



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 90 OF 2019

JOSEPH KIRUJA MAINGI..... APPELLANT

-VERSUS-

ROSE NAMBURA1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION OFFICER TIGANIA..... 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of Hon. G. Sogomo (PM) dated 13th June 2019, in *Tigania PMCC No. 111 of 2009 - Joseph Kiruja Maingi v Rose Nambura & 2 Others*. By the said ruling, the trial court upheld the 1st Respondent's preliminary objection to the effect that the court had no jurisdiction to entertain the Appellant's suit under both the **Land Consolidation Act (Cap 283)** and the **Land Adjudication Act (Cap 284)**. The Appellant's suit was consequently struck out with costs to the Respondents.

2. The material on record shows that by a plaint dated 12th August, 2009 and amended on 8th October, 2009, the Appellant sought the following reliefs against the Respondents jointly and severally:

- a) A declaration that Land parcel No. 2247 Kiguchwa Adjudication Section is the property of the deceased, Henry Maingi.
- b) A declaration that Parcel No. 2247 Kiguchwa Adjudication section was unlawfully, wrongly, illegally and fraudulently transferred to the 1st Defendant and that the Register be cancelled and the land registered to the Deceased's estate.
- c) Costs of the suit and interest.
- d) Any further or better relief that the court may deem just to grant.

3. The Appellant pleaded that his late father Henry Maingi (*the deceased*) had bought a parcel of land measuring 17 acres or thereabouts in 1951 on which he settled and developed by establishing a home and planting various crops. It was further pleaded that sometime in 2008 the Respondents fraudulently subdivided the said land into parcel No. 294 and parcel No. 2247 whereupon the 1st Respondent was allocated parcel 2247. The Appellant contended that the said action on the part of the Respondents was unlawful and he listed several particulars of fraud against them.

4. The 1st Respondent filed a defence dated 29th September, 2009 and amended on 22nd October 2009 in which she denied the Appellant's claim in its entirety. She pleaded that the entire portion of 17 acres belonged entirely to the late M'Tuamwari Mukubua (*Mukubua*) and that the deceased was merely a licensee on the said property. It was further pleaded that it was the said Mukubua who voluntarily and gratuitously gave out 3 acres of his land to the deceased. The 1st Respondent denied knowledge of any decision by the LAO through fraudulent means that she keeps parcel 2247. She denied the fraud and particulars of fraud alleged against her and put the Appellant to strict proof thereof.

5. In further defence, the 1st Respondent pleaded that there were several cases over the said parcels of land during the land adjudication process and all the issues raised by the Appellant were adequately addressed and determined. She contended that the suit was incompetent in view of the provisions of the **Land Consolidation Act (Cap. 283)** and the **Land Adjudication Act (Cap. 284)** and gave notice of

intention to raise a preliminary objection to that effect. The 1st Respondent further denied the jurisdiction of the court for the foregoing reasons.

6. The 2nd and 3rd Respondents also filed a joint statement of defence whereby they denied the Appellant's claim in its entirety. They disputed that the Appellant had legal capacity to sue on behalf of the deceased. They denied the fraud and particulars of fraud alleged against them. They also gave notice of intention to raise a preliminary objection to the effect that the suit was incurably defective for want of compliance with the **Land Consolidation Act (Cap. 283)** and **Section 13A of the Government Proceedings Act (Cap. 40)**.

7. The material on record indicates that before the trial of the action, the 1st Respondent filed a notice of preliminary objection dated 11th February, 2019 to the effect that the trial court had no jurisdiction to entertain the Appellant's suit for the following reasons:

(a) That the suit contravened express and mandatory provisions of Sections 13, 14 and 26 (3) of the Land Consolidation Act (Cap. 283).

(b) That the suit contravened express and mandatory provisions of Sections 26 and 29 of the Land Adjudication Act (Cap. 284.)

8. The said preliminary objection was canvassed by the parties through written submissions before the trial court and vide a ruling dated 13th June, 2019 the court upheld the said preliminary objection and held that it had no jurisdiction to entertain the suit on account of both statutes. The trial court held that where a statute provides a mechanism for the resolution of particular grievances that procedure must be strictly followed and exhausted before an aggrieved party can move the court for redress. Consequently, the Appellant's suit was struck out with costs to the Respondents.

B. THE GROUNDS OF APPEAL

9. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 8th July 2019, raising the following 6 grounds of appeal:

(a) The learned trial Magistrate erred in law and fact in that he misunderstood the law before him and did wrong interpretation and came to a wrong conclusion.

(b) The learned trial Magistrate erred in law and fact in that he did not first of all find out which Act applied to the land in question i.e. Land Reference No 2247 – Kiguchwa Adjudication Section between the Land Adjudication Act (Cap 284) Laws of Kenya and Land Consolidation Act (Cap 283) leading himself to a wrong decision.

(c) The learned trial Magistrate erred in law in applying the wrong Act of Parliament to the matter before him and came to the wrong conclusion.

(d) The learned trial Magistrate erred in law and fact in that he did not consider the consent given by the DLASO which in law authorized the court to hear and determine the matter.

(d) The learned trial Magistrate erred in law and fact in finding that he had no jurisdiction to hear and determine the matter.

(d) The ruling/decision of the trial Magistrate is bad in law and fact.

10. The Appellant, therefore, prayed for the ruling and order of the trial court dated 13th June, 2019 to be set aside and for his suit to be reinstated for hearing on merit.

C. DIRECTIONS ON SUBMISSIONS

11. When the appeal was listed for hearing on 2nd September 2020, it was directed, with the consent of the parties, that it shall be canvassed through written submissions. The Appellant was given 21 days to file his submissions whereas the Respondents were given a similar period to file theirs upon the lapse of the Appellant's period. The record shows that the Appellant filed his submissions on 18th September 2020, whereas the 1st Respondent filed hers on 2nd October 2020. There is no indication on record of the Attorney General having filed any submissions on behalf of the 2nd and 3rd Respondents.

D. THE ISSUES FOR DETERMINATION

12. Although the Appellant raised 6 grounds in his memorandum of appeal, the court is of the opinion that the appeal may be effectively resolved by determination of the following issues:

(a) Whether the trial court erred in law by applying the wrong statute to the dispute.

(b) Whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit.

(c) Who shall bear costs of the appeal.

E. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law by applying the wrong statute to the dispute

13. The court has considered the submissions and material on record on this issue. The Appellant submitted that the trial court failed to determine which of the two statutes, that is, between the **Land Consolidation Act (Cap. 283)** and the **Land Adjudication Act (Cap. 284)** applied to the dispute and as a result ended up applying the wrong statute to the dispute before it.

14. The Appellant contended that since the parcels in dispute were located in Tigania then the applicable statute was the **Land Consolidation Act (Cap. 283)** and that the trial court erred in law in making reference to both statutes. Although none of the parties placed on record the gazette notice declaring the relevant Adjudication Sections an adjudication area, the Appellant relied upon the Court of Appeal decision in **Peter Kimandiu v Land Adjudication Officer Tigania West District & 4 Others [2016] eKLR** where the court found that the Act applicable to Tigania West was the **Land Consolidation Act** and not the **Land Adjudication Act**. The Appellant, therefore, contended that the trial court had applied the wrong statute and as a consequence had arrived at a wrong decision.

15. The court has noted from the 1st Respondent's submissions that she submitted as though both statutes were applicable to the same adjudication area simultaneously. The court has further noted that the Appellant's submissions on the preliminary objection before the trial court were presented on the basis that both statutes applied to the same adjudication area simultaneously. It is clear from the record that the Appellant's counsel had submitted on both **Section 26 of the Land Consolidation Act** and **Section 29 of the Land Adjudication Act** before the trial court. It is not clear why the Appellant never pointed out to the trial court that only one Act could apply to a given adjudication area at any given time.

16. The court is persuaded by the Appellant's cited authority that the applicable statute to the dispute was the **Land Consolidation Act** and not the **Land Adjudication Act**. So, what is the fate of the ruling and order of the trial court? A perusal of the ruling dated 13th June, 2019 reveals that the trial court considered both statutes and came to the conclusion that the court had no jurisdiction to entertain the suit because the Appellant had failed to strictly adhere to the dispute resolution mechanisms established under both statutes. The court was of the view that none of the two statutes permitted the Appellant to file suit without exhausting the established mechanisms.

17. The court is thus of the opinion that even though the trial court may have erroneously applied the **Land Adjudication Act**, the error did not occasion any miscarriage of justice. The trial court would still have arrived at the same conclusion by application of the **Land Consolidation Act** alone. **Section 26 (3) of the Land Consolidation Act** stipulates that:

"No appeal shall lie against any decision by the 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."

18. On the other hand, **Section 29 (1) of the Land Adjudication Act** stipulates as follows:

" Any person who is aggrieved by the determination of an objection under [Section 26](#) of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by -

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land, Adjudication and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."

19. The court is of the opinion that both **Section 26 (3) of Land Consolidation Act** and **Section 29 (1) Land Adjudication Act** oust the jurisdiction of the Magistrates' court to directly deal with appeals or fresh adjudication with respect to matters governed by the Acts. In the circumstances, the court is of the opinion that the Appellant did not suffer any injustice or prejudice hence the order of the trial court cannot be set aside on that basis alone.

(b) Whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit

20. The Appellant submitted that the trial court had jurisdiction to entertain the suit since the consent of the Land Adjudication Officer (LAO) had been obtained before filling the suit. The Appellant referred to the case of **Stephen Kungutia & 2 Others v Severina Nchulubi Nyeri Civil Appeal No 221 of 2010 (unreported)** in support of the submission.

21. The 1st Respondent, on the other hand, contended and submitted that the provisions of **Section 26 (3) of the Land Consolidation Act** were clear that no appeal lies against the decision of the LAO either to dismiss an objection or to order rectification of the register. It was further contended that the Appellant's own documents had revealed that there were previous cases conducted by the Adjudication Committee and the Arbitration Board during the adjudication process. It was further submitted that objection proceedings were filed by the Appellant which he also lost on 9th December, 2008. The 1st Respondent was thus of the view that the Appellant had effectively come to the end of the road in the adjudication process and that the trial court rightly held that it had no jurisdiction to entertain the suit. The 1st Respondent relied upon the cases of **Nicholas Mugambi (suing as legal representative of the estate of Peter Etharia M'Kailibi) &**

Others v Zachary Baariu & 6 Others [2018] eKLR and William Mutuura Kairiba v Samuel Nkari & 2 Others [2018] eKLR in support of her submission.

22. The court has considered the rival submissions of the parties. The court is of the opinion that in the circumstances of the instant case the process of land adjudication and ascertainment of rights and interests over the parcels in issue had come to its logical conclusion subject, of course, to the supervisory jurisdiction of the superior courts. The LAO and other bodies set up under the **Land Consolidation Act** had undertaken their duties all the way to point of determination of objections filed by the parties under **Section 26 (3) of the Land Consolidation Act**.

23. The role of the court *vis-a-vis* that of the adjudicating bodies under the land adjudication statutes was considered by Okongo J, in the case of **Tobias Achola Osindi & 13 Others v Cyprian Otieno Ogalo & 6 Others [2013] eKLR** as follows:

“ The whole process leading up to the registration 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.”

24. The material on record in this appeal, and this is discernible from the Appellant’s list of documents before the trial court, reveals that the dispute between the Appellant’s father and the late Mukabua was handled by all the institutions and bodies set up under the **Land Consolidation Act**. The last phase consisted of objections lodged by both the Appellant and the 1st Respondent over the two parcels in dispute. The proceedings of the objections before the LAO indicates that objection No. 181 was filed on behalf of the 1st Respondent over parcel 294 whereas the Appellant had filed objection No. 45 over parcel 2247. The LAO found that the objecting parties were awarded two separate parcels which they had occupied and developed over the years. It was directed that each party shall retain their respective parcels and both objections were consequently dismissed on 9th December, 2008.

25. The Appellant was obviously dissatisfied with the said decision and opted to file a fresh suit before the trial court for determination of the same issues which were determined against him during the adjudication process. The court is of the opinion that the Appellant was trying to have a second bite at the cherry. Having lost his objection before the LAO he was simply trying to open a new avenue for fresh adjudication of his property rights before the Magistrates’ court in the hope that he may secure a favourable outcome. The court is of the opinion that the trial court had no jurisdiction to re-open the matter and undertake a fresh adjudication of property rights amongst the disputing parties. Entertainment of such a suit would definitely amount to a usurpation of jurisdiction reserved for different bodies under the **Land Consolidation Act**. The court is further of the opinion that the decision of the LAO made on 9th December, 2008 was final subject only to the supervisory jurisdiction of the superior courts.

26. The court is not persuaded that there is merit in the Appellant’s contention that the consent of the LAO could confer jurisdiction upon a court to entertain a matter which had already been considered and determined by the relevant bodies including the LAO. The LAO had no authority to transfer any jurisdiction upon the trial court to re-open and reconsider matters which had already been finalized by the relevant bodies under the **Land Consolidation Act**.

27. As was held in the **Stephen Kungutia & 2 Others (supra)** the consent of the LAO is not intended to grant an aggrieved party a

chance to challenge the decision of the LAO on a matter he has already considered and determined. The Court of Appeal referred to its earlier case and stated *,inter alia*, that:

“In Julia Kaburia v Kabeera & 5 Others (supra) this could held:

“The Land Adjudication Act provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final...

In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication.”

28. In the premises, the court finds no fault with the finding and holding of the trial court that it had no jurisdiction to entertain the

Appellant's suit. The process of land adjudication had effectively come to its logical conclusion and could not be re-opened otherwise than in a manner contemplated by the law. In the opinion of the court, the Appellant's suit was properly struck out. The Appellant did not have any separate cause of action against the 1st Respondent other than the matters which were adjudicated upon and determined by the LAO during objection proceedings.

(c) Who shall bear the costs of the appeal

29. 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 Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the appeal. Accordingly, the 1st Respondent who participated in the appeal shall be awarded costs of the appeal. The 2nd and 3rd Respondents shall not be awarded any costs since they did not participate in the appeal.

F. CONCLUSION AND DISPOSAL

30. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the Appellant's appeal is hereby dismissed with costs to the 1st Respondents only.

It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20TH 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