



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 224 OF 2018**

**KISING’U KINYILL.....PLAINTIFF**

**VERSUS**

**GERALD MUSANGI.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. On 28<sup>th</sup> November 2018, the Plaintiff in this suit filed a Complaint dated 20<sup>th</sup> November, 2018 where he sought for orders stopping the Land Registrar from registering any dealings in respect of land parcel number MACHAKOS KITANGI/866 (*hereinafter referred to as the suit property*) as well as an order of injunction restraining the Defendant from interfering in any manner whatsoever with the suit property. The Plaintiff averred that he was the legal owner of the suit property and that on pretext of purchase, the Defendant had laid a claim on the suit land which culminated in the matter being referred to the Land Adjudication Committee, then to the Land Arbitration Board and later an objection. That the Defendant’s claim was dismissed in the three instances. That the Defendant filed an Appeal before the Minister which was allowed with the result that part of the Plaintiff’s land was allocated to the Defendant. That on the premises of Minister’s decision, the Defendant has started the process of fraudulently transferring the suit land to himself. The Plaintiff’s major complaint being that the Defendant masqueraded as his father’s legal representative in filing the Appeal before the Minister, which according to the Plaintiff is an act of fraud. Simultaneously, the Plaintiff also filed a Notice of Motion dated 20<sup>th</sup> November, 2018 where he sought for a temporary injunction to restrain the Defendant from encroaching, surveying, grazing, trespassing or interfering with the suit land and an order stopping the Land Registrar from further action in relation to the suit land.

2. On 24<sup>th</sup> January 2019, the Defendant filed his Statement of Defence, a Replying Affidavit to the Notice of Motion dated 20<sup>th</sup> November, 2018 and a Notice of Preliminary Objection dated 22<sup>nd</sup> January, 2019. The said Notice of Preliminary Objection was in respect of the Notice of Motion dated 20<sup>th</sup> November, 2018, in which the Defendant averred that the Honourable Court lacked the requisite jurisdiction to handle this matter.

3. The Notice of Motion dated 20<sup>th</sup> November, 2018 was determined by this court on 18<sup>th</sup> October, 2019, wherein the same was dismissed with costs. Thereafter, on 18<sup>th</sup> March, 2021, counsel for the Plaintiff fixed the matter for hearing of the main suit on 28<sup>th</sup> September, 2021. On that date, the Defendant’s counsel informed court that this court lacks jurisdiction to entertain this suit as held in its Ruling of 18<sup>th</sup> October, 2019. On his part, counsel for the Plaintiff argued that the court did not address or pronounce itself on the question of whether or not this court had jurisdiction to hear and determine this matter, but only determined the Notice of Motion dated 20<sup>th</sup> November, 2018. Counsel also contended that the court misdirected itself in its Ruling of 18<sup>th</sup> October 2019. That being the case, this court directed parties to file submissions addressing the question as to whether this court has jurisdiction to entertain this suit.

4. On record are the Plaintiff’s submissions filed on 18<sup>th</sup> October 2021.

**SUBMISSIONS**

5. Counsel for the Plaintiff submitted that the Defendant raised an oral Preliminary Objection, and argued that a Preliminary Objection ought to be formally raised. As regards the Preliminary Objection dated 22<sup>nd</sup> January, 2019, counsel argued that the same had already been determined vide the court Ruling of 18<sup>th</sup> October, 2019 and therefore the Defendant was barred by the doctrine of *res judicata* from raising the issue. Reliance was placed on Section 7 of the Civil Procedure Act as well as the case of ***Raila Amolo Odinga & 2 Others v The Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR***.

6. Further, counsel relied on Article 162 (2) (b) of the Constitution to argue that this court has jurisdiction to determine this matter. Counsel

also pointed out that the Defendant in paragraph 13 of his Defence had conceded to the court's jurisdiction and he is therefore estopped from challenging the suit on account of want of jurisdiction. Counsel relied on the case of *The Owners of the Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*

7. In relying on the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696*, Counsel argued that a Preliminary Objection can only be raised on pure points of law where facts are not disputed. Counsel contended that the facts relied upon by the Defendant in this matter were disputed facts. Counsel argued that although Section 29 of the Land Adjudication Act provides that the Minister's decision is final, it is common knowledge that ministerial decisions are challenged through Judicial Review, Petitions or by way of Plaints seeking declaratory orders. Counsel cited the cases of *Nicholas Njeru v Attorney General & 8 Others [2013] eKLR*, *PYX Granite Co. Ltd v Ministry of Housing & Local Government [1958] 1 QB 554* and *Chris Nyakundi (Suing through his Attorney Jeremiah Matagaru v Mimoso Plantations Ltd & 4 Others [2015] eKLR*.

8. The issue before this court therefore, is whether this court has jurisdiction to determine this suit. I have considered the Ruling of this court made on 18<sup>th</sup> October, 2019, in which the court rendered itself as follows:

***"In the Plaintiff, the Plaintiff has alleged that the Defendant masqueraded as the legal representative of his late father's Estate. Without saying so, the Plaintiff is seeking an order setting aside the Minister's decision.***

***The evidence before me shows that the Defendant's father was the Appellant in Appeal Case No. 368 of 1996, in which the then Deputy County Commissioner, Yatta, on behalf of the Minister found that the Defendant's father was entitled to the suit property.***

***Upon the delivery of his decision, the Plaintiff herein filed a Judicial Review Application No. 69 of 2017 in which he sought for an order of certiorari to quash the decision of the Minister. That Application was dismissed by this court on 26<sup>th</sup> October, 2018.***

***The proceedings before the Minister in Appeal Case No. 368 of 1996 were filed pursuant to the provisions of the land Adjudication Act. ... Section 29 (1) of the Act provides as follows; ...***

***The decision of the Minister in Appeal No. 368 of 1996 was final. When the Plaintiff challenged that decision by way of Judicial Review, this court dismissed the Application. The Minister having determined the issue of ownership of the suit land, the issue of ownership of the same land cannot be revisited by this court by way of a Plaintiff.***

***Considering the finality of the decision of the Minister, and this court having dismissed the Plaintiff's Application for Judicial Review, the Plaintiff cannot challenge the same decision by way of a Plaintiff on the ground that the Defendant did not have Letters of Administration for his father's Estate as at the time the Minister made his decision. That is an issue that he should have argued during the hearing of the Judicial Review Application. (Underlining mine)"***

9. I have stated in detail this court's finding in its Ruling of 18<sup>th</sup> October, 2019, for purposes of evaluating the veracity of the Plaintiff's counsel's assertion that the court did not decide on the question of jurisdiction. Jurisdiction is the power of the court to entertain a claim filed before it. What is in a name? For a rose by any other name would smell as sweet. While the court did not specifically use the word jurisdiction, it expressly stated that the Plaintiff was barred from making the same claim previously made and dismissed in Judicial Review Application No. 67 of 2017. By holding that the Plaintiff cannot challenge the Minister's decision by plaintiff on ground that the plaintiff lacked Letters of Administration when the Minister made his decision, the court was merely stating that it had no power or jurisdiction to entertain the claim.

10. The issue of ownership of the suit land had been determined with finality by the Minister and no challenge thereof on merits can be entertained by this court, hence Judicial Review being the available avenue, was taken by the Plaintiff vide Judicial Review Application No. 69 of 2017, which was dismissed by this court on 26<sup>th</sup> October, 2018.

11. Clearly, from the onset, this court has stated without ambiguity that the Plaintiff's claim herein cannot be revisited as the same was determined by the Minister with finality and the dismissal of the Judicial Review Application was the final nail on the coffin of the Plaintiff's claim. Therefore, it does not take rocket science to deduce and appreciate that this court held that it had no power to determine this matter. In any event, as was held in the case of *The Owners of the Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*, that jurisdiction is everything, and the court should not make one more step after deciding that it has no jurisdiction. The Plaintiff's argument that in paragraph 13 of the Defence, the Defendant conceded to the Plaintiff's averments that this court has jurisdiction to determine this matter is not tenable. It is a well-known legal principle that jurisdiction flows from either the Constitution or statute or both and neither the court nor the parties can cloth a court with jurisdiction that it does not have under the law. See *Samuel Kamau Macharia & Another v Kenya Commercial Bank & Another [2012] eKLR*.

12. The argument by the Plaintiff that the court misdirected itself in its decision of 18<sup>th</sup> October, 2019, is not an argument that this court can entertain as this court is *functus officio* in so far as the issues raised in that Ruling are concerned.

13. Therefore, I have no hesitation to state unequivocally, as I hereby do, that this court has no jurisdiction to determine this matter since the Minister's decision was final and a challenge on the merits thereof cannot be entertained by this court by dint of Section 29 of the Land Adjudication Act. The only avenue of challenge having been Judicial Review Application to investigate whether the processes by the Minister in reaching his decision were in compliance with the Constitution and the relevant statutes, was exhausted when this court dismissed Judicial Review Application No 69 of 2017. Hence, the Plaintiff ought to appreciate that he has reached the end of the road and reconcile with the results of his litigation. Disguising his claim challenging the Minister's decision as a claim based on fraud will not confuse the sharp eye of the court.

14. I have said enough. For avoidance of doubt, this suit is struck out for want of jurisdiction, with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23<sup>RD</sup> DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Mukula for the Plaintiff

Mr. Mulei for the Defendant

Ms. Josephine Misigo- Court Assistant