



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 10 OF 2020

M'IMANYARA M'ATUNGA.....APPELLANT

VERSUS

M'ITHINYA MUTURANDU THANJERI.....1ST RESPONDENT

LAND ADJUDICATION AND SETTLEMENT OFFICER TIGANIA.....2ND RESPONDENT

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

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

delivered on 4th July, 2019, in Tigania PM ELC No. 15 of 2016)

JUDGMENT

A. PLEADINGS

1. The appellant brought a case in the lower court as the recorded owner of **Parcel No. 333 Akaiga Adjudication Section**, which he had gathered prior to adjudication. He claimed the 2nd and 3rd respondents wrongfully, illegally and unprocedurally entertained the 1st respondent's A/R objection No. 579 and purported to award him his land measuring 1.69 acres as **Parcel No. 5245 Akaiga adjudication section** contrary to previous determinations and committee decisions in his favour over the ownership of land.

2. He prayed for an order directing the 1st respondent to transfer **Parcel No. 5248** which formed part of his **Parcel No. 333** to him.

3. Alongside the plaint, the appellant filed a notice of motion dated 12.2.2016 in which he prayed for temporary orders of injunction. The plaint, summons and application were served upon the respondents on 11.3.2016 and 4.3.2016 respectively and a return of service filed on 18.3.2016.

B. PRELIMINARY OBJECTION

4. It appears that the respondents did not enter appearance but on 6.6.2019, the trial court directed the parties to file written submissions and address the court on provisions of **Section 26 (3) Cap 283 and 29 (1) Cap 284** regarding jurisdiction.

5. Through a ruling delivered on 4.7.2019, the trial court struck out the suit with costs triggering this appeal.

C. GROUNDS OF APPEAL

6. The appellant's complaint in this appeal is that trial court misunderstood the law and the facts, its interpretation, application and hence came to the wrong conclusion that it had no jurisdiction to entertain the dispute.

D. WRITTEN SUBMISISONS

7. With leave of court, parties opted to dispose of the appeal through written submissions dated 21.5.2021 and 18.11.2021 respectively.

8. The appellant submits under ground 1 – 4 of the appeal that the court wrongly applied **Cap 283 and 284** as if they apply to an adjudication

section simultaneously. Reliance is placed on *Peter Kimandiu –vs- Land Adjudication Officer Tigania West & Another [2016] eKLR* on the holding that land in Tigania was falling under **Cap 283** and not **Cap 284**.

9. The appellant's view is that the dispute was governed by Cap 283 hence the application of **Section 29 (1) of the Land Adjudication Act** in striking out the suit was wrong and a mix-up of the law.

10. The appellant submits there was a consent to sue issued on 25.1.2016 at page 31 of the record of appeal which the trial court ignored in its ruling. Reliance is placed on *Reuben Mwongera M'Itelekwa –vs Paul Kigea Nabea [2014] eKLR* and *Stephen Kingutia & 2 Others -vs- Severina Nchulubi [2011] eKLR*, *Douglas Kariithi & Another –vs- Stanley Gatuma [2019] eKLR* and *Jackson Koome –vs- M'Limbugi M'Ikiamba & 2 Others [2018] eKLR*.

11. As regards ground No. 6 of the appeal, the appellant submits the court glossed over the issues for determination without compliance with **Order 21 Rule 34 Civil Procedure Rules** hence failing to analyze both the facts and the law resulting to miscarriage of justice.

12. The 1st respondent submits the trial court was right in applying **Section 26 (3) of the Land Consolidation Act** since the courts powers under the **Act** is only limited to review of any compensation award by the land adjudication officer. Consequently, the appellant's only recourse was an appeal to the Minister if he was dissatisfied with the verdict of the land adjudication officer given that paragraph 10 of the plaint was premised on a decision made by an adjudication officer.

13. The mandate of the appellate court of the first instance is to rehear and reappraise itself over the lower court record and come up with its own conclusion as to facts and law. See *Selle –vs- Associated Motor Board Co. Ltd & Others [2016] eKLR*.

E. ISSUES FOR DETERMINATION

14. Having carefully gone through the pleadings, evidence and the law, the issues for determination are:-

1) Whether the trial court analysed the facts and law obtaining in the matter.

2) If the trial court correctly applied the law applicable to the case and came to the correct decision.

15. The appellant came to court claiming there was an illegal, irregular and or unprocedural A/R objection entertained by the 2nd and 3rd respondents regarding his **Parcel No. 333** which the 2nd respondent unlawfully determined in favour of the 1st respondent leading to the creation of **Parcel No. 5245** which in favour of the 1st respondent.

16. The appellant sought for the retransfer of the said portion to his original **Parcel No. 333 Akaiga adjudication section**.

17. The appellant sought for and obtained a consent to sue dated 25.1.2016 from the District land adjudication officer Tigania East District under **Section 8 (1) of the Land Consolidation Act**. This was to institute a suit relating to land in Akaiga adjudication section, Tigania adjudication area, Tigania District. The nature of the dispute was described as on ownership.

18. In *Rimbera Mwongera M'Itelekwa –vs Paul Kigea Nabea [2014] eKLR* P.M. Njoroge the court took the view under **Section 8 (2) of the Land Consolidation Act** a court should be satisfied that the appropriate consent had been granted by the land adjudication officer before a legal process was instituted and continued over prohibited proceedings under **Section 8 (1) of the Land Consolidation Act** whereas in *Douglas Kariithi & Another –vs- Stanley Gatuma [2019]*, *Mwangi Njoroge J* was dealing with a consent which was not filed together with the plaint. He held a preliminary objection should be raised at the earliest opportunity of the proceedings.

19. In *Peter Kimandiu –vs- Land Adjudication Officer Tigania West & Another*, the court took the view that it was incumbent upon the trial court to interrogate the relevant provisions of the law, since it was mandatory for any decision under the **Land Consolidation Act Cap 283** to involve the committee.

20. In *Stephen Kungutia & 2 Others -vs- Severina Nchulubi [2011] eKLR*, the issue was concerning fraud allegedly done during the adjudication process. The court held where a party was not challenging the decision of the land adjudication officer but rather seeking to enforce a claim, it had jurisdiction to entertain the suit.

21. As a starting point, before a court of law determines whether or not it has jurisdiction to entertain a matter, there is always need to ascertain the facts obtaining in the case. In the instant case, there was no defence on record by the respondents.

22. Though the court had issued summons to enter appearance, and service had been effected, there was no response from the respondents. Even at the determination of this appeal, the respondents have not filed a defence to the claim. The appellant/plaintiff attached demand letters from the 1st respondent dated 18.1.2016. The decision by the 2nd respondent had no indication if the appellant had been given any right of appeal.

23. The trial court did not interrogate the issues particularly to establish at what stage the adjudication process had reached.

24. The trial court made no finding on which legislation was applicable to the adjudication process in the subject land.

25. In the instant case, there was no evidence before the court on what stage the adjudication process had reached so as to make a definite

finding that the appellant ought to have exhausted the internal mechanisms under the relevant laws.

26. There was nothing before the court to guide it on whether the process had been declared final either under **Section 27 of Cap 283** or that the subject parcel had been surveyed and or fixed on the ground in terms of **Sections 14 – 19 of the Land Consolidation Act**.

27. As regards **Cap 284**, the court had to ascertain if the objections under **Section 26** were over and open for appeals to the Minister under **Section 29**. Upon the ascertainment of that, it is only then that a court may be in a position to determine whether or not the suit was properly before it and the applicable law.

28. The appellant's claim was that the respondents had illegally, unlawfully and unprocedurally entertained an A/R objection leading to an illegal subdivision of his **Parcel No. 333** to issue the 1st respondent a portion as **Parcel No. 5245**.

29. At paragraph 13 of the plaint, the appellant pleaded he had a consent to sue. The trial court did not interrogate those details to establish if the register was yet to be declared final or not.

30. Assuming the adjudication process was under **Cap 283**, there is no room for a Minister's appeal since the determination of the land adjudication officer and the committee is deemed final unlike under the **Land Adjudication Act** where a party may appeal to the Minister.

31. The trial court ought to have given the parties time and an opportunity to put in written submissions together with pleadings before embarking on determining a preliminary objection over jurisdiction without clear facts.

32. Similarly, the appellant had pleaded illegalities/impropriety by the 2nd and 3rd respondents in unprocedurally entertaining an A/R objection and proceeding to subdivide his land.

33. The appellant was seeking the court to establish if the adjudication process was done in line with the law.

34. In my mind, the court ought to have heard the matter on merits instead of determining the case on technicalities based on unclear facts. See *Kithela Liria –vs- Jacob Nkunjia Kabilu [2022] eKLR, Adita Mwikamba M'Imwili –vs- John Mung'athia M'Marigu [2021] eKLR, Alfred Karumba M'anampiu –vs- Jerusha Muiruri M'Mitaru & 2 Others [2021] eKLR.*

35. Given the foregoing, I come to the conclusion that the appeal herein has 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:

ORIMBO FOR APPELLANT – PRESENT

KABERIA ARIMBA FOR 1ST RESPONDENT – ABSENT

KIETI FOR 2ND AND 3RD RESPONDENTS – PRESENT

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE