



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 44 OF 2018

JULIUS KILEMI MAITAI.....APPELLANT

VERSUS

SILAS MAILANYI MAITAI.....1ST RESPONDENT

JOHN ITHAI.....2ND RESPONDENT

DOUGLAS MBERIA MAITAI.....3RD RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER

TIGANIA EAST/WEST.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (S.R.M.) delivered

on 11th October, 2018, in Tigania PMCC No. 131 of 2010)

JUDGMENT

1. By an appeal dated 6.11.2018 the appellant urges the trial court's ruling to be overturned on grounds:-

- 1. The court misconstrued the facts and the law hence reaching the wrong decision.**
- 2. Failed to evaluate the evidence and reached the wrong decision.**
- 3. Ignored the appellant's evidence and reached incorrect decision.**
- 4. Was bad in law.**

2. This being a first appeal the court is required to re-assess, rehear and re-appraise itself on the lower court record, come up with its own findings and conclusions. ***See Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.***

3. At the lower court the appellant had sued the respondent as the sole user, beneficial owner and possessor of **Parcel No's 2348 and 2611.**

4. He claimed he was denied an equal share of his father's **Parcel No. 1132, 479 and 795 Kitheo adjudication section** by the 1st and 2nd respondents despite lodging an **A/R objection No's 276, 277 and 278.**

5. He prayed for an order that the 1st respondent be ordered to give him 2 acres from **Parcel No. 1132**, 1 acre each from the 2nd and 3rd respondents **Parcel No's 2577 and 579 Kitheo adjudication section** and a declaration that he be demarcated on his properties.

6. The 1st, 2nd and 3rd respondents denied that the appellant was the sole user and beneficial owner of **Parcel No's 2348 and 2611** which displaced his original numbers and that he was entitled to equal share of **Parcel No's 1132, 479 and 795 Kitheo adjudication section.**

7. They admitted they had shared their land with their sons and that the appellant ought to have been satisfied with the results of **objection No's 276, 277 and 278**, averred the suit was defective in law, time barred and offended **Section 35 of the Advocates Act.**

8. The 4th and 5th respondents filed a defence dated 17.8.2011, denied knowledge of the appellant's ownership and possession of **Parcel No's 2348 and 2611**; insisted the objections were heard and determined on merits hence the outcome was lawful and just to all the parties; further they stated the procedure to allocate the 1st and 2nd respondents parcels was lawful and not malicious as alleged.

9. The 1st, 2nd and 3rd respondents filed a notice of preliminary objection dated 29.6.2012 on the grounds that:-

a. The court lacked jurisdiction under Section 29 (1) of Cap 284 to hear the suit.

b. The only option available was to file for judicial review if the plaintiff felt aggrieved.

10. Having gone through the lower court record and the appeal, the issue for determination is whether the trial court had jurisdiction to determine the suit.

11. The record of the lower court shows by a consent dated 3.11.2010 the District Land Adjudication officer Tigania West District granted the appellant a consent to sue the 1st to 3rd respondents under **Sections 9 (1) and 30 of Cap 283 and 284** respectively regarding **Parcel No. 1132, 479, 2348, 2266, 795, 2611, 2176, 2579, 2222, 1401, 2576, 1396 and 2577 Kitheo adjudication section.**

12. The preliminary objection was heard and a ruling delivered on 13.9.2013 where the court dismissed the same as raising no pure points of law. Subsequently the appellant was allowed to amend the plaint by bringing in a 5th respondent.

13. The matter on 16.7.2015 proceeded for hearing with PW1 testifying. He produced **PMF 1**, copy of a receipt as **P exh 2**, consent to sue as **PMFI 3.**

14. PW2 and PW3 took to the witness stand on 24.9.2015 closing the appellant's case with a defence hearing set for 26.11.2015

15. When the matter came for mention on 23.8.2018, the court on its own motion urged parties through written submissions to address it over the provisions of **Section 26 (3) of the Land Adjudication Act.** By a ruling dated 11.10.2018 the trial court struck out the suit for lack of jurisdiction. The appellant submits the court was wrong in striking out the suit.

16. With respect, there was already a previous ruling determining the issue of jurisdiction which had neither been appealed against nor reviewed.

17. Similarly, the matter was already part heard and had the trial court perused the file it would have known the case was pending defence hearing. The matter had been determined by a trial court of a higher rank than a Senior Resident Magistrate. The latter could not possibly sit on appeal against a ruling of a fellow colleague who was of a higher rank.

18. There was no High Court order reviewing and or setting aside the order dismissing the preliminary objection. The former court had already determined the issue of jurisdiction to finality and proceeded with the hearing of the matter.

19. In the circumstances, the trial court was gravely in error to strike out the suit and or decline jurisdiction.

20. The appeal succeeds with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF

JANUARY, 2022

In presence of:

Nyenyire for appellant

Ayub Anampiu for respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE