



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 6 OF 2020

DANIEL MURIUNGI M'MURAA (Appealing as the legal administrator of the estate of

MURAGA M'KAIBI alias **M'MURAA M'KAIBI** alias **MURAGA KAIBI (Deceased)**....**APPELLANT**

VERSUS

STEPHEN KILEMI ANAMPIU.....**RESPONDENT**

(Being an appeal from the Ruling of Hon. P.M. Wechuli (S.R.M.)

delivered on 21st January, 2020 in Tigania PM ELC No.214 of 2018)

JUDGMENT

A. PLEADINGS

1. The appellant in the lower court had sued the respondent on behalf of the estate of M'Muraga M'Kaibi alias M'Muraa M'Kaibi alias Muraga Kaibi over **Parcel No. 3590 Akaiga adjudication section** for a permanent injunction restraining the respondent from entry, trespass or interference with his quiet possession and occupation of the suit land.

2. The respondent filed a preliminary objection dated 20.6.2017 claiming the appellant lacked capacity to institute the suit, that the suit was bad in law, an abuse of the court process and hence defective in law. Similarly, a defence was filed dated 6.10.2017 alleging that after an **A/R Objection No. 1454** was heard and determined on 18.6.2015, the appellant failed to challenge it; there was an overlap between **L.R No. 3590** and the respondent's late father's **Parcel No. 3587** with the former exceeding on the ground hence denied that there was any trespass as alleged or at all.

3. In reply to the defence dated 27.10.2017, the appellant denied the existence of the alleged **A/R Objection** and its outcome and in the alternative averred if any existed, the same could only have related to **Parcel No. 805** and not **No. 3590**; that the acreage on the ground was correct; that the alleged occupation was on **Parcel No. 3587** which the appellant had no interest over and that the notice of eviction had allegedly referred to **Parcel No. 3590** hence the suit was properly before the court.

B. PART HEARD

4. The appellant's evidence was that his late father was the recorded owner of **Parcel No. 3590** measuring 1.30 acres situated in Kiiya area of Antuanthenge village, Akaiga adjudication section which he had gathered in 1960, his late father remains were interred after death in 2009 and that the respondent was in occupation of an adjacent land recorded as **Parcel No. 3587**.

5. Further, the appellant testified that on 29.3.1996, they were served with a demand letter to vacant the land. He produced a limited grant ad litem issued on 19.4.2016 in **Meru High Court Miscellaneous Succession Cause No. 128 of 2016** as **P exh (1)**, a consent to sue dated 12.4.2016 as **P exh (2)**, a letter from District land adjudication and settlement officer dated 7.4.2016 as **P exh (3)**, photographs as **P exh (4)**, a demand letter dated 29.3.2016 as **P exh (5)** and a reply to the letters dated 15.4.2016 as **P exh (6)**.

6. The appellant insisted that the threatened notice of eviction was over **Parcel No. 3590**. He sought for and obtained an injunction to prevent the intended eviction though he had not filed a succession cause over **Parcel No. 3587**.

7. It appears the matter was fixed for further hearing on 31.7.2018 when an application dated 3.7.2018 was filed. Parties were ordered to file written submissions on the jurisdiction and a ruling was delivered on 21.1.2020 striking out the suit.

8. The appellant faults the trial court order for: holding it had no jurisdiction, given the suit land was under any ownership dispute pending or otherwise and that all what the appellant was seeking for was a restraining orders which fell under the court's jurisdiction; failing to follow the cited case law and lastly for failing to establish that the **A/R Objection** proceedings relied upon by the respondent relating to **Parcel No. 814** which was cancelled and replaced with **Parcel No. 805**.

C. WRITTEN SUBMISSIONS

9. In line with **Order 42 Rule 16 of the Civil Procedure Rules**, parties filed written submissions to the appeal dated 15.12.2021 and 18.1.2022 respectively.

10. The appellant submitted the issue of ownership was not before the trial court since the suit land at all material times had been recorded in favour of the deceased estate.

11. Further, it was submitted that **Parcel No. 3590** had no concluded or pending land committee/arbitration board/ **A/R Objection** or an appeal to the Minister. Therefore, what was sought by the appellant was restraining orders, hence the trial court had jurisdiction to entertain the suit.

12. The appellant submitted he had the requisite consent to sue under both **Section 8 (1) of the Land Consolidation Act and Section 30 of the Land Adjudication Act** which is read together with **Article 22 (1) of the Constitution** his rights to institute court proceedings were insulated. Reliance was placed on *Mariam Kadzo Mwalimu & Another –vs- Enock Auma AOL [2021] eKLR.*

13. Further, the appellant submitted that given the pleadings and admission of jurisdiction, the trial court should have heard the parties on merits as held in *Meru ELC Appeal No. 115 of 2019: Adita Mwikamba M'Mwili –vs- John Mung'athia M'Marigu.*

14. On the other hand, the respondent submitted the trial court was right in making the order given the clear provisions of **Section 10 of the Land Adjudication Act Cap 284** that the land adjudication officer had powers to grant the orders sought.

15. The appellant submitted **A/R Objection No. 1454** related to the displacement from original **Parcel No. 805** which proceedings referred to **Parcel No. 3590** at pages 69 and 70 of the record of appeal and were the centre of the dispute before the trial court.

16. Additionally, the respondent submitted that no two cases were exactly the same but what was relevant was the circumstances and applicability of the decision to the case before court hence the court could not be said to have ignored a binding decision.

17. The respondent also submitted that the pleadings before the court referred or talked about **Parcel No. 3590** and that even if jurisdiction was admitted, parties could not donate jurisdiction to the court.

18. As regards the consent to sue, the respondent submitted the trial court could not usurp the powers and jurisdiction of the Minister even if the consent to sue was issued.

19. On whether **Article 22 (1) of the Constitution** could come to the aid of the appellant, the respondent submitted the appellant had both the option of filing an objection before the land adjudication officer or to appeal to the Minister over the **A/R Objection**.

20. The respondent lastly submitted the cited case law by the appellant were at variance and disguisable from the present appeal hence added no value to the appeal.

21. This being a first appeal, the court under **Section 78 of the Civil Procedure Act** has the mandate to come up with independent findings and conclusion.

22. Two issues commend themselves for determination:-

23. The record of appeal indicates parties fully filed compliance documents including the list of issues by the respondent dated 15.2.2018 and the respondent list of documents dated 6.10.2017 in which documents dated 24.3.2016, by District land adjudication and settlement officer had confirmed that there was no pending land dispute over **Parcel No. 3587**.

24. Further, the appellant had filed case summary and a list of issues dated 6.4.2018 in which the issues were inter alia on the threatened eviction.

25. The record of appeal at pages 17 – 19 indicates that the trial court had taken the evidence of the appellant. Thereafter, the matter took another trajectory when the trial court ordered the parties to file written submission on the issue of jurisdiction.

26. It is trite law issues flow from pleadings and parties bound by their pleadings. See *Independent Electoral and Boundaries Commission & Another –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR.*

27. In this suit, the issue as to whether there was a boundary dispute regarding **Parcel No's 805, 3590 and 3587** was both raised in the plaint, defence and a reply to the defence hence became an issue for determination before the trial court in line with **Order 15 of the Civil Procedure Rules**.

28. The trial court had started hearing the matter on merits and taken PW1's evidence. It took an about turn and raised the issue of

jurisdiction. The court in my view was not being called upon to determine ownership. Already the appellant had testified and produced his documents among them **P exh 3**. The law under which the land fell and at what stage the land adjudication proceed had reached was yet to be clarified by the parties through viva voce evidence.

29. Similarly, the High Court had already issued a temporary injunction dated 25.4.2016 pending the hearing of the suit as indicated at page 58 of the record of appeal.

30. Due to the foregoing, the trial court erred in law and in fact by terminating proceedings without hearing the parties on merits. Consequently, I find the appeal with merits. The same is allowed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 23RD DAY OF MARCH, 2022

In presence of:

C.P. Mbaabu for appellant - present

No appearance for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE