



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 106 OF 2016**

**IDD NDEGWA MANGALE**

**(Suing on his behalf and on behalf of and representing all parties interested in the estate of)**  
**MWANGALE MWANYONGO.....PLAINTIFFS**

**-VERSUS-**

- 1. FREDRICK JOHN KOMBO**
- 2. GURIRO LIMITED**
- 3. TEDDY MAJALIWA KOMBO**
- 4. PRUDENCE DEMU MREZI (Estate/administrator of Estate)**
- 5. SAMUEL GWANDU MUNGA**
- 6. FLORENCE FURAH KOMBO**
- 7. DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER KINANGO SUB COUNTY**
- 8. DIRECTOR, LAND ADJUDICATION & SETTLEMENT OFFICER**
- 9. THE CHIEF LAND REGISTRAR**
- 10. HON. ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. By a Plaint dated 11<sup>th</sup> May 2016 and filed on 17<sup>th</sup> May 2016, the Plaintiffs have brought this suit against the Defendants seeking the following reliefs:

- a) A declaration that the Plaintiffs are the absolute and legal owners of land parcels KWALE/TSUNZA ADJUDICATION/1362,1620, 1628,1653, 1654, 1655, 1656, 1671, 1672 AND 1673.**
- b) A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants whether by**

**their servants, or agents or employees or otherwise howsoever from removing, transferring, disposing, trespassing onto, charging, occupying and/or in any manner interfering with the Defendants (sic) land parcels number KWALE/TSUNZA ADJUDICATION/1362,1620, 1628,1653, 1654, 1655, 1656, 1671, 1672 AND 1673.**

**c) A permanent Injunction restraining the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants whether by themselves, their servants, agents or employees or otherwise howsoever from transferring, altering, opening new register and/or registering the 1<sup>st</sup> -6<sup>th</sup> Defendants as the proprietors KWALE/TSUNZA ADJUDICATION/1362,1620, 1628,1653, 154, 1655, 1656, 1671, 1672 AND 1673**

**d) A Mandatory Injunction directed to the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants whether by themselves their servants, agents or employees or otherwise howsoever to alter, amend the register and/or any other records for KWALE/TSUNZA ADJUDICATION/1362,1620, 1628,1653, 1654, 1655, 1656, 1671, 1672 AND 1673 to reflect the name of the Plaintiff herein.**

**e) Costs of the suit and interest.**

**f) Any other relief this Honourable Court may deem just and fair to grant.**

2. The Plaintiff has stated that he is suing on his own behalf and on behalf of and representing all persons interested in the Estate of Mangale Mwanyongo. The other 13 plaintiffs are described as the grandchildren and beneficiaries of Mangale Mwanyongo (deceased).

3. The Plaintiffs claim is that the late Mangale Mwanyongo (deceased) owned a huge chunk of land in Tsunza where he lived with his wife Nzunze Mangale and that upon his demise, his children occupied the said land which measures over 100 acres and upon the demise of his children, his grandchildren who are the plaintiffs herein occupied the land. It is the Plaintiffs contention that in the year 2006 one Samuel Ngwatu Munga the 5<sup>th</sup> Defendant, who is not related to the Plaintiffs, trespassed onto the said land and started cultivating it.

4. The Plaintiffs aver that they reported the matter to the village elder who told the 5<sup>th</sup> Defendant that he had no right to occupy the Plaintiffs land but he refused to vacate and the Plaintiffs went to report to the District Officer Kinango but did not reach the District Officer because they were barred by the area chief of Gandini Location who is a nephew to the 5<sup>th</sup> Defendant.

5. The plaintiffs that in year 2003 while the 5<sup>th</sup> Defendant was still in occupation of the Plaintiffs land, Tsunza Adjudication Section was declared for demarcation and the Plaintiffs raised their dispute with the demarcation committee who later informed the plaintiffs that the demarcation had been done and the land had been sub-divided into KWALE/TSUNZA ADJUDICATION/1632 in the name of the 5<sup>th</sup> Defendant and 1363 in the name of IDD NDEGWA.

6. The Plaintiffs further state that they objected the demarcation to the 7<sup>th</sup> Defendant who dismissed the Plaintiffs objection and allocated the parcels of land to 1<sup>st</sup> – 6<sup>th</sup> Defendants.

The Plaintiffs aver that they have made several steps to recover the land but all in vain, hence this suit.

7. By a notice of motion dated 11<sup>th</sup> May 2016, the Plaintiffs are seeking Temporary Injunction orders as well as a Mandatory Injunction against the defendants over the suit properties. The application is supported by the affidavit of Idd Ndegwa Mangale and the grounds on the face of the motion.

8. The 1<sup>st</sup> Defendant opposed the Application and filed Grounds of Opposition dated 24<sup>th</sup> October 2016 and also filed a Notice of Preliminary Objection dated 25<sup>th</sup> October 2016 objecting the Plaintiffs application and the entire suit on the following grounds:

**i) That no Grant of Letters of Administration to the Estate of Mangale Mwanyongo has been issued and thus the Plaintiff/Applicant has no *locus standi* in the matter.**

**ii) That the adjudication register for the adjudication section herein has not been finalized and/or become final and thus this Honourable Court does not have jurisdiction to hear and determine this matter.**

**iii) That no consent in writing has been given by the Adjudication Officer for the commencement of the proceedings herein.**

**iv) That in the premises, these proceedings ought to be dismissed and/or struck out.**

9. The 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants also a Notice of Preliminary Objection dated 17<sup>th</sup> November 2017 on the following grounds:

**a) That this Honourable Court does not have jurisdiction to hear and determine this matter by dint of operation of Section 27 and 29 of the land Adjudication Act Cap 284 Laws of Kenya.**

**b) That this court lacks jurisdiction to hear and determine the instant matter without proof of determination of the dispute at the land adjudication tribunal and exhaustion of the appellate process under the statute.**

**c) That in any case this court cannot usurp jurisdiction granted to an independent judicial body by statute.**

**d) That further the application and suit have been filed by an individual without *locus standi* therefore the suit herein is incurably defective.**

**e) That these proceedings ought to be dismissed and/or struck out for being defective and failing to comply with mandatory provisions of law.**

10. The Preliminary Objections were canvassed by way of written submissions. The 2<sup>nd</sup> Defendant filed his written submissions on 6<sup>th</sup> March 2017 in which it was submitted that the Plaintiff lacked the *locus standi* to make the application in the absence of proof of a grant of probate or letters of administration over the estate of Mangale Mwanyongo (deceased) and that the leave granted to the plaintiff was insufficient to bring the suit without a proper grant.

11. The 1<sup>st</sup> defendant filed his submissions on 29<sup>th</sup> May 2017 in which it was submitted that the plaintiff lacks *locus standi* because he has failed to show whether he is suing in a representative capacity on behalf of others or on behalf of the estate of a deceased person without letters of administration. The 1<sup>st</sup> defendant further submitted that this court lacks the requisite jurisdiction to entertain both the application and the suit because the plaintiff failed to pursue the remedies available to him under Section 29 of the land adjudication Act Cap 284 laws of Kenya.

12. The 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> defendants filed their submissions on 29<sup>th</sup> November 2017 raising the same issues as the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

13. The Plaintiff filed their submissions on 29<sup>th</sup> May 2017 in which it is submitted that he suit land was ancestral land belonging to and occupied by the plaintiff and that the same does not belong to the deceased as it was not registered in his name. the Plaintiff submitted that the inclusion of the name of the deceased was not fatal and can be cured by amendment and that the suit is an emotive one that pertains land and a mere technicality should not be used to deny the plaintiff justice.

14. I have considered the Notice of Preliminary Objections, filed the written submissions and the

authorities cited. The issues for determination by the court at this state is whether the plaintiff has *locus standi* and whether this court has jurisdiction to hear the matter.

15. In the case of **Owners of Motor Vessel “Lillian S” –v- Caltex Oil Kenya Ltd (1989) KLR 1**, 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 proceeding 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.”*

16. In the case of **Samuel Kamau Macharia & Another – v – Kenya Commercial Bank Ltd & 2 others (2012) eKLR**, the supreme Court stated:

*“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 matter, for without jurisdiction, the court cannot entertain any proceedings.”*

17. The plaintiff from his own pleadings acknowledges that the suit land was under adjudication and that he is dissatisfied with the decision of the Land Adjudication officer who overruled their objection in favour of 5<sup>th</sup> defendant. The process of dispute resolution while adjudication is in progress is provided for under the land adjudication Act, Cap 284 Laws of Kenya. Section 26-30 of the Act give an elaborate process of dispute resolution. Section 29 provides as follows:

**1) 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 by –**

- a. Delivering to the minister an appeal in writing specifying the grounds of appeal, and**
- b. Sending a copy of the appeal to the Director of land adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.**

Section 30 of the Act provides:

*“ (1) 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.*

***(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, having regard to the stage which the proceeding have reached, otherwise directs.***

***(3) any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty –eight days after the refusal, appeal in writing to the minister whose decision shall be final.***

***(4) the foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforce or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time of appeal has expired.”***

18. It would appear that the plaintiff disputed the finding of the land adjudication committee and appealed to the land adjudication officer Under Section 26 of the Act. If became aggrieved by the Land Adjudication officer’s decision, the plaintiff had a right to appeal to the minister within sixty days. There is no evidence that the plaintiff appealed as required by section 29 of the Act. There is no evidence either that the plaintiff obtained consent from the Adjudication Officer to file the interest in a court of Law. In my view, the plaintiff having failed to appeal to the minister against the decision of the land adjudication officer and having failed to get consent of the said officer to file the matter in a court of law, then the decision of the land adjudication officer because final and cannot be challenged except as may be otherwise provided by any other legal provision.

19. For the above reasons, I find that this suit is not properly in court and the court’s jurisdiction has been ousted under section 30 of the Land Adjudication Act. This is a substantive statutory requirement of law and not a mere procedural technicality as the plaintiffs have submitted.

20. The second issue for determination is whether the plaintiff has *locus standi* to institute and prosecute this matter. The plaintiff states that he is suing on his own behalf and on behalf of and representing all persons interested in the estate of Mangale Mwanyongo (deceased). He avers that the plaintiffs are the grandchildren and beneficiaries of the deceased who owned the suit land. To constitute and prosecute an action in respect of a deceased person, a litigant is clothed with locus upon obtaining a limited or a full grant of letters of administration. In the case of **Otieno – v – Ongo & Another (1986 1989)EALR 468**, the Court of Appeal rendered itself thus:

***“.....an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception...”***

The court proceeded to state:

***“ To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus means he cannot be heard, even on whether or not he has a case worth listening to .....”***

21. There is no evidence that the plaintiff herein has taken out and obtained letters of administration in respect of the estate of Mangale Mwanyongo (deceased). Accordingly his capacity and or *locus standi* to initiate these proceedings as pleaded in the plaint has not been established. In the absence of *locus standi*, the action herein is incompetent.

Accordingly I find and hold that the preliminary objections have merit and I uphold the same. The plaintiffs suit is struck out with costs to the defendants.

**Delivered, signed and dated at Mombasa this 9<sup>th</sup> April, 2018.**

**C. YANO**

**JUDGE**