



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT MERU

ELC APPEAL NO. 60 OF 2018

FRANCIS MURUNGI M'IBAYA.....APPELLANT

VERSUS

PAUL KIGEA NABEA (Deceased and

now substituted by KIGEA AMOS KILEMI

and PASKWALE MWITI KIGEA).....1ST RESPONDENT

FRANKLIN MUGAMBI.....2ND RESPONDENT

CHRISTINA MWONJARU (Deceased and substituted by

SAMUEL MUCHENA KUBAI.....3RD RESPONDENT

GEORGE MUTUMA.....4TH RESPONDENT

KANANGA NCEBERE.....5TH RESPONDENT

(Being an appeal from the decision and ruling of Hon. G Sogomo (SRM) delivered on 15/11/2018 in Tigania SRMCC No. 55 of 2011)

JUDGMENT

1. The appellant being the plaintiff in the trial court sued the respondents for a permanent injunction to restrain them from building, cultivating, entering, remaining on and or in any other manner, whatsoever, interfering with his peaceful possession and ownership of the Suit Land F/NO. 5257 – Antuamburi Adjudication Section (hereinafter *the Suit Land*) as well as costs of the suit and interest.

2. The issue of trial court's jurisdiction was raised by the court and through the ruling delivered on 15/11/2018, the court struck out the plaintiff's suit by virtue of **Section 26(3) of CAP 283** and **Section 29(4) CAP 284**.

3. The appellant being aggrieved by the decision filed this appeal based on four (4) grounds, set out as follows;

(i) That the honourable trial magistrate erred in law and fact in adopting a narrow interpretation of sections 26 and 29 of the land consolidation act cap 283 and the land adjudication act cap 284.

(ii) That the honourable trial magistrate erred in law and fact in failing to appreciate that in the circumstances of the case before him and given the outcome in Tigania District Objection No. 3895, sections 26 and 29 of the land consolidation act cap 283 and 29 of the land adjudication act cap 284 did not apply to the case before him.

(iii) That the learned trial magistrate erred in law and fact in descending to the arena, hijacking the proceedings and litigating for the respondent.

(iv) That the learned trial magistrate erred in law and fact in basing his decision on remote matters of technicality and procedure in lieu of evidence.

4. This appeal was canvassed by way of written submissions. The appellant submitted that as per the land adjudication officer's decision, he

was the successful party in **AR Objection No. 3895**. Since he was not aggrieved by the decision he had no business appealing to the minister. Therefore, he was entitled to file a suit for protection of his proprietary rights over the Suit Land in court. Thus, the trial magistrate erred when it dismissed his suit vide **Section 26 (3) and 29 (4) of CAP 283 and 284** respectively. Furthermore, the trial magistrate took a general view that so long as the Suit Land in question fell within an adjudication section, then the court had no jurisdiction on the matter.

5. The 1st respondent submitted that the trial court did not err in its interpretation of **Section 26 and 29 of CAP 283 and 284** respectively, hence the court correctly found that it lacked jurisdiction to ascertain the rights on the Suit Land. The lower court could not cloth itself with jurisdiction to determine a matter that has statutory guidelines to adhere to. The appellant's assertions that it is only an unsuccessful party that ought to exhaust the provisions of **Section 26 and 29 of CAP 283 and 284** respectively is not true. He relied on the case of **Abdallah Mangi Mohammed v Lazarus & 5 others [2012] eKLR**.

6. The issue for determination is *whether the striking out the plaintiff's case was merited*.

7. To be able to adjudicate on a matter tabled before it, a court is required to have jurisdiction which it derives from the Constitution or legislation. Jurisdiction is everything and without it, a court has no power, hence it ought to down its tools. See: **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**.

8. The trial court on its own motion, directed the parties to address it through written submissions in respect of **Section 26 (3) and 29 (4) of CAP 283 and 284** respectively regarding jurisdiction of the court. The Court of Appeal in the case of **John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR** held as follows:

"That jurisdiction is a preliminary issue that must be considered by a court either suo motu or on application by a party. That in this matter, the trial court was entitled to suo motu determine if it had jurisdiction to hear the dispute. ... On our part, we find it was proper for the trial court to suo motu raise and determine the issue of its own jurisdiction."

9. It follows that a trial court had the right to raise the issue of jurisdiction *suo motu*, hence the trial magistrate did not err on this aspect of determination.

10. That being the case, did the trial court have jurisdiction over the matter before it? From the appellant's pleadings, he alleged that he is the sole owner of land parcel F/No. 5257 measuring 0.36 acres. That the respondents have encroached on his land without his authority. It is his claim that the respondents employed fraudulent means to lay an illegal claim over parcel Nos. 4419, 4066, 6323, 4946 and 6127 out of the Suit Land and which parcel numbers do not legally lie on the ground. He submitted that through the AR Objection No. 3895 he was the successful party.

11. The record of appeal at pages 80 to 84 are letters written by the land adjudication officer. He states that parcel Nos. 4419, 4066, 6323, 4946 and 6127 are all under A/R objection stage and are owned by the 1st - 5th respondents respectively.

12. From the material evidence presented by both sides, it is quite apparent that the dispute had been subjected to some of the dispute resolution mechanisms provided for under the adjudication statutes.

13. The **Land Consolidation Act** and **Land Adjudication Act** both provide for elaborate dispute resolution mechanisms arising during the process of adjudication of rights and interests in land.

14. **Section 29 of the Land Adjudication Act** provides that:

"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.

Thus a person aggrieved by the decision of the adjudication officer is required by law to seek redress before the minister whose decision is final.

15. **Section 26 of the Land Consolidation Act** provides that;

"(1) Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.

(2) If the Adjudication Officer considers that such rectification would incur unreasonable expense, delay or inconvenience, he may award such compensation in lieu of rectification as he may deem appropriate.

(3) **No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be, but the Minister or any person to whom compensation has been awarded and who is dissatisfied with the amount awarded by the Adjudication Officer may apply to a subordinate court held by a Resident Magistrate for its revision in such manner as may be prescribed.**

16. Accordingly, under the **Land Consolidation Act**, the decision of the adjudication officer with the aid of a committee is final unless the minister can intervene on issues of compensation.

17. The Court of Appeal in the case of *Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others* [2015] eKLR held that;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts”.

18. In the adjudication arena, courts have repeatedly restated the above position, that once an area has been declared as an adjudication section under the adjudication statutes, the ascertainment and determination of rights and interest in land within that area are then reserved by law for the officers and quasi-judicial bodies set up under the said statutes. This is because the adjudication statutes have elaborate dispute resolution mechanism through which the rights and interests in land are established and determined. See; *John Masiantet Saeni v. Daniel Aramat Lolungiro & 3 Others* (2017)eKLR, *Tobias Ochola Osidi & 13 Others vs. Cyprianus Otieno Ogalo & 6 Others* (2013) eKLR, *Kanampiu M’Rimberia vs. Julius Kathane & 3 others* Meru HCCC No. 6 of 2009.

19. In the case of *Reuben Mwangela M’Itelekwa (suing as the Legal Representative of the estate of M’Itelekwa M’Mucheke Naituri alias M’Itelekwa Mucheke) v Paul Kigea Nabea & 2 others* [2019] eKLR , I stated as follows:

“The petitioner ought to have lodged an appeal to the minister within 60 days of the challenged decision as per section 29 of the Land Adjudication Act in the event that the proceedings were conducted under the Land Adjudication Act. If the law applied was the Land Consolidation Act, then the decision in the objection proceedings was final unless the issue of compensation was raised. Further, parties must follow the laid down Dispute Resolution Mechanism provided for under the relevant laws, in this case, the Land Adjudication Act or the Land Consolidation Act.”

20. The question therefore is *“Did the appellant follow the dispute resolution mechanisms provided for under the relevant statutes. Does it follow that all disputes arising in the adjudication processes can only be dealt with as set out in the adjudication statutes”?*

21. I will first endeavour to answer the first question. Issues for determination before a court are usually determined by the pleadings and the prayers sought thereof. From the appellant’s pleadings he claims to be the owner of the parcel F/NO. 5257 which he contends that the respondents have laid an illegal claim over parcel Nos. 4419, 4066, 6323, 4946 and 6127 out of the Suit Land. As a result he seeks a permanent injunction against them.

22. The point of call in determining whether the appellant followed the laid down procedures in the dispute resolution mechanisms lies in analyzing the proceedings in objection case number 3895 and the outcome thereof. That analysis would also shed light on whether the trial court had jurisdiction to entertain the suit or not.

23. Both parties do admit that there was an **objection case no.3895**, of which the respondents availed the aforementioned proceedings running from page 85 to page 105 of the record of appeal, while the appellant has also availed the said proceedings as captured from page 134 to page 139 in the said record. I have struggled to discern the content from these documents because the respondent’s document is extremely faint, such that it is barely legible. The appellant on the other hand has availed a document which is in shambles, with pages mixed up, where the first page contains the findings, the document is also incomplete and has no page containing the decision.

24. Despite these anomalies, I am still able to discern that both parties were referring to one and the same case going by the content on page 85 and page 136 in the record of appeal. These two pages capture crucial information to the effect that the appellant was the objector **Francis Murungi M’Ibaya**, while the respondents were **James Kaberia Nkubitu** and **Paul Kigea Nabea**, that the objection case was no **3895** and that the proceedings were conducted under **Cap 283**. The decision in that case is captured on page 92 of the proceedings where it is indicated as follows:

“Decision

Objection No. 3895 is allowed.....”.

25. By filing the objection case, the appellant had indeed followed the dispute resolution mechanisms provided in the adjudication statutes, in this case the Land Consolidation Act. If the Objection was allowed, it means that the appellant did not fall in the category of an aggrieved person as indicated in section 26 of both the Land Adjudication Act and the Land Consolidation Act and the appellant was not required to seek redress through the adjudication mechanisms set up in the adjudication statutes.

26. In the case of **Berano M'Mwithiga M'Arauki v. District Land adjudication & Settlement Officer Tigania East and West & 2 Others (2018)eKLR Meru**, the court while dealing with a preliminary Objection touching on the dispute resolution mechanisms in the adjudication processes had this to say;

“If the issues in the petition are whether the petitioner was awarded the land by a land committee, and whether the 3rd respondent filed an objection and if so, whether it was filed after the expiry of the 60 days allowed to file such an objection, then evidence is needed before those issues can be determined. The court cannot determine the preliminary objection without delving into the issue of what actually happened and who was the proper party to file an appeal without considering such evidence.”

27. What resonates from the above analysis is that the court ought to have allowed parties to adduce evidence in view of the fact that the appellant appears to have been the successful party in the objection case, hence he could not have followed any other form of litigation under cap 283.

28. I now come to the 2nd question, whether all disputes arising in the adjudication processes can only be dealt with as set out in the adjudication statutes.

29. It must be noted that the jurisdiction of the courts is not ousted by the adjudication statutes. That is why there are fall back provisions namely **section 8 of the Land Consolidation Act** and **Section 30 of the Land Adjudication Act** which are gateways for litigation in the court's arena. This is because not all disputes arising in adjudication process can adequately be handled under the adjudication statutes. Generally, it is the ordinary courts which step in to enforce the decisions of adjudication bodies. It is also a common phenomenon for the decisions made by the adjudicating bodies to be violated years after the period of seeking redress in the litigation tiers have lapsed.

30. In the case of **Daniel Murungi Mwirabua Anampiu Vs. Jeremiah John Bernard Alias Jeremiah Guantai (Defendant) and Bernard Muthaura M'Chokera (interested party)**, I was facing a situation whereby a dispute had been presented before the adjudication officer but the same was not determined. I held thus;

“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”.

31. Where the courts ought to trend cautiously is in cases where parties are primarily seeking for ascertainment of rights and interests in land in the process of transition from customary tenure system to individual tenure system. See **Tobias Ochola Osidi (supra)**. However, a court of law may even face a situation of a mixed grill claim, where the issue of ascertainment of rights and interests in land are intertwined with other issues in an intricate web. This scenario was aptly captured in the case of **Johnson Mbaabu Mburugu & another v Mathiu Nabea & 9 others [2020] eKLR**, where I stated that;

“The present case goes beyond ascertainment of rights and interests in land.....”.

32. An in depth analysis of the proceedings undertaken in the adjudication processes (*particularly the proceedings commonly referred to as A/R Objection cases conducted under section 26 of both the Land adjudication Act and the Land Consolidation Act*) usually gives the court a sneak preview of the nature of the dispute which guides the court in determining whether such a court has jurisdiction or not. This entails a thorough scrutiny of the material presented before the court. This scenario was played out in the case of **Julius Kailikia Laaru vs. Peter Kaigera Laaru Meru ELC Appeal no 32 of 2009**, where I delivered the judgment on 21.5.2020. In that case, the appellant was claiming land from his brother, the respondent on the basis of customary trust of which the land is in the adjudication process. The appellant lost the case before the trial court on the basis that the court had no jurisdiction to determine the matter. However, upon going through the “*findings and decision*” in the objection proceedings before the District Land and Settlement officer, this court established that the appellant's claim had actually been ascertained though not severed from the property registered in the name of his brother. In the aforementioned case of **Julius Kailikia Laaru**, I held thus;

“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.....”.

33. Back to the present case, there is no evidence to indicate that the trial court perused the **objection proceedings in case no 3895**. If this had been done, the court would have noted that the objection was allowed. The import of that decision ought to have been brought to the fore during the trial of the case. This court is in no way saying that the appellant is the owner of the land. However, armed with the decision of the adjudication officers, each of the party should be allowed to ventilate their claim in a court of law. This is because the issue which was before the trial court concerned the protection of rights and interests in land which had been ascertained.

34. In the final analysis, I am of the view that this appeal is merited and the following orders are hereby issued:

1) The decision of the honorable magistrate delivered on 15/11/2018 in Tigania SRMCC NO. 55 of 2011 be and is hereby set aside and the matter is to be heard on merits before any other honorable magistrate other than Hon. Sogomo SRM with jurisdiction to hear the matter.

2) Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this judgment was given to the parties/advocates on 23/6/2020. 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 judgment 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