



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 105 OF 2019

HENRY KIREMAAPPELLANT

VERSUS

MARTHA NKAMBI1ST RESPONDENT

THE LAND ADJ. OFFICER, TIGANIA EAST & WEST.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of the Hon. G. Sogomo (PM) dated 25th July, 2019 in *Tigania PMCC No. 96 of 2014 – Henry Kirema v Martha Nkambi. The Land Adjudication Officer Tigania East and West and the Attorney General*. By the said ruling, the trial court held that it had no jurisdiction to entertain the Appellant's suit by virtue of the provisions of **Section 26(3) of the Land Consolidation Act (Cap 283)** and **Section 29 of the Land Adjudication Act (Cap 284)**. As a consequence, the trial court struck out the Appellant's suit with costs to the Respondents.

2. The material on record indicates that by a plaint dated 17th July, 2014 the Appellant sought an order for the 1st Respondent to be ordered to transfer 2 acres of land from *L.R. No. 3156 Akaiga Adjudication Section* to the Appellant. The Appellant pleaded that he was the owner of parcel No. 309 in Akaiga Adjudication Section from which he sold the 1st Respondent's late husband Atanasio Nkambi (*the deceased*) 2 acres leaving a balance of 2.26 acres.

3. The Appellant further pleaded that he later on discovered that the deceased had forged a letter indicating that the Appellant had transferred an additional 2 acres to him thereby leaving the Appellant with a balance of only 0.26 acres. It was further pleaded that upon filing an objection during the land adjudication process the 2nd Respondent wrongfully dismissed the objection.

4. It was the Appellant's contention that the deceased and the 2nd Respondent had colluded to fraudulently deprive him of 2 acres out of his property. Interestingly, one of the particulars of fraud pleaded against the Land Adjudication Officer (LAO) was that he had dismissed the Appellant's objection.

5. The material on record indicates that the 1st Respondent filed a defence dated 6th August, 2014 denying the Appellant's claim. She denied that she was party to any collusion or fraud. She further contended that the Appellant's objection was rightly dismissed by the 2nd Respondent for lack of merit. The 1st Respondent, therefore, prayed for dismissal of the Appellant's suit.

6. There is no indication on record to show that the Attorney General ever entered appearance for the 2nd and 3rd Respondents. There is also no indication on record to show that the Attorney General was ever served with summons to enter appearance. The material on record shows that the original summons expired before the Attorney General could be served and that the Appellant had to apply for extension of its validity.

7. It would further appear that when the suit came up for hearing on 27th June, 2019 the trial court on its own motion asked the parties to address the court on the issue of jurisdiction in view of the provisions of the **Land Consolidation Act (Cap. 283)** and the **Land Adjudication Act (Cap. 284)**. The record shows that the Appellant filed his written submissions on the court's jurisdiction to entertain the

suit but there is no indication of the Respondents having filed any.

8. By a ruling dated 29th July, 2019 the trial court held that it had no jurisdiction to entertain the Appellant's suit on account of the provisions of **Section 26(3) of the Land Consolidation Act (Cap 283)** and **Section 29(1) of the Land Adjudication Act (Cap. 284)**. The court relied upon the case of **Meru ELC No. 167 of 2011 Mugambi Nicholas and Others v Zachary Baariu and Others (unreported)** and the case of **Abdalla Maingi Mohamed and Others v Lazarus Bofa and Others [2012]eKLR** and consequently struck out the Appellant's suit with costs.

B. THE GROUNDS OF APPEAL

9. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 25th August, 2019 raising the following 3 grounds of appeal:

(a) *The learned magistrate erred in law in dismissing the Appellant's suit for lack of jurisdiction whereas he had jurisdiction to entertain the suit.*

(b) *The learned magistrate erred in law in his application of **Section 26(3) of the Land Consolidation Act** hence arrived at a wrong decision.*

(c) *The learned magistrate erred in law in his interpretation of **Section 26(3) of the Land Consolidation Act** in the case before him.*

10. Consequently, the Appellant prayed that the appeal be allowed, that the order of the trial court be set aside, and that he be awarded costs of the appeal.

C. DIRECTIONS ON SUBMISSIONS

11. When the appeal was listed for directions on 31st August, 2020 it was directed, with the consent of the parties, that the same shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their submissions. The record shows that the Appellant filed his submissions on 14th September, 2020 whereas the 1st Respondent filed hers on 23rd October, 2020. However, the Attorney General did not file any submissions on behalf of the 2nd and 3rd Respondents.

D. THE ISSUES FOR DETERMINATION

12. Although the Appellant enumerated 3 issues in his memorandum of appeal, the court is of the opinion that the appeal may be effectively determined on the basis of the following two issues:

(a) *Whether the trial court erred in law in its interpretation and application of the law and as a consequence arrived at a wrong decision.*

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

E. ANALYSIS AND DETERMINATION

(a) **Whether the trial court erred in law in its interpretation and application of the law**

13. The Appellant submitted that the Appellant's claim was an ordinary civil suit based on fraud hence the trial court had jurisdiction to entertain the same as such. On the other hand, the 1st Respondent contended that the **Land Consolidation Act** had set out elaborate procedures and mechanisms for resolution of any disputes arising under the Act and that the same had provided that the decision of the LAO and the relevant committee was final hence not subject to appeal. The 1st Respondent relied upon the case of **Nicholas Mugambi and Others vs Zachary Baariu and Others Meru ELC No. 167 of 2011**. (unreported) in support of that proposition.

14. The Appellant further submitted that, in any event, the LAO had already given consent under **Section 8** of the **Land Consolidation Act** hence the trial court had jurisdiction to entertain the suit. The court has noted that the consent letter states, *inter alia*, that:

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

15. The court is of the opinion that the purpose of **Section 8** of the **Land Consolidation Act** is to insulate the process of land adjudication and consolidation from the vagaries and delays of civil litigation. It was the intention of the legislature to facilitate expeditious conclusion of the process but where a legal question or issue arose in the course of the process the LAO was allowed to grant consent to the concerned parties to file suit. The judicial determination was supposed to assist the LAO in completing the adjudication register under **Section 25** of the **Land Consolidation Act**.

16. The material on record in the instant case indicates that the adjudication register was in fact completed, inspected and objections thereto determined under **Section 26** of the **Land Consolidation Act**. It was after determination of the Appellant's objection that the consent letter for filing suit was issued on 8th July, 2014. The court is of the opinion that upon determination of the objection under **Section 26(1) and (2)**, the provisions of **Section 26(3)** of the Act kicked in immediately barring the Appellant from appealing on the merits of the LAO's decision. It would, therefore, follow that the letter of the LAO could not legally circumvent the provisions of **Section 26(3) of the Land Consolidation Act** and allow the Appellant to file a fresh suit on the same facts which were considered by the LAO and found to lack merit.

17. As was held in the **Stephen Kungutia & 2 Others v Severina Nchulubi, Nyeri Civil Appeal No. 221 of 2010** 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.”

18. The court is aware that a statutory provision providing that the decision of a public authority is final and shall not be subject to appeal is not necessarily an absolute bar to any form of litigation. It simply means that an aggrieved person is barred from challenging the merits of the decision. However, the decision making process itself may be challenged through judicial review proceedings. There is no indication on record that the Appellant challenged the decision making process. He simply decided to file a fresh suit on the merits of the LAO's decision but decided to spice it up with allegations of fraud to make it appear as though it was a new or independent cause of action. However, the truth of the matter is that the Appellant was aggrieved by the decision of the LAO dismissing his objection. If the objection had been allowed, he would not have filed the suit seeking the relief which was denied by the LAO.

19. 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.”

20 The court is thus of the persuasion that the trial court had no jurisdiction to entertain the Appellant's suit which was based on matters which were the subject of an objection before the LAO whose decision thereon was not subject to appeal on the merits. The court takes the view that where parliament has provided specific procedures and mechanisms for resolution of a dispute, the concerned parties are required to strictly follow such procedures and mechanisms unless there are exceptional circumstances justifying a departure from such procedures.

(b) Who shall bear costs of the appeal

21. 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 litigant 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 costs since they did not participate in the appeal.

F. CONCLUSION AND DISPOSAL

22. 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 1st Respondent.

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