



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. NO 85 OF 2014
FORMERLY KERUGOYA 817 OF 2013

TITUS MWINZI KITAKA

KIVUVA KALOKI KAVILA NDIKU

MUTISYA MUASYA

KIVUKA KALOKIPLAINTIFFS

KAVILA NDIKU

KASYOKA NTHIANI

JAPHETH MUTISO

VERSUS

THE DISTRICT COMMISSIONER MBEERE

THE COUNTY COUNCIL OF MBEEREDEFENDANTS

**THE DIRECTOR OF LAND ADJUDICATION COMMISSIONER OF
LANDS**

RULING

Introduction

The plaintiffs/applicants have by their notice of motion filed this application under Section 30 of the Land Adjudication Act and Section 3A, 1A, 1B of the Civil Procedure Act and under Order 51, Rules 1 and 2 of the Civil Procedure Rules of 2010, seeking the following orders from this court:

1. That the suit be discontinued from the court since the area where the disputed land was or is located was not declared a Land Adjudication section and according to Section 30 of the Land Adjudication Act the court has no jurisdiction to hear the suit and the dispute be referred to the Land Adjudication Officer at Mbeere District.
2. That the Director of Land Adjudication and Settlement Officer be ordered to have the dispute heard by the Land Adjudication Officers for Gateki, Mbondoni, Washoro, karaba, Makima and Riakanau.

3. The court do order costs of the suit and the application be paid by the respondents.

The defendants/respondents have opposed the application. In support of their opposition, they have relied on the replying affidavit sworn by Okenyi S. Ondari, Land Adjudication Officer dated 13th May, 2013.

The Case for the Plaintiffs/Applicants:

The applicants in support of their application have relied on the affidavit of Japheth Mutiso dated 17th October, 2013. According to the applicants' supporting affidavit, the suit was filed way back in 1978 and it was prompted by the fact that the Provincial Administration who included the District Commissioner in charge of Embu District and the chiefs of Gateki, Karaba, Riakanau, Washoro, Makima and Mbondoni locations had in 1977 and 1978 began to allocate land to people who were not on the ground instead of allocating to the plaintiffs and their representatives, who were in occupation of the land.

Furthermore, it is their evidence that they continued with the case in court and the people they represented and themselves did not participate in the land adjudication process.

According to him, they have now discovered that the parcels of land have been adjudicated and given to other people who do not occupy the parcels of land. It is their further evidence that the areas are still under land adjudication and that title deeds have not been given to the owners.

In terms of paragraph 7 of the supporting affidavit, the applicants came to learn that the areas were declared land adjudication areas in early 1980 and that the adjudication registers have not been declared final as required by the Act.

It is for the foregoing reasons that they have applied to the court to direct that the suit be discontinued as required by Section 30 of the Land Adjudication Act, since the court has no jurisdiction to hear the suit. It is also their prayer that once the suit is discontinued, it should be heard by the Land Adjudication Officers at Mbeere South District.

The Case for the Defendants/respondents:

As I have already indicated, the defendants/respondents have opposed this application. In support thereof, they have relied on the affidavit sworn by Okenyi S. Ondari, the land adjudication officer .

According to them the Director of Land Adjudication and Settlement does not have the power to hear and determine the land adjudication disputes for the areas that have been declared to be under adjudication areas. It is also their evidence that the process of adjudication for these areas was completed, the registers thereof published and the said director signed the certificate of finality in compliance with section 26A of the Land Adjudication Act, Cap 284 Laws of Kenya.

It is also their evidence that the registers were published and completed for inspection in June 1980. They have also stated in that replying affidavit that the plaintiffs were on the ground and they should have raised their claims through objections, when the adjudication registers were published in 1981.

Furthermore, they have stated that since the plaintiffs did not file any objection to challenge the adjudication registers, there is no provision in the Land Adjudication Act that allows the court to make the orders they are now seeking. Finally, they have stated that the Director of Land Adjudication and Settlement does not have the power to order the matter to be referred to the Land Adjudication Officers to re- start the adjudication process again.

The Applicable Law:

The law that governs the adjudication process is set out in Section 30 of the Land Adjudication Act. Under the provisions of Section 30 (1), no person is permitted to file civil proceedings concerning an

interest in land in an adjudication section until adjudication registers for that section has become final in all aspects under Section 29(3) of the Act.

Furthermore, the provisions of that Section mandatorily direct the court not to entertain any civil proceedings concerning an interest in land which is under adjudication, unless there is consent in writing of the adjudication officer.

It goes further to require that where such proceedings were started before the publication of the notice, they shall be discontinued. I may also mention here that the provisions of that section authorize an aggrieved person to appeal in writing to the minister from the refusal of the adjudication officer, to give consent and such an appeal must be filed within 28 days after that refusal.

Counsel for defendants/respondents filed his written submissions in opposition to the application. According to counsel, the plaintiffs/applicants did not raise any objection when the adjudication exercise was progressing. He has also submitted that instead of raising an objection, they opted to pursue the matter in court, which they now want to abandon and have applied to the court for the process to be re-started all over again.

Unfortunately, in counsel's view the Director of Adjudication and Settlement has no power under the relevant statute to direct the re-starting of the adjudication process, as the said director has already forwarded the register to the Chief Land Registrar for purposes of registration. Counsel has cited the case of *The Owners of Motor Vessels "Lillian S". v. Caltex Oil (Kenya) Limited (1989) KLR 1*.

According to the Court of Appeal in that case, where a court has no jurisdiction to entertain a matter in issue, there is no basis for a continuation of proceedings pending other evidence. Once it comes to conclusion, that it does not have any jurisdiction, it must stop any proceedings before it. The plaintiffs/applicants have also relied on the provisions of Section 30 of the Land Adjudication Act which they have quoted extensively.

They have also applied to the court to discontinue this suit and order that the same be heard by the Land Adjudication Officers at Mbeere South District. They have submitted that if the application is granted, justice will have been done to the plaintiffs/applicants, which they have been seeking since 1978, that was filed in the civil registry in Nairobi.

Issues for Determination:

In the light of the affidavit evidence of the parties, the submissions of their counsel and the law, I find the following to be the issues for determination:

1. Whether or not this court has jurisdiction to grant the orders applied for by the plaintiffs/applicants.
2. Whether or not it is proper for this court to grant orders in vain.
3. Who should pay for the costs of this application.

Evaluation of the Evidence, Findings and the Law

It is common cause that this court has no jurisdiction to entertain this suit. According to the plaintiffs/applicants' supporting affidavit in paragraph 8, they have stated that this suit should be discontinued by the court as required by section 30 of the Land Adjudication Act, since the court has no jurisdiction to hear it. The respondents in their submissions have pointed out that this court lacks jurisdiction to entertain the suit in support of which they cited the case of *The Owners of Motor Vessels "Lillian S". v. Caltex Oil Kenya Limited, supra*

It is clear that as between the parties, this court lacks jurisdiction to hear and determine this matter. I find this to be the correct position in law. As a result, any orders that I may make are without the authority of the law. It therefore follows that these orders requested if made will be null and void.

Furthermore, according to the case of *R v Director General of East African Railways Corporation Ex-parte Kaggwa (1977) KLR 654*, it is improper for the court to make orders in vain. According to that case, a court is entitled to make an order that is effective and capable of being implemented.

In the circumstances of this case, I find that the court lacks jurisdiction to entertain this suit and the orders sought are incapable of being implemented. The orders that have been applied for will be in vain as the matter is no longer before the Land Adjudication Officers. I also find that the Director of Land Adjudication and Settlement does not have the power to order the Land Adjudication Officers to re-start or entertain the adjudication process again.

For these reasons, I find that the application for discontinuation of this suit is proper. I also find that it is not proper to make any further orders in this matter because this court lacks the necessary jurisdiction to do so. As regards costs, I find that the case was filed by the plaintiffs on behalf of several other people in pursuit of their rights. The case therefore raises matters of public concern. And for this reason, an order for the payment of costs will not be made.

Verdict and Disposal Order:

In view of the foregoing, I hereby make the following orders:

1. An order discontinuing the proceedings in this case is granted.
2. No orders as to costs

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this.. **4th** day of **FEBRUARY,..2015**

In the presence of Mr Onenga holding brief for Mr Nyakundi and in the absence of the defendants/respondents and their counsel.

Court clerk Mr. Muriithi

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

J.M. BWONWONGA

JUDGE