



Chauri v District Land Adjudication Officer Tigania West/East District & 2 others (Environment and Land Appeal 114 of 2019) [2022] KEELC 14691 (KLR) (9 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 114 OF 2019
CK NZILI, J
NOVEMBER 9, 2022**

BETWEEN

ELIJAH M'MAITAI CHAURI APPELLANT

AND

**DISTRICT LAND ADJUDICATION OFFICER TIGANIA WEST/EAST
DISTRICT 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

GEORGE IRIMBA THIRUAINA 3RD RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. G.
Sogomo delivered on 29.8.2018 in PMC's ELC No. 51 of 2017)*

JUDGMENT

1. By an appeal dated 25.9.2019 the appellant has complained about the ruling by the lower court which held that it lacked jurisdiction to entertain the suit. The ground of the appeal are that:-
 - i. The court failed to adhere to the directions of the Meru Environment and Land Court which had transmitted the file to it.
 - ii. Upheld a preliminary objection based on facts and law.
 - iii. Anchored its ruling on conjectures and speculations.
 - iv. Went against Section 13 of the *Environment and Land Court Act*
 - v. Ignored the facts and written submissions he tendered.
 - vi. Failed to appreciate the practice of possible appeals to the Minister



- vii. Acted in a bias manner.
2. This being a first appeal, the court is mandated to re-assess and re-appraise itself on the lower court file and come up with independent findings and conclusions on both facts and law. See *Peter v Sunday Post Ltd* (1958) E.A 424.
 3. The appellant by a plaint dated 4.3.2015 filed this suit in the High Court at Meru Land & Environment Division on 5.3.2015 following a consent to sue the respondent dated 20.1.2015 by the 1st respondent regarding Parcels No. 3097 and 2995 Kiguchwa Adjudication Section Tigania East District situated at Kirima Kia Baithilua measuring 0.95 acres and 19.24 acres respectively.
 4. He averred that out of Objection No. 1161 the 1st respondent made a decision dated 17.9.2009 purporting to award the 3rd respondent 10 acres to be excised from Parcel No. 3907.
 5. The appellant complained the said objection proceedings and decision was improper, unlawful, unreasonable and made in bad faith for failing to find he had made enormous developments thereon; was based on an alleged purchase with no written sale agreement; it was made without a constituted land committee; breached rules of natural justice; failed to hear crucial witnesses; breached his legitimate expectations for impartial, fair and just hearing; considerations, extraneous factors; the 1st respondent lacked powers to enforce a contract; it lacked jurisdiction to hear the dispute. It was arbitrary vague and lastly failed to visit the locus in quo.
 6. Therefore, the appellant sought for a declaration that he was the sole owner of the two parcels and that there was no valid sale agreement between him and the 3rd respondents relating to the two parcels of land; injunction restraining the respondents from implementing the 1st respondents decision and perpetual and permanent injunction restraining the 3rd respondent from trespassing or in any way whatsoever interfering with the two parcels of land and a mandatory injunction compelling the 1st respondent to register the entire acreage prior to the objection in his favour.
 7. The plaint was accompanied by the appellant's witness statement dated 4.3.2014, list of documents including a consent to sue dated 20.1.2015, record from the land adjudication office, objection proceedings and decision, High Court decree in appellant's JR No. 87 of 2009 dated 6.12.2012 and issued on 6.2.2013 and photos of the suit premises.
 8. The appellant filed a notice of motion dated 4.3.2013, seeking for temporary orders of injunction stopping the implementation of the decision dated 17.9.2017 which was opposed by the 1st & 2nd respondents through a replying affidavit sworn on 11.5.2015 by Ouru K. Obingo and the third respondent George Irimba Thiruane on 12.5.2015.
 9. The 1st & 2nd respondent stated the Objection No. 116 was properly heard and determined to give the 3rd respondent 10 acres from Parcel No. 2925 and created a new No. 6248 measuring 10 acres but the decision was not challenged by way of judicial review after it was heard under the [Land Consolidation Act](#).
 10. Regarding the 3rd respondent, he stated he validly bought his land from the appellant though a sale agreement and paid the entire purchase amount in 1970 and after the appellant reneged on transfer from his Parcel No. 2925 he filed an objection proceeding which was determined on merits after the land adjudication officer visited the suit land and established his developments on the ground.
 11. He averred that the matter had been handled in the High Court hence was resjudicata by dint of High Court Misc. JR 90 of 2009. That the appellant failed to appeal against the Land Adjudication Officer's decision as per the [Land Consolidation Act](#).



12. The 3rd respondent filed a defence dated 26.9.2016 denying the claim and stating he bought the land in 1970 and took vacant possession of the 10 acres after which the appellant declined to transfer the land following which he filed Objection No. 1161 and was awarded the land as L.R No. 6248.
13. He averred that the appellant filed JR No. 90 of 2009 challenging the transfer and demarcation which application was dismissed.
14. The 3rd respondent averred the claim was time-barred, resjudicata, frivolous and vexatious and stated he would raise a preliminary objection on those grounds.
15. From the record, it appears the appellant filed agreed issues dated 9.8.2018 but did not respond to the 3rd respondent's statement of defence. Meantime, the court gave an order dated 17.12.2018 for the establishment of boundaries by the surveyor and the land registrar.
16. Eventually, the 3rd defendant filed a notice of preliminary objection dated 6.6.2019 on the basis that the suit offended Sections 13, 14 & 26 (3) of the [Land Consolidation Act](#) as read together with section 26 & 29 of the [Land Adjudication Act](#).
17. By a ruling dated 12.7.2018, the trial court held injunctive reliefs could not issue against the Government under Section 16 (2) of the [Government Proceedings Act](#) and further the suit was time-barred under Sections 3 (1) of the [Public Authorities Limitation Act](#) (Cap 39) given the decision sought to be impugned was made on 17.9.2009 while the suit was filed on 5.3.2015 which was 4 years after the expiry of one year under Cap 39, without leave of court.
18. The trial court further held there was no consent to sue in accordance with Section 8 (1) of the [Land Consolidation Act](#), Sections 26 (3) of the [Land Adjudication Act](#).
19. Therefore, the trial court dismissed the application with costs.
20. Coming to the preliminary objection dated 6.6.2019 by a ruling dated 29.8.2019 the trial court held that by dint of Sections 26(3) [Land Consolidation Act](#) & 29 (1) [Land Adjudication Act](#), the court had no jurisdiction to entertain the suit against a land adjudication officer, objection determination.
21. Additionally, the trial court held that under Section 16 (2) of [Government Proceedings Act](#), Orders 29 (2) (d) and 4 of the [Civil Procedure Rules](#), injunction could not issue against the 1-2 respondents.
22. He upheld the preliminary objection that the court lacked jurisdiction to entertain the suit.
23. The appellant submitted that this matter was initially filed in the High Court and transferred to the trial court since the lower court had jurisdiction which the respondents did not object to in the defence dated 26.9.2016 hence the respondents were not entitled to raise it in the lower court.
24. The appellant submitted that under Article 166 (2) (b) of the [Constitution](#) and Sections 13 of the [Environment and Land Court Act](#) the court has powers to grant the reliefs sought.
25. It was also submitted that the preliminary objection raised did not meet the parameters of a preliminary objection as held in *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1966) E.A 696, [IEBC v Jane Cheprenger & 2 others](#) (2015) eKLR.
26. Therefore, the appellant submitted that the lower court should not have upheld and determined the suit on merits.
27. Further, the appellant submitted the trial court should have taken into account the authority of this court to resolve disputes and should have taken judicial notice on the impartiality of having appeals to the members heard and disposed off especially declaratory and injunctive prayers.



28. The appellant relied on *AG v Zinji Ltd* (2021) eKLR & *Ben Muthiora v Marion Muthamia Kiara (suing on behalf of the estate of Erastus Muthamia Kiara – deceased)* Civil Appeal 43 of 2017). The 1st and 2nd respondent submitted Article 159 2(c) of *the Constitution* recognized alternative dispute resolution mechanism as those established in *Land Consolidation Act* (Cap 283) and *Land Adjudication Act* (Cap 284).
29. The 1st & 2nd respondent further submitted that the appellant took part in the adjudication process up to the objection level and instituted judicial review proceedings which could not be sustained for lack of evidence on acting ultra vires, illegally, unreasonably and on account of procedural impropriety.
30. It was submitted that the trial court was right since the appellant had not exhausted the mechanisms set up under Cap 284 and 283 if he was aggrieved by the outcome in Objection No. 1161 under Section 29 (1) *Land Adjudication Act*.
31. Reliance was placed on *Speaker of National Assembly v James Njenga Karume* (1992) eKLR, *Joseph Kiruja Maingi v Rose Nambura & 2 others* (2021) eKLR, *Mutanga Tea & Coffee Ltd v Shikara Ltd and another* (2015) eKLR, *Reuben Mwongera M’Iteleka v Paul Kigea Nabea & 2 others* (2019) eKLR.
32. The 1st & 2nd respondents submitted that the alternative mechanism were available after the 18.9.2009 to either appeal on the matter or to go for judicial review and of the two remedies, the appellant attempted the 2nd remedy and after it was dismissed he filed this suit. Therefore, there has been no demonstration that the Minister would have infringed his fundamental rights if he filed the appeal.
33. They urged the court to dismiss the appeal with costs guided by *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* (1967) E.A 281.
34. Having gone through the record of appeal, grounds of appeal and the written submissions the issues for determination are:-
 - i. If the 3rd respondent raised a pure point of law.
 - ii. If the trial court applied the law in upholding the preliminary objection.
 - iii. If the appeal has merits.
35. A preliminary point of law was defined in *Mukbisa Biscuit Manufacturing (supra)* as consisting a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose off the suit. These includes objection as to jurisdiction or that parties are bound to refer the matter to arbitration.
36. In *Oraro v Mbaja* (2005) 1KLR 141 the court held a preliminary objection should not be blurred with factual details liable to be contested and to be proved through the process of evidence and therefore any preliminary objection requiring proof by adduction of evidence may not be a true preliminary objection.
37. In *George W. M Omondi v National Bank Kenya Ltd and 2 others* (2001) KLR the court stated that in determining a preliminary objection the court can look at the pleadings and other relevant documents but must abide by the principles that the objection must raise pure point of law. The court said what is forbidden is for the court to determine a preliminary objection on contested facts or in the exercise of judicial discretion.
38. In *Mary Wambui Munene v Peter Gichuki Kirigara & 6 others* (2014) eKLR the Supreme Court of Kenya said that jurisdiction is a pure point of law and should be resolved on priority basis which the



court in *Jamal Salim v Yusuf Abdullahi Abdi & another* (2018) eKLR, the court held jurisdiction either exist or it does not and cannot be acquiesced or clothed by consent by parties. See *Kakuta Maimai Hamis v Peris Pesi Tobiko & 2 others* (2013) eKLR.

39. Applying the above principles and binding decisions the preliminary objection herein was raised in the replying affidavits sworn by Ouru K Obingo on 11.5.2015 at paragraph 8 and George Thiruane on 12.5.2015 and 3.8.2015 at paragraphs 12-16 & 4-6 respectively.
40. Eventually, the 3rd respondent raised the preliminary objection in the statement of defence dated 26.9.2016 at paragraphs 5-8. Later on, the 3rd respondent filed a standalone preliminary objection dated 6.6.2019.
41. The combined grounds of preliminary objection by the 3rd respondent related to:
 - i. Breach of Sections 12 & 16 (1) & (2) of the *Government Proceedings Act*.
 - ii. Offends to Sections 8 (1), 13, 14 & 26 (3) of the *Land Consolidation Act* & Sections 29 & 30 of the *Land Adjudication Act*.
 - iii. Sections 3 (1) of the *Public Authorities Limitation Act* (Cap 39).
 - iv. Res judicata due to High Court Misc. No. 90 of 2009.
42. In the plaint dated 4.3.2015, the complaint by the appellant was based on a decision over Objection No. 1161 by the 1st respondent relating to Parcel No. 2925 and 3097 Kiguchwa Adjudication Section attacked as improperly, unlawfully, maliciously done in bad faith, irrational, biased, unjustified and unreasonable.
43. At paragraph 19 of the plaint, the appellant admitted he had filed Judicial Review No. 90 of 2009 Meru which was dismissed on 20.9.2013 and it did not deal with merits of the case, JR No. 87 of 2009 Meru where there was a decree dated 6.12.2012 and issued on 6.2.2012. the appellant annexed the two previous judgments and decree.
44. Looking at the judgment in Meru JR No. 90 of 2009, the appellant had sought orders of certiorari to quash the findings and decision by the 1st respondent herein and who was also the 1st respondent together with the 2nd respondent herein and the 3rd respondent herein but then an interested party, dated 17.9.20209 over Objection No. 1161 relating to Parcel No. 3097 and 2925 Kiguchwa Adjudication Section.
45. By a decision dated 20.9.2013, Hon. Justice PM Njoroge made a finding that in the objection proceedings, the appellant had been accorded fair treatment, the decision was within the powers under Caps 283 and 284, there was no procedural impropriety, the 1st respondent acted legally and accorded the appellant a fair hearing. The court therefore found no merits in the judicial review application.
46. In this matter, the appellant brings the suit based on the same facts, same parcels of land, same objection proceedings and decision, same parties and on the same grounds at paragraphs 4, 5, 6, 7, 12, 15 and prayers for the inter alia orders restraining the respondents from implementing the decision dated 17.9.2009 and compelling the 1st respondent to register the two parcels under his name after the court declares that he owns the two parcels of land.
47. The respondents have in their pleadings admitted the existence of the Objection No. 1161, proceedings the decision made on 17.9.2009 and the decision made by this court in JR Misc. 90 of 2009 on 20.9.2013.



48. The appellant has also admitted the existence of that decision save to say in judicial review, the court did not look at the merits of the case but the decision making process.
49. In *John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport & Infrastructure & 3 others* Petition No. 17 of (2015) (2021) KESC 39 (KLR) (C 40) 9th August (2021) Judgment the court stated that a plea of res judicata holds that once the legal rights of parties have been judicially determined, such edict stand as conclusive statement as to those rights. That in effect, it allows a litigant only one bite at the cherry and prevents a litigant or persons claiming under the same title from returning to court to claim further reliefs not claimed in the earlier action. That it serves the cause of order and efficacy in the adjudication process, by preventing a multiplicity of suits which would ordinarily clog the courts apart from occasioning unnecessary costs to the parties and to ensure that litigation comes to an end and the verdict duly translates into fruit for one party and a liability for another party conclusively.
50. In this appeal, looking at the pleadings, there can be no doubt that the appellant is coming back to the court after the matter was determined with finality by a court of competent jurisdiction where he did to succeed to quash the objection proceedings and the decision dated 17.9.2009, by way of certiorari based on the grounds of ultra vires, irrationality, procedural impropriety, unreasonableness, bias, among others.
51. It is on the same grounds that he now wants the court to base the decision this time round by way of a plaint.
52. In all fairness, the appellant is trying to circumvent Section 7 of the *Civil Procedure Act* and have a second bite at the cherry.
53. To my mind once a court has determined a matter to finality and conclusively as to the rights of the parties the matter rests there unless a party goes on appeal or review to a higher court, it cannot like the appellant herein, approach the same court by way of a plaint.
54. Unfortunately for the appellant, this court transferred the matter to Tigania Law courts. That act of transfer was purely administrative and did not put a stamp of jurisdiction to the suit. This court had not determined the issue of jurisdiction and therefore the lower court in determining the issue of jurisdiction once the preliminary objection was filed, defences filed and the issue taken up the appellant cannot fault the trial court for so doing.
55. As regards the issue of failure to exhaust the internal mechanism under the *Land Consolidation Act* and *Land Adjudication Act*, the court in *Tobias Ochola Osidi & 13 others v Cyprianus Otieno Ogola & 6 others* (2013) eKLR held that this court has no powers to determine and ascertain interest in land. This court can only superintend on the process of land adjudication and cannot declare interests in land as the appellant sought in the plaint dated 4.3.2015. Jurisdiction is conferred by statute and the *Constitution*. It cannot be conferred through consent of or acquiescence by the parties. A consent to sue given by a Land Adjudication Officer cannot grant authority to court beyond what is provided under the Statutes.
56. In this matter, the consent clearly indicated that the court should not determine ownership rights. To the contrary, the appellant sought the court to declare ownership rights and compelling orders to the 1st respondent to register him as the owner of the two parcels of land.
57. A party aggrieved by the decision of the Land Adjudication Officer has the option of filing a Minister's appeal or an application for judicial review. The appellant chose the latter option and could only appeal



against the decision of this court to the Court of Appeal but not to revert this court for a redress which is not provided for except on account of compensation.

58. As regards the Sections 12 (1) & 16 of the *Government Proceedings Act* as read together with Order 29 *Civil Procedure Rules*, it is trite law that injunctions cannot issue against government departments. The appellant sought mandatory and perpetual injunctions against the 1st and 2nd respondents from implementing the decision dated 17.9.2009.
59. Such orders cannot issue against the 1st and 2nd respondents. Concerning Section 19 & 13 of the *Civil Procedure Act* in *Council of Governors And 3 others v Senate & 53 others* (2015) eKLR, the three judges cited with approval *Kenya Bus Services Ltd & another v Minister for Transport and 2 others* (2012) eKLR where the court held the section unconstitutional in the face of the guarantees to access to justice under Article 48 of the *Constitution*.
60. In view of the foregoing I find no merits in this appeal. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 9TH DAY OF NOVEMBER, 2022

In presence of:

C/A: Kananu

Kieti for 1st & 3rd respondent

Kurauka for appellant

HON. C.K. NZILI

ELC JUDGE

