REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 184 OF 2014

KITHEKA NDUVYA.....1ST APPELLANT

MUTIA MWAVA.....2ND APPELLANT

MUTINGA MWAVA.....3RD APPELLANT

KINGOLA MWAVA.....4TH APPELLANT

MWASI NDUVYA.....5TH APPELLANT

NDUVYA MUTIA.....6TH APPELLANT

MUSILI NDUVYA.....7TH APPELLANT

VERSUS

NGETA NGETA STEPHEN MULI

*(Being the legal representative of the Estate of **NGETA NGETA**)*.....**RESPONDENT**

(Being an Appeal from the Judgment of Mwingi Senior Resident Magistrate's Court

in Civil Case No. 45 of 2004 delivered on 14th July, 2014 by Hon. V.A. Otieno -(SRM))

JUDGMENT

1. This Judgment is in respect of an Appeal from the Judgment of the Senior Resident Magistrate at Mwingi *(Hon Victor A. Otieno)* in SRMCC N0. 45 of 2004. In their Amended Memorandum of Appeal, the Appellants have averred that the learned Magistrate failed to consider their evidence to the effect that they have been in occupation of the suit land for over sixty (60) years.

2. It is the Appellants' case that the learned Magistrate failed to appreciate that the registration of the suit land in favour of the Respondent was tainted with illegality; that the learned Magistrate disregarded the weight of evidence that was tendered by the Appellants and that the Magistrate failed to consider the concept of land reforms and the importance of investigating the root title of the suit property.

3. The Respondent filed a Cross-Appeal in which he averred that the learned Magistrate erred when he failed to award costs to him and that the decision of the Magistrate is against the weight of the evidence on record. Both the Appeal and the Cross-Appeal proceeded by way of written submissions.

4. The Appellants' advocate submitted that the Appellants' case before the Minister was dismissed on a technicality; that the Appellants have never been given an opportunity to have their case fully determined on merit and that the learned Magistrate failed to consider all the aspects of the case.

5. According to the Appellants' advocate, the suit land had initially been adjudicated and demarcated in their names; that the learned Magistrate failed to consider the facts and evidence on record to arrive at an independent decision and that the Appellants' claim was dismissed without hearing them.

6. The Appellants' counsel submitted that the Appellants having established the long occupation, the learned Magistrate should not have come to the conclusion that the Appellants ought to have filed a Counter-claim; that it was erroneous for the learned Magistrate to come to a conclusion that the register of all the parcels of land had been finalized in all respects without investigating the procedure that was followed and that the learned Magistrate disregarded the Appellants' evidence.

7. On his part, the Respondent's advocate submitted that the trial court was never called upon to determine who between the Appellants and the Respondent is the rightful owner of the suit properties and that the decision of the Minister could only be challenged by way of Judicial Review.

8. Counsel submitted that the learned Magistrate could not exercise supervisory jurisdiction over the institutions established under the Land Adjudication Act. Counsel submitted that the Respondent was entitled to costs; that it was erroneous for the learned Magistrate to have found that the Appellants should have filed a Counter-claim for adverse possession and that in any event, the Magistrates do not have jurisdiction to handle matters pertaining to adverse possession claims.

9. The evidence before me shows that the late Ngeta Ngeta, who is now represented by the Respondent *(herein the Respondent)* filed a Plaint dated 27th April, 2004. In the said Plaint, the Respondent averred that parcels of land numbers 1842, 1843, 1844, 1846, 1847 and 1848 in the Nzewa Adjudication Section *(the suit properties)* had been adjudicated in his favour; that the Appellants' Appeal had been dismissed and that the Appellants were trespassers on the suit land.

10. In the suit, the Respondent sought for the eviction of the Appellants from the suit properties.

11. In their Defence, the Appellants denied that the Respondent was the owner of the suit properties. The Appellants prayed for the dismissal of the Respondent's suit.

12. When the matter came up for hearing, the Respondent *(deceased)* informed the trial court that the suit land was surveyed in 1991; that the Appellants occupy different parcels of land and that during the adjudication process, the Appellants' Appeal to the Land Adjudication Officer was dismissed.

13. PW1 informed the court that when the Appellants filed their Appeal with the Minister, the said Appeal was struck out for having been filed out of time.

14. The Land Adjudication Officer, PW2, informed the court that all the Appeals in respect of the suit properties had been determined by the Minister. PW2 gave to the trial court specific dates when the said Appeals were determined.

15. The 7th Appellant informed the trial court that she lives on parcel number 1841 in Nzalai sub-location and that she was not aware if the Appeals they had filed before the Minister had been dismissed. The evidence of the 7th Appellant was repeated by DW2, DW3, DW4 and DW5. The penultimate statement by all the Appellants was that the Minister did not hear them on merit because the Appeal had been filed out of time.

16. While dismissing the Appellants' claim, the trial court held as follows:

> ***"The evidence further shows that the process of Adjudication provided for under the Land Adjudication Act Cap 284 has been completed. According to PW2 the Lands Adjudication Officer, the Register for parcels No. 1842, 1843, 1844, 1845, 1846, 1847 has been finalized in all respects as provided for under Section 29(3) (b) of the Act."***

17. The preamble to the Land Adjudication Act provides as follows:

> ***"An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto."***

18. It is only during the adjudication process that rights of individuals in respect of their entitlement to a specific portion of land is determined. Although the period that an individual has occupied the land is a relevant factor during the adjudication process, it is not the only factor that the Adjudication Committee or the Adjudication Land Officer considers.

19. Indeed, after the dispute resolution mechanism provided for under the Act has been exhausted, the lower court cannot revisit, nor overturn those decisions. Consequently, the trial court was obliged to hold that indeed the adjudication process in the matter had been completed, and that the Respondent was the bona fide proprietor of the suit lands. The trial Magistrate did not have the jurisdiction to re-open the issue of ownership of the suit land as suggested by the Appellants.

20. Considering that there was evidence to show that all the Appeals before the Minister were dismissed, and in view of the provision of Section 30(3) of the Land Adjudication Act, the decision of the Minister was final. The decision of the Minister could only be appealed by way of filing a Judicial Review Application to the High Court (ELC) and not otherwise.

21. The issue of whether the Appellants had lived on the suit land for more than sixty (60) years could not be dealt by the Magistrate. Indeed, the issue of whether the Appellants were granted a hearing by the Minister or not could only form a ground for Review of the Minister's decision in the High Court (ELC), and not by the Magistrate's court. The trial court's mandate was limited to ascertaining that the adjudication processes had been completed and enforcing the said decisions *(See Section 30(4) of the Land Adjudication Act)*. That is what the lower court did in the instant case.

22. Having failed to file a Judicial Review Application challenging the decisions of the Minister, the Appellants have no other option but to vacate the suit properties. Indeed, having been aware of the decisions of the Minister all along, the Respondent is entitled to the costs of the suit in the lower court. I say so because had the Appellants moved out of the suit land after the decisions of the Minister, the Respondent would not have gone through the process of trial in the lower court.

23. For those reasons, I find the Appellants' Appeal to be unmeritorious. The Appellants' Appeal is therefore dismissed with costs. The Appellants shall also pay to the Respondent herein the costs of the suit in Mwingi SRMCC No. 45 of 2004.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE