



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 113 OF 2014

NYAGA NJEGE.....PLAINTIFF

VERSUS

MUGO NJOKA.....1ST DEFENDANT

NJIRU NJOKA.....2ND DEFENDANT

GERALD NJAGI MUTURI.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. This ruling is on a preliminary objection dated 21.09.21 filed in court on even date. The objection is filed by the 4th defendant and it targets the suit as filed. The objection is premised on five (5) grounds as follows:-

i) The court lacks first instance jurisdiction to hear and determine the Plaintiff's claim as it contravenes Section 29 of the Land Adjudication Act Cap 284 laws of Kenya.

ii) The claim is fatally defective for failure to exercise and/or exhaust the available statutory remedies under the Land Adjudication Act Cap 284 laws of Kenya.

iii) That the court lacks jurisdiction as the suit lands fall within an ongoing adjudication process.

iv) That the court lacks jurisdiction to hear and determine this claim as consent was never sought pursuant to Section 30 of the Land Adjudication Act Cap 284 Laws of Kenya.

v) The plaintiff's claim is misconceived, bad in law and an abuse of the court process.

2. The parties in the suit are **NYAGA NJEGE**, the plaintiff, while **MUGO NJOKA, NJIRU NJOKA, GERALD NJAGI MUTURI and THE HON. ATTORNEY GENERAL** are the defendants.

3. In the suit, the plaintiff claimed ownership of the whole parcel of land previously known as Block No. 150 Gichiche Adjudication Section. According to him, he purchased the land from Njoka Njue, a representative of Ikandi Clan, and has been in occupation of the land from the year 1970. In the year 2009, the District Land Adjudication Officer, Mbeere, is said to have entered into the land and subdivided it into plots No. 4103, 4104 and 4105 without the plaintiff's involvement.

4. The plaintiff claimed entitlement to registration for the resultant subdivisions of the land. He sought to be registered as owner of the said resultant subdivisions being plots no. 4103, 4104 and 4105 or in the alternative a declaration that the 1st, 2nd and 3rd defendants hold the parcels in trust for him.

RESPONSE

5. The suit was defended by the 1st, 2nd and 3rd defendants who jointly denied the averments in the plaint and specifically the fact that they were owners of the parcels of land alluded to by the plaintiff.

6. The 4th defendant equally defended the suit and put the plaintiff to strict proof of the averments. It was argued that if the adjudication officer had subdivided the land it was done within the adjudication officer's mandate and in compliance with statutory provisions. The suit was said to offend the provisions of section 29 and 30 of the Land Adjudication Act Cap 284 laws of Kenya.

7. The 4th defendant filed his submissions on 4.11.2021. Three issues were identified for determination. The first was whether the plaintiff had exhausted the procedure for redress provided for in the Land Adjudication Act. It was argued that a party ought to exhaust all available remedies provided in the Act before seeking the court's recourse. The 4th defendant relied on the provisions of Section 26 of the Land Adjudication Act which gives an objector opportunity to object to any proposed land adjudication in writing for consideration by the adjudication officer. It was submitted that Sections 26A and 27 of the Land Adjudication Act provided for a procedure to be followed in case no objection is raised and further it was stated that any aggrieved objector in the adjudication process was required to lodge an appeal to the Minister under Section 29 of the Act.

8. The plaintiff was said to have failed to adhere to the procedure applicable in the land adjudication process. It is argued that he had a recourse under Section 30(3) of the Land Adjudication Act to appeal to the minister which he failed to pursue and that no reasons were provided for failure to pursue the avenue. In support of this, the 4th Defendant relied on the case of **Speaker of the National Assembly Vs James Njenga Karume (1992)**. It was

submitted that Article 159(2)(c) of the Constitution recognizes alternative forms of dispute resolution which according to the 4th Defendant included dispute resolution mechanisms provided under the Land Adjudication Act. On this, the 4th Defendant relied on the case of **Mutanga Tea & Coffee Company Ltd Vs Shikara Ltd & Another [2015] eKLR**. It was further argued that until the plaintiff had exhausted the provisions provided for under Sections 12 to 26 of the Land Adjudication Act, then entertaining the suit would be a usurpation of the dispute resolution mechanisms provided under the Land Adjudication Act.

9. The second issue was whether the court has jurisdiction to determine the matter. To which the court was said to lack jurisdiction by virtue of the provisions of Section 30 of the Land Adjudication Act. To support the claim on lack of jurisdiction reliance was made on the case of **Owners of the Motor Vessel "Lilian-S- V Caltex Oil (Kenya) Ltd (1989) Eklr**.

10. Finally on whether the suit was bad in law and therefore for dismissal, the court's attention was drawn to the amended pleadings which were said to be poorly drafted and failed to inform the defendants on the claim against them. According to the 4th defendant the prayers in the suit are against the plaintiff. The 4th defendant pleaded that the plaintiff needed to plead with both specificity and clarity. The 4th defendant relied on the case of **Zubeda Wazuri V Speaker of the National Assembly & 4 others [2017] Eklr** where it was stated that a pleading must state all material facts to establish a reasonable cause of action. Ultimately the Preliminary objection was said to have merit and the court was urged to allow it.

11. The 1st, 2nd and 3rd Defendants filed their submissions on 26.11.2021. They sought to rely on the submissions by the 4th defendant and further averred that the plaint did not disclose any cause of action against the 1st to 3rd defendants. The court was called upon to dismiss the suit with costs to them.

12. On 8.12.2021 counsel for the plaintiff had not filed their submissions and the court directed that the said submissions be filed three weeks before the ruling date. However, as at the time of writing this ruling the said submissions were not on the court record and the court shall therefore proceed to deliver the ruling, the absence of the plaintiff's submissions notwithstanding.

ANALYSIS AND DETERMINATION

13. I have considered the objection as raised, the response made, and the submissions by the defendants. I have also looked at the suit as filed. The case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd**. (1969) EA 696, described a preliminary objection as follows:

"A Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit....." "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure 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 has to be ascertained or if what is sought is the exercise of judicial discretion.

14. I find it worthwhile to first determine whether the grounds raised meet the criteria for preliminary objection as outlined in the Mukhisa case. There are five grounds raised in the preliminary objection, I have looked at all the five and I am of the view that grounds 3 and 5 of the objection do not raise pure points of law. The said grounds address issues of fact which require the court to establish the legitimacy and veracity of the grounds by calling evidence. As stipulated above, a preliminary objection should raise a pure point of law which is not the case in the two grounds. I find that the two fall short of the requirements in the Mukhisa case and are therefore not to be entertained as grounds for a preliminary objection.

15. The remaining grounds for determination are grounds 1, 2 and 4. Ground 1 challenges the court's jurisdiction on account that the plaintiff's claim contravenes section 29 of the Land Adjudication Act.

Section 29 of the Land Adjudication Act provides as follows;

"(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 order shall be final.”

Then **Section 26 of the Land Adjudication Act** referred to states as follows;

“(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 further consultation and inquiries as he thinks fit, he shall determine the objection.”

16. The plaintiff's claim is an interest in land on plots no. 4103, 4104 and 4105, the said plots are said to be resultant subdivisions of land Block No. 150 Gichiche Adjudication Section. The plaintiff alleges to have purchased the land from one Njoka Njue but that in the year 2009. The District Land Adjudication Officer subdivided the land which the plaintiff claims to belong to the defendants. The defendants however, have denied such ownership.

17. Ground 2 of the objection alleges that the claim contravenes the provisions of Section 29 of the Land Adjudication Act which mandates that any person aggrieved with the determination of an objection under section 26 of the Act may appeal against the determination to the Minister within 60 days. The said section 26 mandates that a person affected by the adjudication register and considers it to be incorrect should within 60 days from date of publication of the adjudication register object in writing to the adjudication officer giving reasons for such objection.

18. The claim by the plaintiff is on land in an adjudication section. That land was subdivided by the District Land Adjudication Officer. The plaintiff claims an interest in that land which land in my view, is governed under the Land Adjudication Act. The plaintiff is clearly objecting to the actions of the Land Adjudication officer which makes him bound by the procedure contemplated by the said Act. I have looked at the pleadings filed and I have not come across any objection addressed by the plaintiff to the adjudication officer challenging with reasons, the actions of the Land Adjudication Officer regarding the subdivision of the suit parcel of land. Apart from that, I have also not seen any evidence of an appeal filed to the Minister as required by Section 29 of the act against the decision of the land Adjudication officer. I am convinced that the said procedures are mandatory and govern claims on interests in land under an adjudication section.

19. The 4th Defendant has also submitted that the court lacks jurisdiction as the plaintiff's claim contravenes section 30 of the Land Adjudication Act, for failing to obtain consent prior to filing of the suit. The said section 30 states as follows;

(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.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.

(4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.

(5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.

20. I have read the provisions of Section 30- of the Land Adjudication and specifically Section 30(1) of the said section which makes it mandatory for one to obtain consent of the Land Adjudication officer prior to instituting a suit that relates to an interest in land in an adjudication section unless the adjudication register has been final. I have looked at the pleadings filed and have come across a consent letter dated 30th July 2009, the same is drawn by the District Land Adjudication Settlement Officer of Mbeere District and is addressed to the plaintiff, which letter grants him consent to pursue a dispute before the court. This claim therefore is not in contravention of the provisions of Section 30 of the Land Adjudication's Act.

21. The plaintiff additionally in ground 3 of the preliminary objection has been accused of failing to pursue the available remedies under the Adjudication Act. The remedies contemplated under the Act are; the raising of an objection and filing of an appeal protesting the determination of the adjudication officer.

22. I note that despite the grant of the consent by the Land Adjudication Officer for the plaintiff to institute this suit before the court, the

plaintiff's claim ought to have been pursued as per the provisions of Section 29 as read together with Section 26 of the Land Adjudication Act which have laid out a procedure for one to adhere to if dissatisfied with the determination of an adjudication officer. As alluded to above, the plaintiff did not pursue these remedies and the consent notwithstanding the procedure laid out under the Land Adjudication is mandatory to be adhered to.

23. *The Court of Appeal in the case of GEOFFREY MUTHINJA KABIRU & 2 OTHERS VS. SAMUEL MUNGA HENRY & 1756 OTHERS [2015] eKLR held that;*

“It is imperative that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts”.

24. I associate myself with the reasoning of the above case that when there is a mechanism provided for dispute resolution then such mechanism ought to be exhausted before the court's intervention is sought. I find that there is a precise procedure set out in the Land Adjudication Act which the plaintiff failed to adhere to but instead opted to file this suit before the court.

25. Having made a determination that the plaintiff's claim is in contravention of the provisions of section 29 of the Land Adjudication Act. I am inclined to find that this court lacks jurisdiction to entertain the suit before it. In the **Court of Appeal case in The Owners of Motor vessel "LILIAN "S" Vs. Caltex Oil Kenya Ltd (1989) 1 KLR 1**, the court stated 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 and court of law downs it tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. The upshot of the foregoing is that the preliminary objection has merit and this suit is therefore dismissed. The plaintiff shall bear the costs of the suit.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **26TH DAY** of **JANUARY 2022**.

In the presence of Njeru Ithiga for Andande for plaintiff and Kathungu Joe for 1st, 2nd & 3rd defendant, Kiongo for 4th defendant.

CA: Leadys

A.K. KANIARU

JUDGE

26/01/2022