



Kilonzo & another v Juma (Suing on Behalf of Mbithe Mutyambai - Deceased) (Environment and Land Appeal 44 of 2019) [2023] KEELC 21678 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21678 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 44 OF 2019
A NYUKURI, J
NOVEMBER 22, 2023

BETWEEN

MUSILILI KILONZO 1ST APPELLANT

NGONDU KYALO 2ND APPELLANT

AND

JOSPHINE SELE JUMA (SUING ON BEHALF OF MBITHE MUTYAMBAI - DECEASED) RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. Z. J. Nyakundi (SPM), delivered in Mutomo SPM Land Case No.7 of 2018 on 18th September 2019)

JUDGMENT

Introduction

1. This appeal is against the judgment of Honourable Z. J. Nyakundi (SPM) delivered on 18th September 2019 in Mutomo SPM Land Case No. 7 of 2018. In the impugned judgment, the learned trial magistrate found that the suit property belonged to Mutyambai and that Kyuso Mutyambai, the son of Mutyambai had no capacity to sell the suit property to the 1st appellant herein. Consequently, the trial court allowed the respondent's claim by granting orders sought of permanent injunction, declaratory orders, deletion of the appellant's name from the land adjudication register of Kaatene section and instead thereof, the registration of the suit property in the name of the respondent. The court also ordered refund of Kshs. 28,400/= being the purchase price paid by the 1st appellant.
2. The appellants who were the defendants before the lower court, being aggrieved with the above decision, appealed against the same vide a Memorandum of Appeal dated 27th September 2019, raising the following grounds;



- a. That the learned magistrate erred in law and fact in holding that the land known as plot No. 19 and plot No.532 Katene Adjudication Section Mutha, Mutomo sub-county is the property of Mbithe Mutyambai.
 - b. That the learned Magistrate erred in law erred in law and fact in holding that the sale of the portion of the disputed land to the 1st defendant/applicant was illegal, null and void.
 - c. That the learned Magistrate erred in law erred in law and fact in ordering for the deletion from the land register Kaatene adjudication area, the names of the appellants in respect to the unregistered land parcel Nos. 519 & 532 Kaatene adjudication section Mutha, Mutomo sub-county and ordering that the same be registered in the name of Josephine Selle Juma.
 - d. That the learned Magistrate erred in law and fact by failing to conceptualize, contextualize the suit before her thereby disregarding the law with regard to limitation of time for claims affecting land.
 - e. That the learned Magistrate erred in law erred in law and fact in assuming jurisdiction over the suit land.
 - f. That the learned Magistrate erred in law and fact in failing to consider evidence and material placed before him.
 - g. That the learned Magistrate erred in law and in fact in totally disregarding the evidence of the appellants.
 - h. That the learned Magistrate erred in law erred in law and in fact in failing to find that the case filed was an abuse of the court process.
 - i. That the learned Magistrate erred in law erred in law in failing to deliver justice in the matter before him.
3. Consequently, the appellants sought the following orders;
- a. That the judgement of the Hon. Z. J. Nyakundi (Senior Principal Magistrate) delivered in Civil Suit No.7 of 2018 on 18th September 2019 be set aside.
 - b. That the costs of the Magistrate's court and the Appeal be awarded to the appellant.
 - c. Such other further orders as this honourable court may deem appropriate.

Background

4. On 11th September 2018, the respondent (the plaintiff in the lower court) filed a plaint dated even date, which was later amended on 17th December 2018 seeking the following orders;
 - a. A permanent injunction stopping and barring the defendants either by themselves, their agents, servants and employees, relatives from entering into the plaintiff's unregistered land parcel currently demarcated and known as plot No.519 & 532 at Kaatene adjudication section Mutha location, Mutomo Sub County.
 - b. A declaration that the land sale agreement between Kisyu Mutyambai and Musilili Kilonzo Kyalo, the 1st defendant herein is illegal, null and void.



- c. A declaration that the suit property, the unregistered land parcel currently demarcated and known as plot No.519 & 532 at Kaatene adjudication section Mutha location, Mutomo sub-county belongs to the estate of Mbithe Mutyambai.
 - d. An order for the deletion from land adjudication register for Kaatene Adjudication-section the names of Musilili Kilonzo the 1st defendant herein, Ng'ondeu Kyalo the 2nd defendant and Paul Mwanja Kilaku the 3rd defendant in respect to the unregistered land parcel currently demarcated and known as plot No.519 & 532 Kaatene adjudication section Mutha location, Mutomo sub-county the said plot Nos 519 and 532 be registered in the name of Josephine Selle Juma the plaintiff herein.
 - e. Costs of the suit.
 - f. Any other relief that the court finds fit to grant.
5. The plaintiff pleaded that the unregistered land currently demarcated as Plot Nos. 519 and 532 at Kaatene adjudication section, Mutha location, Mutomo subcounty (hereinafter referred to as the suit property) belonged to her mother, the late Mbithe Mutyambai, who died on 16th May 1963. That she was survived by her husband, Mutyambai Kyema and her three children namely, Kisyu Mutyambai, Museveki Moki and Josephine Selle Juma, the latter being the plaintiff. That her father Mutyambai Kyema died in 1977. It was her contention that in the year 2002, she discovered that Musilili Kilonzo Kyalo, the 1st defendant had encroached on Plot No. 519, claiming to have purchased the same from the respondent's brother one Kisyu Mutyambai in 1998, at a consideration of Kshs. 30,000/=, whereof she paid Kshs. 28,400/= leaving a balance of Kshs. 1,600/=. She averred that her brother did not own the land hence he had no capacity to sell the same.
 6. The plaintiff further stated that in 2002, the 2nd appellant (the 2nd defendant in the lower court) encroached on Plot No. 532 and in 2017 a Mr. Paul Mwanja Kilaku (the 3rd defendant in the lower court) claimed ownership of Plot No. 532. She stated that the area chief arbitrated over the dispute and ordered for maintenance of status quo pending adjudication. The plaintiff also stated that she sought the consent of the land adjudication officer to file the suit in the lower court.
 7. The 1st and 2nd defendants, filed a statement of defence on 22nd January 2019. They denied the plaintiff's claim and stated that the suit property already had boundaries set by the plaintiff's grandmother and that the same were not set by the Chief. They also denied knowledge of the 3rd defendant and stated that the suit property was an ancestral land and that the same was sold in 1998 and not 1997. They also stated that the plaintiff was born in 1978 and therefore that it was not true that the late Mbithe Mutyambai was her mother.
 8. The 3rd defendant did not enter appearance and subsequently the suit proceeded to hearing. The plaintiff presented six witnesses while the 1st and 2nd defendants presented four witnesses.

Plaintiff's evidence

9. PW1 was the plaintiff, Josephine Selle Juma. Her testimony was that the defendant entered the suit property but that she did not know when that happened only that it was in the 1980s. She stated that her father Mutyambai had one son, Kisyu Mutyambai who had sold land to the 1st defendant at Kshs. 30,000/= where of Kshs. 28,400/= was paid to him. According to her, Kisyu Mutyambai had no permission to sell the land and that by a resolution with the area chief, the parties had agreed that the amount of Kshs.28,400/= be refunded to the 1st defendant but that the defendant had refused to take the money. She also averred that the 3rd defendant did not enter into the land but that when



- the adjudication process began in 2017, he alleged that the suit property belonged to him. She stated that the boundaries were set in 2007 when the 1st and 2nd defendants were on the land. She stated that she had a copy of her identity card showing she was born on 22nd February 1978 and that there was an error because she was born in 1963. That her daughter Wangoi Juma was born in 1984. She further stated that she obtained consent from the Land Adjudication Officer to file the suit in the lower court. She produced the chief's letters dated 12th September 2007, 29th September 2017 and 16th October 2017; consent letter from the adjudication officer dated 21st November 2018; copy of identity card; birth certificate for Wangoi Juma; a letter from registrar of persons; and application for change of date of birth. On cross examination she stated that her father entered on the suit property before the defendants and that Kisyu Mutyambai did not inform the family he was selling the land.
10. PW2 was Muthami Mbuvi, a neighbour of the plaintiff. He stated that the land belongs to the plaintiff and that his father used to border the defendants. He stated that the 2nd and 3rd defendants had entered the land during adjudication and that the late Mbithe Mutyambai was buried on the land. In cross examination, he stated that he was not aware if the 1st defendant had bought the suit property and that he did not know when the 2nd defendant entered the suit property.
 11. PW3 was Jackson Kisangau Nzau. He stated that he knew the parties to the suit and the suit land as belonging to one Mutyambai and his wife Mbithe. He also stated that they had prepared a report on 12th October 2017 which he signed together with others. He also stated that in 2017, he had participated in the attempted refund of the purchase price to the 1st defendant but that the latter refused to take the money. On cross examination, it was his averment that he did not know of any relationship between the 1st defendant's family and Mutyambai.
 12. PW4 was David Musembi, who averred to have known the family of Mutyambai, and that the late Mutyambai had two wives and that the land of Mbithe his wife was in Kaatene while the other wife's land was in Mutha. He further stated that the defendants were on the land and that they refused to move out. Upon cross examination, he stated that the 1st defendant had bought land belonging to Mbithe and that there was a case at the tribunal where Mutyambai was given the land. He also stated that the 1st defendant was only cultivating on the land and that the 2nd defendant had built thereon.
 13. PW5 was Ngei Nzao, a clan elder from the neighbouring village. He stated that the family of Mutyambai sent him to the 1st defendant in 2002 to stop him from buying the suit property but he failed to heed to their call. Further that in 2007 he went to the land and assisted in placing the boundaries thereon. He also stated that they had written a report in 2007 and that the 1st defendant had bought the suit property despite them trying to stop him from. On cross-examination, he stated that Kilonzo had moved out and that no one had come to lay claim on Mutyambai's land for the time that he had stayed there.
 14. PW6 was Kisyu Mutyambai, who was the brother to the plaintiff that had sold the land to the 1st defendant. He stated that the land was surveyed as No. 519 and 532 and that he had sold a portion thereof to one Musilili Kilonzo who had paid Kshs.28,200/= out of the agreed Kshs.30,000/= therefore breaching the sale agreement. He further stated that the plaintiff complained that he sold the land without authority and that the chief had ordered a refund of the amount paid to the 1st defendant but that the 1st defendant did not come to collect his money. On cross examination, he stated that Syovinya and Ngele belonged to another clan and that when the dispute started in 2007, he did not collect any money from the 1st defendant.
 15. The above evidence marked the close of the plaintiff's case.



1st and 2nd defendants' evidence

16. DW1 was Jeremiah Kyuta Kilonzo who testified on behalf of the 1st defendant being his son and having received a power of attorney for purposes of this suit. He narrated the lineage of their family and stated that the 1st defendant bought the suit property from Kisyo Mutyambai, PW6. He said he had not completed the balance because of the dispute by another person against Kisyo Mutyambai. He argued that the person to be sued was Kisyo Mutyambai and not himself. In cross examination, he stated that in 2007, people were sent on the suit property to erect a boundary on Mutyambai's land. He denied having been asked to stop buying the suit property in 2002.
17. DW2 was Joseph Muyavu Ngovuu, a son to the 2nd defendant. He also outlined their family lineage and claimed that they have been on the suit property being Plot No. 532 as their ancestral land and that Ngondu Kyalo did not encroach on anyone's land. On cross-examination, he stated that they did not buy the land but that their entire family stays on the ancestral land and that Syovinya Kyalo Kiema his mother was buried thereon. In cross examination, he stated that the 1st defendant was the wife to his uncle and that his grandfather moved to the suit property. He stated that the land belongs to his family and there was no reason why his father was sued.
18. DW3 was Mwanzio Ntheu, grandmother to the plaintiff who stated that the plaintiff's father was her son. She stated that she had been on the suit property three times to erect the boundary and claimed to have shown boundaries to Kilonzo, Sammy and Ramamia. On cross-examination, she stated that the land where the defendant lives does not belong to Mutyambai and that when Mutyambai came he found that the defendant had settled there, having bought the land from Malovu wa Nzenge. She stated that she did not know where DW2's grandmother Syovinya was buried.
19. DW4 was Ngethau Masweli. She averred that the disputed land belonged to her father Kiema Nzioka and that he had told Mutyambai to leave which he did. On cross-examination, he stated that the suit property was his and that they had given it to Mutyambai Kiema to use it. He also stated that the late Mbithe Mutyambai had not been buried on the suit property but elsewhere as his father had refused her to be buried there. That marked the close of the defence case.
20. Upon hearing the parties and considering their submissions, the trial court entered judgment on 18th September 2019 in favour of the plaintiff on the basis that Kyuso Mutyambai had no capacity to sell the suit property which belonged to Mutyambai. The plaintiff was directed to refund Kshs. 28,400/= to the 1st defendant. It is this judgement that provoked the current appeal.
21. This appeal was disposed by way of written submissions. On record are the appellant's submissions and further submissions filed on 18th October 2022 and on 2nd October 2023 respectively. There is also the respondent's submissions filed on 10th March 2023.

Appellant's submissions

22. Counsel for the appellant submitted that in holding that the suit property belonged to Mbithe Mutyambai, the trial court disregarded key facts adduced as evidence before the court. That the Plot No. 532 belonged to the 2nd appellant, being land he inherited from his mother Syovinya Kyalo Kiema. That there was no evidence to show that Plot No. 532 belonged to Mutyambai. The said facts according to the appellant were that;
 - i. The Plot No.532 was not brought from Kisyo Mutyambai and did not belong to the respondent's mother.



- ii. That the said Plot No.532 was ancestral land on which the 2nd appellant was born in the 1940s, where he lives with his brothers, their children and grand children.
 - iii. That neither the respondent, her brother nor their deceased mother lived on the said Plot No.532.
 - iv. That the 2nd appellant had lived on the land for over 12 years, during which time no claim was made against his land, rendering any claim statute barred.
23. On the issue of Plot No. 519, it was submitted for the appellants that the 1st appellant was an innocent purchaser for value as she was convinced by the respondent's brother that he had good title and authority to sell the property, and that she subsequently took possession. On the issue of jurisdiction of the court, they argued that the appellants were not represented in the lower court but did mention that they had been on the land for over 20 years hence the respondent was barred by Section 7 of the Limitation of Actions Act from instituting the suit. Counsel relied on section 80 of the Land Registration Act and submitted that where an innocent purchaser takes possession, with no knowledge of fraud, mistake or omission, the register ought not be corrected.
24. On the refund of the purchase price, it was submitted that the trial court erred in ordering a refund of Kshs.28,400/=, when the current value of the said property is Kshs.2,000,000/= as admitted by the respondent in her affidavit to the application for stay dated 27th September 2019. Reliance was placed on the case of Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] eKLR for the proposition that section 7 of the Limitation of Actions Act bars a claim for land after 12 years.
25. Counsel relied on the case of the National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others Court of Appeal at Nairobi, Civil Appeal No. 656 of 2022 for the proposition that where a court has no jurisdiction all proceedings by such court are a nullity and that the question of jurisdiction can be raised at any stage even on appeal for the first time. Counsel maintained that they raised the issue of jurisdiction at the trial and in submissions as the matter of the appellants having been on the suit property for over 20 years was raised as shown at page 55 of the record of appeal, although the appellants appeared in person.

Respondent's submissions

26. Counsel for the respondent submitted that the respondent filed the suit in the lower court in her capacity as administrator of the estate of her mother Mbithe Mutyambai pursuant to the limited grant of letters of administration ad -litem issued on 24th October 2018.
27. It was submitted for the respondent that she had proved her case on a balance of probabilities that the suit property belonged to the late Mbithe Mutyambai, a fact acknowledged by PW1, PW2 and PW3 and that that fact was not challenged by the appellants. They further submitted that the claim by the 2nd appellant to have inherited parcel no.532 does not have any legal basis as that was not raised before the trial court and that even if the same was to be considered, the same would fail since there was no evidence, exhibit or witness statement to support the same, as expected under section 107 of the Evidence Act. Relying on the decision in Isaac Katambani Iminya v Firestone East Africa (1969) Limited [2015] eKLR, for the proposition that where evidence is uncontroverted the same should be deemed to be credible, counsel submitted that since the 1st appellant did not testify to refute or rebut the evidence by the respondent, it can only be construed to mean an admission. It was also argued that the alleged purchase from Kisyo Mutyambai was invalid by dint of sections 45 and 82 of the Law of Succession Act as the seller had intermeddled with the property of the deceased, due to the fact that he did not have grant of letters of administration. Counsel relied on the cases of Morris Mwit Mburugu



v Denis Kimathi M'Mburungu [2016] eKLR and In Re the Matter of David Julius Nturibi Mithinji (Deceased) [2012] eKLR for the proposition that without a grant of letters of administration a person cannot sell property of a deceased person. Counsel cited the case of Antony Ted Andrew Hoareau v Mary Muthoni Wanjohi [2018] eKLR and argued that a defence of bonafide innocent purchaser cannot be used, where a purchaser did not conduct due diligence where the seller had no title.

28. On whether the subordinate court had jurisdiction to hear and determine the suit, counsel relied on the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR and argued that a court's jurisdiction emanated from *the constitution* or statute or both. Counsel argued that the question of jurisdiction was not raised at the trial and therefore that matter cannot be raised on appeal. Counsel argued that parties are bound by their pleadings and that the court can only pronounce judgment only on issues arising from the judgment. Placing reliance on the decision in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR, counsel argued that although the issue of jurisdiction was raised before the trial court in the submissions, that could not place the issue before court for determination as submissions were merely a marketing tool and not pleadings. On whether the respondent complied with the provisions of the *Land Adjudication Act*, counsel relied on the decision in Isaiah Mbaabu & 2 Others v Land Adjudication & Settlement Officer Igembe South District & 4 Others [2020] eKLR and argued that pursuant to section 30 of the Act, the adjudication officer gave consent for the filing of the suit in the lower court as demonstrated by exhibit 5. On the limitation period for filing the suit, it was submitted that time only starts to run when the unregistered land is registered hence the limitation time had not lapsed and further argued that the appellants formally entered the land during adjudication period that is in 2018 as demonstrated in the proceedings.

Analysis and determination

29. This being a first appeal, the duty of this court is to reanalyse, reassess and reconsider the pleadings and evidence presented before the trial court and to apply its own reasoning to the facts and evidence as presented by the parties, and arrive at its own determination. (See Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR)

30. In the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR the court held as follows;

This being a first appeal we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

31. The dispute herein concerns land within an area declared to be an adjudication section, and therefore the suit property is subject to an adjudication process and none of the parties herein hold title to the suit property. The respondent's claim in the lower court rests on the foundation that she is the administrator of the estate of her late mother Mbithe Mutyambai who owned the suit property. Further that although the suit property is subject to an adjudication process, and therefore subject to the *Land Adjudication Act*, she obtained consent from the land adjudication officer to file suit in the lower court in compliance with Section 30 (1) of the *Land Adjudication Act*. The respondent's complaint in the lower court was that without lawful justification, the appellants encroached on the suit property on the strength of an invalid land sale agreement between the 1st appellant and the respondent's brother one Kyuso Mutyambai, who had no capacity to sell the same as he lacked grant of letters of administration for the estate of Mbithe Mutyambai. She relied on section 82 of the



Law of Succession Act and maintained that her brother's action to sell the suit property amounted to intermeddling with the deceased's estate in contravention of section 45 of the *Law of Succession Act*.

32. On the other hand, the appellants' position was that the 1st appellant was on Plot No. 519 by virtue of purchase while the 2nd appellant was on Plot No. 532 because that was his ancestral land which he inherited from his grandmother.
33. In any claim, Section 107 of the *Evidence Act* places the burden of proof in a case on the plaintiff. This applies not only to the merits of the case but also to the question of jurisdiction.
34. The fact that the suit property is subject of an adjudication process is not disputed and therefore the dispute in the lower court was subject to the *Land Adjudication Act*.
35. Section 30 (1) of the *Land Adjudication Act* bars a court from entertaining a suit concerning an interest in land in an area declared as an adjudication section until the adjudication register becomes final, unless the land adjudication officer has given consent for a suit to be filed. That means that a court cannot hear or determine a matter where land is subject of adjudication and is yet to be registered, unless the institution of such suit is sanctioned in written by the land adjudication officer. The said section provides as follows;

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- (1) 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.

36. Therefore, the court's jurisdiction is ousted to hear and determine a land dispute concerning an interest in land which is an area declared as an adjudication section, unless consent to institute suit is obtained from the adjudication officer. The respondent's claim before the lower court was for injunction, declarations and registration of the suit property in her name, which is a claim for an interest in the suit property and therefore falls squarely within the ambit of section 30 (1) of the *Land Adjudication Act*.
37. In paragraph 17 of the amended plaint, the respondent rightly raised the question of consent of the adjudication officer as the basis upon which her claim was being pursued. Proof of such consent is a matter of fact and it was upon the respondent to avail evidence of written consent from the land adjudication officer at the point of institution of the suit in the lower court. Therefore, in my view, the issue as to whether the respondent had consent of the adjudication officer was a question of jurisdiction.
38. The respondent has argued that if jurisdiction is not raised at the trial, it cannot be raised on appeal. I do not agree with this position. Jurisdiction is the power of the court to determine a matter, and that power is obtained from the law. It is the view of this court that it is upon the court to be satisfied that it has the necessary jurisdiction before trying any dispute, whether or not the parties have raised that issue, because failure by parties to raise the issue of jurisdiction cannot clothe a court with the jurisdiction it does not have. If parties in a suit are silent on the question of jurisdiction, that alone cannot vest jurisdiction on the court where it has no jurisdiction. There has to be a legal basis for jurisdiction, even where the same is said to be inherent.



39. Jurisdiction is everything and therefore, before a court embarks on determining a dispute, it ought to be satisfied that it has the necessary jurisdiction. In the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR, the court held as follows;

Jurisdiction is everything. Without it a court 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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

40. The jurisdiction of a court flows from the Constitution or statute or both and a court cannot arrogate itself jurisdiction it does not have. In the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Supreme Court of Kenya held as follows;

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 itself jurisdiction exceeding that which is conferred upon it by law.

41. In this matter, the respondent raised the issue of jurisdiction when she stated that she was in compliance with Section 30 (1) of the Land Adjudication Act and alleged that her suit in the lower court was filed pursuant to a consent from the Land Adjudication Officer in charge of the adjudication section of Kaatene. I have perused the consent produced by the respondent as evidence before the lower court and the same is dated 21st November 2018 as seen at page 25 of the record. I have also considered the trial record and I note that the suit in the lower court was instituted by a plaint which was filed on 11th September 2018, and subsequently amended on 17th December 2018. Since the consent was given in November 2018, while the suit was instituted in September 2018, it is evident that the suit in the lower court was instituted two months and eleven days before the consent was granted by the adjudication officer. That being the case, it is clear that at the time of institution of the suit in the lower court, no consent to institute the same had been obtained from the adjudication officer contrary to the provisions of Section 30 (1) of the Land Adjudication Act. Although the respondent filed an amended plaint on 17th December 2018, the court’s view is that a suit that is a nullity in law cannot be given life by an amendment, because such suit is dead on arrival and a stillbirth cannot be cured by an amendment. Since there was no suit, there was nothing to amend. If a party wishes to institute suit in respect of land declared as an adjudication section, what is key is proof that at the date of institution of suit, there was written consent from the adjudication officer. It is therefore the finding of this court that the suit filed by the respondent before the lower court was a nullity in law and the trial court had no jurisdiction to try the same.

42. Therefore, as the trial court had no jurisdiction to entertain the dispute before it, the same ought to have been filed and tried within the adjudication process in Kaatene section, which has several dispute resolution mechanisms including determination by the survey officer, demarcation officer, recording officer, arbitration committee, arbitration board, adjudication officer and the Minister as provided for in Sections 9, 15, 16, 19, 21, 22, 26 and 29 of the Land Adjudication Act.

43. Besides the question of jurisdiction, I agree with the respondent’s submission that a person without capacity in law cannot do that which they have no power to do. Section 82 (1) of the Law of Succession Act provide that it is only a personal representative of the estate of a deceased person who has the power to file suit on behalf of a deceased person’s estate.



44. In this matter, the respondent brought the suit in the lower court describing herself as an administrator of the estate of Mbithe Mutyambai and alleging that she did so on the basis of a grant of letters of administration issued to her. That grant was produced in evidence and the same is at page 18 of the record of appeal. The grant was issued on 24th October 2018 pursuant to an application filed on the same date as shown at pages 26 to 32 of the record. As stated above, the suit in the lower court having been filed on 11th September 2018, it is clear that the grant of letters of administration ad litem were obtained over one month after institution of the suit and therefore at the time of institution of that suit, the plaintiff therein had no capacity to sue for the estate of the late Mbithe Mutyambai and hence the suit was incurably incompetent. Even the amendment done on 17th December 2018 could not breathe life in the suit as the same was brought to court by a person without the necessary locus standi.
45. The above being the position, it is the finding of this court that the trial court having been informed in the pleadings and evidence that the suit before court was founded on a consent from the adjudication officer and a grant of letters of administration ad litem, was wrong to proceed to hear the dispute when it had no jurisdiction and when the plaintiff therein had no capacity to institute the proceedings before court.
46. As the respondent's suit before the trial court was built on quicksand, the same was incurably incompetent and a nullity ab initio. The subsequent but belated attempts to set up the foundation thereof two months later were acts in futility. Therefore, the suit before the trial court ought to have been struck out. In the premises, the appeal herein succeeds and the same is allowed. The judgment of the learned trial magistrate in Mutomo Land Case No. 7 of 2018 is hereby set aside and the same is substituted with an order striking out the suit with costs to the defendants. The costs of this appeal are awarded to the appellants.
47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Okiru holding brief for Ms. Kyalo for appellants

Ms. Muthoki for respondent

Josephine - Court Assistant

