



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO. 87 OF 2019

MIKE MBEVI NDAMBUKI

(Suing as the legal representative and administrator of the estate of

Gregory Ndambuki Muoki(deceased).....PLAINTIFF

VERSUS

THOMAS MWAKA KAMUNA.....1ST DEFENDANT

DUNCAN MUOKI MWOLOLO.....2ND DEFENDANT

MUKEKU MUTUNGI.....3RD DEFENDANT

PETER KAILU MUTUKU.....4TH DEFENDANT

GRACE KIUMO MUNYOOKU.....5TH DEFENDANT

STANLAW MUTUNGA MUTHOKA.....6TH DEFENDANT

WILFRED MWOVE MALEKELA.....7TH DEFENDANT

MBETE MASILA KANGELA.....8TH DEFENDANT

THE DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER-MAKUENI.....9TH DEFENDANT

RULING

1. By a Plaint dated 13th of November 2019, the Plaintiff sought for the following orders against the Defendants;
 - a) A declaration that land parcel No. 497, 498, 499, 500, 501, 502, 503 and 504 Musalala Adjudication Section forms part and parcel of the Estate of Gregory Ndambuki Muoki(deceased).
 - b) An order directing the District Land Adjudication and Settlement Officer Makueni to strike out the names of the Defendants from the Adjudication record in respect to land parcels No. 497, 498, 499, 500, 501, 502, 503 and 504 Musalala Adjudication Section and in their place include the name of Gregory Ndambuki Muoki (deceased) as the legal owner of the aforesaid parcels of land.
 - c) An order of eviction against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants from the Plaintiff's land to be supervised by the O C S Kilome Police Station.
 - d) Costs of the suit with interest.

e) Any other relief that this Honourable court deems fit and just to grant.

2. In response, the 1st, 4th, 5th and 7th Defendants filed a joint statement of Defence on 7th of July 2021 and denied the Plaintiff's claim.
3. On 15th of July 2021, the 1st, 4th, 5th and 7th Defendants filed a Notice of Preliminary Objection dated 14th of July 2021 on the grounds that the court lacks jurisdiction to hear and determine the suit as:
 - a) **The Plaintiff had failed to exhaust the elaborate statutory dispute resolution mechanism provided for under the Land Adjudication Act Cap 284 Laws of Kenya.**
 - b) **That the decision by the Committee Musalala Adjudication Section dated 12/07/2017 in respect to the 1st, 2nd, 3rd, 4th, and 7th Defendants plots number 497, 498, 499, 500, and 503 respectively Musalala Adjudication Section being valid and undisturbed by way of an appeal under the Land Adjudication Act and this suit not being Judicial Review proceedings to quash the decision of the said Committee, the decision has crystalized with regard to the rights of the 1st, 2nd, 3rd, 4th and 7th Defendants in regard to their respective parcels of land.**
4. They urged the court to dismiss the Plaintiff's suit with costs.
5. Through their submissions filed on the 9th of November 2021, the 1st, 4th, 5th and 7th Defendants submitted that this suit relates to land parcels numbers 497, 498, 499, 500, 501, 502, 503 and 504 Musalala Adjudication section. That it is not in dispute that when Musalala was declared an adjudication area under the Land Adjudication Act, the Plaintiff herein filed cases number 1, 2, 3, 4, 5, 6, 7 and 8 of 2016 in respect to a dispute in the above parcels of land before the Adjudication Committee Musalala Adjudication Section. That thereafter, the Adjudication Committee dismissed the cases on the 12th of July 2017. That being dissatisfied with the decision of the Adjudication Committee, the Plaintiff appealed to the Arbitration Board but later withdrew the appeals on the 7th of May 2019 and filed the present suit against the Defendants.
6. It is their position that the Plaintiff did not move this court by way of Judicial Review to quash the decision of the Committee if he was aggrieved by it as he alleges in the present suit. The Defendants argued that the decision by the Committee was still valid as it had not been appealed against by the Plaintiff.
7. The Defendants contends that there exists a statutory mechanism for the resolution of disputes hence the Plaintiff could only approach the court after exhausting the mechanism provided under the Land Adjudication Act.
8. The Defendants argued that the court has no jurisdiction to entertain the present suit. To buttress their submission, reliance was placed on the following cases:
 - a) **Abdalla Mangi Mohammed Vs Lazarus & 5 Others (2012) eKLR;**
 - b) **Mugambi & Another (suing as the Legal Representative of the Estate of Peter Etharia M'Kailibi & 4 Others Vs Zachary Baariu & 6 Others (2018) eKLR.**
9. The Plaintiff through his written submissions filed on the 20th of September 2021 submitted that the dispute involving land parcels numbers 497, 498, 499, 500, 501, 502, 503 and 504 was first heard by the Musalala Adjudication Committee which determined that Kangéla's land was to be sub divided amongst his four wives. That in 1975, the sons of Kyule Mbindyo Kangéla and Muia Kangéla sold their parcels of land to Gregory Ndambuki (deceased) his late father. The Plaintiff further submitted that the Defendants purchased the same parcels of land from one Mutuku who did not have proprietary interest over the said parcels of lands. The Plaintiff argued that the Committee in their decision held that it could not evict the Defendants as they had built and resided on the land for a long period of time.
10. The Plaintiff further submitted that after the Committee rendered its decision, he appealed against the decision before the Arbitration Board but later expressed his wish to have the issue determined by a court of law. He stated that he was granted consent to file a suit in court by the District Land Adjudication and Settlement Officer on the 3rd of June 2019.
11. The Plaintiff argued that under the adjudication law, any party dissatisfied with any of the adjudication processes could apply to the adjudication officer for a consent to file a suit in court before the adjudication register is finalized. He relied on the case of Martha Kigen Vs Johana Tobino to buttress his submissions.
12. The Plaintiff contends that the Committee made a determination that Gedion Ndambuki(deceased) purchased the disputed parcels of land but one Mutuku, a fraudster, sold the parcels of land to the Defendants herein. He contends that the Committee did not have powers to evict the Defendants from the parcels of land and that is why he moved to court as it is only the court that issues eviction orders. The Plaintiff further argued that the issues for determination in the present suit are on eviction. He submits that he was granted consent to file the present suit in court and therefore he did not jump the adjudication process.
13. I have considered the preliminary objection, the rival submissions by the parties and the decisions annexed thereto and I find that the issue for determination is;

Whether this Court has jurisdiction to hear and determine this suit.

14. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law.

15. In **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696**, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. Further on Sir Charlse Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issue. The improper practice should stop.”

17. The Land Adjudication Act deals with all matters pertaining to adjudication. In its preamble it states that;

“It is an Act of Parliament to provide for the ascertainment and recording of rights and interest in Trust Land, and for purposes connected therewith and purposes incidental thereto.”

18. The Defendant submitted that the Plaintiff had not exhausted all the dispute resolution mechanism provided under the Land Adjudication Act. Section 26 to 29 of the Act provides for an elaborate dispute resolution mechanism for solving any dispute arising from the adjudication process.

19. Section 26 of the Land Adjudication Act provides that;

1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication Officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

2) The Adjudication Officer shall consider any objection made to him under subsection (1) of this section and after such consultations and inquiries as he thinks fit, he shall determine the objection.

20. Section 29 of the Land Adjudication Act provides that;

1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may within sixty days after the date of the determination, appeal against the determination to the minister by;

a) Delivering to the minister an appeal in writing specifying the grounds of appeal; and

b) Sending a copy of the appeal to the Director of Land Adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the orders shall be final.

2) The Minister shall cause copies of the order to be sent to the director of Lands Adjudication and to the Chief Lands Registrar.

3) When the appeals have been determined, the Director of Lands Adjudication shall: -

a) Alter the duplicate adjudication register to conform with the determinations; and

b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alteration and a copy of the certificate to the Chief Lands Registrar, who shall alter the adjudication register accordingly.

21. Section 29 and 30 of the Land Adjudication Act envisages two scenarios My interpretation of Section 26 to 29 of the Act is that it provides for a situation where a party decides to follow all the appellate processes under the Act until they are exhausted. In my view, Section 30 of the Act applies where a party opts not to exhaust all the processes under the Act but instead, to obtain a consent from the Land Adjudication Officer and move to court before the register is made final.

22. It is not in dispute that the Plaintiff filed case numbers 1, 2, 3, 4, 5, 6, 7 and 8 of 2016 before the Adjudication Committee Musalala Adjudication Section seeking for the eviction of the Defendants from land parcel numbers 497, 498, 499, 500, 501, 502, 503 and 504. The powers of the Committee to determine disputes under the Act is donated under Section 20 which provides as follows: -

The committee appointed for an adjudication section shall;

- a) Adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer.
- b) Advise the adjudication officer or any officer subordinate to him upon any question of recognized customary law as to which he has sought its guidance
- c) Safeguard the interest of absent persons and persons under disability
- d) Bring to the attention of officers engaged in the adjudication any interest of which for any reason no claim has been made
- e) Assist generally in the adjudication process.

A person who is aggrieved by the decision of the committee then files it before the board.

In the event of inability of the committee to make a decision, the following procedure would apply: -

- a) If a committee is unable to make a decision on a matter before it, it shall refer the matter to the arbitration board.
- b) The adjudication officer may require the committee to reconsider any decision which it has made.
- c) Any person named in or affected by the decision of the committee who considers the decision to be incorrect may within 14 days after the decision complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.

Upon the receipt of a complaint under subsection (3) of this section, the executive officer of the committee shall refer it with all the particulars of the case to the executive office of the board who shall submit it to the board.

23. In accordance with the provisions of Section 22 of the Act, the Plaintiff being aggrieved with the findings of the Adjudication Committee Musalala Adjudication Section filed appeals before the Arbitration Board. It is not in dispute that the Plaintiff withdrew the appeals to pursue the matter in court. I have carefully looked at document No. 6 in the Plaintiff's list of documents and I find that the Plaintiff informed the Arbitration Board Members that they did not wish to proceed with adjudication procedure and wished to withdraw all the cases and requested for consent to file their cases in court. The appeals before the Arbitration Board were withdrawn and the matter was referred to the District Adjudication and Settlement Officer to act on the Plaintiff's request.

24. The Applicant submitted that the Committee did not have the powers to evict the Defendants and hence the need to file the present suit. I have carefully looked at the decision by the Committee Musalala Adjudication Section dated 12/07/2017 and I find that the Plaintiff's case was dismissed on the grounds that the Committee did not have the powers to evict the Defendants due to the period the Defendants had been on the land.

25. The Plaintiff submitted that he filed the present suit after he obtained consent from the Land Adjudication officer. He contends that it is only a court of law that has the jurisdiction to issue eviction orders.

26. Section 30(1) of the Land Adjudication Act provides that;

“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.”

27. The wordings in Section 30(1) of the Act are mandatory. It sets out the conditions under which a party can approach the court before the adjudication process is complete. The said condition is that consent must be obtained from the Land Adjudication Officer. The requirement for consent to be granted by the land Adjudication Officer before a suit can be filed is a statutory requirement.

28. In the case of **Benjamine Okwaro Estika Vs Christopher Anthony Ouko & Another** the Court of Appeal held that: -

“That being so, the mandatory requirement of section 30(a) had to be complied with i.e. consent of the Land Adjudication Officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”

29. I have also looked at document number one in the Plaintiff's list of documents and I find that it is a copy of a consent letter dated 3rd June 2019 addressed to the Plaintiff. In the consent letter, the Land Adjudication Officer Makuani granted the Plaintiff consent under section 30(1) of the Land Adjudication Act to file a civil case for recovery of land of interest in parcels numbers 497, 498, 499, 500, 501, 502, 503 and 504 Musalala Adjudication Section on 3rd June 2019. The consent to file a civil suit was in writing. The letter indicates that the consent was valid for use within six months from the date of its issue. There is no evidence that placed before me that at that time the adjudication process was not going on.

30. In the instant case, it is evident that the Plaintiff obtained consent from the Land Adjudication Officer to file a civil suit claiming for an interest on land as required. The consent was obtained before the Plaintiff filed the present suit. The consent was annexed in the Plaintiff's suit in his list of documents. The Defendants did not challenge its authenticity. The Defendants submitted that the orders of the Committee were not challenged since the Plaintiff withdrew his appeals before the Arbitration Board. Although the Plaintiff withdrew his appeals before the Arbitration Board, his rights were not extinguished as he obtained consent to file a civil suit in court which will determine them.

31. I find that the Plaintiff complied with the mandatory provisions of Section 30(1) of the Land Adjudication Act before approaching the court. Having complied with provisions of Section 30(1) of the Act, I find that the Plaintiff is properly before the court. I also find that this court has jurisdiction to hear and determine this suit.

32. Consequently, the Defendants preliminary objection dated 14th of February 2021 is dismissed with costs to the Plaintiff.

SIGNED, DATED AND DELIVERED AT MAKUENI IN OPEN COURT THIS 26TH JANUARY, 2022.

.....

HON. T. MURIGI

JUDGE

IN THE PRECENCE OF: -

Mr. Kithuka holding brief for Mathuva for the 1st, 2nd, 3rd, 4th and 7th Defendant.

Mr. Muthiani for the Plaintiff.

Court clerk – Mr. Kwemboi

Court: Parties to comply with Order 11 within 30 days. By consent Mention on 07/03/2022 before the Deputy Registrar.

HON. T. MURIGI

JUDGE

26/01/2022