



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 128 OF 2019**

**BETTY NKATHA.....APPELLANT**

**VERSUS**

**CONSOLATA KAREGI ROBERT.....1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION OFFICER TIGANIA WEST/EAST DISTRICT.....2<sup>ND</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR – MAUA.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. S. Sogomo (P.M.) delivered on 31<sup>st</sup> October, 2019, in Tigania P.M. E&L No. 34 of 2018)*

**JUDGMENT**

1. The appellant seeks to overturn the lower court order on grounds that: the court misinterpreted both the **Land Consolidation and Land Adjudication Act** hence reaching the wrong decision; conducted the suit without hearing the parties; made assumptions therefore reaching an erroneous decision; conducted a sham trial hence occasioning great injustice to the appellant and lastly made a ruling which was against the law.
2. This being a first appeal, the court is expected to rehear, relook and re-appraise itself over the lower court pleadings, evidence and come up with its own findings and conclusion. See ***Selle –vs- Associated Motor Boat Company Ltd [1968]***
3. At the primary court, the appellant as the owner of **Parcel No. 4499 Tigania West Uringu II Adjudication Section**, had sued the respondents for collusion/movement and placement of **Parcel No. Tigania West/Uringu II/671** on her land without her consent or notice hence occasioning her loss of 0.30 acres. She sought for the court to declare the said actions unprocedural, arbitrary, illegal, null and void, for an order returning her property to the originally demarcated measurement of 11.05 acres and that the Land Registrar Maua to amend/rectify the register appropriately.
4. The respondents were duly served with summons to enter appearance and a return of service duly filed on 9.9.2016.
5. The appellant sought and obtained interim orders through a ruling on 21.9.2017. She filed pre-trial questionnaires, case summary and the issues for determination dated 28.3.2017.
6. Through an application dated 15.1.2019 the appellant sought for leave to enter judgment against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents who had not entered appearance, following entry of judgment in default against the 1<sup>st</sup> respondent made on 28.9.2018. The said application was allowed on 12.6.2019.
7. Eventually they came for formal proof on 26.9.2019, when the court on its own motion sought the appellant to address it on **Section 26 of Cap 283 and Section 26 (1) of the Land Consolidation Act** respectively.
8. Mr. Mwanzia advocate for the appellant submits the claim was over the rectification of a title deed for the suit land reflected it was less by 0.30 acres yet the trial court got it wrong by misapprehending the pleadings and assuming there was a pending dispute under both the **Land Adjudication Act** and the **Land Consolidation Act** which was not the case since title deed were already out.

9. Secondly counsel submitted the claim was based on **Section 80** of the **Land Registration Act 2012** and not under **Cap 283 and 284** as held by the trial court. Counsel urged the court to be guided by *Stephen Kirimi M'Rinturi –vs- Land Adjudication & Settlement Officer Igembe District and 3 Others –vs- Peter Kumbu Kimunya & Another (Interested Parties) [2020] eKLR.*

10. On his part Mr. Kieti litigation counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents conceded the appeal submitting the trial court ought to have known as per the pleadings that title deeds were out hence the reasons the orders sought were directed at the 3<sup>rd</sup> respondent over the cancellation of title in line with **Section 76** of the **Land Registration Act 2012**.

11. Counsel further submitted the **Land Consolidation Act** and the **Land Adjudication Act** were inapplicable in the circumstances hence the suit ought to have been sustained.

12. Counsel went on to submit, if there was any variation between what had been demarcated and what came out in the title deed, the **Land Adjudication Act** makes a provision for that eventuality.

13. In his view, Mr. Kieti submitted the appellant was supposed to have gone and examined the register and hence would have known there was a mistake as to acreages and proceed an objection at that point in time before the title deeds were out.

14. Counsel went on to submit the appellant was indolent as the notice was normally made public to go and view the register. Without such objection, counsel submitted, the issues of variation were now settled by acquiescence of the part of the appellant.

15. In a rejoinder, Mr. Mwanzia submitted the appellant perused the register on 5.11.2015 and her acreage was correct but at the issuance of a title on 29.2.2016, it was less hence her only option was to move to court.

16. Having gone through the pleadings, evidence and submissions, the issues for determination are:-

**a) If the trial court applied the correct law.**

**b) If the decision reached by the trial court ought to be sustained.**

17. The record show this suit was initially filed before this court and interim orders were duly granted pending the hearing. Eventually the matter was transferred to the lower court for disposal. The trial court through written request entered a default judgment against the 1<sup>st</sup> respondent and subsequently against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. It thereafter set down the matter for formal proof. By that time there was no defence offered by the respondents as regards the issues for determination filed by the appellant.

18. The plaint and the written submissions dated 24.10.2019 on jurisdiction of the court were clear that the suit land was past **Land Adjudication** and **Consolidation Acts**. The appellant was claiming her title deed was contained a lesser acreage than what was demarcated to her and hence sought for orders under **Section 80** of the **Land Registration Act** for the rectification of the register against the 3<sup>rd</sup> respondent. See *John Juma Muchlesi –vs- Grace Mang'eni Nabukiyabi [2021] eKLR*

19. The trial court did not keenly look at the pleadings and the submissions made. The appellant's list of documents accompanying the plaint attached a copy of the appellant's title deed issued on 29.2.2016. So the trial court erred both in fact and law and misapplied the law obtaining under the circumstances which was the **Land Registration Act 2012**. See *Monika Herta Elfriede Behrmann –vs- Mubia Holdings Limited [2017] eKLR.*

20. In the circumstances the appeal is allowed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19<sup>TH</sup> DAY OF JANUARY, 2022**

**In presence of:**

Kieti for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents

No appearance for appellant

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**