



**M'aruyaru v M'itaru (Environment and Land Appeal E046 of 2021)
[2023] KEELC 15861 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E046 OF 2021
CK NZILI, J
MARCH 1, 2023**

BETWEEN

LYDIA MUNYATTA M'ARUYARU APPELLANT

AND

RAPHEL MUKILA M'ITARU ALIAS RAPHAEL ITARU RESPONDENT

*(Being an appeal from the judgment and decree of Hon. G. Sogomo
P.M in Tigania PMCC ELC NO. 195 of 2021 delivered on 18.3.2018)*

JUDGMENT

1. Before the court is a memorandum of appeal dated 24.3.2021, in which the appellant who was the plaintiff in the primary suit appeals against the ruling delivered on 18.3.2018 by the trial court on the basis that the court:- erred in law and fact by considering issues not raised by any of the parties or the court; misconstrued the application of Section 16 of the Government Proceedings Act (Cap 40); failed to appreciate a title deed had been issued for the suitland; failed to apply the applicable land registration regime; failed to find that it had jurisdiction to hear the matter based on the disclosed cause of action and lastly went against the circumstances of the case and the law applicable.
2. This being the first appellate court, it is expected that it shall rehearse, re-hear or re-appraise itself on the entire record of the lower court and come up with its own independent findings on both facts and the law. This was reiterated in *Peters vs Sunday Post Ltd* (1958) EA 424 as well as *Abok James Odera t/a AJ Odera & Associates vs John Patrial Machira t/a Machira & Machira & Co. Advocates* (2013) eKLR.
3. In the lower court the appellant by a plaint dated 16.10.2018 sued the respondent alleging fraud in causing parcel No. Tigania West/Uringu II/1059 to be registered in his name and the subsequent issuance of a title deed on 12.7.2018 during the pendency of Meru H.C JR No. 59 of 2010 in an attempt to defeat a decree in that suit. She sought for the cancellation of the said title deed, rectification of the register and the register to reflect her as the true owner. Alongside the plaint the appellant



filed a notice of motion dated 10.10.2018 seeking for inhibition orders against the Land Registration No. Tigania West/Uringu II/1059 to which application, she attached a copy of the decree in the earlier suit, and an official search for the suit property as annexures LM “1” & “2” respectively. In the said annexures, the decree indicated that the order by the District Land Adjudication and Settlement Officer dated 1.4.2010 in Objection No. 7 touching on Parcel No. 1059 was quashed on 14.1.2015 whereas the title deed in respect to the said parcel had been registered and title deed issued in favour of the respondent on 12.7.2018. The plaint was accompanied by witnesses’ statements dated 9.9.2018.

4. The respondent opposed the claim through a defence and counterclaim dated 28.11.2018. He stated that the decree in the judicial review case did not touch on the ownership of the suitland which land he had gathered in 1966 and which the appellant allegedly colluded with the Land Adjudication Officer to defraud him. He urged the court to declare him as the valid owner of the land. In a reply to defence and defence to counterclaim dated 5.12.2018, the appellant termed the defence as a mere denial and insisted that the decree nullifying the award was made on 27.2.2015. Both parties filed and served witnesses statements dated 2.11.2019 and 20.3.2019 respectively.
5. On 13.2.2020, the record indicates that the trial court on its own motion directed parties to address it through written submissions on Section 16 of the [Government Proceedings Act](#), which directives parties complied with by filing written submissions dated 3.3.2020 and 18.2.2020 respectively. Through a ruling delivered on 18.3.2021, the trial court struck out the suit with costs for lack of jurisdiction based on Sections 17 and 26 (3) of the [Land Consolidation Act](#) as read together with Sections 26 (1) & 29 of the [Land Adjudication Act](#). The court cited with approval also *Abdalla Mangi Mohamed and others vs Lazarus Benja & others* (2012) eKLR, *Mugambi Nicholas & 5 others vs Zachary Baariu & 6 others* (2018) eKLR, *Tobias Achola Osidi and 13 others vs Cyprianus Otieno Ogola & 6 others* (2013) eKLR and Section 16 (1) of the [Government Proceedings Act](#) (Cap 40).
6. It is this that ruling this court is called upon to determine on its legality and to which the parties with the leave of this court opted to canvass the appeal through written submissions dated 14.10.2022 and 27.1.2023 respectively.
7. The applicants have submitted that the judicial review mechanism had already been used to challenge the Adjudication Officer’s decision and what was before the trial court was a claim based on a title deed issued allegedly fraudulently, based on Section 26 of the [Land Registration Act](#), despite the existence of a valid court decree which in any way did not touch on the [Land Adjudication Act](#) or the [Land Consolidation Act](#).
8. Further, as to the applicability of the [Government Proceedings Act](#), the appellant submitted that the suit before the trial court had no nexus with the [Government Proceedings Act](#) since the government was not a party to the suit and none of the prayers sought were touching on the government. As to the issues of fraud, the appellant submitted that she had pleaded the issuance of a title deed which was in her view illegally obtained hence did not require a consent to sue the respondent under either the [Land Consolidation Act](#) or the [Land Adjudication Act](#). Given that the issues raised by the trial court were suo moto, the appellant submitted it was an unfortunate injustice visited upon her by the court to decline jurisdiction which had properly been invoked.
9. The respondent took the view that the relief sought in the plaint were in the nature of specific performance to have the government cancel the title deed which was not possible under Section (6) (1) of the [Government Proceedings Act](#) and since jurisdiction was everything as held in *Motor Vessel Lilian “S” vs Caltex oil (K) Ltd* 1989 KLR 1, the trial court was right to decline jurisdiction. The respondent submitted that the judicial review decision only quashed the Adjudication Officer’s decision but did not determine the ownership of the suitland. Further, it was submitted that the order of certiorari was



issued late when title deed had already been issued. The court was asked to dismiss the appeal as it lacks merits. Reliance was placed on *Hitenkumar Amritlal vs City Council of Nairobi* (1982) eKLR.

10. The court has gone through the pleadings, the grounds of appeal and the written submissions. The single point for the court's determination is whether the trial court had jurisdiction to determine the suit based on the facts as pleaded and the documents accompanying the respective pleadings.
11. It is trite law that parties are bound by their pleadings and issues flow from pleadings. In the case of *Raila Odinga vs IEBC* (2013) eKLR, the Supreme Court of Kenya took the view that in an adversarial system, parties are the ones who chart the path to determine their respective claims by pleading the relevant facts and setting out the issues unless the court has framed some in line with Order 15 Civil Procedure Rules.
12. In this appeal, the respondent in the defence and counterclaim dated 28.11.2018 never raised any defence based on Section 26 (3) of the *Land Consolidation Act*, Sections 26 (1) and 29 (9) of the *Land Adjudication Act* and Section 16 (1) of the *Government Proceedings Act*. As at the time the trial court sought for written submissions on Section 16 of the *Government Proceedings Act*, none of the parties had raised the issue in their respective pleadings.
13. More importantly, the appellant had pleaded that a title deed had been issued while there was a binding decree from a superior court in 2015 quashing the award relating to the parcel number before the land transformed into registered land. The respondent in his defence and defence to the counterclaim had admitted possession of a title deed for LR No. Tigania West/Uringu II/1059. This is clear at paragraph 13 of the counterclaim. It is on this fact alone that the respondent had prayed in the counterclaim to be declared as the registered owner devoid of any alleged fraud by the appellant in the plaint.
14. The trial court was also faced with the application dated 16.10.2018, to which a copy of an official search for the suit property was attached. The trial court proceeded to issue inhibition orders against the said title deed. The pleadings and documents before the trial court were clear as to the land falling under the *Land Registration Act* and not both the *Land Consolidation Act* and the *Land Adjudication Act*. As to the issue of the application of the *Government Proceedings Act*, again the appellant was directing her claims against the respondent who, while aware of a valid decree of the court proceeded to collect a title deed in his favour in circumstances allegedly bordering on illegality and or procurement through misrepresentation or unprocedural means. The appellant had properly invoked the jurisdiction of the court under Sections 24, 25 and 26 and 80 of the *Land Registration Act*. Whether or not the appellant should have sued the government through the land registrar was besides the point since a suit should not be defeated solely on account of misjoinder or non-joinder of parties as provided under Order 1 of the *Civil Procedure Rules*.
15. In view of the foregoing, I conclude that the trial court erred in law and in fact in declining jurisdiction. The appeal is allowed with no orders as to costs and the file remitted for hearing on merits.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF MARCH, 2023

In presence of:

C/A: Kananu

Mwendwa for respondent

Kiogora Nganga for appellant



HON. C.K. NZILI

ELC JUDGE

