



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. 49 OF 2019**

**ALBERT MBAABU MWILARIA.....APPELLANT**

**-VERSUS-**

**STEPHEN MAINGI.....1<sup>ST</sup> RESPONDENT**

**STEPHEN KAILIKIA.....2<sup>ND</sup> RESPONDENT**

**MURAMANIA KAIRIAMA.....3<sup>RD</sup> RESPONDENT**

**MBERIA M'NGAYA.....4<sup>TH</sup> RESPONDENT**

**THE DISTRICT LAND ADJUDICATION AND**

**SETTLEMENT OFFICER TIGANIA DISTRICT.....5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION AND BACKGROUND**

1. This is an appeal against the ruling and order of Hon. G. Sogomo (Principal Magistrate) dated 28<sup>th</sup> February, 2019 in **Tigania PMCC No. 8 Of 2020 – Albert Mbaabu Mwilaria v Stephen Maingi & 5 Others**. By the said ruling, the trial court dismissed the Appellant's notice of motion dated 28<sup>th</sup> August, 2018 seeking the setting aside of the order dated 31<sup>st</sup> May, 2018 dismissing the Appellant's suit.

2. The material on record indicates that vide a plaint dated 24<sup>th</sup> January, 2010 the Appellant sued the Respondents seeking recovery of the parcels Nos. 748,3860,3851 and 6351 from the 1<sup>st</sup> – 4<sup>th</sup> Respondents which he claimed were fraudulently excised from his own parcel No. 2672 in **Athinja/Athanja Adjudication Section**. The Appellant pleaded that he had lodged objections during the land adjudication process on the matter but the 1<sup>st</sup> – 4<sup>th</sup> Respondents colluded with the Land Adjudication Officer Tigania West (*the 5<sup>th</sup> Respondent*) to have the objection dismissed hence the suit.

3. The record further shows that the 2, 4, 5 and 6<sup>th</sup> Respondents entered appearance to the suit and denied the Appellant's claim. Although the 2<sup>nd</sup> and 4<sup>th</sup> Respondents' defence is not on record they filed affidavits and witness statements denying the Appellant's allegations. They contended that the Appellant's objections were properly dismissed for lack of merit and that he had no legitimate cause of action against them.

4. It would appear that after a delay of about 8 years in the hearing of the matter the suit was placed before the trial court on 31<sup>st</sup> May, 2018 who dismissed the same in the absence of all the concerned parties. There is no indication on record to show whether the suit was dismissed for want of prosecution **under Order 17 of the Civil Procedure Rules** or for default of attendance.

5. Be that as it may, the Appellant appears to have learnt of the dismissal soon thereafter and he filed a notice of motion dated 28.8.2018 seeking a review of the dismissal order and reinstatement of the suit. The application was based upon three grounds only. First, it was contended that the hearing was delayed because of an order issued by the High Court in Malindi which had stopped the hearing of land cases by subordinate courts. Second, it was contended that the Appellant had been of ill-health. Third, that no notice of dismissal of the suit had been given by the court prior to its dismissal.

6. By a ruling dated 28<sup>th</sup> February, 2019 the trial court dismissed the Appellant's said application with costs. The trial court held that it had no jurisdiction to entertain the suit because the Appellant's suit was essentially challenging decisions made during the land adjudication process and that he had not exhausted the laid down statutory mechanisms for dispute resolution set out in the **Land Consolidation Act (Cap. 283)** and the **Land Adjudication Act (Cap. 284)**.

#### **B. GROUNDS OF APPEAL**

7. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 25.3.2019 raising the following 6 grounds of appeal:

- a) That the Learned Magistrate erred in law and fact in that he shut out the Appellant from the seat of justice by not properly or sufficiently considering the fact that the Appellant and his counsel had not been served with notice of dismissal.*
- b) The decision of the Learned Magistrate is against the provisions of the Civil Procedure Rules on the issue of notices to parties and is also against the Constitution of Kenya.*
- c) The Learned Magistrate erred in law and fact in that he allowed himself to be influenced by Acts of Parliament which he did not understand and misapplied to come to a wrong decision.*
- d) The Learned Magistrate erred in law and fact in that he did not first of all find out which Act applied to the land in question as between the **Land Adjudication Act (Cap. 284 Laws of Kenya)** and **Land Consolidation Act (Cap. 283 Laws of Kenya)** as the said Acts do not apply simultaneously and therefore allowed himself to come to a wrong decision.*
- e) The Learned Magistrate erred in law and fact in that he did not consider the effect in law of the consent given to him by the District Land Adjudication Officer to hear and determine the matter.*
- f) The Learned Magistrate erred in law and fact in finding that he had no jurisdiction to hear and determine the matter before him irrespective of the consent from the Adjudication Officer.*

8. The Appellant consequently asked the court to allow the appeal, set aside the trial court's order dated 28.2.2019 and reinstate his suit for hearing

#### **C. DIRECTIONS ON SUBMISSIONS**

9. When the appeal was listed for directions on 2/9/2020, it was directed that the appeal shall be canvassed through written submissions. The parties were granted 21 days each to file and serve their respective submissions. The record shows that the Appellant filed his submissions on 16.9.2020 whereas the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed theirs on 30/9/2020. There is, however, no indication of the 3<sup>rd</sup>- 6<sup>th</sup> Respondents having filed any submissions.

#### **D. THE ISSUES FOR DETERMINATION**

10. Although the Appellant raised 6 grounds in his memorandum of appeal, the court is of the opinion that the following issues would effectively determine the appeal:

- (a) Whether the trial court erred in law in failing to reinstate the Appellant's suit.*
- (b) Whether the trial Court erred in law in misapplying the **Land Consolidation Act** and **Land Adjudication Act** and as a result arrived at a wrong decision.*
- (c) Whether the trial court erred in law in holding that he had no jurisdiction in spite of the consent of the Land Adjudication Officer having been granted.*
- (d) Who shall bear costs of the appeal.*

#### **E. ANALYSIS AND DETERMINATION**

##### **(a) Whether the trial court erred in law in failing to restate the Appellant's suit**

11. The Appellant contended that the dismissal of his suit was irregular in the first place because he was never served with a notice to show cause why the suit should not be dismissed for want of prosecution under **Order 17 rule 2 of the Civil Procedure Rules**. It was further contended that a certain judgment by the High Court in Malindi had delayed the hearing of the suit hence the application for reinstatement ought to have been allowed.

12. Although the Appellant did not give particulars of the Malindi case which he referred to the court is aware of the judgment in **Malindi Constitutional Petition No 3 of 2016 - Malindi Law Society v Hon. Attorney General & 4 Others** dated 11<sup>th</sup> November 2016. By the said judgment the High Court declared that the provisions of **Section 9 of the Magistrates Courts' Act 2015 and Sections 7(3),8(d) and 26 of the Environment and Land Court Act** which granted jurisdiction to the subordinate courts to entertain environment and land matters

were unconstitutional.

13. The court is aware that the said judgment of the High Court was subsequently stayed by the Court of Appeal sometime in 2017 and that by a judgment dated 19<sup>th</sup> October, 2017 the Court of Appeal set aside that part of the High Court judgment which declared as unconstitutional the provisions of the **Magistrates' Courts Act** and the **Environment and Land Court Act** which granted magistrates jurisdiction to entertain environment and land matters.

14. It is thus clear that the delay occasioned by the Malindi petition was quite minimal and in any event lasted less than one year. The Malindi petition cannot therefore explain the entire period of delay of about 8 years. There was no explanation rendered in the Appellant's application dated 28.8.2018 and the supporting affidavit for the balance of 7 years during which his suit remained unprosecuted.

15. The court has also perused and considered the material on record relating to the Appellant's health. It was contended that the Appellant was unwell for a considerable period of time hence the delay in the prosecution of the suit. The court has considered the medical report dated 23<sup>rd</sup> July, 2018 which the Appellant annexed to his application for reinstatement of his suit. It indicates that the Appellant was admitted to hospital for 10 days between 1<sup>st</sup> – 10<sup>th</sup> November, 2016 after which he was discharged. There is no indication in the report that the Appellant could not be able to manage his affairs upon discharge from hospital. The medical report does not also explain the delay of over 6 years prior to his admission in hospital.

16. The court is of the opinion that although a party is entitled to prior notice of dismissal of his suit for want of prosecution, reinstatement of a suit is not automatic upon demonstration of lack of notice. The Plaintiff would still be obliged to demonstrate a reasonable explanation for the delay in the prosecution of the suit. A perusal of the material before the trial court shows that the Appellant did not render any reasonable or satisfactory explanation for the delay.

17. The short period of delay occasioned by the Malindi petition and the 10 day hospitalization could not satisfactorily explain the delay of over 7 years in the prosecution of the suit. The record of proceedings before the trial court shows that the Appellant was not a diligent litigant at all. He was never ready to proceed with the suit on the few occasions it was set down for hearing. The court is thus of the opinion upon a reconsideration of the material on record that even if the trial court had considered the explanation rendered for the Appellant's delay in prosecuting the suit it would still have disallowed the application. Accordingly, the trial court did not err in law in dismissing the Appellant's application.

***(b) Whether the trial court erred in law by misapplying the Land Consolidation Act and the Land Adjudication Act***

18. The Appellant contended that the trial court erred in law in applying both the **Land Consolidation Act** and the **Land Adjudication Act** simultaneously to the same adjudication section. It was submitted that the only Act which applied to Tigania was the **Land Consolidation Act** hence the trial court erred in law in making reference to the **Land Adjudication Act** as well. The Appellant cited the case of **Peter Kimandui v Land Adjudication Officer Tigania West District & 4 Others [2016] eKLR** in support of that submission.

19. The court has considered the ruling dated 28.2.2019 and the material on record on the issue. It is obvious that the trial court relied upon both **Section 26(3) of the Land Consolidation Act** and **Section 29 of the Land Adjudication Act** in its ruling. On the basis of the Court of Appeal decision in the **Peter Kimandui Case**, the trial court erred in placing reliance upon both statutes and in not appreciating that the applicable statute was the **Land Consolidation Act**.

20. The court is, however, of the opinion that the said error on the part of the trial court did not occasion a failure of justice and it did not result in an erroneous decision being reached. The court has considered the provisions of both section **26 of the Land Consolidation Act** and **Section 29 of the Land Adjudication Act**. Both statutes provide that the decisions reached by the respective decision makers are final and not subject to appeal except in very limited circumstances.

21. **Section 26 (3) of the Land Consolidation Act** states:

***“No appeal shall be against any decision by the Land Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.***

22. It is thus evident that the decision of the Land Adjudication Officer in the instant case was caught in the provisions of the said provision hence the option of approaching the subordinate court was only open with regard to review of a compensation award. The Appellant was not at liberty to challenge the merits of the decision of the Land Adjudication Officer to dismiss his objections with respect to the suit properties. He could, however challenge the legality and propriety of the decision making process through judicial review proceedings if he had legitimate grounds for such review. However, filing a civil suit to challenge the dismissal of his objections would be tantamount to prosecuting an appeal through the back door.

23. The court is of the opinion that the Appellant was obliged to strictly abide by the dispute resolution mechanisms and procedures set out under the **Land Consolidation Act**. That was the holding in **Ann Wawunda & Others v Kenya Railways Corporation & Another [2015] eKLR**; **Meru ELC Petition No 6 of 2017 Reuben Mwoyela M'itelekwa v Paul Kigea Nabea & 2 Others [2019] eKLR**. In the **Reuben Mwoyela case**, the court held, *inter alia*, that:

***“Therefore, under the Land Consolidation Act, the decision of the Adjudication Officer is final unless the Minister can intervene on issues of compensation. A perusal of the petition reveals that the petitioner is agitating for his rights and interests in land within Antuamburi Adjudication Section. He had filed cases in the objection proceedings where he lost in***

the decision dated 10<sup>th</sup> February, 2011. The petitioner ought to have lodged an appeal to the Minister within 60 days of the challenged decision as per Section 29 of the Land Adjudication Act. In the event that the proceedings were conducted under the Land Consolidation Act, then the decision in the objection proceedings was final unless the issue of compensation was raised.”

24. The court is, therefore, in agreement with the decision of the trial court to the effect that it had no jurisdiction to entertain the Appellant’s suit under the law. The court agrees with the trial court that it had no jurisdiction to either take over or sit on appeal over the process of land adjudication after dismissal of the Appellant’s objections by the Land Adjudication Officer.

***(b) Whether the trial court erred in law in holding that it had no jurisdiction in spite of the consent of the Land Adjudication Officer***

25. The Appellant submitted that in spite of the dispute resolution scheme and mechanism set out by **Section 26 of the Land Consolidation Act**, the consent of the Land Adjudication Officer granted under **Section 8 of the Act** could confer jurisdiction upon the trial court to entertain the Appellant’s suit. The Appellant relied upon the case of **Stephen Kungutia & 2 Others v Severina Nchulubi Nyeri Civil Appeal No 221 of 2010** in support of that submission.

26. The court has considered the material and submissions on record on this issue. There is no doubt that the consent the Appellant referred to was issued under **Section 8(1) of the Land Consolidation Act** which bars institution of legal proceedings with regard to land falling within a declared adjudication area without the written consent of the written Land Adjudication Officer. A copy of the said letter dated 25<sup>th</sup> November, 2019 states in part that:

***“In order to complete the Adjudication Register for the ATHINGA ATHANJA adjudication Section, I shall in due cause, require a copy of the final orders made for each of the cases listed in the schedule.”***

27. The court is of the opinion that the object of **Section 8 (1) of the Land Consolidation Act** was to insulate the adjudication process from the delays and vagaries of litigation. However, the legislature allowed the Land Adjudication Officer a window to grant consent for filing suit for determination of matters which would facilitate completion of the adjudication register. The section was not intended to grant a second chance to a losing party to restart the adjudication through the judicial process. In particular, it was not intended to provide another window of adjudication to a person who had fully exhausted the dispute resolution mechanisms set in **Section 26 of the Land Consolidation Act**.

28. In the case of **Reuben Mwangela (supra)** the court quoted the following pertinent passage from the case of **Tobias Achola Osindi & 13 Others v Cypriano Otieno Ogalo & 6 Others Kisii ELC No 4 of 2011 (Okongo J)**:

***“The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act... The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land. Due to the foregoing, a consent issued by the Land Adjudication Officer under section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to court for determination issues which should be determined by the adjudication officer or through the dispute resolution machinery laid out in the Act”.***

29. The court is in full agreement with the legal interpretation rendered in the said authorities. Although the case of **Tobias Achola (supra)** has concerned with interpretation of the provisions of the **Land Adjudication Act**, the same reasoning would be applicable to the objects of the **Land Consolidation Act**. The court is thus of the opinion that the consent of the Land Adjudication Officer granted after completion of the land adjudication process and exhaustion of the dispute resolution mechanisms set out in the **Land Consolidation Act** cannot confer jurisdiction upon the Magistrates’ court to reopen the issues which were the subject of adjudication before the Land Adjudication Officer. Such consent cannot also lawfully open a window of appeal to a person aggrieved by the decision of the Land Adjudication Officer either to dismiss an objection or allow rectification of the adjudication register since the same is expressly barred by **Section 26 (3) of the Land Consolidation Act**.

30. As indicated in the earlier part of the judgment, the Appellant filed suit because he was aggrieved by the decision of the Land Adjudication Officer to dismiss his objections which were intended to recover the suit properties from the 1<sup>st</sup> – 4<sup>th</sup> Respondents. He simply decided to flavour his claim with allegations of fraud to create the impression that he had a new cause of action which did not exist during the land adjudication process. The truth of the matter is that he was aggrieved solely because he lost during the objection proceedings. He could not have filed the suit if his objections had been allowed and the adjudication register rectified.

31. The Appellant framed the plaint in such manner as to include collusion and fraud as part of his cause of action. However, the particulars of fraud pleaded in paragraph 7 of the plaint easily give away the true nature of the Appellant’s grievances. He listed 3 particulars of collusion and fraud as follows:

(a) *1<sup>st</sup> to 4<sup>th</sup> defendants colluding with the 5<sup>th</sup> defendant to dismiss the plaintiff's objections without giving good reasons for doing so.*

(b) *Failing to find that parcel Nos. 748, 3860, 3851, 6351 Athinja/Athanja adjudication section belong to the plaintiff as they were excised from plaintiffs' parcel No. 2675 Athinja/Athanja Adjudication Section.*

(c) *Failing to appreciate the evidence of the plaintiff in relation to the said objections.*

32. The court is thus of the opinion that the Appellant's grievances were matters which properly belonged to the subject of land adjudication and which were handled by the officers and bodies set up by the legislature under the **Land Consolidation Act** for resolution of such matters. The decision of the Land Adjudication Officer to dismiss an objection is final under **Section 26 (3) of the Act** and not subject to appeal. The Appellant's quest to recover the suit properties thus came to the end of the road when the Land Adjudication Officer dismissed his objections.

33. The court has considered the **Stephen Kungutia Case** which was cited by the Appellant. The court has noted that one of the grounds of appeal was that the High Court had erred in not finding that the consent of the Land Adjudication Officer was required before the Respondent could file suit. The Court of Appeal found and held that the material on record indicated that the Respondent had indeed obtained such authority before filing suit. It was never contended that the Respondent had filed suit in spite of having exhausted the ordained dispute resolution mechanisms set out under the **Land Adjudication Act**. The said authority is thus clearly distinguishable from the instant matter.

***(b) Who shall bear costs of the appeal***

34. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should be deprived of costs of the appeal. Accordingly, the court shall award costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent who participated in the appeal.

**G. CONCLUSION AND DISPOSAL**

35. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the same is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents only.

It is so decided.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 18TH DAY OF MAY 2021.**

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**Y. M. ANGIMA**

**ELC JUDGE**

**JUDGMENT DELIVERED AT MERU THIS 27TH DAY OF MAY 2021.**

In the presence of:

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**L. N. MBUGUA**

**ELC JUDGE**