



**Mbiriga v Mutuamwari & 9 others (Environment and Land Appeal  
E097 of 2021) [2023] KEELC 18765 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18765 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E097 OF 2021**

**CK NZILI, J**

**JULY 12, 2023**

**BETWEEN**

**STANLEY KITHINJI MBIRIGA ..... APPELLANT**

**AND**

**NDEREBA JOHN MUTUAMWARI ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL NKUNJA MANENE ..... 2<sup>ND</sup> RESPONDENT**

**JOTHAM N'THAMBURI M'TIWAMWARI ..... 3<sup>RD</sup> RESPONDENT**

**JOHN MWENDA GITONGA ..... 4<sup>TH</sup> RESPONDENT**

**FRIDAH MAKENA TARATICIO ..... 5<sup>TH</sup> RESPONDENT**

**KIRIMI MUGERA M'IKIUGU ..... 6<sup>TH</sup> RESPONDENT**

**JOSPHAT KINOTI M'ITHINJI ..... 7<sup>TH</sup> RESPONDENT**

**JULIUS GICHURU NKANATA ..... 8<sup>TH</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER .... 9<sup>TH</sup>  
RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 10<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate's Court at Meru  
delivered on 10.8.2021 in Meru ELC No. E009 of 2020 by D.W Nyambu – C.M)*

**JUDGMENT**

1. The appellant, who was the plaintiff at the lower court, faults the decision made on 10.8.2021 on the basis that:-



- i. It was erroneous and contrary to the evidence on record.
  - ii. It failed to analyze all the evidence.
  - iii. It failed to consider that consent to sue had been sought and obtained from the land adjudication officer.
  - iv. It dismissed the suit at an interlocutory stage.
  - v. It was bad in law, unjust, and offensive to justice.
2. As a first appeal, the law requires that this court re-assesses or re-looks at the entire lower court record and comes up with independent findings regarding facts and the law as held in *Selle & a nother v Associated Motor Boat Co Ltd & others* (1968).
  3. By a plaint dated 5.10.2020, the appellant had sued the respondent, alleging that he was the recorded owner of land parcel LR no Ruiru/Rwarera/1106, measuring approximately 15.3 acres, had been used or possessed for over 27 years. He had averred that in 2016 the 9<sup>th</sup> respondent conspired with the other respondents and fraudulently altered the adjudication register; land remained in his name from the register subdivided the land into new Parcels no's 4626, 9346, 9347, 9348, 9349, 3996, 11171 & 2694 to the 1<sup>st</sup>-8<sup>th</sup> respondents.
  4. Consequently, the appellant averred that he suffered loss and damage for he could not use his land. He prayed for a permanent injunction restraining the 1<sup>st</sup> – 8<sup>th</sup> respondents from interfering with his use and enjoyment of the land; a declaration that he subdivisions and the new parcel numbers belonged to him; a declaration that the re-demarcation by the 9<sup>th</sup> respondent was illegal unprocedural and of no effect in law; reversal of his acreage and parcel number on paper and on the ground to its original position and status before interference by the 9<sup>th</sup> respondent and general damages for the loss or damage. The plaint was accompanied by a consent to sue issued by Justus Levu District Land Adjudication and Settlement Officer Imenti north/South/Central and Buuri under [Cap 284](#) LSK dated 10.9.2019 and a notice to sue the Hon. Attorney General dated 12.8.2020.
  5. Similarly, the suit was filed alongside a notice of motion dated 5.10.2020 seeking a restriction and a temporary injunction to preserve the property pending a hearing and determination of the suit.
  6. The respondents were duly served with the summons to enter appearance and the application. Affidavits of service were filed indicating the service of summons dated 4.11.2020, 11.1.2021, and 17.2.2021, all sworn by Jane Thuo advocate. The 9<sup>th</sup> & 10<sup>th</sup> respondents filed an appearance dated 5.11.2020 and grounds of opposition dated 5.11.2020 on the basis that the suit was defective, misconceived, frivolous, vexatious, mischievous, an abuse of court process, that the jurisdiction to make restrictions lay with the land registrar; an appeal based on dissatisfaction with an objection against any dealings with the land under the [Land Adjudication Act](#) was with the Minister as an appeal or in court by way of a judicial review and therefore in the absence of any exceptional circumstances, the suit was improperly before the court since there existed a statutory remedy. As regards the service of summons to the rest of the respondents, an affidavit of service sworn by Joel Maitethia M'Rukunya on 20.5.2021 was filed.
  7. With leave of court the appellant filed a supplementary affidavit sworn on 3.2.2021 on 4.2.2021, where he attached a copy of the objection as an annexure marked SKM "1". He averred that the suit land was still under adjudication; hence, seeking restrictions orders from the land register was impractical. He further averred that the objection was determined on 25.7.2017 and that the court has inherent jurisdiction, it could hear a claim based on the acts of illegality perpetuated by the respondents resulting



in the extinguishment of his land rights. By a ruling dated 10.8.2021, the court found that it had no jurisdiction since the appellant had failed to exhaust the alternative mechanisms under both the [Land Adjudication Act](#) and the [Land Registration Act](#) before moving to court.

8. The court has carefully reviewed the lower court record, the grounds of appeal and the law. The singular issue for my determination is whether the trial court had jurisdiction to entertain the suit. From the lower court pleadings, it appears that the respondents did not file any defence to the plaint dated 5.10.2020. The consent to sue dated 10.9.2019 and issued by the 9<sup>th</sup> respondent had not been challenged or withdrawn by the time the 9<sup>th</sup> – 10<sup>th</sup> respondents filed the grounds of opposition to the notice of motion dated 5.10.2020.
9. In the affidavit supporting the said application, the appellant had attached a letter by the 9<sup>th</sup> respondent dated 26.6.2020 confirming that Parcel no. 1106 Ruiru/Rwarera Adjudication Section measuring 15.30 acres belonged to the appellant following the correction of the acreage which had been raised by a letter dated 24.6.2020. The appellant had also attached a letter to the DLASO dated 26.3.2009, the objections determined on 25.7.2017 and a letter by the 9<sup>th</sup> respondent dated 3.7.2020 confirming the existence of subdivision nos. 4626, 9346, 9347, 9348, 3996 and 11171, Ruiru Rwarera Adjudication Section in favour of the 1<sup>st</sup> – 8<sup>th</sup> respondents.
10. From the annexures and list of exhibits before the trial court it is quite evident that the suit parcels of land were not falling under the registered land at the time. It does not matter that the application before the trial court was seeking for restrictions orders under Section 76 of the [Land Registration Act](#). No title deeds had been attached to the application for the court to make a finding that the suit parcel(s) of land were falling under the [Land Registration Act](#). The appellant and his lawyers on record may have been mistaken in seeking for prayers not supported by their pleadings.
11. On the 2<sup>nd</sup> issue as to whether the dispute before the trial court ought to have been subjected to the [Land Adjudication Act](#), the pleadings before the trial court had not been challenged by way of a statement of defense by the 9<sup>th</sup> and 10<sup>th</sup> respondents by the time the ruling was delivered. The same case applied to the 1<sup>st</sup> – 8<sup>th</sup> respondents. In paragraphs 6, 8, 9 & 11 of the plaint, the appellant had pleaded fraud, collusion, illegality, and fraud in the manner that the initial parcel of land was subdivided, his acreage reduced, his name removed, and replaced with that of the 1<sup>st</sup> – 8<sup>th</sup> respondents. He had placed the blame on the 9<sup>th</sup> – 10<sup>th</sup> respondents, hence his prayers for the cancellation/reversal of the record to its original size and names, declaration that the changes to the maps and registers were illegal and unprocedural, and general damages for the loss and damage. Issues are determined only based on and in the context of the factual background. In [John Kabwe v Rose Mwonjiru & others](#) (2021) eKLR, the court observed that it could not have the intention of the legislature to insulate the land adjudication process from the scrutiny of courts where alleged irregularities and breach of rules of natural justice had occurred. See [Tobias Ochola Osidi & others v Cyprian Otieno Ongalo & 6 others](#) (2013) eKLR, [Daniel Murungi Mwirabua Anampiu v Jeremiah John alias Jeremiah Guantai](#) (2019) eKLR. The court also observed that where a Land Adjudication Officer had issued consent to sue, he was deemed to know that there was a process of appealing to the Minister, which was also a co-shared power with courts, especially on matters relating to excesses in the land adjudication process.
12. In this appeal, the appellant raised matters relating to fraud and irregularities during the adjudication process. Such issues could not have been handled elsewhere than before the trial court. The trial court, in my considered view, had jurisdiction to hear and determine the matter on merits instead of dismissing or striking it at its infancy even before pleadings had closed.
13. I find the appeal with merits. The same is allowed and the file is remanded to the trial court to be heard on its merits. Costs to the appellant.



**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 12<sup>TH</sup> DAY OF JULY 2023**

**In presence of**

C.A John Paul

Miss Thuo for appellant

1<sup>st</sup> – 8<sup>th</sup> defendants in person

Mbaikyatta for 9<sup>th</sup> – 10<sup>th</sup> respondent

**HON. CK NZILI**

**ELC JUDGE**

