



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**HCCC NO. 39 OF 2006**

**CHEMBE KATANA CHANGI .....PLAINTIFF**

**VERSUS**

**MINISTER FOR LANDS & SETTLEMENT**

**THE DIRECTOR OF LAND ADJUDICATION &**

**SETTLEMENT**

**JAMES M. MBAJI**

**THE HON. ATTORNEY GENERAL**

**THE CHIEF LAND REGISTRAR .....DEFENDANTS**

**JUDGMENT**

1. By his amended plaint filed on 8th June, 2006, the Plaintiff Chembe Katana Changi (Chembe) sued the five defendants being the Minister for Lands and Settlement, the director of Land Adjudication and Settlement, James M. Mbaji, the Hon. Attorney General and the Chief Land Registrar respectively.

2. His pleaded and evidential case is that he was the lawful owner of plot Nos. 803 and 891 in Mikahani/Mawema Mabomu/Chonyi adjudication section, which title was derived from ancestral clan land. He states that during the adjudication process he had disputes with one Mwangolo Nyachi Mbata (Mwangolo) in respect of plot no. 803 and with one Mbaji Mumba Muruu (Mumba) in respect of plot No. 891. Both disputes terminated in his favor but subsequently the 3rd defendant filed appeals to the 1st Defendant and heard by the District Commissioner Kilifi.

3. In the said appeal the 3rd defendant appealed in respect of plots 803 and 891. The Minister's decision allowing the appeal awarded plot 803 and a portion of plot 891 to the appellant, the son of Mumba, i.e the 3rd defendant who had never been a party to the proceedings with respect to the plot no. 891. The plaintiff avers that the alleged appeal by Mumba was incompetent as no objection had been filed to the

Land Adjudication Officer from the decision of the Arbitration board in regard thereto.

4. And secondly that the appeal regarding plot 803 was incompetent as it was filed by a party who did not participate in the original proceedings before the land Adjudication committee or the Land Adjudication officer. The Plaintiff's prayers are for:

***“a) An injunction restraining the Defendants either by themselves, servants and/or agents from implementing the decision of the first defendant altering the duplicate adjudication register to confirm with the determination/decision in the alleged appeals, certifying on the duplicate adjudication register that it has become final in all respects, sending details of the alterations and a copy of the certificate to the fifth defendant and/or specifically from registering the 3rd defendant and/or any other person as the owner of plot nos. 803 and 891 /Mikahani/Mawemabomu/Chonyi Adjudication Section 1 Kilifi.***

***b) A declaration that all the proceedings conducted before the 1st defendant through the District commission, Kilifi in alleged appeal Nos. 9 and 12 of 2002 and the decision made thereunder on the 22nd August, 2005 were a nullity and an order setting the same aside and an Order restoring the original decision of the Land Adjudication Officer.”***

5. In their defence the 1st, 2nd, 4th and 5th Defendants disputed the plaintiff's claim. In particular they denied that the proceedings conducted by the 1st Defendant were a nullity or that the 1st Defendant acted in excess of jurisdiction or made an error of law, and asserted further that by virtue of the provisions of the Government Proceedings Act the prayer for injunction against the Government Officers cannot be maintained. This point was upheld in a ruling delivered herein by Ouko J as he then was, on 18th September, 2006 on a preliminary objection argued by the parties.

6. Beyond this point however, the said defendant did not participate further in the trial. In his defence filed on 5th June, 2006 and evidence at the trial, the 3rd Defendant denied the plaintiff's claim to plots 803 and 891 Mikahani/Mawemabomu/Chonyi Adjudication Section. He stated that he was the rightful administrator of the estate of his late father Mumba while Hamisi Mbaji Mumba who filed the first appeal in respect of plot 803 is his sibling. He asserts that the land parcels were acquired by their late father through purchase for value without notice, from Mwangolo Nyachi Mbata; that Nyachi was a claimant in respect of both plots even though with regard to plot 803 Mwangolo was his undisclosed principal.

7. He argued that the suit is seeking judicial review remedies through the back door and that besides, the suit is time barred. He also asserted that the appeals to the 1st defendant were competent and that the plaintiff having participated therein is estopped from pleading their alleged incompetence.

8. On 15th June, 2007 the parties filed a statement of agreed issues which, basically summarizes the issues raised by the respective pleadings, evidence and submissions. The issues are replicated hereunder:

***“1. Was the plaintiff the owner of plot no. 803 and 891 Mikahani/Mawemabomu/Chonyi Adjudication Section in Kilifi District?***

***2. Did a dispute arise during the adjudication process between the plaintiff and Mwangolo Nyachi Mbata in respect of plot no. 803 and Mbaji Mumba Muruu and Hamisi Mbaji in respect of plot no. 891?; were the said disputes referred to the land adjudication committee, if so, what was the decision of the land adjudication committee?***

***3. Didi Mwangolo Nyachi and Mbaji Mumba Muruu in respect of plot numbers 803 and 891 respectively appeal to the Land Arbitration Board:***

***4. Was Hamisi Mbaji Mumba a party to previous proceedings, or did he claim ownership***

**concerning plot number 803 or claim ownership thereof: did the purport to or file an objection to the Land Adjudication Officer claiming ownership of the said plot, if so, what was the decision of the Land Adjudication Officer.**

**5. Is the Grant of Letters of Administration obtaining by the 3rd Defendant in respect of the Estate of Mbaji Mumba Muruu (deceased) pursuant to Mombasa High court Succession Cause number 24 of 2004 relevant to the matters herein? Were Hamisi Mbaji Mumba and Mbaji Mumba Muruu litigating under the same title and/or cause of action in the proceedings before the Land Adjudicating Committee and the Land Adjudication Officer?**

**6. Was Mbaji Mumba Muruu a party to any previous proceedings in respect of Plot Number 803? or did he appear as an undisclosed principal of Mwangolo Nyachi Mbata; did he file an objection to the Land Adjudication Officer after losing his case before the Land Adjudication Board on Plot Number 891?; and was the 3rd defendant a party to the previous proceedings or appeal before the 2nd defendant herein?**

**7. Were all the proceedings conducted by and/or before the 1st defendant through the district commissioner, Kilifi a nullity? Should they be so deemed and set aside? Are the allegations contained in paragraph 11(a) to (g) of the Amended Complaint true?**

**8. Is the suit herein defective and bad in law and/or does it disclose any cause of action against the 3rd defendant?**

**9. Is the suit time barred, were the acts complained of and sought to be enjoined set in motion more than twelve (12) months ago and/or does the plaintiff seek to secure a judicial review through back door?**

**10. Is the plaintiff entitled to the orders sought herein**

**11. What is the order as to costs?"**

9. It is clear from the positions taken by the respective parties, that the issues 2, 3 and 4 are not in dispute. In respect of issue no. 2 and 3 it is admitted that a dispute arose during the adjudication process in respect of MIKAHANI/MAWEMABOMU/CHONYI ADJUDICATION SECTION, between the plaintiff and Mwangolo Nyachi (in respect of plot 803) and with Mbaji Juma and Mruu Hamisi Mbaji in respect of plot no. 891.

10. That the disputes were brought before the Land Adjudication Committee and the Land Adjudication Board, and in respect of plot 803 an objection was preferred to Land Adjudication Officer, which were all decided in favour of the plaintiff. In respect of plot 891 Mwangolo Nyachi did not file an objection. The 3rd Defendant was not a party in these proceedings prior to filing an appeal in respect of the same before the 1st defendant.

11. The court must determine whether the proceedings conducted by the 1st Defendant were a nullity and should be set aside and whether present suit is bad in law, time barred and/or brought to secure judicial review through the back door.

12. The court has also been asked to determine whether the plaintiff is the owner of the plots number 803 and 891 within MIKAHANI/MAWEMABOMU /CHONYI ADJUDICATION SECTION. The court declines the invitation to determine that issue for reasons that will soon become apparent.

13. With regard to the latter issue, there is no dispute that the suit property was the subject of an adjudication process pursuant to the Land Adjudication Act. The said Act provides for an elaborate dispute resolution mechanism. At the apex of the system is the minister to whom an appeal may be lodged. Section 29 (1) is in the following terms;

**“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.”**

14. The decision of the minister is final. The Act does not provide for an appeal to the High Court or any other body. However, proceedings before the minister being quasi-judicial in nature are subject to the supervision of the High Court. A question has been raised by the 3rd Defendant's submission to the effect that the present suit is bad in law, time barred and a back door attempt by the plaintiff to obtain judicial review remedies.

15. What are the plaintiff's key complaints and prayers? I think the NOTICE OF INTENTION TO INSTITUTE LEGAL PROCEEDINGS issued pursuant to the Government Proceedings Act, a copy whereof was produced as P.Exh.9 provides a good summary in this regard.

16. A portion thereof is reproduced below.

*“The circumstances giving rise to liability are:*

- “1. That during the adjudication process in Mikahani/Mawemabomu/Chonyi Adjudication section a dispute arose between the said Chembe Katana Changi and Mwangolo Nyachi Mbata in respect of plot no. 803 and Mbaji Mumba Muruu and Hamisi Mbaji in respect of plot no. 891 which disputes were referred to the Adjudication Committee which upon hearing all the parties awarded the plots to Chembe Katana Changi.***
- 2. That the said Mwangolo Nyachi in respect of plot no. 803 and Mbaji Mumba Muruu and Hamisi Mbaji in respect of plot no. 891 being dissatisfied with the decision of the Land Adjudication Committee appealed to the Land Adjudication Board which upon consideration of the Appeal dismissed the same and awarded the plots to Chembe Katana Changi.***
- 3. That Hamisi Mbaji Mumba, who was not a party on the previous proceedings concerning plot no. 803 did not claim ownership of the same purported to and did file an objection to the land Adjudication Officer claiming ownership of plot no. 803 which objection was dismissed and the said plot awarded to Chembe Katana Changi.***
- 4. That Mbaji Mumba Muruu not having been a party to all the previous proceedings in respect of plot no. 803 and not having filed an objection to the land adjudication officer after lodging this case before the Land Arbitration Board in respect of plot no. 891 purported to file an appeal to the minister of Lands and settlement who through the District Commissioner Kilifi proceeded to hear the said alleged appeals on or about the 10th June, 2004 whereafter on or about the 22nd August, 2005 of plot no. 891 to James M. Mbaji a son of the said Mbaji Mumba Muruu who was neither a party to all the previous proceedings nor to the appeals.”***

The relief sought is as follows:

***“a) An injunction restraining the Minister for Lands and Settlement, the director of Lands Adjudication and Settlement and the Chief land Registrar either by themselves, their servants and/or agents from implementing the decision of the Minister for lands***

*and Settlement. Altering the adjudication register to conform with the determination/decision in the said appeals, certifying on the duplicate adjudication register that it has become final in all respects, sending details of the alterations and a copy of the certificate to the chief land registrar and/or specifically registering the said James M. Mbaji and/or any other person as the owner of the plot nos. 803 and 891/Mikahani/Mawemabomu/Chonyi.*

*b) A declaration that all the proceedings conducted before the minister of lands and settlement through he district commissioner, Kilifi in the alleged appeals nos. 9 and 12 of 2002 and the decision made thereunder on the 22nd August, 2005 where a nullity and for an Order setting the same aside and an order restoring the original decision of the Land Adjudication officer.*

*c) Costs of and incidental to the intended suit.*

*d) any other and/or further relief that the court may deem just and expedient to grant.”*

17. These matters are pleaded in identical fashion in the Amended plaint. It would appear that the plaintiff received decisions in his favor in all the adjudication proceedings preceding the appeal to the minister. He was prompted to file this suit by the decision of the minister in 2004, which effectively allowed the 3rd defendant's claim to the suit property. His complaint relates to the proceedings before the minister, namely, that the 3rd defendant was not a party to previous proceedings and was therefore a stranger with regard to plot 803 and that in respect of plot 891 no objection had been made to the Land Adjudication Officer previously. Hence the appeal to the minister was incompetent.

18. As pleaded and framed the plaintiff's suit raises matters which on the face of it properly belong to judicial review. An examination of the reliefs sought reveals they are really prerogative orders of Certiorari and Prohibition except in name. Instructively the amended Plaint does not seek any declaration or prayer in respect of the plaintiff's ownership of the suit property hence issue no. 1 in the agreed issues lacks a basis.

19. The parties conducted the hearing in a manner to suggest that this court was expected to determine the true owners of the land parcels, and even the respective acreage. At some point the parties seemed to agree that the dispute relating to plot 891 is about boundaries. The land in question is unregistered land which was under the process of adjudication when these disputes arose. The law applicable does not donate any jurisdiction to the High Court to deal with the merits of adjudication disputes or allow parties to re-agitate their disputes before the High Court after exhausting the mechanisms under the Land Adjudication Act. The court cannot deal with boundary disputes let alone ownership disputes regarding land under adjudication.

20. Along with this issue is the question of the efficacy of the remedies sought. With respect to the 1st, 2nd, 4th and 5th defendants Ouko J had in a considered ruling regarding a Preliminary Objection raised earlier on, stated that the remedy of injunction is not available, and I agree with that position. Moreover, the present suit was brought well after twelve months after the impugned decision. Hence as against the 1st, 2nd 4th and 5th defendants, it is definitely time barred by virtue of Section 16 of the Government Proceedings Act.

21. The scope of the court's jurisdiction in a matter of this nature is really supervisory, concerned with the legality and propriety of the quasi-judicial proceedings before the bodies. The court while exercising such jurisdiction cannot substitute its own findings for those of the inferior tribunal.

22. In R v. National Environment Authority ex-parte Ground Equipment Limited (2010 eKLR) the Hon. Justice Wendo had occasion to consider whether the existence of an alternative remedy is a bar to proceedings by way of judicial review. The court stated that:

*“The law is that the existence of an alternative remedy is not a bar to the*

***commencement of Judicial Review proceedings by an aggrieved Party. This is because of the nature of Judicial Review remedies which do not deal with the merits of the impugned decision but review the decision making process...***”and the following rider:

***“There is a wealth of authority that where there is an alternative remedy, the applicant seeking leave of the court to commence Judicial Review Proceedings must disclose that there is an alternative remedy and should demonstrate the exceptional circumstances under which he seeks judicial review instead of the remedy provided by statute”***

I think the same thing can be said regarding the act of seeking of the alternative remedy rather than judicial review orders where the latter is more convenient and appropriate, as in this case.

23. In this regard two of the key considerations are whether the matter depends on some particular or technical knowledge which is more readily available to the body; and whether the remedy sought will determine the matter in issue fully and directly – see **Halsbury's Laws of England 4th Edn VOL 1(I)**. Such is the situation obtaining in this case. The court is being asked to determine issues such as boundaries and ascertainment of land claims (ownership) within a land adjudication section for which it lacks expertise. In addition it is being asked to grant remedies that in its opinion are not efficacious, or even available in respect of some of the defendants.

24. The remedies in the Amended plaint are really disguised prayers for the issuance of prerogative orders of certiorari and prohibition, which, could in proper cases be available against all the defendants but not the 3rd defendant. Even if the court were to accept, courtesy of Article 159(2) of the Constitution that the said jurisdiction may be invoked through judicial review proceedings or otherwise and that these proceedings should not be defeated on a technicality (even through it appears the matter is more suited to judicial review) that would not be the end of the matter.

25. I suspect that the present approach was taken because the six month window for bringing Judicial Review proceedings lapsed before the plaintiff could file his proceedings. There is no cure however for the fact that under Section 16 of the Government Proceedings Act the proceedings came too late as far as the 1st, 2nd, 4th and 5th defendants are concerned.

26. That aside, the only question this court could validly go into would be an issue as to the propriety of the proceedings before the minister. With regard to plot no. 803 the plaintiff's complainant is that the 3rd defendant had not been a party to previous proceedings, including the objection to the Land Adjudication Officer and was therefore not competent to lodge an appeal to the Minister.

27. The 3rd defendant's answer is that proceedings under the Land Adjudication Act are quasi-judicial and the usual rules and procedure of the court will necessarily apply with modification. Neither the Land Adjudication Act nor the rules made thereunder, the Land Adjudication Regulations define a party. Both Section 29 of the Act and regulation 4(1) appear to allude to the possibility of a person who was not involved in previous proceedings bringing an appeal before the minister. Section 29(1) states 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...”***

What does section 26(1) states regarding an objector?

***“Any person named in or affected by the adjudication register who considers it to be incorrect...or incomplete in any respect may, within sixty days...object to the adjudication officer...”***

28. The rationale for this wide latitude may be the very nature of land itself; parcels belonging to persons not directly involved in an adjudication dispute may be affected by the determination of a dispute between different parties and any subsequent adjustment to the register. They must have an opportunity

to object to the Adjudication officer and also appeal to the minister as the case may be. In my considered view, any other reading of these provisions could defeat the very intent of the Act which is stated in the preamble as follows:

***“An act of parliament to provide for the ascertainment and recording of rights and interests in Trust land...”***

29. Proceedings thereunder are therefore *sui generis* and cannot be forced into the straight jacket of a formal court proceeding or suit section and 12(1) of the Act leaves no doubt about this. It provides:

***“In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official records, and may call evidence of his own accord.”***

The Civil Procedure Rules cannot oust the clear provisions of the Land Adjudication Act.

30. With regard to the question of the authority of the 3rd Defendant to appear before the minister, I think that the Plaintiff too suffers the same handicap. In his evidence, he stated that he was claiming ownership of the suit land because he was entitled through his father and the ancestors before him. It cannot therefore lie in his mouth to demand letters of administration from the 3rd defendant whose basis of claim is not any different. Indeed the Land Adjudication Act recognizes land claims based on Land customary law in respect of a tribe, clan, family or to a group. Section 2 provides:

***“Any proceeding conducted under this Act by the adjudication officer or by an officer subordinate to him for that purpose is a judicial proceeding for the purpose of chapters 11 and 18 of the Penal Code.”***

31. Besides, Section 3 which provides for the ascertainment of interest in land allows for the appearance of the claimant “owner” in person, through a recognized agent or even one successor of a deceased person representing others. Hence the argument that the 3rd Defendant had no capacity to appear in the appeal does not seem tenable in this circumstance.

32. The case cited by counsel for the plaintiff – **Christine Auma Ogendo v Barrack Aguko Ondijo & Anor HCCC NO. 616 of 1988**- is not applicable to the land adjudication process as it involved the filing of a civil suit for damages. The circumstances of this case are also distinguishable from those in **Linus Njai Njiru & Anor vs Trufosa Njeru HC. Misc. Appl. No. 4 of 2003**, which was an ordinary civil suit.

33. With respect to the disputed portion of plot 891, it is true that no objection had been lodged in accordance with section 26 of the Land Adjudication Act hence, no valid appeal could subsequently be made before the Minister under Section 29(1) the Land Adjudication Act, as was purported in this case. However, this issue ought to have been raised within six months via judicial review proceedings.

34. Even assuming a normal suit was preferred or applicable, the period for filing the proceedings challenging the minister's decision should have been brought within twelve months in compliance with the Government Proceedings Act. It appears ironic that the plaintiff while pointing out the lapses on the part of the Defendants fails to acknowledge similar lapses on his part. Indeed, as counsel to the 3rd defendant has stated, the plaintiff was content with proceedings and decisions made in earlier stages of the adjudication even through “non-parties” were allowed to participate. The decisions were favorable to him then. He also participated in the appeal before the minister and did not object to the presence of the 3rd defendant until the adverse decision was rendered.

35. In light of all the foregoing, I am not satisfied that the plaintiff has made out his case before this court. As was stated in the case of **Wareham t/a A. F. Wareham & 2 others vs Kenya Post Office**

**Savings Bank [2004]2KLR 91.**

***“(in) our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact on law framed by the parties or the court on the basis of those pleadings....And the burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities.”***

The plaintiff's case must fail and is dismissed with costs.

Delivered and signed at Malindi this **2nd** day of **April, 2013** in the presence of Miss. Lutta for the Attorney General, Mr. Bosire holding brief for Mr. Tindika for the Plaintiff.

Court clerk – Evans.

**C. W. Meoli**

**JUDGE**