



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 33 OF 2017

DOUGLAS KARIITHI

JAPHITHA RUCIATA.....APPELLANTS

VERSUS

STANLEY GATUMA.....RESPONDENT

(Being an appeal from the judgment of Hon. P.M Wachuhi RM in PMCC No. 143/2014 (Tigania) delivered on 2/11/2015)

JUDGMENT

1. The respondent, Stanley Gatuma who was the plaintiff in PMCC No. 143 of 2014 (Tigania) had filed the said case against the appellants/defendants seeking an order for permanent injunction restraining the defendant/respondent from conducting the “Kithiri” oath in respect of the plaintiff’s land parcel No. 198 Buuri “B” adjudication section.
2. The respondent had also sought an order that the second defendant/appellant had no jurisdiction to hear and determine a land dispute in view of the provisions of the constitution of Kenya, 2010.
3. The plaintiff filed the suit contemporaneously with a notice of motion under order 40 and 51 rule 1 CPR seeking a temporary injunction order to restrain the defendants from conducting a “Kithiri” oath in respect of the plaintiffs land parcel No. 198 Buuri “B” Adjudication section. On 26/8/2015 the defendant through the firm of Mokuia Obiria and associates advocates filed a joint statement of defence denying the plaintiffs claim.
4. In particular, the defendants averred that the suit had been overtaken by events since the Nthenge oath/Kithiri oath was conducted in accordance with the Kimeru customs and dictates on 12th September, 2014 at the instance of the plaintiffs and the parcels of land in question among which was L.P 198 Buuri “B” adjudication section was awarded and registered in the name of the 1st defendant.
5. On the same date, the defendants/appellants also filed a notice of preliminary objection stating that the court lacks the necessary jurisdiction to hear and determine the suit as the same has been filed in contravention of the express provisions of the land adjudication act cap 283 and 284 laws of Kenya.
6. When the notice of motion filed contemporaneously with the suit under certificate of urgency came up for directions before the duty court the lower court certified the same urgent and directed the plaintiff/applicants to serve for inter-parties hearing on 2/10/2014.
7. In view of the notice of preliminary objection filed by the defendants, the parties agreed to canvass the same by way of written submissions. In a ruling delivered on 26th November 2015, the trial magistrate dismissed the said preliminary objection. That decision provoked the present appeal where the appellant filed a memorandum of appeal dated 24/12/2015 citing the following grounds;
 - (i) The Honourable trial Magistrate erred in law and fact by failing to uphold the preliminary objection on a point of law raised by the appellants.
 - (ii) That the honourable Magistrates misapprehended the law applicable in dismissing the preliminary objection by the applicants.
 - (iii) That the honourable trial Magistrate erred in law and fact by failing to deal with the pleadings wholly as filed but instead dealt with the same piece meal.

Appellant’s Submissions

8. The appellant's submitted that the trial court lacked the requisite jurisdiction to hear and determine the suit for want of a consent from the land adjudication officer pursuant to the provisions of section 30 of the Land Adjudication Act Cap 284 Laws of Kenya. they further submitted that the said section is couched in mandatory terms

Respondent's Submissions

9. The respondent submitted that the appellants did not seek and obtain leave to file appeal. He submitted that the appeal is not one envisaged under order 43 rule 1 CPR. The respondent also submitted that the P.O raised by the appellant's before the lower court was wholly misconceived and that the trial magistrate properly directed himself to the law in dismissing the same.

Disposition

10. I have looked at the pleadings before the lower court in PMCC no. 143/2014 (Tigania). I have also perused the notice of preliminary objection raised by the appellants dated 24th August 2015. I have equally re-evaluated the submissions by the parties, the ruling by the trial magistrate and the applicable law. The subject of the suit before the magistrates court as can be seen from the pleadings is a parcel of land No. 198 Buuri "B" adjudication section. That parcel of land is situated within an adjudication area. The preliminary objection raised by the appellants stated that the trial court lacks jurisdiction to hear and determine the suit for lack of consent from the land adjudication and settlement officer under section 8 (1) and 30 of the land consolidation Act and the land adjudication Act chapter 283 and 284 Laws of Kenya respectively.

11. The provisions of the law under the two statutes is to the effect that no suit shall be instituted in an adjudication section without the consent of the land adjudication and settlement officer. The appellant has not demonstrated that he sought and obtained consent from the adjudication and settlement officer concerned before instituting the lower court case. Faced with a similar dispute Justice P.M Njoroge in the case of **Reuben Mwangera M'Itelekwa vs Paul Kigea Nabea (2014) eKLR** held as follows:

"There is no argument regarding the fact that the adjudication register for the adjudication section where the suit land is situated had not become final in all aspects under section 29 (3) of the land adjudication act at the time when the suit was filed. An examination of the court records reveals that a consent from the land adjudication officer was not annexed to the suit documents when his suit was filed. The plaintiff has annexed to his further supporting affidavit a consent from the District land adjudication officer dated 27th June 2011. The said consent concerns parcel No's 44/9, 6/27, 4946 and 6323. Parcel No. 372 is not mentioned. The requirement for consent to be granted by the land adjudication officer before a suit can be filed is a statutory requirement. It cannot be considered a procedural technicality. It is not a mere technicality. It is a legal issue. In accordance with section 30 of the Land Adjudication Act this court and any other court should not entertain any suit filed except with the consent of the adjudication officer until the register for that adjudication section has become final. Section 8(1) of the land consolidation act directs that no recognizance should be taken of any suit appertaining to an adjudication area unless there was prior consent in writing of the adjudication officer. Section 8(2) requires officers of all courts to be satisfied that the appropriate consent has been granted by the land adjudication officer before issuing any plaint or other legal process for the institution or continuance of proceedings prohibited by section 8 (1)".

12. I totally associate with the findings of the learned judge and find that the suit before the trial court was instituted without the statutory requirements under section 8 (1) and 30 of the land consolidation and the Land Adjudication Act cap 283 and 284 laws of Kenya respectively.

13. In the upshot I find that the learned magistrate erred in dismissing the preliminary objection dated 24th August 2015.

14. The final orders are that the decision by the learned magistrate issued on 26th November 2015 dismissing the preliminary objection dated 24/8/2015 is hereby set aside and the same is replaced with an order upholding the same and I hereby dismiss PMCC no. 143 of 2014 (Tigania). Each party to bear his own costs of this appeal and the dismissal of the original suit.

15. It is so ordered.

READ, DELIVERED AND SIGNED AT MERU IN THE OPEN COURT THIS 28TH DAY OF FEBRUARY, 2019

E.C CHERONO - JUDGE

In the presence of:

1. C/A Kananu
2. Mr. Kimathi holding brief for Mokuu for appellant
3. Ms. Rimita holding brief for B.G Kariuki for the respondent