



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO 167 OF 2011

**NICHOLAS MUGAMBI & DOMINIC KAINDIO (suing as the legal
representatives of the estate of Peter Etharia M’Kailibi).....1ST PLAINTIFF**
NICHOLAS MUGAMBI.....2ND PLAINTIFF
DOMINIC KAINDIO.....3RD PLAINTIFF
JOB MAORWE.....4TH PLAINTIFF
AGNES CIACANGI.....5TH PLAINTIFF

VS

ZACHARY BAARIU.....1ST DEFENDANT
PHILIP M’ICHABA.....2ND DEFENDANT
PAUL NTIKA.....3RD DEFENDANT
JOSEPH KINGORI.....4TH DEFENDANT
GERVASIA KUGAIGA.....5TH DEFENDANT
**DISTRICT LAND ADJUDICATION &
SETTLEMENT OFFICER -TIGANIA EAST.....6TH DEFENDANT**
HON ATTORNEY GENERAL.....7TH DEFENDANT

RULING

1. On the 29.11.2011 the Plaintiffs filed a suit against the Defendants seeking the following orders;

a) A declaration that the District Lands Adjudication and Settlement Officer, Tigania East District who is the 6th Defendant herein, through the demarcation officer, Giithu Adjudication Section together with the Land Adjudication Committee of Giithu Adjudication Section acted illegally and unconstitutionally in awarding to the 1st Defendant Authority and permission to perform a Meru traditional “Nthenge” oath as a way of determining a land ownership dispute with the Plaintiffs in favour of the 1st Defendant.

b) A declaration that the registration of the 1st Defendant as the owner of the parcels of land that were initially registered in the names of the Plaintiffs which registration is done pursuant to a “Nthenge” oath is illegal, unconstitutional, discriminatory, null and void and of no effect whatsoever.

c) A declaration that the Plaintiffs are the legal rightful owners of parcels of land named as follows; -

i. No.4039 Githu Adjudication Section – 1st Plaintiff.

ii. No. 2983 & 4031 Githu Adjudication Section – the 2nd Plaintiff

iii. No. 2979 Githu Adjudication Section – 3rd Plaintiff

iv. No. 2981 Githu Adjudication Section – 4th Plaintiff

v. No. 2982 Githu Adjudication Section – 5th Plaintiff

d) An order of permanent injunction restraining the 1st, 2nd, 3rd, 4th and 5th Defendants whether by themselves, their agents, servants and/or employees from in any way or howsoever from trespassing or any in way interfering with the suit land.

e) General damages against the 6th and 7th Defendants for breach of constitutional rights.

f) Kshs 126,422.40/= from the 1st to 5th Defendants.

g) Costs of the suit and interest.

2. The Plaintiffs' case is that during the process of demarcation in Githu Adjudication Section the following parcels of land were registered as follows;

4039 – Peter Etharia (deceased)

2983 – Nicholas Mugambi

4081 - Nicholas Mugambi

2979 - Dominic Kaindio

2981 - Job Maorwe

2982 - Agnes Ciacangi

3. The Plaintiffs contend that the parcels of land were ancestral lands which have devolved from within their family lineage. That in 2007 the 1st Defendant lodged a case No LC/107-LC/125/07/08 with the land committee Githu Adjudication section over parcels Nos. 2975-2988, 2991, 4038-4041. That the Land committee reached a verdict on 3.4.2009 and ordered a traditional Meru oath called “*Nthenge*” to be administered on the 1st Defendant. It is the case of the Plaintiffs that the 1st Defendant undertook the oath clandestinely and without notice to the Plaintiffs after which the 1st Defendant became registered by the demarcation officer as the owner of the said parcels of land based on the alleged illegal and unprocedural oath. Other claims raised are in respect to fraud, trespass and damages to trespass on the part of the defendants.

4. The 1st -5th Defendants filed a defense on the 31.5.2016 denying the Plaintiffs' claims. Insisting that the suit lands are currently registered in the name of the 1st Defendant to hold in trust for the other defendants following the unchallenged decision of the committee in LC/107-LA/125/07/08 in which the late Peter Etharia declined to undergo the oath. That the 6th Defendant followed the provisions of S. 9, 11, and 26 of the Land Consolidation Act and heard the dispute in accordance with the customary practices of the parties i.e Ameru. That the 2nd, 3rd and 5th Defendants have been in exclusive and continuous occupation of the suit lands and have made developments thereto.

5. Under para 18 of the defence the 1st -5th Defendants undertook to file a Preliminary Objection and true to their word filed one on the 31.5.2016 on the following grounds;

a. The Honourable Court lacks jurisdiction to hear this case for want of mandatory consent to file this case under section 8 of the Land Consolidation Act Cap 283, and Section 30 of the Land Adjudication Act, Cap 284.

b. The Plaintiffs did not exhaust all the remedies set out under sections 13,14, and 26 of the Land consolidation Act and sections 26 and 29 of the Land Adjudication Act, cap 284.

6. Parties elected to file written submission which I have carefully considered however I note that the 6th and 7th Defendants neither filed any nor associated themselves with any of the party's written submissions on record.

7. The twin issues for determination remain; Whether the Plaintiffs have exhausted the provisions laid out in the Land Adjudication Act , Cap 284 and the Land Consolidation Act, Cap 283 ; Whether the Plaintiffs obtained the consent of the District Land Adjudication & Settlement Officer (DLASO) to file the suit; Whether the Preliminary objection is a pure point of law.

8. I have perused the proceedings before the committee and observed that the claim was raised under the Land adjudication Act cap 284 (LA/125/07/08) and Land Consolidation Act, 283 (LC/NO/107). It would appear that both cases were combined and heard together by the

committee under Cap 284 as can be seen in the proceedings;

“In this regard the committee also realized that the defendant has lived on the suit lands for quite some time but there were evictions and orders of no stay before the section was declared an adjudication section but was ignored until demarcation stage when the aggrieved party filed this lawful committee case under Cap 284 of the laws of Kenya.”

This Court will therefore determine the preliminary objection in accordance to the Land Adjudication Act Cap 284.

9. The definition of a preliminary objection is given in the classical case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**. Similarly, in the case of **Oraro vs. Mbaja(2005) I KLR 141** Ojwang, J the Court held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a preliminary objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence

10. The effect of the case law cited above means for one to succeed in putting up a preliminary objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

11. The powers of the committee to determine disputes under the Act is donated under section 20 as follows;

“The committee appointed for an adjudication section shall—

- (a) adjudicate upon and decide in accordance with recognized customary law any question referred to it by the demarcation officer or the recording officer;
- (b) advise the adjudication officer or any officer subordinate to him upon any question of recognized customary law as to which he has sought its guidance;
- (c) safeguard the interests of absent persons and persons under disability;
- (d) bring to the attention of officers engaged in the adjudication any interest in respect of which for any reason no claim has been made;
- (e) assist generally in the adjudication process.

12. In the event of inability of the Committee to make a decision, the following procedure apply;

- “(1) If a committee is unable to reach a decision on a matter before it, it shall refer the matter to the arbitration board for decision.
- (2)The adjudication officer may require the committee to reconsider any decision which it has made.
- (3)Any person named in or affected by a decision of the committee who considers the decision to be incorrect may, within fourteen days after the decision, complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.
- (4)Upon receipt of a complaint under subsection (3) of this section, the executive officer of the committee shall refer it with all the particulars of the case to the executive officer of the board, who shall submit it to the board

13. It does not end there. After the adjudication register is completed and a party is still dissatisfied he may file an objection with the adjudication Officer who will consider and make a determination on the objection in this manner;

- “(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection

14. Section 29 of the said Act provides for appeal to the Minister whose decision shall be final.

15. The above serves to underscore the elaborate procedure provided for dispute resolution in the Act.

16. Coming back to the case in point it would appear that the committee proceedings were at the demarcation stage. The committee ordered as follows;

“an oath “Nthenge” to be administered as provided in the Ameru customary law by Zacharia Baariu M’Kaunga and an implementation to be done after the ceremony for the winner of this case and those parties who were removed will not be affected.”

17. There is no evidence on record to show that Plaintiffs referred the matter to the arbitration board in accordance with section 22; nor filed a 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.

18. I associate myself with the decision in **Abdallah Mangi Mohamed Vs Lazarus & 5 others (2012) EKLR** where the Learned Judge Mr Justice Murithi stated;

“Where there is a dispute as to the applicant’s entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property”.

19. 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”

20. 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.

21. In respect to the 2nd limb, Section 30 of the Act stays all suits in respect to land suits as follows;

“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.”

22. It is the 1st -5th Defendants contention that the Plaintiffs did not obtain the statutory consent to file suit and therefore this suit is incompetent before the Court. I have perused the record and there is a consent dated the 3.10.2011 given under section 30 the Land Adjudication Act and section 8(1) the Land Consolidation Act. Both sections as contained in the two Acts are more or less similar in import. I therefore do not agree with the 1st -5th defendants contention that there is no consent on record. Para 19 of the plaint states that the consent was obtained and that it is filed with the plaint. The concern of the 1st -5th Defendants as captured in their response to the plaintiff’s submissions filed on 4.12.2017 is that the said consent was not filed with the plaint as it is not stamped. I am prepared to accept that the consent was obtained as seen in the court file and therefore the contention that the plaintiffs did not have consent fails. To the extent that the Court has to look at the facts on record and/or exercise its discretion removes the Preliminary objection from being a pure point of law. The preliminary objection collapses on the 2nd limb.

23. The Preliminary objection has merit and the suit is therefore dismissed with costs to the Defendants.

DATED, DELIVERED AND SIGNED AT MERU THIS 28TH DAY OF JUNE 2018

J.G. KEMEI

JUDGE

In the presence of:

C/A Mutua

Muchira for 1st - 5th plaintiffs

Gikonyo holding brief for Calpeters Mbaabu for 1st - 5th defendants

Kiongo for 6th -7th defendants