



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 41 OF 2020**

**JOSPHAT KARAIN N'ABATU.....1<sup>ST</sup> APPELLANT**

**CHARLES NKUNDURU M'ABATU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSPHAT M'NCHEBERE M'ITHAE.....1<sup>ST</sup> RESPONDENT**

**NICHOLAS GITONGA.....1<sup>ST</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. S. Sogomo (P.M.))*

*delivered on 29<sup>th</sup> July 2020, in Tigania P.M. ELC No. 183 of 2018)*

**JUDGMENT**

1. By an amended memorandum of appeal dated 12.8.2020 the appellants fault the trial court's order on the grounds that: it erred in law and in fact by misunderstanding the law; wrongly applying the hence coming to the wrong conclusion; applying the **Government Proceedings Act** yet the government was not party to the suit; failing to appreciate which law was applicable to the suit hence reaching the wrong decision; ignoring the application for the amendment of the plaint and hence denying the appellants an opportunity to prosecute the suit and lastly wrongly declining jurisdiction.
2. This being a first appeal, the court is expected to reappraise itself of the proceedings, evidence and the law and come up with independent findings and conclusion. See ***Selle -vs- Associated Motor Boat Company Ltd [1968] EA 123.***
3. The appellants had sued the respondents for fraudulently registering themselves as owners of **L.R No. Athinga/Athanja/8573** and **L.R. Athinga/Athanja/8043**. They sought for the cancellation, return of the parcels and permanent a injunction barring the respondents from entering, trespassing or in any way whatsoever interfering with the quiet occupation of the suit land.
4. Similarly, the appellants filed a notice of motion dated 24.9.2018 and obtained interim orders with hearing interpartes on 18.10.2018.
5. The respondents filed a defence and counterclaim in which they denied the alleged fraud, stated they were legally the registered owners of **Parcel No's L.R Athinga/Athanja 8573** and **7717** and that it was the appellants who were encroaching into their parcels. They prayed for a permanent injunction prohibiting the appellants from entering their parcels of land.
6. The respondents likewise filed an application dated 25.10.2018 seeking the setting aside or staying of interim orders issued on 27.9.2018 and for an order the land registrar and surveyor do visit the **locus in quo** and furnish the court with a report over boundaries between the respective parcels of land.
7. Parties filed written submissions dated 6.11.2018 and 14.11.2018 respectively. The court in a ruling delivered on 26.3.2019 struck out the application with costs.
8. The appellant through a notice of motion dated 23.10.2019 sought to amend the plaint which the respondents opposed by a replying affidavit sworn on 6.11.2019.
9. A further supporting affidavit was filed on 12.11.2019 in which the appellants stated the reason for the proposed amendment was that they had been issued with a title deed on 16.7.2019 hence the need to align the plaint with the new realities.

10. At the same time the respondents filed a preliminary objection dated 18.2.2020 alleging the suit offended **Section 16 (2)** of the **Government Proceedings Act Cap 40 Laws of Kenya, Order 29 rule 23 of the Civil Procedure Rules** and lastly that the suit was fatally defective and incurable in law.
11. Once more parties filed written submissions to the preliminary objection dated 2.3.2020 and 4.3.2020 respectively.
12. By a ruling delivered on 29.7.2020 the trial court upheld the preliminary objection and struck out the appellants' suit with costs triggering the current appeal.
13. With leave of court parties agreed to dispose of the appeal through written submissions dated 12.10.2021 and 8.11.2021 respectively.
14. The appellant submit the trial court was wrong since the applicable law was the **Land Registration Act 2012** since title deeds were already out in the area.
15. Secondly, it is submitted the suit was struck out while there was a pending application for an amendment hence denying the appellants an opportunity to be heard on merits.
16. Thirdly, it is submitted the court was wrong to apply the **Government Proceedings Act Cap 40** yet the Government was not party to the suit.
17. The appellants rely on *Douglas Karithi & Another –vs- Stanley Gatuma [2019] eKLR, Jackson Koome –vs- M'limongi M'ikuamba & 2 others [2018] eKLR, Peter Kimandiu –vs- Land Adjudication Officer & Others [2016] eKLR and Stephen Kungutia & 2 Others –vs- Severina Nchulubi (unreported).*
18. On the other hand, the respondents' submit the suit was seeking orders of injunction effecting non-parties to the suit hence guided by *Elijah Kinyua Nganga & 3 Others-vs- Gitu Wa Kahengeri & 3 Others [2014] eKLR* the court was right in upholding the preliminary objection.
19. Secondly, the respondents submit the appellants if aggrieved by inaccuracies or incompleteness of the adjudication record, they ought to have appealed to the Minister as per **Cap 284 and 283** hence the trial court was right in upholding the preliminary objection. They rely on *Abdallah Mangi Mohamed –vs- Lazarus & 5 Others [2012] eKLR.*
20. Having gone through the pleadings, the record of appeal, supplementary records of appeal and rival submissions, the issues for determination are:-
- a) **If the trial court applied the correct law in the circumstances.**
  - b) **If the upholding of the preliminary objection was justified.**
21. The appellants' claim was based on fraud over registered **Land Reference No. Athinga/Athanja 8043 allegedly** subdivided in favour of the respondents as **L.R Athinga/Athinja/8573** and **L.R No. Athinga/Athinja/7717**.
22. The respondents filed a defence and counterclaim dated 3.10.2018 and stated they were the legally registered owners of **Parcel No. L.R. No. 8573 and 7717** hence they sought for a permanent injunction against the respondents.
23. The appellants filed a reply to defence and defence to counterclaim dated 16.10.2018. Up to that point in time it was clear the parties were disputing over parcels of land which were already registered and title deeds issued to them. Their rival claims were therefore beyond the jurisdiction of both the **Land Adjudication Act** and the **Land Consolidation Act**.
24. Further the reply to defence and defence to the counterclaim was regarding parcels of land which had title deed and not adjudication numbers.
25. The respondents' own submissions over the preliminary objection were also clear that the issue was over cancellation of title deeds.
26. In the application dated 23.10.2019 the appellants attached a copy of the title deed issued on 16.7.2019 as the basis why they required leave to amend the plaint and bring forth the issues in controversy. In the said application and which the trial court for unknown reason failed to determine, the appellants stated the title deed for the area had been released to them.
27. Under **Section 26** of the **Environment and Land Court Act Cap 12 (A)**, subject to pecuniary limits a magistrate court has jurisdiction to hear and determine land matters.
28. **Section 7 (1) of the Magistrates Act 2015** allows a designated magistrate to hear and determine claims relating to inter alia, title and boundaries.
29. **Section 80** of the **Land Registration Act** provide for the rectification of a register by an order of the court. The Section states the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained by fraud, mistake or collusion.

30. **Section 2** of the **Environment and Land Court Act** defines an ELC court to include a magistrate's court. The trial court appears to have had a mistaken belief that rectification of a register is only covered by **Section 26 (2)** of the **Land Consolidation Act** and **Section 29 (1)** of the **Land Adjudication Act**.

31. The position is erroneous both, on cases where title deeds have been issued and secondly where issues of fraud, illegalities and collusion have been raised so long as the matter is within the court's pecuniary jurisdiction. Once a title deed is issued the next port of call is the court and not through a Ministers appeal.

32. The second issue raised by the appellants is the trial court applied the **Government Proceedings Act Cap 40** yet the Government was not party to the suit. The 1<sup>st</sup> line of the preliminary objection was that the suit offended the mandatory provisions of **Section 16 (2)** of the **Government Proceedings Act Cap 40**. That **Section** provides as follows:-

***“The court shall not proceed in any proceedings to grant an injunction or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give relief against the Government which could not have been obtained in proceedings against the Government”.***

33. Further, **Order 29 rule 2 (2) (3)** of the **Civil Procedure Rules** provides no order of injunction shall be made against the government. In this suit the appellants claim was for the declaration that the respondents' parcels were fraudulently obtained and transferred out of his **L.R Athanga/Athanja/8043** and for permanent injunction from further subdivisions, transfer, eviction and interference.

34. In its finding the trial court misconstrued the prayer and held the appellants were seeking a mandatory injunction against the Land Registrar, a Government officer. With respect, that was not in the pleadings before the trial court as demonstrated above.

35. Incidentally, the respondents' defence and counterclaim was also seeking a permanent injunction against the appellants over **Parcel No. 8573 and 7717**. If the trial court was to advance this reasoning one would have expected the reasoning to be extended to the defence and counterclaim and proceed to, likewise, strike out the respondents' claim. It is apparent therefore the trial court did not keenly consider the issues raised in the plaint, defence, counterclaim and reply to defence and defence to counterclaim otherwise it would not have declined jurisdiction.

36. Again once the suit was struck out, the trial court continued to entertain other applications brought by both the appellants and the respondents yet the court had ruled it had no jurisdiction to entertain the claim.

37. In the premises, my findings are the appeal has merits. The same is allowed with costs to the appellants.

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

**In presence of:**

Otieno for appellants

Mukaburu for Mutinda for respondents

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**