



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 28 OF 2019

JOHN KIRIABU LAIKURU.....APPELLANT

-VERSUS-

STANLEY MUGAMBI LITHARA.....1ST RESPONDENT

ELIUD NYENJERE IKIAO.....2ND RESPONDENT

LAND ADJUDICATION & SETTLEMENT OFFICER TIGANIA DISTRICT....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of the Hon. G. Sogomo (PM) dated 17th January, 2019 in *Tigania PMCC No. 61 of 2018 – John Kiriabu Laikuru v Stanley Mugambi Lithara & 3 Others*. By the said decision, the trial court held that it had no jurisdiction to entertain the Appellant's suit and as a result struck it out with costs to the Respondents.

2. The material on record indicates that by a plaint dated 28th September, 2009 and amended on 26th October, 2009 the Appellant sought the following reliefs against the Respondents:

(a) A declaration that the Land Parcel Nos. 2185 and 1055 Uringu 1 Adjudication Section are the property of the Plaintiff.

(b) An order that the 3rd Defendant's records on parcel Nos. 2185 and 1055 be cancelled and the Adjudication Register and the demarcation map be redone to reflect the Plaintiff as the sole lawful proprietor of Land parcel Nos. 2185 and 1055 Uringu 1 Adjudication Section.

(c) An order of injunction against the first and second Defendants jointly and severally either by themselves, their servants and/or agents from damaging, felling down, cutting down, or any way destroying or any way damaging the Plaintiff's trees, coffee trees or and macadamia trees on land Ref Nos. 2185 and 1055 Uringu 1 Adjudication Section.

(d) An order that the Land Registrar be ordered to rectify the register of Land Parcels Nos. Nyambane/Uringu 1/2185 and 1055 and register the same in the names of the Plaintiff.

(e) Damages to cover the value of the damaged trees, coffee and macadamia trees.

3. The Appellant pleaded that parcel Nos. 2185 and 2055 in **Uringu Adjudication Section** (*the suit properties*) constituted his ancestral land which he had developed extensively but that during the land demarcation exercise the 1st and 2nd Respondents had unlawfully and fraudulently obtained registration thereof to his detriment. The Appellant pleaded further that when he lodged an objection to reclaim the suit properties during the land adjudication process, the Respondents colluded or conspired to have the same dismissed. It was contended that the 3rd Respondent did consider the objection on merit and that the verdict rendered was flawed and illegal.

4. The Appellant further pleaded that following the delivery of the flawed and illegal verdict on his objection in December, 2008 the 1st and 2nd Respondents had maliciously destroyed and felled his trees and crops on the suit properties. The Appellant further pleaded that he had

obtained the consent of the Land Adjudication Officer (LAO) to file the said suit.

5. The record shows that the 2nd Respondent filed a defence and counterclaim dated 23rd November, 2009. By his defence, he denied the Appellant's claim in its entirety. He also denied the allegations and particulars of fraud and illegality attributed to him and put the Appellant to strict proof thereof. He denied that he had destroyed the Appellant's trees and crops as alleged and put him to strict proof thereof. He also pleaded that there was a pending suit between the parties being **Civil Suit No. 254 of 1985** whose full particulars were not provided.

6. By his counterclaim, the 2nd Respondent pleaded that he was the registered proprietor of Parcel No. 1055. He stated that he was the one who had developed and resided on the said property for over 30 years. It was pleaded that sometime in 2007, the Appellant lodged an objection (No. 574) claiming one acre out of parcel No. 1055 which objection was allowed by the 3rd Respondent who granted the Appellant 1.5 acres instead.

7. The 2nd Respondent further stated that he challenged the decision of the LAO in *Meru High Court Misc. Application No 89 of 2008* which was still pending determination. The Appellant was said to be an interested party on the said matter.

8. The 2nd Respondent also pleaded that sometime in 2009 the Appellant had maliciously destroyed trees on parcel No. 1055 without lawful justification or excuse in consequence whereof he suffered loss and damage. In the result, the 2nd Respondent sought the following reliefs in the counter claim:

(a) *A declaration that Antuanjau/Nciru plot No. 1055 measuring 3.76 acres in Tigania District belongs wholly to the 2nd Defendant.*

(b) *A permanent injunction restraining the plaintiff, his agents, servants and employees from interfering with the 2nd Defendant's and his family's peaceful and quiet possession and ownership of parcel No. 1055.*

(c) *Damages for trespass and value of damaged property.*

(d) *Any other or further relief that the court may deem fit to grant.*

(e) *Costs and interest.*

9. The Attorney General filed a defence dated 26th May, 2015 on behalf of the 3rd and 4th Defendants denying liability for the Appellant's claim. The 3rd and 4th Defendants denied the fraud, illegality and the particulars of fraud pleaded against them and put the Appellant to strict proof thereof. It was the Attorney General's case that the Appellant had filed A/R objection No. 574 against Parcel 1055 recorded in the name of the 2nd Respondent which objection was allowed to the extent of awarding him 1.5 acres since he had proved his claim to that extent. However, the Appellant's A/R objection No. 1331 with respect to Parcel 2185 recorded in the 1st Respondent's name was dismissed for lack of merit upon full hearing. The 3rd and 4th Defendants denied that the Appellant had been granted any consent to file the suit.

10. The record shows that the Appellant filed a reply to both defences and a defence to the 2nd Respondent's counter claim. The Appellant simply joined issue with the Respondents' defences and reiterated the contents of his amended plaint. The Appellant also denied the contents of the 2nd Respondent's counter claim by way of a general traverse.

11. Before the suit and counterclaim could be heard, however, the trial court called upon the parties to address it on the question of its jurisdiction to entertain the Appellant's claim. The parties filed their submissions on the issue and by a ruling dated and delivered on 17th January, 2019 the trial court held that it had no jurisdiction to entertain the suit. The trial court was of the opinion that the Appellant had failed to comply with the dispute resolution mechanisms set out under the **Land Adjudication Act (Cap. 284)**. In particular, the court was of the opinion that upon dismissal of his objections, the Appellant should have pursuant the option of appealing to the Minister under **Section 29 of the Land Adjudication Act**. As a consequence, the trial court struck out the Appellant's suit with costs.

B. THE GROUNDS OF APPEAL

12. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 28th January, 2019 raising the following 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 as between the Land Adjudication Act (Cap. 284 Laws of Kenya) and the Land Consolidation Act (Cap. 283 Laws of Kenya) and 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 judgment/decision of the trial Magistrate is bad in law.*

(e) *The learned trial Magistrate erred in law and fact in that he did not consider the CONSENT given to him by DLASO to hear the matter.*

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

13. The Appellant, therefore, prayed that the appeal be allowed and his suit reinstated for trial. He also prayed for costs of the suit.

C. DIRECTIONS ON SUBMISSIONS

14. When the appeal was listed for hearing on 2nd September, 2020 it was directed that the same shall be canvassed through written submissions. The Appellant was given 21 days to file and serve his submissions whereas the Respondents were given 21 days upon the lapse of the Appellant's period to file theirs. The record shows that the Appellant filed his submissions on 16th September, 2020 but the Respondents' submissions were not on record by the time of preparation of the judgment.

D. THE ISSUES FOR DETERMINATION

15. Although the Appellant raised 6 grounds of appeal 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.*

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

E. ANALYSIS AND DETERMINATION

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

16. 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) (LCA)** and the **Land Adjudication Act (Cap. 284) (LAA)** applied to the dispute and as a result ended up applying the wrong statute to the dispute before it.

17. The Appellant contended that since the parcels in dispute were located in Tigania then the applicable statute was the **LCA** 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 **LCA** and not the **LAA**. The Appellant, therefore, contended that the trial court had applied the wrong statute and as a consequence arrived at a wrong decision.

18. The court is persuaded by the Appellant's cited authority that the statute which was applicable to the dispute at hand was the LCA and not the LAA. The court concurs with the Appellant's submission that the trial court had erred in applying the latter statute instead of the former. So, what is the fate of the trial court's ruling in view of this holding? Does it mean that if it had no jurisdiction under the LAA that it would of necessity have jurisdiction under the LCA?

19. It is evident from the ruling of the trial court that the ratio decidendi of the decision was that the Appellant had failed to strictly follow and exhaust the dispute resolution mechanisms set out under the LAA. The court is aware that the LCA also has elaborate land adjudication and dispute resolution mechanisms. So, that did the Appellant strictly comply with the relevant provisions of the LCA? Section 26 (3) of the LCA 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."

20. The court is of the opinion that **Section 26 (3) of the LCA** ousts the jurisdiction of the Magistrates' court to deal directly with appeals challenging the decision of the **LAO** or from undertaking fresh adjudication with respect to matters governed by the Act. The court is of the opinion that even though the trial court made reference to the wrong statute, the error did not occasion a miscarriage of justice since the correct statute still ousted its jurisdiction to entertain the suit.

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

21. The Appellant submitted that the trial court had erred in law in holding that it had no jurisdiction to entertain the suit for two reasons. First, that the trial court had applied the wrong statute and as a consequence had arrived at a wrong conclusion that it did not have jurisdiction. Second, that the trial court erred in law in failing to take into account the fact that the LAO had granted consent for filing suit under Section 8 of the LCA.

22. In addition to what the court has stated on the first issue, the court is of the opinion that the process of land adjudication and ascertainment of rights and interests over the suit properties had essentially come to its logical conclusion within the meaning of Section 26 of the LCA subject, of course, to the supervisory jurisdiction of the superior courts. The LAO and other bodies set out under the Act had fully undertaken their duties all the way to the point of determination of objections filed by the Appellant under Section 26 (3) of the Act. One of the parties had even filed a judicial review application to challenge the decision of the LAO in allowing the Appellant's objection with respect to Parcel No. 1055.

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 the appeal reveals that the dispute between the Appellant on the one hand, and the 1st and 2nd Respondents on the other hand, over the suit properties was handled by all the relevant institutions and bodies set up under the LCA. The final stage consisted of two objections lodged by the Appellant asserting his perceived interest in the suit properties. The material on record indicates that whereas his objection on Parcel 1055 succeeded in part, his objection on parcel 2185 was dismissed by the LAO.

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 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 Magistrate's court in the hope that he may secure a different 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 the jurisdiction reserved for different bodies under the LCA. 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 LCA.

27. As was held in the case of *Stephen Kungutia & 2 Others v Severina Nchulubi Nyeri Civil Appeal No 221 of 2010 (unreported)*, 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 which he has already considered and decided. The Court of Appeal referred to its earlier decision and stated that:

“In *Julia Kaburia v Kabeera & 5 Others* (supra) this court 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**. However, since the Respondents did not file submissions or participate in the appeal, there shall be no order as to costs.

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 no order as to costs.

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