



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELC CASE NO. 18 OF 2015**

**(FORMERLY E.L.C. KERUGOYA 659 OF 2013)**

NGARI KIRANGA.....PLAINTIFF

**VERSUS**

JERUSHA MUCOGO KIURA.....DEFENDANT

**(BY ORIGINAL ACTION)**

JERUSHA MUCOGO KIURA.....PLAINTIFF

**VERSUS**

NGARI KIRANGA.....1<sup>ST</sup> DEFENDANT

SAMSON KIRIA NGARI.....2<sup>ND</sup> DEFENDANT

MARY MUTHONI KIRIA.....3<sup>RD</sup> DEFENDANT

**(BY COUNTERCLAIM)**

**JUDGEMENT**

**A. Introduction**

1. By a plaint dated 16<sup>th</sup> August 2013 and filed on 19<sup>th</sup> August 2013 the Plaintiff by original action sought the following reliefs against the Defendant:

*a. A declaration that the decision of the Minister for Lands dated 7<sup>th</sup> June, 2011 in Land Appeal Case No. 291 of 1995 awarding land parcel No. Mbeere/Kirima/1199 to the Defendant is illegal, null and void, unmeritous and not based on facts and the said decision be set aside and that land parcel No. Mbeere/Kirima/1199 belongs to the Plaintiff Ngari Kiranga and any Title or propriortory documents in the possession of the Defendant be recalled and cancelled. (sic)*

*b. That the register for land parcel No. Mbeere/Kirima/1199 be rectified by the relevant Land Registrar by cancellation of the name of the Defendant Jerusha Mucogo Kiura from the proprietorship section and reinstatement of the name of Ngari Kiranga as the proprietor of the said land and that the Plaintiff Ngari Kiranga be issued with a Title Deed to the said land.*

*c. Costs of the suit.*

**B. The Plaintiff's case**

2. The Plaintiff pleaded that at all material times he was the legitimate owner of *Title No. Mbeere/Kirima/1199* (hereafter the *suit property*) having been allocated the same by his Ikambi clan of the Mbeere tribe during the process of land adjudication in 1972.

3. It was the Plaintiff's case that the Defendant's late husband one Kiura Mwarire (hereafter *Mwarire*) challenged the Plaintiff's allocation

through the Unit Committee, the Arbitration Board and the Land Adjudication Officer but lost all through. However, when Mwarire appealed to the Minister in *Minister's Land Appeal Case No. 291 of 1995*, the Minister unlawfully allowed the appeal and awarded the suit property to Mwarire.

4. The Plaintiff contended that the Minister's said decision was unlawful, irrational, and null and void for various reasons. First, it was contended that the said Mwarire died before the appeal could be concluded hence the Defendant had no authority to prosecute it without a grant of letters of administration. Second, it was contended that the Defendant had given false and contradictory evidence before the Minister. Third, it was contended that the Minister's decision was not based on any factual evidence at all. However, there was no allegation that the Plaintiff was not given a hearing by the Minister or that there was a breach of the rules of natural justice.

### **C. The Defendant's defence and counterclaim**

5. The Defendant filed a written statement of defence dated 27<sup>th</sup> February 2014 and amended on 27<sup>th</sup> March 2017 denying the Plaintiff's claim and any illegality or impropriety on the part of the Minister. The Defendant contended that she did not require any grant of letters of administration before prosecuting the appeal on behalf of her late husband. She contended that she was the rightful owner of the suit property and she supported the decision of the Minister.

6. The Defendant also counterclaimed against the Plaintiff by seeking an eviction order against him and his two sons. She pleaded that she was the registered owner of the suit property and that the Plaintiff was merely a licensee who had refused to vacate the suit property upon termination of the licence. She therefore urged the court to dismiss the Plaintiff's suit and allow her counterclaim.

### **D. The summary of evidence at the trial**

7. At the trial of the suit, the Plaintiff testified on his own behalf and also called one more witness in support of his case. The Plaintiff adopted his witness statement dated 6<sup>th</sup> August 2013 as his evidence in chief. He also produced the documents listed in his list of documents dated 16<sup>th</sup> August 2013 as exhibits. The Plaintiff's case remained simply as pleaded in his amended pleadings. He maintained that the Minister was wrong in overturning the decision of the earlier adjudicating authorities and in awarding the suit property to Mwarire.

8. The Plaintiff's second witness was Wilson Munyi who testified as PW2. He adopted his witness statement dated 16<sup>th</sup> August 2013 as his sworn testimony. He informed the court that he knew both the Plaintiff and the Defendant in the suit. His evidence was that it was the Plaintiff who was allocated the suit property during the land adjudication process and that Mwarire was allocated a different parcel of land. Although he did not testify on the outcome of the Minister's appeal during his evidence in chief, he conceded during cross examination that he testified on behalf of the Plaintiff in the appeal.

9. The Defendant testified at the trial hereof and called 3 more witnesses in support of her defence and counterclaim. She adopted her witness statement dated 27<sup>th</sup> February 2014 and further statement dated 7<sup>th</sup> October 2019 as her evidence in chief. She also produced the documents in her list of documents as exhibits. The Defendant maintained that the suit property was rightfully hers and that although Mwarire had lost in previous adjudication cases, justice was ultimately done when the Minister allowed the appeal in question.

10. The rest of the Defendant's witnesses supported the Defendant's evidence in various respects. It emerged during the trial that although the Plaintiff was no longer personally residing on the suit property he had one or two sons who were still in occupation of part thereof.

11. Upon conclusion of the trial on 20<sup>th</sup> November 2019, the Plaintiff was given 30 days to file and serve his written submissions whereas the Defendant was given 30 days upon the lapse of the Plaintiff's period to file hers. The record, however, shows that the Defendant's submissions were filed on 13<sup>th</sup> January 2020 whereas the Plaintiff's submissions were not on record by the time of preparation of the judgement.

### **E. The issues for determination**

12. The court has considered the pleadings, documents and evidence on record in this matter. The parties do not seem to have agreed on a common statement of issues. The court is of the opinion that the following issues arise for determination in this suit:

- a) *Whether the decision of the Minister in Land Appeal Case No. 291 of 1995 was illegal, irrational, or null and void.*
- b) *Whether the Defendant required a grant of letters of administration before prosecuting the said appeal.*
- c) *Whether the Plaintiff is entitled to the reliefs sought in the pleadings.*
- d) *Whether the Defendant has proved her counterclaim to the required standard.*
- e) *Whether the Defendant is entitled to the reliefs sought in the counterclaim.*
- f) *Who shall bear the costs of the suit and counterclaim.*

### **F. Analysis and determinations**

13. The court has considered the entire evidence and submissions on record on the 1<sup>st</sup> issue. It is evident that the Plaintiff was gravely

aggrieved by the decision of the Minister in the appeal. The Plaintiff appears to have had a good ride throughout the adjudication process until the appeal under **Section 29** of the **Land Adjudication Act** was determined. The Plaintiff appears to have succeeded in previous proceedings before the Unit Committee, the Arbitration Board and the Land Adjudication Officer.

14. **Section 29** of the **Land Adjudication Act** stipulates as follows:

**(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—**

**(a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and**

**(b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.**

**(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.**

**(3) When the appeals have been determined, the Director of Land Adjudication shall—**

**(a) Alter the duplicate adjudication register to conform with the determinations; and**

**(b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.**

**(4) Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.**

15. It is quite evident from the said section that the decision of the Minister is a final decision. The finality relates to the merits of the adjudication hence it is not subject to challenge except upon grounds which may justify annulment of a decision in judicial review proceedings. The court is of the opinion that the Minister's decision is only subject to judicial review proceedings challenging the decision making process. See **Watuku Mutsiemi Watuku & Another V R & 5 Others [2018] eKLR**. The law does not provide for a second appeal to a court of law.

16. The court has considered the Plaintiff's evidence in support of his case. The Plaintiff considered the Minister's decision illegal because it was not properly supported by factual evidence. The Plaintiff contended that the Defendant had given false and misleading evidence before the Minister. He contended that the Defendant had given contradictory evidence before the Minister hence her case ought not to have been believed. There is no doubt that the Plaintiff participated in the appeal before the Minister. He even called witnesses before the Minister. One of them was Wilson Munyi who testified in this suit as PW2. If the Minister upon analyzing the evidence of the parties was persuaded to believe the Defendant and not the Plaintiff, that cannot form the basis of a further appeal, judicial review, or declaratory suit.

17. The court is not persuaded that a suit of this nature would lie against the decision of the Minister under **Section 29** of the **Land Adjudication Act**. The court is of the opinion that the instant suit is in effect an appeal against the Minister's decision which is disguised as a declaratory suit and which appeal is expressly precluded by statute.

18. The mere fact that the Minister departed from previous decisions of other adjudicating authorities cannot be a good ground for either filing a declaratory suit or even application for judicial review. It was precisely intended by parliament that the Minister's decision should come last and become final. As was held in the case of **Timotheo Makenge V Manunga Ngochi [1976-80] KLR 1136**, the Minister was not bound by previous decisions of other adjudicating bodies.

19. In the said case of **Timotheo Makenge** the Court of Appeal referred to the case of *Bisuche V Barasa Civil Appeal No. 31 of 1972* (unreported) in which the Appellant had found himself in a predicament similar to that of the Plaintiff in the instant Case. **Law J.A.** made the following pronouncement in the said case:

**“... This case has many features in common with *Bisuche V Barasa* (unreported) in which the Appellant, whose right to ownership of certain land in an adjudication area had been recognized by the adjudication committee, by the arbitration board and the adjudication officer, yet on an appeal to the Minister, he lost everything. The High Court refused to issued *certiorari*, and this court's predecessor agreed, on the basis that there was no want or excess of jurisdiction which had been established.”**

20. In the instant case, there was no allegation by the Plaintiff that the Minister had no jurisdiction to entertain the appeal or that he had exceeded his powers. It was not contended that he had violated the rules of natural justice or that he had acted in bad faith or in abuse of power. The mere fact that he found against the Plaintiff, without more, could not found a cause of action against him. Accordingly, the court finds that the Plaintiff has failed to demonstrate that the Minister's decision was illegal, irrational, null or void as pleaded. The 1<sup>st</sup> issue is consequently answered in the negative.

21. The 2<sup>nd</sup> issue is whether the Defendant was competent to represent her late husband (Mwarire) in the appeal before obtaining a grant of letters of administration for his estate. There is no doubt that at the time the appeal was heard the Defendant had not obtained such a grant. Whereas the Plaintiff contended that the Defendant had no legal capacity to prosecute the appeal the Defendant contended that such a grant was not necessary at all.

22. The court is of the opinion that whereas a grant of letters of administration may be required before a person can initiate or prosecute legal proceedings before a court of law, the same requirement may not necessarily apply before other fora for a such as executive, administrative, legislative or quasi-judicial bodies. The court is not persuaded that the strict provisions of **Order 24** of the **Civil Procedure Rules** applied to the appeal which was pending before the Minister. The Plaintiff did not cite any legal authority to support the position he had taken.

23. In the aforesaid case of **Timotheo Makenge** (*supra*) the Appellant had complained that the ‘judgement’ or decision of the Minister did not comply with the provisions of **Order XX rule 4** of the repealed **Civil Procedure Rules (1948)**. The Court of Appeal held that the Minister was not bound to follow the procedure set out in the **Civil Procedure Rules**. So, by parity of reasoning, if the Minister is not bound to follow **Order XX** of the **Civil Procedure Rules** on preparation of judgements then he is unlikely to be bound by **Order 24** of the **Civil Procedure Rules** in the determination of an appeal.

24. There are other reasons why the Plaintiff’s complaint is unable to find favour with the court. First, there is no evidence to demonstrate that the Plaintiff ever objected to the Defendant’s capacity at the earliest opportunity before the Minister. The material on record shows that the Plaintiff fully participated in the appeal proceedings without protest. Second, there is no evidence to demonstrate that the Plaintiff suffered any prejudice by reason of the said omission by the Defendant to timeously obtain a grant of letters of administration. Accordingly, the 2<sup>nd</sup> issue is answered in the negative.

25. The 3<sup>rd</sup> issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has already found that the Plaintiff has failed to prove his case to the required standard. In fact, the court has found that the declaratory suit does not lie against the Defendant in the circumstances of this case. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought, or any one of them. The 3<sup>rd</sup> issue is therefore answered in the negative.

26. The 4<sup>th</sup> issue is whether the Defendant has demonstrated her counterclaim to the required standard. It is evident that both the Plaintiff and the Defendant were claiming the suit property. Although the Plaintiff was previously the owner thereof, that ownership was overturned by the Minister in the appeal in question. Since the Plaintiff has failed in his bid to overturn the decision of the Minister, then the ownership of the suit property remains with the Defendant who is the current registered owner. As proprietor of the suit property, the Defendant is entitled to all the rights and privileges to which a proprietor is entitled under the **Land Registration Act, 2012**. The court is thus satisfied on the basis of the material on record that the Defendant is entitled to quiet enjoyment of the suit property. In that regard, she is entitled to immediate possession of the suit property.

27. The 5<sup>th</sup> issue is whether the Defendant is entitled to the reliefs sought in the counterclaim. The court has already found that the Defendant has demonstrated her counterclaim against the Plaintiff to the required standard. It would, therefore, follow that the Defendant is entitled to the reliefs sought in her counterclaim. There is evidence on record to demonstrate that although the Plaintiff himself is no longer in occupation he left behind at least two family members in occupation of part of the suit property. Those two were his son and his wife who were sued as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the counterclaim.

28. The 6<sup>th</sup> and final issue is on costs of the suit and counterclaim. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, owing to the special circumstances of this case and the fact that the parties herein appear to be somehow related the order which commends itself to the court is that each party shall bear his own costs of both the suit and counterclaim.

#### **G. Conclusion and disposal orders**

29. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his case against the Defendant. The court also finds that the Defendant has proved her counterclaim against the Plaintiff on a balance of probabilities as required by law. Accordingly, the court makes the following orders for disposal of the matter:

*a. The Plaintiff’s suit be and is hereby dismissed in its entirety.*

*b. The Defendant’s counterclaim be and is hereby allowed in terms of prayers (a) and prayer a (i) thereof.*

*c. Each party shall bear his own costs of the suit and counterclaim.*

*d. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants in the counterclaim are hereby given a grace period of 30 days within which to vacate the suit property in default of which execution shall ensue.*

30. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 20<sup>TH</sup> DAY of FEBRUARY, 2020.**

In the presence of Ms. Nzekele holding brief for Mr. Okwaro for the Plaintiff and Rose Njeru for the Defendant.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**20.02.2020**