



**Mwirabua v Murungi (Environment & Land Case E028 of 2022)
[2024] KEELC 6598 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E028 OF 2022
CK NZILI, J
OCTOBER 2, 2024**

BETWEEN

JOEL MWORIA MWIRABUA APPELLANT

AND

STANLEY MURUNGI RESPONDENT

*((Being an appeal from the ruling of Hon. P.M Wechuli – SRM
delivered on 5.5.2022 in Tigania P. M’s ELC No.67 of 2019))*

JUDGMENT

1. The appellant, as the plaintiff at the lower court, filed Tigania PMC ELC No. 67 of 2019 against the respondent pursuant to a consent to sue issued on 19.9.2019. His complaint was that Parcel No. 5294 Karama Adjudication Section recorded under his name, excised from his father's parcel No. 615 Karama Adjudication Section had been trespassed into and damaged by the respondent pursuant to which he was charged convicted, sentenced to 12 months and fined Kshs.15,000/= in Tigania Criminal Case No. 2071 of 2017 and 1029 of 2019. He prayed for permanent injunction orders and in default eviction orders. The suit was accompanied by a consent to sue and a confirmation letter from the land adjudication and settlement officer showing that the adjudication section was at the objection stage in the adjudication process.
2. Alongside the plaint, the appellant filed an application dated 24.9.2019 seeking interim orders of injunction. The respondent entered an appearance by a memorandum of appearance dated 30.9.2019. Equally, the respondent filed a replying affidavit sworn on 30.9.2019 stating that Parcel No. 5294 was in a different locality from his P. No. 10331 and was of different measurements. He denied trespassing on the alleged parcel measuring 1.05 acre, unlike his parcel measuring 50 points. The respondent averred that there was no boundary or any other dispute between him and the appellant since the two parcels of land were not related or situated in the same locality.



3. Parties were directed by the trial court to ventilate the said application by way of written submissions. Meantime by a ruling delivered on 10.12.2019, the trial court consolidated the two files, with the operative file being case No. 53 of 2019.
4. In the consolidated file, the respondent, who was the plaintiff at the lower court in Case No. 53 of 2019, had, by a plaint dated 3.9.2019, sued the appellant for trespass to his parcel No. 10331 Karama Adjudication Section pursuant to a consent to sue issued by the Land Adjudication Officer under Section 8 of the [Land Consolidation Act](#) dated 5.8.2019. The respondent had prayed for a permanent injunction and an order of eviction against the applicant.
5. Through a statement of defense dated 1.10.2019, the appellant opposed the claim, stating that he had no interest in Parcel No. 10331 Karama Adjudication Section said to be in Sheet No. 217. On the contrary, the appellant averred that it was the respondent who had invaded his land in Sheet No. 215. Further the respondent averred that there was a pending ELC Suit No. 67 of 2019, which the respondent was aware of, for he was the defendant and had sworn a replying affidavit thereto dated 30.9.2019.
6. From the record of appeal, when the matter came up on 3.3.2020, the issue of jurisdiction was raised, and parties were directed to file submissions on it. The appellant filed written submissions dated 20.3.2020 that under Section 26 (3) of the [Land Consolidation Act](#) (Cap 283) and 29 (1) of the [Land Adjudication Act](#) (Cap 284), the appellant had not exhausted the internal dispute resolution mechanisms under the statutes before moving to court to seek for relief. Reliance was placed on Nicholas Mugambi & another (suing as the legal representative of the estate of Peter Etharia M'Kailibi) & others vs Zakary Baariu & others (2018) eKLR.
7. The respondent relied on written submissions dated 11.3.2020. It was submitted that the appellant was the objector in Objection No. 3160 over parcel No. 10331 Karama Adjudication Section that was heard and determined in his favor, and hence, if the decision aggrieved the respondent, he ought to have preferred a minister's appeal or filed judicial review proceedings.
8. The respondent submitted that instead, the appellant resorted to criminal charges against him, and after being served with summons in this suit, he filed ELC No. 67 of 2019, which was consolidated with this matter on 4.2.2020. Again, the respondent submitted that this suit was not over the A/R decision, but because the respondent had interfered with the suit land after the land adjudication officer implemented the A/R decision, hence the restraining and eviction orders sought.
9. The respondent reiterated that he was satisfied with the demarcation officers' decision and, therefore, had nothing to appeal against to the minister or prefer judicial review proceedings. The respondent submitted that the matter before the court was for enforcement orders which jurisdiction falls under the court. He termed the appellant suit as the one filed without exhausting the internal dispute mechanism under the law.
10. Through a ruling dated 26.1.2021, the trial court held that it had no jurisdiction to hear and determine the suit and struck out suit No. 67 of 2019. By an application dated 10.9.2021, the appellant sought for review of the orders made on 26.1.2021. The grounds were that parcel No. 5294 Karama Adjudication Section, the subject matter in the respondent Suit No. 67 of 2019, had not been a subject of objection proceedings at the adjudication process, under the relevant statutes and that the reliefs sought in the main suit could not be obtained in any other forum apart from the court.
11. The application was supported by an affidavit sworn by Joel Mworira Mwirabua on 9.9.2021, attaching a copy of a confirmation letter for Parcel No. 5294, a consent to sue, a copy of the memorandum of appeal he attempted to file and was told the title deed was about to be issued. He urged the court to



find that it had jurisdiction to hear the matter. The application was filed by the firm of Frank Gitonga & Co. Advocates pursuant to a notice of change of advocates filed on 10.9.2021. When the matter came up on 27.1.2022 counsel for the respondent raised an issue under Order 9 Rule 9 of the Civil Procedure Rules. He sought time to raise the issue on a preliminary basis.

12. By a ruling dated 24.2.2022, the trial court upheld the objections and struck out the application as filed by a law firm improperly on record. The appellant appeals to have filed another application dated 10.11.2021 seeking an amendment of the plaint whose effect was to change the description of the suit property to read parcel No. 5294 Karama Adjudication Section and the based outcome as Tigania Magistrates Criminal Case No. 1029 of 2019 and 2071 of 2017.
13. Additionally, the appellant filed an application dated 28.2.2022 seeking leave for the law firm of Frank Gitonga and Co. Advocate to come on record on behalf of the appellant. The 2nd prayer was for review of the orders of the court made on 26.1.2021. In a ruling delivered on 5.5.2022, the trial court granted leave to the firm of Frank Gitonga and Co. Advocates to come on record for the appellant but declined to review its orders.
14. Through a memorandum of appeal dated 3.6.2022, the appellant appeals against the said ruling on the grounds that the trial court:
 - i. Erred, in fact and law for finding that it had no jurisdiction to hear the suit.
 - ii. Failed to recognize that the suit land was not subject to the dispute resolution mechanism under Cap 284.
 - iii. Failed to find that by virtue of the consent to sue under Section 30 of Cap 284, it had jurisdiction to hear and determine the suit.
 - iv. Failed to appreciate that there were new and important matters that were not within the knowledge of the appellant hence the need to review its orders.
 - v. Disregarded the uncontroverted fact that Karama Adjudication Section had closed its land adjudications register; hence, the remedies sought could only be granted by the court.
 - vi. Determined the matter against the weight of material on record.
15. With leave of court parties were directed to canvass the appeal through written submissions, which the court has duly considered as provided under Order 42 Rule 16 of the Civil Procedure Rules.
16. The mandate of this court under Order 42 Civil Procedure Rules, as read together with Section 78 of the *Civil Procedure Act*, is to re-look afresh at the lower court record and come up with independent findings as to facts and the law, while aware that the trial court had the benefit of seeing and hearing the witnesses first hand. See *Gitobu Imanyara & others vs AG (2016) eKLR*.
17. In *Selle & another vs Associated Motor Boat Co. Ltd & others (1968) E. A 123*, the court observed that it was not necessarily bound to accept the findings of fact by the court below and that an appeal was like a retrial by reconsidering the evidence, evaluating it and drawing its conclusion.
18. The single most important question for my determination is whether the trial court, based on the material before it and those brought to its attention through application for review, had jurisdiction to hear and determine the suit as framed by the parties. Jurisdictional questions are so central and determinative that it is fundamental and overarching. Once raised, it has to be determined preliminarily. Without jurisdiction, a court has to down its tools; otherwise, it will be undertaking futile proceedings.



19. In *Owners of Motor Vessel Lillian "S" vs Caltex (K) Ltd (1989) KLR 1*, the court observed that the issue of jurisdiction should be raised at the earliest opportunity and decided by the court right away, for jurisdiction was everything, without which a court cannot make one more step.
20. In this appeal, the issue of jurisdiction had not been pleaded in the statement of defense dated 1.10.2019. Instead, the respondent pleaded that there was another matter over the suit land, namely Tigania PMCC No. 67 of 2019, between the same parties in the said court. By an order dated 4.2.2020, the two files were consolidated with the operative file remaining, file suit No. 53 of 2019. In the file suit P. No. 67 of 2019, the suit land was described as parcel No. 5294 Karama Adjudication Section. A consent to sue had been issued dated 19.9.2019, as well as a confirmation letter on ownership.
21. The land adjudication and settlement office had indicated that the section was at the objection stage in the adjudication process. The respondent had pleaded that parcel No's. 5294 and 10331 were different parcels of land and were of different sizes and in different localities, going by an affidavit sworn on 30.9.2019, which the appellant has unfortunately omitted in his record of appeal. The proceedings and pleading in Tigania PMC ELC No. 67 of 2019 have not also been included in the record of appeal.
22. Be that as it may, a preliminary objection has by way of jurisdiction had been raised by the respondent who had also, in his Suit No. 53 of 2019, relied on a consent to sue dated 5.8.2019 to enforce his occupation interest over parcel No. 10331 Karama Adjudication Section against the appellants which as indicated above was disputed to the extent that it had no relationship with parcel No. 5294 as claimed by the appellant.
23. A preliminary point of law as defined in *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) E. A 696*, is a pure point of law that has been pleaded or arises out of clear implication of the pleadings, if argued, may dispose of a suit. It includes a plea of limitation of time or jurisdiction.
24. The jurisdiction of a court is either a creature of *the Constitution* or a statute. The jurisdiction of the court on matters of land falling under the adjudication process is ousted by Section 30 of the *Land Adjudication Act* and Section 26 of the *Land Consolidation Act*. In *Tobias Achola Osidi and others vs Cyprianus Ogalo & 7 others (2013) eKLR*, the court observed that it could only exercise a supervisory, enforcement and interpretative role to ensure that the ascertainment of interests and rights under Cap 283 and Cap 284 adheres to the law.
25. In *Stephen Kungutia & others vs. Severian Nchulubi, Nyeri Civil Appeal No. 221 of 2010*, the court observed that a claim for enforcement of the right to the land was properly before the court. In *Amaranth (suing on behalf of the estate of the late Amarnath Gupta vs Kazungu & others (Civil Appeal E033 of 20221 (2023) KECA (1280) 1 KLR (27th October 2023) (Judgment)*, a preliminary objection had been raised on the jurisdiction of the court to sit on appeal of a minister's decision, through a suit instead of a judicial review application.
26. The court cited *Julia Kaburia vs. Kabeera & others (2007) eKLR* that by Section 30, (1) (2) of Cap 284, the jurisdiction of the court is ousted once the process of the adjudication of land commences until the adjudication register has been made final. The court said that the consent envisaged under Section 30 of the Act to institute or continue with civil proceedings was a consent to file a suit to challenge the decision of the land adjudication officer, himself or the merits of his decisions. Instead, the court said that a consent is given to a person to file a suit or continue with a suit against persons who have competing claims on the land under adjudication. The court held that once the process of land adjudication has come to its logical conclusion, it could not be re-opened otherwise than the manner



contemplated by the law by pursuing a judicial review under Article 47 of *the Constitution* and the *Fair Administrative Action Act*.

27. It is trite law that pleadings and issues bind parties and the court, which has no room for any other business, apart from what parties have brought before it for determination. Courts determine the issues that arise from pleadings or have been framed for their determination. See *Raila Odinga & others vs Independent Electoral and Boundaries Commission & others* (2017) eKLR. In *Kimani & others vs Kenya Revenue Authority & others* (2021) KESC 43 (KLR) (16th July 2021) (Judgment), the court observed that in determining whether a court has jurisdiction, it looks at the pleadings.
28. In the pleadings before the trial court, in the two files, it is apparent that each of the parties was armed with consent to sue from the land adjudication officer under Cap 284 to enforce their interests over the land said to be under adjudication. There were two parcels of land namely: parcel No. 5294 and 10331 Karama Adjudication Section. Each of the parties was alleging trespass against the other. The locality and the size of the two parcels of land were disputed. None of the parties was challenging the roles of the land adjudication bodies or its decisions. The mover of the preliminary objection was also a primary party in the consolidated file.
29. The outcome of the preliminary objection was to strike out the two suits. Given that the mover had a separate suit, I do not think the respondent had intended to turn the gun against himself as well as the opponent, when his lawyer was moving the preliminary objection unless he was doing so mischievously to defeat the cause of justice and more so to frustrate the appellant's claim.
30. The issue of jurisdiction, as raised preliminarily, was not a pure point of law. I say so because even in the written submissions by the parties to the preliminary objection, they relied on materials of facts and not the law. The issue before the trial court required evidence of the status of the two parcels of land, size, locality and encroachment the alleged.
31. A proper preliminary objection serves two purposes of merit as held in *IEBC vs. Jane Chepengerer and others* (2015) eKLR. It serves as a shield for the originator of the objection against the profligate deployment of time and other resources and secondly, serves the public cause of sparing judicial time to only deserving cases. The court said that a preliminary objection should not be used as a sword for winning a case otherwise destined to be resolved judicially and on the merits.
32. The facts, as pleaded by the parties at the lower court, did not point out any issue requiring a resort to the internal dispute mechanism under Cap 284 or 283. Such adjudication bodies have no powers to issue and enforce temporary injunctions or eviction orders. Trespass falls under the jurisdiction of regular courts. I think the trial court needed to investigate the facts of the two suits as to the origin of the two parcels of the land, status of the same and land adjudication process. The parties contested those facts. See *Oraro vs Mbaja* (2005) eKLR.
33. I find the appellant was, therefore perfectly in order to seek for review of the orders of the court, in my view on errors apparent on the face of the record. The upshot is that I allow the appeal, set aside the rulings made on 26.1.2021 and 5.2.2022. The two suits shall be heard on merits by the trial court other than P.M Wechuli S.R.M. Costs to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 2ND DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Miss Gitonga for the appellants



Ondieki for the respondent

HON. C K NZILI

JUDGE

