



**Komora & 8 others (On their own behalf and on behalf of 9 Waata Families) v
Cabinet Secretary Lands and Physical Planning & 13 others (Constitutional Petition
E35 of 2021) [2023] KEELC 15723 (KLR) (20 February 2023) (Ruling) (with dissent)**

Neutral citation: [2023] KEELC 15723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION E35 OF 2021
MAO ODENY, J
FEBRUARY 20, 2023**

BETWEEN

**HIRIBAE BASHORA KOMORA 1ST PETITIONER
BAJILA DOKATA KOMORO 2ND PETITIONER
CHARLES KALANDI 3RD PETITIONER
SAMSON BAJILA WARIO 4TH PETITIONER
BARISA GODANA BAKUNA 5TH PETITIONER
NAFTALI GALOGALO KOMORO 6TH PETITIONER
BASHORA DOGOTA KOMORO 7TH PETITIONER
GUIYATO GODANA BARISA 8TH PETITIONER
BASHORA SOSO ASHALI 9TH PETITIONER
ON THEIR OWN BEHALF AND ON BEHALF OF 9 WAATA FAMILIES**

AND

**CABINET SECRETARY LANDS AND PHYSICAL PLANNING 1ST
RESPONDENT
THE DIRECTOR OF LAND ADJUDICATION 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
HARRISON FONDO CHAIRMAN- ADU/KAMALE ADJUDICATION
COMMITTEE 5TH RESPONDENT
PATRICK CHARO- AREA CHIEF -ADU LOCATION 6TH RESPONDENT**



FESTUS MAKANGA	7 TH RESPONDENT
KAZUNGU NZOVU	8 TH RESPONDENT
KASUKU MAKANGA	9 TH RESPONDENT
RAYMOND JEFWA DYEKA	10 TH RESPONDENT
SARAH RWAMBA NJIRU	11 TH RESPONDENT
PATRICK ANGEE MUTANYI	12 TH RESPONDENT
JOE DUDI TETE - KILIFI COUNTY CONTRACTED SURVEYORS	13 TH RESPONDENT
KELVIN OMONDI	14 TH RESPONDENT

***(IN THE MATTER OF: PROTECTION OF RIGHT TO OWN LAND BY THE WAATA
COMMUNITY BEING THE ANCESTRAL LAND IN CHAMARI AREA IN MAGARINI
SUB-COUNTY IN KILIFI COUNTY (MEASURING APPROXIMATELY 3471.59 Ha)***

RULING

1. This Ruling is in respect of a Notice of Motion dated 15th December 2021 by the Petitioners and a Preliminary Objection dated 7th June, 2022 by the 1st, 2nd, 4th, 5th and 6th Respondents. The Petitioners sought the following orders: -
 - a. Spent.
 - b. That an order of temporary injunction do issue restraining the chairman Adu/Kamale adjudication section Mr. Harrison Fondo, the 5th Respondent and the area chief Mr. Patrick Charo the 6th Respondent and restrain them from chairing any meeting or hearing or hearing any dispute involving the land forming the subject in the petition herein or any of the Respondents from further engaging themselves in any way on matters touching on the subject land herein either by surveying, selling, disposing and/or any further action towards registration of the land in any person's name pending the hearing and determination of this application.
 - c. That an order of temporary injunction do issue restraining the chairman Adu/Kamale adjudication section Mr. Harrison Fondo, the 5th Respondent and the area chief Mr. Patrick Charo the 6th Respondent and restrain them from chairing any meeting or hearing or hearing any dispute involving the land forming the subject in the petition herein or any of the Respondents from further engaging themselves in any way on matters touching on the subject land herein either by surveying, selling, disposing and/or any further action towards registration of the land in any person's name pending the hearing and determination of the petition.
 - d. Costs of the Application be provided for.



2. The 1st, 2nd, 4th, 5th and 6th Respondents filed a Preliminary Objection dated 7th June 2022 on the following grounds: -
 - a. That this Honourable Court lacks jurisdiction to hear and determine the application and Petition herein.
 - b. That the Petition is fatally defective for lacking an affidavit in support.
 - c. That the application herein lacks the legs to stand on.
 - d. That the application and the Petition contravene Section 30 of the *Land Adjudication Act*.
 - e. That the annexures in the affidavit in support to the application are not marked and/or commissioned hence lack evidential value.
 - f. That the Petition is not supported by an affidavit which is against the law and procedure of the court.
 - g. That this Petition does not meet the threshold of a constitutional petition.
3. Counsel agreed to canvas the application and the Preliminary Objection vide written submissions which were duly filed.

1ST, 2ND, 4TH, 5TH & 6TH Respondents' Submissions

4. Counsel relied on the cases of *Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Lts* Civil Appeal No. 9 of (1969) EA and [*Jeremiah Nyangwara Matoke v Independent Electoral And Boundaries Commission & 2 Others*](#) [2017] eKLR on the principles of Preliminary Objection and urged the court to strike out the Petition.
5. On the issue whether the Petition contravenes Section 30 of the *Land Adjudication Act*, counsel relied on the Court of Appeal case of [*Speaker of the National Assembly vs. James Njenga Karume*](#) [1992] eKLR cited in the case of [*Kiroket Ole Punyua v Umash Ole Mwanik & 2 Others*](#) [2021] eKLR where the court held that where there was a clear procedure for the redress of any particular grievance prescribed by [*the Constitution*](#) or an Act of Parliament, that procedure should be strictly followed.
6. It was counsel's further submission that this is aimed at promoting alternative dispute resolution as contained in Article 159(2)(c) and if this court were to entertain the application and Petition herein the same will be an usurpation of the dispute resolution mechanisms provided under the [*Land Adjudication Act*](#).
7. Counsel further submitted that this Petition has been brought prematurely before the exhaustion of other remedies available and further that no consent has been granted to the Petitioners to file this suit as envisaged in Section 30 of the [*Land Adjudication Act*](#). That the Petitioners admit that the adjudication register has not been closed hence it was mandatory to apply and obtain the consent from the Adjudication Officer.
8. On the issue raised by the Petitioners of lack of a fair hearing, counsel submitted that the Petitioners could have appealed to the Minister and relied on the case of [*Kiroket Ole Punyua v Umash Ole Mwanik & 2 others*](#) [2021] eKLR where the court held that the Petitioner had a recourse under Section 30(3) of the [*Land Adjudication Act*](#) Chapter 284 to appeal to the Minister over the denial or lack of a fair hearing and that the Petitioner has not given reasons why he could not pursue this avenue before coming to court.



9. On the issue that the application is fatally defective counsel relied on Rule 9 of the [Oaths and Statutory Declarations Rules](#) which provides that all exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with the serial letters of identification.
10. It was counsel's submission that the Petitioners' annexures have neither been marked nor sealed by a Commissioner of Oaths in contravention of Rule 9 of the Oaths and Statutory Declarations Act and relied on the case of [Jeremiah Nyangwara Matoke \(Supra\) and the case of Abraham Mwangi vs. S.O. Omboo & Others](#) HCCC No. 1511 of 2002; where the court held that exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected.
11. Counsel therefore urged the court to uphold the Preliminary Objection and strike out the Petition.

Petitioner's Submissions

12. Counsel for the Petitioners submitted that the Respondents have admitted that there are affidavits in support of the Application and the Petition and their only contest is that the annexures are not marked with a Commissioner's seal. Counsel stated that the purpose of the annexures is to evidence the facts pleaded.
13. It was counsel's submission that even if the annexures are contrary to the rules, it does not make the whole of the contents affidavit whose facts are admitted defective as the court can only expunge the exhibits and not the affidavit.
14. Counsel relied on rule 10 of the [Constitution of Kenya \(protection of rights and fundamental freedoms and enforcement of practice and procedure rules\)](#) 2012, which rule provides that the Petition filed under these rules may be supported by an affidavit. Documents to be annexed to affidavit or Petition, and submitted that it is not mandatory that a Petition be accompanied by a supporting affidavit.
15. Ms Marubu cited Article 159 and the Oxygen Rule and submitted that the court ought to adjudicate on the dispute without undue regard to technicalities.
16. On the issue that the Petition contravenes Section 30 of the [Land Adjudication Act](#) counsel submitted that the said provision applies to matters brought under the normal litigation as to a dispute between two parties as to who claims to hold an ancestral right over land under adjudication.
17. Counsel further submitted that the Section does not apply to when the rights are being trampled on by the government and officials who are appointed to help in adjudication of land and urged the court to dismiss the Preliminary Objection with costs.

Analysis And Determination

18. The Respondents raised a Preliminary Objection to the application for injunction by the Petitioners restraining the Chairman of Adu/Kamale and the other Respondents from chairing or hearing any dispute involving the land which is the subject matter of the Petition.
19. The Respondents raised a Preliminary Objection that the court has no jurisdiction to hear and determine this matter as it contrives Section 30 of the [Land Adjudication Act](#) and further that the Petition is not supported by an affidavit.
20. The effect of the application by the Petitioners is to stop the adjudication of the Section pending the hearing and determination of this suit. The reason why dispute resolution procedures/mechanisms are



- provided for in Acts of Parliament and the Constitution is for them to be followed and exhausted before moving to other levels either for appeal or originate cases in the court.
21. These procedures or requirements and not put in place for naught. For example, the Land Adjudication Act has elaborate procedures on how the adjudication is done or should be done and appeal mechanisms for aggrieved persons. This is to safeguard the interference of a process by anybody who is apprehensive that the process might not go in their favour. If this were the case, then we would have all adjudication processes stalled by court orders to the detriment of individual parties.
 22. Section 30 of the Land Adjudication Act is very important as it gives an Applicant leeway to apply and obtain a consent to move to court while the adjudication process is still ongoing and the register is not final if he/she is aggrieved by the process.
 23. The application as couched as earlier stated is to stop the whole adjudication process but counsel submitted that Section 30 only applies to a normal suit and not a Petition where rights have been trampled upon. With due respect to counsel, even where a person's right to ownership has been denied in an adjudication process, it also involves rights. It means that this is the type of application that should have followed the laid down procedures and filed a normal suit after applying and obtaining a consent from the Land Adjudication Officer.
 24. In the case of Benard Muage v Fine Serve Africa Limited & 3 Others [2015] eKLR the Court held as follows...

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”
 25. In the case of Kiroket Ole Punyua v Umash Ole Mwanik & 2 others (*supra*) the in upholding a Preliminary Objection and striking out the Petition the court held that:

“There is nothing to show that the provisions of the Land Adjudication Act which deal with dispute resolution mechanism have been declared unconstitutional. It would therefore be usurpation of the dispute resolution mechanisms provided under the Land Adjudication Act if this Court were to entertain this petition until the Petitioner has exhausted the clear provisions that have been provided for under sections 12 to 26 of the said Act.”
 26. Counsel cited Article 159 (2) (d) of the Constitution that courts should not pay undue attention to procedural technicalities at the expense of substantive justice. The Supreme Court in the case of Raila Odinga v. I.E.B.C & others (2013) eKLR, the court observed as follows:

“Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”
 27. The issue of exhaustion of remedies provided for under an Act of Parliament in this case the Land Adjudication Act cannot be wished away as a procedural technicality to be salvaged by Article 159 of the Constitution.
 28. Similarly, the issue that the Petition did not have a supporting affidavit and that the annexures to the affidavit in support of the application were neither marked or commissioned by a Commissioner for



oaths, this was admitted by counsel for the Petitioners, but submitted that the only thing that the court can do is to expunge the annexures and leave the affidavit.

29. In the case of *Solomon Omwenga Omache & Another v Zachary O Ayieko & 2 others* [2016] eKLR where Justice Mutungi stated as follows;

“..... Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner’s stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistant’s lack of attention and due diligence.”

30. I agree with Mutungi J that practitioners should not be too casual with processing of documents whereby if there are laid down procedures that must be met in filing of documents then let them be meticulously and diligently done because behind that case there is a client who has bestowed all their faith in the competence of the practitioner to do the right thing.

31. Counsel further submitted that the filing of an affidavit in support of a Petition is not mandatory hence the Petition can stand without such affidavit. The question is if the Petition proceeds by way of affidavit evidence then which evidence will the Petitioner rely on and further after the court has expunged the annexures what remains in the Petition.

32. To clarify this position, in Petitions that are challenging the constitutionality of a particular legislative text may not require an affidavit, but a Petition that relies on evidential facts, then this must be proved by affidavit or oral testimony as the court may direct.

33. In the case of *Isaac Aluoch Polo Aluochier v The National Alliance and 542 others* [2016] eKLR quoting the earlier decision in *Bryson Mangla v Attorney General & Others* Nairobi HC Petition No 284 of 2016 considered Rule 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* ("Mutunga Rules") and summarized the law on evidence in Constitutional Petitions as follows: -

“Want of supporting evidence in the petition

In *Bryson Mangla v A. G. & Ors* Nairobi Pet. No. 284 of 2016, this court held that The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms;

Documents to be annexed to affidavit or petition

- (1) The petition filed under these rules may be supported by an affidavit.
 - (2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”
14. It is conceivable that a petition which challenge for example constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct.”



11. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act....”
34. In the case of Justus Achinga Kebari & 25 others v The Attorney General [2018] eKLR the court held that :
- “It is trite law and process that a petition shall be accompanied and supported by a valid affidavit in such support. In the instant case, the affidavits in support are dubious for want of veracity in their commissioning. The petitioner has failed to controvert the clear provisions of the law negating their case in the circumstances, it must fail.... This application does not stand the test of law and process. The affidavits in its support are inadmissible for want of form and compliance with the law. They must be struck out.”
35. The Petition does not seek to declare any text unconstitutional but to restrain the Respondents from continuing with the hearing and chairing the adjudication disputes within the adjudication Section. The issues are factual therefore a lack of a supporting affidavit is detrimental to the Petition.
36. I had indicated that if the Preliminary Objection is in the affirmative then I will not belabor dealing with the application whether the Petitioners are entitled to an order of injunction.
37. I have considered the pleadings, the Preliminary Objections, submissions by counsel and find that the Preliminary Objection has merit and is therefore upheld. The net effect is that this Petition is struck out with each party bearing their own costs

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF
FEBRUARY, 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.

