



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 96 OF 2019**

**PETER NCHEBERE .....APPELLANT**

**VERSUS**

**M'INANGA M'AKWALU .....1<sup>ST</sup> RESPONDENT**

**KIUNGA M'AKWALU .....2<sup>ND</sup> RESPONDENT**

**SILAS ITONGA.....3<sup>RD</sup> RESPONDENT**

**STEPHEN MUGAMBI AMBURUGUA .....4<sup>TH</sup> RESPONDENT**

***(Being an appeal from the Ruling delivered in Tigania ELC No. 80 of 2017 on 4<sup>th</sup> July 2019 by Honorable G. SOGOMO***

***Principal Magistrate)***

**JUDGMENT**

1. The appellant was the plaintiff in the lower court where he instituted the suit vide a plaint dated 19/04/2011 seeking the following orders;
  - a. A declaration that the Parcel Numbers 3543, 1684, 1504, and 5930 in Athiga/Athanja/Adjudication Section in Tigania East District (formerly Meru North District) belong to the plaintiff.
  - b. An order directing the District Land Adjudication Officer Tigania East District to transfer Parcel Numbers 3543, 1684, 1504, and 5930 to the Plaintiff.
  - c. An order of permanent injunction restraining the defendants either by themselves and/or through their servants, employees and/or assignees or any person acting on their behalf from evicting the plaintiff from L.R 3543, 1684, 1504, and 5930 in Athiga/Athanja/Adjudication Section in Tigania East District (formerly Meru North District)
  - d. Costs and interests of the suit.
2. It was the appellant's case that he was in possession of all the suit parcels which he has developed extensively from the year 1962, while the defendants have registration numbers from the Land Adjudication Office. That he filed a suit **H.C MISC APPL NO. 18 of 2008** which quashed **Objection No. 107 of 2007** of Area Adjudication Committee Tigania North District, but the decision did not determine the ownership of the said suit parcels and now the defendants are threatening to evict him by force and destroy all his properties.
3. The respondents filed their statement of defence and counter-claim dated 23/08/2011 denying the plaintiff's claim, while seeking a declaration that the suit parcels No. 3543, 1684, 1504, and 5930 in Athiga/Athanja/Adjudication Section belong to them. They also sought a permanent injunction restraining the plaintiff from interfering with the aforementioned suit parcels.
4. On 23/5/2019, the trial court directed parties to address it on the provisions of Cap 283 and 284 Laws of Kenya by way of written submissions. In its ruling which forms the subject matter of his appeal, the trial court stated as follows;

***“This Court upholds the defendant's preliminary objection dated 8<sup>th</sup> July 2015 and for avoidance of doubt the plaintiffs suit fails in limine and this court peremptorily orders that the plaintiff's suit be and is hereby struck out with costs to the defendants.”***
5. The appellant being aggrieved by the decision filed his memorandum of appeal dated 25/07/2019 citing two (2) grounds as follows;-

i. That the learned Principal magistrate erred in law and fact in finding that he had no jurisdiction to hear and determine the appellants claim.

ii. That the learned Principal magistrate erred in law and fact in failing to address the counter claim preferred by the respondents.

6. The appeal was canvassed by way of written submissions. The appellant submitted that there had been objection proceedings in respect to the suit parcels of land which the appellant challenged vide **Meru High Court Miscellaneous Civil Application 18 of 2008** and the said objection proceedings were quashed, though the issue of ownership was never determined by the court. It was further stated that the award in favour of the respondents no longer stands in view of the quashing of the decision of the High court. The appellant also invited the court to note that the trial magistrate did not consider the counterclaim.

7. The respondents submitted that the appellant had jumped the gun by passing the stipulated procedures set out under Section 26(3) of the Land Consolidation Act together with Section 26-30 of the Land Adjudication Act. The appellant ought to have taken his claim to the adjudication officer and there is no evidence that the matter was ever handled by the arbitration committee or the DLASO. Thus the appellant did not exhaust the statutory provisions provided under the act.

8. It was also submitted that the appellant sought orders for the DLASO, Tigania East to transfer the suit parcels to him, but the said DLASO was not a party to the suit.

9. The respondents aver that indeed the trial court lacked jurisdiction to hear the matter and urged the court to dismiss the appeal with costs. They relied on the following cases; **Rose Njiru V Nicholas Muthuri [2018]eKLR**, **Nicholas Mugambi & another (suing as the legal representatives of the estate of Peter Etharia M'Kailibi) & 4 others v Zachary Baariu & 6 others [2018]eKLR** and **Abdallah Mangi Mohamed vs. Lazarus & 5 Others (2012) eKLR**.

#### **Analysis and determination**

10. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and make its own determination, See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123, Kenya Ports Authority vs. Modern Holdings (E.A.) Limited (2017)eKLR**.

11. At this juncture, I must point out that this court is at a loss as to why the trial court in its ruling made reference to a preliminary objection dated 8.7.2015 lodged by the respondents. This is because the ruling which is the subject matter of this appeal is anchored on the directions given on 23.5.2019 where there is no mention of a preliminary objection. Nevertheless, the court will still analyse the matter to determine if this appeal is merited or not.

12. The trial court dismissed the suit on the basis of lack of jurisdiction. To this end, the trial court made reference to the case of **Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited (1989) KLR1**, where Nyarangi JA (as he then was) had this to say:

*“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

13. The trial court had stated that the plaintiff had a statutory obligation to petition the minister in an appeal from the Adjudication officer's decision upon dissatisfaction of the said verdict. That even after this recourse, the trial court would still have been shackled by statutory injunction from disturbing the minister's decision. To this end, the trial court had made reference to the cases of **Mugambi Nicholas & Others vs. Zaachary Baariu & Others Meru ELC 167 of 2011** and **Abdalla Mangi Mohammed & Others vs. Lazarus Benja & Others (2012)eKLR**.

14. The respondents agree with this position stating that the Adjudication statutes provide detailed mechanisms for dealing with complaints in the adjudication process and the appellant has not exhausted them.

15. It is indeed true that the adjudication process is conducted through an elaborate statutory anchored mechanism. The said procedure was succinctly set out in the case of **Martha Kigeu Vs Johana Tibino (2014) e K.L.R** which was quoted with approval in **Republic v Tigania East District Land Adjudication and Settlement Officer & another; Joseph Mathita Ikirima Ex parte Solomon Mworja Samuel [2020] eKLR** as follows;

*“Under Section 13, every person who considers himself to have an interest in land within the adjudication section makes his claim to the recording officer and points out his boundaries to the demarcating officer. If there are two or more conflicting claims to an interest in land, and the recording officer is unable to resolve the conflict, the dispute is submitted to an Adjudication Committee as noted in Section 19. The Adjudication Committee is meant to listen to the conflict and issue a decision. If the Committee is unable to reach a decision on a matter before it, it shall refer the matter to an Arbitration Board. A person affected by a decision of the Committee may also make a complaint to the Executive officer of the Committee and the Executive officer is mandated to refer the complaint to the Arbitration Board. The Arbitration Board hears and determines the matters referred to it by the Committee. The Adjudication officer prepares what is termed as an Adjudication register. This comprises the demarcation map and the Adjudication record. Under Section 24, when the Adjudication register is completed, the Adjudication officer is inter alia supposed to give a 60 days' notice for the inspection of the Adjudication register. Any person who is of the view that the Adjudication register is incorrect, may make an objection to the Adjudication officer in writing within 60 days of the publication of the notice for inspection. The Adjudication officer is empowered to determine the objection.*

*He is also empowered to alter the adjudication register from time to time so as to conform to any objections. Any person aggrieved by the determination of an objection may within 60 days of the determination, appeal to the Minister. After determination of all objections, the Adjudication register is inter alia forwarded to the Chief Land Registrar alongside any list of appeals. The Land Registrar then causes the registration of the parcels of land. Where there is an appeal, a restriction is to be made and registered on the subject land and is to endure until the determination of the appeal. Appeals are determined by the Minister and his decision is final. On such determination, the register may be altered in accordance with the determination. When all appeals have been determined, the Director of Land Adjudication certifies that the Adjudication register has become final”.*

16. As was pointed out in the case of **Republic v Tigania East District Land Adjudication and Settlement Officer & another; Joseph Mathita Ikirima Ex parte Solomon Mworira Samuel [2020] eKLR (supra)**,

*“It is imperative to note that the above procedure is similar to both Acts except that under the Land Consolidation Act Cap 283, an appeal does not lie to the Minister. The decision of the Adjudication officer is final save that the Adjudication officer is mandated to hear the objections with the aid of a committee”.*

17. In **Reuben Mwongela M’Itelekwa (suing as the Legal Representative of the estate of M’Itelekwa M’Mucheke Naituri alias M’Itelekwa Muccheke) v Paul Kigea Nabea & 2 others [2019] eKLR**, I rendered myself on the subject matter as follows;

*“Parties must follow the laid down Dispute Resolution Mechanism provided for under the relevant laws, in this case, the Land Adjudication Act or the Land Consolidation Act”*

18. I have looked at the ruling of Judge Lesiit delivered on 19.11.2010 (found in the original file) in **Meru High Court Miscellaneous Civil Application 18 of 2008**, where an order of certiorari was given quashing the decision of the Land Adjudication Officer (DLASO). What the current appellant had sought in that Judicial review matter was the halting of the administration of the Nthenge oath in the determination of ownership of the suit parcel, but by the time the Judicial review case was being finalized, the oath had apparently been administered. In essence, the Judicial Review case undid whatever had been done by the DLASO purely on the basis that the Nthenge Oath was an unknown dispute resolution mechanism under the adjudication statutes.

19. What this means is that the parties resulted to their previous status before the filing of the objection case. The dispute remains unresolved.

20. Thus I do not agree with the trial court that the appellant ought to have lodged an appeal to the minister, since the decision of the DLASO had been quashed. Nevertheless, I do find that the ascertainment of rights and interests in land ought to be resolved by the statutory bodies established under the adjudication statutes.

21. In the case of **Stephen Kirimi M’Rinturi v Land Adjudication and Settlements Officer – Igembe District & 3 Others; Peter Kumbu Kimunya & Another (Interested Parties) [2020]eKLR**, I stated that;

*“Even though there is a dispute resolution mechanism available under Cap 283 and Cap 284, this court takes cognizance of the fact that courts have jurisdiction to determine some disputes arising out of adjudication process. However, the courts have to be extremely careful so as not to emasculate the powers bestowed upon the adjudication bodies by the statutes. This was aptly captured by Okongo J in Tobias Achola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 others (2013) eKLR held”.*

22. Having concluded that the dispute was not resolved and that the appellant could not have appealed to the minister, the next question is, where should the plaintiff seek redress? The answer lies in the preamble of the Adjudication statutes. The Land Adjudication Act provides that it is;

*“An act of parliament to provide for the ascertainment and recording of rights and interest in community land, and for purposes connected therewith and purposes incidental thereto”.*

23. The Land Consolidation Act similarly provides as follows in its preamble;

*“An Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto”*

24. In **Muthara Njuri Ncheke Council of Elders & another v Committee of Ngare Mara/Gambella Adjudication Section & 2 others [2019] eKLR**, I stated as follows in reference to dispute resolution mechanisms under the adjudication statutes;

*“Thus the dispute resolution mechanisms provided for under this act (read Land Adjudication Act) are geared towards meeting the objectives and goals set out in the preamble”.*

25. In instances, where the proceedings before the adjudication bodies are heard contrary to the law, then such cases can always be re- heard by the said bodies, as long as it is practically possible. This position was aptly captured in the Court of Appeal case of **Peter Kimandui v Land adjudication officer Tigania West District & 4 others [2016] eKLR**, where a dispute was remitted back to the Land Adjudication officer for hearing and determination in accordance with the law.

26. In the present case, the appellant has not availed the objection proceedings in the record of appeal, but I have traced the said document in the original court file. It is not possible to tell which particular statute was being applied in those proceedings, nor can it be discerned as to what stage of dispute resolution mechanism the objection was lodged. The consent obtained by the appellant simply makes reference to the two statutes that is the **Land Consolidation Act** and the Land Adjudication Act.

27. However, I am able to discern that the appellant is the one who lodged the objection proceedings, where the verdict was as follows;

***“Justice denied is justice delayed, and in this case, I do dismiss the objection. Parcels nos. 3543, 1664, 1504 and 5930 to remain recorded under the names of the respondents....”***

28. What resonates from this verdict is that the dismissal of the appellant’s case before the DLASO attracted a negative order in so far as the question of ownership is concerned. Thus even if the decision of the DLASO was quashed, this did not disturb the issue of registration of the suit parcels in the name of the current respondents. It follows that the appellant is back to the position he was in when he was lodging the dispute in the objection proceedings. Thus the process which the appellant initiated ought to be completed in the same forum but in the right way.

29. In the circumstances, I find that the appeal is not merited. I however direct the appellant to lodge his complaint with the Adjudication officer within a period of 21 days from the date of delivery of this judgment, failure to which this window shall be closed upon him. The appellant is condemned to pay the costs of this suit.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF APRIL, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 2.2.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**