



REPUBLIC OF KENYA



**Ngure v Ndegwa & 2 others (Environment and Land Appeal  
33 of 2016) [2022] KEELC 3556 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3556 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 33 OF 2016**

**M SILA, J**

**JUNE 22, 2022**

**BETWEEN**

**GEORGE MWACHALA NGURE ..... APPELLANT**

**AND**

**HAMISI NDEGWA ..... 1<sup>ST</sup> RESPONDENT**

**KUZIKA HAMISI ..... 2<sup>ND</sup> RESPONDENT**

**SIMON MUTIA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. S. M. Wabome, Senior Principal Magistrate delivered on 20th April 2015 in the suit Voi CMCC No. 151 of 2006)*

**JUDGMENT**

(Appeal against decision of the magistrate's court which struck out the suit of the appellant on the basis that the matter had been heard under the dispute mechanism under the [Land Adjudication Act](#); appellant inter alia contending that he had been granted consent to commence suit in court by the Land Adjudication Officer; the consent being procured after the suit was already filed; such consent is null and void; consent must be obtained before filing suit; issue having been determined by the dispute resolution mechanism under the [Land Adjudication Act](#) and magistrates' court had no jurisdiction to rehear it; avenue was for appellant to appeal to the minister; appeal dismissed with costs).

1. This appeal arises out of a ruling delivered on April 20, 2015, where the Magistrate's Court at Voi (Hon. Wabome), upheld a preliminary objection raised by the defendants, and proceeded to hold that the court had no jurisdiction in the matter, mainly on the basis that the dispute had been decided under the dispute resolution mechanism provided under the [Land Adjudication Act](#), Cap 284, Laws of Kenya.
2. The matter before the subordinate court was rather convoluted. Through a plaint filed on December 28, 2006, the appellant sued the respondents claiming that they have interfered with his land, which



land was never described by way of a registration number, though it was said to be located in Kaloleni area in Voi. He asked that they be restrained from the land and a mandatory injunction be issued for them to demolish their structures. The respondents filed a joint defence where they refuted the claims of the appellant. It emerged in the course of the proceedings that the disputed land was actually land that fell within an adjudication section and it was specifically identified as Plot No. 82. Being land under adjudication, pursuant to Section 30 of the [Land Adjudication Act](#), the court would not have had jurisdiction to hear it unless consent of the Land Adjudication Officer was granted. A purported consent was granted by the Land Adjudication Officer through a letter dated 23 November 2007, despite the suit having been earlier filed, and the court, I believe on the strength of the said letter, commenced hearing the case. However, parallel proceedings under the dispute resolution mechanism provided in the [Land Adjudication Act](#) continued.

3. In court, evidence was taken between March 15, 2007 and July 12, 2007 when the appellant, as plaintiff, closed his case and the matter was adjourned to August 9, 2007 for defence hearing. On that day, Mr. Muthami, learned counsel for the respondents, informed court of a letter dated June 27, 2007 from the Land Adjudication Officer mentioning that the subject land was under adjudication. The court (Hon. J.M Gandani, Senior Resident Magistrate) stated that the letter was also sent to court and the court will not hear the matter. The case was stood over generally. The matter next came before court on February 14, 2008 when Mr. Muthami informed court that the matter had been heard by a land tribunal and that the court should first get the tribunal's findings. Nothing was mentioned about these submissions and the court only made the order that the case is stood over generally. Despite the foregoing, on March 18, 2009, counsel for the appellant took a hearing date for April 23, 2009. The matter came before Hon. Gandani on that day and she ordered the defence case closed as the defendants and their counsel were absent. The court then reserved judgment for May 21, 2009 which judgment was eventually delivered on May 27, 2010, more than a year later. The court was of the opinion that the appellant's case was uncontroverted and entered judgment in his favour.
4. Nothing happened in the matter until the respondents filed an application dated December 11, 2013 seeking that the judgment be reviewed and be set aside, and in place thereof, judgment be entered in favour of the defendants based on the decision of the Land Adjudication Officer in Case No. 1 of 2007. That application was based on grounds inter alia that the dispute was already heard under the adjudication process and a finding reached that the land was owned by the 1<sup>st</sup> respondent, and that the appellant misled the court to write another judgment. It was averred that this finding was never brought to the attention of the court, and further, that the court had earlier held that it had no jurisdiction to proceed and had stayed the suit. It appears that by this time, Hon. Gandani had been transferred from Voi Magistrate's Court and the matter was placed before Hon. Wahome, Senior Principal Magistrate. He heard the application and allowed it through a ruling delivered on December 30, 2013. He set aside the judgment but declined to enter judgment in favour of the 1<sup>st</sup> respondent pursuant to the decision of the Land Adjudication Officer, for reason that the decision was not filed in court. Curiously, the Honourable Magistrate directed that the matter do proceed for hearing. Counsel thereafter filed witness statements and documents in preparation for trial, and in fact the matter was listed a couple of times for hearing, though the same did not take off owing to some contingencies.
5. On October 6, 2014, Mr. Muthami, learned counsel, applied orally in court that the Adjudication Officer be summoned to enlighten the court on the issues in contention and the court obliged. The Adjudication Officer attended court on October 27, 2014. He testified and he was cross-examined by both Mr. Muthami, for the defendants, and Ms. Shariff, learned counsel for the plaintiff. His evidence was that the land had been demarcated to the appellant but the 1<sup>st</sup> respondent raised a complaint which was heard by the adjudication committee. The Adjudication Committee rendered itself on August 8, 2007 in favour of the 1<sup>st</sup> respondent. They therefore proceeded to alter their records. I will mention,



- because the appellant wants to make some heavy weather of it, that during cross-examination by Ms. Shariff, he did acknowledge that they had issued consent to the appellant to proceed in court.
6. Subsequently, the respondents filed a preliminary objection dated February 23, 2015 drawn as follows :-
    - (a) This court lacks jurisdiction to hear this matter.
    - (b) The award/finding of the Land Adjudication officers should be recorded as the final order.
  7. The preliminary objection was heard and ruling delivered on April 20, 2015. The court upheld ground (a) of the preliminary objection and found that it has no jurisdiction to hear the matter because the disputed land is an adjudication area. The court found that the plaintiff had subjected himself to the Land Committee and thus waived his right to pursue the suit before the court. The court however declined to enter judgment as requested by the defendants, on the reasoning that once he found that he has no jurisdiction, he could not proceed any further. It is this decision which has provoked this appeal.
  8. The appeal is based on the following grounds :-
    - a. That the learned trial magistrate erred in law and in fact in ruling that his court had no jurisdiction to deal with the matter when it had previously entertained a setting aside application by the respondent.
    - b. That the learned trial magistrate erred in law and in fact in holding that by submitting themselves to the Land Committee parties had waived their right to seek court's intervention.
    - c. That the learned trial magistrate erred in law and in fact in failing to hold that the appellant had duly obtained the requisite consent from the Land Adjudication Officer Taita Taveta to continue with the civil suit.
    - d. That the learned trial magistrate erred in law and in fact in disregarding the vice voce evidence of the Land Adjudication officer Voi.
  9. The appellant seeks orders for this court to inter alia order the Voi Senior Principal Magistrate's Court to hear and determine the suit Voi SPMCC No. 151 of 2006 to its conclusion.
  10. Ms. Shariff learned counsel for the appellant, submitted that the trial magistrate erred in both law and in fact when he ruled that the court had no jurisdiction, yet the court had entertained an application for setting aside judgment by the respondents. She added that the appellant had been granted leave to proceed with the case by the Land Adjudication and Settlement officer Taita, Mwatate and Voi, pursuant to the provisions of Section 30(1) of the *Land Adjudication Act*. Counsel submitted that the Land Adjudication officer testified that the appellant had leave to proceed with the suit and that the court orders were to supercede the ones before the Adjudication Committee. Counsel further submitted that his evidence was ignored by the trial court. Counsel submitted that the trial court erred in law and in fact in failing to rule on the leave granted to the appellant and further erred in law and in fact in making a finding that the parties had ousted the jurisdiction of the court by participating in the land tribunal proceedings.
  11. Mr. Muthami learned counsel for the respondents, submitted on three grounds of appeal. On the jurisdiction issue, counsel pointed out that the trial court had made a ruling that the matter be determined by way of adjudication. He submitted that the court should have stayed the matter instead of standing it over generally. He submitted that one cannot have a case in court and another before the adjudication officers. On the claim that consent to proceed with the case had been given, counsel submitted that no consent could have been given on November 23, 2007 as the decision had been delivered on August 8, 2007. He did not think that the court erred in its ruling.



12. I have taken into consideration all of the above.
13. The fact of the matter is that the land in dispute, identified as Plot No. 82, was subject to adjudication even when the suit was filed on December 28, 2006. Strictly speaking, the suit ought not to have been entertained at that early stage given the provisions of Section 30 of the [Land Adjudication Act](#), which provides as follows :-
  - 30 (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.
14. It follows from the above, that when a person is instituting suit, he needs to already have the consent of the Land Adjudication Officer. The suit was instituted without the consent of the Land Adjudication Officer and the same was a non-starter ab initio. There is no avenue of filing suit, then when the same is on going, you proceed to get consent of the Land Adjudication Officer. The law requires that the consent be procured before the suit is filed. The risk is there to see if consent is issued later. It can be issued after the dispute has already been decided, as indeed happened in this case, or it can be issued when parallel proceedings are going on before the dispute mechanism process under the [Land Adjudication Act](#), which can lead to a conflict of decisions. It is expected that when the Land Adjudication Officer issues the consent, then he will proceed to stop any other proceedings under the [Land Adjudication Act](#) and will await the decision of the court. I am not persuaded that the subsequent purported consent of the Land Adjudication Officer, issued through the letter dated 23 November 2007 cured the anomaly, because the consent was now being issued after the suit had already been filed. The suit by the appellant was a nullity ab initio and should have been struck out in limine. When the trial (Hon. Gandani) opted to proceed with the case on the basis of the letter dated November 23, 2007, it fell into error.
15. I observe that on September 13, 2007, Hon. Gandani made the order that the court will not hear the matter on being informed that the dispute was under the Land Adjudication dispute resolution process. I fail to understand why she still proceeded with the suit, without first setting aside the very order that she had given, that court will not hear the case. Clearly, the court fell into error. I am persuaded that the court (Hon. Wahome) was correct in setting aside the judgment of 27 May 2010 upon the application filed by the respondents. I of course stated that I found it curious that the court nevertheless invited the parties to prepare the case for trial before it but this appears to have been cured by the court upholding the preliminary objection that it had no jurisdiction. This appeal attacks that finding but I find no basis whatsoever to fault the trial Magistrate for holding that the court had no jurisdiction and also for holding that the appellant could not pursue two parallel dispute resolution mechanisms, at the same time.
16. I have already taken the trouble to point out that the suit was a nullity ab initio following the provisions of Section 30 of the [Land Adjudication Act](#). The appellant cannot hide behind the purported consent subsequently issued. It was issued erroneously and it cannot help the appellant. Further, by pursuing that consent, the appellant was engaging in an abuse of the process of court and an abuse of the dispute resolution process under the [Land Adjudication Act](#). He was in essence pursuing his case in two fora which was a total abuse of the process. I castigate that action in the strongest terms possible. I agree with the finding of the trial Magistrate that once the appellant subjected himself to the dispute resolution mechanism under the [Land Adjudication Act](#), he could not now proceed with the same dispute in court. It does not matter what the Adjudication Officer stated in court and what he thought of the letter that gave the appellant consent to have a suit in court.



17. In this appeal, the appellants want this court to order the Magistrate's Court to hear the case before it. To allow the Magistrate's Court to proceed with the hearing of the suit would be akin to the Magistrate's Court sitting on appeal against the decision of the Land Adjudication Committee of which the Magistrate's Court has no jurisdiction. Pursuant to Section 29 of the *Land Adjudication Act*, such appeals are heard by the Minister.
18. There was argument by the appellant that the court erred in setting aside the judgment because in the same vein it found that it had no jurisdiction. A court can be moved to set aside its own judgment on the ground that it had no jurisdiction. It is a paradox to suggest that the court has no jurisdiction to do so. How else can such judgment then be set aside? I find no merit in this argument.
19. I think I have said enough to demonstrate that I see nothing wrong with the decision of the trial Magistrate in the ruling of April 20, 2015. That decision is upheld. The court correctly found that it had no jurisdiction and was correct to down its tools. What the court did not proceed to do was to explicitly order the appellant's case struck out. For the avoidance of any doubt, I make that order. The appellant's suit, that is, Voi Senior Principal Magistrate's Civil Suit No. 151 of 2006, is hereby struck out. I note that the trial court ordered each party to bear their own costs. I would have thought that the proper order to make was to have the appellant bear the costs of the suit as he proceeded to file suit in a forum that had no jurisdiction. But, there is no cross-appeal filed on the issue of costs and I will leave it at that. However, the respondents will have the costs of this appeal.
20. The result is that this appeal is hereby dismissed with costs to the respondents.
21. Judgment accordingly.

**DATED AND DELIVERED THIS 22ND DAY OF JUNE 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

