



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 137 OF 2019

MAINGI PETER STANLEY 1ST APPELLANT

STANLEY MUKUNA M'AMPURIA2ND APPELLANT

VERSUS

JUDA K.M. IMUNYA 1ST RESPONDENT

DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER TIGANIA EAST..... 2ND RESPONDENT

HON. ATTORNEY GENERAL..... 3RD RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.) delivered on 28th November, 2019, in

Tigania PM E & L No. 123 of 2018)

JUDGMENT

A. PLEADINGS

1. The appellants at the lower court filed a plaint dated 21.9.2016 claiming that their interest on **Land Parcels No. 5175/Karama Adjudication Section** as gathered by the 2nd appellant's father in 2000 measuring approximately 4.21 acres had been fraudulently subdivided by the 2nd respondent in collusion with the 2nd respondent and its committee members into **Parcel No. 2449/Karama adjudication section** approximately 3.21 acres and transferred into the 1st respondents name.
2. The appellants averred they lodged an objection case on 16.7.2012 which was heard in their favour but the 2nd respondent in collusion with the 1st respondent neglected and or refused to implement the decision.
3. Instead, the 2nd respondent on 2.9.2016 summoned the parties, heard and determined another objection in favour of the 1st respondent in a malicious, fraudulent and negligent manner.
4. They sought for an order compelling the 2nd respondent to implement the committee's decision of 16.7.2012 and a declaration that **Parcel No. 2449/Karama adjudication section** belonged to them and lastly, nullification/declaration that the verdict made on 3.9.1996 was illegal.
5. The appellants attached to the plaint a consent to sue dated 6.9.2016, the committee proceedings and a land complaint investigation dated 1.8.2012.
6. The 1st respondent entered appearance, filed a defence and counterclaim dated 12.10.2017 whereas the 2nd and 3rd respondent filed a defence and a notice of preliminary objection dated 4.9.2017 respectively.
7. The 1st respondent denied his Parcel No. 2449/Karama adjudication section was as a result of a subdivision of Parcel No. 5175 Karama adjudication section or that the 2nd appellant's father had allegedly gathered the land in 1920's; or that any decision was delivered by the Land adjudication officer on 16.7.2012. He insisted that he bought an acre from Tarticius Mathiu M'Abuaba's Parcel No. 2060 Karama adjudication section which was consolidated with his other parcels of land all measuring approximately 3 acres or thereabout to make Parcel No. 2449/Karama adjudication section.

8. Further, he averred the 2nd appellant forcefully trespassed into and remained on Parcel No. 2449 Karama adjudication section after cutting the 1st respondent's fence following which he reported to the police and the 2nd appellant was subsequently arrested, charged and convicted in **Tigania PCCCR. 1379 of 2002 Republic –vs- Stanley Mukuna M'Ampuria** for trespass.

9. The 1st respondent pleaded the 2nd appellant lodged objection No. 263 against his Parcel No. 2449 Karama adjudication section claiming that the said land had been superimposed on his parcel of land No. 5175 which objection was dismissed for lack of merits on 3.9.2016 but the 2nd appellant did not appeal to the arbitration board. Instead the 2nd appellant lodged objection No. 859 over **Parcel No. 2060 on 30.8.2016** which was dismissed on 3.9.2016, but did not appeal against the said dismissal under **Cap 283**. He therefore sought for a declaration that he was the sole owner of Parcel No. 2449, an order for the appellants to vacate his land in default an order for a forceful eviction, permanent injunction against the appellants from entering, remaining or interfering with his rights of occupation, use and possession, mesne profits, costs and interests.

10. The 1st respondent attached copies of the proceedings for objection No. 263, letter dated 26.10.2012 confirming ownership of **Parcel No's 5175 and 2449** and proceedings in objection No. 859 over Parcel No. 2060.

11. The 2nd and 3rd respondents denied the allegations of gathering, demarcation and subdivision of the appellants' parcel of land as well as the alleged collusion or negligence. Further, they averred if there were any alleged subdivisions, the same were done legally, lawfully and within the jurisdiction of the 2nd respondent. Lastly, the 2nd and 3rd respondents raised a preliminary objection that the suit offended **Section 3 (1) Cap 39 and Sections 4 (1) (c) and 4 (2) of Cap 22 Laws of Kenya**.

12. The appellants filed a reply to the defence and a defence to the counterclaim dated 10.11.2017. They insisted that following the Ministry of Lands' investigations on 1.8.2017, the findings were in favour of the 2nd appellant. Unfortunately, the 2nd respondent had failed to implement the said decision. They denied ever filing objection No. 859 and maintained that they were summoned for a fresh hearing by the 2nd respondent to which they declined and filed this.

B. PRELIMINARY OBJECTION

13. Parties were ordered to comply with **Order 11 of the Civil Procedure Rules**. On 21.11.2018, the court **suo moto** directed that parties to file written submissions with regard to **Section 26 (3) of Cap 283 and 29 (1) of Cap 284 Laws of Kenya**.

14. Both parties complied and filed written submissions dated 20.11.2019 and 18.11.2019 respectively.

15. The appellants submitted that the suit was based on tort and fraud which was discovered on 2.9.2016 hence the issue could not be handled through a Minister's appeal.

16. On the other hand, the respondents took the view that the appellants should have exhausted the internal mechanisms under Cap 283 and 284 before moving to court. They relied on **Morris Kirema M'Ituru –vs- James M'Amanja M'Rukunga & 2 Others [2018] eKLR**.

17. By a ruling dated 28.11.2019, the trial court struck out the suit with costs to the respondents for lack of jurisdiction leading to this appeal.

18. The appellants have listed twelve grounds of appeal namely: the trial court failed to make a finding that there was a valid consent to sue; failed to adhere to the High Court order that the matter be heard on merits, moved **suo moto** based on technicalities instead of the constitutional requirement to hear matters on merits; acted on a preliminary objection and matters not raised by the respondents; failed to appreciate there was no decision appealable to the Minister since the suit was on tort and fraud; went against the law under **Cap 283 and 284 Laws of Kenya**; condemned the appellants contrary to laws on natural justice hence occasioning miscarriage of justice; failed to consider the appellants' written submissions and the principle that parties are bound by their pleadings.

C. WRITTEN SUBMISSIONS

19. With leave of court, parties agreed to compromise this appeal through written submissions dated 16.11.2021 and 14.12.2021 respectively.

20. The appellants submit under grounds 1, 2 and 10 of the appeal that they had a duly signed and filed consent to sue. They rely on the decision in **William Mutura Kairiba –vs- Samuel Nkari & 2 Others ELC Chuka No. 08 of 2018**.

21. On grounds 3 and 4 of the appeal, the appellants submit the suit was transferred from the High Court to be heard by the lower court on merits and that the cause of action was on tort of fraud and negligence hence the court had jurisdiction to entertain it.

22. As regards grounds 5, 6 and 7 of the appeal, the appellants submit there was a pleading on collusion between the 1st, 2nd and 3rd respondents subsequent to which the 1st respondent filed a defence and counterclaim and the 2nd and 3rd respondents filed a defence raising a preliminary objection under **Section 3 (1) of the Public Authorities Limitation Act Cap 39 and Section 4 (1) (c) and Section 4 (2) of Cap 22** which the court did not determine but acted on another preliminary objection **suo moto**.

23. Touching on ground 8 and 9 of the appeal, the appellants submit the issue was failure by the 2nd respondent to impellent a decision and instead purporting to hear an objection afresh four years down the line after the decision was made; necessitating the filing of the suit.

24. On grounds 11 and 12 of the appeal, it is submitted that the issue was on fraud, collusion and negligence based on non-implementation of a valid decision by the 2nd respondent hence the court had jurisdiction.

25. This being a first appeal, the court is mandated to re-hear, re-assess and re-hear the suit bearing in mind the lower court had the benefit of seeing and hearing the witnesses first hand. See *Peters –vs- Sunday Post Ltd [1958] E.A. 424.*

D. ISSUES FOR DETERMINATION

26. Having gone through the pleadings, proceedings and the judgment of the trial court, the issues for determination are:-

1) Whether the trial court had jurisdiction to entertain the suit.

2) If the ruling made on 28.11.2019 was grounded on law based on the facts and evidence before court.

27. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. See *Independent Electoral Boundaries Commission –vs- Stephen Mutinda Mule & 3 Others [2015] eKLR, Galaxy Paints Co. Ltd –vs- Falcon Guard Ltd [2000] E.A 385.*

28. The appellants pleaded that their parcel of land had been irregularly and or unprocedurally subdivided in favour of the 1st respondent acting in collusion and or fraudulently with the 2nd respondent, and that investigations had established the land belonged to the 2nd appellant but the 2nd respondent had unlawfully refused to implement the decision and instead it on 2.9.2016 purported to re-hear a similar objection brought by the 1st respondent which they objected to and a consent to sue was issued to them to come to court.

29. The 1st respondent filed a counterclaim alleging a purchaser's right from a third party over **Parcel No. 2060** and which was consolidated with other parcels of land to form the subject suit land. He denied any collusion, fraud or negligence. He prayed for declaratory orders that the suit land belonged to him, vacant possession in the alternative forceful eviction and a permanent injunction against the appellants.

30. On its part, the 2nd and 3rd respondents denied any fraud or illegal subdivisions and or collusion. They raised a preliminary objection under **Cap 40 and Cap 22 Laws of Kenya.**

31. The trial court **suo moto** raised the issue of jurisdiction under **Sections 26 and 29 of Cap 283 and 284** respectively.

32. The appellants have complained that the court acted **suo moto** by raising objections not pleaded or brought up by the respondents.

33. In *Republic –vs- Karisa Chengo & 2 Others [2017] eKLR*, the court held a court's jurisdiction flows from either the constitution or statute and that there was nothing wrong for the court to be sure it had jurisdiction in a matter before it since it could arrogate to itself powers it did not possess.

34. The law is that the court is at liberty at the earliest opportunity once jurisdictional issues are raised either by the parties or by itself to determine. See *Owners of the Motor Vessel/LILLIAN "S" –vs- Caltex Oil (K) Ltd. See John K. Malembi –vs- Trufosa Cheredi Mudembei & 2 Others [2019] eKLR.*

35. Turning to the question whether the dispute at hand fell on the court or the internal dispute mechanisms as set out under the *Land Adjudication Act Cap 284 and or Land Consolidation Act Cap 283*, the court has gone through the pleadings, documents attached to the pleadings, witness statements and the list of issues prepared and filed by the parties.

36. **Order 3 Rule 9 Civil Procedure Rules** provides that, no suit shall be open to objection on the ground that a mere declaration order is sought whereas under **Section 80 (1) of the Land Registration Act 2012** the court has powers to cancel or amend a register where the registration was obtained, made or omitted by fraud.

37. In *Mutsonga –vs- Nyati [1984] KLR 425*, the court held allegations of fraud must be pleaded and strictly proved.

38. The appellants' claim was largely based on the failure by the 2nd respondent to impellent a decision made on the rights and interests on land in favour of the 2nd appellant and on an attempt to re-hear the objection afresh contrary to the law and procedure.

39. The role of the court vis a vis the adjudication bodies under both the **Land Consolidation Act** and the **Land Adjudication Act** was considered by **Okongo J** in *Tobias Achola Osindi & 13 Others –vs- Cypriano Otieno ogola & 6 Others [2013] eKLR* as supervisory only to ensure that the process was carried out in accordance with the law and by interpreting and determining any issue or point of law in the course of the adjudication process.

40. The issues raised by the parties in their respective pleadings herein touch basically on points and issues of law particularly whether or not the 2nd respondent could refuse to implement a lawful decision and instead seek to rehear afresh an objection outside the timelines given by the law.

41. The claim as framed was against the respondents allegedly acting fraudulently so as to defeat the accrued rights and interests of the appellants contrary to the law.

42. The issues as raised in my view were beyond the competing claims between the appellants and the 1st respondent. The inclusion of the 2nd and 3rd respondents in the suit and the fact that the 2nd respondent had given a consent for the appellants to institute the suit were clearly indicative that the issues were no longer between the appellants and the 1st respondent. See *Japhet Muriungi Rukunga –vs- Stephen*

43. Therefore, the trial court fell in error both in fact and in law by failing to sustain the suit rather than striking it on a technicality.

44. The upshot is I find the appeal with merits. The same is allowed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 2ND DAY OF MARCH, 2022

In presence of:

Appollo holding brief for Kiogora Mugambi for appellants

Kiautha Arithi for 1st respondent – absent

Kieti for 1st and 2nd respondents – present

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE