



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 98 OF 2019

LAWI MWANIKA.....APPELLANT

-VERSUS-

JOEL MWORIA MWIRABUA1ST RESPONDENT

THE LAND ADJUDICATION & SETTLEMENT OFFICER,

TIGANIA EAST.....2ND RESPONDENT

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

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of Hon. P.M. Wechuli (PM) dated 16th July, 2019 in *Tigania PMCC No. 22 of 2017 – Lawi Mwanika v Joel Mworira Mwirabua & 2 Others*. By the said ruling and order, the trial court held that it had no jurisdiction to entertain the Appellant's suit and consequently struck it out with no order as to costs.

2. The material on record indicates that by a plaint dated 10th April, 2017 the Appellant sought the following reliefs against the Respondents:

(a) A declaration that the trial before the 2nd Defendant between the Plaintiff and the 1st Defendant was a nullity and bad in law.

(b) An order that the Adjudication Register and the map of Land Parcel No. 2760 Karama Adjudication Section be rectified to reflect the Plaintiff's original acreage of 2 acres.

(c) Costs and interest.

(d) Any further or better relief this honourable court may deem fit to grant.

3. The Appellant pleaded that at all material times, he was the owner of Parcel No. 10032 in Karama Adjudication Section which measured 2.00 acres (*the suit property*). It was contended that the 1st Respondent who was his neighbour and who was a committee member of Karama Adjudication Section had wrongfully excised and taken away 0.8 acres of his land thereby leaving the Appellant with 1.2 acres only.

4. The Appellant further pleaded that upon raising the issue with the concerned authorities the 2nd Respondent was directed to settle the issue by the Director of Land Adjudication and Settlement. It was contended that the 2nd Respondent did not comply but instead waited for the hearing of objections to the adjudication register.

5. The Appellant contended in his plaint that the 1st and 2nd Respondents had unlawfully and fraudulently colluded to have his objection dismissed and the 1st Respondent allowed to retain the portion of 0.8 acres he had fraudulently obtained from the suit property. The Appellant pleaded several particulars of fraud against the 1st and 2nd Respondents and sought the remedies indicated in paragraph 2 hereof.

6. The material on record shows that the 1st Respondent filed a defence dated 27th June, 2017 denying the Appellant's claim in its entirety.

He stated that he purchased his own portion of land measuring 1.27 acres from One Romano Kobia who had also sold a portion of his land to Evangeline Karambu who subsequently sold her portion to the Appellant.

7. The 1st Respondent further contended that upon purchase of his property demarcation officers went to the ground and marked out the boundaries and fixed beacons on the ground. He stated that he thereupon took possession of his land and had been in occupation thereof since then. He further stated that he was not aware of any other survey or visit to the suit property by surveyors or land officials to resurvey the Appellant's land. The 1st Respondent consequently denied any fraud, collusion or illegality as pleaded by the Appellant and put him to strict proof thereof.

8. It was the 1st Respondent's further defence that he was merely a party and witness during the hearing of the Appellant's objection hence he did not influence the decision made against the Appellant by the Land Adjudication Officer.

9. The record further shows that the Attorney General filed a defence dated 20th July, 2017 on behalf of the 2nd and 3rd Respondents denying the Appellant's claim in its entirety and putting him to strict proof thereof. The 2nd and 3rd Respondents denied the alleged fraud and the particulars of fraud pleaded against them by the Appellant. It was contended that the objection filed by the Appellant was properly and lawfully heard and determined in accordance with the law.

10. It would appear from the material on record that before the suit could be heard the trial court asked the parties to submit on whether or not the court had jurisdiction to entertain the suit in view of the provisions of the **Land Consolidation Act (Cap. 283) and the Land Adjudication Act (Cap. 284)**. The parties duly complied and filed their written submissions on the issue of jurisdiction.

11. By a ruling dated and delivered on 16th July, 2019 the trial court held that it had no jurisdiction under the two Acts to entertain the suit and grant the orders sought. The trial court held that under **Section 26(3) of the Land Consolidation Act** the decision of the Land Adjudication Officer was final and not subject to appeal except on very limited grounds. The trial court was also of the opinion that an appeal against the impugned decision of the Land Adjudication Officer was barred under **Section 29 of the Land Adjudication Act**. The court was further of the opinion that the recourse the Appellant may have had was to apply for judicial review before the superior court.

B. THE GROUNDS OF APPEAL

12. Being aggrieved by the said ruling and order the Appellant filed a memorandum of appeal dated 31st 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. 2760- Karama 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.

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

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

13. The Appellant consequently sought that the appeal be allowed, that the order striking out the suit be set aside, and that costs of the appeal be awarded to him.

C. DIRECTIONS ON SUBMISSIONS

14. When the appeal was listed for directions on 31st August, 2020 it was directed that the appeal shall be canvassed through written submissions. The Appellant was granted 21 days to file his submissions whereas the Respondents were granted 21 days upon the lapse of the Appellant's period to file theirs. The record shows that the Appellant filed his submissions on 24th September, 2020 whereas the 1st Respondent filed his on 28th September, 2020. However, there were no submissions on behalf of the Attorney General for the 2nd and 3rd Respondents by the time of preparation of the judgment.

D. THE ISSUES FOR DETERMINATION

15. Although the Appellant raised 6 grounds in his memorandum of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following 3 key issues:

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

(b) Whether the trial court erred in striking out the Appellant's suit.

(c) Who shall bear costs of the appeal.

E. ANALYSIS AND DETERMINATION

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

16. The court has considered the material and submissions on record on this issue. The Appellant submitted that the trial court applied the wrong legislation, that is, the **Land Adjudication Act (Cap. 284)** instead of the **Land Consolidation Act (Cap. 283)** and as a result arrived at a wrong decision. The 1st Respondent was of the view that it did not matter whether the trial court applied one statute or the other because the bottomline was that both statutes decreed the finality of the respective decisions made in the adjudication process. In particular, the 1st Respondent contended **under Section 26(3) of the Land Consolidation Act** the decision of the Land Adjudication Officer and relevant committee was final and not subject to appeal.

17. The Appellant relied upon the Court of Appeal case in **Peter Kimandiu v Land Adjudication Officer Tigania West District & 4 Others [2016] eKLR** for the proposition that the trial court had applied the wrong statute. In that case, the Court of Appeal was of the opinion that it was the **Land Consolidation Act** and not the **Land Adjudication Act** which applied to Tigania West District. It must, however, be borne in mind that the trial court applied both statutes to the matter in question and found that it had no jurisdiction to entertain the claim under both Acts.

18. In holding that it had no jurisdiction by virtue of Section 26 of the Land Consolidation Act, the trial court rendered itself as follows:

Section 26(3) of the land Consolidation Act has provided a concise procedure on how the register herein is supposed to be rectified. The duty to rectify is wholly placed in the hand of the Adjudication Officer. At no point is the court granted jurisdiction to rectify the register. In fact, Section 26(3) is clear that no appeal shall lie against the decision by the Adjudication Officer to order rectification”.

19. The trial court was further of the opinion that the court only plays a very limited role of reviewing the compensation awarded. The trial court was further of the opinion that entertaining the suit for a declaration and rectification of the adjudication register would amount to judicial usurpation of the mandate and functions of the Land Adjudication Officer under the law. The trial court relied upon **Meru ELC No. 198 of 2016 M’Muthara M’Thing’a v Murithi M’Amburubua** for the proposition that the court had no jurisdiction to usurp the functions of the institutions created by parliament under the Land Adjudication Act and the Land Consolidation Act.

20. The court is of the opinion that even though the trial court may have erred in considering both the Land Consolidation Act and the Land Adjudication Act instead of the former only, there was no miscarriage of justice since the court arrived at the same conclusion that it had no jurisdiction to entertain the Appellant's claim under both statutes. The only issue which would then arise is whether the trial court erred in Law in holding that it had no jurisdiction to entertain the claim under the Land Consolidation Act.

21. There is no doubt from a reading of **Section 26(3) of the Land Consolidation Act** that no appeals are allowed against the decision of the Land Adjudication Officer to dismiss an objection or order rectification of the adjudication register. So, can an aggrieved person who is debarred from appealing commence fresh proceedings before the magistrates' court to ventilate his grievances? Whereas the Appellant contended that filing a fresh suit would be in order, the 1st Respondent contended otherwise.

22. The 1st Respondent submitted that the Appellant was bound by the provisions of the **Land Consolidation Act** and that upon the decision of the Land Adjudication Officer being rendered it would become final subject only to the supervisory jurisdiction of the superior courts through judicial review proceedings. The 1st Respondent cited the case of **Abdalla Mangi Mohamed v Lazarus and 5 Others [2012] eKLR** where it was held, *inter alia*, that:

“...where there is a dispute as to the Applicant's entitlement to property and where there exists a mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the Applicant's claim to the property rather than clog the constitutional court with applications for enforcement of property rights which require prior determination...”

23. The court is of the opinion that there is a good reason why parliament in its wisdom created the various institutions under the **Land Consolidation Act** and vested them with specific functions and responsibilities for execution of the statute. It was not the intention of parliament that once the statutory process of dispute resolution came to its logical conclusion under the **Land Consolidation Act**, then the adjudication process for determination of property rights would start afresh before the Magistrates' courts. That is why the legislature provided that the decision of the Land Adjudication Officer would be final and not Appellable.

24. The court is of the view that by filing suit before the Magistrates' Court at Tigania, the Appellant was simply trying to circumvent the statutory bar under **Section 26(3) of the Land Consolidation Act**. The Appellant was simply trying to take a second bite at the cherry after having failed in his objection before the Land Adjudication Officer. The court has noted that in his submissions before the trial court, the Appellant submitted that **Section 26(3) of the Land Consolidation Act** was not applicable to him because the 1st Respondent was an influential member of the adjudication committee and that the decision of the Land Adjudication Officer to dismiss his objection was tainted with conflict of interest. The court is thus of the opinion that if the Appellant took the view that the Land Adjudication Officer unfairly dismissed his objection on account of the perceived bias and conflict of interest then he ought to have moved the superior court for judicial review orders.

25. The court is of the opinion that it would defeat the object of the **Land Consolidation Act** and the intention of the legislature if all the parties who lost during the adjudication process were to be allowed to commence the process afresh with the Magistrates' courts taking over as land adjudication officers. The process of land adjudication would never come to an end if that were allowed to happen.

26. 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.”

27. The Appellant has contended that the trial court erred in not considering the consent of the Land Adjudication Officer to the institution of the suit. It was further contended that the consent was sufficient to cure any defects of jurisdiction in so far as the trial court was concerned. The court has noted from the ruling of the trial court that the issue of consent was in fact considered. The trial court was of the opinion that a consent letter could not grant jurisdiction upon the court where none was granted by law.

28. The court is of the opinion that the consent of the Land Adjudication Officer under **Section 8** of the **Land Consolidation Act** would have come in handy if the issue before the trial court was that the court had no jurisdiction to entertain the suit for want of such consent. The object of the requirement for consent was to insulate the adjudication process from the vagaries of litigation except where the Land Adjudication Officer required a legal question or issue to be resolved to enable him complete the adjudication register. Consequently, the consent given by the Land Adjudication Officer in the instant case stated, *inter alia* that:

“In order to complete the Adjudication Register for the KARAMA Adjudication Section I shall in due course require copy of the final orders made for each case(s) listed in the schedule...”

29. The facts which emerge from the material on record do not lend credence to the contents of the consent letter issued by the Land Adjudication Officer. It would appear that the Adjudication register had already been prepared, subjected to public inspection and objections thereon lodged and determined. The material on record indicates that the Appellant's objection was dismissed on 22nd November, 2016 whereas the letter of consent is dated 14th February, 2017.

30. As was held in the **Stephen Kungutia & 2 Others v Severina Nchulubi - Nyeri Civil Appeal No. 221 of 2010** the consent of the Land Adjudication Officer is not intended to grant an aggrieved party a chance to challenge the decision of the Land Adjudication Officer 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.”

31. It would thus appear that the consent letter was issued mechanically without consideration of the entire scheme of the **Land Consolidation Act**. The court is thus of the opinion that such a consent would not override the statutory bar contained in **Section 26(3) of the Land Consolidation Act**. Once the adjudication process had come to its logical conclusion under **Section 26** of the said Act a letter of consent issued under **Section 8 of the Act** cannot legally confer jurisdiction upon the Magistrates' Court to re-open the process, declare the objection proceedings a nullity and order rectification of the adjudication register. The court is thus of the opinion that **Section 8** bars suits during the pendency of the adjudication process whereas **Section 26 (3)** bars proceedings upon conclusion of the entire process except of course, judicial review proceedings.

(b) Whether the trial court erred in striking out the Appellant's suit

32. The court has already found and held that although the trial court erred in holding that he did not have jurisdiction by virtue of **Section 29 of the Land Adjudication Act**, it was right in holding that it had no jurisdiction to entertain the suit by virtue of **Section 26 of the Land Consolidation Act**. The error of law in making reference to the **Land Adjudication Act** did not occasion a miscarriage of justice. Accordingly, the court is of the opinion that the trial court was entitled to strike out the Appellant's suit since it had no jurisdiction to usurp made of the institutions set up under the **Land Consolidation Act** to resolve the property dispute at hand.

(c) Who shall bear the costs of the appeal

33. 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 parties should not be awarded costs of the appeal. Accordingly the 1st Respondent shall be awarded costs of the appeal. The 2nd and 3rd Respondents shall not be awarded any costs since they did not file any submissions in the appeal.

F. CONCLUSION AND DISPOSAL

34. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the court makes the following orders for disposal thereof:

- (a) The Appellant's appeal be and is hereby dismissed in its entirety.
- (b) The order of the trial court dated 16th July, 2019 striking out the Appellant's suit is hereby upheld.
- (c) The 1st Respondent is hereby awarded costs of the appeal to be borne by the Appellant.

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