



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 13 OF 2020**

**M'IMANYARA M'ATUNGA.....APPELLANT**

**VERSUS**

**JENARO LUMIRI NABEA .....1<sup>ST</sup> RESPONDENT**

**LAND ADJUDICATION AND SETTLEMENT**

**OFFICER TIGANIA..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. S. Sogomo (P.M.) delivered on 8<sup>th</sup> June, 2019, in Tigania PM E & L No. 88 OF 2018)*

**JUDGMENT**

1. By an appeal dated 6.2.2020 the appellant attacks the lower court ruling striking out this suit for want of jurisdiction on the grounds that: the court misapplied the law and made a wrong interpretation; applied the wrong law; failed to consider a consent to sue had been granted and lastly applied the law by misconstruing the facts of the case before him.
2. This being a first appeal the court has to go through the entire lower court file making its own finding as to facts, evidence and make conclusions thereof. **See Selle & Another –vs- Associated Motor Boat Co. Ltd & Another (1968) EA 123.**
3. The appellant by a plaint dated 13.12.2016 sued the 2<sup>nd</sup>,3<sup>rd</sup> and 4<sup>th</sup> respondents for fraud, collusion and lawful transfer of **Parcel No. 333 Akaiga Adjudication Section** to the 1<sup>st</sup> defendant a in purported objection **No. 278**. He sought for an order directing the 2<sup>nd</sup> defendant to rectify the register to reflect him as the owner.
4. The respondents were duly served with summons to enter appearance . The 1<sup>st</sup> respondent entered appearance but filed no defence.
5. On 11.4.2019, the trial court directed the parties to address it on the issue of jurisdiction which they did and filed written submissions dated 18.4.2019 and 22.5.2019 respectively.
6. The appellant took the view that the operative word in **Sections 26 and 29** of the **Land Consolidation Act** and **Land Adjudication Act** were not in mandatory terms hence once a consent is issued the court had powers to entertain the suit. He relied on **Justus Ntuiti –vs- Mwirichia Kaimbuthu [2004] eKLR.**
7. The 1<sup>st</sup> respondent took a different view and submitted the appellant only avenue was to appeal to the Minister and that had Parliament intended the court play any role in the ascertainment and recording of rights in a trust land, it would not have set up the land adjudication office and its internal structures of dispute resolution.
8. By bringing the suit to court, the 1<sup>st</sup> respondent submitted the court would be usurping a jurisdiction it did not have except where it is expressly provided for under the law.
9. The appellant takes the view the lower court misconstrued the facts of the case, misinterpreted the applicable law and misapplied it hence reaching a wrong decision.
10. In its decision the trial court sets out the facts as relating to dissatisfaction of the appellant regarding a ruling by the 2<sup>nd</sup> respondent and whose appeal could only lie with the minister.

11. The appellant filed a consent dated 5.12.2016 the Sub-County Adjudication and Settlement issued by the 2<sup>nd</sup> respondent under **Section 8 (1) of Land Consolidation Act and Section 30 of Land Adjudication Act.**

12. The appellant undisputed facts are pleaded in paragraphs 11, 12, 13 and 14 of the plaints dated 13.12.2016. The claim was based on fraud, illegalities and collusion committed between January 2014 and 10<sup>th</sup> September 2015 by the respondents jointly. The facts do not allude to any compensation at. The claim as pleaded and presented was no longer between the appellant and the 1<sup>st</sup> respondent. It was involving the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

13. In my view it was wider than that envisaged under **Sections 26 and 29 and 30 of the Land Adjudication Act and the Land consolidation Act.**

14. Further the consent given gave the appellant right to seek to quash the entire process and the eventual decision. All these in my considered view were both matters of law and fact which needed to be ventilated through viva voce evidence at a full hearing.

15. Secondly as at the time the trial court was hearing the matter, there was already a High Court order made on 19.12.2016 granting an order of temporary injunction. The matter was initially filed at the High court before it was transferred to the lower court.

16. Additionally, at the time the court made the decision to strike out the suit, the respondents had not responded to the serious allegations of fraud, collusion and illegality by way of a defence. A preliminary objection as per **Mukisa Biscuits Manufacturing Co. Ltd. -vs- West End Distributors Ltd [1969] E.A 696** assumes that facts as pleaded are admitted by the other side.

17. As noted above, the pleadings were not yet closed. No preliminary objection had been raised by the respondents. Indeed they had not filed any defence to the serious issues raised herein. It was therefore in my view premature for the court to raise the issue before pleadings were closed. See **Stephen Kungutia & 2 Others -vs- Severina Nchulubi Njeri Civil Appeal No. 221 of 2010.**

18. Given the foregoing my considered view is the lower court erred in law and in fact in declining jurisdiction.

The appeal is hereby allowed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021**

**IN PRESENCE OF:**

**ORIMBO FOR APPELLANT**

**MUTHOMI FOR 1ST RESPONDENT**

**KIETI FOR 2ND RESPONDENT**

**COURT ASSISTANT - KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**