REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 32 OF 2009

JULIUS KAILIKIA LAARU.....APPELLANT

VERSUS

PETER KAIGERA LAARU.....RESPONDENT

(Being an appeal from the judgement of Hon G. Wakahiu (CM)

delivered in Maua Law Courts on 27/12/2018 in Cmcc No. 7 *of 2001)*

JUDGMENT

1. The appellant herein instituted proceedings in the trial court vide a plaint dated 22nd November 2001 and amended on 18th May 2018 seeking a declaration that the respondent holds 10 acres out of land parcel no. 419 Kitharene adjudication section in trust for him and a transfer of the aforementioned portion of land to him as well as a permanent injunction against the defendant/respondent from interfering with his occupation and use of the suit land.

2. The appellant case was that he is a younger brother to the respondent. That the suit land was registered by their father in the name of the respondent for the latter to hold the same in trust and to later on share the land with the appellant. That in breach of the trust, the respondent has refused to transfer the land to him and falsely claims to have solely gathered the land.

3. The respondent filed his statement of defence dated 2.10.2018, denying that he ever held the land in trust for the appellant.

4. The matter proceeded for hearing on multiple dates. Upon hearing both parties the trial court held that the appellant had not proved the allegations that the respondent holds ten acres of the suit premises in his trust. He found the respondent's defence plausible and upheld it. He also held that the orders sought by the appellant were in the nature of a prerogative order of declaration and mandamus which can only be issued by the high court.

5. Aggrieved by the aforesaid decision, the appellant filed his memorandum of appeal on 30th January 2019 raising seven (7) grounds of appeal enumerated as follows;

i. That the learned magistrate erred in law in holding that the appellant had not proved his case on a balance of probabilities.

ii. The learned magistrate erred in law in failing to find that the appellant had tendered sufficient evidence to prove that the respondent held land parcel Number 419 Kitharene Adjudication Section in trust for the appellant.

iii. That the learned trial magistrate erred in law in failing to find that the respondent had not tendered any evidence to controvert the appellants claim.

iv. That the learned Magistrate erred in law in failing to appreciate and apply the evidence tendered before him, before arriving at his decision.

v. That the learned Magistrate erred in law in holding that the appellant had sought for prerogative orders of declaration and mandamus.

vi. That the learned Magistrate erred in law in holding that he had no jurisdiction to issue the declaration order.

vii. That the findings of the learned magistrate are not supported by the evidence before him and applicable law.

6. This court directed the parties to canvass the appeal through written submissions, of which both parties have duly complied. The appellant reduced the appeal to two issues; a) *Whether the appellant proved his case in the lower court on a balance of probabilities; b) Whether the lower court had jurisdiction to hear and determine the appellants claim.* The appellant submitted that the trial magistrate erred in failing to find that their father had gathered the whole suit land i.e. 34.24 acres, which land was distributed by the committee amongst the parties' father and his two wives, the result of which the appellant's house was granted 22.24 acres through the eldest son, the Respondent. That the trial magistrate erred in failing to find there was enough evidence to presume customary trust in favour of the appellant to which the court had jurisdiction to hear and determine the claim.

7. The appellant further submitted that he had obtained the prerequisite consent under **section 30** of the **Land Adjudication Act** before filing his suit in the trial court. He relied on the cited cases of **Thomas Kinyori Hussein & 3 others v Mokha Mghanga & 2 Others [2018] eKLR, Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & another [2018] eKLR, and Ntoiti vs Kaumbuthu (2004) eKLR.**

8. For the respondent, it was submitted that he is the one who gathered the suit land way back in 1966 when plaintiff was not yet born and that appellant never filed any objection to claim the land. That the appellant's evidence was full of contradictions and falsehoods together with his witnesses who could not express themselves in court during cross-examination. It was also contended that the consent from the lands office was not sought before the filing of the suit as contemplated in Cap 283 and 284 laws of Kenya. The respondent has therefore urged this court to dismiss the appeal.

Analysis and Determination

9. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123,** where it was observed thus:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally."**

10. Pw1 Juius Kalikia Laaru testified and also adopted his statement dated 23.8.2017 as his evidence. He averred that the District Land Settlement officer (DLASO) heard objection proceedings over the suit land and determined that the land belonged to the father of the parties herein. That after this determination, his father opined and directed the DLASO to divide the suit premises to his three sons namely Peter Kaigera Laaru 10 Acres, Julius Kailikia Laaru 10 acres and Shadrack Kangote Laaru 10 acres. That he also directed that the balance of the land ought to be granted to the respondent while his share was also to be registered in the name of the respondent.

11. In cross-examination, PW1 stated that he was born in 1969 and he doesn't know how the land was gathered. He also averred that his father was representing him in those proceedings and that is why he could not demand the land at that time. He also stated that their mother gave him land no. 3655 Kithalane Adjudication Section of which he sold this land to Johana Muhoro, Kario Ikuri and David Paul Erima but this was not his father's land. He also confirmed that the issues herein had been determined by Njuri Ncheke house of Ntilia which granted him 3 acres of the suit premises. That he also sought to appeal the decision in Mitunguu Njuri Ncheke House and later on, he went to court.

12. In support of his case, pw1 had produced as his exhibits, the objection proceedings in case no. 1150 for parcel no. 419 dated 20.1.1998.

13. Pw2 John Lithara Kuria testified and also adopted his recorded statement as his evidence. He identified the two litigants as brothers and that he comes from the same family as the parties herein where they share one great grandfather known as Ndutu. PW2 stated that the land was gathered by the father of the two litigants who then registered it in the name of the respondent but the latter was to share the land with other brothers. He also stated that the father of the litigants had two wives of which the two litigants are from same mother.

14. In cross-examination, pw2 stated that he is aware that the parties' father got land from around Munyariko area measuring 34 acres but was not aware how the land was gathered. That the mother to the parties herein equally had land which she divided amongst her sons and daughters, the appellant getting 5 acres. He told the court that he was called by the parties' father in the presence of Laura the parties' mother, and the younger wife when their father subdivided the land giving each son 10 acres.

15. Pw3 Elias Mbaabu testified and also adopted his statement as his evidence. He identified himself as a brother in law of the two litigants. He was present when the father of the litigants stated in the presence of the land adjudication officer that he had distributed his land to his sons, whereby, plaintiff (Julius) was to get 10 acres. But when appellant was given his share, he said that it was to remain in the name of respondent to be transferred to him later. PW3 further testified that he is a Njuri Ncheke elder and the chairman of Nthithia Committee. That they had resolved that the parties ought to divide the land as their father had wished. He disputed that the land was gathered by the respondent.

16. Dw1 Peter Mwenda testified and adopted his statement as his evidence. He identified the appellant as his brother. He averred that he was born in 1952. He gathered the suit land, 46 acres in total in 1966 by himself and by then, the appellant was not born (as he was born in 1969). That his father sued him in Land adjudication case No. 1150 where he voluntarily agreed that he would give 10 acres to his father's younger wife. He stated that his father did not have any land as he had sold his land and distributed the rest to their mother and children.

17. He told the court that he did not agree with the Njuri Ncheke findings that he ought to transfer 3 acres to his father. He confirmed that

land parcel No. 3655 belonged to their mother.

18. Dw2 Peter Ithale testified and also adopted his statement as his evidence. He averred that the matter herein was heard and determined by the Njuri Ncheke which held that the respondent ought to give the appellant 3 acres of the land on his own volition. In cross examination, Dw2 had stated that the father of the parties is the one who gathered the land. That Njuri Ncheke agreed to give the appellant the three acres because their mother had stated that the appellant was selling his other lands.

19. Dw3 Henry Mutwiri testified that he was present when the respondent gathered the 46 acres of land. He does not know the number or the acreage owned by the father of the parties. He admitted that the father shared out his land to his wives and children.

20. The trial court in its determination held that it had no jurisdiction to determine ownership where the subject matter is still under adjudication. That from the provisions of section 27 and 28 of Cap 284 laws of Kenya and the registration process under Section 6 & 7 of the Land Registration Act, 2012, the whole process is undertaken by the adjudication officer together with officers appointed under the Act and it follows therefore that once an area has been declared an adjudication area, the ascertainment and determination of the rights and interest in the land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act.

21. The trial court therefore concluded that it cannot usurp the powers and duties of the committees, adjudication officers and the ministers and it had no supervisory powers of the high Court to entertain judicial review proceedings. The trial court had relied on the following cited authorities in the determination of the suit; **Benjamin Okwaro Estika vs Christian Anthony Ouko 7 Another (2013) eKLR, Kinyamal Ole Tare vs Sotua Sakana Muyia [2015] eKLR** and the case of **Tobias Achola Osindi vs. Cyprianus Otieno Ogalo & 6 Others (2013)eKLR.**

22. I have looked at the evidence on record and considered the statements and submissions of the parties. It is apparent that the main reason as to why the appellant lost his case was on the basis that the trial court had no jurisdiction to determine the claim as the same fell in the ambit of the adjudication bodies. This court will therefore determine **the question of Jurisdiction, whether the respondent holds the suit land in trust for the appellant. The court will also consider the issue of consent to file this suit.** I must also point out that there are some undisputed facts which are; that the two parties are brothers born of the same father and mother and that appellant is the younger of the two. It is also not disputed that there were objection proceedings in case no. 1150 in respect of parcel no. 419 and that respondent was registered as the owner of this land years ago in 1966 in so far as adjudication records are concerned.

Jurisdiction

23. I am wholly in agreement with the jurisprudence resonating from the cases relied on by the trial magistrate in so far as the dispute resolution mechanism is concerned. I have often held that parties must follow the dispute resolution mechanisms provided for in the adjudication statutes – see **Meru ELC Petition 6 of 2017 Reuben Mwongela M'Itelekwa vs Paul Kigea Nabea & others**, **Kanampiu Rimberia vs Julius Kathawe & 3 others**, **Meru HCC no. 6 of 2009**, **Meru ELC Petition No. 2 of 2012, Zipporah Nkoyai vs James Kaberia & 2 others,** just to mention a few.

24. However, 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 analyse 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.

25. The preamble of the **Land Adjudication Act cap 284** provides as follows:

> **"An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto".**

26. The preamble of the **Land Consolidation Act Cap 283** provides that:

> **"An Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto".**

27. 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 statues is meant to shepherd this process of ascertaining the rights and interests of claimants, before crystalizaiton of the same under the land Registration Act (formerly the Registered Land Act cap 300 repealed).

28. In the case of **Daniel Murungi Mwirabua Anampiu vs Jeremiah John Bernard & others Meru ELC No. 225 of 2012,** I stated thus in regard to a dispute which was not determined by the adjudicating body;

> **"What is discernible from this decision is that the dispute was not determined and the Land Adjudication officer found that a court of law was better placed to deal with the matter. Rightly so because not all land disputes emanating from areas under adjudication fall under the dispute resolution mechanisms provided for under the act".**

29. Respondent has admitted that his father had sued him in the objection no. 1150 regarding the suit parcel, of which the said proceedings

were availed by the appellant as P-exhibit 1. I deem it crucial to reproduce the findings and decision thereof in order to grasp the crux of the dispute;

> **"FINDINGS;**
>
> **The defendant is a son of the objector and the objector stated that he measured the disputed land in the names of the defendant while he was a young boy. Later the land got involved by cases and the objector being the guardian of the defendant defended the land all along and the land remained. The total land that was measured for the defendant by the father was 46.04 acres, later 10 acres were given to Isaack who assisted the objector during the cases. The mother of the defendant there was left a balance of 36.04 acres less % cut was deducted of 1.80 acres, the defendant got left with 34.24 acres. The objector is married to two wives the mother of the defendant and the mother of Kangote. The mother of the defendant don't stay with the objector but the objector live together with the mother of Kangote. The mother of the defendant has got two sons including the defendant and they are in good terms. The second wife is not in good terms with the first wife mother of the defendant and there is need to separate land of the young family wife and the old wife mother of defendant (Emphasize added). Although the defendant and his mother allege that the objector sold the land he had measured, all those land were taken back to the mother of the defendant as a result of the cases. Therefore all the land went back to the defendant's mother. The land held by defendant now on dispute was of the objector and the defendant could not have got any land if he was not a son of objector. The defendant was accepting during statement that he would accept to share land to his two brothers among them Kangote Laaru the son of the younger wife of objector The defendant having being recorded the land by father objector the court finds it inhuman to leave him father objector with nothing this will be to avoid the curse.(Emphasize added).**
>
> **DECISION**
>
> **In view of the above findings and because every son of the objector had the whole right to inheritance of land from his father the objector, the objection is partly allowed that (Emphasize added):**
>
> **a. The objector is awarded two acres from the claimed land.**
>
> **b. Kangote Laaru the son of the young wife of the objector is also awarded ten (10) acres to avoid later family dispute (emphasize added)".**

30. What resonates from the findings and decision in the **Objection case no. 1150** is that the two families one being that of the young wife of the parties' father, and the older wife being mother of the two litigants herein were not in good terms. The concern of the adjudication officer in the case was to separate the two families particularly to secure the interest of Kangote Laaru, the son of the younger wife. Another issue that emerges is that the land had belonged to the father of the litigants but he registered the same in the name of the current respondent. The DLASO had also established that the current respondent had accepted to share the land with his two brothers. It is crystal clear that the interests of the appellant were bundled together with those of his mother's household (read respondent), where they remained in a state of inertia.

31. Thus, through the objection proceedings, the interests of the appellant were actually ascertained, but were not severed from those of the respondent as there was no need to do so at that time as there was no dispute to that effect. This situation did not however preclude the appellant from raising the matter in future. Even if the respondent had gone ahead to acquire a title deed as it so happens when the process of adjudication is over, that still would not have eclipsed the appellant's claim of customary trust.

32. This is not a case where the appellant was claiming ownership of the land when the objection case was ongoing. Further, the registration of the land in the name of the respondent was not being questioned by the appellant hence there was no reason for the appellant to escalate the dispute to any other stage within the envisaged dispute resolution mechanisms provided for in the adjudication statutes. This is because the interests of the appellant had clearly been ascertained and taken care of.

33. I must also add that pursuant to provisions of section 30 of the Land Adjudication Act and section 8 of the Land Consolidation Act, the jurisdiction of the court is not totally ousted in the adjudication process. See ***Ntuti vs Kaumbuthu (2004) eKLR.*** This position was clearly enunciated by **Okong'o J** in the **Tobias Ochola Osidi** case (Supra) where he stated that the courts comes in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law.

34. In view of the fact that the appellant's claim was ascertained in the objection proceedings which are anchored under the statutes, then the trial court had a duty to uphold the law and ensure that the spirit and the letter of the adjudication statutes are not rendered impotent by unscrupulous greed driven persons like the respondent. It was also erroneous for the trial magistrate to import the doctrine of judicial review in this case when the circumstances of the case did not warrant such action. What I can conclude is that the trial magistrate appears to have misapprehended the law in the **Tobias Ochola Osidi** (supra) case to imply that the courts nature of intervention of disputes falling under adjudication processes can only be through judicial review. Judicial review is just one of the many plat forms the courts handle matters in the adjudication arena. A court of law is required to analyse the circumstances of each case including the history of the dispute to make a clear determination as to whether the dispute fell within the dispute resolution mechanisms provided under the adjudication statutes.

35. In the circumstances I find that the court erred in holding that it had no jurisdiction to determine the dispute.

Trust

When it comes to trust, the law never implies the court never presumes a trust but in case of absolute necessity. The court will not imply a trust – save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined

before a trust will be implied, see **"Julebati African Adventure Limited & another vs Christopher Michael 2017 eKLR, Samson Ngugi Philip Kangari vs Peter Njuguna Samson (2018) eKLR**

36. In the Supreme Court of Kenya of **Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari & another (2018) eKLR,** the court set out some of the elements that would qualify a claimant as a trustee in so far as customary trust is concerned as follows:

> **"1. The land in question was before registration, family, clan or group land, 2. The claimant belongs to such family, clan, or group, 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous. 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. 5. The claim is directed against the registered proprietor who is a *member of the family, clan or group".***

37. The first criteria to consider is whether the suit land was ancestral? The respondent has averred that he is the one who gathered the land in 1966. On this issue, he is supported by one of his witnesses, DW 3 – Henry Mutwiri. However, respondent was only 14 years old in 1966 having been born in 1952. He certainly could not have gathered the land by 1966. The respondents other witness DW 2 Peter Ithalii clearly stated that it is the father of the litigants who gathered the land hence collaborating appellant and his witnesses evidence that the land had been owned by the father of the litigants.

38. The proceedings in **objection case no. 1150** further indicate that the land belonged to the father of these two litigants. In those objection proceedings, the respondent stated that the suit land claimed by his father came from Mworoka who then left it to M'Atwara and in 1966, his father had the land measured out for him "*respondent'*. In the findings of the objection case, it emerges that the father of the parties had measured the land in the name of his young son. But the land got involved in many cases and the father of the litigants being the guardian of respondent defended the land in those cases. From the foregoing analysis, I have no doubts that the land was ancestral land.

39. Does the appellant belong to the family of respondent? Yes, indeed the two litigants are brothers. The respondent has advanced an argument that his brother was not even born when he was registered as the owner of the land. The answer to this query is aptly captured in the case of **Patrick Gitonga M'Ikiara vs Ruthson Mangati M'Ikiara Meru ELC NO. 16 of 2018** where I held as follows:

> **"From the foregoing I am of the view that the suit land was ancestral/ family land of which, the appellant held the same in trust for his father and the other siblings. The appellant has advanced a claim that his siblings were not even born when he was given the land. However, it is noted that customary trust has the flavour of intergenerational equity, thus even future generation stand to benefit from such land on the basis of that principle of intergenerational equity. I therefore conclude that the trial magistrate did not err in his Judgment".**

40. Thus it matters to not that the appellant was born in 1969, long after his brother the respondent had been registered as the owner of the land.

41. In the findings in the objection case, it had been noted that the respondent was willing to share the land with his brothers. The adjudication officer had found it inhuman that respondent was leaving out his own father. If only the adjudicating officer knew that the respondent was to even turn against his own brother! It is quite apparent that the respondent held the suit land in a fiduciary position for the benefit of himself and his brother the appellant, but the respondent has miserably failed to be a trustworthy trustee hence the litigation herein.

42. All in all, I do find that it was erroneous for the trial magistrate to fail to determine the issue of trust. I also find that the respondent holds 10 acres out of the suit land in trust for the appellant, taking into account that the land is more than 22 acres.

Consent

43. Indeed a consent from the adjudication officer is required when a party is filing a suit pursuant to provisions of section 8 of cap 283 and section 30 of cap 284. However this issue was only raised in the appeal. It was not a subject of contest before the trial court. In the case of **Kiplagat Korir vs. Dennis Kipngeno Mutai (2006) eKLR**, the court had this to say in regard to matters not raised before the trial court;

> **"In this case, the appellant has raised the issue of jurisdiction so much later in the day. Substantial justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it is being called upon to decide on an issue which is raised for the first time on appeal. If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal, but be acting as a court of first instance. This is because the issue of jurisdiction was not raised before the trial Resident Magistrate's court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction".**

44. I wholly associate myself with the holding in the above cited case save to add that raising the issue of consent at this stage amounts to stealing a match from an opponent. The court hence declines to determine the issue of consent.

Final orders

45. In the final analysis, I find that this appeal is merited. Ordinarily, I desist from condemning parties to pay costs in family related matters. However, in this case, respondent has displayed unmitigated greed in the manner he has handled the claim of his brother. I will condemn him to pay costs. Ultimately, I issue orders as follows:

1. The judgment of the lower court delivered on 27.12.2018 is set aside and in its place an order is issued declaring that the respondent holds 10 acres out of the land parcel No. 419 Kitharene Adjudication section in trust for the appellant.

2. An order is hereby issued for the respondent Peter Kaigera Laaru to transfer 10 acres out of land parcel no. 419 Kitharene Adjudication section to the appellant Julius Kailikia Laaru.

3. The adjudication records to be rectified to reflect the severance of the 10 acres out of parcel no 419 Kitharene adjudication section.

4. A permanent injunction is hereby issued restraining the respondent from interfering with the appellant's occupation and use of the ten (10) acres out of the suit land.

5. The respondent is condemned to pay costs of this appeal. However each party is to bear their own costs in the lower court.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. 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 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling 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