



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. 74 OF 2019

BENEDICT KILEMI M'ITHINYAI.....APPELLANT

VERSUS

JOSEPH NGITUYU1ST RESPONDENT

JAPHET AKWALU MBERIA2ND RESPONDENT

JUDGMENT

(Being an appeal from the Ruling of Hon. G. Sogomo (S.R.M.) delivered on 1st November 2018, in Tigania PMCC No. 25 OF 2014)

JUDGMENT

1. The appellant faults the order striking out the suit for lack of jurisdiction claiming it was made in misapprehension of the facts and law obtaining in the matter.
2. This being a first appeal the court is mandated to relook at the entire record, come up with its own findings on law and facts and establish if the decision made was properly grounded in law.
3. The appellant had vide consent dated **24.12.2012** issued by the District Land Adjudication Officer sued the respondents to restrain them from entering and destroying vegetation and trees on his **Parcel No. 3625 & 142 Antuamburi Adjudication Section**.
4. The respondents denied the claim that **Parcel No. 417** was unfairly, wrongly and unlawfully subdivided. They denied any occupation by the appellant. On the contrary, they alleged they had lawfully bought and got transferred their portions in 1986 and 1991 respectively after which they took vacant possession, and embarked on various developments.
5. The court made a scene visit and a report was filed confirming destruction of trees. Vide a ruling made on 1.11.2018, the trial court struck out the suit on the basis the appellant had not exhausted internal remedies under **Sections 25 and 26(3)** of the **Land Consolidation Act Cap 183 Laws of Kenya** leading to the instant appeal.
6. The appellant submits the court has power to entertain suits as held in *William Onginjo Kenga –vs- Eric Mawira [2000] eKLR, Peter Ndirangu Muchemi –vs- Asiemo Ndatho Marengo [2018] eKLR, Nicholas Tukei –vs- Chepocheptatug Loyeruk & 2 Others eKLR.*
7. Further the appellant submits it is not mandatory to appeal to the Minister as held in *Julius Ntuiti –vs- Mwirichia Kaumbuthu [2014] eKLR.* Additionally the appellant submits striking out a suit was drastic and must be rarely done as held in *Omar Saleh Said –vs- Kilindini Warehouses (K) Ltd & Another [2013] eKLR* and that it was not fair to condemn him unheard as held in *Harrison Wanjohi Wambugu –vs- Felista Wairimu Chege & Another [2013] eKLR*.
8. On the part of the respondent, they submit the basis of the claim was objections **No's A/R 3654 & 3654** over **Parcels No's 3625 & 142**, where the appellant was the objector while the respondents were the respondents, were heard and dismissed by **Land Adjudication Officer** as per **Section 26 of Land Consolidation Act**.
9. Under **Section 26**, any aggrieved party like the appellant ought to have appealed to the Minister within 60 days.
10. Given the prayers in the plaint, the court was being called to declare the appellant the owner of the suit land, which in other words was tantamount to surpassing the powers of an adjudication officer to ascertain and declare rights and interests over the suit land by sitting on an

appeal against the decision of an adjudication officer. The respondents urged the court to be guided by Margaret Mukomugaa –vs- Samuel Kingirwa Amuru & 4 Others [2021] eKLR.

ANALYSIS AND FINDINGS

11. The claim by the appellant is captured in paragraph 5, 6 and 7 of the plaint. It was over fraudulent, unlawful and unfair subdivisions and an award of the same to the respondents without due regard to the law.

12. The respondents at paragraph 5, 11 and 12 of the defence denied the illegality and claimed to have lawfully purchased the suit lands from **M’Mungania M’Ekindu** and **Ntarangwi Bruno** respectively.

13. Section 26 of Land **Consolidation Act** provides any person named or affected by the adjudication register, and who considers the register to be incomplete or inaccurate in any respect or aggrieved by the allocation of land as entered therein to appeal to the Minister within 60 days, after the notice in **Section 25** of the **Act** is published.

14. Now the questions which need to be answered are: whether the section ousts the jurisdiction of the court to superintend any illegalities and irregularities during the adjudication. Put another way, other than the instances which are indicated in the **Land Consolidation Act**, did the legislature intend the role of the courts to be cosmetic and minimal to the extent that the role of the adjudication officer is left unsupervised? More importantly to this case, what if the notice was not published and the appellant noticed the actions of the respondents knowing very well the Minister and or the adjudication officer had no powers, unlike courts to issue restraining orders. Can it therefore be said the consent order issued by the land adjudication officer had no basis in law?

15. Additionally, what should the courts make of parties issued with consent to sue for a specific order but widen their scope and seek prayers beyond what was initially indicated in the consent.

16. In Tobias Achoka Osindi & 13 Others –vs- Cyprian Otieno Ogola & 6 Others [2013] eKLR the court held that the power and authority of ascertainment and determination of rights and interests belong to the land adjudication officer with the court’s role being supervisory in nature.

17. Given the facts in this matter, the trial court appears to have taken a narrower view of the issues raised in the pleadings.

18. It follows therefore the court cannot take up the powers to ascertain and determine rights and interests over land within an adjudication area. That does not mean the court cannot determine any complaints against an adjudication officer who has acted outside the law.

19. In my considered view Parliament gave adjudication officers powers to issue consent since it was expected there would be instances where the courts’ intervention would be inevitable.

20. It could not have been the intention of the legislature to deny parties with deserving and urgent complains from enjoying their Constitutional rights as to fair hearing and access to justice.

21. One of the ways in which the access to justice has been widened on land disputes is the enactment of the Environment and Land Court and the amendment to the **Magistrates Courts Act**.

22. The **Land Adjudication Act** and the **Land Consolidation Act** must be read together with the **Constitution of Kenya 2010** and all other laws thereof in line with the National Land Policy 2016. Similarly Kenyans have a right to fair administrative action especially those exercising quasi-judicial powers such as the land adjudication officers, land adjudication committee, board and the Minister. They cannot therefore operate in a manner which is not in **pare meteria** with the above laws.

23. In the same way, parties who act or cause the process of adjudication to be done below what is expected by the law cannot come to court and object to the role of the court in the name of lack of jurisdiction.

24. In Stephen Kungutia & 2 Others –vs- Severina Nchulubi Nyeri Civil Appeal No. 221 of 2020, the court was emphatic on this point.

25. I therefore find the appeal herein with merits. The same is allowed with costs to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Haron Gigonga for respondent

Murango Mwenda absent

Court Assistant - Kananu

HON. C.K. NZILI

