



REPUBLIC OF KENYA



**KENYA LAW**

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**Munga v Tinga & 3 others (Petition 3 of 2021)  
[2023] KEELC 248 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 248 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
PETITION 3 OF 2021  
MAO ODENY, J  
JANUARY 25, 2023**

**BETWEEN**

**JAMES MWAMUYE MUNGA ..... PETITIONER**

**AND**

**TINGA KALU TINGA ..... 1<sup>ST</sup> RESPONDENT**

**MUNGA MAGESHO DZILA ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, KILIFI ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of a Preliminary Objection dated April 27, 2021 by the 4<sup>th</sup> Respondent on the following grounds: -
  - a. That the Petition does not meet the threshold of a constitutional litigation.
  - b. The proceedings in the Land Dispute Tribunal No 3 of 2009 were commenced contrary to the provisions of the *Land Adjudication Act*.
  - c. The Petitioner is guilty of unclean hands
  - d. The suit is misconceived, incompetent and an abuse of the court process and the same ought to be struck out.
  
2. The Petitioner instituted this constitutional Petition on March 29, 2021 challenging the title for land parcel Kilifi/Pingilikani/994 (the suit property) registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. The Petitioner averred that the dispute started during the adjudication process in 2009, which prompted him to file Land Dispute No 3 of 2009 against the 1<sup>st</sup> Respondent where the same was



- concluded in his favour. In 2011, the 1<sup>st</sup> Respondent was evicted from the suit property. That despite the existence of the court order, one Walter Nyale Mwango and the Registrar of Land caused the suit property to be registered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and two others, now deceased.
3. The Petitioner sought orders inter alia for a declaration that his right to property has been breached and that he is the rightful owner of the suit property.
  4. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was in support of the Preliminary Objection and submitted that the preliminary objection should be upheld since it satisfies the principles outlined in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors* [1969] EA 696 and the case of *Hassan Nyanje Charo –v- Khatib Mwashetani & 3 others* [2014] KLR.
  5. It was counsel’s submissions that the Petition raises statutory issues as opposed to constitutional issues and does not meet the threshold required in constitutional petitions.
  6. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents relied on the case of *Leakey Muthini Mulonzi & another v Principal Secretary, Ministry of Lands, Housing and Urban Development & 4 others* [2020] eKLR and submitted that the issues of ownership as raised in the Petition could only be adequately addressed in a civil suit and further that the Petitioner has failed to precisely state how his said rights were infringed thus making the Petition to fall short of the threshold of what amounts to a Constitutional Petition as per the case of *Anarita Karimi Njeru v Republic* [1979] eKLR and *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR.
  7. Counsel for the Respondents further submitted that the proceedings before the Land Dispute Tribunal relied upon by the Petitioner were null and void since they were in contravention of Section 30 of the *Land Adjudication Act*. To buttress this point, the Respondents relied on the case of *Sande Baya Thoya & another v Arbitration Board & 3 others; Ali Sunday Chea (Interested Party)* [2021] eKLR.
  8. In response to the Respondents’ submission, counsel for the Petitioner submitted that by virtue of Article 22(1), 40(1), (3) (b) (ii) of the *Constitution of Kenya*, and Section 13 of the *Environment and Land Court Act*, the Petitioner was entitled to institute court proceedings claiming a violation of his rights, before this court.
  9. Mr Magolo relied on the case of *Nicholas Kiptoo Arap Korir Salat –v- Independent Electoral and Boundaries Commission & 6 others* [2014] eKLR and submitted that striking out this suit at this stage will deny the Petitioner justice and violate his constitutional right.

### **Analysis and Determination**

10. The issue for determination is whether the Preliminary Objection raises a pure point of law as per the principles on Preliminary Objections laid down in the *Mukhisa Biscuit* case (supra).
11. The grounds on the Notice of Preliminary Objection, as stated are not pure points of law but issues that would require a full hearing so that evidence is tendered to whether the allegations about the non-compliance with Section 30 of the *Land Adjudication Act*. These are factual issues which the court must look outside the Preliminary Objection which means that it no longer fits the bill as regards Preliminary Objections
12. Further when you cite grounds like misconceived, incompetent and an abuse of court process, you do not give the Respondent an opportunity to know the allegation levelled grounds against him or her. This is an adversarial system where there is no trial by ambush.



13. The court will have an opportunity to an opportunity to determine whether or not the suit meets the threshold of a Constitutional Petition and or whether the petition is merited or otherwise, at the hearing of the Petition.
14. In the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others* [2015] eKLR the Supreme Court explained as follows regarding preliminary objections:
  - “(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
15. With due respect to counsel, this is an application that I should have dismissed on the spot just by looking at the grounds on the Notice of Preliminary Objection but I restrained myself and wrote this ruling. Parties should avoid unnecessary Preliminary Objections where the issues that they raise are not purely points of law per se and concentrate on the hearing of the main suit. When Preliminary Objections are raised on pure points of law, courts will not hesitate to uphold them when they are merited.
16. The upshot is that the Preliminary Objection is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

