



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. E008 OF 2020

STEPHEN M'IKIAMBA.....1ST APPELLANT

TABITHA N. LAARIA (Suing as legal representative of the Estate of

SOLOMON RARIA M'ETHANGATHA).....2ND APPELLANT

CHARITY GAKII ITABARI

(Suing as legal representative of the Estate

of JOHN MUTABARI THIMANGU).....3RD APPELLANT

JAMES K. AKWALU.....4TH APPELLANT

JULIUS RUKIOYA.....5TH APPELLANT

VERSUS

JOHN KIRIMANA IKABU.....1ST RESPONDENT

LAND ADJUDICATION OFFICER TIGANIA.....2ND RESPONDENT

THE HON. THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo

(P.M.) delivered on 14th October, 2020, in Nkubu PM E&L No. 65 OF 2019)

JUDGMENT

1. By an appeal dated 23.10.2020 the appellant seeks to overturn the lower court ruling or order on the basis that the court misapplied the relevant laws to the facts hence reaching the wrong decision.
2. This being the first appeal the court is expected to look at the lower court record, come up with its own findings and conclusions while alive to the fact the trial court had the advantage of seeing and hearing the witnesses. **See *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) eKLR.***
3. The appellants had sued the respondents for fraudulently using the name of one Isaac Mainuri Mirini to take away their **Parcels No's 1155, 1157, 413, 103 and 476 Uringu II Adjudication Section** through a fictitious objection proceedings.
4. They sought for a declaration that the said parcels of land belonged to them and for the rectification of or redoing or restoration of the adjudication record to reflect their names as it was before the alleged illegal, wrongful and or fraudulent decisions.
5. The 1st respondent denied the claims through an amended statement and counterclaim dated 13.8.2012 on the basis that the parcels could not attract a common cause of action; there was no basis laid for fraud or collusion; the consent granted to institute the suit did not include all the sued parties and therefore the suit was defective and an abuse of the court process.

6. Further the respondents counterclaimed for eviction illegal subdivisions of **Parcel No. 3112 and Parcel No. 1157 into 1157 and 2062; Parcel No. 453 into 413, 2024 and 2063; Parcel No. 103 into 103, 2053, 2071 and 2072 and Parcel No. 476 into 472, 2004, 4072, 1073, 4074, 4075, 4078, 4077 and 4158** whereof objections were raised and determined on 13.5.2010 deleting the appellants names which decisions had not been appealed against either through judicial review or a Minister's appeal.
7. The appellants filed a defence to the counterclaim dated 30.8.2012, claimed to be the legal owners of the suitland, denied that the earlier civil suits had anything to do with them, stated the counterclaim lacked a consent from the land adjudication officer and maintained the respondents lacked standing to institute the counterclaim.
8. The 2nd and 3rd respondents opposed the counterclaim through a defence dated 11.1.2010, denied the alleged fraud or collusion, for lack of any forensic report and pleaded there was no compliance with **Section 13A of the Government Proceedings Act**.
9. The appellants by a reply to the 2nd and 3rd respondents defence dated 30.8.2012 stated they were beneficiaries and or bonafide owners of the suit land and maintained the court had jurisdiction to determine the suit.
10. The appellants complied with **Order 11**, filed case summaries and issues for determination dated 19.12.2018 and 22.3.2018 respectively.
11. With the above pleadings the trial court made a ruling and which is the subject of this appeal.
12. The appellants complains the trial court not only misunderstood the law before it and wrongly applied it, hence reaching to the wrong conclusion.
13. Through written submissions dated 20.5.2021 they submit the applicable law for Tigania area as held in **Peter Kimandiu v Land Adjudication Officer Tigania West District & 4 Others [2016] eKLR** was the **Land Consolidation Act** and not the **Land Adjudication Act**.
14. Further it is submitted the appellants had a consent to sue under **Section 8** of the **Land Consolidation Act** which the trial court did not consider at all contrary to the holding in **Daniel Murungi Mwirabua Anampiu v Jeremiah John alias Jeremiah Guantai; Bernard Muthaura M Chokera (unreported)**.
15. The appellants relied on **Douglas Kariithi & Another –vs- Stanley Gituma [2019] eKLR, Jackson Koome -vs- M'Limungi M'Ikwamba & 2 Others [2018] eKLR, Stephen Kunyua & 2 Others -vs- Severina Nchulubi (unreported)**.
16. On the other hand the respondents through written submissions dated 5.7.2021 state the appellants failed to disclose all materials facts hence the trial court was right in applying the law since the A/R objection did not indicate which law was applicable but nevertheless **Section 19 of Land Consolidation Act** provides the decision under **Section 18** shall be final while **Section 26 (3)** thereof provides no appeal shall lie against any decision by the adjudication officer to dismiss an objection.
17. Additionally it is submitted in Peter Kimandiu case the court was dealing with Antuamburi Adjudication Section while the suit lands are situated in Uringu II Adjudication Section. Further the respondents submit the appellants are bound by **Sections 19 and 26** of the **Land Consolidation Act** to appeal to the Minister and also **Section 30** of **Land Adjudication Act** as held in **Tobias Achola Osindi & 13 Others – vs-Cypriano Otieno Ogalo & 6 Others [2013] eKLR, Reuben Mwangela M'Itelekwa –vs- Paul Nabea [2019]** and **Nicholas Mugambi & Dominic Kaindio & 4 Others –vs- Zachary Baariu & 6 Others (unreported)**
18. Having gone through the pleadings, lower court ruling, the appeal and parties' respective submissions, the issues for determination are whether the court had jurisdiction to entertain the suit and secondly if the court applied the correct law and principles in reaching the impugned decision to the application dated 7.11.2019. It is trite law parties are bound by pleadings.
19. In this suit the appellants pleaded fraud and collusion on the part of the respondents done on an alleged objection proceedings. They sought for the cancellation of the objections proceedings, reversal of the decisions and a declaration that they are the rightful owners of the suit land.
20. In the plaint there are no particulars pleaded as to the objection proceedings number or numbers and the parties involved in them.
21. It is trite law and courts have held that the court has no powers to ascertain and declare interests and rights under both the **Land Adjudication Act** and the **Land Consolidation Act**. Those powers are donated to the land adjudication officer and land adjudication committee. See **Tobias Achola Osindi & 13 others –vs- Cyprianus Otieno Ogalo & 6 others [2013] eKLR**.
22. The court's role is supervisory in nature. In essence the appellants were asking the court to grant orders and exercise jurisdiction it did not have to determine and ascertain rights and declare them the rightful owners of the suit land.
23. Again, in the respondents defence and counterclaim it was pleaded that the appellants claim was based on objection proceedings determined on 13.5.2010 and which had not been appealed against either through a Minister's appeal or by judicial review proceedings.
24. The appellants defence to the counterclaim did not deny those facts. Given that the said facts are assumed to be admitted, the trial court in my view was right to find it had no jurisdiction to entertain a suit wherein the appellants had not exhausted the internal legal mechanism under both the **Land Consolidation Act** and the **Land Adjudication Act**. See **Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others. (2012) JELR 95245 & Speaker of the National Assembly v James Njenga Karume[1992] eKLR**.

25. As regards the issue that the court considered the wrong law, misapplied it and reached the wrong conclusion, the consent letter to sue dated 6.10.2010 was issued under **Section 8 (1)** of the **Land Consolidation Act** and **Section 30** of the **Land Adjudication Act** respectively. The trial court in my view was perfectly in order to consider the two pieces of legislation over the appellants' claim.

26. To interpret the law otherwise as the appellants urges the court to do so would amount to shooting themselves on the foot by saying the consent they used to come to court was by itself defective and illegal in law.

27. The notice of motion dated 7.11.2019 was based on **Sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act** and **Order 51 rules 1, 2 and 4** of the **Civil Procedure Rules**. The supporting affidavit sworn on 7.11.2019 attached annexure **8KE "4"** the objection No's 51 and 117 proceedings.

28. The appellants' replying affidavit sworn on 19.11.2019 did not specifically address the main issues in the application and which was with regard to the objection proceedings and whether the appellants had filed any Minister's appeal or judicial review proceedings within the stipulated time or at all.

29. Strangely, the same way the appellants avoided to respond to the defence and counterclaim, in this application, they failed to deny or admit the facts as presented by the respondents.

30. In absence of such material, the trial court was right in my view to make a finding that the appellants had not exhausted the remedies as provided under the adjudication and consolidation statutes.

31. The respondents in the application dated 7.11.2019 sought for the court to find it had no jurisdiction and to strike out the suit. They proceeded to do so but unfortunately failed to make a finding as to what became of the counterclaim.

32. Even though a counterclaim is a stand-alone suit, the trial court did not give any directions on the way forward and more particularly since the appellants had also raised objections that the 1st respondent had no locus standi to institute the same and secondly that he lacked a consent to sue.

33. In my view and looking at the record the 1st respondent did not produce any document to show he had capacity to institute a suit for and on behalf of the estate of the late Isaac M'Mainuri alias Murebu for **Parcel No. 846** and hence claim the land in paragraph 4 of the counterclaim.

34. Further since the 1st respondents had also admitted the suit land was governed by both the **Land Consolidation Act** and the **Land Adjudication Act**, he produced no consent to institute the suit as pleaded in the defence to the counterclaim dated 30.8.2012 by the appellants. In absence of the two vital documents, my considered view is the trial court ought to have given directions on the counterclaim. See *Nahyer Sharrif Hassan Alwi –vs- Housing Finance Co. of Kenya Ltd. & 2 Others [2009] eKLR.*

35. Consequently my finding is that the counterclaim herein was bad in law. The same is struck out with costs.

36. In the final analysis this appeal lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15TH DAY OF DECEMBER, 2021

In presence of:

Gakuya holding brief for C.P. Mbaabu for 1st respondent

Kieti for 3rd respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE