REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC SUIT NO. 135 OF 2017

KYUMWA MALII..1ST PLAINTIFF

JONATHAN MASOO MALII.....................2ND PLAINTIFF

-VERSUS-

JACKSON NYAMAI..................................1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

MUSYIMI MUTUNGA............................ 3RD DEFENDANT

RULING

1) What is before this court for ruling is the notice of preliminary objection by the 1st and the 3rd Defendants dated 10th July, 2018 and filed in court on 17TH July, 2018. The grounds in the preliminary notice are:-

> **1. That the said suit is incompetent, bad in law as it offends the mandatory provisions of Sections 29(1) b of the Land Adjudication Act Cap 284 since the decision of the Minister is final and its implementation was long done in the year 1985.**
>
> **2. That the Plaintiffs ought to have commenced Judicial Review proceedings if they were dissatisfied with the Ministers decision and/or its implementation in Ministers Appeal no. 242 of 1974.**
>
> **3. That the Ministers decision was fully implemented, boundaries marked both in the map and on the ground hence the suit is *rejudicata*.**
>
> **4. That the said suit is frivolous, vexatious and an abuse of this honourable court's process and hence ought to be struck out with costs.**

2) The Plaintiffs on one hand and the 1st and the 3rd Defendantson the other consented to disposing off the preliminary objection by way of written submissions.

3) The counsel for the 1st and 3rd Defendant has submitted that the 1st Defendant's father is the registered proprietor of land parcel number Nzaui/Matiliku/784 while the Plaintiff's father owns land parcel number Nzaui/Matiliku/625. That in their amended plaint dated 7th June, 2018, the Plaintiffs have averred that a portion of (almost half) of land parcel number Nzaui/Nziu/784 was appropriated and merged with land parcel number Nzaui/Nziu/784. The counsel wondered why the Plaintiffs who have averred in paragraph 10 of their amended plaint that the boundary dispute between the two parcels of land was long solved and yet in paragraph 13 of same plaint, they claim that there are no boundary marks on the ground. The counsel cited Section 29(1) of the Land Adjudication Act which provides as follows;

> ***"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 the appeal; and***
> >
> > ***b) Sending a copy of the Appeal to the Direction (SIC) of Land Adjudication and Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."***

4) The counsel correctly submitted that once a party appeals to the Minister, the Minister's decision is final and wondered why the Plaintiffs are out to reopen an issue that was long settled and boundaries fixed in line with the decision in Appeal no 242 of 1974. The counsel correctly submitted that if a party is dissatisfied with the Minister's decision in a land adjudication area, the proper procedure is to challenge the Minister's decision through judicial review proceedings and not by way of a plaint. The counsel added that the Plaintiffs are calling on this court to review and/or relook at the decision and implementation of the decision of the Minister.

5) The counsel was of the view that the plaint herein is meant to appeal against the decision of the Minister in Appeal number 242 of 1974 and cited the case of ***John Masiantet Saeni V Daniel Aramat Lolungiro and 3 others eKLR*** where Mutungi, J held thus;

> "***In the instant matter before the court the Petitioner did not move the court by way of Judicial Review but rather opted to file a petition abeit after a lapse of 13 years from the time of the decisions of the Minister was given. In my view the petition is tantamount to seeking to appeal the decision of the Minister through the back door. It is an attempt on the part of the Petitioner to have a second bite of the cherry. There is no explanation why the Petitioner did not exhaust the process/procedure established under the Land Adjudication Act by challenging the decision of the Minister by way of Judicial Review and/or why it took the Petitioner a whole 13 years from the time the decision was rendered to bring these proceedings".***

6) Mutunga, J further went on to hold that "***In the recent case of Lepore Ole Maito Vs Letwat Kortom & 2 others [2016] eKLR the court considered the application of the Land Adjudication Act with particular regard to the dispute resolution mechanism. In this case, the court stated***;

> "***The Land Adjudication Act, sets an elaborate procedure through which the right and interest of all persons is to be established and once the that process and procedure is followed and completed the determination of such rights and interests is final. The Act provides an appropriate mechanism for resolution of any disputes. The Ministers is the apex in that dispute resolution mechanism and once an appeal is made to the Minister and determined under the provisions of Section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister's decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction."***

7) The counsel submitted that the Land Adjudication Act has set up an elaborate procedure through which the rights and interest of all persons are established and that once the same is completed, the determination by the Minister is deemed as final and not subject to appeal. The counsel termed the plaint as misconceived and having been brought in total disregard of the law and constitutes an abuse of the court process since implementation and issuance of title deeds was long done and boundaries fixed and urged the court to strike out the entire suit.

8) On the other hand, the counsel for the Plaintiffs submitted that the court should not grant the orders sought in the preliminary objection since the grounds do not meet the threshold observed in the case of ***Oraro V Mbaja [2005] eKLR*** where Ojwang, J (*as then was*) expressed himself thus;

> "***A preliminary objection, correctly understood is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be provided through the process of evidence…".***

9) The counsel added that paragraph 3 of the preliminary objection is not free from the definition of what constitutes a preliminary objection as it invites the court to relook into the acreage and the entire demarcation exercise done by the Surveyor. The counsel pointed out that the Plaintiffs' suit as captured in the amended plaint dated 7th June, 2018 is premised on the fact that almost half of the land parcel number Nzaui/Nziu/625 was appropriated and merged with land parcel number Nzaui/Nziu/784. The counsel was of the view that the suit focuses on unlawful implementation of the decision that arose from the appeal to the Minister which was heard under the Land Adjudication Act, Cap 284 of the Laws of Kenya. The counsel submitted that this issue can only determined by allowing the Plaintiffs to have their day in court.

10) The counsel went on to submit that in paragraphs 8,9 and 10 of their amended plaint, it is clear that the Plaintiffs do not have any problem with the Minister's finding. That the Plaintiffs allege that the late father of the 1st Defendant connived with the Surveyor to demarcate the land contrary to the decision of the Minister. The counsel added that this court remains clothed with power and jurisdictions under Article 162(2) 9 of the Constitution as well as under Section 13 of Environment and Land Court Act, 2011 to hear and determine the dispute herein.

11) The counsel went on to submit that the notice of preliminary objection dated 10th July, 2018 does not meet the criteria set out in ***Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Limited [1969] EA 696*** on what constitutes a preliminary objection. The counsel pointed out that for a preliminary objection to meet the criteria set out in Mukisa's case, there should be no contest on the facts and issues raised. The counsel added that Law JA (as he then was) pronounced himself thus;

> ***"… a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court….."***

12) The counsel submitted that the Defendants herein have not filed a statement of defence or a replying affidavit.

13) He went on to submit that the fact that the Plaintiff's deceased father was issued with a certificate of ownership which does not defeat the Plaintiffs' claim that the implementation of the Minister's decision was done wrongly and unlawfully. The counsel added that the court must determine certain facts for it to dispense the preliminary objection which include;

i. **Where do the defendants draw their rights over the subject parcel of land in question?**

ii. **Whether the said rights fall within the Land Adjudication Act.**

iii. **Whether the Defendants' rights are superior or inferior to those of the Plaintiffs.**

14) The counsel cited the case of ***Stephen Ntongai M'Mailutha vs. M Minyori M'twerandu & 2 others [2010] eKLR*** where Lady Justice Mary Kasongo held thus;

> "***It therefore follows that the Plaintiff was correct to have filed this case in this court as he did. The 1st Defendant submitted that the correct Procedure ought to have been followed by the Plaintiff other than appealing as provided under the Land Adjudication Act was to file a judicial review. Judicial Review relates to court's power to review the actions of other branches or level of government. See Blacks Law Dictionary. Here the Plaintiff was not merely challenging the actions of the L.A.O per se but rather he was alleging fraudulent alterations of the decision of the Land Adjudication Committee and that fraudulently implementation of the decision on a parcel of land that was not the subject of the Land adjudication committee's decision. The Plaintiff's claim therefore of fraud is outside the realm of judicial review".***

15) The counsel urged the court to be persuaded by the aforementioned authority and dismiss the preliminary objection with costs to the plaintiffs.

16) I have read the notice of preliminary objection as well as the submissions that were filed by the counsel on record for the parties herein. I do note that ground number 3 of the notice of preliminary objection does not raise a point of law as it raises issues of fact which will have to be proved by way of evidence. It is not lost on me that the 1st Defendant has not filed his statement of defence. A perusal of paragraphs 8, 9 and 10 of the Plaintiffs' amended plaint clearly show that the Plaintiffs are not questioning the decision of the Minister in Appeal number 274 of 1974 but rather the way implementation of the said decision was carried out. The case herein is distinguishable from ***John Masiantet Saeni vs. Daniel Aramat Lolungiro & 3 others [2017] eKLR*** relied by the 1st Defendant as it is clear that the Petitioner therein filed a petition to challenge the Minister's decision was carried out. I am persuaded by the authority cited by the Plaintiffs/Respondents.

17) I agree with the Plaintiffs' counsel that this court is clothed with jurisdiction under Article 162(2) (9) of the Constitution as well as Section 13 of the Environment and Land Court Act No.19 of 2011 to hear and determine the issues raised in the amended plaint notwithstanding the fact that the Plaintiffs have come to court 44 years since the implementation of the Minister's decision in Appeal number 242 of 1974. The upshot of the foregoing is that the notice of preliminary objection lacks merit and same is dismissed with costs to the Plaintiffs/Respondents.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 20TH DAY OF FEBRUARY, 2019.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF;

Mr. Langalanga holding brief for Mr. Mutia for the Respondent.

No appearance for the Applicants

Ms Nzioka Court Assistant

Mbogo C.G, Judge

20/2/2019