



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

ELC CASE NO. 623 OF 2011

HAMISI MOHAMED BAKARI

KALUME KITZAO MURIMI

ABDALLA SOMBO BAKARI

KASIRIMI MWAJIRANI & 149 OTHERS.....PLAINTIFFS

VERSUS

THE LAND ADJUDICATION OFFICER

DISTRICT LAND REGISTRAR

SENIOR REGISTRAR OF TITLES MOMBASA

THE COMMISSIONER OF LANDS.....DEFENDANTS

RULING

1. The Attorney General, on behalf of the defendants has raised a preliminary objection seeking that this suit be struck out for non-compliance with the provisions of Section 30 of the Land Adjudication Act. That before the plaintiff filed their suit, they did not lodge an appeal with the minister to challenge the adjudication process undertaken. Secondly that no consent of the Land Adjudication Officer was obtained. The Attorney General relied on the decision of **Jackson Koome versus Mlimongi M'ikuamba & 2 others (2018) eKLR** where the High Court held that consent was mandatory before filing a suit involving a dispute over an adjudicated land. The A.G argued that this court lack jurisdiction to entertain this matter by virtue of this provision of the law.

2. In response, Mr Kithi learned counsel for the plaintiffs opposed the Preliminary Objection. He submitted that the objection is being raised too late in the day. That the Preliminary Objection does not rely on pure points of law as there is need for evidence to be adduced to confirm whether or not the area has been gazetted as an adjudication area. That there is also need to confirm the appointment of an Adjudication Officer as provided for under Section 4(1) of the Adjudication Act. That Section 30 of the Adjudication Act is limiting the rights of parties to access justice contrary to the provisions of Article 48 of the Constitution. That the dissatisfaction with the behaviour of an adjudication officer does not equate with an interest in land. That a party cannot give you consent to sue him. He urged the court to disregard the Preliminary Objection and allow the suit to proceed on merits.

3. Section 30(1) of the Land Adjudication act provides thus;

“except with the consent in writing of the Adjudication Officer, no person shall institute and no court will entertain any civil proceedings concerning an interest in land in adjudication section until the adjudication section has become final in all respects under Section 29(3) of this Act.

Section 30(2), where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued unless the adjudication officer otherwise directs.”

4. In the suit before court, the plaintiffs has not denied that consent was not obtained. Their contention is that there is no evidence that the area is gazetted as un-adjudicated. The plaintiffs pleaded in plaint thus;

Paragraph 9; “The plaintiffs avers that all through they have been living on un-adjudicated land.”

Paragraph 10; “That sometimes in the year 2000, the 1st defendant connived with the other defendants and mobilized the community of Maganda village with a view to adjudicating their land to enable them be issued with the title documents. Paragraph 17; the plaintiff maintain that the whole process of adjudication was tainted with irregularities which has left them homeless.”

Paragraph 18; “That the adjudication process was un-procedural and they are asking this court to order that the same be re-adjudicated.

5. From the excerpts of the plaint taken above, the plaintiffs have themselves admitted that they are living on un-adjudicated land. It conflicts with the plaintiff’s submission that there is need for evidence to be adduced to show that the area is gazetted as un-adjudicated land. The plaintiffs also argued that the preliminary objection cannot stand because there is no adjudication officer that has been appointed as provided for under Section 5(1) of Cap 284. However, the 1st defendant is sued as the Land Adjudication and Settlement Officer and the plaintiffs have described in *paragraph 2* of the plaint that he is duly appointed pursuant to Chapter 284 of the Laws of Kenya.

6. Is the provision of Section 30 of Cap 284 limiting the rights of parties thus unconstitutional? The stated provision of Cap 284 only provides for a process that a party should follow before coming to court. The plaintiffs want this court through this suit to issue an order that their land be re-adjudicated. In my view, the court option should be followed only after the appeal to the minister is unsuccessful and or where such an appeal is lodged, no steps is taken to resolve the dispute. It was thus pre-mature to bring this suit and to this extent I do not find that Section 30 is unconstitutional.

7. On whether the 1st defendant cannot give consent where he is likely to be sued, I find this submission to be made without any supporting evidence (both legal and factual). The plaintiffs did not inform the court that they made a request to the 1st defendant to be issued with a consent and such application refused and or ignored. Further, on whether the defendants ought to have been estopped from raising the preliminary objection because it was being made too late in the case does not have a basis in law. In the case of **Republic versus Chief Registrar of the Judiciary & 2 Others exparte Ridey Services Ltd (2015) eKLR**, the High Court sitting in Nairobi citing other decisions held that a preliminary objection can be raised at any time when the case is active. The plaintiffs’ counsel had the choice to argue it on another date but he informed court that he was ready.

8. In spite of the analysis I have given above, I do not think that Section 30 of CAP 284 can limit the powers of this court bestowed upon it by **Article 162 (2) of the Constitution**. Article 162 (2)(b) provides thus; **“The Environment & LAND Court shall hear & determine disputes relating to the environment and the use and occupation of the title to land.”** This provision is reproduced in **section 13** of the Environment & Land Court Act. In light of the constitutional provisions, I hold that it is not fatal where a party opts to come to court before following the process given in Statute in this case being Section 30 of Cap 284. Consequently, I decline to strike out this suit for non-compliance with the provisions of Section 30 of the Land Adjudication Act. The Preliminary Objection is hereby dismissed with no order as to costs

Dated, signed and delivered at Mombasa this 14th day of June 2019.

A. OMOLLO

JUDGE.