



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 23 OF 2019

PETER MUROKI KAMUNDI.....APPELLANT

VERSUS

JOSHUA MBAABU..... 1ST RESPONDENT

IGEMBE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER ...2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the Judgment of Hon. A.G MUNENE (SRM)

in Maua Cmcc No. 192 of 2010 dated and delivered on 28/12/2018)

JUDGMENT

1. The appellant was the plaintiff in the lower court where he instituted the suit vide a plaint dated 2/08/2010 and amended on 21/08/2017 seeking a declaration that he is the lawful owner of land parcel No. 1750 AKIRANG'ONDU 'A' ADJUDICATION SECTION, an order canceling the transfer of his aforementioned parcel of land to the defendant plus costs of the suit.
2. It was his case that he is the owner of the suit land which he bought from one Mwokairiama M'Mucheke on 20/10/1999 and that he has been in actual open possession of the said land since then. The 1st respondent is the son of the original owner who caused the 2nd respondent to illegally and fraudulently transfer the suit land to his name.
3. The 1st respondent filed his statement of defence dated 16/09/2010 denying all allegations raised in the plaint. He contended that him and his 3 brothers inherited various portions of land from their father, whereby he acquired 8.50 acres out of land parcel S/NO. 1193 AKIRANG'ONDU 'A' ADJUDICATION SECTION which was then registered in his name as S/NO. 2087 AKIRANG'ONDU 'A' ADJUDICATION SECTION. That without his knowledge, a portion of his land to the tune of 0.50 acres was hived off and registered in appellant's name. This prompted the 1st respondent to lodge an objection in September 2008 which was determined in his favor. He denied the court's jurisdiction on the ground that the appellant ought to have sought redress via Judicial Review proceedings.
4. The 2nd and 3rd respondents did not enter appearance or defend the suit.
5. The suit proceeded to hearing and on 28/12/2018 the trial court entered judgment in favor of the 1st respondent by dismissing the suit on the ground that if the appellant was not satisfied with the verdict of the objection proceedings, he should have used the mechanisms provided in the Land Adjudication Act to Appeal.
6. The appellant being aggrieved by the decision filed his memorandum of appeal dated 25/01/2019 containing 7 grounds thereof. In summary, the appellant avers that; **the learned trial magistrate erred in law and fact in failing to properly evaluate the overwhelming evidence and find that the appellant proved he had purchased 0.51 acres of land parcel No. P/NO 1750 AKIRANG'ONDU "A" ADJUDICATION SECTION and taken possession of the same, that the trial magistrate failed to determine the real issues thereby arriving at a wrong decision.**
7. The appeal was canvassed by way of written submissions. The Appellant vide submissions dated 11/01/2021 stated that the District Land Adjudication and Settlement Officer (DLASO), had no authority to interfere with the records over P/NO. 1750 as it was not the legal administrator over P/NO. 1193. That the DLASO had no will or documents from the deceased on how to share out the parcel no. 1193 other than what was presented by deceased's wife.

8. It was submitted that Mwokairiama Mucheke is the wife of the deceased M'Mucheke Mucheke, the owner of the original parcel no. 1193 and she is the one who was entitled to inherit her deceased's husband's property unless the DLASO had a different version of the law of succession. That Mwokairiama only gave herself 1/2 an acre while the 1st respondent who is her son got 8 acres, but in his greed, the latter is pursuing his mother's portion of the original land. The appellant terms the actions of the DLASO as fraudulent.

9. The appellant also submitted that he was an innocent purchaser and did not fraudulently give off any land and the trial court blatantly disregarded all evidence and forced the scale to tilt in favor of the 1st respondent. The appellant therefore urges this court to allow the appeal with costs.

10. The 1st respondent vide submissions dated 01/03/2021 stated that the trial magistrate exercised his mind judiciously as there is no dispute that there was an objection proceeding between the parties and the same was decided in his favor. That it is the appellant who took a wrong route in seeking justice as he ought to have used the mechanisms provided for in the Land Adjudication Act. The 1st respondent is seeking for the dismissal of the appeal with costs. He has relied on the cases of; **R vs. District Land Adjudication officer, Transmara District, Samson Kiserian Kilerai (2021)eKLR** and **William Mulura Kairiba vs. Samuel Nkari & 2 Others (2018)eKLR**.

Analysis and determination

11. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

12. I will not belabour reproducing the evidence of the witnesses before the trial court as the summary thereof has already been captured in this judgment. I however add that the appellant had relied on his list of documents dated 13.3.2012. The same are a sale agreement between the appellant and 1st respondent's mother dated 20.10.1999 and a letter of land transfer. For the 1st respondent, he had relied on the documents in his list dated 19.6.2012. These are;

- i. Letter dated 28th September 1988 by the chief, Ithima location addressed to the land adjudication & settlement, offices regarding transfer of lands Serial No. 1133 Akirang'onde 'A' adjudication section.
- ii. Defendant's demarcation notebook.
- iii. Letter of objection by the defendant dated 22.9.2008 relating to land parcel S/No.1750 Peter Kamundi addressed to the district land adjudication officer.
- iv. Summons dated 13th May 2010 regarding hearing of objection case no. 2889.
- v. Proceedings and decision of the land adjudication officer in respect of objection no. 2889 involving land parcel no. 750 Akirang'onde 'A' adjudication section.
- vi. Receipt No. A 5745593 dated 8th June 2010 for Kshs.300/= in respect of proceedings.
- vii. Letter of confirmation of ownership of land parcel no. 1750 Akirangonde 'A' Adjudication section from the district land adjudication & settlement officer, Igembe district.

13. The summary of the decision of the trial court is captured in the following words; **“The defendant's claim in the objection proceedings was allowed to the effect, 0.50 acres was to be combined with his 8.0 acres to make it 8.5 acres. If the plaintiff was not satisfied with the verdict of the objection proceedings he should have used the mechanism provided in the Land Adjudication Act to Appeal.”**

14. The question for determination is whether the trial magistrate erred in arriving at the aforementioned decision. Having perused the lower court file, the record of Appeal as well as the submissions of the parties, I have no doubts that there were objection proceedings relating to the suit land P/NO. 1750 in objection case No. 2889 where the appellant and the 1st respondent were both present and adduced evidence. The objection case was ruled in favour of the 1st respondent. Vide a document on page 55 of the record of appeal (produced by the 1st respondent as an exhibit), the appellant wrote a letter to the DLASO requesting for the proceedings and ruling upon serial no. 1750 Objection no. 2889, which was passed against him.

15. In light of the foregoing findings, the 1st respondent correctly restated the position of the law by questioning the jurisdiction of the court in paragraph 12 of his statement of defence. Jurisdiction is key, for without it a court cannot make any other step. It is derived from the Constitution, legislation or both. In **Johnson Mbaabu Mburugu & another v Mathiu Nabea & 9 others [2020] eKLR** the court quoted with approval, the Supreme Court in the case of **Samuel Kamau & Another v. Kenya Commercial Bank and two others – Sup. Ct. Civil**

Application No. 2 of 2011 where it was stated as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

16. The Land Adjudication Act and the Land Consolidation Act capture the steps of adjudication from the start when a declaration is made up to the time of finalization or close of the register of adjudication. The aforementioned statutes provide dispute resolution mechanisms which need to be followed in case of any grievance arising during the process of adjudication. In particular, the Land Adjudication Act (Cap 284 of the Laws of Kenya) which applies in this dispute provides an elaborate procedure that ought to be followed in line with the provisions of section 26 and 29 thereof.

17. Still in the case of Johnson Mbaabu Mburugu & another v Mathiu Nabea & 9 others [2020] eKLR which quoted Abdullah Mangi Mohamed v Lazarus Beja & 5 Others [2012]eKLR, it was held that:

“...where there is a dispute as to the Applicant's entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, that statutory procedure should be utilized in the determination of the Applicant's claim to the property.... ”

18. This court in 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 [2019] eKLR held that;

“Parties must show that they have exhausted all available remedies. Further, parties must follow the laid down Dispute Resolution Mechanism provided for under the relevant laws, in this case, the Land Adjudication Act or the Land Consolidation Act.”

19. In the case of Kanampiu M’Rimberia v Julius Kathane & 3 others [2019] eKLR, this court was dealing with a situation whereby the claimant appears to have opted to seek redress in a court of law instead of pursuing his appeal before the minister after objection proceedings. I held thus;

“This is a situation whereby the plaintiff simply shunned the appeal proceedings before the minister, yet the decision of the minister is the final stage of determination of rights and interest in land under adjudication process. The bottom line of this matter is that the rectification of the register pursuant to the A/R Objection proceedings is grounded in law under section 26 of the Act. As a matter of fact, under section 27 of the Act, the register is taken to be final ONLY SUBJECT TO APPEAL. The adjudication officer is required to send the adjudication register with particulars thereof to the Director of adjudication for onward transmission to the chief Land Registrar to facilitate the issuance of title deeds. It was therefore not open for the plaintiff to opt to come before this court. Recourse lies with the Minister. My conclusion is that this court has no jurisdiction to determine the dispute at hand”

20. It is not the place of this court sitting in its appellate forum to examine whether the DLASO had the mandate to conduct the objection case, nor can this court delve into the issue of inheritance in relation to the property of the deceased M’Mucheke Mucheke. I conclude that the trial magistrate arrived at a correct finding in stating that the appellant ought to have followed the dispute resolution mechanisms provided for under the adjudication statutes in challenging the decision of the DLASO. As such, I do opine that the appeal is unmerited. The same is hereby dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 9.4.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE