



**M'Mwambio v M'Kaumbuthu (Environment and Land Appeal
E080 of 2022) [2024] KEELC 733 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E080 OF 2022
CK NZILI, J
FEBRUARY 14, 2024**

BETWEEN

FAVIANO NKONGE M'MWAMBIO APPELLANT

AND

KAILIKIA M'NABEA M'KAUMBUTHU RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate Maua delivered
on 23.11.2022 in Maua CM ELC No. 12 of 2012 by Hon. Andrew Munene)*

JUDGMENT

1. The appellant, who was the defendant and plaintiff to his counterclaim, had been sued by the respondent seeking:
 - a. That LR No's Kiengu/Kanjoo/2716 and 1831 be combined, resurveyed, or subdivided in equal parts and each portion registered separately in line with the recommendation of the committee dated 23.3.2006.
 - b. Eviction of the appellant from his portion.
 - c. Permanent injunction restraining the appellant from interfering with the portion designated and or belonging to the respondent.
2. The appellant denied the claim, stating that the decision of the committee was implemented and the respondent demarcated as an owner of LR No. 2716 while he remained with LR No. 1831, which decision was upheld by the arbitration board, at the objection and the Minister's level; hence the suit disclosed no cause of action against him.
3. Through a counterclaim, the appellant averred the parent Parcel LR No. 1831 was subdivided and the respondent's Parcel LR No. 2716 hived in favor of the respondent.



4. Further, the appellant averred that through an arbitration board decision, each of the parties was ordered to remain in their respective positions; which decision was finally upheld by the Minister and was never appealed against. The appellant averred that title deeds were accordingly issued as LR No. Kiengu/Kanjoo/1831 and 2716, on 28.11.2014. He prayed by way of a counterclaim for the court to declare his title deed as proper, legal, and valid. Additionally, the appellant averred that the respondent's claim for the recovery of land recorded in his name on 23.3.2006 was statute-barred.
5. At the trial, the respondent told the court that initially, that his parcel of land before invasion by the appellant in 1986 was 8.50 acres. PW 1 insisted that the appellant had illegally demarcated the land as parcel LR No. 1831 Kiengu/Kanjoo/Adjudication Section to which he successfully filed a committee case, which ordered that the land be shared equally, which decision the adjudication officer to date failed to implement by amending the adjudication records.
6. PW 1 said the appellant appealed the committee's decision to the arbitration board, who dismissed his appeal, and that the appellant once more filed an objection to the adjudication officer, which he also lost. Further, it was averred that the appellant appealed to the Minister, which appeal was also dismissed, confirming the arbitration committee's decision.
7. The respondent told the trial court that unknown to him, the appellant secretly and without involving him colluded with the adjudication officer and, instead of implementing the arbitration committee's decision to the letter, subdivided the land into two unequal portions, his portion being smaller in size. Further, the respondent told the court the appellant illegally and continued occupying the two parcels of land after eventually evicting him from his parcel of land.
8. In support of his claim, the respondent produced a demand notice letter dated 2.8.2011, a sketch map, committee proceedings and ruling, arbitration board, proceedings and judgment, objections proceedings and ruling Minister's appeal proceedings and judgment, copy of the adjudication record and the District Land Adjudication and Settlement Officer's consent to sue as P. Exh No's. 1-9 respectively.
9. In cross-examination, PW 1 told the court that he never filed any proceedings against the minister's decision dated 9.11.2010 and was challenging the non-implementation of the arbitration committee's decision. PW 1 said he never collected his title deed, which came out in 2016, as per the official search dated 22.3.2021, indicated as LR No. Kiengu/Kanjoo/2716. He said he was not in occupation of the land. In re-examination, PW 1 insisted the appellant had continued using the entire land even after the committee's decision was upheld all the way to the Minister's level. He said he was disputing the size of his land as per the title deed.
10. The appellant testified as DW 1. He told the court that he gathered the parent land in 1975 and settled therein with his family until the area known as Kiengu clan land was declared Kiengu/Kanjoo Adjudication Section. DW1 said that during the demarcation, he was recorded as the owner of parcel LR No. 1831 and planted trees on his boundary until 2005 when the respondent filed a committee case against him. Similarly, DW1 said the committee case was heard and determined to the effect that half of his land be demarcated in the respondent's name as parcel LR No. 2716.
11. The appellant told the trial court that the respondent appealed against the decision at the arbitration board, which held that both parties should remain on their respective parcels of land. Dissatisfied with the verdict, the appellant said he filed an objection with the Land Adjudication Officer, which he lost but appealed to the Minister, who again dismissed his appeal on 9.11.2010.
12. DW 1 said he subsequently collected his title deed for LR No. Kiengu/Kanjoo/1831 on 28.11.2014 for land measuring 3.52 ha and settled on his land. DW 1 further said the respondent's parcel of



- land was approximately 1.73 ha. He said the arbitration committee's decision was fully implemented and that the respondent could not come to reclaim the land 13 years after the decision was made and implemented and after the Minister made a final decision on the issues. In support of his counterclaim, the appellant produced the committee's proceedings/arbitration board objection, the Minister's proceedings, the certificate of title, and an official search as D. Exh No. 1-6, respectively.
13. In cross-examination, DW 1 denied that the committee's decision stated that each party was entitled to half of the suit land. DW 1, however, admitted that his parcel of land was larger in size than that of the respondent. Similarly, DW 1 said it was he and his children who were utilizing the land. He said he did not involve the respondent in implementing the committee's decision.
 14. The appellant faults a decision by the trial court on the grounds that:
 - a. The court erred in law and in fact by finding it had jurisdiction to entertain the suit.
 - b. The trial court arrived at the wrong decision.
 - c. The decision was erroneous in view of Section 29 of the *Land Adjudication Act* since the respondent had used a fundamentally flawed process to move the court.
 - d. The decision made was both erroneous and against the evidence tendered.
 15. With leave of court, parties were directed to canvass the appeal through written submissions to be filed by 18.11.2023. The respondent submitted that an appellate court could only interfere if the trial court proceeded on the wrong principle of law, thereby arriving at misconceived estimates as held in *Mbogo & another v Shab* (1968) EA 93. Further, the respondent submitted, based on [*United India Insurance Co. Ltd & others v E.A Underwriters \(K\) Ltd*](#) (1985) eKLR, that a court can only interfere if the trial court misconstrued the facts, took into account considerations that it should not have taken or if the decision was plainly wrong.
 16. To this end, the respondent submitted that since the committee decision was upheld up to the Minister's stage and was never challenged, it was wrong to implement it otherwise and for him to be evicted from his half share of the land. The respondent submitted that the trial court had jurisdiction to entertain the suit since the land was registered under Section 25 of the [*Land Registration Act*](#).
 17. The mandate of a first appellate court as captured in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR, the court said an appeal to the court of appeal was by way of a retrial by reconsidering the evidence, evaluating it and drawing conclusions, mindful that the court below saw and heard the witnesses. In [*Abok James Odera t/a AJ Odera & associates v J.P Machira t/a Machira & Co. advocates*](#) (2013) eKLR, the court said the court on first appeal must re-evaluate, reassess, and re-analyze the extracts on the record and then determine whether the conclusions by the lower court could stand or not and give reasons either way.
 18. In this appeal, the issues for my determination are:
 - i. If the trial court had jurisdiction to hear and determine the dispute.
 - ii. If the respondent moved the trial court through the correct procedure.
 - iii. If the appeal has merits.
 19. The primary complaint by the respondent was that after the parties went through the entire process of the internal mechanism set under the *Land Adjudication Act*, the decision made by the committee in Case No. 138 of 2005 to hive out half of the then-parcel No. 1831/Kiengu/Kanjoo Adjudication Section was illegally, mistakenly, deliberately and or erroneously omitted to be implemented in the



- adjudication register, resulting to title deed for LR No. Kiengu/Kanjoo/1831 and 2716, being of unequal acreage. The respondent sought a combination of the two parcels of land for subdivision and registration in equal proportions.
20. On the other hand, the appellant, while admitting that there was a committee decision that was upheld up to the Minister's level, insisted there had been implementation of it decision leading to title deeds measuring 3.52 ha and 1.75 ha, respectively. He urged the court to declare the title issued in his favor, lawful and valid, since the Minister had made a final decision.
 21. The appellant never raised any jurisdictional issue in the amended defense and counterclaim dated 30.3.2021. All that he pleaded was that the suit disclosed no cause of action and was statute-barred. It is trite law that parties are bound by their pleadings, and issues flow from them. See *Raila Odinga & others v IEBC* (2017) eKLR.
 22. It is not permissible unless with leave to raise new matters at the appeal stage that were not canvassed before the trial suit. See *Mahamud Mubamed Sirat v Ali Hassan Abdirahman & others* (2010) eKLR, *Bwana Mohamed Bwana v Silvano Buko Bonaya & others* (2013) eKLR. In *Republic v Tribunal of Inquiry to Investigate The Conduct of Tom Mbaluto & others* (2018) eKLR, as cited in *Frera Engineering Co. Ltd v Morris Mureithi Mutembe* (2020), eKLR, the court said the philosophy and logical reason behind our appellate system to restrict the appellate court to, except in exceptional cases, to consideration of the issues that were canvassed before and decided by the trial court, otherwise it would become a trial court in disguise and decide matters without the benefit of the input of the court of the first instance. Consequently, I decline to consider ground number 1 of this appeal.
 23. There is no dispute that by the time the suit was filed on 31.1.2012, the land was still under the *Land Adjudication Act*, hence the consent to sue dated 2.12.2011. As at the time a further amended plaint was filed on 21.1.2020, the suit parcels of land had become registered land by 28.11.2014, going by the appellant's amended defense and counterclaim, list of documents dated 30.3.2021 attaching a copy of his title deed and an official search for LR No. Kiengu/Kanjoo/2716.
 24. After amending their pleadings, the respondent, in paragraph 5 (a) of the further amended plaint, pleaded the particulars of illegalities, irregularities, collusion, and mistakes leading to a smaller acreage of his land in the title deed contrary to the committee's decision made on 23.3.2006. The appellant, on the other hand, in the amended defense at paragraph 5 (a) thereof, insisted that the committee's decision had been implemented and that the two title deeds issued were in line with the decision.
 25. So, the single question for determination at the trial court was whether the resultant title deeds were in tandem with the adjudication records, following the confirmation of the committee's decision dated 23.3.2006, to amend the adjudication register in equal shares. The effect of the decision was that each of the two parties had equal rights to the suit land. The Land Adjudication Officer was supposed to amend the record to reflect the committee's decision. The respondent's case was that the title deeds eventually issued to the parties did not accord with any amendments that may have been effected on the adjudication records, otherwise, his land would have been of the same size as that of the respondent.
 26. Under Section 26A of the *Land Adjudication Act*, a Land Adjudication Officer forwards to the Director of Land Adjudication a final adjudication register in regards to all parcels without objections for transmission to the Chief Land Registrar for purposes of registration. Under Section 27, the Land Adjudication Officer is mandated to alter the adjudication register from time to time to conform with any determination of objections under Section 26 of the Act.
 27. Under Section 28, the Chief Land Registrar is required to cause registration to be effected in accordance with the adjudication register and alter it if affected by any outcome of a pending appeal.



- 28. In this appeal, the appellant insists the trial court was wrong to allow the suit. Unfortunately, the appellant did not produce any evidence to show that his title deed was lawfully, regularly, and legally obtained. It was not in equal size as that of the respondent. This was the effect of the decision made in 2006 and, which was confirmed up to the Minister's appeal.
- 29. Therefore, I find the certificate of title held by the appellant was liable to challenge under Section 26 (1) (b) of the Land Registration Act. It was acquired unprocedurally, for it did not accord with the finding as mentioned earlier. It was null and void. See *Macfoy v United Africa Co. Ltd* (1961) 3 ALLER 1169. In *Henry Muthee Kathurima v Commissioner of Lands & another* (2015) eKLR, the court said Article 40 (6) of the Constitution does not extend to property unlawfully acquired. The appellant is estopped from denying the effect of the decisions made in 2006. He acquired a title out of a flawed process before the committee decision was implemented on the adjudication register. See *Kipkobel Arap Misoi v Priscillah Chepkorir* (2016) eKLR.
- 30. The upshot is that I find the appeal lacking merits. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 14TH DAY OF FEBRUARY 2024

HON. CK NZILI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In presence of

C.A Kananu

Miss Asumah for Mutembei for the respondent

Respondent

Mr. Mwanzia for the appellant

