



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 95 OF 2019**

**ELIZABETH KAIRIGO.....APPELLANT**

**VERSUS**

**M'IKIAO AMURU.....1<sup>ST</sup> RESPONDENT**

**SILVESTER LUBETA.....2<sup>ND</sup> RESPONDENT**

**MAKELINA KANOCIA.....3<sup>RD</sup> RESPONDENT**

**GODFREY MUGAA AMURU.....4<sup>TH</sup> RESPONDENT**

**DOMINIC MURANGIRI.....5<sup>TH</sup> RESPONDENT**

**PHILLIP KAIRITHIA MUGWIKI.....6<sup>TH</sup> RESPONDENT**

**THE TIGANIA WEST DISTRICT LAND**

**ADJUDICATION & SETTLEMENT OFFICER.....7<sup>TH</sup> RESPONDENT**

***(Being an appeal from the ruling of the learned magistrate Hon. SOGOMO***

***in Tigania ELC No. 1 of 2017 delivered on 4/07/2019)***

**JUDGMENT**

1. The appellant being the plaintiff in the trial court sued the respondents vide a plaint dated 4/03/2012 seeking the following orders;

a) A declaration that the defendants hold land in Uringu ii Land Adjudication Section measuring 36 acres as initially gathered by the plaintiff.

b) A order directing the 7<sup>th</sup> defendant to rectify the register by reconstituting 36 acres from parcel no. 365, 148, 561, 1304, 1548 and 749 Uringu 11 Land Adjudication Section as originally demarcated under parcel no. 1555, return it to its original parcel no. 1555 and location and transfer the same to the plaintiff.

c) An order of eviction directed against the 1<sup>st</sup> to 6<sup>th</sup> defendants, his family members, agents, servants or anybody else claiming through him from the reconstituted land parcel no. 365, 148, 561, 1304, 1548 and 749.

d) An Order of permanent injunction against the defendants, their agents, family members, servants, employees or anybody else acting at their behest restraining them from transferring, subdividing, occupying, trespassing, utilizing or in any other way interfering with the plaintiff, her family, agents and/or successors in title peaceful occupation and utilization of land parcel no 365, 148, 561, 1304, 1548 and 749 Uringu II Land Adjudication Section as originally demarcated at 36 acres or thereabout.

2. Years later, the 1<sup>st</sup> - 4<sup>th</sup> respondents filed a preliminary objection dated 25/03/2019 on the grounds that; **“the court lacked jurisdiction to determine the suit as the matter originated from objection proceedings thus the plaintiff should have filed an appeal to the minister**

**or file a Judicial Review”.**

3. The trial court in its ruling delivered on 4.7.2019 upheld the Preliminary Objection and dismissed the plaintiff's suit with costs to the defendants. Being aggrieved by the said ruling, the appellant filed her memorandum of appeal dated 15/07/2019 basing her appeal on seven (7) grounds as follows:-

(i) *The learned magistrate erred in law in construing narrowly the powers of the court by not considering the Act 283 section 30 Land Adjudication Act.*

(ii) *The learned magistrate erred gravely in law in failing to be guided by law in the exercise of his discretion to hear the matter as it pertains to land.*

(iii) *The learned magistrate erred in law in taking too technical view of preliminary objection failing to find that the demands of justice weighed in favour of hearing the land matter and make the ruling on the same.*

(iv) *The learned trial magistrate erred in law in being guided by the decision emanating from the civil procedure act.*

(v) *The learned trial magistrate in striking out the suit and refusing to set the suit for hearing failed to consider that article 159 (2) of the constitution a court is to be guided by the principle of doing justice to all regardless of status and further that such justice should be administered without technicalities of procedure.*

(vi) *The learned trial magistrate by striking out the matter by preliminary objection has grossly caused miscarriage of justice as the appellant was denied her day in court and was sent away from the seat of justice.*

(vii) *Further by striking out the suit the learned trial magistrate failed to consider the gravity of the subject matter being a land dispute and that the history of the case demonstrated that the appellant had diligently prosecuted her case”.*

4. The appeal was canvassed by way of written submissions. The Appellant vide submissions dated 16/03/2021 submitted that this matter was not only about the ascertainment of the rights of the appellant but also the mishandling and legality or lack thereof of the adjudication process by the adjudication officer. As such the matter could not be put into one box and be simply labeled one for determining rights and ignoring other complexities that brought the plaintiff to court.

5. That the appellant obtained a written consent from the adjudication officer to institute the suit and has complied with the law by exhausting all dispute mechanisms as provided for by the Land Adjudication Act and Land Consolidation Act. The matter is about the flawed manner in which the adjudication process was carried out and the trial court left her without a point of recourse, that she ought to have been heard not only because the case was about the ascertainment of her rights and interest over the land but also because she had exhausted all the statutory remedies provided.

6. In support of her case, the appellant proffered the following authorities; **Johnson Mbaabu Mburugu & another v Mathiu Nabea & 9 others [2020] eKLR, Thomas Mungiria & 9 Others V Joseph Mutuma & 4 Others[2012]eKLR, Muthara Njuri Ncheke Council of Elders & Another v Committee of Ngaremara/Gambella Adjudication Section through the Chairman Cyprian Kaume Mukira & 2 others [2020] eKLR.**

7. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents vide submissions dated 15/04/2021 submitted that the appellants claim is based on the allegation that the 7<sup>th</sup> respondent mishandled her objection thus clearly this is a matter resulting from objection proceeding which the appellant did not agree with and she ought to have followed the laid down procedures as per section 11 and 12 of Cap 283 and 284. The mere fact that she obtained a consent letter does not explain why she did not exhaust the laid down procedures before going to court. She should be estopped from pursuing any perceived interest in the suit land through this case. The respondents therefore seek for the dismissal of the appeal.

8. In support of their case, the aforementioned respondents relied on the following cases: **Republic V District Land Adjudication Officer, Transmara District Samson Kiserian Kilerai [2012]eKLR, William Mutuura Kairiba V Samuel Nkari & 2 Others [2018]eKLR.**

#### **Analysis and determination**

9. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and make its own determination. The issue for determination is whether the trial court arrived at a wrong finding in dismissing the appellant's suit while stating that; ***“it comes into sharp focus that the plaintiff in this suit jumped the gun by passing procedures stipulated by statute instead of presenting his case prematurely to a court not draped with requisite competence to preside over the conduct of this matter.”***

10. The definition of a preliminary objection is well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696**, as follows:

***“So far as I'm aware, 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.”***

11. A preliminary objection is therefore strictly on a point of law and not of fact. It should not be hazy with factual details liable to be contested and proved by presentation of evidence. It cannot be raised if any facts have to be ascertained.

12. I discern from the records particularly the pleadings of the appellant that there were objection proceedings in so far as the suit lands are concerned. That being the case, then what was the recourse for the appellant, and was the trial court suited with the requisite jurisdiction to hear and determine her suit?

13. It is trite that 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 which rightly captured the issue 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.”***

14. 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.

15. The court in Reuben Mwongela M’itelekwa (suing as the Legal Representative of the estate of M’itelekwa M’muचेके Naituri alias M’itelekwa Muचेके) 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.”***

16. The trial magistrate had stated in his ruling that:

***“From a cursory glance at the plaintiff’s pleadings this suit is predicated upon a decision made by an Adjudication officer after presiding over objection proceedings which determination the plaintiff is aggrieved of”.***

17. The court went ahead to make reference to both the provisions of the Land Consolidation Act and the Land adjudication Act. However, though these are the two main adjudication statutes, they don’t apply at the same time. Indeed this issue was raised by the appellants before the trial court when they stated that there was no specificity of the applicable law, that the defendants had not ascertained the legal regime they were relying on. It was therefore not open for the trial magistrate to lump the two adjudication statutes together in arriving at the decision to dismiss the suit.

18. In the case of Julius Kailikia Laaru v Peter Kaigera Laaru [2020] eKLR, I stated as follows in relation to the jurisdiction of the courts in land adjudication related disputes;

***“It doesn’t follow that all disputes arising during the adjudication process must or ought to have been dealt with by the adjudication bodies. A court of law has to analyze the claim before it to see if the same falls under the dispute resolution mechanisms provided for under the adjudication statutes mainly The Land Consolidation Act Cap 283 and The Land Adjudication Act Cap 284 Laws of Kenya. In order to have a better perspective of the issue, one must fall back on the preamble of the two statutes.....***

***What emerges from the above statutes is that adjudication process is the bridge albeit long and winding in which land held in a communal tenure system transitions to individual tenure system through the process of ascertainment of rights and interests in land, recording of such rights and interests and demarcation of the land. The dispute resolution mechanisms provided for under the two aforementioned statutes is meant to shepherd this process of ascertaining the rights and interests of claimants, before crystalization of the same under the land Registration Act (formerly the Registered Land Act cap 300 repealed).”***

19. I have keenly perused the record and I have not seen the proceedings or the decision undertaken by the adjudication bodies. The court therefore cannot discern the nature of those “objection proceedings” in order to determine if the dispute fell within the dispute resolution mechanisms in the adjudication statutes.

20. In the case of Francis Murungi M’Ibaya v Paul Kigea Nabea (Deceased and now substituted by Kigea Amos Kilemi & Paskwale Mwiti Kigea) & 4 others [2020]eKLR, I stated that;

***“An in depth analysis of the proceedings undertaken in the adjudication processes (particularly the proceedings commonly referred to as A/R Objection cases conducted under section 26 of both the Land adjudication Act and the Land Consolidation Act) usually gives the court a sneak preview of the nature of the dispute which guides the court in determining whether such a court has jurisdiction or not. This entails a thorough scrutiny of the material presented before the court”.***

21. The material presented to the trial court was not sufficient to determine what legal regime was applied in the proceedings before the adjudication bodies or what transpired thereof. Thus this case is distinguishable from the authorities cited by the respondents. For instance, in the case of Replib V District Land Adjudication Officer, Transmara District Samson Kiserian Kilerai [2012]eKLR , the court was dealing with judicial review proceedings in relation to proceedings where parties were heard on merits and a ruling was delivered on a known

date (1.8.2003), while in the case of **William Mutuura Kairibia V Samuel Nkari & 2 Others [2018]eKLR** the court was dealing with the issue of consent.

22. I come to the conclusion that the trial court erred in making a blanket finding that the plaintiff ought to have exhausted the remedies in the adjudication statutes. In the final analysis, I find that the preliminary Objection presented before the trial court was not a pure point of law as some facts particularly the nature and legal regime of the previous proceedings needed to be ascertained which entailed proof via evidence. I therefore come to the conclusion that the trial magistrate erred in law and fact in allowing the preliminary objection of the respondents.

23. **Final orders:**

- 1) **The appeal is allowed and the suit before the trial court is reinstated,**
- 2) **The lower court file is to be forth with transmitted to Tigania law court for determination of the case on merits,**
- 3) **Each party to bear their own costs of this appeal.**

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 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 notice issued on 3.9.2021. 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 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> 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**