



REPUBLIC OF KENYA



**Jawa & another v Leli & 4 others (Environment & Land Case E033 of 2023) [2024] KEELC 7399 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7399 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E033 OF 2023**

**AE DENA, J**

**NOVEMBER 7, 2024**

**BETWEEN**

**JAWA NYUNDO JAWA ..... 1<sup>ST</sup> PLAINTIFF**

**OMAR BORA NYUNDO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RAI LELI ..... 1<sup>ST</sup> DEFENDANT**

**CHITAI LELI ..... 2<sup>ND</sup> DEFENDANT**

**MWANDOGO LELI ..... 3<sup>RD</sup> DEFENDANT**

**MWANAKOMBO BEYAGA ..... 4<sup>TH</sup> DEFENDANT**

**LUVUNO MKALLA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs herein instituted this suit vide a plaint filed before court on 10/5/2023 and sought for the following reliefs before court; -
  1. A declaration that the Plaintiffs are the lawful registered owners of the suit land known as Plot No 1059 Busa Adjudication Scheme
  2. An order of permanent injunction restraining the Defendants either by themselves or through their agents/servants, employees or anyone acting under their instruction from selling, charging, sub dividing, cultivating, occupying, constructing, taking possession or otherwise dealing in any manner with the said suit land.
  3. An order of vacant possession by way of eviction of the Defendants and anyone in occupation of the suit property known as Plot No 1059 Busa Adjudication Section



4. General damages for trespass
5. Costs and interest at courts rates
2. Following the service of the Plaint and summons to enter appearance, the Defendants herein entered appearance through a Memorandum of Appearance filed before court on 26/5/2023 by the firm of Chimera Kamotho & Co Advocates LPP. The Defendants further filed a Notice of Preliminary Objection dated 23/5/2024 contending that this court is divested of jurisdiction to entertain and/or adjudicate upon this suit.
3. The preliminary objection raises the following grounds; -
  1. The jurisdiction of this honourable court has been wrongly and prematurely invoked in relation to issues for which specific and exclusive procedures have been prescribed and in particular that; -

The issues raised in this suit offend the mandatory provisions of section 30[1] of the [Land Adjudication Act](#) and therefore offends the doctrine of exhaustion remedies
  2. The suit before this court is incompetent, frivolous, vexatious and amounts to an abuse of due process and the same ought to be dismissed/struck out with costs.

### **Parties Submissions**

4. On 24/7/2024 the court directed that the objection be canvassed by way of written submissions.
5. The Defendants submissions highlighted two main issues for determination Whether the grounds raised in the Defendant's preliminary objection raise pure points of law and Whether the jurisdiction of this honourable court has been wrongly and prematurely invoked.
6. It is submitted that the preliminary objection herein is founded on the failure by the Plaintiffs to seek consent from the Land Adjudication Officer to approach the court as provided for under Section 9, 29[3] and 30 of the [Land Adjudication Act](#). It is further stated that the preliminary objection herein is merited as the same raises pure points of law on this court's jurisdiction to determine the suit before it. The Defendants state that the Plaintiffs have failed to invoke the doctrine of exhaustion before embarking on the instant court process. Further that there are no exceptional circumstances that warrant the immediate intervention of this court in resolution of the instant dispute.
7. The Defendants maintain that the jurisdiction of this court has been prematurely invoked and thus the suit should be struck out. The Defendants further seek for costs. In buttressing their claim, the Defendants have relied on the list and digest of authorities accompanying the submissions and whose contents the court duly notes.
8. The Plaintiffs submissions are dated 19<sup>th</sup> August 2024. It is submitted that based on the prayers outlined in the plaint, the provisions under the [Land Adjudication Act](#) cannot avail to the plaintiffs herein. That the plaintiff did obtain consent and have already filed the letter granting consent from the Adjudication Officer Kinango Sub County.
9. On whether there is violation of the doctrine of exhaustion, it is submitted that upon securing the consent, this argument collapses. That the consent by the adjudication officer is made with the realisation that there are other redress mechanisms under the [Land Adjudication Act](#) but the redress mechanisms have short comings and may fail to address the issues as raised by the parties.



10. The Defendants filed further submissions in response to the averments raised in the Plaintiffs submissions. Noting that consent is dated 16th July 2024 it is submitted that the Plaintiffs ought to have sought the consent of the adjudication officer before instituting the Plaint dated 13th April 2023. To this extent it is the Defendants' argument that the law does not operate retrospectively but progressively. The court was referred to the Court of Appeal at Malindi decision in *Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019)* [2022] KECA 119 (KLR) (18 February 2022) (Judgment) where the Court held as follows:

Section 30 of the *Land Adjudication Act* required consent to be given before 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 any matter seeking a declaration of Disputes.”

11. On whether the plaintiffs violated the doctrine of exhaustion, it is submitted that ownership is in the ambit of the adjudication process. The court is urged to allow the preliminary objection as presented before it.

### Determination

12. Having considered the pleadings, submissions herein, the issue that commends determination is whether the Preliminary Objection dated 23/5/2024 is merited.

13. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* as follows:

...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

14. The preliminary objection in this matter is founded on the notion that the Plaintiffs herein have failed to exhaust the dispute resolution mechanism under Section 30 of the *Land Adjudication Act*. That consequently the suit is unmerited having been instituted in a court devoid of jurisdiction to hear and determine it. The issue of jurisdiction is an issue of law and as such the preliminary objection is properly raised.

15. Section 30 of the Land Adjudication provides 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. [Rev. 2012] Land Adjudication CAP. 284 L5 - 17 [Issue 1]. (Emphasis is mine).
- (2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
- (3) .....



16. I think it is not in dispute that the suit property is in an adjudication section. This is discernible from paragraph 4 of the Plaint and the witness statement of the 2<sup>nd</sup> Plaintiff dated 13<sup>th</sup> April 2024 who states ‘I am the owner together with the 1<sup>st</sup> Plaintiff of plot No. 1059 Busa Adjudication Section.’. It is also clear from the pleadings that the Plaintiffs claim ownership on the basis that the above suit property has been adjudicated to them under the provisions of the [Land Adjudication Act](#).
17. The gist of the preliminary objection is that the consent of the Land Adjudication officer was not obtained prior to the filing of these proceedings. The Defendants state that the letter dated 16th July 2024 emanating from the Sub-County Land Adjudication and Settlement Officer Kinango gave consent to the 2nd Plaintiff to institute the suit as against the Defendants. The suit was however instituted before the consent dated 16th July 2024 was granted. Indeed, from the record the suit was instituted vide the plaint dated 10/5/2023, the consent was granted vide the letter dated 16/7/2024 and which was slightly over two months after instituting the suit.
18. I have noted the interpretation of the Court Appeal in respect of when the consent should be sought in [Bhaijee & another v Nondi & another \(Civil Appeal 139 of 2019\)](#) [2022] KECA 119 (KLR) (18 February 2022) (Judgment). It is to the effect that the consent is condition precedent and must predate the filing of the intended suit.
19. The other limb of the objection is based on the principle of exhaustion. It is contended that the jurisdiction of this court has been wrongly and prematurely invoked in relation to issues for which specific and exclusive procedures have been prescribed. The court is aware of the numerous court decisions where it has been held that where there are existing mechanisms provided under statute for resolution of disputes then this must be exhausted. See the Supreme Court of Kenya holding in the case of Bernard Murage -vs- Fine Serve Africa Limited & 3 others [2015] eKLR and the Court of Appeal holding in Speaker of the National Assembly v James Njenga Karume [1992] eKLR.
20. Having outlined the case law above are the same cast on stone. Should the present suit be struck out based on the binding precedent or is there a way to salvage these proceedings?
21. The Plaintiffs state that there are special circumstances in this case that make viable the exemption to the doctrine of exhaustion. The Plaintiffs state that the Defendants have trespassed into the suit parcel and are making developments thereon. They therefore seek for orders of injunction against them. It is stated that the nature of the orders sought cannot obtain by the process in the [Land Adjudication Act](#).
22. Are the Plaintiffs arguments merited so as to surpass the strictness deployed in the doctrine of exhaustion. The Court in [William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others \(Interested parties\)](#) (2020) eKLR outlined the exceptions to the rule as follows:
  60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in [the Constitution](#) or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
  61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was



extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”
23. Arising from the foregoing caselaw what can be deduced is that it is necessary for the court to look carefully at the suitability of the dispute mechanism in the context of a case to case basis in making its determination. Indeed, every case carries with it different circumstances as compared to another. Where the adequacy and availability of the mechanism is deemed wanting this creates an exceptional case that allows the Court to intervene. This was well captured in the case of *Krystalline Salt Limited v Kenya Revenue Authority* (2019) eKLR where it was held that:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”

24. I think the above principles would apply to the circumstances of this case. The plaintiffs suit is premised majorly on their right to ownership of property. Evidence has been tendered to confirm that the suit was issued to the plaintiffs herein, see the letter dated 28/3/2023 by Davis M Njeru the Sub County Land Adjudication/Settlement Officer Kinango Sub County. It is trite that the next step to be taken is for any person aggrieved with the decision to appeal the same to the Minister under the provisions of section 29 of the Act. The decision of the Land Adjudication Officer is in favor of the Plaintiff and therefore it goes without say that the Plaintiffs cannot appeal a decision in their favor. The appellate mechanism provided under the Act is therefore not available to the Plaintiff. It is only available to the Defendants and that is if they claim an interest on the suit property. The Defendants seem to have taken the path of entering the suit property without the consent of the Plaintiffs.
25. Additionally if one were to strictly follow the provisions of the Act then the Plaintiff herein would have to await the closing of the Adjudication register while the alleged trespass continues. The plaintiffs are entitled to protection of their rights to the property once they present a prima facie case pending a full hearing. It is in the interest of justice that this court should declare the circumstances aforementioned to be special circumstances which ought to lead to an exemption of the doctrine of exhaustion.
26. The upshot of the foregoing is that I would be hesitant to uphold the preliminary objection raised and hereby, dismiss the Defendant’s preliminary objection filed on 24/7/2024.

Each party to bear its own costs.

Orders accordingly



**RULING DATED SIGNED AND DELIVERED THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024**

.....

**A E DENA**

**JUDGE**

No appearance for the Plaintiff

Ms. Kimani for the Defendants

Asmaa Maftah- Court Assistant

