



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 41 OF 2019**

**KITHELA LIRIA.....APPELLANT**

**VERSUS**

**JACOB NKUNJA KABILU.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. G.N. Wakahiu (C.M.)*

*delivered on 28<sup>th</sup> December, 2021, in Maua CMCC No. 287 of 2011)*

**JUDGMENT**

**A. PLEADINGS**

1. The appellant was sued by the respondent in the lower court claiming that **Parcel No. 62 Akirang'ondu A adjudication section** belonged to his father but the appellant had allegedly unlawfully taken possession of and alleging ownership.
2. The respondent sought for a declaration the suit land belonged to him and a permanent injunction restraining the appellant from interfering with his quiet possession and use.
3. The respondent attached a consent to sue from the Land Adjudication Officer dated 28.10.2011 given under the provision of **Section 8 (1) of the Land Consolidation Act** and further attached a copy of **objection No's 627 and 628** wherein the objection had been dismissed on 28.5.2010.
4. In his defence dated 16.1.2012, the appellant stated he was the recorded owner of the suit land though admitted initially it was in the name of Andrew Kabilu Muciri who passed on and left no surviving offsprings but his brother one Joseph Muciri was appointed a heir by the elders and with approval of the land adjudication committee he was recorded as the owner subsequent to which he sold the land to him, hence enabling him to take vacant possession with effect from 1993.
5. Further the appellant averred upon request and on compassionate grounds, he allocated a portion measuring 0.2 acres to the respondent and his mother who has cunningly adopted the name Kabilu (his late uncle) name so as to purport to inherit the suit land deceitfully knowing his father was Kirema and not Kabilu. He averred the respondent had lodged an **objection No. 628** proceedings which found his claim unmerited.
6. The respondent filed his witness statement dated 25.6.2018, list of documents dated 28.12.2011, list of issues dated 27.8.2018 and case summary whereas the appellant relied on his list of exhibits dated 16.1.2012.

**B. TESTIMONY**

7. In his evidence, the respondent adopted his witness statement stating he was born in 1973, lived on the suit land and that his late father Andrew Kabilu died while he was a minor but left him under the care of his elderly uncle one Joseph Muchiri who also passed on and left him with his wife.
8. He stated upon becoming of age, he went to the lands office and lodged an objection which was dismissed though the appellant agreed to transfer only refunded 0.20 acres of his land now registered in the name of his late uncle's wife's name. He sought for the reminder of 0.83 acres of the appellant's land.

9. He produced the consent to sue dated 18.10.2011 the objection proceedings dated 28.5.2010, and a letter by Joseph Muchiri seeking for the transfer and a request to be recorded in place of deceased recorded owner.

10. On his part, the appellant told the court that in 1993, one Joseph M'Muchiri offered to sell to him the suit land for Kshs. 150,000/= which he paid upon confirming the ownership at Gituine land adjudication offices. Later on they attended the offices with the seller and was transferred the suit land into his name; he took possession and erected a fence after the land officials showed him the boundaries.

11. He told the court the family of the seller was living elsewhere but when he died they were evicted by one M'Kinyua. They requested him to get them somewhere to live hence he gave out 0.20 acres out of his land where she now lives with the respondent. He testified before her death, she transferred the portion to her son the respondent as Parcel No. 5446; who has adopted the name Kabuli. He stated he had stayed in the suit land for 17 years after purchase on a willing buyer - willing seller basis. He produced the transfer letter, a copy of the agreement of sale and the objection proceedings as exhibits.

### **C. JUDGMENT**

12. In its judgment dated 28.12.2018, the court dismissed the suit but issued an order of injunction restraining the appellant from interfering with the suit land until the adjudication process was over leading to this appeal.

### **D. GROUNDS OF THE APPEAL.**

13. The appellant in this appeal complains the trial court issued orders above yet the respondent did not deserve any; should have dismissed the suit; issued conservatory orders without any evidence; failed to appreciate the appellant was in possession of the suit land but proceeded to issue adverse orders against him; gave unjust, biased, unfair and discriminatory orders and lastly exercised its discretion in a wrongful and capricious manner, particularly by failing to award costs, and making orders contrary to the findings.

14. This being a first appeal, the duty of this court is to re-appraise, rehearse and reassess the pleadings, evidence and decision of the lower court and come up with its own findings bearing in mind the trial court had the opportunity to hear the witnesses first hand. **See *Selle & Another –vs- Associated Motor Boat Company Ltd & Others [2016] eKLR.***

### **E. WRITTEN SUBMISIONS**

15. With leave of court, parties opted to dispose of the appeal through written submissions dated 18.10.2021 and the respondent filed on 22.11.2021 respectively.

16. The appellants submits the trial court at page 42 of the record of appeal reached a finding the respondent had failed to prove his case but instead of dismissing the suit, the court invoked **Article 159 of the Constitution** and proceeded to grant orders contrary to the findings.

17. Secondly, it is submitted the respondent did not tender any evidence to support the trial court's findings that a technicality prevented him from subjecting the dispute to the internal dispute mechanism set out under the **Land Consolidation Act** hence wrongfully invoked **Article 159 of the Constitution**.

18. Thirdly, the appellant submitted there were no reasons given for being denied an award of costs contrary to **Section 27 of the Civil Procedure Act**.

19. On the other hand, the respondent submits the trial court was fair in its findings and the decision hence this court should be affirmed by this court.

### **F. ISSUES FOR DETERMINATION**

20. The issues commenting themselves for determination are:-

**a) If the judgment of the trial court is properly grounded in fact and law.**

**b) If the appeal has merits.**

21. The respondent was seeking for declaratory orders and permanent injunction on the suit land which fell under the adjudication process going by the consent dated 28.10.2010. The consent was specific that the nature of the proceedings would be judicial review. Instead the respondent filed a normal plaint.

22. On the other hand the appellant denied the claim but admitted he had given the respondent part of his land approximately 0.20 acres for lack of somewhere to live and raised issues of impersonation and subsequent dismissal of the objection proceedings.

### **G. MODE OF UNDERTAKING CIVIL PROCEEDINGS**

23. The manner of handling civil proceedings is governed by the **Civil Procedure Act, Civil procedure Rules, Practice Directions for Environment and Land Court 2014** and the **Evidence Act Cap 80 Laws of Kenya**.

24. **Order 18 of the Civil Procedure Rules** provides the plaintiff shall begin, state his case and produce his evidence in open court. **Rule 16 (c) of the Hon. Chief Justice Practice Directions of July 25<sup>th</sup> 2014**, require witnesses to adopt witnesses statements in chief, minimally highlight and produce documents and thereafter be subjected to cross examination.

25. In *Surgipharm Ltd –vs- Kenya Invalid & Pharmacy Supplies Ltd & 2 Others [2013] eKLR* the court held a witness statement remains a guide for oral testimony which is subject to cross-examination.

26. **Article 50 of the Constitution** provides every person has a right to a fair and public hearing. **Article 47** to a **Fair Administrative Actions Act**. The **Fair Administrative Actions Act 2015** goes further to state a person has a right to cross-examine and hence that opportunity must be accorded to him.

27. In *Bhandari –vs- Guatama [1964] E.A 606* the court held a party has a right to cross-examine without any hindrance and no evidence affecting a party is admissible unless an opportunity to test its truthfulness and credibility by cross-examination is allowed.

28. In *Kenneth Nyaga Mwige –vs- Austin Kiguta and 2 Others [2015] eKLR*, the court held a document becomes part of evidence of the court only after it is tendered or produced in court by either party and the court admits the documents as evidence. That once admitted the document becomes proved or disapproved when the court applies its judicial mind to determine its relevance and veracity of the contents.

29. In the instant case, there is no record to show the documents by both parties were ever produced and or marked as exhibits. Similarly, there is no record if the plaintiff was cross-examined by the respondent and vice versa.

30. In absence of that elementary process, I am inclined to find that the omission was fatal. See *Presbyterian Foundation (A Company Limited by Guarantee) –vs- Bernard Ole Mereu & 4 others [2021] eKLR*.

31. The respondent was seeking declaratory orders that the suit land belonged to him after his objection proceedings were dismissed by the land adjudication office.

32. **Section 26 of the Land Consolidation Act** provides an aggrieved party considering the A/R inaccurate or incomplete and has sixty days to inform the adjudication office stating the ground of his objection and the adjudication officer shall consider the matter with the committee and may dismiss the objection or ask the committee to take appropriate action.

33. Further, it is provided that no appeal shall lie against any decision by the adjudication officer to dismiss an objection or order the rectification or award compensation.

34. It therefore means under **Land Consolidation Act**, the decision of the adjudication office with the aid of the committee is final. This was the holding in *Reuben Mwangela M’Itekwia –vs- Paul Kigea Nabea & 2 Others [2019] eKLR*. The trial court held the respondent had not exhausted the remedies available. There was no other remedy for the respondent to exhaust hence the reason he was granted a consent to come to court. See *Joshua Mithika & another –vs- Kobia M’Twamwari Kangeri & 2 others [2021] eKLR*.

35. The respondent at paragraph 5 of the plaint was alleging unlawful possession and or ownership of the suit land by the appellant hence the claim for the return of the land to him.

36. In his defence, the appellant admitted at prayer 3 the suit land was initially in the name of Andrew Kabilu Muciri deceased allegedly without offsprings, leading to the altering of the adjudication register so as to enter the name of Joseph Muchiri as the owner who later on sold the land to the appellant.

37. It is averred the respondent resurfaced and the appellant allocated part of the suit land to him. At paragraph 7 of the defence, the appellant averred the respondent had allegedly adopted a deceitful name so as to claim he was an offspring of the initial owner in order to mislead and or hoodwink the court.

38. In my view, the respondent was not directing or alleging any impropriety against the land officials or any officer of government. Consequently, the issue of not joining the District Land Adjudication and Settlement officer did not arise for the appellant who had obtained the land upon transfer by a person purporting to be the heir of the deceased father of the respondent when in actual fact there was a wife and son in existence, upon whose appearance the appellant opted to partially settle them on the suit land.

39. Further, the issue before the court was the manner in which the appellant had acquired the suit land through purchase from a buyer who allegedly had no good title to pass.

40. If the trial court had given the parties an opportunity to cross-examine and produce documentary evidence, all the above issues would have become clear and the court would have not reached the decision it arrived at.

41. Consequently, my conclusion is that the trial court erred in law and in fact in finding it lack jurisdiction to entertain the suit and by extension granting orders of injunction against the appellant until the adjudication process was completed.

42. The upshot is the appeal is allowed with an order that the suit be heard afresh before a different magistrate.

43. Costs shall be in the course given the mistake was on the part of the trial court.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Apollo for Haron Gitonga for appellant

Respondent in person

Court Assistant – Kananu

**HON. C.K. NZILI**

**ELC JUDGE**