



REPUBLIC OF KENYA



**Kiswii v Muindi & 3 others (Environment & Land Case E006 of 2023)
[2024] KEELC 7199 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E006 OF 2023
TW MURIGI, J
OCTOBER 23, 2024**

BETWEEN

MAKUMI KISWII PLAINTIFF

AND

PETER MUSAU MUINDI 1ST DEFENDANT

MULEI REUBEN 2ND DEFENDANT

HON ATTORNEY GENERAL 3RD DEFENDANT

COUNTY SURVEYOR 4TH DEFENDANT

RULING

1. This ruling is in respect of the Preliminary Objection dated 24th March 2023 raised by the 1st and 2nd Defendants on the following grounds:-
 - a. This court lacks jurisdiction to hear this suit as it offends the express provisions of Section 9, 10 and 11 of the *Land Adjudication Act* for the reason that:-
 - i. The subject of the application is a boundary issue which falls within the jurisdiction of the Adjudication Officer.
 - b. The suit against the 1st and 2nd Defendants ought to be struck out since it is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.
 - c. The costs of this application be borne by the Plaintiff.
2. Parties were directed to canvass the preliminary objection by way of written submissions.



The 1st And 2nd Defendants Submissions

3. The 1st and 2nd Defendants filed their submissions dated 14th May 2024.
4. On their behalf, Counsel submitted that for a preliminary objection to succeed, it must be based on a pure point of law. To buttress this point, Counsel relied on the case of *Mukisa Biscuits vs West End Manufacturing Co. Ltd (1969) E.A 696*. Counsel submitted that the only issue for determination is whether this court has jurisdiction to hear and determine this suit.
5. Counsel submitted that the Plaintiff had pleaded at paragraph 8 of the Plaint that the Defendants had unlawfully, irregularly and without any justification colluded and altered the size and the boundaries of Land Parcel No. Kilome/Wathini/163 thereby fraudulently relocating the Plaintiff's parcel of land in the map.
6. Counsel further submitted that the court lacks jurisdiction to hear and determine this suit as the boundary dispute falls within the jurisdiction of the Land Adjudication Officer.
7. Counsel further submitted that the Plaintiff did not attach ownership documents for the suit property because the adjudication process has not been finalized. Counsel argued that the Plaintiff ought to have lodged an Objection in accordance with the [Land Adjudication Act](#) instead of filing the present suit.
8. Concluding his submissions, Counsel urged the court to allow the preliminary objection and strike out the suit with costs.

The Plaintiff's Submissions

9. The Plaintiff filed his submissions dated 19th July 2024.
10. On his behalf, Counsel submitted that it was obvious from the Plaintiff's pleadings that the matter herein involves an ownership dispute and not a boundary dispute hence Sections 9, 10 and 11 of the [Land Adjudication Act](#) are inapplicable to this matter. Counsel argued that the provisions would be applicable if the Defendants had obtained and filed in this court a certificate under Section 30 (5) of the [Land Adjudication Act](#).
11. Counsel relied on the provisions of Section 13 of the [Environment and Land Court Act](#) to submit that the prayers sought by the Plaintiff are within the mandate of this court to grant or refuse. Counsel further submitted that the court cannot refuse to hear a land dispute when the orders sought in the plaint and counterclaim fall within the jurisdiction of the court.
12. Concluding his submissions, Counsel relied on the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696* to submit that the preliminary objection is misplaced and is intended to delay the hearing of the main suit.

Analysis And Determination

13. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696*, Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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.”

15. In *Oraro Vs Mbaja* (2005) eKLR, Ojwang J (as he then was) described it as follows:-

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

16. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.

17. The Defendants’ preliminary objection is based on the grounds that the Court lacks jurisdiction to hear and determine this suit as dispute falls within the jurisdiction of the Land Adjudication Officer.

18. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is satisfied that the 1st and 2nd Defendants’ Preliminary Objection is based on a pure point of law.

19. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case.

20. The question of jurisdiction was discussed in the celebrated case of *Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi held as follows;

“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 does not have tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

21. Similarly, the Supreme Court in the case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR pronounced itself thus;

“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. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

22. A court derives its jurisdiction from the Constitution or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act. Article 162(2) (b) of the Constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.
23. To give effect to Article 162 (2) (b) of the Constitution, Parliament enacted the Environment & Land Court Act. Section 13(1) and (2) of the said Act provides as follows:-

“ 13. Jurisdiction of the Court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.”
24. The 1st and 2nd Defendants’ contended that the suit herein offends the provisions of Sections 9, 10 and 11 of the Land Adjudication Act as it involves a boundary dispute which falls within the jurisdiction of the Land Adjudication Officer.
25. Section 9 of the Land Adjudication Act provides for the duties of the Land Adjudication Officer as follows:-
1. The Adjudication Officer shall be in charge of and shall exercise general supervision and control over the adjudication.
 2. The Adjudication Officer shall hear and determine-
 - a. Any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer; and



- b. Any objection to the adjudication register which is submitted in accordance with Section 26 of this Act.
26. Section 10 provides for the general powers of the Adjudication Officer while Section 11 provides for the particular powers of the Adjudication Officer.
27. The Plaintiff instituted this suit vide a Plaint dated 14th February 2023 seeking the following orders :-
- a. Revocation, cancellation and removal of land parcel number 1962 and 1964 from the map and restoration of the original size and boundaries of land parcel number 1631 so as to include what was land parcel number 1962 and 1964.
 - b. Costs of the suit.
28. At paragraph 7 of the Plaint, the Plaintiff pleaded fraud on the part of the Defendants as follows:-
- “The Defendants unlawfully and irregularly and without any justification colluded and altered the size and boundaries of land parcel number Kilome/Wathini 1631 and fraudulently relocated Plaintiff’s parcel of land in the map to within parcel number 1757 owned by one Pannuel Muthoka Mulwa the Defendants through collusion subdivided and allocated to the 1st and 2nd Defendants part of the Plaintiff’s parcel without the Plaintiff’s knowledge and/or permission. He listed the particulars of fraud”.
29. The 1st and 2nd Defendants submitted that the Plaintiff has not exhausted the dispute resolution mechanism provided under the *Land Adjudication Act* before approaching this court. According to the 1st and 2nd Defendants, the Plaintiff ought to have filed an objection with the Land Adjudication Officer since the adjudication process has not been finalized.
30. At this juncture, this court is called upon to determine whether the Plaintiff has exhausted the dispute resolution mechanism provided under the *Land Adjudication Act* before approaching this court. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the Courts. The principle has been expressed and upheld in several decisions.
31. In the case of Secretary, County Public Service Board & Another Vs Hulbhai Gedi Abdille [2017] eKLR the doctrine was expressed by the Court of Appeal as follows;
- “Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”
32. In National Assembly v James Njenga Karume (1992) 3KLR the Court of Appeal held that:-
- “...where there is a clear procedure for the redress of any particular grievance prescribed by *the constitution* or an Act of Parliament that procedure should strictly be followed”.
33. The purpose of the principle was earlier stated by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others [2015] eKLR as follows:-
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last



resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute.”

34. The Plaintiff filed a list of documents dated 14th February 2023 containing the following documents:-
- i. Grant of letters of Administration Ad Litem
 - ii. Letter dated 12th November 2022.
 - iii. Receipt of area map dated 13th August 2008.
 - iv. Area map as at 13th August 2008.
 - v. Area map as at 22nd June 2022.
 - vi. Any other document that may be required.
35. Document Nos. 4 and 5 are the Maps for Wathini Adjudication Section. The maps and the cards from Wathini Demarcation Office clearly show that parcel No 1631 (the suit property herein) is situated within Wathini Adjudication Section. The Plaintiff alleged that the Defendant fraudulently relocated his parcel of land in the map to parcel No. 1757 and allocated it to the 1st and 2nd Defendants. From the evidence presented by the parties herein, it is crystal clear that the suit property falls within Wathini Adjudication Section.
36. The *Land Adjudication Act* deals with all matters pertaining to adjudication. In its preamble it states that;
- “It is an Act of Parliament to provide for the ascertainment and recording of rights and interest in Trust Land, and for purposes connected therewith and purposes incidental thereto.”
37. Section 26 to 29 of the Act provides for an elaborate dispute resolution mechanism for solving any dispute arising from the adjudication process.
38. Section 26 of the *Land Adjudication Act* provides that;
- 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.
- The Adjudication Officer shall consider any objection made to him under subsection (1) of this section and after such consultations and inquiries as he thinks fit, he shall determine the objection.
39. Section 29 of the *Land Adjudication Act* provides that;
1. 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;
 - a. Delivering to the minister an appeal in writing specifying the grounds of appeal; and



- b. Sending a copy of the appeal to the Director of Land Adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the orders shall be final.
 2. The Minister shall cause copies of the order to be sent to the director of Lands Adjudication and to the Chief Lands Registrar.
 3. When the appeals have been determined, the Director of Lands 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 alteration and a copy of the certificate to the Chief Lands Registrar, who shall alter the adjudication register accordingly.
40. Section 30(1) of the [Land Adjudication Act](#) provides that;
- “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.”
41. The wordings in Section 30(1) of the Act are mandatory. It sets out the conditions under which a party can approach the court before the adjudication process is complete. The said condition is that consent must be obtained from the Land Adjudication Officer before a suit can be filed is a statutory requirement.
42. In the case of *Benjamine Okwaro Estika Vs Christopher Anthony Ouko & Another* (2013) eKLR the Court of Appeal held that: -
- “That being so, the mandatory requirement of section 30(a) had to be complied with i.e. consent of the Land Adjudication Officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”
43. Section 29 and 30 of the [Land Adjudication Act](#) envisages two scenarios. My interpretation of Section 26 to 29 of the Act is that it provides for a situation where a party decides to follow all the appellate processes under the Act until they are exhausted.
44. In my view, Section 30 of the Act applies where a party opts not to exhaust all the processes under the Act but instead, to obtain a consent from the Land Adjudication Officer and move to court before the register is made final.
45. The Defendants contended that the Plaintiff ought to have filed an objection with the Adjudication Officer since the adjudication process has not been finalized. No evidence was adduced to show that the Adjudication process had been completed. Similarly, no evidence was adduced to show that the Plaintiff has filed an objection with the Land Adjudication Officer. It is evident from the proceedings herein that the Plaintiff did not obtain consent from the Land Adjudication Officer to file a civil suit claiming for an interest in land as required.



46. This therefore means that the Plaintiff did not comply with the mandatory provisions of Section 30(1) of the *Land Adjudication Act* before approaching the court.
47. The Plaintiff did not obtain the mandatory consent that would clothe this Court with the requisite jurisdiction to hear and determine a matter that touches on interest and right to the land that is part of an Adjudication Section.
48. The Plaintiff has clearly not exhausted the laid down procedures in the aforementioned statute before filing the present suit hence, the jurisdiction of this Court had been invoked prematurely.
49. In the end, I find that in the absence of the consent as stipulated by Section 30(1) of the *Land Adjudication Act*, and the Plaintiff's failure to exhaust all the dispute resolution avenues as provided in Sections 26 and 29 of the *Land Adjudication Act*, this court lacks jurisdiction to hear and determine this suit.
50. In the end, I find that the preliminary objection is merited and the same is hereby upheld. Consequently, the Plaintiff's suit is hereby struck out with costs to the Defendants.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF OCTOBER, 2024.

In The Presence Of:

Court assistant Steve

Kithuka for the 1st and 2nd Defendants

Kitana holding brief for Mutua Mboya for the Plaintiff.

