



**Gerald v Mugwika & 2 others (Environment and Land Appeal
11 of 2020) [2022] KEELC 3320 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 11 OF 2020**

CK NZILI, J

MAY 4, 2022

BETWEEN

**GERALD M'LINGERA M'IBUI (DECEASED) SUBSTITUTED BY JEREMY
MURIUKI GERALD APPELLANT**

AND

**JOHN MUCHUI MUGWIKI (LEGAL REPRESENTATIVE OF THE DECEASED
M'RUGI WA RUGOI) 1ST RESPONDENT**

**LAND ADJUDICATION AND SETTLEMENT OFFICER, TIGANIA 2ND
RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

A. Pleadings

1. The appellant by a further amended plaint dated 18.8.2015 had sued the respondents at the lower court for an alleged fraudulent transfer of three acres from Parcel No. 4543 and renaming it Tigania/Kianjai 5126 and secondly, a transfer Tigania/Kianjai/3390 measuring 7 acres to the 1st respondent. The appellant averred this was done despite some directives to investigate the issue by the Director of Land Adjudication and Settlement together with his extensive developments of the aforesaid parcel of land. He sought for declaratory orders that he was the rightful owner of the parcels and the rectification of the adjudication registers to reflect his initial land parcels and sizes.
2. By a further amended defence and counter claim dated 18.8.2015, the 1st respondent insisted that the decision to transfer the suit parcel of land was out of a successful objection he had lodged which was duly heard by the adjudication committee members but instead of appealing to the Minister, the appellant rushed to court. He denied any alleged fraud or collusion with the 2nd and 3rd respondents.



3. Similarly, the 1st respondent by way of a counter claim averred that the appellant using his position as a committee member of the adjudication section, he fraudulently and unjustly acquired 20.32 acres out of his Parcel No. Tigania/Kianjai 1/4543/3390, yet he was the rightful owner.
4. The 1st respondent therefore prayed for a declaration that he was the rightful owner of Parcel No. Tigania/Kianjai 1/5126 and 3390; an order that Parcel No. Tigania/Kianjai 1/4543 be registered in his name; eviction from Parcel Nos. Tigania/Kianjai 1/4543, 3390 and 5126, a permanent injunction over the continued occupation of the parcels aforesaid by the appellant and a rectification of the adjudication register to reflect his rightful ownership of 20.32 acres.
5. The 2nd and 3rd respondents by an amended statement of defence dated 9.9.2015 averred the suit was bad in law for; raising no cause of action; being filed without a statutory consent; was time barred; offended section 13 A of the [Government Proceedings Act](#) and an injunction could not issue against the 2nd respondent.
6. Further, the 2nd and 3rd respondents denied the alleged fraud and averred their actions in handling objection were lawful procedural and in execution of the 2nd respondent statutory mandate.

B. The Record

7. This suit started in 1992 following which the court granted an injunction against the 1st respondent. On 24.10.1996, parties herein by consent referred the matter to the Land Adjudication Committee for hearing and an award was to be filed in court within 60 days. On 14.1.1997 parties came to court and the appellants counsel sought to review the consent order allegedly made in error, given the committee had heard the matter in 1992 and a complaint made to the Director of Land Adjudication regarding the irregularities. The court ordered for a formal application for review to be filed. On 14.1.1997, the court stayed the hearing by the land adjudication committee scheduled for 12.3.1997.
8. On 22.9.1997, the court declined to review the consent order and directed that the dispute to be heard by a different panel and an award to be filed before the court within 90 days from that date. Come 15.5.1998, there was no compliance hence the court stayed any further hearing by the committee until the court directed otherwise. It appears on 10.7.1998, the parties revived the application for an out of court settlement but could not agree on the way forward. The matter was given a hearing date during which it was dismissed for non-attendance but was eventually reinstated on 27.5.1999.
9. Following some preliminary issues raised by the 2nd and 3rd respondents regarding section 30 (1) of [Land Adjudication Act](#), Sections 13 A and 16(1) of [Government Proceedings Act](#), and Order 29 Rule 2 Civil Procedure Rules, the court on 11.2.2003 found the three grounds as lacking merits paving way for hearing on 25.8.2003, when PW 1 testified though he was stood down.
10. The record indicates that on 12.8.2015, the court made directions on fast tracking the hearing of the matter in terms of Order 11 Civil Procedure Rules, including hearing the matter denovo. On 14.1.2015, PW 1 & 2 gave their testimony and produced 1-7. At that juncture the court directed a valuation report to be filed on the question of the court's pecuniary jurisdiction. The same was done and the court on 14.12.2015 established it had the requisite jurisdiction to proceed with the matter. The court could not however proceed given the Malindi matter regarding jurisdiction.
11. On 12.7.2017, the court ordered for the proceedings to be typed. Meantime the file was transferred to Tigania Law Courts following directives by the then presiding ELC Court Meru.
12. By an order dated 21.11.2019, the trial court directed the parties to address it on jurisdiction in view of section 29 (1) cap 284 and section 26 (3) cap 283.



C. Grounds of Appeal

13. By amended grounds of appeal dated 19.10.2021, the appellant complains about the ruling and the order made on 23.1.2020 by the trial court in declining jurisdiction was that and the court: misunderstood the law applicable in the circumstances; made the wrong interpretation of the law, applied the wrong law; failed to consider the consent to sue, failed to consider an appeal had previously been made regarding the subject objections but the 2nd respondent failed to implement it and failed to give directions on the counter claim after striking out the suit.

D. Written Submissions

14. The appellant relied on written submissions dated 11.11.2021 and 22.2.2022, whereas the 1st respondent relied on written submissions dated 3.12.2021.
15. The appellant submitted the trial court should have specified the applicable law before striking out the suit as held in Joshua Mithika and another vs Kobia M'Twamwari Kugeri and 2 others Meru ELC Appeal No. 16 of 2020.
16. Secondly, the appellant submitted that a valid consent to sue was on record hence there was jurisdiction. Reliance was placed on Yuda Imunya Alias Yuda K. Imunga vs Atanasio Kibara Meru ELC No. 245 of 2016.
17. Thirdly, the appellant submitted that the trial court failed to appreciate that an appeal had been preferred and the Director for Land Adjudication had directed that the decision not to be implemented as per page 50 of the record of appeal, but the 1st and 2nd respondents ignored the said directive, hence the claim was based on fraud and prayers for rectification of the register which could only be determined by a court of law as held in Joshua Mithila (supra), and Francis Muriungi M'Ibaya vs Paul Kigea Nabea Meru ELC Appeal No. 60 of 2018.
18. Fourthly, the appellant submitted the trial court was duty bound to make a definitive pronouncement on the status of the 1st respondent's counterclaim.
19. Fifthly, the appellant urged the court to be guided by Article 48 of *the Constitution*, and find there was unimpeded access to justice by hearing matters on merits which the trial court should have done instead of declining jurisdiction.
20. The appellant further submitted that both under the *Land Adjudication Act* and the *Land Adjudication Act*, caps 283 and 284, the tribunals thereof lack the mandate to hear matters related to fraud which fall within the jurisdiction of the court.
21. As regards Section 16 (3) of the *Government Proceedings Act*, the appellant submitted that courts are empowered to make declaratory orders. Similarly, with regard to the order of an injunction against the 2nd and 3rd respondents, the appellant submitted the 1st respondent misunderstood section 16 (2) of the *Government Proceedings Act* and order 29 rule 2 *Civil Procedure Rules*, since the further amended plaint had only sought an injunction against the 1st respondent.
22. On his part, the 1st respondent submitted that two issues falling for this court's determination were namely; (1) if the trial court erred in placing emphasis on section 26 (3) *Land Consolidation Act*, Section 29 (1) *Land Adjudication Act*, Section 16 (2) *Government Proceedings Act* and order 29 rule 2 *Civil Procedure Rules* and (ii) secondly, if the trial court went contrary to the rules of national justice and article 50 (1) of *the Constitution*, thus occasioning a miscarriage of justice.



23. On the first issue, the 1st respondent submitted the appellant had not exhausted the internal mechanisms set out under section 26 (1) [Land Consolidation Act](#) by filing an A/R Objection, hence took a short cut to come to court; under sections 26 (1) & (2) of the [Land Adjudication Act](#), the appellant had a right to file an objection to be heard by the land adjudication officer. Similarly, under section 29 of the [Land Adjudication Act](#), the appellant had a right to file a minister's appeal.
24. It is submitted that the decision by a Land Adjudication Officer was appealed to the minister.
25. Given the circumstances the appellant submitted the trial court was right to decline jurisdiction. Reliance was placed on [William Mutuura Kairiba vs Samuel Nkari & 2 others](#) (2018) eKLR, [Ransa Co Ltd & 2 others vs Manca Francesco](#) (2015) eKLR, [Hunker Trading Co. Ltd vs Elf Oil \(K\) Ltd](#) (2010) eKLR, [Motor Vessel Lilian "S" vs Caltex Oil \(K\) Ltd](#) (1989) 1 KLR 1, [Dume Deri Mumbo & 19 others vs Cabinet Secretary of Land Housing and Urban Development and 6 others](#) (2016) eKLR.
26. This being a first appeal, this court is mandated under the law to re-appraise the pleadings, record and evidence and to draw inferences of facts and come up with independent findings and conclusion. See [Selle vs Associated Motor Boat Co.](#) (1968) E.A 123.
27. Having gone through the pleadings, proceedings, grounds of appeal and written submission, the issues for my determination are:
 - (i) If the trial courts exercised its discretion properly in seeking for parties to address it on matters of jurisdiction and proceeding to find it had no jurisdiction.
 - (ii) If the appeal has merits.
28. It is trite law parties are bound by their pleadings and issues flow from pleadings. See [IEBC v Stephen Mule](#) [2014] eKLR.
29. In this matter, the appellant's claim was based on irregularities and illegalities termed as fraudulent in the manner the objection proceedings were handled and a complaint made to the Director of Land and Settlement whose directives were ignored by the 1st and 2nd respondents.
30. The respondent's filed their defences and counter claim in which the 1st respondent brought up a counter claim that he was entitled to more land than the objection proceedings had given him.
31. Similarly, the 2nd and 3rd respondents raised preliminary objections prior to the commencement of the plaintiff's testimony, which the trial court heard and determined on merits. The aforesaid ruling was never appealed against by the respondents herein.
32. Secondly, and more importantly, the court record shows that, the matter proceeded for full hearing and the appellant produced documentary evidence in support of his claim including exhibits which if the court had looked at, would have found the issue was beyond the ascertainment of rights and interest over the land.
33. In my view therefore, the trial court had a duty to peruse the file and find out the history of the matter. As much as jurisdiction is everything, the court in seeking to have parties address it on whether it had jurisdiction or not, should have looked at the pleadings, list of issues, list of documents and the proceedings thereof. Both parties had filed list of issues including the 2nd and 3rd respondents, which went beyond the section 29 (1) [Land Adjudication Act](#) and section 26 (3) [Land Consolidation Act](#).
34. Additionally, the consent to sue certified on 28.2.2001 by the Land Adjudication & Settlement Officer was issued under section 30 (1) [Land Adjudication Act](#).



35. Parties herein have extensively submitted on section 16 (2) of *Government Proceedings Act* and order 29 rule 2 *Civil Procedure Rules*.
36. With respect, the ruling and the order appealed against does not touch on the aforesaid issue. Needless to say, the trial court on 11.2.2003 made a determination of the preliminary objection, on those issues as raised by the 2nd and 3rd respondents after which there was an amended plaint seeking for injunction directed at the 1st respondent only.
37. Further, PW 1 produced the statutory notice to the 2nd and 3rd respondents which was also clear on the major complaint in the suit.
38. Access to justice and the right to fair hearing are constitutional rights requiring a party's dispute to be resolved by the application of law in a fair manner. A party coming to court has a legitimate expectation that his dispute shall be resolved expeditiously and fairly. In this matter the court had started hearing the suit after determining it had jurisdiction. PW 1 & PW 2 had testified. The court went even further to ascertain the pecuniary jurisdiction by ordering for a valuation report.
39. After doing all the above, it was quite odd and irregular for the subsequent trial court to ignore the directives orders and the proceedings by its predecessors which were geared towards the expeditious disposal of the matter based on merits. See DT – *Dobie & Co Ltd vs Muchina (1992) KLR*.
40. In *Tobias Achola Osindi & 13 others vs Cyprianus Otieno Ogalo & 6 others* [2013] eKLR, the court held it had residual and supervisory jurisdiction on matters touching on land adjudication, especially on whether the law and rights of the parties were being adhered to by adjudicatory bodies.
41. As regards the counter claim, the 1st respondent has in this appeal deliberately failed to address the court on the aspect yet the same raises issues going to the merits, demerits and the legality of the decision made in the objection proceedings. The 1st respondent did not attach any consent to sue to the counter claim.
42. In the application dated 11.6.2012, the 1st respondent attached a copy of investigation summons dated 2.4.2012. The court proceeded to issue a temporary order of injunction against the 2nd and 3rd respondents and the appellant from interfering with the adjudication registers and maps.
43. Even though a counter claim is a separate suit, in this instance, both “suits” were based on the same issues and facts and the law.
44. The trial court ought to have given the way forward otherwise a court is not a packing bay for matters which should be determined one way or the other instead of being kept at abeyance, see *Doge vs Kenya Cannery Ltd* (1985) eKLR and *County Government of Kilifi vs Mombasa Cement Ltd* (2017) eKLR.
45. In the premises, I find the appeal meritorious. The same is allowed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 4TH DAY OF MAY, 2022

In presence of:

C.P Mbaabu for appellant

Mugira holding brief for Mbaabu Inoti for respondent

HON. C.K. NZILI

ELC JUDGE

