



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA CASE NO. 2 OF 2019

DAVID MWITHIRWA M' IBAYA.....APPELLANT

VERSUS

GEOFFREY KIBAARA M' IBAYA.....RESPONDENT

JUDGMENT

(Being an Appeal from Ruling and orders of Hon. Sogomo G. delivered on 20th December 2018 in ELC No. 47 of 2017, (Tigania)

Background

The Appellant, David Mwithirwa M' Ibaya was aggrieved by the decision of the Hon. Sogomo G. Principal Magistrate in PMCC No. 47 of 2017 (Tigania) delivered on 20th December 2018 and filed a memorandum of appeal dated 7th January, 2019 raising the following grounds of appeal:

- (1) The learned trial magistrate erred in law and in fact by failing to consider and or acknowledge that a copy of Adjudication officer's consent was duly stamped and filed together with the plaint.*
- (2) The learned trial magistrate erred in law and in fact in dismissing appellant's suit. The same having disclosing reasonable cause of action.*
- (3) The learned trial magistrate erred in law and fact in failing to find that the appellant had sought and obtained consent in writing and as such the Court had jurisdiction to entertain the suit.*
- (4) The learned trial magistrate erred in law and in fact in going against and/or failing to comply with the High Court order that the matter be heard on its merits.*
- (5) The learned trial magistrate erred in law and in fact by failing to find that the appellant's claim is the issue of trust and the relevant subsidiary regulation do not provide a convenient mechanism for determination of such issue and a party who wishes to have such matter resolved ought to file a substantive suit to be determined by Environment and Land Court.*
- (6) That the learned trial magistrate erred in law and in fact and misdirected himself contrary to the letters and spirit of the Constitution of the Republic of Kenya by failing to find that the appellant had raised triable issues in his suit by dismissing the suit based on technicalities instead of allowing the same be ventilated in a full hearing.*
- (7) The learned trial magistrate erred in law and in fact in awarding costs to the respondent when indeed the parties herein are relatives.*
- (8) The learned trial magistrate erred in law and in fact in failing to find that the suit property is a family land and by dismissing the appellant's suit amounts to eviction and depriving the appellant of his right to share the properties of the deceased.*
- (9) The learned trial magistrate erred in law and in fact in failing to find that provisions of Section 16 (2) of the Government Proceedings Act Cap. 40 Laws of Kenya and Order 29 Rule 2 (2) and (D) of the Civil Procedure Code doesn't apply since the Honourable Attorney General is not a party in this matter.*
- (10) The learned trial magistrate erred in law and fact by finding that the Court had no jurisdiction to entertain the suit in view of the facts of the case and Section 30 of the Land Adjudication Cap. 284 and Section 8 of the Land Consolidation Act, Cap. 283 Laws of Kenya.*

(11) *The learned trial magistrate's finding was erroneous and contrary to the law and occasioned the appellant miscarriage of justice, in that the appellant never sought for orders of injunction against Government officials.*

(12) *The learned magistrate erred in law and in fact by failing to consider the appellant's submissions in that the parties are bound by their own pleadings.*

From his plaint before the trial Court dated 10th May 2012, the appellant/applicant had sought an order for declaration that the defendant/respondent holds land parcels No. 1838, 4301 and 4403 in trust for him and a further order directing the District Land Adjudication officer Tigania West District to rectify the Register in relation to land parcels No. 1838 and 403 to read the plaintiff's names in place of the defendant's and costs of the suit.

By a statement of defence dated 7th June 2012, the defendant/respondent denied the plaintiff's claim and admitted the jurisdiction of the Court.

Submissions by the Appellant

The appellant through the firm of M/S Kiogora Mugambi & Co. Advocates submitted that the learned magistrate in his one page ruling in paragraph 3 applied the provisions of *Section 16 (2) of the Government proceedings Act Cap. 40 Laws of Kenya and Order 29 Rule 2 (2) of the Civil Procedure Rules* which provisions doesn't apply in this matter since the appellant did not seek mandatory injunction against Government officials and they were not party to the suit and as such the magistrate misdirected himself.

The appellant also submitted that he had sought and obtained requisite consent to file the suit before the trial magistrate and that the same was filed together with the plaint and as such, the magistrate misdirected himself in failing to find and hold that the Honourable Court had jurisdiction to entertain the suit hence dismissal should be set aside. The appellant further submitted that once the Adjudication officer has given consent to institution of the suit, the consent is a document to be relied by the plaintiff in his list of documents dated 10th May 2012 and that there was no dispute as to its authenticity and character and the same was signed by the relevant officer and as such the learned trial magistrate erred in law in failing to consider the consent.

Submissions by the Respondent

The respondent through the firm of M/S Carl Peters Mbaabu & Co. Advocates submitted on grounds No. 1, 3 & 11 combined and stated that the three grounds of Appeal are misplaced and misconceived since the impugned ruling delivered on 20th December 2018 did not address the issues of Land Adjudication officer's consent to file the primary suit, in fact, the learned trial magistrate ruled in favour of the appellant regarding the provisions of *Cap. 283 and 284 of the Land Consolidation and Land Adjudication Act* respectively. In the alternative, the respondent also submitted that even the consent obtained by the appellant did not automatically confer the trial Court with jurisdiction to hear and determine the primary suit.

The respondent further submitted that the claim that was before the trial Court for determination concerned the ownership and interest of parcels of land Nos. 1838, 4301 and 4403 within Kianjai Adjudication Section, which the appellant herein claims that the respondent holds in trust for him. He submitted that it is not in dispute, that the suit parcels of land are situated in an adjudication Section and that the Court cannot entertain any suit from an adjudication section without exhausting the dispute resolution mechanisms provided under the *Land Consolidation Act. Cap. 283 and the Land Adjudication Act Cap. 284 Laws of Kenya*. The respondent also submitted that the Court has no jurisdiction whatsoever to usurp the powers of institutions created by the Land Consolidation Act, and the Land Adjudication Act, which are the creatures of the Legislature. It is further submitted that a consent under *Section 30 of the Land Adjudication Act Cap. 284* is not a ticket of skipping the procedures of dispute resolution mechanism laid down in the two Acts and rush to Court.

He submitted that the two Acts provides for clear procedure of resolving disputes and that the trial Court rightly held that consent *under Section 30 of the Land Adjudication Act* is not meant to usurp the laid down procedures of resolving disputes. In conclusion, the respondent submitted that the consent obtained by the appellant in the lower Court did not confer jurisdiction upon the trial Court to hear and determine the primary suit since he did not exhaust the laid down procedures of dispute resolution mechanisms provided in the Acts.

Ground No. 2 & 6 of the Appeal

The respondent submitted that the trial Court gave its reason to dismiss the primary suit and it matters not whether he had a reasonable cause of action or not. He submitted that the moment the court finds itself without jurisdiction or incapable of granting the orders sought, it ought to down its tools at the earliest possible moment. He cited the following cases:

(1) *Francis Murugi M'ibaya Vs Paul Kigea Nabea (deceased) and now substituted by Kigea Amos Kilemi and Paskwale (Mwiti Kigea and 4 others (2020) e K.L.R.*

(2) *M Vs Lilian 'S' (1989) K.L.R 1.*

(3) *Samuel Kamau Macharia and Another Vs Kenya Commercial Bank Ltd & 2 Others (2012) e K.L.R.*

In conclusion, the respondent submitted that the learned trial magistrate correctly exercised his powers in dismissing the suit on that ground. He further argued that the order transferring the primary suit to Tigania Magistrate Court did not confer jurisdiction to the Court to hear the same if it found itself without jurisdiction. He submitted that an order directing the matter be heard and determined by another Court does not confer jurisdiction where there is none.

Ground No. 4 of the Appeal

The respondent through counsel referred to this ground and submitted that this matter was transferred to Tigania Magistrate's Court for hearing and determination by an order of this Honourable Court dated 15th November 2017. He further submitted that that order cannot be construed as conferring jurisdiction upon a Court if the Court finds itself not seized with the requisite jurisdiction to handle the matter. He cited the Supreme Court case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others (2012) e K.L.R* as quoted in the case of *Lydia Iza Mwamburi Vs Patrick Njoka Ndwiga (2020) e K.L.R*. The learned counsel further submitted that procedurally, the Court can act on its own motion (*suo moto*) and rule that it does not have jurisdiction to hear a matter as was in the primary case where the Court pronounced itself on the provisions of the *Government Proceedings Act, Cap. 40*. He argued that the order transferring the primary suit to Tigania Magistrate's Court did not confer jurisdiction on the Court to hear the same if it found itself without jurisdiction. He contends that the order directing the matter be heard and determined by another Court does not confer jurisdiction where there is none.

Ground No. 5 and 10

On the two grounds, the learned counsel submitted that they are misplaced and misconceived since the trial Court did not strike out the primary suit because of the reason that the appellant's claim is the issue of trust and that the relevant subsidiary legislation does not provide a convenient mechanism for determining of such issue. If anything, he submitted, the learned magistrate agreed with the appellant on the issue of trust. He further submitted that the trial Court could only hear and determine a claim based on trust if the land is registered under the *Land Registration Act No. 3 of 2012*. He referred to *Section 25 (2) of the said Act* which stipulates the obligation and duty of a trustee under the Act. The learned counsel argued that on matters of trust, the trial Court did not have any jurisdiction to hear and determine it, without the parties exhausting all the mechanisms provided for under the *Land Consolidation Act Cap. 283 and the Land Adjudication Act Cap. 284* respectively since the suit lands fell within an Adjudication Section.

Ground No. 7

On this ground, the learned counsel submitted that it is trite that costs follow the event. He submitted that the Judicial officer reserves the discretion to award or not to award costs to the successful party. He cited *Section 27 (1) of the Civil Procedure Act* and the case of *Impressing Fortune Federice Vs Nabwize* which was cited with approval in the case of *Ethics and Anti-Corruption Commission Vs Nderitu Wachira and 2 Others (2016) e K.L.R*. He argued that the trial Court correctly exercised its discretion in awarding the costs to the respondent.

Ground No. 8

The learned counsel for the respondent weighed in on this ground submitting that the same is misconceived and misplaced. He further submitted that the primary suit was dismissed for militating the provisions of the *Government Proceedings Act Cap. 40*, the Court could not proceed and confer jurisdiction upon itself and hear and determine the primary suit on merit. He also submitted that the appellant was not prevented from lodging a proper claim and using the proper mechanisms to ventilate his issue via the mechanisms provided for under the law and until then, the Court cannot come to his aid and he cannot fault the Court for dismissing the primary suit.

Ground 9 and 12

On the two grounds, the counsel for the respondent submitted that it matters not whether the Attorney General is a party or not in the suit. He argued that in the appellant's plaint in the primary suit dated 10th May 2012, the appellant sought an order directing the DLAO Tigania West District to rectify the register in relation to land parcel Nos. 1834 and 4403 to read his name in place of the respondent. He submitted that that prayer is the same as seeking an order of injunction against a Government officer which is in contravention with *Section 16 (2) of the Government Proceedings Act and Order 29 Rule 2 (2) (d) of the Civil Procedure Rules, 2010*. He cited *Section 2 and 4 (a) of the Government Proceedings Act Cap. 40*. In conclusion, the learned counsel submitted that the trial Court did not error at all in finding that the provisions of the *Government Proceedings Act Cap. 40 Laws of Kenya* apply.

Ground No. 13

On this last ground, the respondent submitted that the decision of the trial magistrate was in a summarized form. He argued that the trial Court even agreed with the appellant on the provisions of *Cap. 283 and Cap. 284* and therefore it is misleading for the appellant to imply that his submissions were not considered.

Legal Analysis and Determination

This appeal arises from an order by the trial Court striking out the primary suit for want of jurisdiction. As the first appellate Court, my duty is to re-evaluate and re-consider the evidence, evaluate the same afresh and come up with my own conclusions.

The appellant has set out 13 grounds of Appeal. To my mind, there are only two issues requiring determination by this Court. First, whether the trial Court was seized with jurisdiction to determine the dispute in the primary suit. Secondly, whether the appellant was liable to pay costs.

Black's Law Dictionary Tenth Edition defines judicial jurisdiction as the legal power and authority of a Court to make a decision that binds the parties to any matter properly brought before it. Jurisdiction can either be donated by the Constitution, statute or both. Judicial jurisdiction was defined by the Court of Appeal in the celebrated case of *Owners of the Motor Vessel "Lillian s" Vs Caltex Oil (Kenya) Ltd (1989) K.L.R 1* where it was held:-

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, character, or commission under which the Court is constituted, and may be extended or restricted by the Statute, Charter, or Commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

Turning to the Appeal before me, the appellant is challenging the decision by the trial magistrate to dismiss his claim for want of jurisdiction when he had sought and obtained consent in writing from the Land Adjudication officer as required by law. From the plaint presented to the Court in the primary suit being HCCC No. 86 of 2012, the plaintiff/appellant indicated that the suit was filed pursuant to consent by the District Land Adjudication officer, Tigania West District dated 20th March 2012. At paragraph 5 of the plaint, the appellant/plaintiff averred as follows:

“That the grandfather owned a parcel of land situated at Kianjai which parcel was later demarcated and registered as parcel number Kianjai Adjudication Section 1838, 4301 and 4403 respectively after the demise of M’ MAITAI M’ LAIBICHIA in 1974”.

My understanding of the claim by the plaintiff/appellant from his pleading is that the subject parcels of land in dispute before the trial Court and the subject of this Appeal are matters under Adjudication Section. That would explain why the appellant/plaintiff had to seek and obtain consent pursuant to the provisions of **Sections 8 (1) of the Land Consolidation Act Cap. 283 and Section 30 of the Land Adjudication Act Cap. 284 Laws of Kenya**. In fact, the letter from the District Land Adjudication officer, Tigania West District contained in the plaintiff/appellant’s list of document dated 10th May 2012 Item No. 2 is instructive on the issue. The said letter confirms that the parcels of land are indeed situate at Kianjai Adjudication Section. It is instructive that the **Land Consolidation Act, Cap. 283 and the Land Adjudication Act, Cap. 284** which are the applicable law provide an elaborate procedure where a claimant has an interest in land situated within an Adjudication Section and also provide avenues for aggrieved parties such as the dispute between the appellant and the respondent in the primary suit. **Section 9, 10 and 11 of the Land Adjudication Act** sets out the powers and duties of a Land Adjudication officer – **Section 9** provides as follows:-

9 (1) *The Adjudication officer shall be in charge of and shall exercise general supervision and control over the adjudication.*

(2) *The Adjudication officer shall hear and determine:-*

(a) *Any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer; and*

(b) *Any objection to the adjudication register which is submitted in accordance with Section 26 of the Act.*

Section 10 sets out the general powers of an Adjudication officer as follows:-

(10) (1) *The Adjudication officer shall have jurisdiction in all claims made under this Act relating to interest in land in the adjudication area, with power to determine any question that needs to be determined in connection with such claims. And for that purpose he shall be legally competent to administer oaths and to issue summonses, notice or orders requiring the attendance of such persons or the production of such documents as he may consider necessary for the carrying out of the adjudication.*

(2) *The Adjudication officer may himself exercise all or any of the powers which are given by this Act to officers subordinate to him.*

Section II provides:-

In the course of the adjudication, the Adjudication officer shall have the following powers:-

(a) *He may issue to the officers subordinate to him and to committees and boards such general or particular directions as he thinks necessary for carrying out the provisions of the Act which relate to the procedure of demarcation, recording of title and survey within the adjudication area.*

(b) *At any time before the adjudication register is completed, he may correct any error or supply any omission occurring in the adjudication register;*

(c) *He may make a claim or otherwise act on behalf of a person who is absent or under disability if he considers it necessary to avoid injustice”.*

My discernment of the appellant’s claim as contained in the primary suit is that he was dissatisfied in the manner in which his grandfather’s land was demarcated and registered as parcels No. 1838, 4301 and 4403 in favour of the respondent/defendant.

Section 26 of the Land Adjudication Act Cap. 284 Laws of Kenya deals with any party aggrieved with an adjudication register and states as

follows:-

“26 (1) Any person named in or affected by the Adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The Adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such consultation and inquiries as he thinks fit, he shall determine the objection”.

It is instructive from the above provisions of the law that If the appellant/plaintiff thought or believed that the adjudication register in respect of the disputed parcels of land No. 1838, 4301 and 4403 were incorrect or incomplete, he was to lodge his complaint to the Adjudication officer under the Internal Mechanisms provided under *Section 26 of the Act* within sixty (60) days from the date of such publication. There is no indication that the appellant/plaintiff exhausted the internal mechanism of resolving the dispute before filing the primary suit. In the case of **Stanley Thiaine Mbui & Another Vs the Land Adjudication officer, Tigania West & Another, HC ELC Misc. Application No. 93 of 2010 (Meru)** (unreported), the Court held as follows:-

“I have examined all the averments of the parties. I have also considered their submissions. I have looked at the operative law. Section 26 (1) of the Land Adjudication Act says:-

Any person named or affected by the Adjudication register who considers it to be incorrect or incomplete in any respect may within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the Adjudication officer in writing, saying in what respect he considers the adjudication register is incorrect or incomplete. I find that the wording of the above Section allows the interested party to have capacity as an affected party to file an objection.

Section 29 allows any person aggrieved by the determination of an objection under Section 26 to appeal to the Minister within sixty days after the date of the determination. The Minister is mandated to determine the appeal and his order therein is final. There is no evidence that the applicants appealed to the Minister and if they did, there is no evidence of the Minister’s order.

It is clear that the interested party had the capacity to file an objection before the District Land and Adjudication officer. There is no claim by the ex-parte applicant that the register had been closed at the time the objection was lodged. The only recourse which the applicants had was to appeal to the Minister in accordance with Section 29 of the Land Adjudication Act”.

Again in the case of **Tobias Achola Osindi & 13 Others Vs Cypriano Otieno Ogalo & 6 Others HCC No. 4 of 2011, Justice Okongo** held as follows:-

“The whole process leading up to the registration of a person as a proprietor 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 interest 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. (Emphasis added).

In my view, the role of the Courts 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 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”. (Emphasis added)

I totally agree with the reasoning of the learned Judge in the above decision which I hereby apply to the instant case mutatis mutandis. The consent issued by the Land Adjudication officer under **Section 30 of the Land Adjudication Act Cap. 284** cannot confer jurisdiction to the Courts to perform functions and duties that the statute has clearly spelt out as belonging to other bodies.

In a more recent case of **Savraj Singh Chana Vs Diamond Trust Bank (Kenya) Limited & Another (2020) e K.L.R Weldon Korir J.** observed as follows:-

“It is appreciated that the cited decision does not indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165 (3) (b) of the Constitution to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the Courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the Constitutional jurisdiction of this Court. What it simple does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The Courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute”.

I agree with the decision by the Judge in the above decision on the jurisdiction of the Courts and the statutory mandate given to tribunals and quasi-judicial bodies in the dispute resolution mechanisms. These tribunals and quasi-judicial bodies are skilled and have the technical knowledge on the issues in which they are mandated to handle. The subject of this Appeal relate to determination of rights and interest on land under Adjudication Section as spelt out under the Land Consolidation and Cap. 283 Laws of Kenya and the **Land Adjudication Act Cap. 284** Laws of Kenya respectively. **Section 4, 5, 6, 7, 8, 9, 10, 11, 12,13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23** gives an elaborate structure of the office of the Adjudication officer and his officers who assist in determining rights and interests in land under Adjudication. The Land Adjudication Act also provides an elaborate mechanism of addressing internal disputes. Parliament did not establish these statutory provisions in vain. It was meant to be exhausted before a party seeks alternative mechanisms including moving to the High Court and Courts of equal status.

In the second issue of costs, **Section 27 of the Civil Procedure Act** provides as follows:-

“27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order”

The trial magistrate after finding that he was not seized with jurisdiction to handle the matter, struck out the primary suit with costs. The appellant is appealing against the order awarding costs to the respondent on grounds that they are relatives. The law does not bar costs from being awarded to a relative. If the appellant realized that the respondent was a relative, he should have sought to resolve the dispute in a more amicable way than dragging him to Court. Costs is a discretionary power and unless good

reasons are given, it always follows the event. Since the trial magistrate held that he had no jurisdiction in the dispute and went ahead to strike it out, it followed that plaintiff was liable to pay costs.

The upshot of my analysis is that this Appeal lack merit and the same is hereby dismissed with costs. It is so ordered.

DATED, DELIVERED Virtually and SIGNED at GARISSA this 28th day of July, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Appellant/Advocate- Absent
2. Respondent/Advocate- Absent
3. Fardowsa ; Court Assistant- Present