



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 102 OF 2019

ALOIS KABURI NAITULI.....APPELLANT

VERSUS

MUCHUI KOBIA.....1ST RESPONDENT

GEORGE MUTUMA.....2ND RESPONDENT

THE LAND ADJUDICATION & SETTLEMENT

OFFICER TIGANIA EAST DISTRICT.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

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

on 18th July, 2019 in Tigania PM E&L No. 13 of 2017)

JUDGMENT

1. The appeal herein seeks to overturn the ruling made on **18th July 2019** in **Tigania ELC No. 13 of 2017** where the appellant was the plaintiff and the respondent, the defendant. It is based on the following grounds:-

i. That the learned trial magistrate erred in law in finding that he had no jurisdiction to entertain the suit.

ii. That the learned magistrate erred in law in failing to appreciate that the appellant having obtained consent from the Land Adjudication Officer the court had jurisdiction to hear and determine the matter.

2. This being a first appeal the court as per ***Selle –vs- Associated Motor Boat Co. Ltd & Others [1968] E.A 123*** is expected to re-hear, rehearse and reappraise itself on pleadings, evidence and findings of the lower court and come up with its own findings so as to establish if the court based its judgment or ruling on sound legal principles.

3. Through an amended plaint dated **9.11.2013** the appellant sued **Muchui Kobia** for eviction from **L.R No. 4927** Ankamia Adjudication Section pursuant to a consent issued on **1.11.2013** by the District Land Adjudication Office Tigania Wes/East District. The court record shows the **1st** respondent filed a defence and one George Mutuma was enjoined to the suit.

4. Parties took directions on **18.11.2018** and on **17.2.2016** in which the District Land Adjudication Officer was to visit the disputed parcel and file a report.

5. A report dated **1st April, 2016** was filed in court on **4.6.2016** giving details on how the parcels implementation was done on **10.3.2016** by parties. The report attached sketch maps. Meantime the suit could not proceed out of the jurisdiction aspect raised by the Malindi High Court matter in 2016.

6. Following the report and resumption of court business the plaintiff sought to amend the plaint. An amended plaint was filed on **11.4.2019**. The **1st** and **2nd** respondents amended their defence dated **26.3.2019** and put in a preliminary objection that the suit was based on objection proceedings hence the appellant ought to have proceeded by way of judicial review or an appeal to the Minister.

7. In the amended plaint, the appellant enjoined the 3rd and 4th respondents herein alleging conspiracy, fake objection proceedings and hiving of his portion of land, in a fraudulent manner without his knowledge.

8. He further pleaded the 1st, 2nd and 3rd respondents altered the land records. The appellant's sought a declaration that the hiving off a portion measuring 1.63 acres from his Parcel No. 4927 to create Parcel No. 111 in favour of the 1st respondent was fraudulent, irregular and unlawful.

9. The appellant filed a response to the preliminary objection by way of a replying affidavit sworn on **10.5.2019** alleging he had filed a suit No. **Meru CMCC 349 of 2013** on **12.11.2013** and which was transferred to Tigania Law Courts. He denied he was a party to the alleged objection proceedings and further averred his claim was based on fraud.

10. The 1st and 2nd respondents filed written submissions in which they admitted the objection proceedings were brought by the 2nd respondent, whose decision could only be overturned through a Minister's appeal or judicial review. The 1st and 2nd respondents attached a copy of the decision dated **4.10.2012**.

11. On the other hand the appellant opposed the preliminary objection through written submission dated 10.7.2019 claiming the alleged objection was heard without his notice, knowledge or presence. He relied on **Narendra T/A Sanghani & Sons –vs- P.N. Mashru Ltd [2018] eKLR and Article 159 (2) (d)** of the Constitution on the right to be heard based on substantive justice.

12. As a starting point, the consent by adjudication officer was specifically for orders of eviction against the 1st respondent.

13. The court record shows initial parties consented for amendments, subsequent to which the 3rd and 4th respondents were brought on board and the claim broadened to include matters of fraud, illegality and collusion against 1, 2 and 3rd respondents.

14. It appears the 3rd and 4th respondents did not file any defence yet the amended plaint raised serious issues against them.

15. Whereas the trial court made a finding that the claim arose out of objection proceedings by a land adjudication officer, my considered view is that after the trial court allowed joinder of more parties the claim was no longer over objection proceedings

16. To my mind the court allowed the appellant's replying affidavit in opposition to the preliminary objection to be filed. The same was clear, the appellant was not party to the objection proceedings.

17. The written submissions in support of the preliminary objection attached a copy of the objection proceedings which, carefully looked at, raised factual issues which ideally a preliminary point of law frowns upon. Those facts were contested by the parties and hence weakened the alleged preliminary objection.

18. Thirdly issues of fraud, impropriety and collusion fall under the court's mandate. In my view, therefore the learned trial magistrate erred in law and in fact in holding he lacked jurisdiction to determine the suit.

19. The appeal herein succeeds with costs to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 3RD DAY OF NOVEMBER, 2021

IN PRESENCE OF:

ONDIEKI FOR 1ST AND 2ND RESPONDENTS

KIETI FOR 4TH RESPONDENT

NKUNJA FOR APPELLANT – ABSENT

COURT CLERK: KANANU

HON. C.K. NZILI

ELC JUDGE