



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MERU

ELC APPEAL NO. 70 OF 2019

LEONARD KAMENCHU KAIRIAMA.....APPELLANT

-VERSUS-

ELIJAH MAITAI ICHICHA.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER TIGANIA DISTRICT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

(Being an Appeal from the decision of the Hon. G. Sogomo (PM) in PMCC No. 59 of 2018 (Tigania) (formerly ELC No. 57 of 2010 (Meru) dated 24/01/2019)

INTRODUCTION

This Appeal arises from a decision by Hon. G. Sogono, Principal Magistrate in PMCC No. 59 of 2018 (Tigania) where the Appellant Leonard Kamenchu Kairiama had sued the Respondents for inter alia orders of a declaration that parcels No. 1500, 3647, 1252, 3660, 3666, 3668, 3670, 3675, 3704, 3816, 3813 and 3821 Kiguuchwa Adjudication Section is the property of the Plaintiff.

The Plaintiff had also sought a declaration order that the said parcels of land mentioned herein above were unlawfully, wrongfully, illegally and fraudulently transferred to the 1st Defendant/Respondent and that the registration should be cancelled and the land registered to the Plaintiff.

In a plaint dated 13th April, 2010, at paragraph 6 thereof alleged that on or about 10th April, 1992, the Kiguchwa Arbitration Board awarded the suit parcels of land to one Peter Kabira Kairiama vide Arbitration Board Case No. 2 of 1992 following which the said Peter Kabira Kairiama transferred the same to the Plaintiff. However, the District Land Adjudication and Settlement Officer Tigania District (2nd Defendant/Respondent) unlawfully, illegally and fraudulently reversed the board's decision by awarding the same to Elijah Maitai Ichicha (1st Defendant/Respondent). The Plaintiff/Appellant maintained that the 1st and 2nd Defendants/Respondents acted unlawfully, illegally and fraudulently particulars of which were set out thereunder.

By way of response, the 1st Defendant/Respondent filed a statement of defence dated 07th June, 2010 denying the Plaintiff's claim and all particulars of fraud illegality and unlawfulness. The 2nd and 3rd Defendants filed no response to the claim. The suit was subsequently transferred to the Principal Magistrate Court in Tigania by consent of the parties on 8/3/2018. When the matter was mentioned on 4/12/2018, the trial magistrate directed the parties to file written submissions within given timelines whether the court was seized with jurisdiction to hear and determine the dispute under Section 24(3) of the Land Consolidation Act (Cap 283) and Section 29 of the Land Adjudication Act (Cap 284) Laws of Kenya. In a ruling delivered on 24/1/2019, the trial magistrate held that the court lacked jurisdiction to hear and determine the matter and struck off the suit with costs to the Defendants/Respondents.

Being aggrieved by the said decision/ruling the Plaintiff/Appellant preferred this appeal citing the following six grounds;

1. 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.

2. The learned 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 Consolidation Act Cap. 283 Laws of Kenya and leading himself to a wrong decision.
3. The learned trial magistrate erred in law applying the wrong Act of Parliament to the matter before him and came to the wrong conclusion.
4. The judgement/decision of the trial magistrate is bad in law.
5. The learned magistrate erred in law and fact in that he did not consider the consent given to him by DLASO to hear the matter.
6. The learned trial magistrate erred in law and fact in finding that he had no jurisdiction to hear and determine the matter.

APPELLANT'S SUBMISSIONS

The Appellant filed written submissions through the firm of Maitai Rimita & Co. Advocate and submitted on all the five grounds;

Ground No. 1 and 2 combined;

On the first ground, the Appellant submitted that the trial court on its own motion ordered the parties to address it on the issue of the Section 24(3) of the Land Consolidation Act Cap 283 Laws of Kenya and Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya. By this order, the trial magistrate caused confusion to himself and the parties because he should have known that the two Acts of Parliament do not apply simultaneously to a given adjudication area and that the two are independent Acts of Parliament. He submitted that the learned trial magistrate was therefore wrong to apply Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya and caused injustice and prejudice to the Appellant.

Ground No. 3 and 4 combined;

The Appellant submitted that the two grounds are related to grounds 1 and 2 above and that the decision of the learned trial magistrate is bad in law and therefore prejudicial to the Appellant.

Ground No.5;

On this ground, the Appellant argued that he had consent from the Adjudication Officer to file the suit in terms of Section 8 of the Land Consolidation Act, Cap 283 Laws of Kenya. He submitted that the learned trial magistrate did not consider or even mention the issue of consent at all. He stated that many courts including the Court of Appeal have held that if this pre-condition is met and the Plaintiff has the consent, then the court has jurisdiction to hear and determine the case where the dispute is over land which is under Adjudication.

Ground No. 6;

He submitted that the learned trial magistrate was wrong in holding that he had no jurisdiction to hear and determine the matter which ruling was bad in law. The Appellant cited the following authorities in support of this application;

- I. ELC Appeal No. 33 of 2017 Douglas Karithi & Another –Vs- Stanley Gatuma (2019) eKLR.
- ii. ELC Appeal No. 1 of 2018 Jackson Koome –Vs- M'Limungi M'Ikuamba & 2 Others (2018) eKLR.
- iii. Civil Appeal No. 28 of 2015 Peter Kamandiu –Vs- Land Adjudication Officer & Others (Nyeri) (2016) eKLR.
- iv. Civil Appeal No. 221 of 2010 Stephen Kangutia & 2 Others –Vs- Severina Nchulubi (Nyeri) CA No. 221 of 2010 (Nyeri) (UR)
- v. The Land Consolidation Act Cap 283 Laws of Kenya.
- vi. The Land Adjudication Act Cap 284 Laws of Kenya.

1ST RESPONDENT'S SUBMISSIONS

The 1st Respondent on his part through the firm of Ms Mithega & Kariuki Advocates submitted on the grounds of Appeal collectively and whether the trial court was seized with jurisdiction to handle the matter. The Appellant noted that the learned trial magistrate had directed the parties to address him on the issue of jurisdiction in line with the provisions of Section 26 (3) of the Land Consolidation Act Cap 283, Laws of Kenya and Section 29(1) of the Land Adjudication Act Cap 284 Laws of Kenya. This direction properly falls within the ambit of a preliminary objection as the issue to be determined was that of jurisdiction and the same could be raised at any stage of the proceedings by any party including the court on its own motion. He submitted that the trial magistrate acted properly by suo moto directing parties to address the issue of jurisdiction. He cited the locus classicus case of **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributor (1969) EA 696** where it was held;

“.....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.”

The Appellant also cited the Court of Appeal case of John K. Malembi –Vs- Trufosa Cheredi Mutembei & 2 Others (2019) eKLR where it was held;

“That jurisdiction is a preliminary issue that must be considered by a court either suo moto or on application by a party. That in this matter, the trial court was entitled to suo moto determine if it had jurisdiction to hear the dispute.”

The Applicant therefore submitted that guided by the authority cited above, it is clear that a trial court has a right to raise the issue of jurisdiction suo moto. He stated that the trial magistrate did not err when on 04/12/2018 he directed that parties tender submissions on whether the court had jurisdiction to handle the matter or not.

He stated that Section 26(3) of the Land Consolidation Act Cap 283 Laws of Kenya provides as follows;

“ 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.”

The Appellant argued that from paragraph 6 of the plaint shown at pages 5-7 of the record of appeal, the Appellant acknowledged before the trial court that there existed Arbitration Board Case No. 2 of 1992 before Kiguchwa Arbitration Board relating to the suit lands that were in question before the trial court. The Appellant further stated that his cause of action clearly arose from the decision of the Board in the aforesaid case. He submitted that as cited above, Section 26(3) of the Land Consolidation Act clearly gives the trial court jurisdiction where the claim is for review of the compensatory monetary award given by the Adjudication Officer. He submitted that in the instant case and from the plaint presented before the trial court, the issues to be determined were not monetary compensation but ownership of the suit lands. He submitted that the trial court therefore properly held that he did not have jurisdiction to entertain the Appellant’s claim as was presented going by the prayers that were sought in the plaint. He stated that the trial court therefore properly struck out the Appellant’s suit in line with the provisions of Section 26(3) of the said Consolidation Act.

The Appellant also cited Section 29 (1) of the Land Adjudication Act which provides as follows;

“Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by –

a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be finale.”

The Appellant stated that the above Section of the law provides that in the event a party is dissatisfied with the decision of an Adjudication Officer, then they ought to appeal to the Minister. In the instant case, there was Arbitration Board Case No. 2 of 1992 before Kiguchwa Arbitration Board but the Appellant did not provide any proof that he had challenged the decision to the Minister as required under Section 29(1) of the Land Adjudication Act. He submitted that the Appellant failed to exhaust the dispute resolution mechanism as provided under Section 29(1) of the Land Adjudication Act before presenting his suit before the trial court. The trial court could not therefore have jurisdiction to determine the claim presented by the Appellant which the trial court properly held that the Appellant’s suit fell in limine and stuck the same out with costs.

As regards the consent granted by the District Land Adjudication & Settlement Officer (DLASO) the Appellant submitted that it is trite law that jurisdiction is only conferred either by the Constitution or statute. DLASO cannot give a court the power to hear and determine a suit. He stated that it is the same way in which jurisdiction cannot be conferred to a court even by consent of the litigating parties before such a court.

He further noted that where a court lacks jurisdiction, then it must down its tools. He cited the locus classicus case of Owners of the Motor Vessel “Lilians” –Vs- Caltex Oil (K) Limited (1989) KLR 1 where Nyarangi, JA expressed himself as follows;

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The Appellant further cited two other cases in opposition to this appeal as follows;

i Nicholas Mugambi & Another –Vs- Zachary Bariu & 6 Others (2018) eKLR .

ii. William Mutuura Kairiba –Vs- Samuel Nkari & 2 Others (2018) eKLR

In conclusion, the Appellant urged this court to find and hold that the trial court properly considered the applicable provisions of the law and

the pleadings filed and therefore arrived at a right decision to the effect that she had no jurisdiction to handle the matter presented by the Appellant.

LEGAL ANALYSIS

I have re-evaluated, re-analyzed and re-assessed the extracts on the record of appeal. The grounds of appeal as I understand revolve around whether the trial court was seized with jurisdiction to entertain the suit and especially where the relevant District Land Adjudication and Settlement Officer (DLASO) had given consent to the Appellant to institute the suit.

From the record of appeal as seen in the proceedings at page 62, the trial court raised a preliminary objection on 04/12/2018 where she directed the parties to address the issue of whether it was vested with jurisdiction to handle the matter in line with the provisions of Section 24(3) of the Land Consolidation Act Cap 283 and Section 29 of the Land Adjudication Act Cap 284 Laws of Kenya.

In order to understand where the trial magistrate was coming from and appreciate where he was heading to, it is what jurisdiction entails. Case of **Owners of Motor Vessel "Lilians" –Vs- Caltex Oil (Kenya) Limited (1989) KLR 1**, Nyarangi, JA (as he then was) expressed himself as follows;

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision.....jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

I agree with the above decision of the Superior Court which is binding on me. Where a court is of the opinion that he has no jurisdiction in a matter presented before him, he is under an obligation to ask the parties to address him on the same by way of a preliminary objection.

Preliminary objection was defined in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors (1969) EA 696** as follows;

“.....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.”

The learned trial magistrate on 04/12/2018 directed the parties to address him on the issue of jurisdiction in line with the provisions of Section 24(3) of the Land Consolidation Act and Section 29(1) of the Land Adjudication Act Cap 283 and 284 respectively. The directions by the learned magistrate in my view falls within the ambit of a preliminary objection as the issue to be determined was that of jurisdiction which the trial court raised on its own motion.

As to whether the trial court was in order to raise the preliminary point suo moto, the Court of Appeal has rendered itself in the case of **John K. Malembi –Vs- Trufosa Cheredi Mudembei & 2 Others (2019) eKLR** where it was held;

“That jurisdiction is a preliminary issue that must be considered by a court either suo moto or on application by a party. That in this matter, the trial court was entitled to suo moto determine if it had jurisdiction to hear the dispute.”

It is clear from the above decision by the Court of Appeal that a trial court is well within the law where it is of the opinion she has no jurisdiction to give a preliminary notice to the parties to address the issue in the earliest opportunity possible. With respect to the instant matter, it is clear that the learned trial magistrate did not err when on 04/12/2018 he directed that parties tender submissions on whether the court was seized with the requisite jurisdiction to handle the matter.

I have also looked at the plaint presented by the Appellant at page 6-7 of the record of appeal. At paragraph 6 of the plaint, the Appellant acknowledges that there existed Arbitration Board Case No. 2 of 1992 before Kaguchwa Arbitration Board relating to the suit lands that were in question before the trial court. The Appellant who was the Plaintiff in the trial court stated that his cause of action clearly arose from the decision of the Arbitration Board in the aforesaid case.

If the facts as stated by the Appellant are anything to go by, then the provisions of Section 26(3) of the Land Consolidation Act Cap 283 Laws of Kenya apply. The Section states as follows;

“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.”

The provisions of the statute as cited above is clear in that the trial court is only given jurisdiction where the claim is for review of the compensatory monetary award given by the Adjudication Officer. From the reading of the plaint and the prayers sought, the issues presented for determination were those of ownership of the suit lands and not compensation. I therefore find that the trial court properly held that he did not have jurisdiction to entertain the Appellant's claim.

Even assuming the suit property was not subject of the Land Consolidation Act, the Land Adjudication Act Cap 284 is the only alternative statute dealing with an area declared as an adjudication area. Under Section 29(1) of the said Act, provides as follows;

“Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

The above Section provides that in the event that a party is dissatisfied with the decision of an Adjudication Officer, then they ought to appeal to the Minister. In the instant case, there was Arbitration Board Case No. 2 of 1992 before Kiguchwa Arbitration Board. The Appellant did not provide any proof that he had challenged the decision to the Minister as required under Section 29(1) of the Land Adjudication Act. I agree with counsel for the 1st Respondent that the Appellant failed to exhaust the dispute resolution mechanism as provided under law before presenting his suit before the trial court.

Before terminating my re-evaluation, I note that one of the grounds of this Appeal (No.5) is that the learned trial magistrate erred in law and fact in that he did not consider the Consent given to him by the DLASO to hear the matter. On that ground, I wish to state that it is now trite law that jurisdiction is only conferred by the Constitution or statute or both. The consent by the DLASO cannot in my view confer jurisdiction to a court. It is the same manner in which jurisdiction cannot be conferred to a court by consent of the litigating parties in a suit.

CONCLUSION

The upshot of my findings on this appeal is that the same lack merit and is hereby dismissed with costs to the 1st Respondent.

READ, 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. Respondents/Advocate- Absent
3. Fardowsa ; Court Assistant- Present