



REPUBLIC OF KENYA



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**John (appealing as the legal Administrator of the Estate of Amburuki M’Muketha (Deceased) & another v M’Aciuri & 2 others (Environment and Land Appeal 138 of 2019) [2022] KEELC 14664 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14664 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT AND LAND APPEAL 138 OF 2019**  
**CK NZILI, J**  
**NOVEMBER 9, 2022**

**BETWEEN**

**KARITHI JOHN (APPEALING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF AMBURUKI M’MUKETHA (DECEASED) ..... 1<sup>ST</sup> APPELLANT**  
**M’ITARU M’NAITULI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**M’MBOROTHI M’ACIURI ..... 1<sup>ST</sup> RESPONDENT**  
**TIGANIA EAST/WEST DLASO ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling and order dated 5.12.2019 delivered by Hon. G. Sogomo Principal Magistrate in Tigania PMCC E&L Case No. 135 of 2013)*

**JUDGMENT**

1. The appeal relates to a ruling by the trial court where it held that it lacked jurisdiction to entertain this suit by dint of sections 26 (3) of the [Land Consolidation Act](#), 26 and 29 (1) of the [Land Adjudication Act](#).
2. The appellant has appealed to the said order on the basis that:
  - i. No decision of the land adjudication officer was in existence contrary to the holding by the court.
  - ii. The suit before the court was not based on fraud, illegality and collusion by the 1<sup>st</sup> & 2<sup>nd</sup> respondents but on trust.



- iii. There was no decision appealable to the minister.
  - iv. It disregarded a consent to sue issued by the land adjudication officer.
  - v. The court had jurisdiction to entertain a suit based on trust.
3. As a first appellate court the mandate under section 78 Civil Procedure Act and order 42 rules 24 – 26 Civil Procedure Rules is to re-hear, re-hearse and re-evaluate the record come up with independent findings and conclusion as to facts, evidence and the law.
  4. This power was restated in Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co advocates (2013) eKLR
  5. Before the trial court was the plaint dated November 7, 2013 in which the 1<sup>st</sup> appellant suing as the administrator of the deceased M'Amburukwa M'Muketha and the 2<sup>nd</sup> appellant who were the recorded owners of Parcel No's 5005 and 5640 Kianjai Adjudication Section, sued the 1<sup>st</sup> respondent for forceable entry into the land in March 2009 and his illegal construction therein.
  6. It was averred that upon further inquiries the appellants established that the 2<sup>nd</sup> respondent had illegally transferred the suit parcels to the 1<sup>st</sup> respondent.
  7. The appellants averred that the 1<sup>st</sup> respondent could only have been recorded as the owner of the land in trust for them as their relative, which land the 2<sup>nd</sup> appellant had inherited hence should revert to the estate of the deceased.
  8. The appellants prayed for:
    - a. Declaratory order that the 1<sup>st</sup> respondent held Parcels No 5005 and 5640 in trust.
    - b. An order compelling the 2<sup>nd</sup> respondent to rectify the register and or record by cancelling the name of the 1<sup>st</sup> respondent and replacing it with those of the appellants as recorded owners.
    - c. Eviction of the 1<sup>st</sup> respondent from the suit parcels.
    - d. Mesne profits against the 1<sup>st</sup> respondent with effect from March 2009 till vacant possession was surrendered.
  9. The plaint was accompanied by the list of documents dated November 7, 2013 among them grant of letters of administration, notice withdrawing Meru HCCC No 46 of 2012, consent to sue dated September 11, 2013, statutory notice to the Attorney General dated September 9, 2013 and several correspondences with the Director of Land Adjudication and Settlement and list of witness statements.
  10. The 1<sup>st</sup> respondent filed a defence dated November 25, 2013 denying the contents of the plaint including the issue of trust and the alleged inheritance of the land by the 2<sup>nd</sup> appellant. He specifically averred the suit land belonged to him after he was bequeathed the same by his deceased brother Joseph M'Ngaruthi Aciuri who was not related to the appellants and hence were imposters to the throne.
  11. The record indicates that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed to enter appearance following which the appellants filed a request to enter judgment alongside an application dated December 2, 2013 requesting for leave to enter interlocutory judgment. This was allowed on January 20, 2014. Later on, by an application dated September 19, 2019, the appellants sought leave to amend the plaint after the parcels of land became registered under the Land Registration Act as LR No's Kianjai/5005 & 5640.
  12. The 1<sup>st</sup> respondent filed a notice of preliminary objection dated October 16, 2019 on the ground that:



- i. The 1<sup>st</sup> respondent was long dead for over 9 years and no application for substitution had been preferred to give life to the suit.
  - ii. The court lacked jurisdiction ab initio to entertain the suit.
  - iii. No form of an amendment could regularize what was irregular in the first instance and that the suit was an abuse of the court process.
13. Parties filed written submissions dated November 21, 2019 and November 20, 2019. The appellants relied on *St Patrick's Hill School Ltd vs Bank of Africa Kenya Ltd* (2018) eKLR, *Irene Kemunto Ongori vs HFCK* (2018) eKLR, on leave to amend; *Mukhisa Biscuit Manufacturing Co Ltd vs West End Butchery* (1969) EA; on the proposition that the preliminary objection was unmerited; *Justus Ntuitu vs Mwirichia Kaumbuthu* (2014) eKLR on the proposition that the court had powers to hear matters of customary trust and order 24 rule 7 (2) *Civil Procedure Rules* on the revival of a suit.
  14. On his part the 2<sup>nd</sup> respondent submitted the 1<sup>st</sup> respondent passed on October 2, 2018 and the case could not be prosecuted against a dead person under order 24 rule 4 (4) *Civil Procedure Rules*. Reliance was placed on *Leonard Mutua Mutevu vs Benson Katela Ole Kantai & another* (2015) eKLR, *Murithi Ngwenya vs Gikonyo Macharia Mwangi & others* (2018) eKLR, *Gladys Njeri Muhura vs Daniel Kariuki Muthiguro* (2018) eKLR & *Mbugua Wangige & another vs Muthanji Wangige* (2015) eKLR.
  15. The 1<sup>st</sup> respondent submitted the court lacked jurisdiction since the suit having been a subject of committee case heard *vide* A/R Objection No 1735 of 1991, it could not be entertained without exhaustion of the mechanism under sections 30 of the *Land Adjudication Act* cap 284.
  16. The 1<sup>st</sup> respondent ingeniously attempted to attach a burial permit behind the written submissions in order to sustain his preliminary objection.
  17. Through a ruling dated December 5, 2019 the trial court struck out the suit for lack of jurisdiction following which the appellants filed an application dated December 17, 2019 seeking for review and reinstatement of the suit based on mistake, error, apparent on the face of the record; that there was no such decision appealable to the minister and that the suit was based on trust.
  18. The application was supported by an affidavit of CP Mbaabu in which he attached the ruling and letters dated May 19, 2010 and October 21, 2010 from the Director of Land Adjudication and Settlement and the plaint which was eventually withdrawn by a notice dated February 6, 2020.
  19. In this court, the 1<sup>st</sup> respondent also filed a notice of preliminary objection dated October 27, 2021 similar to the one at the lower court. Again, he filed a list of documents dated March 21, 2022 without leave of court.
  20. The appellants submitted that the lower court suit was based on trust, acts of fraud, illegality and collusions allegedly committed by the 1<sup>st</sup> & 2<sup>nd</sup> respondents and not on an alleged A/R decision capable of being appealed to the minister contrary to the holding by the trial court.
  21. The appellants submitted that the prayers sought in the plaint were for eviction, mesne profits and declaration of trust which could only be granted by the court and not the minister.
  22. Reliance is placed on *Francis Murungi M'Ibaya vs Paul Kigea Nabea, & 4 others* (2020) eKLR, *Yuda Imunya, alias Yuda K Imunya vs Atanasio Kibara* (2016) eKLR, *Ochieng & others vs First National Bank (supra)*, *Irene Kemunto (supra)*, order 8 rule 5 (1) and order 24 rule 7 (2) *Civil Procedure Rules* and *Mukhisa Biscuits (supra)*.
  23. The issues commending themselves for court's determination are: -



- i. If the trial court had jurisdiction to entertain the suit.
  - ii. If the 1<sup>st</sup> respondent had pleaded abatement and lack of jurisdiction.
  - iii. If the list of documents dated March 21, 2022 is properly before this court.
24. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. See [Mutinda Mule vs IEBC](#) (2014) eKLR.
  25. In the lower court, the primary pleadings by the parties herein were the plaint dated November 7, 2013 and the accompanying list of witnesses, witness statements and list of documents dated November 7, 2013 in line with order 3 rule 2 of the [Civil Procedure Rules](#), the reply to defence dated 6.12.2016, the 1<sup>st</sup> respondents defence dated November 25, 2013 and a notice of preliminary objection dated October 16, 2019. The defence was not accompanied by any witness statements and list of documents in line with order 7 rule 5 of the [Civil Procedure Rules](#).
  26. At the time of filing the defence and the preliminary objection dated October 16, 2019, the 1<sup>st</sup> respondent never filed any death certificate as proof of the allegations of death for the trial court and this court to determine the veracity or the truthfulness of that claim.
  27. Similarly, even at the time the 1<sup>st</sup> respondent filed the list of documents dated March 21, 2022, the death certificate was not among the documents included therein.
  28. Order 42 rule 27 of the [Civil Procedure Rules](#) limits without leave of court, a party from producing or relying on additional evidence, whether oral or documentary during the appeal stage. The 1<sup>st</sup> respondent never sought leave of the court to file, adduce and or rely on any additional evidence.
  29. Having gone through the entire lower court record, the documents filed by the 1<sup>st</sup> respondent did not include a burial permit. Consequently, the same is improperly before the court and shall not form part of the record of this appeal.
  30. As to whether the suit abated or not, though the 1<sup>st</sup> respondent had urged the trial court to find the suit to have abated, unfortunately, there was no material before the trial court by way of evidence for it to make such a finding.
  31. Death cannot be inferred or assumed. A party cannot just make such a statement or assertion without producing evidence of death under the [Registration of Births and Deaths Act](#). My finding therefore is that the said objection lacked merits and is hereby rejected.
  32. As indicated above, parties are bound by their pleadings and issues flow from the pleadings. The appellant's pleadings were based on breach of trust, fraud, illegalities and irregularities in the manner the 1<sup>st</sup> respondent had obtained the suit parcels No's 5005 & 5640 said to have been registered as LR No Kianjai/Kianjai/5005 and 5640.
  33. The 1<sup>st</sup> respondent did not plead any A/R objection proceedings and decision leading to the acquisition of the suit parcels of land and the date such proceedings were determined. The said objection proceedings and decision thereof were never part of the documents the 1<sup>st</sup> respondent had filed and was relying upon in the lower court.
  34. A preliminary objection going by Mukhisa (*supra*) raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.



35. In this matter the 1<sup>st</sup> respondent had not pleaded any facts on A/R objection, its outcome and nature. The 1<sup>st</sup> respondent merely pleaded that he had been bequeathed the land by his late brother and that there was no blood relationship between the appellants and himself.
36. Essentially, these are pleadings answering to the issue of trust which had been pleaded by the appellants. The appellants filed a reply to defence and answered to those facts.
37. It is trite law that submissions however powerful cannot replace pleadings. *Daniel Toroitich Arap Moi vs Stephen Mwangi Murithi* (2014) eKLR. Parties are not allowed to travel outside their pleadings as was held in *Raila Amollo Odinga vs IEBC* (2014) eKLR otherwise it will amount to trial through abuse.
38. The trial court was faced with a claim based on breach of trust and an alleged illegal recording of the land in favour of the 1<sup>st</sup> respondent by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. At the time the preliminary objection was made the 2<sup>nd</sup> and 3<sup>rd</sup> respondent had not entered appearance and interlocutory judgment had been entered against them.
39. The trial court merely based its findings on paragraphs 14, 16 & 17 of the plaint. With respect, the three paragraphs did not mention anywhere about a decision of the land adjudication officer but pleaded breach of trust. The consent to sue did not mention any land adjudication officer's objection. Where and how the trial court got information of the alleged A/R objection and decision is not borne out of the pleadings before the court at the time the suit was struck out.
40. More importantly, the application before the trial court was seeking to amend the plaint to bring on board new facts after the adjudication section was closed and the suit land became registered under the *Land Registration Act* from the *Land Adjudication Act* and the *Land Consolidation Act*.
41. These were the facts before the trial court at the time going by the affidavit sworn by CP Mbaabu advocate attacking the draft amended plaint. The trial court had jurisdiction to determine the proposed amendments and exercise its discretion on whether to allow them or not.
42. The 1<sup>st</sup> respondent never filed a replying affidavit to deny that the suit parcels of land had already been registered and title deeds issued.
43. There was therefore no basis for the trial court to make a finding that even if the amendments were allowed, the suit was fatally defective ab initio for lack of jurisdiction.
44. Given the pleadings before the trial court, it is my finding that the trial court was properly seized of jurisdiction and the preliminary objection was premature and not a pure point of law since it required evidence to ascertain if there were such an objection proceedings and decisions which had not been appealed against in line with sections 8, 26 (1) of the *Land Consolidation Act* and sections 29 and 30 of the *Land Adjudication Act*.
45. Consequently, I allow the appeal, the application for an amendment dated September 19, 2019 is allowed, preliminary objection dismissed and the suit remanded for hearing on merits. Costs of the appeal to the appellants.

Orders accordingly.

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

In presence of:

C/A: Kananu



C.P Mbaabu for appellants

Mr. Kaume for 1<sup>st</sup> respondent

Kieti for 2<sup>nd</sup> & 3<sup>rd</sup> respondent

**HON. C.K. NZILI**

**ELC JUDGE**

