



REPUBLIC OF KENYA



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**Karithi v Kamwiti & 2 others (Environment and Land Appeal
E045 of 2022) [2024] KEELC 1005 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E045 OF 2022
CK NZILI, J
FEBRUARY 21, 2024**

BETWEEN

JOSHUA KARITHI APPELLANT

AND

JOHN GITUMA KAMWITI 1ST RESPONDENT

DISTRICT LAND REGISTRAR, MERU NORTH 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

*(Being an appeal from the judgment of Hon. Gathogo Sogomo
in Tigania ELC Case No. 25 of 2017, delivered on 19.08.2021)*

JUDGMENT

1. On 30.6.2017, the appellant sued the respondent at the lower court, claiming that his land, LR No. Tigania/Thananga/89, initially recorded under his name measuring 7 acres was through fraud and collusion, subdivided into two and a portion measuring 3 acres carved out of it and registered in the name of the 1st respondent as LR No. Tigania/Thananga/95
2. The appellant averred that he had been in exclusive possession of where he has planted over 500 tea stumps, 1500 coffee trees and food crops since 1970, and that the 1st respondent had never been on the said land until he discovered the fraud in 2000. He termed the subdivision creation, transfer and registration of the 1st respondent title deed as illegal and fraudulent. The appellant, therefore, prayed for revocation of LR No. Tigania/Thananga/89, an amalgamation of the two parcels into his name and general damages for the wrongful transfer or registration.
3. The 1st respondent opposed the claim through a statement of defence and counterclaim dated 11.2.2019. He averred that he was allocated LR No. Tigania Thananga, upon application for allocation, was duly approved for the land which formed part of Thananga settlement scheme. The



- 1st respondent averred the suit land was never under land adjudication and that after allocation and registration on 29.6.1970, he took vacant possession, and that it was the appellant a neighbour, who has over the years been trespassing and grazing his cattle on his land and now intend to grab and consolidate it with this adjacent land illegally. The 1st respondent denied the alleged fraudulent subdivisions, creations, transfer and registration in collusion with the 2nd and 3rd respondents.
4. By way of a counterclaim, the 1st respondent reiterated that he lawfully acquired LR No. Tigania/Thananga/89 in 1970 and has been in exclusive use and possession where he had planted trees. That the appellant was a neighbour and owner of LR No. Tigania/Thananga/95, who had been trespassing into his land to graze cattle without his consent and authority. He sought a permanent injunction to restrain him, his agents, servants or employees from trespassing on his land.
 5. From the record of the appeal, it is not clear whether the 2nd and 3rd respondents were served with a summons to enter an appearance and, if so, if they filed a statement of defence. The record shows that when the matter came up for hearing on 19.11.2020, the trial court suo moto directed the parties to address it on Section 26 (1) of the [Land Consolidation Act](#) together with Section 16 of the [Government Proceedings Act](#) as read together with Order 29 Rule 2 (2) of the [Civil Procedure Rules](#). By a ruling dated 19.8.2021, the trial court struck out the suit.
 6. The appellant, by an amended memorandum of appeal, complains that the trial court erred in law and in fact for:
 - a. Holding it had no jurisdiction.
 - b. Holding the appellant should have exhausted the internal mechanisms of appeal to the Minister, yet title deeds were already out.
 - c. Holding the Land Adjudication Officer should have been joined in the suit
 - d. Holding the appellant had sought injunctive orders, yet none had been prayed for.
 - e. Failing to find the suit was based on fraud, which was beyond the jurisdiction of a land adjudication officer.
 - f. Failing to grant the appellant a fair hearing.
 - g. Holding against the weight of pleadings before it.
 7. The role of an appellate court of the first instance is to re-look, reanalyze and re-appraise itself with the record of the lower court and come up with its findings on facts and law. See *Peters v Sunday post* [1958] E.A, [Gitobu Imanyara & others v Attorney General & others](#) [2016] eKLR
 8. As indicated above, the 2nd and 3rd respondents had neither filed any defence to the plaint nor raised any preliminary objection to the suit under the [Government Proceedings Act](#) or Order 29 of the [Civil Procedure Rules](#). Whereas a court can raise the issue of jurisdiction suo moto, what is expected of a trial court is to identify the legal and factual issues for consideration. In the suit before the court, the 1st respondent had not raised any issue on jurisdiction. In [Republic v Karisa Chengo and two others](#) [2017] eKLR, the court said a court's jurisdiction flows from either the [Constitution](#) or legislation or both. It went on to say that a court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. See [John K. Malembi v Truphosa Cheredi Mudembei & other](#) [2019] eKLR
 9. In this appeal, the trial court had not been moved on the issues it determined preliminary by any of the parties. It acted sua sponte. In an adversarial system, it is the parties who direct the course of the litigation while the court plays the referee. See [Nagendra Saxena v Miwani Sugar Mills Limited](#)



- [1989] L. A (under receivership) Kisumu HCCC No. 225 of 1993 as cited by Odunga as he then was. In *Political Parties Disputes Tribunal & another vs Musalia Mudavadi & others exparte Petronila Were* [2014], that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings. See *Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors* [1969] EA 696.
10. The trial court raised suo moto the issue of Section 26 (1) of the *Land Consolidation Act*, Order 29 of the *Civil Procedure Rules* and Section 16 of the *Government Proceedings Act*. None of the parties had pleaded to such issues. Documents attached to the plaint and the 1st defendant's statement of defence had not raised those issues. Right from the plaint to the 1st defendant's statement of defence, parties had pleaded that the suit land was registered.
 11. In my view, whereas a court can, on its motion, raise and determine preliminary issues touching on jurisdiction, there must be a basis for it. A court of law is bound by the pleadings by the parties. In the appeal before me, I think the trial court misconstrued the facts as pleaded by the parties and hence, was mistaken on the applicable law to the case. No party had pleaded that the suit land was falling under the *Land Consolidation Act*. No proceedings had been attached by the parties showing a land adjudication officer had determined any objection against the appellant, which called for a Minister's appeal. See *Nakumatt Holdings Ltd v Commissioner of Tax* [2011] eKLR In any event, under the *Land Consolidation Act*, there is no room for a minister appeal since the decision of the land adjudication officer is final.
 12. In *Peter Kimandiu v Land Adjudication Officer Tigania West District & another* [2016], eKLR the court took the view that it was incumbent upon the trial court to interrogate the relevant provisions of the law since it was mandatory for any decision under the *Land Consolidation Act* to involve the committee. Under Section 26 (3) of the *Land Consolidation Act*, no appeals lie to the Minister. See *Nicholas Mugambi & others v Zachary Baariu & others* Meru ELC No. 167 of 2011.
 13. Since the suit was about land with a title deed, where the appellant was alleging fraud during registration, there was need to ascertain by way of pleaded facts and evidence which land registration regime was applied to the area and the manner in which the title deed by the 1st respondent was acquired. The trial court had jurisdiction under Section 26 of the *Environment and Land Court Act* subject to pecuniary jurisdiction to determine matters relating to the acquisition of title to land. The Magistrate's Court had jurisdiction over the cancellation of the title. See *Amos Tirop Matui & another v Festus K. Kiprono & 2 others* [2018] eKLR
 14. As to injunction, I think the trial court was also mistaken. The appellant had not pleaded and prayed for an injunction. I therefore, entirely agree with the submissions by the appellant dated 1.12.2023 that the trial court erred in fact and law in declining jurisdiction.
 15. As to the written submissions by the 1st respondent dated 13.12.2023, I do not think the 1st respondent had pleaded that the registration of his land was still on and under the *Land Consolidation Act* and therefore, the suit was premature. The caselaw of *Reuben Mwangela M'Itelekwa v Paul Kigea Nabea & others* [2019] eKLR, was inapplicable to the suit.
 16. Further, the caselaw of *Tobias Acholla Osinde and others v Cypriano Otieno Ogola* [2013] eKLR cited by the 1st respondent was inapplicable in the suit before the trial court. The facts were that the land registration took place in 1970. There was, therefore, nothing pending before the Land Adjudication Officer for the court to invoke the *Land Consolidation Act* or the *Land Adjudication Act* Cap 283 or 284.



17. The upshot is that I find the appeal with merits. The same is allowed. The suit is remitted to the trial court for hearing on merits. Costs to the appellant.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 21ST DAY OF FEBRUARY 2024**

In presence of

C.A Kananu

Anampiu for the 1st respondent

Kendi for 2nd & 3rd respondent

Bwonoga William for the appellant

HON. CK NZILI

JUDGE

