



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO. 82 OF 2017

MUSAU KITONE.....PLAINTIFF

-VERSUS-

PATRICK MAKAU KATIKU.....1ST DEFENDANT

ELIJAH MWAU MUNYALI.....2ND DEFENDANT

ANNA MWIKALI MUNYALI.....3RD DEFENDANT

JULIUS KAMUYA KYENGO.....4TH DEFENDANT

AGNES NDUKU MALIO.....5TH DEFENDANT

MUTUKU KYENGO.....6TH DEFENDANT

RULING

1) What is before this Court for ruling is the 4th, 5th and 6th Defendant's Notice of Preliminary Objection dated 25th May, 2017 and filed in Court on even date.

2) The Preliminary Objection is premised on the grounds that: -

1. That the Application the same is bad in law and an abuse of Court process.

2. Section 29 of the Land Adjudication Act (Cap 284) Laws of Kenya provides that after the determination of an objection under section 26 of the said Act an aggrieved part may appeal to the Minister within sixty days. The appeal shall be in writing. Thus the land Adjudication officer has no jurisdiction to issue Consent to the aggrieved party to file a suit in Court on plot No.1865 which is subject of finding and/or Judgement/Judicial Judgement by a competent Judicial Officer appointed under an Act of Parliament (Cap 284).

3. That the findings in objection dated 25.1.15 amounts to a Judgement made by a quasi-judicial officer given power by an Act of parliament and any further suit over the same subject matter would amount to res judicata and or an abuse of Court process. Since the Adjudication Officer is empowered to adjudicate upon disputes under Cap 284, Section 26 and his findings can only be overturned by the Minister in an appeal as provided in Section 29 of the aforesaid Act.

4. That the Respondents gave evidence that he had no land at all and was living on the land as an employee having been brought to the land by one Manyali Thayaka to look after family cattle.

5. The Land Adjudication Consent is null and void as it purports to give power to Court to act as an appeal body against the finding/Ruling/determination of a claim over the Adjudication Register.

6. The Application is based on pleadings which are null and void and therefore incompetent.

7. There is no probability of success in the suit.

8. Other grounds to be adduced at the hearing of this suit.

3) On the 18th February, 2019 the Court directed that the Notice of Preliminary Objection be disposed off by way of written submissions. The 4th, 5th and 6th Defendants as well as the 2nd and 3rd Defendants filed their respective submissions on the 08th July, 2019.

4) The Plaintiff had not filed his submissions by the time of writing this ruling.

5) The Counsel for the 4th, 5th and 6th Defendants has submitted that it is not in dispute that the land parcel number 1865 Kasikeu Adjudication Section is still under an adjudication area/section. That during the adjudication process, the adjudication committee heard a dispute concerning the parties herein pursuant to Section 20 of the Land Adjudication Act Chapter 284 of the Laws of Kenya. That case committee No.KSK/COMM/115/92 made a decision on 16th February, 1992 that the plaintiff's name be inserted in the subject matter herein. That similarly vide objections Nos.110 and 1383, the Land Adjudication Officer held that the Plaintiff ought to get a share of the subject matter herein. The Counsel submitted that the Plaintiff did not appeal to the Minister against the determination of the objection proceedings as is provided for under Section 29 of the Land Adjudication Act. The Counsel added that the Plaintiff did not institute judicial review proceedings. The Counsel relies on the case of **Nicholas Mugambi & another (suing as the legal representative of the Estate of Peter Etharia M'Kailibi) & 4 others vs. Zachary Baariu & 6 others [2018] eKLR** where J. G. Kemei, J stated thus:-

“There is no evidence on record to show that Plaintiffs referred the matter to the arbitration board in accordance with Section 22; nor filed an A/R Objection with the DLASO under Section 26; nor finally proffered an Appeal to the Minister under Section 29 of the Act. They did not. They chose to come to Court instead. Neither did they file judicial proceedings under Order 53 CPR together with section 8 & 9 of the Law Reform Act, Cap 26 to quash the decision of the Committee and DLASO, if they indeed were aggrieved by the same as alleged in their suit before this Court.....”

The Adjudication proceedings are anchored under The Land Adjudication Act (Cap 284) where in the preamble, it is stated that;

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.

It is clear that the Plaintiffs have not exhausted the statutory provisions provided under the Act. The preliminary objection therefore, succeeds in respect to the 1st limb.

The Preliminary Objection has merit and the suit is therefore dismissed with Costs to the Defendants.”

The Counsel further cited the case of **William Mutuura Kairiba vs. Samuel Nkari & 2 others [2018] eKLR** where P. M. Njoroge, J held: -

“the Plaintiff has not controverted in any way that the disputed land is within an adjudication Section. It is also not controverted that the Plaintiff did not exhaust the procedures laid down in the relevant law.

In the circumstances, I uphold the Preliminary Objection filed by the 1st, 2nd & 3rd Defendants.

Therefore, this suit is dismissed.

Costs shall follow the event and are awarded to the Defendants.

It is so ordered.”

6) It was also the Counsel's submissions that the Plaintiff having failed to exhaust the remedies provided for under the Land Adjudication Act, he is not entitled to temporary injunctive orders that he has sought. That pursuant to Section 27(1) of the Civil Procedure Act Chapter 21 of the Laws of Kenya, the Plaintiff should be condemned to bear the costs of the suit for instituting the same in ignorance of the law.

7) The Counsel concluded by urging the court to dismiss the Plaintiff's suit and the application.

8) The Counsel for the 2nd and the 3rd Defendants submitted that as per paragraphs 6, 7, 8 and 9 of the plaint, this suit has been instituted to challenge the decision of the objection filed by the 1st Defendant. The Counsel went on to submit that **Section 29 of the Land Adjudication Act, Chapter 284 of the Laws of Kenya** 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...”

That pursuant to the aforementioned provisions of Section 29 of the Land Adjudication Act (supra), the only avenue provided for by the law to challenge the objection was through filing an appeal to the minister. The Counsel cited the case of **Paul Muthethia Mboroki vs. Land Adjudication & Settlement Officer, Buuri Sub-County & others [2018] eKLR** where E. C. Cheron, J quoted with the authority the decision in the case of **The Speaker of the National Assembly vs. Karume [1992] KLR at page 425**, where the Court held as follows: -

“Where there is a clear procedure for the redress of any particular grievance prescribed by the constitution of an act of parliament,

that procedure should be strictly followed.”

The Counsel added that this suit lacks merit.

9) The Counsel further cited **Section 30 of the Land Adjudication Act** which provides that: -

“Except with the consent in writing of the adjudication officer, no person shall institute, and no Court shall entertain, any Civil Proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects Under Section 29(3) of this Act”.

The Counsel was of the view that the reasoning behind Section 30 is that the process of determining rights of the people in an adjudication area is left to the mechanism set out in the Land Adjudication Act and not to the courts.

10) I have read the Notice of the Preliminary Objection as well as the submissions filed by the Counsel on record for the parties herein. As was submitted by the Counsel for the 4th and the 6th Defendants, it is apparent that in paragraphs 6, 7, 8 and 9 of the Plaintiff is out to challenge the objection proceedings that were filed by the 6th Defendant as well as the decision that was arrived at by the Land Adjudication Officer. There is nothing to show that the Plaintiff ever appealed to the Minister against the decision arrived at in the objection proceedings as is provided for under Section 29 of the Land Adjudication Act. He has instead chosen to institute this suit to challenge the objection proceedings and attack the decision of a party that is not before this court.

11) In my view, the plaintiff ought to have exhausted the procedure provided for under the Land Adjudication Act instead of rushing to court. In the circumstances, therefore, my finding is that the Notice of Preliminary Objection has merits. Having looked at the order dated 29th August, 2016 it is apparent that the Notice of Motion Application dated 08th July, 2016 has already been determined. Once the Plaintiff's suit is dismissed, the application and the order that was issued will have no legs to stand on. Consequently, I hereby strike out the Plaintiff's suit with costs to the 2nd, 3rd, 4th, 5th and 6th Defendants.

Signed, Dated and Delivered at Makueni this 7th day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Kituku for the Plaintiff

Mr. Muthiani for Mrs. Nyaata for the 2nd and 3rd Defendant

Mr. Kisongo for the 4th, 5th and 6th Respondents

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

07/10/2019.