



Wabore & 2 others v Okello & 2 others (Environment and Land Appeal E066 of 2021) [2022] KEELC 14420 (KLR) (28 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E066 OF 2021
A OMBWAYO, J
OCTOBER 28, 2022**

BETWEEN

**SAMWEL OWINYO WABORE 1ST APPELLANT
GEORGE ODHIAMBO ABONG'O 2ND APPELLANT
JACOB LUCY OTIENO 3RD APPELLANT**

AND

**JOSPEH OKELLO OKELLO 1ST RESPONDENT
BERNARD OGINGA OKELLO 2ND RESPONDENT
ESTATE OF PITALIS OKELLO ATIENO 3RD RESPONDENT**

(Being an appeal of the ruling of the Hon. S O Temu given in Nyando on the 9th day of September 2021 in Nyando ELC No. 116 of 2018)

JUDGMENT

1. This appeal herein is christened as an appeal against the ruling of the Hon S.O Temu given in Nyando on the September 9, 2021 Nyando ELC No 116 of 2018 which ruling I have not seen in the record but I believe that the appeal is from the judgment of the lower court made on the same date.
2. The background facts of the appeal are that the appellants instituted a suit in the lower court against the respondents *vide* plaint dated December 6, 2018. The plaint was amended on March 17, 2020. In the amended plaint, the 1st appellant was described as the administrator of the estate of one Priscilla Akoth Wabore comprising of land parcel No 4654 Wawidhi A1 adjudication section, whereas the interests of the 2nd appellant is that he is the administrator of the estate of John Abong'o Wabore whose estate is land parcel No 4655 Wawidhi A1 adjudication section and lastly the 3rd appellant has interest in this



suit as the administrator of the estate of Otieno Wabore whose estate is land parcel No 4653 Wawidhi A1 adjudication section.

3. The respondents herein filed a succession cause and listed land parcel Wawidhi A1/4653, as forming part of their father's (one Pitalis Okello Atieno deceased) estate when the same is not true.
4. The grandfather of the appellants, Wabore Ogola(deceased), was the original proprietor of the land parcel No Wawidhi A1/4654, Wawidhi A1/4655 and Priscila Akoth Wabore, John Abong'o and Otieno Wabore Wabore, inherited the same parcel from their father, the deceased.
5. During land adjudication in Wawidhi A1 adjudication section, the said land parcels were fraudulently claimed by one Pitalis Okello Atieno (deceased) having been related to the plaintiff's father in that he was the son of Atieno Ogolla, a brother to the plaintiffs' grandfather (Wabore Ogolla).
6. A dispute arose between the plaintiffs' family and that of the late Pitalis Okello Atieno and the same was first heard by the land committee in case No 257/86,259/86 and 257/86 where a decision dated 30th 1986 was reached by the committee, awarding the land parcels No WawidhiA1/4654, Wawidhi A1/4655 and Wawidhi A1 4653 to Priscila Wabore, John Abong'o Wabore and Otieno Wabore respectively.
7. Having been dissatisfied by the afore-mentioned decision of the committee, the late Pitalis Okello Atieno appealed to the arbitration board but passed away before the appeal was heard.
8. In the appeal the arbitration board case No 171/86,172/86 and 170/86, the late Pitalis Okello Atieno was represented by one Lukas Jayo whereas for the arbitrators case No 171/86 where land parcel Wawidhi A1/4654 was the suit parcel the first plaintiff's mother had passed away and was therefore not represented by anyone as being the representative to her estate, the first plaintiff did not receive any summons of hearing notices for the above arbitrations.
9. In matter of arbitration case No 172/86 where the suit parcel was Wawidhi A1/4655, there was no representation as the late John Abong'o Wabore was at the time away from home as he was working in Tana River and he did not receive any summons of hearing notices requiring his presence at the arbitration therefore he was not aware of the same proceedings.
10. As for the case of arbitration case No 170/86, there were no representative for Otieno wabore as apart from being unwell at the time , he passed away two weeks from hearing dates on the March 26, 1988, he did not receive summons or hearing notices to inform him of the same proceedings.
11. The arbitration board in their decision dated March 10, 1989, the aforementioned parcels of land were awarded to the late Pitalis Okello Atieno.
12. The aforementioned parcels of land are ancestral land which the plaintiffs inherited from their parents and it is within their belief that the late Patalis Okello Atieno was registered as the proprietors of the said land parcels only as a trustee for and on the behalf of their parents.
13. In the lower court, the appellants prayed for a declaration that the plaintiffs are entitled to exclusive and unimpeded rights of possession of the parcels of land that are the subject in this matter. Moreover, an order of injunction permanently restraining the respondents, their employees, servants, workers and/or agent from entering upon, remaining on, taking possession of carrying out any construction, cultivating or any other activity whatsoever on the suit parcel or any part thereof, and from alienating or interfering by any means howsoever, with the property known as land parcels No Wawidhi A1/4654, Wawidhi A1/4654 and Wawidhi A1/4655. Furthermore, an order of cancellation of any title deed issued or registration entries made pertaining to land parcel No Wawidhi A1/4654, WawidhiA1/4654



and Wawidhi A1/4655 in favour of the deceased Pitalis Okello Atieno. Lastly, a declaration against the defendants that the land parcel No Wawidhi A1/4654, Wawidhi A1/4654, and Wawidhi A1/4655 legally belong to the estate of the deceased Priscilla Akoth Wabore, John Abong'o and Oieno Wabore respectively and the same to revert back to them and an order of eviction of the respondents from land parcel No Wawidhi A1/4654, Wawidhi A1/4654 and Wawidhi A1/4655.

14. The respondent denied the allegation of the appellants and stated that their father was the first and original proprietor of the suit properties. The respondent's asserted that after the land committee decision, their father's appealed before the board where the decision of the land committee was set aside and the disputed lands were given to their father. The respondent denied that the suit properties were ancestral land. The respondent averred that the appellant never appealed to the High Court as was then required by law. The respondent then put the appellant on a notice of intention to raise a preliminary objection on a point of law on that basis.
15. When the matter was placed before the learned magistrate for hearing, the 1st appellant adopted his written statement and reiterated that they were awarded land marked 4653,4654 and 4655. The land was being issued by the defendant. He was to be given back the land. On cross examination he stated that he came to court because the board did not do the case properly.
16. PW2 Gordon Omollo Otieno a cousin brother to the 1st appellant adopted his witness statement as evidence in chief and on cross examination he stated that land adjudication and demarcation was done in 1982 in respect of the suit property. Wabore was given 4653,4654, and 4655. In 1986 Pitalis Okello went to the land Committee and filed a case and was claiming Wabore's land that is 4653,4654 and 4655. The committee had given Wabore the land in 1986.
17. Benard Oginga Okello testified as DW1 and also relied on his recorded statement dated February 17, 2020 and filed on February 24, 2020. He produced the proceedings from African Court of appeal at Kisumu case No 51 of 1954. He produced proceedings in appeal case No 51 and 54 dated June 17, 1977. He also produced proceedings in Appeal case number 179, 171 and 172 of 1986. He also produced land committees and proceedings dated October 30, 1986 additional record for parcel No C/W A1/4653,4654,4655. He also produced the land board records and correspondences. He reiterated that the parcels of land belonged to the respondents.
18. In the lower court findings it was held that there was a case in the land disputes committee which proceeded to the appeals board. The appellant board granted the land to Pitalis Okello Otieno in 1989. The appellant did not appear to the High Court at Kisumu and he did not produce any evidence to that effect.
19. The learned magistrate found that the matter was not properly before the court as it was res-judicata as the matter was determined by the committee and the appellant's board and that the appellant did not pursue an appeal to the High Court in Kisumu. The appellant has come to this court in this appeal on grounds that the trial magistrate erred in law and fact in finding and holding that the court lacks jurisdiction to hear and determine this matter as required by law thus dismissing the appellants suit and by holding that the case was *res-judicata* and by failing to appreciate the totality of the evidence before him, and disregarding the same, and the submissions made by the parties .
20. The appellant pray that the appeal be allowed and the ruling of the learned magistrate be set aside hence the appellant be awarded costs.
21. The facts of this case are that the three parcels of land No 4653,4654,4654 have generated a lot of litigation since 1954. In the African Appeal court at Kisumu, in land appeal No 51 of 54 between Stephen Okelo, appellant (applicant father) and Atieno Ogola (respondent father, the appeal by



Stephen Okelo Owalo was dismissed. The court upheld the decision of the African Court at Nyando. This decision was made on June 26, 1977. Another decision was made by land adjunction committee Waridhi A Land adjudication section. In Kisumu the matter was in respect to the suit property of land and was on October 30, 1986 between Pitalis Okello Otieno as plaintiff and Otieno Wasore, Priskah Akoth Wabore and James Abong’o Wabore. In this case the land committee awarded the parcels of land to the appellant’s father thus Otieno Wabore and Priskilla Akoth Wabore and James Abong’o Wabore. The respondent parents were informed of the right of appeal to the court of appeal. The land committee dealt with the dispute on the parcels in case numbers 357 of 1986, 258 of 1986 and 251 of 1986. However the matter was referred to the arbitration board via case number 170 of 1986, 171 of 1986 and 112 of 1986 and the board made a decision that the parcels of land be awarded to the respondent’s father. This decision was made on March 10, 1989. The area list was published in 1995 and a period of 60 days was given for an appeal but no appeal was forthcoming and no objection was filed. The learned magistrate considered those facts when she found that the suit was *re-judicata*.

22. This court agrees with the learned magistrate that the suit before her was *res-judicata* as the parties had litigated upto the “appeals’ board” which was a competent body to determine their dispute and indeed it did determine the dispute. The appellants merely wanted to have a second bite at the cherry.

23. Section 7 of the [Civil Procedure Act](#) cap 21 Laws of Kenya provides :-

7. *res judicata*

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.

Explanation—(1) the expression “former suit” means a suit which has been decided before the suit in question—(1) whether or not it was instituted before it.

Explanation—(2) for the purposes of this section, the competence of a court shall be determined irrespective of—(2) any provision as to right of appeal from the decision of that court.

Explanation—(3) the matter above referred to must in the former suit have been alleged by one party and either—(3) denied or admitted, expressly or impliedly, by the other.

Explanation—(4) a matter which might and ought to have been made ground of defence or attack in such—(4) former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation—(5) relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes—(5) of this section, be deemed to have been refused.

Explanation—(6) where persons litigate bona fide in respect of a public right or of a private right claimed in—(6) common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

24. This court further finds that the appellant having litigated in the African Court, adjudication Committee and the “appeals board” was barred to file the suit in the magistrates court. Moreover, the appellant had a right to move to the High court if dissatisfied with the decision of the “appeals board” and therefore the appellant did not exhaust the process of adjudication by failing to file an appeal against the decision of the arbitration board. This court find further that the suit filed by the appellant was in contravention of the doctrine of exhaustion which requires the postponement of judicial consideration of matters to ensure that a party is first diligent in the protection of his own



interest within the mechanism in place for resolution outside courts. In this matter, the only available action for the appellants was to appeal to the High Court against the decision of the appeals board.

25. The doctrine of exhaustion is defined in *Blacks Law Dictionary* 10th Edition as follows –

“exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.

26. Section 90 of the *Fair Administrative Action Act* provides for the doctrine of exhaustion thus –

9. Procedure for judicial review

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*.
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

27. The doctrine was aptly captured by the Court of Appeal in *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd*, (supra), where the Court of Appeal observed: -

“... Where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”

28. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR the court held as follows;

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is,



first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

29. This court finds that the appellants dispute was initially before the African Court, adjudication committee, adjudication board and that the appellant’s father had a right to appeal to the High Court but they did not do so hence this appeal is not merited and the same is dismissed with costs.

DATED, AND DELIVERED AT KISUMU THIS 28TH DAY OF OCTOBER 2022.

A O OMBWAYO

JUDGE

