REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 1 OF 2018

(FORMER MERU HCA. 129 OF 2009)

JACKSON KOOME.....APPELLANT

VERSUS

M'LIMONGI M'IKUAMBA.....1ST RESPONDENT

LAND ADJUDICATION & SETTLEMENT

OFFICER NYAMBENE DISTRICT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The Appellant's Case

1. The appellant filed a plaint dated 13/1/1997 in the Chief Magistrate Court in Meru in which he sought the following orders against the defendants therein (who are now named as the respondents herein) jointly and severally:-

(a) A declaration that the awarding and subsequent registration of Parcel No. 544 is illegal;

(b) A declaration that termination of objection case No. 57 of 1967 was illegal;

(c) Cancellation of 1st defendant's name from in (sic) register/folio in respect of the land parcel No. 544 situate in Uringu adjudication section and the same be substituted with the plaintiff's name;

(d) Mesne profit;

(e) General damages for non-user;

(f) Special damages for destroyed trees (namely muringa, gravelia and mutimoko)

(g) Any other relief.

2. According to that plaint the plaintiff's father was the owner of Parcel No. 544 and the 1st and 2nd defendant colluded and defrauded the plaintiff's father of that land with the result that it was given to the 1st defendant by the 2nd defendant. The particulars of the fraud by the 1st and 2nd defendants were given in paragraph 6 of that plaint. The particulars of damages were given and quantified in paragraph 7 of that plaint.

3. The defendants filed their respective defences to the suit and the 1st defendant also later filed a notice of preliminary objection dated 12/11/2007 to the effect that the suit offended the provisions of **Section 8** of **Cap. 283** as read with **Section 30** of **Cap. 284** and sought that the suit be struck out with costs.

4. The provisions of **Section 8** of **Cap 283** read as follows:

Staying of land suits

8.(1)Subject to the provisions of this section, no person shall institute and no court whatever shall take cognisance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given.

(2)No officer of any court whatever shall issue any plaint or other legal process for the institution or continuance of any proceedings which by virtue of the provisions of subsection (1) of this section are for the time being prohibited, except upon being satisfied that the consent required by those provisions has been given.

(3)Nothing in the foregoing provisions of this section shall prevent the enforcement or execution of any final order or decision given or made in any proceedings in respect of any land in an adjudication area, where such order or decision is not the subject of a pending appeal at the time of the application of this Act to such land.

(4)A certificate signed by an Adjudication Officer certifying any parcel of land to be, or to have become on a specified date, land within an adjudication area shall be conclusive evidence that the land is such land.

(5)Every certificate purporting to be signed by an Adjudication Officer shall be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown.

5. The provisions of **Section 30** of **Cap 284** read as follows:

Staying of land suits

30(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 proceedings 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 enforced 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 for appeal has expired.

(5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.

6. Upon the hearing of the preliminary objection based on the above cited provisions of the law, the trial issued a ruling on the **30th October 2009** and struck out the plaint but with no orders as to costs.

7. The appellant being dissatisfied with the whole of that decision on the preliminary objection lodged this appeal raising five grounds as follows:-

(1) That the learned magistrate erred in law in her finding that consent of the Land Adjudication Officer should be filed at the time the suit is instituted whereas there is no such provision and the law only requires the court to be satisfied there was consent before entertaining such suit.

(2) That the learned magistrate erred in law and in fact in failing to consider and/or acknowledge a copy of the Adjudication officer's consent which was duly stamped and a letter from Provincial Land Adjudication Officer authorizing issuance of consent produced by plaintiff's advocate at the hearing of the preliminary objection.

(3) That the learned magistrate erred in law by striking out a plaint which had been entertained by other courts including the High court.

(4) That the learned magistrate erred in law and in fact by going against and/or failing to comply with the High Court Order for the matter to be heard on its merits.

(5) That the learned magistrate erred in law and in fact in her ruling in upholding a preliminary objection raised almost 12

years after commencement of the suit.

Submissions of the Parties

8. This appeal was dealt with by way of written submissions. The appellant filed his submissions on 15/12/2017 while the 1st respondent filed his submissions on 9/1/2018.

Determination

Issues for Determination

9. The issues that arise for determination in this matter are as follows:

> ***a. Whether the trial court erred in holding that the consent of the Land Adjudication Officer should be filed at the time of institution of suit;***
>
> ***b. Whether a consent not so filed but produced by the plaintiff's counsel at the hearing of the preliminary objection should be considered or acknowledged by the court.***
>
> ***c. Whether the trial court erred in failing to hear the matter on its merits as ordered by the High Court and in striking out a plaint that had been entertained by the High Court;***
>
> ***d. Whether it was proper to entertain and uphold a preliminary objection raised 12 years after the institution of a suit.***

The issues are discussed as here under.

> ***a. Whether the trial court erred in holding that the consent of the land adjudication officer should be filed at the time of institution of suit;***

10. In its ruling striking out the plaint the trial court found that the land fell under the provisions of **Cap 284** and noted that no consent was filed at the institution of the suit. It stated that the provisions of **Section 30** of the **Act** are couched in mandatory terms that the consent should be filed at the time of the institution of the suit and that failure to file such consent is fatal to the suit.

11. In submissions on the appeal, the counsel for the appellant lamented that the counsel for the defendant who raised the preliminary objection does not seem to understand the fundamental difference between the two legislative regimes, that is, Cap 283 and Cap 284. He submits that Cap 283 is the original older version promulgated in 1959 during the advent of the colonial period and this Act described the three stages of the process of land registration as follows:

> (i) Ascertainment of each individual holding by the process of chain survey and recording it in a book called the record of existing rights.
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> (ii) Hearing by the committee of all disputes arising from the first process during which stage no dispute arising from that first process was allowed to be heard by the ordinary court of law except with the consent of the land adjudication officer. He submits that the law which applies is the African customary law which was the basis of individual land holdings and should another law be found to apply to any land in dispute this required to go to court and this is how the consent of the land adjudication officer became necessary and was sought under **Section 8** of **Cap 283.**
>
> (iii) Demarcation and consolidation of the individual's several holdings into one single whole. Counsel submitted that under this stage there arose numerous disputes and if there was any law which was applicable other than African customary law this requires parties to go to ordinary court of law and this is where consent was also required. He submits that this stage was called the adjudication record stage because the individual rights were recorded in a book called the adjudication records register.

12. Counsel submitted that the Land Consolidation Act was applied for a short while and only applied in Central Province of Kenya which was the epicenter of Mau Mau claims for lost lands, but it was found inadequate for the whole country. He submits that in 1968 the Land Adjudication Act was enacted and it entailed the ascertainment of the individual rights by directly demarcating the individual holdings where that individual had his own occupation. The disputes that arose related to occupation rights only under customary law and they were also determined by a committee and under African tradition law where an individual proved that his "occupation rights" were better determined by a court of law he would seek permission or consent of the land adjudication officer under **Section 30** of **Cap 284** to file his case in the ordinary court.

13. The counsel submitted that the two Acts did not apply simultaneously in the same area of land and that the Land adjudication officer decided which area to declare where the particular legislation would apply in the larger Meru area **Cap 283** applied in Chuka, Mwimbi/Muthambi, Imenti, Tigania and Igembe.

14. He faulted the objection "under section 8 as read with section 30" in very vehement language. He submitted that in both these legislations they seek to prohibit any process of court being filed except with the consent of the land adjudication officer. He argues that the prohibition was directed at the officers of the court not to accept plaint or issue summons where there was no consent, and adds that the fact that the suit had been in existence for many years was proof that the consent was availed at the filing of the suit as no officer of the court

would have accepted the process without the necessary consent being shown. He took exception with the Trial court's reference to paragraph 5 of the plaint to determine that the Uringu adjudication section was under **Cap 284** and argues that a look at the Kenya Gazette which declared that area of Tigania to be an adjudication section should have shown otherwise. He however never produced the Gazette. He submits that the learned magistrate engaged herself in the process of searching for evidence of consent while the law on preliminary objections is quite clear that a preliminary objection is a legal objection and not evidential objection. He submits that the search for evidence of filing of the consent showed that this was not an issue of law of fact which could not be raised by way of a preliminary objection but by way of interlocutory application and the evidence tendered by affidavit. He cited the case of **Mukisa Biscuits Manufacturing Company Limited Versus West End Distributors Limited 1969 EA Page 1695.**

15. He also relied on **Registered Trustees Of The Catholic Archdiocese Of Nyeri And Another Versus Standard Limited And Others (2003) 1 EA Page 253** and quoted the said decision as hereunder:

> ***"Preliminary point are to be raised at the beginning of the hearing and not at the end of the hearing. Secondly, the issue of capacity to sue goes to the very root of the case and must be pleaded".***

16. The counsel also quoted the case of **UU Net Kenya Ltd vs Telcom Kenya Ltd (2004) 1 EA 348** in terms of the following passage:

> ***"In his ruling in Garden square ltd versus Kogo & another …. Justice Ringera said that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing the suit or application entirely."***

17. The case of **Oraro vs Mbaja (2005) 1 KLR 141** also came in handy for counsel and he again quoted a passage therefrom as follows:

> ***"A preliminary objection correctly understood is a point of law we must not be blurred with factual details liable to be contested and in any event to be proved through the process of evidence."***

18. On his part counsel for the defendant averred that the plaint showed that the land in question was the subject of an adjudication process though it is not clear from the pleading as to which Act applied. He submits that nevertheless, that did not make any difference as it was the consent of the land adjudication officer which was required in each case. He further stated that the Minister for Lands applies any of the two Acts to an area as he may find it appropriate. He submitted that the preliminary objection was rightly taken.

19. I have considered the submissions of the parties as analysed above. It is common ground that whether the **Land Consolidation Act** or the **Land Adjudication Act** that had been applied to the suit land a consent had to be provided. The question is at what stage the consent had to be provided. The provisions of **Section 8(1)** of **Cap 283** provides that "…***no person shall institute and no court whatever shall take cognisance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given…"***

20. ***Section 8(2) of Cap 283 is emphatic that "no officer of any court whatever shall issue any plaint or other legal process for the institution or continuance of any proceedings which by virtue of the provisions of subsection (1) of this section are for the time being prohibited, except upon being satisfied that the consent required by those provisions has been given.***

21. To start with, in my view the only interpretation of the mandatory terms and language employed in **section 8** of **Cap 283** and **Section 30** of **Cap 284** is that the provisions of the two Acts are an absolute bar and they make the suit incompetent from its inception if no consent is filed with the suit and that implementation of that law is placed on the litigants and the court, with additional remedial safeguards applicable where a violation of those provisions is noted.

22. The only question that remains is at what stage such proceedings may be deemed to be incompetent. That may be either before the filing or, after the filing and before the hearing thereof. There is also probability of a mistaken institution of suit without running undetected through the entire lifespan of the proceedings to the judgment stage undetected.

23. The burden of preventing the institution of the prohibited proceedings is distributed twofold: first, before the institution of proceedings, it is cast upon both the person intending to commence any proceedings and the court. Both have to ensure that the consent has been obtained beforehand. The intending litigant shall desist, and the court shall decline, the institution of a suit before consent is issued. It is good to note that the other measures of barring any hearing of the matter are merely supplemental to the main bar which is that "***no person shall institute any***" proceedings.

24. Secondly, the Act recognizes the probability of instances where a litigant having failed to obtain consent, has managed to institute the proceedings for one reason or another, including human error. The burden in such instances is shifted to the court to take appropriate action to bar issuance of process, or if process has issued, barring such suit from proceeding to hearing and determination. It is clear that the suit before the trial court fell into this last category. In my view these provisions open up a window through which a preliminary objection can be raised against the suit.

25. Such a burden having been shifted to the court, it is now clear that a court can not take any preventive action *before* the institution of the suit unless it becomes aware that such consent is needed, and investigates whether it has been obtained, so that it may be furnished with evidence of the issuance thereof.

26. If this court holds that the consent is not supposed to be filed at the time the suit is instituted, the question would then arise as to when, if those mandatory legal provisions are to be enforced, the court officials receiving the documents initiating the proceedings would have

occasion to be satisfied as to whether consent has been issued.

27. The inescapable conclusion is that proof of the obtainance of the consent must be furnished at the time the suit is being instituted. Nullity of the suit begins at inception of the proceedings if no prior consent has been obtained and the jurisdiction of the court has not been properly invoked.

28. It has been held in previous judicial decisions that jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (See: **Owners of Motor Vessel "Lillian S" vs Caltex Oil (K) Ltd (1989) KLR 1.)**

29. Want of consent, at whatever stage it was brought to the notice of the court, warranted the court to determine that it had no jurisdiction from the commencement of the suit, and to dismiss or strike it out.

b. Whether a consent not so filed but produced by the plaintiff's counsel at the hearing of the preliminary objection should be considered or acknowledged by the court.

30. The holding of this court on the first issue above, that is that proof of the obtainance of the consent must be furnished at the time the suit is being instituted and that nullity of the suit begins at inception of the proceedings if no prior consent has been obtained, is instructive on the answer to the second issue herein being addressed.

31. In my view the production of such a consent at the hearing of the preliminary objection would not save the suit from dismissal as it is the production at the commencement and the satisfaction of the court that consent has been issued at that stage, that makes it possible to deem the legal requirements in either of the two sections as having been met at the time of the filing of the suit. Further a consent is only for the purposes of the institution of the proceedings and there it is not possible to understand why, unless there was no such prior consent obtained, the consent would not form part of the boast as to the proud fulfilment of a legal requirement while lesser requirements normally required plaints, for instance, a declaration that there exist no other similar proceedings in the same cause of action between the same parties, are routinely observed.

32. When the suit is already rendered a nullity by reason of default of the plaintiff to satisfy the court at the commencement of the suit, I am of the view that no subsequent production of a consent may redeem it. It remains a nullity and the hearing of the preliminary objection can not be turned into a forum for production of the consent but must remain a forum for demonstration or controverting of such nullity.

33. In the case of **Andrew Mambo Muthee v Raphael Ngugi Mambo & another [2014] eKLR (Murang'a Miscellaneous Application No. 76 of 2012),** the issue of nullity that steps in from the inception of proceedings from want of jurisdiction has been addressed. In that case the court, albeit while dealing with nullity arising from want of jurisdiction that arose from the filing of suit in the wrong court, stated as follows:

> ***"Looking at the applicant's cause filed in the magistrates court from the foregoing perspective it is easy to see why a petition filed in a court without jurisdiction, as the applicant's was, cannot be a valid petition. The question that would then follow is, if a petition is invalid, can that invalidity can be cured by its transfer to a court of competent jurisdiction? This question has been raised before in other cases and the consistent answer has always been that such suits are a nullity ab initio and a transfer to a court of competent is inconsequential."***

Drawing from the theme of limitation, reference can also be made to the case of **Iga vs Makerere University 1973 EA 65,** in which the court found that a plaint that was time-barred should have been rejected at the filing stage. In that case the court took up an objection on the basis of limitation and dismissed the action despite the fact that the plaint had already been accepted. In **Iga (supra)** it was held:

> ***"A plaint which is barred by limitation is a plaint "barred by law". A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief".***

34. In view of the approach accorded to the above two cases, the argument of the appellant that the court had already permitted the institution of the suit does not aid him, for indeed he has not demonstrated that the court was consciously satisfied that prior consent had been obtained.

c. Whether the trial court erred in failing to hear the matter on its merits as ordered by the High Court and in striking out a plaint that had been entertained by the High Court;

35. As I have already observed earlier in this judgment there is probability that an error may pass unnoticed all the way to the end of proceedings. Fortunately or unfortunately that was not the case in the instant suit. If the appellant could demonstrate that the High court was aware of the issue of want of consent as at the time it was issuing the order that the matter be heard on the merits then he would have stood a better chance of convincing this court that the issue was *res judicata,* for indeed the High Court would have ruled, or directed the trial court to rule on such an important issue that went to the jurisdiction of the trial court to handle the matter.

36. In my view the High court's direction could not have been taken mechanically and applied to secure the calling of witnesses and the taking of evidence in total disregard of any other legal objection that, having been found to exist, could have applied to the suit.

37. A proper perspective to be taken of the matter is that it could not have been the intent of the High Court, which never handled the

objection relating to want of consent, to fetter the power of the trial court to handle any preliminary legal objections that it found fit and which had not been decided by the High Court. It would be grossly incongruent to hold otherwise. For that reason, this ground should fail.

d. Whether it was proper to entertain and uphold a preliminary objection raised 12 years after the institution of a suit.

38. It is now trite that preliminary objections on points of law can be raised at any stage of the proceedings.

39. In the case of **Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited [2015] eKLR (Nairobi Judicial Review Miscellaneous Application No 2 Of 2015)** the court found that:-

> ***"…the question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of Beatrice Cherotich Koskei and Another –vs- Olenguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007, the court observed as follows:***
>
> > ***"If, as respondents' counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody's time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I, therefore, hold that respondents' counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon."***
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> ***These sentiments echoed the view of the court in the case of Ali Oshan and Others –vs- Mrs. Catherine Kaswii Nyiha and Others Misc Civil Application 525 of 2002 where the court stated as follows:***
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> ***"It is obvious that the Kenya National Football Federation Constitution does not allow parties whose disputes fall within the definition of Article XIX (1) to commence proceedings in a court of law but to refer them to Arbitration. … It is trite law that a preliminary objection can be raised at any time when the action is still active. Hence Mr. Gikandi is perfectly right to raise the preliminary point at this stage... "***

40. The dicta in the cases mentioned above is clear on the approach that the courts have taken in respect of the raising or preliminary objections. Whereas they should preferably raised early during the proceedings, they can be raised at any time while the suit is still active.

41. In the circumstances I find no merit in the ground that the preliminary objection was raised after 12 years.

42. The upshot of the above is that I find this appeal to be without merits and I dismiss it with costs to the respondent.

Dated and signed at Kitale this 15th day of June 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of June, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

In the presence of:

C/A Janet/Galgalo

Mr. Abubakar holding brief for Rimita for 1st respondent

Mr. Otieno holding brief for M. Kioga for appellant

N/A for Attorney General for the 2nd and 3rd respondents