



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO 322 OF 2016
(Formerly Civil Suit No.6/2016)

THOMAS KINYORI HUSSEIN

RAMA LUKINDO SENZIGHE

WALI OMAR KIPIMO

RODGERS HUSSEIN MOHAMMED..... PLAINTIFFS

**[All suing on their behalf and on behalf
of the members of Mata Community within Mata Location]**

-VS-

1. MOKHA MGHANGA

2. JULIUS MWANZIGHE

3. BEN MWAMBURI.....DEFENDANTS

**[All sued on their behalf and
on behalf of the members of Lesuyai Community]**

RULING

1. By a Plaint dated 24th October 2016 and filed in Court on 25th October 2016, the Plaintiffs have brought this suit against the defendants seeking the following reliefs:

a. Permanent Injunction orders restraining the Defendants, their servants and/or agents from further entering, trespassing, unlawfully developing, burying their deceased persons on the piece of land or from exercising any further activities or dealings on the Suit Property.

b. A declaration that the Plaintiffs are the rightful owners of the land (hereafter known as the Old Mata/Matutani area since time immemorial and therefore have the rights of occupation, peaceful and quiet enjoyment of the said property and that any occupation, sell, purchases

and or sublease made by the Defendants are unlawful and therefore null and void).

c. A mandatory eviction order against the Defendants, their servants and/or agents who have wrongfully and forcefully possessed, occupied and settled on the Plaintiffs piece of land.

d. Mandatory orders that the bodies forcefully buried by the Defendants on the Plaintiffs suit piece of land be exhumed and ejected from the Plaintiffs piece of land and the property be used by the Plaintiffs community only.

2. By a Notice of Motion dated 24th October 2016, the Plaintiffs are seeking a temporary order of injunction restraining the Defendants by themselves, agents or servants from interfering, further entering, trespassing, developing, burying their deceased persons on the piece of land and/or from conducting any manner of dealings whatsoever on the unregistered and unsurveyed land known as OLD MATA area situated in currently known as Kimurigo Location within Taveta County pending hearing and determination of this suit. The application is based on the grounds on the face of the motion and supported by the affidavit of Thomas Kinyori Hussein sworn on 24th October 2016 and further affidavit sworn on 11th July 2017.

3. The Plaintiffs' claim is that they are of the Mata Community (Pare) who have been squatters on the unregistered and unsurveyed piece of land measuring approximately 2000 acres situated in Mate Village, Kimurigo Location within Taveta County since 1927 and have continuously grazed and conducted subsistence activities on the said land for a very long period of time without any interruption from any persons. They aver that it was for the same reasons that the piece of land was declared community land in 1987 by the then Kimala – Mata sub location land adjudication and later confirmed by the land Adjudication committee on 9th July 2007. It is the Plaintiffs' contention that without any colour of right, the Defendants who are total strangers and only known to the Plaintiffs as the Lesuyai community have forcefully, unlawfully and illegally trespassed, invaded and gained forceful ingress on the suit land without the consent of the Plaintiffs and that the Defendant are building trenches, selling and subleasing the suit land to unsuspecting 3rd parties thereby depriving the Plaintiffs of their rightful ownership, possession, occupation and peaceful use of the land. The Plaintiffs aver that the Defendants have acted in total disregard of the Plaintiffs' legal rights to own land, have the same protected and to have peaceful enjoyment and have continued to trespass and are currently threatening to forcefully evict the Plaintiffs from the land. The Plaintiffs further aver that they are at risk of losing their native land where they have for long time grazed their animals and undertook subsistence farming. They state that due to the Defendants acts and/or omissions they have suffered and continue to suffer irreparable loss and damage.

4. The 1st and 2nd Defendants opposed the application and filed a Replying Affidavit sworn by Mchanga Moka, the 1st Defendant on 6th March 2017 and an affidavit of Lilian Oluoch –wambi sworn on 5th June 2017 in which they deny the Plaintiffs claim and depones inter alia that Suit Land are their property as Lesuyai Community in which they have carried out various activities and developments for over thirty (30) years. The Defendants further aver that there was a previous dispute which was decided against the Plaintiffs and that there is another pending case over the Suit Property which was filed by Hon. Basil Criticos against one of the Lesuyai members Atanasi Mchawiya being **Civil Suit No.247 of 2010**. They further aver that after the appeal by Lesuyai succeeded before the Arbitration Board, Lesuyai Community have lived peacefully in the Suit Property tilling their land until 5th July 2016 when villagers from the Pare Community who are the Plaintiffs herein started invading the Suit Property, destroying properties, boundaries and allocating the land to themselves claiming that the Suit Property belonged to their ancestors, and that the matter was reported to the police, Director of Public Prosecution, the Inspector General of Police and the National Land Commission. It is the defendants' contention that there are various development and or activities currently ongoing on the suit property by the community and should the defendants be restrained, the community will be denied their rights to basic needs such as food which will infringe on their right to life. The defendants contend that the Plaintiffs application is without merit, bad in law and an abuse of the court process since the land demarcation and registration process is still ongoing and that the Plaintiffs have not been granted consent to institute these proceedings as required by the Land Adjudication Act, Chapter 284 Laws of Kenya, and pray that the same should be

dismissed with costs.

5. The 1st and 2nd defendants also filed a notice of preliminary objection dated 5th April 2017 seeking to have the entire suit struck out or dismissed on the ground that it does not comply with the Mandatory requirements of the Land Adjudication Act, Cap 284 Laws of Kenya.

6. When the matter came up before me on 11th May 2017, I directed that the preliminary objection and the application be heard simultaneously and that the same be argued by way of written submissions.

The plaintiffs filed their submissions dated 2nd October 2017 on 5th October 2017 while the 1st and 2nd Defendants filed their submissions dated 20th November 2017 on even date.

7. I have considered the Plaintiffs Notice of Motion, supporting affidavits and annexures, the 1st and 2nd Respondents Replying Affidavits and Notice of Preliminary Objection and the Written Submissions filed by their respective Advocates as well as the authorities cited. The issue for determination by the court at this stage is whether the preliminary objection taken by the 1st and 2nd respondents is sustainable or not.

8. In the case of Owners of the Motor Vessel “Lillian S” –v- Caltex Oil (Kenya) Ltd (1989)KLR I, Nyarangi JA stated:

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide on the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Referring to the passage in Words and Phrase legally defined – volume 3: 1 – N page 113, Nyarangi, JA went on:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, commission under which the court is constituted, and may be extended or restricted by the like means.....where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

9. As was stated by the Supreme Court in Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the mater, for without jurisdiction, the court cannot entertain any proceedings.”

10. The 1st and 2nd Defendants Preliminary Objection is premised on the ground that the Plaintiff’s suit does not comply with the mandatory requirements of the land Adjudication Act. Under the provisions of the Land Adjudication Act Cap 284 Laws of Kenya, the court has no jurisdiction to entertain any dispute arising out of the adjudication process unless the adjudication process is completed and/or consent has been given by the adjudication officer for the suit to be brought. Similarly, under the Act, a court cannot entertain a claim on interest in land which is still under adjudication without the consent of the adjudication officer as provided under Section 30 of the Act.

11. Section 30 of the Land Adjudication Act provides as follows:

“30 (1) Except with the consent 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 aspects under Section 29(3) of this Act.”

Section 29 (3) referred to states as follows:

“29 (3) When all appeals have been determined, the Director of Land Adjudication shall : -

a) Alter the duplicate register to confirm with the determination; and

b) Certify on the duplicate adjudication register that it has become final in all respects and send details of the alterations and copies of certificate to the Chief Land Registrar, who shall alter the adjudication, register accordingly. ”

12. The Plaintiffs from their own pleadings acknowledge that the suit land is land under adjudication. That being so, the Plaintiffs ought to have obtained the consent of the Adjudication Officer prior to filing this case. The Plaintiffs admit that they did not obtain consent to file this case. The Plaintiffs aver that owing to the nature of urgency in the matter, they were unable to follow the procedure of obtaining consent from the Adjudication Officer because they were apprehensive that the application would be overtaken by events as the Defendants were moving with haste to bury their dead on the suit land. The provisions of Section 30 of the Land Adjudication Act are couched in mandatory terms. A court cannot entertain a claim on interest in land which is still under adjudication without the consent of the adjudication officer. This is a substantive statutory requirement of the law and not a mere procedural technicality as the applicants have submitted. It was clearly stated in Joshua Werunga –v- Joyce Namunyok & 2 Others (2015) eKLR *inter alia*.

“In the case of Raila Odinga –v-IEBC & Others (2013)eKLR, the Supreme Court said that Article 159 (2)(d) of the Constitution simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigant to comply with procedural imperatives as they seek justice from the court. ”

Obtaining consent as required under Section 30 is not a technicality that can be disregarded. It is a fundamental statutory requirement that one must obtain before commencing proceedings in court. In my view, I do not think that Article 159 will come to the aid of the Plaintiffs in this case.

13. In the case of Benjamin Okwaro Estika –v- Christopher Anthony Ouko & Another (2013) eKLR, the Court of Appeal commenting on the application of Sections 29 and 30 of the Land Adjudication Act stated:

“That being so, the mandatory requirements of Section 30(a) had to be complied with i.e. consent of the land adjudication officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned Judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”

14. From the above judicial pronouncement, it is patently clear that the courts have held that they have no jurisdiction to deal with a dispute where the process of adjudication is ongoing unless the adjudication officer has under Section 30 (1) of the Act given consent for the party to institute court proceedings. No such consent was granted by the Adjudication Officer to the Plaintiffs to enable these proceedings to be brought. The court in the premises has no jurisdiction to entertain the matter as no consent was obtained prior to its being filed.

15. I accordingly find and hold that the 1st and 2nd Defendants preliminary objection has merit and I uphold the same.

I hereby vacate the orders issued by the court on 14th December 2016 and strike out the Plaintiffs suit with costs to the 1st and 2nd defendants.

Delivered, signed and dated at Mombasa this 14th March, 2018.

C. YANO

JUDGE