



**Pembe as legal representative Kaingu Pembe Mwachaka v Ngonyo & 2 others
(Civil Appeal E064 of 2021) [2024] KECA 562 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 562 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E064 OF 2021
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

**KAZUNGU KAINGU PEMBE AS LEGAL REPRESENTATIVE KAINGU PEMBE
MWACHAKA APPELLANT**

AND

**KITSAO NGONYO 1ST RESPONDENT
GEORGE KATANA YERI 2ND RESPONDENT
FENYSON CONSTRUCTION LTD 3RD RESPONDENT**

*(An appeal against the Judgment and Decree of the Environment and Land Court
in Malindi (Olola, J.) delivered on 28th May 2021 in ELC Case No. 200 of 2016)*

JUDGMENT

1. This appeal originates from a judgment delivered by the Environment and Land Court at Malindi (Olola, J.) on 28th May 2021 in Malindi ELC Case No. 200 of 2016 in which the learned Judge dismissed the suit filed by the Appellant, one Kaingu Pembe Mwachaka, who is since deceased and is now represented by Kazungu Kaingu Pembe. The Appellant instituted the suit in the Environment and Land Court at Malindi (hereinafter “ELC”) by a plaint dated 3rd August 2016, where he prayed for judgment against the 1st to 3rd Respondents herein, Kitsao Ngonyo Hinzano, George Katana Yeri and Fenyson Construction Limited, for orders that the registration of the 1st, 2nd and 3rd Respondents as owners of Title No Ngomeni Squatters Settlement Scheme/ 1359 and Ngomeni Squatters Settlement Scheme/ 1375 (hereinafter “the suit land”) be cancelled, and that he be registered as the absolute owner thereof. The Appellant pleaded that during the mapping, planning, demarcation and identification of settlers and allocation of land in the Ngomeni Squatters Settlement Scheme, he was the sole owner and occupant of the land in which the suit land was situate, which measured 4.76 hectares; that the two parcels of the suit land were created by hiving off from his land a parcel of land measuring 1.5



- hectares which was named Parcel No. Ngomeni Squatters Settlement Scheme /1359 and allocated to the 1st Respondent, and another parcel measuring 1.94 hectares named Ngomeni Squatters Settlement Scheme 1375 which was allocated to the 2nd Respondent; and that, consequently, his parcel of land was fraudulently reduced to 0.95 hectares.
2. The particulars of fraud pleaded included allegations that the 1st and 2nd Respondents were at the time not residents, occupants or settlers of the respective parcels of land allocated and registered to them; that the 1st and 2nd Respondent abused their then respective positions of local land settlement committee member and ward councillor to allocate the said parcels of land to themselves while knowing or having reason to believe that the said portion was within the Appellant's parcel; and that they obtained the registration of the said parcel in their name without having the charge created in favour of the Settlement Fund Trustees duly discharged. It was the Appellant's contention that, although the 1st and 2nd Respondents subsequently sold the said parcels of land to the 3rd Respondent, they did not confer any valid title on account of mistake, omission, fraud and misrepresentation.
 3. The 1st and 2nd Respondents relied on their defence dated 13th September 2016 filed by the 3rd Respondent, and in which it was averred that the Appellant voluntarily entered into an agreement with the 1st Respondent dated 11th September 2007 and extinguished his title and proprietary interest in the suit land. Additionally, the 3rd Respondent, which was in sole occupation of Ngomeni Squatter Settlement Scheme/1359 and 1375 and Ngomeni Squatter Settlement Scheme/ 1375 has since been transferred to Himalaya Properties Limited and, as such, it no longer had any interest in the property. The 3rd Respondent stated that they were strangers to the allegations of fraud, mistake and omission as it was an innocent purchaser for value, and that the orders sought by the Appellant were therefore untenable in the circumstances. In any event, the Land Registrar was also not made a party to the proceedings.
 4. The Appellant testified as PW1 and called two additional witnesses during the ensuing trial in the ELC. His testimony was that he was claiming his land which comprised 12.5 acres and extended to the ocean. He denied selling or entering into any agreement with respect to the land, and stated that the 1st and 2nd Respondents took his land and sold it to the 3rd Respondents. PW 2 was Said Ali Menza and a neighbour to the Appellant, and testified that the 1st and 2nd Respondents were not their neighbours. Similar testimony was given by PW3, Karisa Fundi Murushi.
 5. The Respondents also testified during the trial. The 1st Respondent testified as DW1 and gave evidence that he was allocated Plot No. 1359 by the government after adjudication and granted title thereto; that he later sold the said parcel of land, and that the Appellant had no issue with the sale; that the problem started when one Abeid Ali Islam told the Appellant that the 1st Respondent's land was his and filed the case on the condition that, if the case succeeded, he would be given 30% of the value of the property; that, at the time the Ngomeni Scheme was started in 1994, he was a squatter in Plot No. 1359 even though he had not built, but had planted coconut trees thereon; and that the Appellant was his neighbour, and that their plots were separated by a road.
 6. The 2nd Respondent testified as DW1 that he had been using the subject land allocated to him prior to adjudication, and that there had been no complaints against him from anyone; that he had planted coconut trees thereon; and that he got his title in 2007 and sold the land the same year while the Appellant started claiming his land from 2016. He also stated that he was a councillor in Magarini Ward at the time. Salro Palliari, a director of the 3rd Respondent, testified as DW3 that he bought Plot no 1359 from the 1st Respondent and Plot No. 1375 from the 2nd Respondent, and that all the parcels were in the 3rd Respondent's name and had no problems with the land for six years until one Abeid Islam came to the ground.



7. After hearing the parties and considering their evidence and submissions, the trial Judge (Olola, J.) delivered a judgment dated 28th May 2021 and found that, from the evidence, the Appellant's and 1st and 2nd Respondents' titles arose from an adjudication process conducted pursuant to the Land Adjudication Act, and that there was no objection lodged by the Appellant; that the Appellant does not appear to have followed the laid down procedure on the alternative dispute resolution mechanisms in the Act; and that he did not explain why he waited until the year 2016 to challenge an allocation which, was made when the Ngomeni Settlement Scheme was established by the Government in 1994. The learned Judge was not persuaded that the Appellant had any more right than the 1st and 2nd Respondents to what was then Government land prior to the creation of the scheme, and noted that he did not place any restriction on the two titles.
8. In addition, the learned Judge observed that the 3rd Respondent acquired the suit land from the registered owners eight years before the Appellant instituted the suit and that, under section 26 (1) of the [Land Registration Act](#), a certificate of title issued upon registration or to a proprietor upon transfer is prima facie evidence that the person named therein is the absolute and indefeasible owner thereof, and that the same is subject to challenge only on the ground of fraud, misrepresentation, or where the certificate was acquired illegally, unprocedurally or through a corrupt scheme. In conclusion, the learned Judge held that the Appellant had failed to prove his case on a balance of probabilities that the 1st and 2nd Respondents acquired the titles they subsequently transferred to the 3rd Respondent fraudulently or through misrepresentation, or that the titles were acquired illegally or through a corrupt scheme, and dismissed the suit with costs to the 3rd Respondent.
9. Aggrieved by the said decision, the appellant filed the instant appeal on four grounds set out in his Memorandum of Appeal dated 21st December 2021, namely:
 - a. The learned Judge erred in law and fact by failing to properly evaluate and analyse the evidence, as a result of which he arrived at an erroneous decision.
 - b. The learned Judge erred in law and fact in ignoring the uncontroverted evidence of the Appellant without giving any reason.
 - c. The learned Judge erred in law and fact in holding that the Appellant, having failed to furnish any evidence that he had raised an objection under the [Land Adjudication Act](#) Chapter 284 of the Laws of Kenya, was precluded from challenging the titles issued to the 1st and 2nd Respondent under the Act.
 - d. the learned Judge erred in law and fact in failing to find and hold that the 1st and 2nd Respondent acquired their respective titles to the suit properties fraudulently or through misrepresentation and/ or illegally.
10. We heard the appeal on this Court's virtual platform on 28th November 2023. Learned counsel, Mr. Shujaa, appeared for the Appellant while Mr. Kitsao Ngonyo, the 1st Respondent, and Mr. George Katana, the 2nd Respondent, both appeared in person. Learned counsel Mr. Anthony Okuto, holding brief for learned counsel Mr. Katsoleh, appeared for the 3rd Respondent. Mr. Shujaa, highlighted his written submissions dated 11th August 2022 while the 1st and 2nd Respondent placed reliance on their joint written submissions dated 28th September 2022. Mr. Okuto also relied on the written submissions filed by Mr. Katsoleh also dated 28th September 2022.
11. We hasten to reiterate the duty of this Court as set out in the decision of *Selle & another v Associated Motor Boats Co. Ltd & Others* (1968) EA 123, which is to reconsider the evidence, evaluate it and draw conclusions of the fact and law, and that this Court will only depart from the finding by the trial Court



if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & another v Shab* (1968) EA 93.

12. In this regard, the two main issues raised in the grounds of appeal and submissions thereon were, firstly, whether the findings by the learned trial Judge were supported by evidence; and, secondly, whether the statutory dispute resolution procedure under the *Land Adjudication Act* was applicable and, if so, whether it was complied with. In his submissions on the first issue, Mr. Shujaa posited that the learned trial Judge failed to properly evaluate and analyse the evidence, and ignored the Appellant's uncontroverted evidence. After reiterating the facts of the Appellant's case as set out hereinabove, counsel submitted that the evidence adduced by the 1st and 2nd Respondent showed that they were not genuine settlers or occupants, as they were both residents elsewhere at the time of allocation; that PW2 and PW3, and a member of the land allocation committee, testified that the 1st and 2nd Respondent were not in occupation of the suit properties at the time of the allocation, but that the Appellant was; and, further, that the learned Judge did not evaluate and completely ignored the evidence of the ground report dated 14th November 2013 by the District Land Adjudication & Settlement Officer, the survey reports and correspondences from the National Land Commission, which resonated well with the Appellant's position that Ngomeni Squatter Settlement Scheme/ 1357 and 1375 were hived off Ngomeni Squatters Settlement Scheme/1298.
13. Counsel further submitted that the 3rd Respondent's evidence contradicted the testimony of the 1st and 2nd Respondent that they had been in occupation of the suit property before and immediately preceding the sale to the 3rd Respondent. The 1st and 2nd Respondent had testified that they had been in occupation of their respective parcels of land before the establishment of the squatter allocation scheme and even planted coconut trees. However, the testimony of the 3rd Respondent was that, before it purchased the two suit properties from the 1st and 2nd Respondent, he had visited the suit properties and found nothing on the ground to suggest that any evidence of occupation by the 1st and 2nd Respondent. The counsel asserted that the 3rd Respondent was therefore not a bona fide purchaser for value without notice; and that, having been established by the evidence that the 1st and 2nd Respondent titles in the suit properties were obtained by misrepresentation, their titles were impeachable by dint of section 26 (1) as read with section 80(1) of the *Land Registration Act* No. 3 of 2012; and that it followed that any subsequent transactions to the 3rd Respondent had to be cancelled as well.
14. The 1st and 2nd Respondents did not make any submissions on the issue, while Mr. Okuto's submission in this regard was that the sole issue for determination was whether the 3rd Respondent was a *bona fide* purchaser for value without notice of any defect of title. The counsel's position was that, upon conduct of an official search of the properties, the 3rd Respondent ascertained that the same had no encumbrances, and that there was no caveat and/ or restriction placed on the properties. Reference was made to section 26 (1) of the *Land Registration Act* to assert that the Appellant had not placed any evidence before the trial Court to demonstrate that the 3rd Respondent acquired its title by way of fraud and / or misrepresentation, and that it was therefore the absolute and indefeasible owner thereof. Counsel submitted further that the 3rd Respondent laid evidence in the trial Court to the effect that it had purchased the suit land in good faith and, having executed the sale agreement, paid the purchase price without notice of fraud. Lastly, that the 3rd Respondent had disposed his portion of the land during the pendency of the suit in the Trial Court and that, therefor, the Appellant was praying the Court to act in vain.
15. On the issue of the applicability of the statutory dispute resolution procedure under the *Land Adjudication Act*, Mr Shujaa submitted that the holding by the trial Judge that the Appellant was



precluded from challenging the registration of the 1st and 2nd Respondent title to the suit properties in Court because he had not shown that he had raised objection under the *Land Adjudication Act* was not based on any evidence. Further, no evidence had been adduced during the trial to show that the area in whose jurisdiction the suit properties were situated had been declared an adjudication section as provided under section 5(1) as read with section 3(1) of the said Act, to warrant lodging of an objection proceedings under the Act and that, therefore, the learned Judge's findings and conclusion were not based on factual evidence placed before him at the trial. Lastly, counsel submitted that the learned Judge appeared to acknowledge that the land was government land prior to the establishment of the squatter settlement scheme, even though no such evidence had been placed before him. However, the Judge still held that the Appellant had failed to exhaust the remedies provided in the *Land Adjudication Act* when it is trite that the *Land Adjudication Act* was not applicable to Government land, but to the Trust land.

16. On their part, the 1st and 2nd Respondents identified the sole issue for determination as being whether the Appellant had exhausted all avenues and/ or procedures pursuant to the *Land Adjudication Act*. It was their submission that the suit properties were subject to adjudication process, which was conducted at Ngomeni Squatter Settlement Scheme; therefore, the parties were guided and governed by the *Land Adjudication Act*; and failure to adhere to the provision of section 26 of the *Land Adjudication Act* was not a procedural technicality which could be cured by the provisions of Article 159 of the *Constitution*. Reliance was placed on the case of *Speaker of the National Assembly v James Njenga Karume*, Civil Application No. Nai 92 of 1992 highlighting the principle that, where there is a clear procedure for the redress of any particular grievance for prescribed by the Constitution or an act of Parliament, that procedure should be strictly followed.
17. It was their submission that the Appellant was strictly bound by the provisions of section 26 and 29 of the *Land Adjudication Act* and that, therefore, the decision of the trial Court was merited. Additionally, it was not prudent for the Appellant to allege that the suit land did not originate from the adjudication process while he averred in his submission that the 2nd Respondent was also a member of the land allocation committee, and informed this Court that the documents produced in the Trial Court were by the District Land Adjudication & Settlement Officer. Therefore, the Appellant was estopped from denying that the suit properties were an outcome of adjudication process.
18. We find it necessary to reproduce the findings of the learned trial Judge after he had evaluated the evidence, which were as follows:
 - “ 38. While it was not clear when the Scheme was established, it was apparent that by the year 2007, the process had reached an advanced stage as to enable the 1st and 2nd Defendants to be issued with their titles. That same year on 27th July 2007 to be precise, the Plaintiff's title was created and charged to the Settlement Fund Trustees. The title would later be discharged on 24th June 2015, the same day the Plaintiff was issued with his title deed.
 39. Accordingly, and from the material placed before me, it was evident to me that the Plaintiff's title and those of the 1st and 2nd Defendants arose from an adjudication process conducted pursuant to the Land Adjudication Act, Cap 284 of the Laws of Kenya. Under the said Act, any person who is not satisfied with the boundaries or acreage of his parcel of land is required to raise the same



with the adjudication officer in charge of the process. Section 26 of the Act provides in this respect as follows:

‘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 notice of completion of the register is published object to the adjudication officer in writing saying in what respect he considers the adjudication register to be incorrect or incomplete.’

40. There was no evidence of any such objection having been lodged by the Plaintiff and/or the determination thereof. think, before seeking recourse to the Court, a party ought to exhaust all available remedies provided for under the Act unless there was a valid reason demonstrated as to why one was prevented from following the laid down procedure. In this respect it is to be noted that Section 29 of Cap 284 provides as follows: -

1. Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-
 - a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
2. The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar....”

19. We have reproduced the said findings to illustrate that, firstly, the trial Court in effect found that the suit was not properly before it and that, therefore, contrary to the Appellant’s assertions, did not make any findings on the merits of the Appellant’s case on account of the procedure under the Land Adjudication Act. Secondly, the outcome of the two issues before us therefore turns on whether that the suit land underwent an adjudication process under the Land Adjudication Act.

20. It was not in issue that the suit land was the subject of a demarcation process leading to issuance of titles to the Appellant, 1st and 2nd Respondents. In his Complaint, the Appellant severally averred as to the “the planning, mapping, demarcation and identification of the settlers within Ngomeni Settlement Scheme” when claiming that he was the sole owner, occupant and settler on the said parcel of land. Among his particulars of fraud and misrepresentation on the part of the 1st and 2nd Respondents were that the 1st Respondent abused “his position as a member of the local land settlement committee during the identification of settlers” to hive off a portion of the Appellant’s land and allocating the same to himself; and that the 1st and 2nd Respondents omitted “to disclose to the Land Adjudication & Settlement Officer or Demarcation Officer and Survey Officer” that they did not occupy the said parcel of land. These averments were reiterated in the Appellant’s witness statement, which he adopted during the hearing of the suit. Likewise, PW2 and PW3 adopted their witness statements during the



hearing, and in which they severally states that during the “demarcation and adjudication” the suit land was owned by the Appellant.

21. Section 1 of the [Evidence Act](#) defines evidence as “the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity”. The [Evidence Act](#) further defines a fact in issue as a fact from which, either by itself or in connexion with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. Therefore, any evidence adduced is only useful to prove a fact which is in issue. Section 61 of the [Evidence Act](#) in this respect also provides that any facts which are admitted by parties or which are deemed to have been admitted by their pleadings, need not be proved in any civil proceeding. We are of the view that the Appellant is deemed to have admitted in his pleadings and evidence that the suit land was subjected to an adjudication process, and that it was therefore subject to the procedure under the [Land Adjudication Act](#). The Appellant cannot therefore be allowed to approbate and reprobate in this regard.
22. It therefore follows that the dispute resolution procedure set out in the [Land Adjudication Act](#) was applicable, and under section 107 and 109 of the [Evidence Act](#), it is the Appellant, as the party who desired the trial Court to give judgment as to his legal rights under the [Land Adjudication Act](#), who bore the burden of proof to demonstrate that the existence of facts required to have been met in the [Land Adjudication Act](#) had been satisfied.
23. The question as to the exhaustion of statutory remedies was also settled by the Supreme Court of Kenya as follows in [Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 Others](#) [2019] eKLR:

(116) The foregoing verdict also finds support in an adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. see *Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd* [2008] eKLR *Narok County Council case v Trans Mara County Council* [2000] 1 EA 161 *Kones v Republic & Another ex parte Kimani wa Nyoike & 4 Others* (2008)3 KLR (EP); *Speaker of the National Assembly v Njenga Karume* (2008)1 KLR (EP) 425, *Francis Mutuku v Wiper Democratic Movement - Kenya & Others* [2015] eKLR *David Ochieng Babu v Lorna Achieng Ochieng & 2 others* [2017] eKLR among other cases not referred to. The Court of Appeal in *Geoffrey Muthinja & Another v Emanuel Muguna Henry & 1756 Others* [2015] eKLR held that:

‘We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article



159 of the constitution which commands Courts to encourage alternative means of dispute resolution.”

24. In conclusion, we find that the learned trial Judge did not err in his findings. Consequently, we find that this appeal has no merit and is hereby dismissed with costs to the Respondents.

25. Orders accordingly.

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

P. NYAMWEYA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

