



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MERU

ELC APPEAL NO. 16 OF 2020

JOSHUA MITHIKA..... 1ST APPELLANT

M'IKUNYUA ANAMPIU2ND APPELLANT

VERSUS

KOBIA M'TWAMWARI KANGERI1ST RESPONDENT

NTONGAI M'TWAMWARI KANGERI2ND RESPONDENT

MARIMBA ANAMPIU3RD RESPONDENT

(Being an appeal from the Ruling of Tigania Principal Magistrate's Court delivered on 18th July 2019 by Hon G. Sogomo in Tigania PM ELC No. 14 of 2015)

JUDGMENT

1. The appellants being the plaintiffs in the trial court sued the respondents vide a plaint dated 13/02/2015 seeking the following orders;
 - a. A declaration that the defendants' actions were fraudulent and transfer of 6.50 acres from land parcel No. 418 AKAIGA ADJUDICATION SECTION fraudulent and bad in law.
 - b. An order of cancellation of the said transfer and an order for rectification of the register to reflect the original acreage and transfer the same to the 1st plaintiff.
 - c. Costs of the suit.
 - d. Any further or better relief this Honorable Court may deem fit to grant.
2. The respondents filed a preliminary objection dated 19/03/2019, on the grounds that the suit offends Section 26 and 29 of the Land Consolidation Act Cap 283 and the Land Adjudication Act Cap 284 together with Order 29 of the Civil Procedure Rules 2010. The trial court in its ruling delivered on 29.8.19 (*and not 18.7.2019 as indicated in the memorandum of appeal*) upheld the P.O and struck out the suit with costs to the respondents.
3. Being aggrieved by the said ruling, the appellants filed their memorandum of appeal dated 12/02/2020 basing their appeal on four (4) grounds as follows:-
 - i. **The learned trial magistrate erred in law and facts in failing to take cognizance of the submissions filed by the appellants thereby coming to the wrong conclusion.**
 - ii. **The learned trial magistrate erred in law and fact, as he failed to understand and properly apply the Land Consolidation Act and the Land Adjudication Act and misled himself to arrive at the wrong conclusion.**
 - iii. **The learned trial magistrate erred in law and fact in finding that he had no jurisdiction to hear and determine the matter.**
 - iv. **The Ruling/Decision of the trial Magistrate is bad in law and facts.**

4. By consent the appeal was canvassed orally. It was argued for the appellants that the suit parcel was in AKAIGA ADJUDICATION SECTION under Land Consolidation Act Cap 283 as captured on page 40 of the Record of Appeal, thus the court cannot use two acts to determine if it had jurisdiction or not. The court relied on the wrong Act, Cap 284 hence the court arrived at the wrong decision and it was wrong for the trial magistrate to apply Cap 284 in deciding whether the court had jurisdiction or not. That Cap 283 has no provision for appeal to the minister so an aggrieved party can only come to court.

5. Further, it was submitted that the appellants had in their pleadings raised the issue of fraud on the part of the respondents. Thus the court had jurisdiction to hear the matter as not every adjudication section falls under Cap 284.

6. The appellant relied on the case of **Stephen Kungutia & 2 others v Severina Nchulubi [2020] eKLR**, where the court stated that once consent was granted the court had jurisdiction to hear the matter. The appellants also relied on the case of **Peter Kimandiu v Land adjudication officer Tigania West District & 4 others [2016]eKLR**.

7. For the Respondents, it was argued that it is misleading for the appellants counsel to submit that the trial court relied on Cap 284 and not Cap 283 in dismissing the appellants case as the magistrate relied on both Cap 283 and Cap 284 particularly section 26 and 29 of the Acts. It was stated that the consent obtained prior to filing of the suit doesn't supersede the mandatory provisions of section 26 and 29 of Cap 283 and 284. The subject matter of the suit was the subject of objection proceedings before the DLASO where the appellants were unsuccessful and they did not exhaust the avenues available which was to appeal to the minister within a period of 30 days.

8. It was further argued that the suit was not founded on fraud as alleged and that the decisions relied on are distinguishable and not relevant to this case and the appeal should be dismissed. The respondents relied on the cases of; **Reuben Mwangela M'Itelekwa (suing as the Legal Representative of the estate of M'itelekwa M'Mucheke Naituri alias M'Itelekwa Mucheke) v Paul Kigea Nabea & 2 others [2019] eKLR**.

Analysis and determination

9. Having considered the record, the arguments advanced by both parties as well as the authorities tendered by respective counsels, I consider the main issue for consideration to be **whether the trial court erred in determining that it had no jurisdiction to hear the suit?**

10. In the case of **Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited (1989) KLR1**. Nyarangi JA (as he then was) had this to say: -

“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 and 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.”

11. The adjudication process is primarily provided for under two statutes namely; the Land Consolidation Act Cap 283 and the Land Adjudication Act Cap 284. Both acts have elaborate mechanisms in regard to dispute resolutions. The acts deal with ascertainment and recording of rights and interests in land so as to transition such rights and interests from a customary tenure system to individual tenure system. It is only at the tail end of the dispute resolution mechanism and after the closing of the adjudication register can it be said that such rights and interests in land have been ascertained.

12. From the objection proceedings attached in the record of appeal at page 15 to 20, I discern the following; that the adjudication process referred to by the Parties fell under the Land Consolidation Act (Cap 283 laws of Kenya), that the objector there in was one M'TWAMWARI PAUL KANGERI, while the respondents were 1) MAINGI LITHARA, 2) M'IMAANA NTHUNGO, 3) NABEA MUGUONGO, 4) MWANGI ANAMPIU, 5)MARIMBA ANAMPIU and that the objections were in respect of parcels nos. 2362, 319, 832, 979, 524, **418**, 293,in Tigania East District Akaiga Adjudication section of which a determination was made. The findings are to be found on page 19 Of the record of appeal though the content thereof is not clearly discernible.

13. **Section 26 of the Land Consolidation Act** provides that;

“(1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.

(2) If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate.

(3) 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.”

14. Accordingly, under the Land Consolidation Act, the decision of the adjudication officer with the aid of a committee is final unless the

minister can intervene on issues of compensation.

15. The first and core issue for consideration relates to the doctrine of exhaustion of remedies. After all, this was the basis upon which the trial court allowed the preliminary objection.

16. On the issue of the doctrine of exhaustion of remedies, the appellants argued that once a consent was given by the adjudication officer, the court acquired jurisdiction to hear the matter. To this end, the appellants cited the case of **Stephen Kungutia & 2 others v Severina Nchulubi (supra)**. The respondents on the other hand aver that consent doesn't supercede the mandatory provisions of section 26 and 29 of Cap 283 and 284 and they relied on the case of **Reuben Mwongela M'Itelekwa (suing as the Legal Representative of the estate of M'Itelekwa M'Mucheke Naituri alias M'Itelekwa Mucheke) v Paul Kigea Nabea & 2 others (supra)**.

17. Both parties however appear to have misinterpreted the import of the aforementioned decisions to suit their respective arguments. In the **Stephen Kungutia case**, the court of appeal did not state that a consent was an automatic gateway into the ordinary courts. Instead, the court had taken cognizance that the issue of consent had not been disputed in the primary suit and that such an issue of jurisdiction ought to have been raised at the earliest opportunity.

18. In **Reuben Mwongela M'Itelekwa case**, this court went into great details to elaborate the applicability of dispute resolution mechanisms. The court also stated that a consent was required when instituting a suit in court in matters relating to ascertainment of rights and interests in land. The court went ahead to observe as follows;

“A perusal of the petition reveals that the petitioner is agitating for his rights and interests in land within Antuamburi adjudication section. He had filed the cases in the objection proceedings where he lost in the decision dated 10.02.2011. The petitioner ought to have lodged an appeal to the minister within 60 days of the challenged decision as per section 29 of the Land Adjudication Act in the event that the proceedings were conducted under the Land Adjudication Act. If the law applied was the Land Consolidation Act, then the decision in the objection proceedings was final unless the issue of compensation was raised”.

19. The aforementioned case of **Reuben Mwongela M'Itelekwa** is distinguishable from the current case in that in the current matter, the appellants had actually not participated in objection proceedings and their issues were not anchored on the ascertainment of rights and interests in land.

20. The respondents herein contend that the appellants had lost their case before the adjudication officer and they failed to exhaust the available mechanisms. However, as already stated herein, the objector in the aforementioned proceedings was one **M'Twamwari Paul Kangeri**, whom the appellants have identified as the father of 1st and 2nd respondent and who is deceased. On the other hand the respondents in the objection case were; **Maingi Lithara, M'Imaama Nthungo, Nabea Muguongo, Mwangi Anampiu and Marimba Anampiu**. It then follows that the arguments being advanced by the respondents are false. The crux of the matter is that the appellants do not fall in the category of an aggrieved person as envisaged in Section 26 of the Land Consolidation Act.

21. I also find that the appellants in their pleadings had raised the issue of fraud in paragraph 11 and 12 thereof. Thus they complied with the provisions of **Order 2 rule 10 (1)** of the **Civil Procedure Rules**.

22. The appellants have not alleged any impropriety on the part of any land official or officers of the government nor are they seeking an order against the government hence the assertion by the trial court that the failure to include the land officials as parties to the suit renders it a futility cannot hold water. In any event, the issue of joinder had not been framed as a point of determination in the preliminary objection dated 19.3.2019.

23. The issues before court were whether the defendants transferred and acquired the suit land through fraudulent actions and not so much as to the determination of ownership and interest of the suit land. In **Lucy Karauki Kirambia (suing as the legal representative of the estate of Peter Muriungi Kaunga (deceased) v Muthengi M'mwathi Muthigu & 2 others [2018] eKLR** the dispute between the parties was the ownership of the suit property in an area where adjudication, consolidation and demarcation had taken place. In his judgment, Justice P.M. Njoroge found that there was on a balance of probability that the defendants had perpetuated fraud and the court held as follows;

“The fact that the disputed land had not been registered in the name of the deceased Peter Muriungi (deceased) even though there was evidence that he and his family had occupied the land, is on a balance of probability, proof that there was fraud by the 1st and 2nd defendants through collusion and conspiracy to illegally acquire the suit land.”

24. This court in the case of **Stephen Kirimi M'Rinturi v Land Adjudication and Settlements Officer – Igembe District & 3 Others; Peter Kumbu Kimunya & Another (Interested Parties) [2020]eKLR**, stated that;

“Even though there is a dispute resolution mechanism available under Cap 283 and Cap 284, this court takes cognizance of the fact that courts have jurisdiction to determine some disputes arising out of adjudication process. However, the courts have to be extremely careful so as not to emasculate the powers bestowed upon the adjudication bodies by the statutes”.

25. In **Daniel Murungi Mwirabua Anampiu v Jeremiah John alias Jeremia Guantai [2019] eKLR**, this court held that;

“What is discernible from this decision is that the dispute was not determined and the Land Adjudication officer found that a court of law was better placed to deal with the matter. Rightly so because not all land disputes emanating from areas under adjudication fall under the dispute resolution mechanisms provided for under the act”.

26. Another issue for consideration relates to the applicable law. The appellants contend that it was wrong for the trial court to determine the matter based on the two statutes (Cap 283 and Cap 284) yet the dispute fell under Cap 283. The respondents term this averment as misleading averring that the trial court made reference to section 26 and 29 of the aforementioned statutes. While citing Section 29 (1) of the Land Adjudication Act and the case of **Mugambi Nicholas and others vs. Zachary Baariu & Others Meru elc no. 167 of 2011**, the trial court had stated as follows;

“In light of the foregoing, the plaintiff had a statutory obligation to petition the minister in an appeal from the adjudication officers decision upon dissatisfaction of the said verdict.....”.

27. It is noted that in the case of **Mugambi Nicholas and others vs. Zachary Baariu & Others (supra)**, the court was dealing with a dispute falling under the Land Adjudication Act, where the court held that the claimants had failed to lodge an appeal to the minister. What resonates from this analysis is that one of the reasons why the preliminary objection was upheld by the trial court was because the appellants had failed to lodge an appeal to the minister. However, the objection proceedings as pointed out by the appellants were conducted under Cap 283 (The Land Consolidation Act). Thus even if the trial court had made reference to section 26 and 29 of both the adjudication statutes, the court still arrived at a verdict based on the wrong application of the law, for there is no provision to seek redress to the minister in so far as Cap 283 is concerned.

28. From the foregoing analysis, I do opine that the trial court failed to properly interpret the doctrine of exhaustion of remedies in the adjudication arena, he also failed to apply the two adjudication statutes (Cap 283 and Cap 284) properly thus arriving at the wrong conclusion. In the circumstances, I find that the appeal is merited.

29. Final orders;

1. The decision of the Honorable Magistrate delivered on 29/08/2019 in Tigania PM ELC NO. 14 of 2015 be and is hereby set aside and the matter is to be heard on merits.

2. Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21ST DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE