



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 11 OF 2019

RAPHAEL KANGOGO.....1ST PLAINTIFF

JOSPHAT KIMUTAI KIMETO.....2ND PLAINTIFF

VERSUS

KIMETTO KANDIE LAL.....1ST DEFENDANT

JOSEPHINE JEPKOSGEI KIPCHUMBA.....2ND DEFENDANT

DAVID KIBET YATOR.....3RD DEFENDANT

KIMETTO WILLY KIPKENEL.....4TH DEFENDANT

BARNABA KISANG.....5TH DEFENDANT

SAMUEL KISANG.....6TH DEFENDANT

RULING

1. The 2nd to 6th Defendants' Notice of Preliminary Objection dated 20th March, 2019 seeks for the Plaint dated the 24th January, 2019 and filed on the same date to be struck out with costs for the court lacks jurisdiction on the matter in view of **Section 29 of the Land Adjudication Act Chapter 284 of Laws of Kenya**. They further contend without prejudice that the suit is fatally defective for failure to obtain consent of the Adjudication Officer as required under **Section 30 of the Act** and for suit being premature as the adjudication process is yet to be finalized in all respects under **Section 30(1) as read with Section 29(3) of the said Act**.

2. The preliminary objection came up for hearing on the 30th July, 2019 when Mr. Maiyo, Mr. Kipnyekwei and M/s Tum, the learned counsel for 2nd to 6th Defendants, 1st Defendant and the Plaintiffs respectively attended and directions on filing and exchanging written submissions were given. That subsequently, the submissions dated the 13th August 2019, 17th October, 2019 and 23rd October, 2019 were filed by Counsel for the 2nd to 6th Defendants, 1st Defendant and Plaintiffs respectively.

3. The submissions of the learned Counsel for the 2nd to 6th Defendants is that this court is without jurisdiction to hear and determine the suit in view of the fact that the question of ownership of the suit properties has been heard and determined by the Minister in favour of the Defendants, and that the court has no powers to sit on appeal of the Minister's decision. That the Plaintiffs have not obtained the requisite consent from the adjudication officer to file the suit which relates to suit properties in an area where the adjudication process is ongoing. That though the Plaintiffs' suit is brought as one for trespass, paragraph 11 of the Plaint discloses that it is a challenge of the Minister's decision over the suit properties. That **Section 29 of the Land Adjudication Act** provides that the Minister's decision is final. That as there is no appeal provided for over the Minister's decision, the suit is incompetent, defective and the court is without jurisdiction. The learned Counsel referred to the following superior court's decisions:

- **Owners of Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Limited (1989) eKLR**, and,
- **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others – Supreme Court Civil Appeal (Application) No. 2 of 2011 [2012] eKLR**.

On the issue of jurisdiction, and

- *Watuku Mutsiemi Watuku & Another Vs Republic & 5 Others [2018] eKLR* and,
- *Onesmus Daniel Masumbuko & Others Vs Augustino Baya Thotho [2019] eKLR*,

On the Minister's decision being final and,

- *Nicholas Tukei Vs Chepochepkatug Loyeruk & 2 Others (2013) eKLR* and,
- *Moses Mbuvi Kithi Vs Kalikanda Mwola (2008) eKLR* and,
- *William Mutuura Kairiba Vs Samuel Nkari and 2 Others (2018) eKLR* and,
- *Jackson Koome Vs M'limongi M'ikuamba & 2 Others [2018] eKLR*,

On the mandatory requirement of consents from the Adjudication Officer before filing a suit on properties under adjudication process. The learned Counsel also referred to the case of *Okiya Omutatah Okoiti & Another Vs Bidco Africa & 4 Others; Uhai Lake Forum (Interested Party) (2019) eKLR* on the position that where a party comes to court before exhausting the legally established process to total disregard of the available mechanisms amounts to ***"disenfranchising this court of the necessary jurisdiction"***.

4. The learned Counsel for the 1st Defendant submitted that as the Plaintiffs claim over the suit land had been heard and decided against them up to the level of an appeal to the Minister, this suit is res-judicata. That accordingly, the court is without jurisdiction to hear and determine this suit and should be struck out with costs.

5. The learned Counsel for the Plaintiff in opposing the preliminary objections by the Defendants submitted that this court has jurisdiction to hear and determine the suit in view of the provisions of **Article 262 (2)(b) Constitution of Kenya, 2010** and **Section 13 of the Environment and Land Court Act**. That **Section 30(1) of the Land Adjudication Act** cannot be said to ouster this court's jurisdiction to preserve and protect the suit properties. That the suit properties are not under an ongoing adjudication process as the exercise has been completed and titles issued to the Defendants. The learned Counsel referred to the case of *Francis Musyoki Makenzi & 61 Others Vs Director for Land Adjudication & Settlement & 2 Others, Samuel Mulinge Kyalo & 36 Others (Applicants) [2019] eKLR*, where the preliminary objection based on failure to obtain the adjudication officer's consent before filing the suit was rejected as the adjudication register had become final. The Counsel further referred to the case of *D. T. Dobie & Company (Kenya) Limited Vs Joseph Mbaria Muchina & Another [1980] eKLR*, where Madan JA, as he then was stated that ***"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable"*** in support of her submission that striking out the plaint is a draconian step that will leave the Plaintiffs without a remedy.

6. The following are the issues for the court's determinations;

(a) Whether this court has jurisdiction in this suit in view of Sections 29 and 30 of the Land Adjudication Act.

(b) Who pays the costs of the preliminary objection?

7. The court has after considering the grounds on the preliminary objection in the notice dated 20th March, 2019 and statements of defence filed by the Defendants, the written submissions by the three learned Counsels for the parties and the pleadings filed come to the following determinations;

(a) That this suit was commenced through the Plaint dated and filed on the 24th January, 2019 seeking for two declaratory orders that the suit properties described belongs to the Plaintiffs, one injunction order restraining the defendants from the said properties, determination of boundaries of one of the properties, eviction of the Defendants from the said lands, general damages for trespass, mesne profits for illegal use of the properties from 1998 to the date the Defendants vacate, costs and interests. That the Plaintiffs are at paragraph 8 of the Plaint described as representatives of Kamindira Family and the de facto owners of the suit properties and that they had been in possession until 1998, when they were forced to flee after one of their member killed another from Kaplal Family. That at paragraph 10, they disclose that during land adjudication, the suit land were awarded to the Defendants and the matter was heard before the Adjudication Committee, Arbitration Board culminating with an appeal to the Minister whose decision of 19th May, 2017 was in favour of the Defendants. That the Plaintiffs' position is that the Defendants' claim over the suit properties was unlawful, unjustified and were illegally registered with the titles. That the Defendants' occupation of the suit lands amounts to trespass and has caused the Plaintiffs' loss, damages and have this suit.

(b) That from the finding in (a) above, and in view of the statements of defence filed by the Defendants, both sides are in agreement that the parties herein have had the dispute over the ownership of the suit properties heard by the entities provided for under the **Land Adjudication Act Chapter 283 of Laws of Kenya** to the highest level of an appeal to the Minister. That the Minister's decision was delivered on the 19th May, 2017 in favour of the Defendants and according to the Defendants, that decision is final, and hence the preliminary objection that this suit is res-judicata and the court without jurisdiction.

(c) That under the Land Adjudication Act, the highest forum for determining issues of ownership or title to land under adjudication is the Minister who is defined as the Cabinet Secretary responsible for matters relating to land. That the Minister is empowered under **Section 29(4) of the said Act** to delegate by notice in the Gazette, the powers to hear appeals and his duties and functions under the Section to any public office by name or to the person for the time being holding any public officer specified in such

notice. That **Section 29(1) of the Act** provides that “...the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.” [emphases mine]. That superior courts have in various decisions, including the Court of Appeal in ***Watuku Mutsiemi Watuku & Another Vs Republic & 5 Others*** and this court in ***Onesmus Daniel Masumbuko & Others Vs Augustino Baya Thoto [2019] eKLR***, held that the Minister’s decision is final and not amenable for appeal to this court, unless when moved through invoking the court’s judicial review jurisdiction. That this suit is clearly not one invoking the court’s special jurisdiction of judicial review under the **Civil Procedure Rules**, the **Fair Administrative Actions Act** or the **Constitution, 2010**.

(d) That the Plaintiffs have annexed to their list of documents dated the 24th January, 2019 copies of the green card for the suit properties that show that they were registered on the 24th May, 2017, which is a confirmation that the adjudication exercise had been finalized. That the registration of the titles by the Registrar must have been done after receipt of the adjudication register upon completion of the Minister’s appeal in accordance with **Section 29(3) of the Land Adjudication Act**. That there was therefore, no need for the Plaintiffs to seek for consent of the adjudication officer before filing this suit, as the suit properties were not subject to any ongoing adjudication exercise. That in that respect, the decision in the case of ***Francis Musyoki Makenzi & 61 Others Vs Director of Land Adjudication & Settlement and 2 Others, Samuel Mulinge Kyalo & 36 Others (Applicants) [2019] eKLR***, is relevant.

(e) That it is true that a court of justice should aim to sustain a suit rather than terminate it by summary dismissal as was held in the Court of Appeal case of ***D. T. Dobie & company (Kenya) Limited Vs Joseph Mbaria Muchina & Another [1980] eKLR***. However, the situation in this case is different as the Plaintiffs herein have come to this court in pursuit of a claim of ownership of lands that has already been determined in accordance with the law under the Land Adjudication Act. The provisions of **Section 13 of the Environment and Land Court Act No. 19 of 2011** does not oust the provision of **Section 29(1) (b) of the Land Adjudication Act**. That to allow the Plaintiffs suit to continue being processed through the hearing processes when the foregoing findings are apparent, would be counter to the provisions of **Article 159 (2)(b) of the Constitution, Sections 1A (1), 1B and 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That will amount to delay, increase the time and costs for the court and parties, while it is apparent at this stage that court is without jurisdiction in the matter.

(f) That as was held in Court of Appeal, cases of ***Owners of Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Limited (1989) eKLR*** and ***Supreme Court of Kenya in Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others, Supreme Court Civil Appeal (Application) No. 2 of 2011 (2012) eKLR***, where the court has no jurisdiction conferred by the constitution or other written law, the court has no basis to continue with the proceedings. That the situation could have been different had the Plaintiff invoked the court’s special jurisdiction of judicial review.

(g) That in view of the foregoing, the Defendants’ preliminary objection has merit and the Plaintiff should therefore meet the costs in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

8. That for the reasons set out above, the preliminary objection by the Defendants to the suit commenced by the Plaintiffs through the Plaintiff dated and filed on the 24th January, 2019 is hereby upheld and the suit struck out with costs.

Orders accordingly.

Dated and delivered at Eldoret this 20th day of November, 2019.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Oyo for M/s Tum for Plaintiffs.

Mr. Mitei for Nyekwei for 1st Defendant.

Mr. Maiyo for 2nd to 6th Defendants.

Christine: Court Assistant