



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. 66 OF 2019**

**JAPHET MURIUNGI RUKUNGA**

**(Suing as legal representative of the estate of**

**M'ITIRI MBIRITHI M'MBIRITHI (DECEASED).....APPELLANT**

**VERSUS**

**STEPHEN MURIUKI BAIBAYA.....RESPONDENT**

***(Being an appeal against the ruling and order of Hon. G. Sogomo (P.M)***

***made on 11.4.2019 in Tigania PMCC no. 97 of 2015)***

**JUDGMENT**

**Introduction**

1. Japhet Muriungi M'Rukunga suing as a legal representative of the estate of M'Itiri Mbirithi M'Mbirithi (deceased) herein after the appellant has filed a memorandum of appeal dated 3<sup>rd</sup> May 2019 being dissatisfied with the ruling and an order made by the trial court in Tigania PMCC no. 97 of 2015 on the following grounds:

*(i) That the appeal and this application has been filed expeditiously.*

*(ii) That in the appeal, the appellant has demonstrated that he has prima facie an arguable case and/or appeal.*

*(iii) That the trial court, struck out the plaintiff's suit with costs, on the ground under section 29 of the Land Adjudication Act, the court lacked the requisite jurisdiction, to hear the plaintiff's suit. the appellant shall argue that since a title deed had already been issued, section 80 of the Land Registration Act allows Rectification of register if fraud is proved and therefore, the trial court had jurisdiction to their and determine the plaintiff's suit.*

*(iv) That vide the ruling of the trial court dated 11.4.2019, the respondent herein, was granted a leeway to ex parte fix for hearing his counterclaim for eviction of the plaintiff and his family members from the suitland. If this happens, the respondent shall acquire a decree for eviction against the plaintiff and if eviction takes place, the plaintiff and his family members risks losing their houses and developments on the suit land.*

*(v) That in the interests of justice, a stay of proceedings ought to be issued to allow the appellant pursue his appeal.*

*(vi) That the appellant deserves the exercise of discretion in his favour.*

**Background**

2. The brief facts of the lower court case are that on 24<sup>th</sup> June 2015 by a plaint dated 23<sup>rd</sup> June 2015 the appellant sued the respondent claiming that objection against the deceased's parcel no. 484 in Athinga/Athanja adjudication section was heard on 15.8.2007 and a decision made on 11.10.2007 excising one acre out of the deceased land being parcel no. 6507 Athinga/Athanja adjudication section which was registered in the name of the defendant now the respondent.

3. The appellant sought declaratory orders that the said action was fraudulent, illegal that the land ought to revert to the name of the deceased and a permanent injunction restraining the defendant, his agents, successors in title and any other person acting on his behalf from entering, using or interfering with the ownership of the aforesaid disputed land.
4. Alongside the plaint the applicant sought interim injunctive as well as inhibition orders with a supporting affidavit sworn on 23.6.2015 in which he deposed at paragraph 11 that title deed had recently been issued for the adjudication section.
5. In response the respondent swore an affidavit on 8<sup>th</sup> July 2015, attaching a title deed issued on 12<sup>th</sup> January 2015 for parcel no. Meru North/Athinga/Athanja/6507.
6. The respondent filed a defence dated 8<sup>th</sup> July 2015 and a preliminary objection dated on the said date which later amended on 18.12.2015 bringing on a counter claim. The gist of the defence was that objection was filed as per the Land Adjudication Act, determined as per the law, was not appealed against as a result of which the land was validly registered in favour of the respondent in line with Land Registration Act 2012. Consequently the respondent as an absolute proprietor alleged he is entitled to both eviction, permanent and mandatory injunction over the land.
7. The trial court certified the appellant's application dated 23.6.2015 urgent and granted interim orders during interparties hearing which the court heard a preliminary objection dated 8<sup>th</sup> July 2015 which was determined on 3<sup>rd</sup> September 2015.
8. The notice of preliminary objection was premised on three key grounds namely;
  - (a) *There is in existence and a valid determination under chapter 283 and 284 of the laws of Kenya in objection no. 1305 and the same has not been set aside, reviewed and or appealed from.*
  - (b) *Consequently the decision and determination on record can only be set aside by the High court exercising the supervisory jurisdiction by way of Judicial review under order 53 of the civil procedure rules.*
  - (c) *The court is therefore not possessed of the necessary jurisdiction to hear and determine this case.*
9. In support of the preliminary objection the respondent stated that as per paragraph 5 of the plaint, admission of the objection proceedings had been made by the appellant, that there was an allegation that the proceedings had been filed against a dead person; the appellant was faulting the procedure used; that the only way such a decision would be challenged was through a Judicial review proceedings under order 53 of the civil procedures rules at the High Court but not through a plaint hence prayed for the suit to be struck out.
10. In response the appellant was of the view the preliminary objection was misconceived as under Environment and Land court Act, section 13(2) grants courts powers to hear and determine the suit; he relied upon petition no. 72 of 2013 to say that court had jurisdiction; and wide discretion under both the Constitution and Section 80 of the Land Registration Act 2012; the plaint had raised issues of fraud and illegality which fall squarely on the Environment and Land Court; the title deed was allegedly issued before the register was open; the title deed issued was questionable under section 80 of the Land Registration Act and could be cancelled by the court; matters of technicalities if any are curable under Article 159 of the Constitution and hence the court should hear the suit on merits .Given a right of reply the respondent reiterated that the court lacked jurisdiction, urged petition no. 72 of 2013 was irrelevant to the objection and that the appellant could not evade order 53 hence urged the suit be struck out.
11. A ruling was reserved for 15<sup>th</sup> October 2015. However the record shows the then court recused itself on 12<sup>th</sup> November 2015 for reasons unclear to this court and the matter was placed before Hon. Sogomo on 25.10.2018 who by consent of parties directed the application to be canvassed by way of written submissions. In passing, again it is not clear if the previous proceedings of oral submissions were done away with.
12. Be that as it may the plaintiff filed written submissions dated 8<sup>th</sup> January 2019 relying on the **Catherine Muthoni Kiriungi and another vs The Chairman Land Adjudication and Settlement officer Tigania East Central division and 3 others** unreported on the issue of proceedings against a dead party; that as per sections 26 (1) (a) & (b) and 80 of the Land Registration Act 2012 and since there was admissions and existence of a title deed, the court had jurisdiction to determine the suit on account of fraud, illegality ,misrepresentation and unprocedural acquisition .
13. On the part of the respondent/defendant submissions were filed dated 21<sup>st</sup> November 2018 in which he sets out paragraph 5 of the plaint, list of plaintiffs documents in support of the claim; relied on paragraph 5, 6 & 9 on the defence dated 8<sup>th</sup> July 2015, urged the court to look through provisions of section 26 of the Land Adjudication Act and conclude the correct procedure was to appeal to the minister and thereafter approach the court for judicial review. The respondent relied on the case **Motor vessel Lillian vs Caltex oil Kenya Ltd 91989) eKLR** urging the court to down its tools for lack of jurisdiction.
14. In a ruling delivered on 11<sup>th</sup> March 2019 the trial court upheld the preliminary objection and proceeded to strike out the suit.
15. Aggrieved by this ruling the appellant urges this court to find there was on record a land adjudication consent as per section 30 of the Land Adjudication Act cap 284 to hear and determine the suit; the court was erroneous to rely on the Land Adjudication Act; there was jurisdiction under section 80 of the Land Registration Act; the court considered extraneous issues outside what was raised in the preliminary objection and negated known principle that there can be no wrong without a remedy.
16. This being a first appeal the court is obligated to review, rehearse, reassess and re-analyze the finding of facts and law to determine if the

trial court erred in both fact and law in reaching its findings and conclusion as held in **Selle & anor vs Associated Motor Boat Co Ltd & others (1968) EA 123**

17. Having gone through the pleadings, proceedings and the directives given it is clear that parties herein on 24<sup>th</sup> July 2017 filed a consent dated 15<sup>th</sup> July 2017 in which they compromised the application dated 2<sup>nd</sup> December 2015. This was during the pendency of the ruling in which parties had orally argued the preliminary objection on 3.9.2015 and which led the respondent herein to file an undated amended defence and counterclaim on 18.12.2020.

18. Strangely in the written submissions in support of the preliminary objection the respondent did not rely on the said amended defence and counter claim. It is also not clear if the appellant herein filed a reply to defence and defence to the counterclaim as per the filed consent within 14 days upon service.

19. Further, for the first time the respondent herein by a supporting affidavit sworn on 2<sup>nd</sup> December 2015, he admitted he had a title deed under the Land Registration Act and hence the reason he sought to amend the defence and counterclaim. He also displayed the said title deed for the disputed land.

20. In his submissions dated 2<sup>nd</sup> December 2020 the appellant maintains the land in issue was not under adjudication at the time the court allegedly upheld the preliminary objection since there was in existence a title deed hence the court erred by declining jurisdiction. He urges this court to be guided by **Owners of Motor vessel Lilian vs Caltex oil Kenya Ltd (1989) KLR 1** in the proposition of what jurisdiction is; **Samuel Kamau Macharia and another vs Kenya commercial Bank Ltd and 2 others (2013) eKLR on constitutional and statutory jurisdiction principles, Nilesh Premchand Mulljishah and another t/a Ketan Emporium vs M.D Popot and others (2016) eKLR** on the proposition that striking out a suit is a draconian measure to be exercised cautiously.

21. On his part the respondent in his written submissions dated 14<sup>th</sup> December 2020 opposes the appeal on the basis that sections 30 of the Land Adjudication Act and 8 of the Land Consolidation Act were not applicable with regard to the subject dispute, reiterates the complaint in the plaint is against the decision flowing from the objection at the adjudication stage; there was non exhaustion of internal mechanisms laid down in cap 284 and non-failure to move the court by way of judicial review if aggrieved by rulings or decisions under the relevant adjudication law and lastly sought reliance on case law of :

- **Mugambi Nicholas and others -& Zacharia Baariu & others ELC 167 of 2011 (unreported).**

- **Abdulla Maingi Mohammed and others vs Lazarus Benja and others 2012 eKLR.**

- **Owners of Motor vessel Lilians vs Caltex Kenya Co. Ltd (1989) KLR.**

#### **Factual Analysis of the lower court case**

22. The main issue in this appeal is whether or not the respondent raised a pure point of law in the first instance and secondly whether the lower court was in order to uphold the said objection.

23. The law on a preliminary point of law has been settled in a legion of cases within and without our jurisdiction.

24. In **Mukhisa Biscuit manufacturing co. Ltd vs West End Distributors Ltd (1969) E.A 696** it was held:

***“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of which if argued as a preliminary point may dispose of the suit.....***

***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”.***

25. The first ground of objection was there was in existence a valid determination under Chapters 283 and 284 of the laws of Kenya in objection no. 1305 and the same had not been set aside, reviewed and or appealed .The second point is that such a decision could only be set aside by the High court by way of Judicial review and thirdly the court had no jurisdiction to hear and determine the case.

26. As per the above cited decision, a preliminary point of law is based on the assumption that what is pleaded by the other side is correct and that facts are undisputed.

27. The questions this court will have to answer is first what were the facts as pleaded by the respective parties, secondly if those facts were clear and undisputed, third what issues were before the court as facts flow from pleadings and lastly if the lower court applied the correct legal principles enunciated above so as to find there was a pure point of law.

28. The plaint dated 23.6.2015 at paragraph 3 states parcel no. 484 Athinga/Athanja had been registered under Land Registration Act 2012 and a title deed issued in 2015.The deceased passed on 10<sup>th</sup> June 2006 while the objection was allegedly to have been done between 15.8.2007 and 11.10.2007 creating parcel no. L.R 6507 in favour of the respondent.

29. The appellant therefore contends the aforesaid process was fraudulent, illegal and irregular .Further in paragraph 9 thereof the appellant seeks for cancellation of the title no. L.R Athinga/Athanja/6507. In response to the plaint the respondent filed an amended defence and

counterclaim on 18.7.2015. At paragraph 3 he admits L.R no. 484 was registered in the name of the deceased but had been sold, admits filing an objection, that the same was heard and determined according to the law and that the decision had not been challenged or subsequent to which he was registered as the absolute proprietor of L.R No. Meru North Athinga/Athanja/6507. He denied there was any fraud; argued the said process had not been challenged by way of Judicial review and hence the court had no jurisdiction to revisit the result of the objection.

30. Further the respondent at paragraph 11 of the amended defence and counterclaim maintained his title to the land was above board with no illegalities or fraud as alleged. At paragraph 14, the respondent alleges the appellant had admitted occupying his land, which was illegal and sought eviction. In the counterclaim the respondent admits he had a title deed for parcel 6507 and hence was entitled to eviction orders as well as permanent injunction against the appellant.

31. From the pleadings it is clear that there was already in existence title deeds in respect to parcel no. 484 and 6507, and that the process was no longer governed by both the Land Consolidation and Adjudication Act cap 283 and 284 respectively, but was already falling under the Land Registration Act.

32. Secondly it is clear the complaint by the appellant was not merely the process but the merits/ illegalities of the issuance of the title deed in favour of the respondent.

33. Thirdly there was already an issue as to whether or not at the time the respondent brought the alleged objection, had it determined, got issued with a title deed, whether the alleged seller was alive and, if not so if he had legal capacity to transact such business.

34. More importantly and as indicated elsewhere in this judgment, long after filing the preliminary objection and pending the initial ruling, the respondent changed goal posts, amended his defence and brought on board a counter claim bringing a new set of facts which confirmed the dispute was past objection stage.

35. Given the foregoing facts which are disputed and controverted by each side, can it be said the point of preliminary objection herein met the threshold of the decision afore quoted?

36. The answer to this question is that unfortunately the trial court misapprehended the facts in this case, the controversy in issue and subsequently the law applicable under the circumstances. From the above analysis of the facts the trial court took a very narrow view of the dispute yet the pleadings are showing a broader controversy.

37. Once a title deed is issued a party seeking to have its legality determined cannot be told to return to the law which adjudicated the land. A title deed is issued not under the law adjudicating the land but the Land Registration Act.

38. Further looking at the prayers sought both in the plaint and the counterclaim it is clear parties are talking of land reference nos. Meru North/Athinga/Athanja/484 and 6507 respectively and not an adjudication section.

39. The appellant had also pleaded an issue of customary trust as an overriding interest.

40. All these issues were within the jurisdiction of the trial court under the Land Registration Act 2012 as well as the Environment and Land Act.

41. Additionally the case law the court relied upon in its ruling is totally distinguishable for they deal with matters falling under Land Adjudication Act yet the dispute before the trial court was under the Land Registration Act.

42. In my considered view, had the trial court looked at the pleadings and the law in totality, it would not have reached the said finding hence fell into both factual and legal errors.

43. Similarly, there was already a counterclaim filed by the respondent in place at the time the court struck out the appellant's suit. Though the same is in law a stand-alone suit, the trial court did not give directions on what became of it.

44. With regard to the prayer for cancellation of a title deed the learned trial magistrate erred in law by equating the same with a prayer for mandatory injunction against land registrar. The law grants a court power to make the cancellation in deserving cases. In the instant case though the land registrar had not been joined as a party, the law grants the court discretion on joinder of parties and issuance of third parties notices.

45. In view of the foregoing the appeal herein is allowed with costs to the appellant.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2021 IN PRESENCE OF:**

C/A: Kananu

Ondari for respondent

Mwirigi Kaburu for appellant

**HON. L.N MBUGUA**

**ELC JUDGE**