



**Kitheka (Suing as administrator of the Estate of Kitheka Mweta) v Mwova & 8 others  
(Constitutional Petition E001 of 2021) [2023] KEELC 350 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 350 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITUI**  
**CONSTITUTIONAL PETITION E001 OF 2021**  
**LG KIMANI, J**  
**JANUARY 26, 2023**  
**IN THE MATTER OF: ALLEGED CONTRAVENTION OF**  
**FUNDAMENTAL RIGHTS AND FREEDOM UNDER**  
**ARTICLES 25(C); 47(1) AND 50(1) OF THE**  
**CONSTITUTION OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF: ARTICLES 2(1); 19(1); 19(2); 19(3)(A),(B) AND (C);**  
**20(1); 20(2); 20(3); 20(4)(A) AND (B); 22(1); 23(3);**  
**25(A); 47(1); 159 2(B)(D) AND 162(2)(B) OF THE**  
**CONSTITUTION OF KENYA.**  
**AND**  
**IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 AND**  
**IN THE MATTER OF THE SPECIAL MINISTER**  
**APPOINTED FOR PURPOSES OF APPEALS UNDER**  
**SECTION 29 OF THE LAND ADJUDICATION ACT**  
**CAP 284.**  
**AND**  
**IN THE MATTER OF: THE RULING AND/OR AWARD OF THE DEPUTY**  
**COUNTY COMMISSIONER, KYUSO IN LAND**  
**APPEAL NO.395 OF 2011 DATED 13/8/2018**  
**BETWEEN**  
  
**BETWEEN**



**KILONZO KITHEKA ..... PLAINTIFF  
SUING AS ADMINISTRATOR OF THE ESTATE OF KITHEKA MWETA**

**AND**

**ALEXANDER MWENDWA MWOVA ..... 1<sup>ST</sup> RESPONDENT  
LAND ADJUDICATION OFFICER-KYUSO ..... 2<sup>ND</sup> RESPONDENT  
DEPUTY COUNTY COMMISSIONER, KITUI KYUSO ..... 3<sup>RD</sup> RESPONDENT  
LAND REGISTRAR (MWINGI) ..... 4<sup>TH</sup> RESPONDENT  
SURVEYOR, MWINGI KYUSO ..... 5<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL REPUBLIC OF KENYA ..... 6<sup>TH</sup> RESPONDENT  
RUKIA IKUTHU MULUKI ..... 7<sup>TH</sup> RESPONDENT  
JOHN KYALO MUNYITHYA ..... 8<sup>TH</sup> RESPONDENT  
ESTHER KAMOLI MWOVA ..... 9<sup>TH</sup> RESPONDENT**

### **RULING**

1. Before this Honourable Court for determination the 1<sup>st</sup> Respondents Application under Notice of Motion dated 14<sup>th</sup> April 2022 seeking the following orders:
  - a. THAT this Honourable Court be pleased to strike out the Petition herein dated 26/11/2021 for being scandalous, vexatious and otherwise an abuse of court process or alternatively;
  - b. THAT this Honourable Court be pleased to strike out this petition for being res judicata.
  - c. THAT the Petitioner does bear the costs of this Application.
2. The background to this petition is a dispute between Nyamu s/o Kitheka and Kitheka s/o Mweta who are claimed to be predecessors in title to the suit land to the Petitioner and the 1<sup>st</sup> Respondent which started from 1977 and led to filing of suits being Migwani District Magistrate's Case No. 31 of 1978 Nyamu S/O Nzeka vs Kitheka S/O Mweta and Mwingi Resident Magistrates court case N. 68 of 1994. When the area where the suit land is located was declared an adjudication section land parcel No 179 and later 597 and 734 became the subject of the dispute between Alexander Mwenda Mwova and Francis Kitheka Mweta in committee Case No. 20 of 2009, Arbitration Board Case No. 11 of 2010 and finally the Appeal to the Minister Case No. 395 of 2011.
3. The Petitioner claims in the petition that he exercised his rights of appeal under section 29 of the [Land Adjudication Act](#) in filing the appeal to the Minister but his rights to fair hearing under Article 50 (1) and right to fair administrative action under Article 47 (1) of [the constitution](#) were violated and in the process he was denied what he believes to be his right to the properties cited.
4. However according to the 1<sup>st</sup> Respondent, the Petition relates to a parcel of land known as KYUSO/KYUSO"A"/179 and the resultant plots from it being KYUSO/KYUSO"A"/734, 587, 152, 153, 154,155, 157, 179, 568, 569, 570, 571, 572, 573, 574, 575, 576 and 597 which went through the entire adjudication process up to the Minister's Appeal. They exhausted all the available judicial processes in relation to the suit property and therefore the court lacks jurisdiction to hear the petition and the



doctrines of res judicata under section 7 of the [civil Procedure Act](#) the doctrine of and exhaustion as enumerated in the case of Geoffrey Muthinja Kabiru & 2 Others VS Samuel Munga Henry & 1756 Others (2015) eKLR and other authorities apply.

5. In response thereof, the Petitioner filed a Replying Affidavit stating that the application is frivolous since it seeks the same prayers as that of the Preliminary Objection which is yet to be determined. According to the Petitioner, the 1<sup>st</sup> Respondent is filing the Applications to buy time so as to keep wasting the suit properties.

It is the Petitioner's averment that this court has the jurisdiction to hear and determine issues of violation of the Petitioner's constitutional and statutory rights and the Petition has high chances of success. He denied that the matter is res judicata since it is not seeking the same orders as was decided previously by the quasi-judicial bodies but declaratory orders that do not touch on ownership. According to the Petitioner, these questions are validly before the right court and can only be determined after the court hears the petition to conclusion.

### **1<sup>st</sup> Respondent/Applicant's submissions**

6. The 1<sup>st</sup> Respondent submitted that the dispute dates back to 1977 between the Petitioner's father and the 1<sup>st</sup> Respondent's father that led to the filing of DMC Case No.31 of 1978. The area became an adjudication section in 2009 and during the adjudication process; a dispute arose touching on Parcel Nos 179,734 and 597. During the objection proceedings, the decision was made that Plot No.179 be sub-divided into two parcels where Kitheka Mweta(Petitioner's father) maintained the original number 179 and the 1<sup>st</sup> Respondent was given Parcel No.597. During the proceedings before the arbitration board, Kitheka Mweta was issued with Parcel No.736 while the 1<sup>st</sup> Respondent remained with Parcel No.597.
7. The culmination of the entire process was the Minister's Appeal where a decision was delivered that the 1<sup>st</sup> Respondent was entitled to a ¼ of Parcel 179. The 1<sup>st</sup> Respondent submitted that the law relating to disputes arising from adjudication is clear in the [Land Adjudication Act](#) and that the decision of the Minister is final as stipulated by Section 29(1)(b).
8. The 1<sup>st</sup> Respondent quoted the case of Mbebe & 105 others vs Attorney General & 7 others (2021) eKLR stating that the remedy available to the petitioner does not lie in the filing of a constitutional petition where the court held that the fact the Petitioners are aggrieved by the decision does not amount to grave injustice and that there must be a case of flagrant abuse of fundamental principles of law.
9. Further, counsel for the 1<sup>st</sup> Respondent submitted that the decisions are in rem which is effective against the whole world being pronounced by a tribunal having competent authority as they cited the cases of Pattni vs Ali & Anor(Isle) of Mann (Staff of Government Division) (2006)UKPC 51 and National Land Commission vs Registered Trustee of the Arya Partiniadhi Sabha, Eastern Africa & Another(2019)eKLR.
10. According to the 1<sup>st</sup> Respondent, the issue of title, ownership and survey of the suit property is res judicata since it was already decided upon to finality by virtue of Section 29 of the [Land Adjudication Act](#) as they relied on the holding in the case of National Gender & Equality Commission & another v. Judicial Service Commission & 2 others (2017) eKLR and Matwanga Kilonzo vs District Commissioner, Kitui & Another (2021) eKLR.
11. On the doctrine of exhaustion, the 1<sup>st</sup> Respondent relied on the case of Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others (2015) eKLR and on jurisdiction, he relied on the case of Owners of Motor Vessel Lilian'S' Caltex Oi (K)Ltd (1989) eKLR.



12. It is the 1<sup>st</sup> Respondent's submission that the Petition is an abuse of Court process because the Petitioner has been filing case after case on the same subject matter even after exhausting all the previous proceedings under the [Land Adjudication Act](#) CAP 284. He also submitted that no cause of action has survived as the deceased's rights were extinguished under Section 29(1)(b) of the [Land Adjudication Act](#) and cited the cases of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No.25 of 2022(2009) and sought that the Petition be struck out with costs.
13. The Petitioner submitted that he is not appealing the decisions of the adjudication process, he is challenging the interpretation of the same. According to the Petitioner, he is invoking the supervisory and judicial review jurisdiction of the Court and it is the 1<sup>st</sup> Respondent's duty to prove that the case is scandalous and vexatious to the extent that it has no chance of success, which he denies and states that the Petition raises admissible and triable issues.
14. The Petitioner relied on the holding in the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR that no suit ought to be summarily discharged unless it plainly and obviously discloses no reasonable cause of action submitting that the case does not meet the threshold of a scandalous suit according to the authority.
15. On res judicata, the Petitioner submitted that these issues are different from what has been before the adjudication courts which was the ownership of Plot No. 279 and not the parcels currently before this court. He also contends that the parties are different.
16. The Petitioner also pointed out that he is invoking his fundamental rights, which is the right to a fair trial and that the court has judicial review jurisdiction in cases of ultra vires or error on the part of the tribunals and relied on the case of Muhamed Abdi Mohamud vs Ahmed Abdulahi Mohamad & 3 others Petition No. 7 of 2018.
17. The Petitioner's view is that res-judicata cannot apply in cases where the court or tribunal whose determination is being challenged had jurisdiction to hear and make such determination while quoting from the case of John Florence Maritime Services Ltd and Another-vs Cabinet Secretary for Transport and Infrastructure & 3 others (2021) eKLR. He therefore prays that the application dated 14<sup>th</sup> June be dismissed with costs.

### **Analysis and Determination**

18. I have considered the application herein, supporting affidavit, replying affidavit and the submissions by counsel for the parties and the authorities cited. The Applicant terms the Petition as scandalous, vexatious and otherwise an abuse of court process as well as res judicata and in his submissions claims that the petition is offensive to the doctrine of exhaustion.
19. The 1<sup>st</sup> Respondent has supported the application by enumerating the process of litigation that has bedeviled the dispute between the parties relating to the suit land commencing with Migwani DMCC case No 31 of 1978 to the land adjudication dispute resolution process culminating in Ministers Appeal No. 395 of 2011. The petitioner claims that under section 29 of the [Land Adjudication Act](#) the decision in the Ministers appeal is final and thus the same cannot be the subject of the current proceedings by way of a constitutional petition.
20. Section 29 of the [Land Adjudication Act](#) does indeed provide that the decision of the Minister is final and the same states 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 order shall be final.
  - (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.”
21. However, Article 165 (6) and (7) of *the constitution* of Kenya 2010 provides for the courts supervisory jurisdiction over persons, bodies or authorities exercising judicial or quasi-judicial function and states that;

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

22. The Environment and Land Court is a court with equal status to the High Court having jurisdiction to hear and determine disputes relating to the use and occupation of and title to land. Section 13 of the *Environment and Land Court Act* elaborates the jurisdiction of the Court. This jurisdiction allows the court to hear and determine matters that relate to the denial, violation or infringements of or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. This position was also taken by the court by Okongo J in *Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others* (2013) eKLR who held as follows;

“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.”

23. I have looked at the petition herein and note that even though the Petitioner has gone into great details on the merit of the decision in the appeal to the Minister, the final prayers consist of both prayers on determination of the merits and also determination of the constitutionality of the process. The court is very clear that what is before it is not an appeal against the decision in the Appeal to the Minister. Whether or not the court finds that the Petitioners rights were violated is an issue that can only be determined upon hearing of the petition.
24. The Petitioner has stated that during the process of ascertainment and recording of rights to the suit land under the *Land Adjudication Act*, his rights to fair hearing under Article 50 (1) and right to fair administrative action under Article 47 (1) of *the constitution* were violated and in the process he was denied what he believes to be his right to the properties cited. I find that the Petitioner has a right to be heard to the conclusion of this matter on the questions of whether or not his rights were violated



as he claims. In my view, the Petitioner is well within his rights to file this Petition on behalf of his father's estate as provided under Article 22(1) and (2) and 23 of *the Constitution* of Kenya (2010) which provides for the right to institute proceedings claiming violation of a right and fundamental freedom and states that:

- “(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

25. Article 23 which provides as follows:

“The High court has jurisdiction in accordance with Article 165 to hear and determine Applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.

Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine Applications for redress of a denial, violation or infringements of or threat to a right or fundamental freedom in the Bill of Rights.

In any proceedings brought under Article 22, a Court may grant appropriate relief including

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- (a) A declaration of rights
- (b) An injunction
- (c) A conservatory order
- (d) A declaration of an invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill or Rights and is not justified under Article 24.
- (e) An order for compensation
- (f) An order of Judicial Review.

26. The question to ask is whether the grounds set forth in support of the petition are frivolous vexatious and an abuse of the process of the court to warrant striking out of the petition. Another issue is whether the process taken for determination of the dispute renders the current petition frivolous, vexatious and an abuse of the process of the court. Before answering this question, it is necessary to interrogate what vexatious, frivolous scandalous pleadings entail or when they are taken to be an abuse of the process of the court. These concepts have been discussed in Halsbury's Laws of England (Civil Procedure) (Volume 11 (2009) 5<sup>th</sup> Edition, Paras 1-1108; At paragraph 534 the concept of 'abuse of process' is explained in the context of the court's inherent power to stay or strike out proceedings; it is explained in the following terms:

534. Abuse of process.

The most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of abuse of process. This power will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity (See *Dawkins v Prince Edward of Saxe Weimar* (1876) 1 QBD 499). The applicant for a stay on this ground must show not merely



that the claimant might not, or probably would not, succeed, but that he could not possibly succeed on the basis of the pleadings and the facts of the case.

It is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. (See *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, PC).

A party may be guilty of an abuse of the process of the court even though he may comply with the strict literal terms of an applicable rule of law, where he does so for improper or ulterior motives or purposes. (see *Castanho v Brown and Root (UK) Ltd* [1981] AC 557, [1981] 1 All ER 143, HL).

27. From the above explanations, frivolous or vexatious proceedings are understood to be synonymous with or aspects of what is deemed to be an abuse of the process of the court and therefore these concepts may not necessarily be distinct from each other; where one exists the other will certainly be lurking around. Thus in *Hunter versus Chief Constable of West Midlands Police* (1982) AC 529, re-litigating on the same issues was held to be vexatious and therefore an abuse of the process. The two concepts are more often than not used interchangeably; in the South African case of *Farjas (Pty) Limited & Another versus Regional Land Claims Commissioner, Kwazulu Natal-* (LCC21/96) (1998) ZALCC 1 the South African Land Claims Court made reference to the discussion of these terms in Claasen, CJ's *Dictionary of Legal Words and Phrases* 1 ed (Buttherworths Durban) 1977 Vol. 2&4 where it is stated that:

“The concept of ‘frivolous and vexatious’ has one established legal meaning. It refers to a claim or legal proceeding which is pursued where there is plainly no prospect of success and the motive of the claimant or plaintiff is to harass the defendant.

27. As for ‘scandalous’ matter, it is defined in *Black’s Law Dictionary Standard*, 9<sup>th</sup> Edition as ‘a matter that is both grossly disgraceful (and defamatory) and irrelevant to the action and defence.’
28. Having considered the petition and the grounds in support I do not consider the same to be manifestly groundless or in which there is clearly no cause of action in law or in equity and neither is it grossly disgraceful or irrelevant. I further do not find the petition a re-litigation of matters that have already been litigated since the issues under consideration in the constitutional petition are not the same as what was in issue in the adjudication process.
29. The Applicant states that the dispute raised in the petition was already addressed during the adjudication process to finality; and thus the Petitioner had already exhausted all avenues of legal redress. This goes into the question of jurisdiction and jurisdiction is everything since the court cannot make any further steps if it lacks the requisite jurisdiction. The often-cited case on jurisdiction is *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR.
30. However, I do find that after the decision in appeal to the Minister, the court is the only body that has original jurisdiction to hear matters that pertain to infringement of fundamental rights and freedoms during the process under Article 22 of *the Constitution* of Kenya (2010). The court also possesses supervisory jurisdiction over all other quasi-judicial tribunals and bodies like the ones set up under the *Land Adjudication Act*. In the case of *West Kenya Sugar Co. Limited – v- Busia Sugar Industries Limited & 2 others*, [2017] eKLR, the court held that:

“This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in *the constitution*.



The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of the ELC....” (Emphasis supplied)

27. The Petitioners Counsel submits that on the authority of *Mbebe & 105 others vs the Attorney General & 7 others* (2021) eKLR the supervisory jurisdiction of the court under Article 165 ought to be used sparingly. I do agree with that view but in the present that jurisdiction has been invoked by the petition and whether or not it succeeds can only be determined after the court hears the petition and determines whether it has merit. In my view that issue cannot in the circumstances be determined on an application for striking out the suit.
28. Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu* [2009] eKLR restated these principles as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. *Madan J.A.* (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

27. Taking into account all the above, I am of the view that this petition is not frivolous, vexatious or an abuse of the process of the court. I further find that the petition is not res judicata and does not offend the principle of exhaustion.
28. The final order of this court is that the application dated 14th April 2022 is hereby dismissed with costs to the Petitioner.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

**Ruling read in open court and virtually in the presence of:**

**Musyoki Court Assistant**

