



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 110 OF 2019

JOSEPH NDEGWA.....1ST APPELLANT

DOMISIANO KAMENCU.....2ND APPELLANT

VERSUS

M'ABUTU M'RINYU.....1ST RESPONDENT

THE LAND ADJUDICATION & SETTLEMENT OFFICER TIGANIA DISTRICT.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.)

delivered on 22nd August, 2019, in Tigania CM ELC No. 28 of 2017)

JUDGMENT

A. PLEADINGS

1. The appellants in the lower court had sued the respondents for fraudulently colluding in lodging a committee case and having it decided in their absence and awarding the 2nd respondent the **Parcels No's Athinga/Athinja/1965, 1198, 5049, 1965, 1198, 2128, 5049, 2128, 1965 and 1198** respectively which belonged to the appellants. They prayed for the return of the said parcels to their names.

2. By defence dated 23rd December 2009 and 13th October 2010 respectively, the 1st, 2nd and 3rd defendants denied the claim insisted parties were granted a fair hearing at the hearing of objection case **No's 414, 540, 534, 535, 547, 536, 547, 539, 537 and 540** pertaining to the suit land, pleaded the suit was res judicata and bad in law for lack of consent to sue. The 1st respondent stated the objections were heard on 5.8.2000 by the land adjudication officer, the appellants were ordered to vacate the suit land in vain and hence counterclaimed for an order of eviction against the appellants to vacate **Parcel No's 5059, 5018, 1965, 2128 Athinga/Athinja adjudication Section**.

3. As regards the 2nd and 3rd respondent, they denied any fraud as alleged, claimed no consent to sue had been sought and obtained and further stated no notice had been issued and or served to them in line with **Section 13 A Cap 40 Laws of Kenya**.

4. Through a reply to the defence and defence to counterclaim dated 18.1.2010, the appellants averred a consent to sue was validly issued and filed in court, maintained any alleged ruling by the land adjudication officer was done irregularly and contrary to the rules of natural justice.

5. The appellants filed a reply to the 2nd and 3rd respondents' defence maintained a consent to sue was filed together with the plaint and averred the statutory notice to the Attorney General was duly served.

B. PRETRIAL COMPLIANCE

6. The parties complied with **Order 11** wherein the appellants filed a plaintiffs' summary of evidence, list of documents including a consent to sue dated 15.9.2009 and a notice to the Attorney General dated 28.4.2009, list of witnesses dated 14.9.2011. Similarly, the 1st respondent filed a list of documents dated 29.8.2011, case summary and list of issues dated 8.9.2014.

7. The parties filed additional list of witnesses together with witness statements dated 21.8.2017 and 30.8.2017 respectively for the plaintiff and 1st defendant.

C. JURISDICTION

8. On 4.7.2019, the trial court directed parties to address it on the question of whether it had jurisdiction to entertain the suit. The court proceeded to strike out the suit for lack of jurisdiction leading to the instant appeal on the grounds, the trial court:

- i. Misdirected itself on both the facts and the law in finding it had no jurisdiction to determine the suit.**
- ii. Failing to find there was a consent to sue from the land adjudication officer in line with Section 8 (1) of the Land Consolidation Act.**
- iii. Failing to properly apply and interpret Section 8 of the Land Consolidation Act.**
- iv. Misapprehending the provisions of Cap 283 Laws of Kenya.**

D. WRITTEN SUBMISSIONS

9. With leave of court, parties opted to file written submissions in order to dispose of the appeal dated 27.10.2021, 22.9.2020 and 14.10.2021 respectively.

10. The appellants submit the suit land was governed by the **Land Consolidation Act Cap 283** whose **Sections 8 (1) and 26** grants the court conditional statutory jurisdiction to entertain and determine disputes upon the issuance of a consent to sue which in this case was filed alongside the plaint.

11. Secondly, the appellants urge the court to find under **Article 162 (2)** to have a Constitutional mandate and recognition to determine all disputes regarding title to land. They urge the court to find the trial court failed to give effect to **Section 8 (1) of Land Consolidation Act** instead of **Sections 26 and 30 of Cap 283 and 284** respectively.

12. The 1st respondent submits the court had no jurisdiction to entertain the suit. He relies on the *Owners of the Motor Vessel "Lillian S" – vs- Caltex Oil (Kenya) Ltd [1989] eKLR, John K. Malembi –vs- Trufosa Cheredi Mudembei & 2 Others [2019] eKLR* since there are internal dispute mechanisms under **Sections 26 and 29** of the **Land Consolidation Act and Land Adjudication Act** respectively.

13. The 1st respondent relies on *Geoffrey Muthinja Kabiru & 2 Others –vs- Samuel Munga Henry & 1756 Others [2015] eKLR, John Masiantet Saeni –vs- Daniel Aramat Lolungiro & 3 Others, Tobias Ochola Osidi & 13 Others –vs- Cyprianus Otieno Ogola & 5 Others [2013] eKLR, Kanampiu M'Rimberia –vs- Julius Kathane & 3 Others [2009] eKLR, Reuben Mwongela M'Itelekwa –vs- Paul Kigea Nabea & 2 Others [2019] eKLR, Abdallah Mangi Mohamed –vs- Lazxarus & 5 Others [2012] eKLR, Rose Njiru –vs- Nicholas Muthuri [2018] eKLR and Nicholas Mugambi, Dominic Kaindo & 4 Others –vs- Zachary Baariu & 6 Others [2011] eKLR.*

E. ISSUES FOR DETERMINATION

14. Due to the foregoing, the issues for determination in this appeal are:-

- i. What was the law applicable to the suit before the trial court.**
- ii. Did the trial court apply the law properly on the facts, pleadings and evidence presented by the parties.**
- iii. If the decision was proper in law.**

15. The appellants pleaded they sought, obtained and filed the consent to sue dated 15.9.2009. Unfortunately, the appellant filed a record of appeal which does not comply with the provisions of **Order 42 of the Civil Procedure Rules** and **Section 78 of the Civil Procedure Act**.

16. The consent to sue was issued by the District Land Adjudication officer dated 15.9.2009 both under **Section 8 (1) Land Consolidation Act** and **Section 30 of the Land Adjudication Act** regarding **Parcel No's 5049, 5018, 1965, 1198 and 2128 Athinga/Athinja adjudication section**. The consent bears no court receipt stamp for 13.10.2009 and covers only five Parcels of land. It was issued to the 1st appellant to sue the 1st respondent only.

17. The appellants pleaded fraud and collusion which the respondents denied in their defence. Similarly, the 1st respondent filed a defence and counterclaim which the appellants denied its contents through a defence to a counterclaim.

18. Both parties except the 2nd and 3rd respondents filed their list of issues and list of documents.

19. Looking at the pleadings, it is my considered view the dispute was over the legality and the determination of the objection proceedings without adherence to the rules of natural justice.

20. As an illustration of the issues, **Section 9 (1) of the Land Consolidation Act** requires the land adjudication officer to hear the objection alongside a committee. The proceedings attached to the pleadings indicate it was solely determined by the 2nd respondent contrary to **Section 20 and 26** as read together with **Section 9 (1) of Cap 283**.

21. In **Peter Kimandiu and Land Adjudication Officer Tigania West –vs- Zaverio Mithika**, the Court of Appeal determined this aspect and allowed a suit where there was evidence of the decision under **Cap 283** being handled without the aid of a committee.

22. In my view therefore, the decision complained about in this appeal did not fit within the internal mechanism under the **Land Adjudication Act and Land Consolidation Act**. See **Meru Petition No. 5 of 2019 Muthara Njuri Ncheke Council of Elders & Another –vs- the Committee Ngare Mara/Gambella Adjudication Section and 2 Others [2019] eKLR**.

23. Similarly, looking at the issues raised in the pleadings, the trial court could not determine the preliminary objection without looking at the consent to sue and the objection proceedings so as to ascertain whether there was any right of appeal granted to the appellants to prefer an appeal. In doing so, the trial court in my view would have had to look at the facts as pleaded and the documentation thereof.

24. Further, none of the parties had raised any preliminary objection over jurisdiction.

25. Where's the court has jurisdiction to raise matters of jurisdiction **suo moto**, my view is that there was no pure point of law and in any event the trial court ought to have done more probing of evidence and facts before it to determine whether it had jurisdiction or not. See **Oraro –vs- Mbaja [2005] eKLR 141**.

26. The appellants as stated above were questioning the process of the adjudication rather than the determination of interests to land which questions fell under the court. See **Republic –vs- Musanka Ole Runkes Tarakwa Lempaso Ole Kuyoini & 2 Others & Johnson Mbaabu Mburugu & Another –vs- Mathiu Nabea & 9 Others [2020] eKLR**.

27. Lastly the **Land Consolidation Act** does not provide for an appeal to the Minister. See **Republic –vs- Director of Land Adjudication & Another Exparte Stanley Mbiuki [2015] eKLR**. The trial court struck out the suit but failed to determine if the counterclaim could also be entertained.

28. In sum I find the appeal with merits. The same is allowed with costs to the appellants.

Orders accordingly

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2ND DAY OF FEBRUARY, 2022

In presence of:

H. Gitonga - absent

Orimbo for 1st respondent

Kieti for 2nd and 3rd respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE