



Githinji v Koi & 3 others (Environment & Land Miscellaneous Case E028 of 2024) [2024] KEELC 14162 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND MISCELLANEOUS CASE E028 OF 2024
FM NJOROGE, J
DECEMBER 10, 2024**

BETWEEN

GEORGE KIRATU GITHINJI APPLICANT

AND

KADENGE KENGA KOI 1ST RESPONDENT

DISTRICT LAND REGISTRAR KILIFI 2ND RESPONDENT

LAND ADJUDICATION OFFICER KILIFI 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. In the substantive judicial review notice of motion dated 19/7/2024 the applicant seeks the following orders:
 - a. Certiorari to quash the decision of the 3rd respondent made on 12th February;
 - b. Mandamus to compel the 1st respondent to rectify the register by removing the name of the 2nd respondent and substituting therefor the applicant as proprietor;
 - c. Prohibition restraining the 2nd respondent by himself or agent from interfering with the suit land howsoever;
 - d. A declaration that to entertain an objection after the statutory time allowed by the 3rd respondent was illegal unlawful and without jurisdiction;
 - e. A declaration the 4th respondent exercising powers under section 29 of the [land adjudication act](#) could not entertain an appeal that arises from proceedings that violate section 26 of the land adjudication thus the Minister's decision of September 2018 is null and void.



2. The application is supported by the sworn affidavit of the ex parte applicant dated 19/7/2024. The grounds upon which the application has been brought are as follows:
 - a. On 20/9/2007 One Jambo Fondo Gona (now deceased) was adjudicated owner of the suit land also referred to herein as Kadzonzo/ Madzimhani /176;
 - b. The 2nd respondent never filed an objection thereto within 60 days as required.
 - c. The final adjudication register was issued on 14/8/2013;
 - d. By virtue of that final register the suit land was not affected by appeals to the Minister;
 - e. That without any appeal in place, a title could issue;
 - f. On that basis the applicant purchased the suit land from Jambo Fondo Gona vide a written agreement dated 16/2/2011;
 - g. Title was issued in the two names of the applicant and Jambo in 2016;
 - h. However unknown to the applicant the 2nd respondent had allowed out of the statutory time, an objection with the land adjudication officer in November 2011 after the purchase of the land;
 - i. That the adjudication officer ought to have dismissed the belated objection filed four years later;
 - j. The objection was dismissed;
 - k. The 2nd respondent appealed;
 - l. The appeal was heard in 2018;
 - m. The appeal found that the 2nd respondent was the legal owner of the suit land and was issued with a title deed;
 - n. That the Land Adjudication Officer lacked jurisdiction after first title was issued for the land and therefore he abused his power, acted unfairly and illegally; and his decision is for certiorari and even though he dismissed the objection the subsequent appeal was invalid ab initio; the 1st and 2nd respondent's enforcement of the decision of the Minister is thus unjust and illegal.
 - o. No court order cancelled the applicant's title dated 16/5/2018;
 - p. The 2nd respondent has now subdivided the suit land for disposal and the applicant has been denied the right to develop it;
 - q. The applicant has been acquitted of criminal cases in connection with the suit land.
3. A notice of preliminary objection dated 27/9/2024 was filed by the 2nd respondent. In it he lays down the following grounds:
 - a. That the issues canvassed in support of the application are Res Judicata Malindi ELC Misc. Civil Case No 10 Of 2019;
 - b. That the application offends the provisions of order 53 rule 3 CPR;
 - c. That the application offends the provisions of section 9(3) of the *law reform act* in that the statutory period of 6 months provided for has been exceeded before the filing of the application;



- d. That the application is tainted with procedural impropriety.

Submissions.

Respondent's submissions on the preliminary objection

4. The applicant filed submissions dated 14/10/2024 while the 2nd respondent filed submissions dated 27th September 2024. I have considered the filed submissions.
5. Citing *Heritage Insurance Co Ltd Vs Patrick Kasina Kisilu* 2015 eKLR, and *Mburu Kinyua Vs Gichini Tuti*; 1978 KLR 69, he urged that the present suit is res judicata Malindi miscellaneous Civil Case No 10 of 2019 and ELC Petition No 34 Of 2019 as well as *Kaloleni PMELC E006 of 2024* and that Section 7 CPA bars these proceedings; citing Section 9 of the *Law Reform Act* and Order 53 Rule 2 CPR, *Wilson Osolo V John Ochola & Another* 1996 EKLR, *Chabari V District Land Adjudication Officer Meru South Maara District & 3 Others* KEELC 1128 (KLR), he further urged that applications for leave to seek orders of certiorari must be filed within 6 months of the decision in question and going by the date of decision impugned in this case the applicant is 6 years late and no prayer for extension of time has been included in the motion. He submitted that the application ought to be dismissed with costs.

Applicant's Submissions on the preliminary objection.

6. The applicant submits that the preliminary objection does not raise a pure point of law but calls for ascertainment of facts outside this case; that he had filed a petition which was dismissed and a subordinate court case which was struck out; that the issues herein have not been heard by a competent court and that they are not res judicata; that Article 50(1) entitles the applicant to be heard in a fair and public hearing; that the substantive law in Section 7 of the *Limitation Of Actions Act* overrides the provisions of Order 53 Rule 3 CPR;
7. I have considered the preliminary objection and the response thereto. Preliminary objection properly so called must of the nature described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 which defined it as follows:

“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.”
8. In the same case it was stated as follows:

“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...”
9. It is clear that matters of fact would have to be excluded if they are disputed. Only matters that have been agreed as arising out of the pleadings and which are, if argued as a preliminary objection, can dispose of the entire suit. Matters regarding whether the case is res judicata or not require this court go outside of the pleadings in this case to examine other decisions some of which this court has not been availed, not even by the respondent objector who has not filed any replying affidavit in the matter. I



decline to find this limb of the preliminary objection to be proper and in accordance with the Mukisa case (*supra*) and it is for dismissal.

10. The second issue is whether the failure to file these proceedings within 6 months of the decision in question is fatal. I note that the application has been brought under the provisions of Sections 23 -29 of the *Land Adjudication Act*, as well as Articles 40 and 47 of *the Constitution*. This means the judicial review application before this court is not brought under the *law reform act* but under *the constitution*. The remedies therein sought must amount to constitutional remedies whether described as certiorari or mandamus in the manner the traditional judicial review remedies under the LRA are described. Notably no timelines are set out for the seeking of such remedies in *the constitution*. Consequently, I find that this limb of the preliminary objection must also fail.
11. The upshot of the foregoing is that the preliminary objection is not merited and it is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 10TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

