



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.72 OF 2015

- 1. DUME DERI MUMBO**
- 2. BENSON MAFONDO MUMBO**
- 3. CONSTANCE MBEYU MUMBO**
- 4. JOSEPHINE BAHATI MUMBO**
- 5. SYLVIA MWAKA MUMBO**
- 6. FRIDA MBEYU KALUME**
- 7. ESTHER MBEYU MUMBO**
- 8. GARAMA DERI CHONDO**
- 9. MBEYU GARAMA**
- 10. JUMA DERI CHONDO**
- 11. ABDALLA DERI GARAMA**
- 12. RAMADHAN MUMBO DERI**
- 13. KAHINDI DERI CHONDO**
- 14. SAFARI DERI KAHINDI**
- 15. JAPHET MWAFONDO KAHINDI**
- 16. HAMISI DERI CHONDO**
- 17. FRANCIS KUTA CHONDO**
- 18. EMMANUEL MUPE KALAMA**
- 19. PETER KATANA**
- 20. PETER MTURO KAHINDI & 19 OTHERS**

(Suing on their behalf and on behalf of Wandarari clan

.....PLAINTIFFS/APPLICANTS

=VERSUS=

1. CABINET SECRETARY OF LANDS, HOUSING & URBAN DEVELOPMENT
2. DIRECTOR OF LAND ADJUDICATION & SETTLEMENT
3. LAND ADJUDICATION OFFICER, KILIFI
4. DISTRICT SURVEYORS, KILIFI
5. REGISTRAR OF LANDS, KILIFI
6. THE HON. ATTORNEY GENERAL
7. JUSTIN NYIRO NYOKADEFENDANTS/RESPONDENTS

RULING

Introduction:

1. The Application before me is the one dated 11th May, 2015 seeking for the following orders:

(a) That pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction against the Defendants either jointly and/or severally, restraining them whether by themselves, their agents and/or servants howsoever from subdividing, disposing, taking possession, transferring and/or interfering with the Plaintiffs' possession and use Land Title Number Mwapula//Magogoni/458.

(b) THAT costs of the Application be provided for.

The Plaintiffs'/Applicants' case:

2. The Plaintiffs' case is that in 1888, his late grandfather, Deri Kamta Mumbo, moved into the suit property with his younger brother, Deri Kudza and that his late father, Deri wa Chundo, was born on the suit property in the year 1904.
3. According to the Plaintiffs' deposition, the 7th Respondent's clan, the Wamwamaya clan, were welcomed by his grandfather on the adjacent ancestral land being plot number 459 and have since been cultivating on the portion that they were given measuring approximately 10 acres.
4. The Plaintiff has deponed that when the adjudication process commenced in 1993, he was nominated by his clan to be registered as the proprietor of the suit property while the Respondent's clan was registered as the proprietor of plot number 459.
5. It is the Plaintiff's deposition that an objection was lodged in respect of the suit property and that the Appeals Committee directed that the suit property should be registered in favour of the 7th Respondent and his clan members, with 1/3 of the suit property to be registered in favour of the Plaintiff and his family members.
6. It is the Plaintiff's case that the decision of the Appeals Committee was manifestly unreasonable and unfair.

The Respondents' case:

7. The 7th Respondent filed a detailed Replying Affidavit giving the history on why his clan is the one entitled to the suit property.
8. It is the Respondents' case that by virtue of an Appeal to the Minister of Lands and Settlement through case number 276 of 2007, Kilifi, the suit property was awarded to him; that the 1st Plaintiff was awarded 1/3 of the suit property and that the Applicant has never appealed against the said Ruling.
9. The totality of the 7th Respondent's case is that the 1st Plaintiff's allegation are marred with illegality and falsehood.

Submissions:

10. The Plaintiff's advocate submitted that civil proceedings concerning an interest in land in an adjudication section can be filed at any time after the adjudication register has become final; that the register in respect to the suit property has since become final and titles have been issued and that there is no bar in filing a suit of civil in nature.
11. The Plaintiff's counsel submitted that there is no time limit of appealing against the decision of the Minister by way of an ordinary suit.
12. This Application, in my view, turns on those two arguments by the Plaintiff's counsel.

Analysis and findings:

13. This suit was filed after this court dismissed a Judicial Review Application being ELC JR. Misc. Application Number 9 of 2013.
14. In my Ruling of 20th February 2015, I held as follows:-

“22. The only options that are available to the Applicant after the decision of the Minister was to file an appeal by way of an ordinary suit or by praying for the quashing of the said decision.”

15. In the current Plaintiff, the Plaintiff is seeking for a declaration that the decision of the 1st defendant apportioning two (2/3) of the Land Title Number Mwapula/Magogoni/458 to the 7th Defendant is manifestly unfair and biased; an order setting aside the decision of the 1st Defendant in relation to Land Title Number Mwapula/Magogoni/458 and an order restraining the 5th Defendant from registering any title or entry on the basis of the decision of the 1st Defendant.
16. It is obvious that the Plaintiff is challenging the decision of the Minister to award the 7th Respondent 2/3 of the suit property.
17. Before I delve into the issue of whether the Plaintiffs' Application for injunction is meritorious or not, I have to determine as to whether the Plaintiff has a right of appeal as against the decision of the Minister by way of a suit.
18. I say so, because although a litigant can file a suit in a matter where the adjudication register, pursuant to the provisions of the Land Adjudication Act, has been closed and a title deed issued, the current suit is challenging the decision of the Minister in its entirety.
19. Indeed, the issues raised by the Applicant in his Application and the Plaintiff are the same issues that were dealt with by the Minister in the decision of 27th March 2012.
20. The Plaintiff's advocate submitted that an Appeal and Judicial Review proceedings are remedies available to the Plaintiff.
21. The Plaintiff's counsel further submitted that in view of the provisions of Section 30(1) of the Land Adjudication Act, civil proceedings concerning an interest in land in an adjudication section can be filed at any time after the adjudication register has become final; that the register under the adjudication section in respect of the suit property has since become final and titles have since been issued and that there is no bar in filing the current suit.
22. According to counsel, there is no time limit of appealing against the decision of the Minister and

that nothing prevents a party from challenging the decision in a suit seeking a declaration that such a decision was null, void and unfair.

23. Counsel relied on the case of **Jamin Kiombe Vs Emily Jorono (2013) e KLR** where Munyao J held as follows:-

“The mere fact that a decision can be challenged by way of judicial review does not prevent a party from taking proceedings for a declaratory suit.....my own opinion of the matter is that there is no bar to filing a suit to declare the decision of a Land Dispute Tribunal null and void., the avenues of appeal and judicial review are available, but I am not of the view that these are the sole avenues for relief.....”

24. In the case of **Nicholas Njeru Vs The Hon. Attorney General (2013) eKLR**, the Court of Appeal held as follows:-

“We agree those prayers could have perfectly filled the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However, we do not entirely agree with the learned Judge's observation that the court had no jurisdiction to grant a declaratory order.”

25. In the above case, the Court of Appeal further held as follows:-

“We agree with the trial judge that during the various proceedings the issues in this appeal were perhaps thrashed almost to the pulp and the dispute over who owned the suit property had long been determined”.

26. It is instructive to note that in the above case, the Applicants informed the Court of Appeal that they had raised a new cause of action before the trial court, other than the issues which were addressed by the Minister, which included cancellation of the title deed.

27. The facts in the **Nicholas Njeru case (supra)** are not the same as in this case.

28. I have gone through the pleadings that are before this court and the proceedings that were before the Minister.

29. The issues that are being raised in the current suit as to which clan owns the suit property were conclusively dealt with by the various bodies, including the Minister, pursuant to the provisions of the Land Adjudication Act.

30. Considering that the suit herein is wholly challenging the decision of the Minister to allocate the 7th Defendant's clan 2/3 of the suit property, and in view of the provisions of Section 29(1)(b) of the Land Adjudication Act which provides that the decision of the Minister shall be final, the Plaintiff cannot appeal against the said decision in the manner that he has done.

31. I say so because the mechanism to resolve disputes within an adjudication area have been set out in the Act.

32. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings.

33. As was stated by the Court of Appeal in the **Nicholas Njeru case (Supra)**, during the various proceedings, the issues in the current “appeal” were thrashed to the pulp and the issues as to which clan owned the suit property was determined in the year 2012. This court cannot re-open that issue as claimed by the Plaintiff by way of an ordinary suit, without disclosing the new cause of action that has arisen.

34. For those reasons, I find and hold that the Plaintiff does not have a prima facie case with chances of success.

35. Consequently, I dismiss the Application dated 11th May, 2015 with costs.

Dated and delivered in Malindi this **11th** day of **March**, 2016.

O. A. Angote

Judge