



Gona v Poldo Limited & 12 others (Environment & Land Case 38 of 2022) [2024] KEELC 7564 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 38 OF 2022
EK MAKORI, J
NOVEMBER 13, 2024**

BETWEEN

KAINGU KONDE GONA PLAINTIFF

AND

POLDO LIMITED 1ST DEFENDANT

SEA GREEN LIMITED 2ND DEFENDANT

SENKO LIMITED T/A GREEN VILLAGE LIMITED 3RD DEFENDANT

MAISHA MAREFU LIMITED 4TH DEFENDANT

DREAM GEAST LIMITED 5TH DEFENDANT

THE ADMINISTRATORS OF THE ESTATE OF THE LATE SAMUEL JOHN MULEWA 6TH DEFENDANT

ALBERT MUKARE MULEWA 7TH DEFENDANT

FRANCIS MUKARE MULEWA 8TH DEFENDANT

PAUL CHAI MULEWA 9TH DEFENDANT

THE LAND ADJUDICATION AND SETTLEMENT DEPARTMENT 10TH DEFENDANT

THE LAND REGISTRAR KILIFI 11TH DEFENDANT

THE NATIONAL LAND COMMISSION 12TH DEFENDANT

THE HON ATTORNEY GENERAL 13TH DEFENDANT



RULING

1. For determination is the Notice of Motion dated 15th February 2024 brought under Section 3A, 1A, and 1B of the [Civil Procedure Act](#) Cap 21 and Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules seeking the following orders:
 - a. That the plaintiff's suit and the amended plaint commencing this suit dated 24th June 2022 and amended on the 23rd February 2023 be struck out with costs to the 1st, 2nd, 5th and 6th Defendant.
 - b. That the costs of the application be provided for.
2. The Application is founded on the grounds set out on its face and the supporting affidavit of Philemon Mwavala, a manager of the 1st, 2nd, and 5th Defendants/Applicants. He deponed that the 1st, 2nd, and 5th Defendants/Applicants are the registered proprietors of parcels of land known as Chembe/Kibabamshe/524, 525, and 387, respectively. That the 1st and 2nd Defendants/Applicants Plot Nos. Chembe/Kibabamshe 524 and 525 are subdivisions of Plot No. Chembe/Kibabamshe/380 initially belonged to the estate of the 6th Defendant, who sold the same to the 4th Defendant for valuable consideration. In addition, the 5th Defendant is the current registered proprietor of Plot No. Chembe/Kibabamshe/387 since 30th May 2007, having bought the same from the adjudicators of the 6th Defendant and the 7th and 8th Defendants.
3. It was averred that from the documents availed by the 1st, 2nd, 5th, and 6th Defendants during the adjudication process, Chembe/Kibabamshe/380 was adjudicated to the late Samuel John Mulewa, whereas Plot No. Chembe/Kibabamshe/387 (now subdivided) was adjudicated to the late Samuel John Mulewa and the 7th and 8th Defendants, who subsequently sold their interest in those plots legally and for consideration to other parties who in turn sold their interests in those properties for a valuable consideration culminating with the 1st, 2nd and 5th Defendants as the current registered owners.
4. Mr. Philemon Mwavala stated that the Plaintiff herein had previously filed concerning the same claims alleged in this suit - Malindi ELC No. 227 of 2013 - Kaingu Konde Gona v Eden Village Hotel & 4 others and Malindi ELC No. 130 of 2015- Kaingu Konde Gona v Okundi Tom Oyieko T/A Okundi & Co. Advocates & 6 others which were all dismissed and struck out by the Court.
5. Further, the Plaintiff herein complained to the National Land Commission about the issues in this matter, and the Commission correctly adjudicated that the suit properties legally belonged to the 1st, 2nd, 5th, and 6th Defendants herein; thus, the instant suit is an abuse of the Court process.
6. Moreover, the Plaintiff questions the process of adjudicating the suit properties. In contrast, the Court has no jurisdiction as the jurisdiction is vested in the juridical panels established under the [Land Adjudication Act](#)—cap 284 Laws of Kenya.
7. Further, the suit relates to land rights before adjudication, which customary rights have ceased to have effect, and the suit is time-barred.
8. Lastly, it was averred that in Malindi HCC No. 69 of 2006- Fernando Vischi & another v Albert Mukare Mulewa & 6 others, the Court made conclusive findings that Plot No. Chembe/Kibabamshe/387 belonged to the late Samuel John Mulewa, the 7th and 8th Defendant. The 3rd Defendant is wrongfully joined as a Defendant as he was a tenant of the 2nd Defendant, whose tenancy was not renewed upon lapsing, and no cause of action has been pleaded against him.



9. This Court directed the parties to canvass the application through written submissions—the 1st, 2nd, 5th, and 6th Defendants did comply. This Court did not see submissions from the Plaintiff / Respondent. All the Applicant's averments went unanswered. I have considered the Application herein, the grounds it is set upon, the submissions, and the authorities relied upon. As indicated, I did not benefit from hearing the submissions from the Plaintiff/Respondent; therefore, what the 1st, 2nd, 3rd, 5th, and 6th Defendants/Respondents averred went unanswered.
10. The issues that I frame for determination are:
 - a. Whether the Court has the jurisdiction to hear and determine this matter
 - b. Whether the suit herein is res judicata and sub judice simultaneously.
11. The Applicants' counsel submitted that under Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules and Section 3A and 1A and 1B of the Civil Procedure Act, this Court has the discretion to strike out any pleading.
 - a. If it is scandalous, frivolous, and vexatious, or
 - b. It may prejudice, embarrass or delay the fair trial of the action; or
 - c. It is otherwise an abuse of the court process.
12. It was submitted to this Court that the Plaintiff's suit as drawn and presented is scandalous, frivolous, and vexatious and is duly filed to embarrass, prejudice, and delay the fair trial of the matter and is an otherwise an abuse of the process of the Court for the following reasons - that the entire of the Plaintiff's suit is time-barred in law as per the provisions of Section 7 of the Limitations of Actions Act for the reason that at paragraph 9 of the amended Plaint dated 23rd February 2023, the Plaintiff acknowledges that the adjudication of the suit properties occurred in the 1970s and in the Plaintiff's witness statements filed in Court on the 23rd January 2023 corroborates the said averment and the Plaintiff's knowledge that after the adjudication ended; titles were issued for the suit properties which were subsequently sold and transferred to other parties.
13. Regarding this point, it was additionally submitted that documents Nos. 8 and 9 of the Plaintiff's List of Documents dated 23rd January 2023, the Plaintiff has annexed titles for Plot No. Chembe/Kibabamshe/380, which was issued to the late Samuel John Mulewa after the adjudication exercise on the 4th day of December 1978 and after the embargo and cancellation of the first adjudication titles in 1986, was again re-issued to the late Samuel John Mulewa on the 16th October 1992. Documents Nos. 10 and 11 of Plaintiff's list of documents above show that plot No. Chembe/Kibabamshe/380 was sold and transferred to the 4th Defendant on the 13th of August 1993, and documents listed as No. 12 show that the said 4th Defendant subdivided plot No. Chembe/Kibabamshe/380 into subplots Chembe/Kibabamshe/524 and Chembe/Kibabamshe/525 on 16th September 1996, which were respectively sold to the 1st Defendant on 10th September 2008 and 5th December 2012 as per the Plaintiff's list of documents numbered 13, 14 and 15.
14. The cumulative time from the time the title for plot No. Chembe/Kibabamshe/380 was first issued and subsequently sold, transferred, and subdivided is over 12 years; hence, Plaintiff's suit concerning plot No. Chembe/Kibabamshe/380 is statutorily time-barred in law.
15. The above position is corroborated by the 1st, 2nd, 5th, and 6th Defendants' documents Nos. 2 to 13 of the 1st, 2nd, 5th, and 6th Defendant's list of documents filed in Court on the 8th December 2023, paragraphs 2 to 4 and annexures marked PM2 (a) to PM (3h) of the supporting affidavit to the Notice of Motion



dated 15th February 2024 sworn by a one Philemon Mwavala on the 29th February 2024 in support of this application. In addition, the 1st, 2nd, 5th, and 6th Defendant's supporting affidavit in support of the instant application sworn by Philemon Mwavala in paragraph 5 and annexures marked PM (4) (i) to PM 4 (ix) the 1st, 2nd, 5th and 6th Defendants have shown that plot No. Chembe/Kibabamshe/387 was adjudicated in favor of the late Samuel John Mulewa, Albert Mkare Mulewa, and Francis Karema Mulewa, and a title was issued thereof on the 13th August 1993 and similarly is over 12 years; hence, the Plaintiff's claim regarding plot No. Chembe/Kibabamshe/387 is statutorily time bared in law. Since the Plaintiff did not obtain leave of the Court to file suit out of time as is required under Section 26, read together with Section 28 of the Limitation of Actions Act, it is the submission of the 1st, 2nd, 5th and 6th Defendants that the Plaintiff's entire suit is time-barred in law and should be struck out in limine with costs to the 1st, 2nd, 5th and 6th Defendants.

16. The Plaintiff's suit against the 1st, 2nd, 5th, and 6th Defendants primarily challenges the adjudication process for plot no. Chembe/Kibabamshe/380 and Chembe/Kibabamshe/387. However, it is important to note that this Court does not have jurisdiction over the adjudication process. The Land Adjudication Act, specifically Sections 26 to 29, outlines the procedures for challenging entries in the Adjudication Register. The Plaintiff has not demonstrated that he followed these steps, despite admitting in paragraph 9 of the amended plaint that he was aware of the adjudication of the subject plots in the 1970s.
17. Reliance was placed on the case of the Speaker of the National Assembly v James Njenga Karume Application No.92 of 1992 KECA 42 (KLR), which was cited with approval in the case of Luka & 3 others v Chairman Land Adjudication Committee, Leshuta Land Adjudication Section & 6 others [2023] KECA 1232 (KLR) and the case of William Muttura Kariba v Samuel Nkari & 2 others [2018] eKLR, and the case of Bhajee & another v Nondi & another [2022] KECA 119 (KLR)
18. In addition, it was submitted that this Court has no jurisdiction to entertain the Plaintiff's suit at the first instance as the entire plaint is a collateral challenge to how the Settlement Fund Trustees (SFT) subsequently allocated plot Nos. Chembe/Kibabamshe/380 and Chembe/Kibabamshe/387 after the 1986 embargo when the Plaintiff never challenged the same to the Agricultural Appeals Tribunal established under Section 193 as read with Section 195 of the Agriculture Act Cap 318 in which this Court has under Section 196 (4) of the Agriculture Act, has no jurisdiction to entertain the proceedings before it.
19. Moreover, the entirety of the Plaintiff's claim relates to perceived land rights before the adjudication process was completed and how the government undertook the process of adjudication over the suit properties, which in law have ceased to have effect as was held so by the Court in the cases of Esiroyo v Esiroyo & another [1973] E. A 388 and Opiyo v Opiyo [1972] E.A, and as such, the entire suit against all the defendants is unsustainable.
20. Counsel also submitted that in Malindi HCC No. 69 Of 2006, Fernando Vischi & another v Albert Mukare Mulewa & 6 others Ouko J. made conclusive determinations of fact on page 11 of his ruling that plot No. Chembe/Kibabamshe/387 belonged to the late Samuel John Mulewa and the 7th and 8th Defendants herein; thus, the suit as duly filed by the Plaintiff therefore lacks any legal foundation and ought to be struck out with costs to the 1st, 2nd, 5th, and 6th Defendants.
21. The applicant submitted that the suit is res judicata and sub judice at the same time since the Plaintiff herein had filed a similar case over the same claim as in this case in Malindi ELC No. 227 of 2013 – Kaingu Gona Konde v Eden Village Hotel & 4 others which suit was struck out by Angote J. by an order dated 27th June 2014 upon hearing of the Notice of Motion dated 17th march 2014 - annexures



marked PM 5(a) to PM 5(d) in paragraph 7 of the supporting affidavit of Philemon Mwavala in support of the instant application.

22. The 1st, 2nd, 5th, and 6th Defendants submit, therefore, that this Court, having heard the case through the application to strike out and went ahead and struck out with costs that suit rendered the filing of the current suit res judicata as the Court heard the merits of the application and came to an opinion that the previous suit had no merits.
23. A passage was quoted from the case of Kirao & 106 others v Kassamjee (Environmental and Land Originating Summons 27 of 2022) [2023] KEELC 22520 (KLR) (13 December 2023) (Ruling), where this Court emphasized the need to frown on actions by parties who file lawsuits well after another competent Court has heard and determined the same or files another suit while knowing there is a similar one pending in another Court of competent jurisdiction – these acts amount to abuse of the Court process.
24. This Court reiterates what the Court of Appeal stated in *Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017)* (Consolidated) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) in a decision rendered on 8th February 2022 on the doctrine of the jurisdiction in general as follows:

“Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders, in “Words and Phrases Legally Defined”, Volume 3 at, Page 113, defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the 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 the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

“...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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.



39. The Supreme Court, In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at, paragraph 30 of its decision, held in part as follows:

“...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.”

40. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

“(68). 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 itself jurisdiction exceeding that which is conferred upon it by law.”

25. This Court's jurisdiction has been challenged in what I can merge into one sentence - the Plaintiff’s suit questions the adjudication process of the suit properties vested in the quasi-judicial bodies established under the *Land Adjudication Act*.

26. A look at the amended plaint dated 23rd January 2023, the Plaintiff seeks the following orders that touch on the adjudication process:

“AA. A declaration that the 10th, 11th and 12th Respondents jointly and/or severally unlawfully deprived of adjudication to property known as Chembe/Kibabamshe/380 and Chembe/Kibabamshe/387 situated at Mayungu Area of Malindi District in Kilifi County.

AB. A declaration that the adjudication of the subject properties in a squatter settlement scheme in favour of the 6th Defendant, a state officer within the meaning ascribed by law was unlawful and illegal and a nullity ab initio.”

27. From the application, it is clear that the jurisdiction of this Court is challenged based on the doctrine of exhaustion, which requires a party to exhaust any alternative dispute resolution mechanism provided by Statute and law before resorting to the Courts. The principle has been expressed and upheld in several decisions. In the case of Secretary, County Public Service Board & another v 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.”



28. The purpose of the principle was earlier stated by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 others v 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 resolution.”

29. The regime for the ascertaining and recording of registrable rights in land and grievances arising therefrom under the *Land Adjudication Act* is summarized by the Court of Appeal in Amarnath (Suing on *Behalf of the Estate of the Late Amarnath Gupta*) v Kazungu & 2 others (Civil Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment) as follows:

“In Julia Kaburia vs. Kabeera & 5 Others [2007] eKLR, this Court, commenting on Section 30 of the Act, held:

“The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather, the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication. This protection was availed to the parties herein by the appellate process, which culminates with Section 29 of the Act;

“(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 order shall be final.”

24. The ELC commenting on the role of the Court vis-a-vis that of the adjudicating bodies under the Act in the persuasive authority of Tobias Achola Osindi & 13 Others vs. Cyprian Otieno Ogalo & 6 Others [2013] eKLR by Okongo J., as follows:

“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine



interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land...”

25. Having carefully considered this appeal, we find no fault with the finding and holding of the ELC Judge that it had no jurisdiction to entertain the Appellant’s suit. The process of land adjudication had effectively come to its logical conclusion and could not be re-opened otherwise than in the manner contemplated by the law. In the circumstances, the ELC properly struck out the Appellant’s suit. The Appellant did not have any separate cause of action against the 1st Respondent other than the matters which were adjudicated upon and determined by the Ministerial Appeals Committee during the appeal to the decision of the objection proceedings. That decision was final.”
30. From the materials placed before this Court, the adjudication process ended in the 1970s, and the parcels of land have long been subdivided and sold to other third parties. Any suggestion that this Court revisits the same cannot be countenanced. In any event, to challenge decisions made under the *Land Adjudication Act*, one has to appeal to the Minister, whose appeal is final, and to challenge the decision of the Minister in a Court of law would be through judicial review, as elaborately stated by the Court of Appeal in the Amarnath Case (supra). This Court has no jurisdiction to reopen matters handled under the *Land Adjudication Act*. I down tools.
31. Having established that the Court does not have the necessary jurisdiction to proceed further, there is no need to consider whether the suit is res judicata or sub judice. But I will restate that even if the Court had jurisdiction to proceed further, the claim by the Plaintiff/Applicant is time-barred, the cause of action accrued in the 1970s. It has also been shown to offend both res judicata and sub judice rules. The Plaintiff has been litigating and relitigating over the same matter – with the same results. That is why the Applicants’ passage from the decision of this Court in *Kirao & 106 others v Kassamjee (Environmental and Land Originating Summons 27 of 2022) [2023] KEELC 22520 (KLR) (13 December 2023) (Ruling)* is relevant:

“There is a common strand here - the Malindi ELC, where either numerous suits are filed and then abandoned on the midway, and other suits similar filed or where when one loses a matter, one rushes to other courts of parallel or concurrent jurisdictions on a forum shopping extravaganza to seek “fresh” redress oblivious of the judicial trail of the earlier filed matters. It tends to abuse the court process. It must be stopped. Look at it this way, ELC No. 55/2020 (O. S) was filed with the intent, I think running the full circle of a hearing and to have it concluded timeously (sic). Instead, it was withdrawn leaving behind a counterclaim that has to be heard. How do we reconcile the two files? How do we factor the judicial time, and that of the litigants expensed in the former suit? And what about the monetary expenses to both the court and the litigants? Is this not what is called abuse of the judicial process? If not what do we call it? My take will be (and this is purely on active case management strategy), that the applicants in this matter cannot escape from the initial file No. ELC



55/2020 (O.S), which is currently active. Witnesses have not been called to testify. It will be up to the applicants to move the court, plow back the withdrawal, and have the matter heard on merit to avoid proliferation and convolution of suits.”

32. the application dated 15th February 2024 is merited; thus, the Plaintiff’s suit is hereby struck out with costs to the 1st, 2nd, 5th, and 6th Defendants /Applicants.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13TH DAY OF NOVEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Kilonzo, for the 1st 2nd, 5th and 6th Defendants/Applicants

Mr. Sumba for the 2nd Defendants/Applicant

Happy: Court Assistant

In the absence of

Mr. Mwadilo, for the Plaintiff/Respondent

