



REPUBLIC OF KENYA



**Nabea & 2 others (Civil Appeal 189 of 2019)
[2024] KECA 1004 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 1004 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 189 OF 2019
P NYAMWEYA, LK KIMARU & AO MUCHELULE, JJA
MAY 24, 2024**

IN THE MATTER OF

**SOLOMON MATHIU NABEA 1ST RESPONDENT
LAND ADJUDICATION OFFICER, ANKAMIA ADJUDICATION
SECTION 2ND RESPONDENT
HON ATTORNEY GENERAL 3RD RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court
at Meru (Kemei, J.) dated 28th June, 2018, in ELC J.R. No. 2 of 2013)*

JUDGMENT

1. The 1st respondent, pursuant to leave of the court, filed a judicial review application before the Environment and Land Court (ELC) at Meru, seeking an order of certiorari, to quash the proceedings and decision of the 2nd respondent dated 9th November 2012, in Objection No. 541, relating to Land Parcel No. 1845, situate in Ankamia Adjudication Section. The application was based on grounds that the 2nd respondent usurped the powers of the Land Committee in hearing the said objection, contrary to Sections 9, 11 and 26 of the *Land Consolidation Act*; that the 1st respondent was denied a fair hearing, as he was not given a chance to call his witnesses; and that the 2nd respondent determined the matter unprocedurally, irregularly, irrationally, illegally and improperly.
2. It was the 1st respondent's case that he inherited Parcel No.1845 (hereinafter, 'suit land') from his father, M'Nabea Gituunda, in 1967, and that he has since lived on the suit land with his family. He averred that the suit land resulted after the original parcel of land which was shared equally between himself and the appellant. The 1st respondent deponed that he sub-divided the suit land, which measured approximately 4.95 acres, and allocated portions of it to his four sons and three purchasers. He averred that he remained with one (1) acre of the suit land, which he still utilizes.



3. The 1st respondent pleaded that the appellant's land borders the suit land, and that they had co-existed peacefully, until the year 2012 when the appellant filed Objection No. 541, claiming 1.83 acres of the suit land. That the 2nd respondent decided the objection in favour of the appellant. The 1st respondent faulted the 2nd respondent: for failing to constitute a 25-member committee to hear and determine the objection as provided by the *Land Consolidation Act*; for usurping the statutory powers of the committee, yet he was not conversant with Meru customs on land acquisition and ownership; for denying the 1st respondent's witnesses, namely, Peter Mugaa, Festus Mithika, and Jennifer Gakii M'Mukaria a chance to testify; and lastly, for violating his right to a fair and procedural hearing, and legitimate expectation to be allowed to call witnesses to support his case.
4. The appellant opposed the application in his replying affidavit sworn on 3rd April, 2013. The appellant urged that the suit land, contrary to the averments made by the 1st respondent, was originally owned by his late grandfather, Baing'oni. That the suit land was given to the 1st respondent, on the understanding that another family land located at Kiangorwe, would be registered in the appellant's name. That the 1st respondent did not honour the agreement, hence the appellant filed Land Committee Case No. 178/81/82, where it was determined that the suit land be shared equally between the appellant and the 1st respondent.
5. The appellant contended that he filed Objection No. 541, since the 1st respondent only transferred 0.65 acres of the suit land to him, instead of half of the said land. That the objection was decided in his favour, and the 1st respondent was ordered to transfer a further 1.83 acres of the suit land to the appellant. The appellant denied colluding with the 2nd respondent, and maintained that the objection proceedings were lawful and procedural.
6. The 2nd respondent filed a relying affidavit dated 26th June 2013, and sworn by Philip Ager Awando, the District Land Adjudication Officer, (DLSAO), Tigania East and West districts. Mr. Awando deponed that he heard Objection No. 541, filed by the appellant against the 1st respondent, in the presence of Land Committee members of Ankamia Adjudication Section. He swore that he delivered his decision in the presence of both parties as well as members of the Land Committee, which decision was in the appellant's favour. He averred that his decision was based on the fact that the decision in Committee Case No. 178/81/82 (Objection No. 242) directed that the suit land be shared equally between the appellant and the 1st respondent, and that the said decision remained unchallenged. Mr. Awando deponed that he accorded both parties a fair hearing, and even paid a visit to the suit land. He swore that his decision in Objection No. 541 had already been implemented, and hence the orders sought by the 1st respondent had already been overtaken by events.
7. In rebuttal, the 1st respondent filed a further affidavit dated 26th February 2018. He deponed that the suit land has never been occupied by the appellant, who resides on his father's land on Parcel No. 1245. He maintained that he inherited the suit land from his father, and that he was not aware of Committee Case No. 178/8/82. He averred that the 2nd respondent did not give him a chance to call witnesses to support his case. He denied Mr. Awando's assertion that the decision in Objection No. 541 had already been implemented on the ground, because there existed orders of stay against the impugned decision.
8. The application was canvassed by way of written submissions.

After hearing the parties, Kemei, J., in a judgment delivered on 28th June 2018, allowed the 1st respondent's application, and quashed the proceedings and decision made by the 2nd respondent in Objection No. 541. The trial Judge determined that since the said objection was filed pursuant to the provisions of the *Land Consolidation Act*, the 2nd respondent erred by failing to determine the matter with the aid of a committee, as is required by Section 26 of the said Act.



9. Aggrieved by this decision, the appellant proffered six (6) grounds of appeal before this Court challenging the decision of the ELC. In summary, the appellant argues that trial Judge erred in fact and in law: In failing to appreciate that there were two objections with respect to the suit land, that is, Objection Nos. 541 and 242, which were decided in favour of the appellant; in holding that DLSAO Mr. Philip Agero Awando conducted the proceedings in the absence committee members; in allowing the 1st respondent's application, against the weight of the evidence and the law; in failing to include other grounds for allowing the application; and lastly, in directing that the appellant and the 2nd respondent pay costs of the application, jointly and severally.
10. The appeal was canvassed by way of written submissions. It was submitted on behalf of the appellant that the trial Judge erred in failing to appreciate that the decision in Objection No. 541, was meant to enforce the decision in Land Committee Case No. 178/81/82 (Objection No. 242), which directed that the suit land be shared out equally between the appellant and the 1st respondent, and which decision remained unchallenged. Ms. Mbumbuya for the appellant asserted that the proceedings in Objection No. 242 evidenced a list of fifteen committee members, who were present during the said proceedings. She explained that the affidavit sworn by Philip Ager Awando indicated that Objection No. 541 was heard and determined in the presence of the Land Committee members of Ankamia Adjudication section
11. Ms. Mbumbuya was of the view that principles of equity are applicable in judicial review proceedings, and that he who comes to equity must come with clean hands. Counsel maintained that the 1st respondent failed to accede to the execution of the decision of the committee in Objection No. 242, and he therefore came to court with unclean hands. Counsel stated that the issue of the presence of the committee members was not a conclusive and overriding reason to allow the 1st respondent's application. She submitted that the proceedings in Objection No. 541 were conducted by the 2nd respondent, and that the trial Judge fell into error in directing that the appellant pay costs of the application. She urged the court to allow the appeal and set aside the decision of the superior court.
12. The respondents did not file written submissions despite being duly served with the hearing notice by the court.
13. This being a first appeal, our duty was well stated in *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re- assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
14. Guided by the foregoing principles, grounds of appeal, as well as the appellant's submissions, we find that the issue arising for our determination is whether the trial Judge erred in allowing the 1st respondent's judicial review application dated 29th January 2013.
15. Section 26 (1) of the *Land Consolidation Act* mandates the Adjudication officer to determine objection disputes in the presence of a committee. It provides as follows:

“Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the



Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act.”(emphasis added)

16. The central role played by the committee under the Land Consolidation Act was emphasized by this Court in *Peter Kimandiu v Land Adjudication Officer Tigania West District & 4 Others* [2015] eKLR, where the Court observed as follows:

“We say the committee is a crucial organ because it is the one which has the mandate under Section 11 to “...adjudicate upon and determine in accordance with African customary law the claim of any individual person to any right or interest in any land within the adjudication section.” Only when it is unable to reach an adjudication in accordance with African customary law will it refer the matter to the Arbitration Board, and even then, the Board has to inform the committee of its decision...

In the latest dispute, the parties were invoking Section 26(1) of the Act which comes into play after completion of the Adjudication Register and provides in relevant parts as follows:

‘Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published... inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by Section 21 of this Act’.

From the foregoing examination of the scheme of the Act, it is manifestly evident that the centrality of the committee is maintained throughout, and it is mandatory for the LAO to sit with the committee even after the completion of the Adjudication Register, albeit the final arbiter remains the LAO, who may also on his own ‘...correct any clerical error or error of a like nature in the Adjudication Register’.”

17. The replying affidavit sworn by Mr. Awando states that the objection proceedings were heard and determined in the presence of the committee. We have perused the proceedings which were annexed by the 1st respondent in his application before the ELC. Nowhere in the said proceedings is there any evidence that a committee was involved in the decision making process.
18. As was correctly observed by the trial Judge, the Adjudication Officer is the only one who featured in the said proceedings. In the absence of such evidence, we agree with the finding made by the trial Judge that the decision in Objection No. 541 was null and void since it was determined in the absence of a committee, which is contrary to the law. The judicial review application succeeded on this ground as the 1st respondent was able to demonstrate that the decision complained of was tainted with illegality.
19. It is important for us to note that this being a judicial review matter, the ELC was not being called upon to determine who between the appellant and the 1st respondent was the rightful owner of the suit land. On the contrary, it was the court’s supervisory jurisdiction that was invoked, as the court was



being asked to determine the legitimacy of decision-making process when Objection No. 541 was being heard. Therefore, the decision earlier made by the committee in Objection No. 242 in favour of the appellant did not validate the illegality and the unprocedural nature of the proceedings and subsequent decision of the 2nd respondent in Objection No. 541.

20. The last question is the issue of costs. The appellant was of the view that the proceedings in Objection No. 541 were conducted by the 2nd respondent, and in the premises, the trial Judge erred in directing that costs of the application be borne by the appellant and the 2nd respondent, jointly and severally. We hold that the mistake in question was occasioned by the Land Adjudication Officer, and therefore each party, with respect to the suit before the ELC, ought to have borne their own costs of the suit.
21. For those reasons, the appeal is hereby dismissed, save for the order that each party shall bear their own costs, with respect to the suit before the ELC and before this Court.
22. We make no orders as to costs, as the respondents did not participate in this appeal.
23. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF MAY, 2024.

P. NYAMWEYA

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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A. O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

