

KENYA / JUDGMENT

Kithae v Malombe [2026] KEMC 878 (KLR)

[2026] KEMC 878 (KLR)**COURT**

Magistrate's Court

CASE / FILE NUMBER

Environment and Land Case E010 of 2025

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REPUBLIC OF KENYA IN THE SENIOR PRICIPAL MAGISTRATES COURT AT MUTOMO ELC CASE
NUMBER E010 OF 2025 MARSHAL MWENDWA KITHAE.....
PLAINTIFF VERSUS JAMES KISILU MALOMBE.....
.....DEFENDANT

JUDGMENT

1. The plaintiff's claim against the Defendant is comprised in the plaint dated 3/3/2025 and filed on 26/3/2025. He seeks the following orders; (i) A declaration that the plaintiff –Marshall Mwendwa Kithae is the owner and/or of the parcels of land known as Plot number 949 Ndakani Adjudication Section to the exclusion of the defendant herein. (ii) A declaration made to the effect that the sale of 100 acres of the suit properties herein being Ndakani Adjudication section numbers 940 is voidable for[sic] (iii) An order of permanent injunction to restrain the Defendants whether by themselves, their agents and servants from trespassing onto, encroaching on, possessing, developing, constructing on, accessing or by any other way howsoever interfering with the plaintiff's quite possession of 1 | P a g e the parcel of the parcel of land known as Ndakani Adjudication Section plot number 940. (iv) Special damages of Kenya Shillings one million eight hundred and forty seven thousand five hundred and twenty eight. (v) General damages for continuous trespass. (vi) An order directed to the officer in charge Mutha Police Station directing him to ensure compliance of the orders herein. (vii) Costs of this suit. (viii) Any other relief or order this honourable court deems fit to grant.
2. The plaintiff avers that he is the proprietor of parcels of land known as Ndakani Adjudication Section plot No. 940; Ndakani Adjudication Section plot No. 2310 and plot number (sic). Further that, sometimes in December 2024, he entered into an agreement with the defendant for sale of 100 acres of the suit property for a consideration of Kshs. 200,000/= out of which the Defendant only paid him Kshs. 150,000/- via Mpesa platform.

3. The plaintiff alleges that before the defendant could settle the balance- he encroached onto the suit property and cut down trees thereon, burnt indigenous vegetation, erected structures thereon –and effectively took possession and occupation without a consensus between them. The damage caused was stated to be Kshs. 1,847,528/= 2 | P a g e
4. On 29/10/2025, interlocutory judgment was entered against the defendant for failure to enter appearance and/or file his Statement of Defence. The matter proceeded for formal proof on 4/3/2026. Plaintiffs Evidence
5. The plaintiff was the sole witness in his case. He adopted his witness statement dated 3/3/2025 as evidence in chief and produced a list of documents of an even date as PEX 1-PEX 8.
6. By the aforesaid witness statement, he testified that he is the owner of the suit properties herein. He produced letter dated 5/11/2023 from Land adjudication & Settlement of Mutomo/ Ikutha Sub- Counties as Pex 1. Further that around December 2024, he entered into an agreement with the defendant for sale of 100 acres of the suit property. It is his testimony that the transaction was never completed- that is by payment of agreed full purchase price by defendant and his giving of vacant possession by the Defendant.
7. The plaintiff further stated, the defendant without any colour of right encroached into suit property and caused damage. In this regard, he tabled evidence of extent of damage through report by agricultural officer dated 3 | P a g e 20/2/2025(PEX 2) and report by Forest Officer dated 12/2/2025 (PEX 3).

Analysis and Determination

8. I have considered the plaint, the plaintiff's evidence and his written submissions dated 31/5/2025. From the pleadings and the evidence herein, it is clear that this suit properties are still under the process of adjudication. Indeed, the letter dated 15/11/2023 by Mr. S.P. Wachira of Mutomo Land Adjuration and settlement Department (PEX 1) is explicit on this issue. It states- in the material part- that: "This is to confirm that according to the records in this office, parcel no- 1315,1368, 940 and 908 Kalia Katune Adjudication Section is recorded in the names of Marshall Mwendwa Kithae I.D 3740694 and has no pending issue. Land Adjudication process is ongoing and once finalised the land owner shall be issued with a title deed"
9. This obtaining, the plaintiff, by dint of section 30(1) Land Adjudication Act (LAA) herein after referred to as the Act had to obtain a consent from the adjudication officer of the respective Adjudication Section, prior to filing this suit. The said section provides: 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. 10. In the case at hand, the plaintiff did not provide evidence that he had obtained the consent under Section 4 | P a g e 30(1) of the Act. As was

held in the court of appeal in *Bhaijee & Another Vs. Mondhi & Another* [2022] KECA, 119 (KLR), the effect, of failure to obtain the said consent is fatal. The court stated thus; “The section therefore requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. The said consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section and specifically requires the suits to be discontinued if started without consent. The section therefore clearly affects the power and jurisdiction of courts to hear and determine such disputes. The rationale for the said provisions is that there is an elaborate process that is laid down by the Land Adjudication Act, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication, and it is therefore necessary that it is first employed before resort is made to the Courts, and also shielded from unnecessary and unjustified abuses. Indeed, it has been severally held by this Court that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the courts is invoked” 11. From the above, it is the consent that gives jurisdiction to a court to entertain a suit in regard to a land under Adjudication. Way back in- 17/11/ 1989-Nyarangi JA in the case of *Owners of Motor vessel Lillian “s” vs Caltex Oil Kenya Limited* (1989) KLR taught us where a court has no jurisdiction, it lacks power to make one more step and it should down its tools. He stated “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court 5 | P a g e has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. 11. The Supreme Court of Kenya, on the issue of jurisdiction, in *Samuel Macharia & Another Vs Kenya Commercial Bank Limited & 2 others* (2012) eKLR, had this to say: “A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” 12. It is clear to me that, I have no jurisdiction herein for want of consent under Section 30(1) LAA. I should do more than down my pen. But before I

proceed to rest my 6 | P a g e pen, let me address the issue of interlocutory judgment that was entered against the defendant on 29/10/2025. 13. Once interlocutory judgment was entered against the defendant, the plaintiff had discharged his legal burden of proof as set out in Section 107 Evidence Act. He was however called upon to discharge the evidentiary burden as set out in Section 109 & 112 of the Evidence Act. 14. The above proposition was well captured by the court of Appeal in *Anne Wambui Ndiritu Vs. Joseph Kiprono Ropkoi & Another* (2004) eKLR as follows: “As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80, which provides: “107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus: “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.” The two sections carry forward the often-repeated evidential adage: “he who asserts must prove”. 7 | P a g e 15. The plaintiff herein had an evidential burden upon entry of interlocutory judgment to prove his case by way of formal proof- interlia -he was to prove that he had obtained the pre-requisite consent under Section 30(1) LAA. He did not. 16. As to effect of interlocutory judgment entered on 29/10/2025, Order 10 Rule 11 of Civil Procedure Rules, gives this court, power to set aside interlocutory judgment. The said Rule provides: “Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.” 17. Having found and held that the suit herein is fatal for want of consent under Section 30(1) LAA, I proceed to set aside the interlocutory Judgment of 29/10/2025.

Disposition

18. In light of the above analysis, I find that the Plaintiff’s claim is incompetently before this court. The suit is hereby struck out. 19. It is so ordered. Hon. L. K Mwendwa Senior Principal Magistrate. Delivered virtually on 9/9/2026- in the presence of:
1. Mr Wambua for the Plaintiff 8 | P a g e
 2. N/A for Defendant
 3. Daniel- Court Assistant_ 9 | P a g e

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