction to hear and determine boundary disputes within the parameters provided by law save that in this case, it would be advisable to have the National Land Commission as a party to this suit.
23. From the above, the preliminary objection fails on the ground that there is a dispute between the petitioners and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents over an unregistered land. As such, the notice of preliminary objection dated 8<sup>th</sup> May, 2024 lacks merit and it is hereby dismissed. Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL this 5<sup>TH</sup> day of JUNE, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**05/06/2024.**

**In the presence of: -**

Mr. Meyoki Pere – C.A

