



Nkedianye & 3 others v Ntukusoi & another; Ntukusoi (Respondent) (Environment and Land Appeal 16 of 2021) [2022] KEELC 12590 (KLR) (20 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 16 OF 2021
EM WASHE, J
SEPTEMBER 20, 2022**

BETWEEN

**LETUTUI NKEDIANYE 1ST APPELLANT
CHARLES NKENDIANYE 2ND APPELLANT
MOSES KIPENO 3RD APPELLANT
FRANCIS KEPENO 4TH APPELLANT**

AND

JOHN SAKAJA NTUKUSOI RESPONDENT

AND

FRANCIS KEPENO DEFENDANT

AND

JOHN SAKAJA NTUKUSOI RESPONDENT

((An Appeal from the Ruling and Order of Hon.D.K.Matutu (Principal Magistrate) Dated and delivered on the 24th day of September 2019 in the Original KILGORIS PMCC ELC NO. 13 OF 2018))

JUDGMENT

1. The Appellants herein filed a Memorandum of Appeal on the October 23, 2019(hereinafter referred to as “the Appeal”) challenging the Ruling delivered on the September 24, 2019 by Hon.D.K.Matutu (hereinafter referred to as “the Lower Court Ruling”) appertaining to the Preliminary Objection dated February 15, 2019(hereinafter referred to as “the Preliminary Objection”).



2. The Lower Court Ruling was to the effect that the entire Preliminary Objection be dismissed with Costs.
3. The Preliminary Objection had raised two points of law for determination namely: -
 - a) That the Complaint dated March 30, 2016 (hereinafter referred to as “the Complaint”) offended the mandatory provision of section 30 of the [Land Adjudication Act](#), cap 284 Laws of Kenya & as a result thereof, the Court did not have jurisdiction to entertain the proceedings thereof.
 - b) Similarly, the Appellant pleaded that the Complaint failed to disclose any reasonable cause of action and was an abuse of the Court process.
4. The preliminary Objection was canvassed by way of written submissions as per the directions of the Lower Court.
5. The appellants filed their written submissions dated July 17, 2019 while the Respondents filed their written submissions dated August 11, 2019.
6. The Lower Court upon considering the submissions of both parties arrived at the decision which is now being appealed in this Court.
7. Section 13 (4) of the [Environment & Land Court](#) grants jurisdiction to this Court to entertain Appeals of Orders or Decrees from the Sub-Ordinate Courts and local Tribunals.
8. In exercising this Appellate Jurisdiction, the court is guided by the finding in the case of *Selle v Associated Motor Boat Company Limited* (1968) EA, 123 which stated as follows; -

“The jurisdiction of courts of first appeal is unlimited in so far as they are duty bound to re-evaluate evidence laid before the trial court and make a determination whether the magistrate made the correct decision on the basis of sound law and the evidence laid before it.”
9. In the case of [Josephat Mwangi Moracha \(suing as the Legal Administrator of the Estate of Isaac Moracha Ongwacho- \(Deceased\) v Beatrice Nyambeki Minda, Patrick Rodgers Mogaka & Omwoyo Auctioneers](#) (2018) eKLR (KisiiELC), the court held as follows; -

“The court is expected to make an independent decision on the basis of evidentiary facts and applicable law.”
10. Turning back to the grounds raised in this Appeal, this court will now evaluate the facts that gave rise to the Preliminary Objection filed by the Appellants and make its independent decision thereof.

Issue No.1- Did the complaint dated March 30, 2016 Offend the Provisions of Section 30 of the [Land Adjudication Act](#), Cap 284?

Section 30(1) provides as follows; -

“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.”



11. Looking at the Plaintiff the respondent describes himself as the duly registered owner of the property known as Transmara/Nkararo/212.
12. A perusal of the Appellant's Statement of Defence dated April 18, 2016 (hereinafter referred to as "the Defence") indicates that the property referred to as Transmara/Nkararo/212 is actually known as Plot.no.212, Nkararo Adjudication Section.
13. The Defence states that entire Adjudication Section known as Nkararo was still under demarcation and adjudication by the Land Adjudication and Settlement Officer.
14. The Appellants argue that any litigation for any interest of land within the Adjudication Section known as Nkararo required the written consent of the Land Adjudication and Settlement Officer.
15. The court has perused the Plaintiff and also the attached List of Documents dated March 30, 2016.
16. The Letter dated December 18, 2007 from the District Land Adjudication and Settlement Officer contained on Page 266 is key in the determination of this issue.
17. The letter under reference was a reply to the respondent's Counsel's request for a Consent to lodge civil proceedings over the property known as Plot. No. 212 Transmara/Nkararo Adjudication Section.
18. The response contained in the letter dated December 18, 2007 read as follows in part.

"I therefore don't see the merit for your going to court and so I decline to grant consent as requested.

If you are aggrieved by my refusal to grant consent, you may appeal to the minister for lands within twenty eight days from today."
19. The significance of the letter December 18, 2007 is the fact that the Respondents was aware of the mandatory requirements to section 30 of the [Land Adjudication Act](#), cap 284 Law of Kenya.
20. This is the only reason as to why he requested for the Consent of the Land Adjudication and Settlement Officer way back in the year 2007.
21. The refusal to grant the Consent as contained in the letter dated December 18, 2007 clears the air on this issue.
22. The respondent has not placed any proof of an Appeal to the Minister of Lands as directed in the letter dated December 18, 2007 which overturned the decision of the Land Adjudication and Settlement Officer.
23. Similarly, there is no proof that the Adjudication of Nkararo Adjudication Section was complete as envisaged in section 29 of the [Land Adjudication Act](#), cap 284 so as to waive the requirement of section 30 of the [Land Adjudication Act](#), cap 284.
24. Although this court concurs with the respondent's submissions that article 50 of [the Constitution](#) grants the right for any person to enjoy a fair hearing in a court of law and/or Tribunal, it is the court's considered view that such a right should also be within the statutory provisions contained in Acts of Parliament.
25. The Respondent upon receiving the refusal of consent contained in the letter dated December 18, 2007 had an opportunity to challenge this decision under section 30(3) of the [Land Adjudication Act](#), cap 284, Laws of Kenya.



26. The inaction by the Respondent to pursue the provisions of section 30(3) of the *Land Adjudication Act*, cap 284 Laws of Kenya and instead instituting this suit without the Consent is an abuse of the Court process to say the least.
27. The legal effect of filing a suit in court without the Consent required in line with section 30(1) of the *Land Adjudication Act*, cap 284 Laws of Kenya was discussed by the Court of Appeal *Benjamin Okwaro Estika v Christopher Antony Ouko & another* (2013) eKLR.

The Judges of the court held as follows; -

“From what we have discussed above, it will be clear that we are in full agreement with the Learned Judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”

28. In conclusion therefore, the Court having made a finding that there was no consent as envisaged in Section 30 of the *Land Adjudication Act*, Cap 284 Laws of Kenya obtained by the Respondent, the Lower Court did not have jurisdiction to entertain any proceedings emanating from the Plaintiff.

Issue No. 2- Did the Respondent’s Plaintiff dated 30th March 2016 disclose a reasonable Cause of action?

29. On this Second issue, the court has made a finding that the Plaintiff was filed without the mandatory Consent required under section 30 of the *Land Adjudication Act*, cap 284 Laws of Kenya.
30. Clearly therefore, any alleged cause of action against the Appellants cannot succeed without first complying with the provisions of section 30 of the *Land Adjudication Act*, cap 284 Laws of Kenya.
31. The contents of the Letter dated December 18, 2007 further indicate that the Decision of the Minister has not been implemented both on the map and the ground.
32. In essence, the Adjudication of the Nkararo Adjudication Section had not been completed and therefore the cause of action pleaded in the Plaintiff had not accrued yet.
33. Looking at the facts of this matter, the court is of the considered view that the Respondent’s Plaintiff failed to disclose a reasonable cause of action against the Appellants.
34. In conclusion therefore, the court hereby makes the following Orders in determination of this Appeal; -
 - A. The Memorandum of Appeal dated October 22, 2019 is merited.
 - B. The Ruling and the subsequent Orders issued on the September 24, 2019 by Hon.D.K Matutu, Principal Magistrate be and are hereby set-aside.
 - C. The Preliminary Objection dated February 15, 2019 be and is hereby upheld.
 - D. The Costs of both the Preliminary Objection dated February 15, 2019 together with the Costs of this Appeal be borne by the Respondents herein.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THE 20TH SEPTEMBER 2022.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: ELISHA



ADvocates For The Appellant: Mr. Mulisa

Advocates For The Respondent: Mr. Sagwa

