



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E029 OF 2020

ROMAN MUTUKU KISINI (*Suing*

***as an administrator of the Estate of GIDEON KISINI MUSAU, deceased for the benefit
of the Estate and its beneficiaries and on his own behalf as a beneficiary of the Estate)***

ELIJAH KAMAU KISINI *alias* KAMAU KISINI

MUKUA MUIA.....PLAINTIFFS/RESPONDENTS

VERSUS

MARY MWIKALI MUASYA.....1ST DEFENDANT/APPLICANT

KATUA MUASYA.....2ND DEFENDANT/APPLICANT

FRANCIS NGANGA KIHEGE.....3RD DEFENDANT/APPLICANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT/APPLICANT

RULING

1. By a Notice of Preliminary Objection and a Further Notice of Preliminary Objection both dated 20th January, 2021 against the Plaintiffs' Notice of Motion dated 27th November, 2020, the 1st to 3rd Defendants have averred as follows:

a. That the suit is res judicata as encapsulated under Section 7 of the Civil Procedure Act Cap. 21.

b. That the suit and the Application offends the provisions of Section 29(1) (b) of the Land Adjudication Act Cap. 284.

2. The Plaintiffs filed Grounds of Opposition dated 21st January, 2021 in opposition to the Notices of Preliminary Objection. The Plaintiffs averred that they have a new cause of action upon which they can seek the reliefs from court and that the Preliminary Objections are grossly misconceived since there was no Appeal to the Minister as envisaged under Sections 26 and 29 of the Land Adjudication Act.

3. According to the Plaintiffs, the Minister acted without jurisdiction, irregularly, illegally and unconstitutionally in blatant breach of the procedure and the law. It is urged that the objections are baseless and should be dismissed with costs in the interest of justice.

4. The Notices of Preliminary Objection proceeded by way of submissions. Counsel for the Defendants submitted that pursuant to Section 7 of the Civil Procedure Act, this suit is *res judicata* as the issue of ownership of the subject land was addressed by the Land Adjudication Officer and that an Appeal was filed before the Minister whereby a determination was made and the objection overturned in respect of the suit properties.

5. According to counsel, the parties in the adjudication forum are the same persons herein and/or representatives of the deceased persons; that the 1st and 2nd Plaintiffs were Respondents in the Appeal against the Land Adjudication Officer's decision and that the suit property has been a subject matter in the Minister's Appeal No. 345 of 2008 whose decision as per Section 29(1) of the Land Adjudication Act is final.

6. Further, it was submitted that the suit and the Application offends the provisions of Section 29(1) (b) of the Land Adjudication Act; that the Plaintiff participated in the Appeal to the Minister and that the Plaintiffs having participated in the Appeal before the Minister and failed to raise the issue of limitation of time in filing the Appeal cannot raise it now.

7. According to counsel, the Plaintiffs should have challenged the Minister's decision through Judicial Review proceedings. Reliance was placed on the cases of **John Masiantet Saeni vs. Daniel Aramat Lolungiro & 3 Others eKLR** and **Lepore Ole Maito vs. Letwat Kortom & 2 Others [2016] eKLR**. It was submitted that the implementation and issuance of the Title Deeds was long done and boundaries fixed and that the suit should be struck out with costs and the Preliminary Objections upheld.

8. In response to the Defendants' advocates' submissions, counsel for the Plaintiffs submitted that the Minister purported to entertain Appeal No. 345 of 2008 thirteen (13) years later after the decision of the Land Adjudication Officer made on 25th October, 1995; that Section 29(1) of the Land Adjudication Act requires the Appeal to be filed with sixty (60) days and that the Minister's admission of the Appeal out of the requisite sixty (60) days was in gross breach of the law and *ultra vires* the powers under the Act.

9. It was submitted that Josephat Mulwa who filed Appeal Case No. 345 of 2008 was not an objector in the Objection Case No. 588 neither is he a party to this suit; that the Appeal was filed out of time for obvious reasons and that the Defendants are silent on the date when the purported Appeal was filed and by whom.

10. According to counsel, the Plaintiffs are not precluded from seeking declaratory reliefs from this court. Reliance was placed on the cases of **Nicholas Njeru vs. The Hon. Attorney General (2013) eKLR** and **Dume Deri Mumbo & 19 Others (Suing on their behalf and on behalf of Wandarari Clan vs. Cabinet Secretary of Lands Housing & Urban Development & 6 Others [2016] eKLR**.

11. The Plaintiffs' counsel submitted that the admission of the Appeal by the Minister out of time was a nullity *ab initio*. Reliance was placed on the case of **Jamin Kiombe Lidodo vs. Emily Jerono Kiomber & Another [2013] eKLR** and **Republic vs. District Commissioner, Keiyo & 2 Others; Peter Kiprono Chirchir (Interested Party) and Ex parte Robert Kipsigirio Lotiang [2018] eKLR**.

12. It is submitted that the suit is not *res judicata* for the reason that parties in Objection No. 588 were different from the parties herein; that the purported Appeal Case No. 345 of 2008 was filed by a party who was not a party in the Objection Case No. 588 and also not a party in this suit and that the purported Appeal Case No. 345 of 2008 was admitted and entertained out of time hence the Minister lacked jurisdiction.

13. I have considered the Defendants' Notices of Preliminary Objection, the Plaintiffs' Grounds of Opposition, submissions and the authorities filed by respective parties.

14. This suit was commenced by way of a Plaint dated 27th November, 2020. In the Plaint, the Plaintiff has sought for numerous declaratory orders, including a declaration that the decision of the Minister in Appeal Case Number 345 of 2008 over the suit property, namely L.R No. Nos. Machakos/Nguluni/2803, 2804 and 2805 was irregular and contrary to the provisions of the Land Adjudication Act, hence a nullity *ab initio*.

15. What is before me are Notices of Preliminary Objections. What constitutes a Preliminary Objection is set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696**, where it was held that:

"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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion."

16. The Defendants have challenged this suit on the basis that the issues raised herein were determined with finality by the Land Adjudication Officer and the Minister as contemplated under the provisions of the Land Adjudication Act.

17. In **Nicholas Njeru vs. The Hon. Attorney General (2013) eKLR**, the Court of Appeal held as follows:

"We agree those prayers could have perfectly filled the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However, we do not entirely agree with the learned Judge's observation that the court had no jurisdiction to grant a declaratory order... We agree with the trial judge that during the various proceedings the issues in this appeal were perhaps thrashed almost to the pulp and the dispute over who owned the suit property had long been determined."

18. In **Dume Deri Mumbo & 19 others vs. Cabinet Secretary of Lands, Housing & Urban Development & 6 Others [2016] eKLR**, this court held as follows:

*"The issues that are being raised in the current suit as to which clan owns the suit property were conclusively dealt with by the various bodies, including the Minister, pursuant to the provisions of the Land Adjudication Act. Considering that the suit herein is wholly challenging the decision of the Minister to allocate the 7th Defendant's clan 2/3 of the suit property, and in view of the provisions of Section 29(1)(b) of the Land Adjudication Act which provides that the decision of the Minister shall be final, the Plaintiff cannot appeal against the said decision in the manner that he has done. I say so because the mechanism to resolve disputes within an adjudication area have been set out in the Act. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings. As was stated by the Court of Appeal in the **Nicholas Njeru case** (supra), during the various proceedings, the issues in the current "appeal" were thrashed to the pulp and the issues as to which clan owned the suit property was determined in the year 2012. This court cannot re-open that issue as claimed by the Plaintiff by way of an ordinary suit, without disclosing the new cause of action that has arisen."*

19. Indeed, as was held by this court in the case of *Dume Deri Mumbo* (*supra*), the court can only interfere with the decision of the bodies established under an Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review proceedings.

20. To determine whether this suit is *res judicata* or not, this court has to consider the proceedings that were before the Minister, and the decision of the Minister thereof. Those proceedings could only be brought to the attention of this court by way of an Application and not a Preliminary Objection.

21. Considering that a preliminary point only raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct, and in view of the fact that a preliminary point cannot succeed if any fact has to be ascertained or if what is sought is the exercise of judicial discretion, I decline to allow the two Preliminary Objections.

22. For those reasons, the Notices of Preliminary Objection dated 20th January, 2021 are struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE