



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 360 OF 2017

LEONARD MUENDO MUIA.....PLAINTIFF

-VERSUS-

CHARLES MUTUA MUSYOKI.....1ST DEFENDANT

JONES NYAMASYO NZANGI.....2ND DEFENDANT

PETER MWOVE NYAMAL.....3RD DEFENDANT

GRACE YULA MUSYOKI.....4TH DEFENDANT

RULING

1. The Plaintiff filed this suit on 9th November, 2017 against the Defendants seeking various reliefs in the Plaint *inter alia*:

a) An order of permanent injunction restraining the Defendants whether by themselves, their agents, servants, sons, daughters, wives, husbands or anybody claiming under their behalf from entering upon interfering with or in any other way utilizing the Plaintiffs parcels of land known as plot nos. 3259, 3236, 3223 and 3254 Ngai Adjudication Section.

b) A declaration that parcel of land known as plot nos. 3259, 3236, 3223 and 3254 are rightfully owned by the Plaintiff and a consequential order directed to the Land Adjudication Officer Ngai Adjudication Section to deregister the names of the Defendants and eventually register the Plaintiff as the owner of parcel of land.

c) Costs of the suit.

d) Any other or further relief as this Honourable Court may deem fit and just to grant.

2. In reply, the Defendants filed their Defence and Counterclaim on 31st August, 2018. The Defendants have sought in the counterclaim the following reliefs *inter alia*:

a) The Court do declare that the parcels of land known as plot nos. 3236, 3259, 3223 and 3254 do belong to the Defendants respectively by virtue of inheritance.

b) The costs of the suit be paid by the Plaintiff.

c) Any other relief that this Honourable Court shall deem fit and just to grant.

3. On 28th January, 2021 the Defendants filed a Notice of Preliminary Objection against the Plaintiff's suit on grounds that this Court has no jurisdiction to hear and determine the dispute because the Plaintiff has not exhausted all the avenues for determination of his dispute in accordance with the Land Adjudication Act.

4. In keeping with the Court's directions of 21st January, 2021 the parties herein filed their respective submissions and Lists of Authorities on 3rd June, 2021 for the Defendants and on 7th June, 2021 for the Plaintiff. In their submissions, the Defendants submitted that the Plaintiff's claim was duly registered under Section 13 of the Land Adjudication Act. That the Plaintiff's claim reached the committee stage of hearing and determination. That the claim has not gone before the Arbitration Board under Section 22 of the Act nor has the claim reached the

Appeal stage before the Minister under Section 29 of the Act. The Defendants relied on two sets of authorities namely: -

Paul Mutethia Mboroki -Vs- Land Adjudication & Settlement Officer;

Buuri Sub-County & another [2018] eKLR; and

Musau Kitone -Vs- Patrick Makau Katiku & 5 others [2019] eKLR

5. In his submissions, the Plaintiff submitted that under Section 29(1) of the Land Adjudication Act, he is given discretion to either appeal his case to the Minister or to alternatively seek the Land Adjudication Officer's consent in writing for purposes of commencing court proceedings. The Plaintiff submitted that he was granted the Land Adjudication Officer's consent to file this suit and the authenticity of that consent not being in question, then the preliminary objection is unsustainable. The Plaintiff relied on the case of **Justus Ntuiti -Vs- Joseph Kaumbuthu [2004] eKLR**. The Plaintiff further submitted that the Defendants' preliminary objection is unsustainable since it does constitute the definition of a preliminary objection in **Mukisa Biscuit Manufacturing Co. Ltd -Vs- West End Distributors Ltd [1969] EA 696** wherein Sir Charles Newbold, P thus held: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. I have perused the pleadings and submissions and I have isolated the single issue for determination as follows: -

i) Whether the Plaintiff's claim is barred from hearing and determination herein by virtue of Section 30(1) of the Land Adjudication Act Cap 284 Laws of Kenya?

7. To begin with, I shall start from what constitutes a preliminary objection. I will adopt Justice Law's description in **Mukisa Biscuit Manufacturing Co. Ltd -Vs- West End Distributors Ltd [1969] EA 696** (at page 700) wherein the learned judge held as follows: -

“In so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. I have perused the Defence herein and I have seen that the jurisdiction of this Court was challenged at paragraph 12 of the Defence. The Defendants have pleaded that the dispute concerns an interest in land within a land adjudication section and since the Land Adjudication Act creates a dispute resolution hierarchy, then this court is ousted from hearing the matter other than by way of judicial review proceedings. Guided by the description of Justice Law in the **Mukisa Case** as reproduced hereinabove, I am persuaded to find that what is before me is a competent preliminary objection.

9. On my interpretation of Section 30(1) of the Land Adjudication Act, my view is that the consent of the Land Adjudication Officer can only be issued subject to Section 29(3) of the Act where it is clearly prescribed that the appeals pending before the Minister must have been determined. To further elaborate, Section 30(1) of the Act requires that the adjudication register for a specific adjudication area must have become final in all respects. Under Section 29(3) of the Act, the adjudication register becomes final when the Director of Land Adjudication has altered the duplicate adjudication register to conform with the determinations of the appeals and after the Director of Land Adjudication has certified on the duplicate adjudication register that it has become final in addition to sending details of alterations thereof and a copy of the certificate to the Chief Land Registrar.

10. In my perusal of the pleadings herein, I have not come across the certificate of the Director of Land Adjudication confirming either of the following; alterations were made to the duplicate adjudication register, that the adjudication register has become final or that the adjudication register was forwarded to the Chief Land Registrar together with a list of the appeals.

11. To this end, I am unable to find merit in the Plaintiff's submission that they have the apposite statutory consent to file this suit when they have not exhausted the resolution hierarchy outlined in the Land Adjudication Act. I am also not convinced that there is a certificate from the Director of Land Adjudication confirming that the adjudication register has become final and that the appeals have been determined. To buttress my finding I am guided by two Court of Appeal authorities. In **Speaker of the National Assembly -Vs- James Njenga Karume [1992] eKLR**, the Court held as follows: -

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

12. In **Mutanga Tea & Coffee Company Ltd. -Vs- Shikara Ltd & Another [2015] eKLR** the Court of Appeal held as follows: -

“However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.”

13. The upshot of the foregoing is that the Preliminary objection dated 27th January, 2021 has merits and I proceed to strike out the suit is with costs to the Defendants.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 15TH DAY OF JUNE, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi