REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ELC APPEAL NO. 11 OF 2021

ROBERT KULINGA NYAMU.....APPELLANT

VERSUS

MUSEMBI MUTUNGA.....1ST RESPONDENT

JACARANDA INVESTMENTS LIMITED.....2ND RESPONDENT

(Being an appeal from the ruling of the Principal Magistrates Court delivered on 26th day of November 2020 in Mutomo ELC NO. 4 OF 2020 before the Senior Resident Magistrates Hon P. M. Mayova")

JUDGEMENT

1. The Appeal herein emanates from the ruling of the Principal Magistrates Court delivered on 26th day of November 2020 in Mutomo ELC case No. 4 OF 2020 before the Senior Resident Magistrate Hon P. M. Mayova. The Appellant sets out the following Grounds of Appeal.

A) THAT the learned trial magistrate erred in fact and in law by failing to gibe concise statement of the case, points of determination, decision thereof and reasons for his judgement.

B) THAT the learned trial magistrate erred in fact and in law by failing to consider the Respondents submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned determination and thereby dismissed appellants suit without justification.

C) THAT the learned trial magistrate erred in fact and in law by dismissing the Appellants case without justification and failing to appreciate the fact that Plaintiff had a triable case which should be heard on merits and therefore liable in law.

D) THAT the learned trial magistrate erred in fact and in law by applying wrong and inapplicable principal of law in land dispute case and which did not form any basis to warrant his determination.

The Appellant seeks the following substantive orders;

a) The Appeal be allowed and the ruling against the appellant be set aside

b) The order dismissing the appellants suit be reviewed and/or revised accordingly and the Plaintiffs suit be reinstated.

Brief Background

2. On 15th August 2020 the Appellant filed a suit before the Magistrates Court at Mutomo where he sought the following substantive orders:

A) An order to issue to ensure that the Defendants are restrained from taking possession and/or evicting the Plaintiff from the said parcels of land known Plot No. 1557 also known as IKANGA/ITHUMULA/1557 and cancellation of the title deed fraudulently in favour of the 2ndDefendant and the same to be reissued in the name of the Plaintiff.

B) A permanent injunction to issue restraining the Defendants whether by themselves, servants, agents and/or otherwise from proceeding with the threat of evicting and/or interference with the Plaintiff parcel of land.

3. The Plaintiff averred that in the year 1979 he acquired what he claims was virgin land and he fixed traditional marks of Kamba land acquisition process. He claims that in the year 2002 the area where the suit land is located was declared a land adjudication area and the land was given number 1557 now known as IKANGA/ITHUMULA/1557.That prior to the declaration of land adjudication, the plaintiff claims he

had sold a portion of the land to one Mulei Kiteme and the said purchaser was issued with a title deed to the portion of land purchased.In 2012 the 1st Defendant laid a claim of ownership to the same and sought to evict him from the land. He claimed that the 1st Defendant had transferred the land to the 2nd Defendant.

4. It is the Plaintiffs further claim that the dispute concerning the suit land was heard and determined through the land dispute resolution mechanism provided under the Land Adjudication Act culminating with a decision by the Minister. In the particulars of malice enumerated under paragraph 9 of the Plaint, the Plaintiff stated that the Defendants deliberately conducted the hearing before the Minister contrary to rules of natural justice as to fair hearing and administration of justice. That they deliberately failed to acknowledge that the Plaintiff had taken possession of the land and enjoyed peaceful occupation for over 32 years. That the Defendants fraudulently conspired to have the title deed issued in favour of the 2nd Defendant and directing the Plaintiff to vacate the suit land despite the fact that the 1st Defendant knew that the land belonged to the Plaintiff.

5. The Defendants filed a joint defence denying the Plaintiffs claim and seeking dismissal of the suit. They averred that the adjudication process was done openly, fairly and that all rules of natural justice were observed. The Plaintiff was heard and his witnesses as well. That the Plaintiff filed an Appeal to the Minister which he lost and thus they claimed that the suit was displaced and was filed in the wrong forum. At the time of filing the defence the Defendants filed a Preliminary objection seeking striking out of the suit on the following grounds:

A) This court lacks jurisdiction as the suit offends sections 29 and 30 of the Land Adjudication Act, CAP 284

B) The suit is Res-judicata having been heard and determined by competent quasi-judicial institutions

C) This Court lacks pecuniary jurisdiction as the suit property is valued over 20 million shillings.

6. The Preliminary Objection was heard by way of written submissions. The Court rejected and dismissed ground number 1 and 3 of the Preliminary Objection. However, the court found as follows concerning ground number 2:

> *"However, in the instant case, the dispute was handled by bodies of competent jurisdiction. The Adjudication Act provides that the decision of the Minister shall be final. There is a good reason in law why that process was established. Hearing this matter would be re-opening a dispute which was determined by competent statutory authorities with quasi-judicial powers equivalent to that of this court. This court cannot purport to sit on an appeal against the decision of the Minister. In fact, the Plaintiff is not challenging the merit of that decision. He is challenging the process. That can only happen in the High Court by way of judicial review to quash the decision."It's unfortunate that this Court cannot help them at this stage. This ground is merited in law. The Preliminary objection succeeds on this ground. It therefore follows that the court lacks jurisdiction to hear and determine this matter and the same is hereby dismissed with cost to the defendants.*

The Appellants submissions

7. The Appellant combined the grounds of appeal and addressed them as one as hereunder;

> **Did the court error in law and facts by dismissing appellants suit without giving the appellant the opportunity to present his case on merit and was the suit res judicata or not**

8. The Appellant challenges the ruling on the ground that the court did not give a concise statement of the case followed by the points for determination, decision thereon and the reasons for the judgement or ruling. The Appellant claims that failure to give the stated particulars in the judgement is fatal and the entire decision ought to be set aside.

9. On the substance of the appeal, the Appellant stated that the court erred in upholding ground 2 of the preliminary objection and dismissing the Plaintiffs suit. The Appellant argues that Res-judicta is provided for under section 7 of the Civil Procedure Act. The said section refers hearings before.

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court*."

10. The Appellant argues that the section only refers to matters heard by courts and not by quasi-judicial institutions which in the present circumstances is the decision of the Minister which he claims cannot be held to be synonymous with the decision of a court of law.

11. The Appellant further claims that the jurisdiction of the Trial court with special jurisdiction to hear Environment and Land cases is donated by Article 162(2) (b) and cannot be equated to the powers of the Minister under the Land Adjudication Act. He further submitted that there is no law that limits the Appellant after exhausting the adjudication mechanisms from proceeding to file the matter before the ordinary Magistrates Court. He relied on the case of **Mbenchi Nkandau& 19 Others vs AG and 3 others (2019) Eklr.** The Appellant also relies on the provisions of Article 159 (d) of the Constitution of Kenya 2010 which state that "Justice shall be administered without undue regard to procedural technicalities. He relied on the case of Kenya Commercial Bank Ltd V Kenya Planters Co-operative Union Civil Application Nairobi 85/2010.

12. The Appellant further claimed that his suit was dismissed without being given an opportunity to be heard contrary to the provisions of Article 50 of the Constitution. Further that Article 40 (6) of the Constitution provides that "The rights under this Article do not extend to

property that has been found to have ben unlawfully acquired. He relied further on the case of **Munyua Maina V Hiram Gathiha Maina Court of Appeal No. 239 of 2009**where it was held that when a registered proprietor's root of title is under challenge, the instrument of title of ownership is not sufficient but they must prove the legality of how they acquire the title.

The Respondents submissions

13. The Respondent submitted that the Trial court was correct in upholding ground 2 of the preliminary objection and finding that the matter was Res-judicata having been heard and determined by competent quasi-judicial organs, which are the adjudication bodies.

14. The Respondents submitted that there is no law that allows subordinate courts to overturn a decision of the Minister after the dispute has gone through the legally recognized land adjudication dispute resolution process. Further that the determination of ownership and interests in land in an adjudication area is left to the Adjudication Officer and the powers are under section 10. Under Section 29 an appeal is allowed to the Minister and his decision is final. They relied on the case of **Speaker of the National Assembly versus Karume, [1992] KLR 22**,and **Mutanga Tea and Coffee Company Ltd v Shikara Ltd and Another [2015] e KLR** where the Court of Appeal held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

15. He further relied on the case of T**obias Achola Osindi& 13 others vs Cyprian Otieno Ogalo& 6 others** where it was held that it is not the duty of this court to ascertain rights and interests in land in an adjudication section. That jurisdiction restswith the Land Adjudication officer and other officers and bodies set up under the Act. The Act has machinery for resolving any disputes that may arise in the process of adjudication.

Analysis and Determination

16. Having considered the Record of Appeal and the parties' submissions on record, I will proceed to deal with the grounds of appeal as consolidated by the Appellant in his submissions as hereunder;

> **Did the Court error in law and in facts by dismissing the Appellants suits without giving the Appellant an opportunity to present his case on merit and was ht suit res-judicata or not?**

17. The first issue raised is whether the Trial Court was obliged to give a concise statement of the case, points of determination, decision thereon and reasons for his judgement and did he fail to do so?Questions of what is to be contained in a judgement are dealt with under Order 21 Rule 4 and 5 of the Civil Procedure Rules which provide that;

> *"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.*
>
> *In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue"*

18. It is the Courts finding that this ground of appeal has no merit. The Ruling of the trial court clearly set out all the grounds of the Preliminary Objection, discussed and considered them one by one and further gave reasons for not upholding the first and third groundswhile upholding the second ground. It is as a result of upholding the second ground that the Preliminary Objection was found to have merit and the suit was dismissed.

19. The Appellant raised the question of whether the Trial Court ignored relevant guiding facts in the parties' submissions and dismissed the suit without justification. In the Appellants submissions, he states that the Trial court erred in law by proceeding to uphold ground 2 of the preliminary objection and that the court delved into matters that it had not been called upon to consider. The issue before court according to the Appellant was whether "*the suit was Res- judicata having been heard and determined by a competent quasi-judicial institution"*. The court ought to have confined itself with examination of Section 7 of the Civil Procedure Act. It is the Appellant's submission that the suit is not res-judicata having been handled by a quasi-judicial institution as according to them it is not synonymous with a decision of a court of law.

20. I however, do not agree with the submissions by the Appellants Counsel for the reason that the quasi-judicial institutions referred to are established under the Land Adjudication Act whose purpose is to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto. The dispute resolution mechanism provided under the said Act is elaborate, Section 13 of the Act provides for commencement or institution of a claim as follows;

> *"Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act"*

Section 10 provides as follows;

> *"The adjudication officer shall have jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connexion with such claims…,"*

The elaborate dispute resolution process culminates with the appeal to the Minister under Section 29which provides that;

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— delivering to the Minister an appeal in writing specifying the grounds of appeal; andsending 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.***

21. The Appellant submitted that there is no provision that limits the Appellant right after exhausting the adjudication mechanisms from filing a suit before the Magistrate's Court for determination. However, it is the Courts view that the above provision of Section 29 of the Land Adjudication Act that the Ministers decision is final is couched in mandatory terms. If the legislature meant to give the right to a party to re-litigate a dispute which had been heard through the entire dispute resolution process provided under the Land Adjudication Act, nothing would have been easier than to state so clearly.

22. The provision in law that empowers Magistrates Courts to hear and determine environment and land cases is section 26 (3) of the Environment and Land Court Act which provides that "*The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country"* In my understanding such an appointment does not give power to the Magistrates Courts to hear cases whose specific mandate lies with other institutions and in this case the officers and quasi-judicial institutions under the Land Adjudication Act. This position is reiterated by **Okongo J**in **Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others (2013) Eklr** where the court held as follows;

"It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act. It is for this reason that, there is injunction under section 30 of the Act to any civil suit being instituted over an interest in land in an adjudication area save with leave of the Land Adjudication Officer. The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. (Emphasize added). As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. (Emphasize added). The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land".

23. I agree with the findings of the Court in the above case that the court has no jurisdiction to ascertain and determine interests in land in an adjudication area and that the role of the court is supposed to be supervisory only of the adjudication process. The Appellant ought to have filed his claim invoking the Courts supervisory jurisdiction if what he wished to challenge was the decision-making process that he claimed was marred by irregularities.

24. In addition to this, Section 29 (3) of the Land Adjudication Act provides that after the decision in the appeal to the Minister is made, the register will become final in all respects. This means that one cannot re-open an adjudication process that has been completed. In the case of **Nyeri Civil Appeal 340 of 2002 Julia Kaburia v Kabeera & 5 Others** the court held:

"The Land Adjudication Act provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final...

In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication."

25. In my opinion, if the Appellant wished to challenge the legality of the process at arriving at the final decision, they would have come under judicial review. This position has been restated in the case of **Lepore Ole Maito –vs- Letwat Kortom & 2 Others [2016] eKLR** where the court considered the application of the provisions of the Land Adjudication Act with particular regard to the dispute resolution mechanism and stated:

"The Act provides an appropriate mechanism for resolution of any disputes. The Minister is the apex in that dispute resolution mechanism and once an appeal is made to the Minister and determined under the provisions of Section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister's decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction."

26. In **John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others [2017] eKLR**, **Mutungi J i**n yet another similar case where the Respondents raised a preliminary objection to the court for being *res judicata* held as follows:

"In the matter before the court the petitioner did not move the court by way of judicial review but rather opted to file a petition albeit after lapse of 13 years from the time the decision of the Minister was given. In my view the petition is tantamount to seeking to appeal the decision of the Minister through the back door. It is an attempt on the part of the petitioner to have a second bite of the cherry……..The Director of Land Adjudication and Settlement conveyed the decision of the Minister to the Chief Land Registrar as required under Section 29(3)(b) of the Act for implementation. The instant petition is an attempt at reversing what had properly and validly been done pursuant to the provisions of the Land Adjudication Act. The petition is misconceived having been brought in total disregard of the law and in my view the same constitutes abuse of the court process. The Kenya Constitution, 2010 cannot be

invoked to resurrect matters that had been duly resolved through due process such as the matter that the petitioner wishes to revive through the instant petition. I accordingly uphold the preliminary objection taken by the 2nd, 3rd and 4th respondents and I order the petition to be struck out in its entirety against all the respondents"

27. The position that the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed was upheld in the case of **Dume Deri Mumbo & 19 others vs. Cabinet Secretary of Lands, Housing & Urban Development & 6 Others [2016] eKLR,** where the court held as follows:

"The issues that are being raised in the current suit as to which clan owns the suit property were conclusively dealt with by the various bodies, including the Minister, pursuant to the provisions of the Land Adjudication Act. Considering that the suit herein is wholly challenging the decision of the Minister to allocate the 7th Defendant's clan 2/3 of the suit property, and in view of the provisions of Section 29(1)(b) of the Land Adjudication Act which provides that the decision of the Minister shall be final, the Plaintiff cannot appeal against the said decision in the manner that he has done. I say so because the mechanism to resolve disputes within an adjudication area have been set out in the Act. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings. As was stated by the Court of Appeal in the ***Nicholas Njeru case*** *(supra), during the various proceedings, the issues in the current "appeal" were thrashed to the pulp and the issues as to which clan owned the suit property was determined in the year 2012. This court cannot re-open that issue as claimed by the Plaintiff by way of an ordinary suit, without disclosing the new cause of action that has arisen."*

28. Further the Court of Appeal further restated the Constitutional requirement for use of alternative dispute resolution mechanisms and held that usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective under Article 159 (2) (c). This position was taken in the Court of Appeal decision in **Mutanga Tea & Coffee Company Ltd V Shikara Limited & Another [2015] eKLR,** where the following remarks were made:

"We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the constitution or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that the constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms".

29. For the foregoing reasons, I find that the trial court was not wrong in upholding the preliminary objection on the ground that the suit was Res-judicata having been heard and determined by competent quasi-judicial institutions. I find that all the elements of res judicata have been established as provided under Section 7 of the Civil Procedure Act. That the matters in question in the suit before the Trial court were directly and substantially in issue in the proceedings before the quasi-judicial tribunals and/or officers authorized under the entire dispute resolution mechanism under the Land Adjudication Act. It has not been denied that the dispute was between the same parties, or between parties under whom they or any of them claim, litigating under the same title. I am further satisfied that the issues raised in the suit before the trial court were issues of rights and interests in the suit land and that the quasi-judicial tribunals and/or officers authorized under the Land Adjudication Act to hear disputes were competent to try such issues as subsequently raised and that the case was heard and finally decided by such quasi-judicial tribunals and/or officers.

I therefore find that the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF FEBRUARY, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

JUDGEMENT READ IN OPEN COURT IN THE PRESENCE OF-

C. NZIOKA……...COURT ASSISTANT

N/A……...……...……..……..…….....FOR THE APPELLANT

MWENDWA ADVOCATE.. ……..…FOR THE RESPONDENT