Katana v Mwadundu & 3 others (Civil Appeal E053 of 2021)
[2024] KECA 721 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 721 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E053 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 21, 2024

BETWEEN

KARISA KAZUNGU KATANA ..... APPELLANT

AND

KALIYE KIMWELI MWADUNDU ..... 1ST RESPONDENT

LAND REGISTRAR - KILIFI ..... 2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER-KALOLENI SUB-COUNTY .... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an appeal from the Judgement of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 30th April 2021 in E.L.C Petition No. 14 of 2018)

JUDGMENT

1. The judgment from which this appeal arises was rendered in determination of the petition dated 25th September 2018 filed by the appellant, Karisa Kazungu Katana, in which he prayed for:

    a. a declaration that the decision of the 2nd respondent to allow the 1st respondent's appeal to the Minister for Lands based on extraneous evidence not adduced by either party was against the just expectation of the appellant and amounts to a denial of the appellant's rights to a fair hearing and to a reasonable and procedurally fair administrative action as enshrined in Articles 47 and 50 of *the Constitution* of Kenya;

    b. a declaration that the action of the 2nd respondent in not recording all the evidence tendered by the appellant was an infringement of the appellant's right to a fair hearing and to a reasonable and procedurally fair administrative action as enshrined in Articles 47 and 50 of *the Constitution* of Kenya;

c. a declaration that the issuance of a Title Deed to the 1st respondent for the suit property pursuant to a flawed decision will further violate the appellant's right to a fair hearing and a fair administrative action as well as to the appellant's right to property as enshrined under Articles 40, 47 and 50 of *the Constitution* of Kenya;

d. an order of Certiorari quashing the decision of the 2nd respondent made on 8th August 2018 that allowed the 1st respondent's appeal to the Minister for Lands and also quashing the Order of even date that Plot No. 945 Kawala 'B' Adjudication Section be registered in the name of the 1st respondent;

e. an order substituting the decision of the 2nd respondent with a judgment in favour of the appellant and against the respondents with an order directing the 3rd respondent to register the appellant as the proprietor of Parcel No. Kawala 'B'/954;

f. costs of this Petition; and

g. any other relief that the Court may deem just to grant so as to meet the ends of justice and the protection of the appellant's Constitutional rights.

2. The history of this dispute was that, when the Kawala 'B' Area was declared an Adjudication Section, Plot No. 945 was allocated to the appellant herein. Unhappy with that decision, the 1st respondent filed a case before the Area Land Committee (the Committee) pursuant to sections 19 and 20 of the *Land Adjudication Act* (the Act). That complaint was heard and determined by the Land Committee and a decision returned in favour of the 1st respondent. Aggrieved by the Committee's decision, the appellant moved to the Arbitration Board (the Board) pursuant to the provisions of sections 21 and 22 of the Act. On or about 16th December 2011, the Board rendered a determination which this time round went in favour of the appellant. Once more, being unhappy with that decision, the 1st respondent lodged Objection Case No. 6 of 2014 (the Objection) against the appellant. On 26th November 2012, that Objection was also dismissed and the 1st respondent then lodged an Appeal to the Minister pursuant to section 29 of the Act. The Minister thereafter constituted a Ministerial Panel Chaired by the 2nd respondent as the Deputy County Commissioner, Kaloleni Sub-County (the Panel). In a decision rendered on 8th August 2018, the Panel allowed the 1st respondent's appeal and directed that the suit property be registered in the name of the 1st respondent in trust for other family members.

3. According to the appellant, at all times material herein, he was the beneficial owner entitled to possession of Plot No. 945 Kawala 'B' Adjudication Section (the suit property), having acquired the same from the original owner, Mwandoro Iha, pursuant to a sale agreement dated 9th July 2008; and that he had since erected his residence on the property and that, when the area was declared an adjudication section, he was documented as the owner thereof pending an objection filed by Kaliye Kimweli Mwadundu, the 1st respondent herein. The appellant then set out the sequence of events leading to the petition as set out above and deposed that, prior to the declaration of the area as an adjudication section, the 1st respondent had been sued over the suit property in Kaloleni District Magistrates Court Land Case No. 3 of 1970 - Mwandoro Iha v Kimweli Mwadundu, and that the case was determined in favour of the said Mwandoro Iha.

4. The appellant contended that, in the course of the hearing of the appeal to the Minister, he adduced all evidence in support of his case, including the judgment delivered on 11th July 1970; but that unbeknown to him, that evidence was neither recorded nor considered by the Deputy County Commissioner Kaloleni Sub-County (the 2nd respondent herein) in the course of the appeal proceedings; and that the 2nd respondent's ecision in awarding the suit property to the 1st respondent

was based on extraneous considerations, and was a violation of the appellant's right to a fair hearing and to reasonable and procedurally fair administrative action as enshrined in *the Constitution*.

5. In opposition to the petition, the 1st respondent, Kaliye Kimweli Mwadundu, filed a replying affidavit sworn on 11th October 2018 and filed herein on 12th October 2018 in which he denied that the appellant acquired the suit property from the original owner on 7th July 2008. The 1st respondent asserted that the person who allegedly sold the property to the appellant was not the owner and had no proprietary interests therein, and which could be passed to the appellant; that the alleged sale and purchase of the property was not done in accordance with the law in that the necessary consents were not applied for and or obtained by both the appellant and the seller; that the developments carried out on the property by the appellant were done at his own risk as the same were done during the pendency of the dispute herein, and in spite of the 1st respondent's protests and objections; that Land Case No. 3 of 1970 was not in respect of the suit property as stated by the appellant; that, to the contrary, the dispute involving the suit property was Land Case No. 12 of 1968 - Kimweli Mwandandu v Kajefwa Chai - wherein the 1st respondent's father, the late Kimweli Mwadundu, was awarded land comprising what is now the suit property.

6. The 1st respondent denied further that the evidence presented by the appellant was not recorded in the course of the appeal proceedings, or that the decision by the Minister was based on extraneous evidence or considerations. He averred that the decision by the Minister did not in any manner contravene or violate the appellant's rights, and asserted that the petition is nothing but an attempt to appeal the decision of the Minister, which ought to be final, through the back door.

7. The 2nd, 3rd and 4th respondents were opposed to the petition vide the Grounds of Opposition dated 22nd October 2018 in response to the appellant's Notice of Motion dated 25th September 2018, which they adopted in response to the petition, and in which they asserted: -

    1. That the application lacked merit since the appeal to the Minister was heard and determined in strict compliance with Section 29(1) of the *Land Adjudication Act*;

    2. That the Application and reliefs sought therein are fundamentally flawed since the procedure followed in arriving at the decision was in accordance with the *Land Adjudication Act* and did not violate any constitutional provisions;

    3. That the application is premature and an abuse of the Court process in that the applicant has neither exhibited proof of any violation of Articles 40, 47 and 50 of *the Constitution* by the 2nd respondent and the same does not meet the threshold for grant of the orders sought herein;

    4. That no allegation of irregularity, ultra vires or irrationality can be contrived from the pleadings and evidence adduced against the 2nd respondent;

    5. That the application is fatally defective and the orders sought therein untenable for lack of material disclosure; and

    6. That the application is otherwise an abuse of the process of this Honourable Court.

8. The petition was heard and determined on affidavit evidence and submissions. In his judgement dated 30th April 2021, the learned Judge (Olola, J.) found that the issue of the sub- division of the property and the burial of a member of the 1st respondent's family had been raised before the Ministerial Panel Chaired by the 2nd Respondent as the Deputy County Commissioner, Kaloleni Sub-County (the Panel) and that the petitioner was therefore being less than candid in his assertion that the Panel made a finding based on evidence which was not tendered; that the Panel sitting on appeal of the previous

decisions was bound to look at the proceedings recorded by the lower committees that had dealt with the dispute; that, while the petitioner only attached to his petition the proceedings before the Panel, the 1st respondent attached to his replying affidavit the proceedings before the Arbitration Board culminating in their decision made on 6th April 2011; that a perusal thereof revealed, not only that the 1st respondent represented to the Board that the suit land was sub-divided, but that he also produced in evidence the judgment of the Court rendered in Kaloleni District Magistrates Land Case No.12 of 1968 between one Kimweli Mwadundu and Kajefwa Chai; that the judgment of Honourable J. K. Mwangome, DM III rendered on 13th February 1969 revealed that the land in contention was indeed sub-divided between the parties and, hence, there was no basis for the petitioner's contention that the 2nd respondent's findings did not arise from the material and evidence placed before it; and that, as the Minister sat as a quasi-judicial tribunal, there was no basis for contending that the Panel had ignored the basic principles of natural justice in determining the appeal or in making the orders in issue.

9. According to the learned Judge, the mere fact that the outcome of the appeal was not in favour of the petitioner does not in his view render the whole process unreasonable and procedurally unfair. Accordingly, he was not persuaded that the petitioner's constitutional rights were violated as alleged in the petition or at all. The learned Judge cited section 29(1) of the Act as regards the finality of the Minister's determination of the appeal and held that, absent any evidence of impropriety on the part of the Panel, the petition was nothing but an attempt to appeal the decision of the Minister through the back door.

10. It was the learned Judge's finding that since the Panel was sitting in a quasi-judicial capacity, if indeed the petitioner had proof that any of the evidence he adduced before the Panel had been left uncaptured and/or unconsidered, his option lay in applying for review of the Minister's decision on the ground of discovery of an error or mistake apparent on the face of the record. However, no evidence was tendered that his full testimony was not captured, and there was no evidence that he was denied fair administrative action as enshrined under Article 47 of *the Constitution*.

11. It was on that basis that the petition was dismissed with costs to the respondents.

12. Aggrieved by this decision, the appellant has appealed to this Court contending that the learned Judge erred in law and in fact: in finding and holding that the 2nd respondent's decision was based on evidence and material tendered before court; in failing to find that the decision was based on extraneous evidence not tendered by the 1st respondent; in failing to find that the evidence tendered by the appellant was not considered or analyzed by the 2nd respondent; and in failing to find that the appellant's constitutional rights were violated by the 2nd respondent. The appellant urged this Court to allow the appeal, set aside the impugned judgment and substitute therefor judgment allowing the petition in its entirety with costs of the appeal.

13. We heard this appeal on the Court's GoTo Meeting virtual platform on 4th March 2024 when learned counsel, Mr. Shujaa, appeared for the appellant while Mr. Odhiambo appeared for the 1st respondent. There was no appearance for the 2nd, 3rd and 4th respondents notwithstanding due service of the hearing notice. Counsel for the appellant and the 1st respondent relied on their respective written submissions, which they briefly highlighted.

14. The appellant submitted that no evidence of actual subdivision of the suit property was tendered before the 2nd respondent. Hence, it was erroneous for the learned Judge to have held that evidence of the subdivision had been adduced; that the finding by the 2nd respondent that the 1st respondent had buried a relative of his son on the suit property was not supported by any evidence, as no evidence was tendered before it on the same; that the learned Judge did not properly analyse the evidence

on such issues and proceeded to accept the finding of the 2nd respondent as correct and arrived at a wrong conclusion; and that the learned Judge's failure to properly evaluate the evidence resulted in an erroneous conclusion that the appellant had failed to prove that his constitutional rights to a fair trial under Article 50 of *the Constitution* and his right to a procedurally fair administrative action under Article 47(1) of *the Constitution* had been infringed by the 2nd respondent. The appellant urged this Court to find that the appeal is merited and pray that the appeal be allowed in its entirety.

15. The 1st respondent submitted that the 2nd respondent's decision was based on evidence and material tendered before him; that the evidence tendered was considered so as to arrive at a proper decision; that the learned Judge did not hold that the plot was subdivided as submitted by the appellant; that the appellant had the opportunity to access justice as provided for under the *Land Adjudication Act* and the *Land Act* No. 6 of 2012; that the appellant's constitutional right under Articles 40, 47 and 50 of *the Constitution* were not contravened or infringed; that the appellant ought to have filed an application before the 2nd respondent for review; and that the matter before the 2nd respondent was not an administrative issue, but were quasi-judicial proceedings. The 1st respondent urged this Court to find that the appeal lacks merit and should be dismissed with costs.

16. We have considered the submissions made by the parties in this appeal.

17. Although the petition was determined on the basis of affidavit evidence and submissions, it is our view that on a first appeal, the principles that apply to oral hearing largely apply to cases where a determination is arrived at based on affidavit evidence subject to the rider that the caution applicable to the court's handicap of not hearing and seeing the witnesses does not apply to cases where there was no oral hearing. Nevertheless, the court has to reconsider the evidence, whether in an affidavit form or orally adduced, evaluate it and draw own conclusion of facts and law (See Selle & another vs. Associated Motor Boat Co. Ltd & others (1968) EA 123).

18. From the grounds of appeal, it is clear that grounds 1 to 3 challenge the factual findings of the learned judge. Ground 4 flows from the first three grounds. As this Court has previously restated, the findings of fact by the trial court must be given their rightful place, and the first appellate court will only depart from such findings if they were not based on evidence on record or where the said court is shown to have acted on the wrong principles of law as was held in Jabane vs. Olenja (1986) KLR 661; or where its discretion was exercised injudiciously as was held in Mbogo & Another vs. Shah (1968) EA 93.

19. As regards factual findings by the trial court, the position is that, whereas an appellate court has, indeed has jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand, this jurisdiction should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. A Court of Appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case, unless it is based on no evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did, or unless the findings are shown to be plainly wrong. See Peters vs. Sunday Post [1958] EA 424; Chemagong v Republic [1984] KLR.

20. According to the appellant, no evidence of actual subdivision of the suit property was tendered before the 2nd respondent. Hence it was erroneous for the learned Judge to have held that evidence of the subdivision had been adduced. In his judgement, the learned Judge held that:

> "...it was evident [from the evidence] to me that the issue of the sub-division of the property and the burial of a member of the 1st Respondent's family had been raised before the Panel and that the Petitioner was therefore being less than candid in his assertion that the Panel made a finding based on evidence which was not tendered."

21. As rightly submitted by the 1st respondent, there was no finding anywhere that the learned Judge concluded that there was actual sub-division. The learned Judge only referred to the evidence of the 1st respondent as recorded by the Panel where the respondent said that there was a dispute in 1968between Kimweli Mwadundu and Kajefwa Chai; that the case was heard at Kaloleni Law Courts and the ruling was that the Plot in dispute to be sub-divided into two equal portions; and that his father was allocated the Southern part and Kajefwa Chai the northern part. We find no basis for the complaint against the learned Judge as regards the issue of the subdivision, since the learned Judge did not find, contrary to the appellant's submissions, that actual subdivision was done.

22. The learned Judge was also faulted for failing to find that, contrary to the finding by the 2nd respondent, there was no evidence that the 1st respondent had buried a relative of his son on the suit property. In his judgement, the learned Judge reproduced the record of the proceedings before the Panel in which the 1st respondent in cross-examination confirmed that the they had buried a family member on the suit property. Therefore, it is erroneous for the appellant to contend that there was no evidence in support of the fact of burial by the 1st respondent's relatives on the suit property.(not Clear)

23. In our view, the learned Judge having found that the appellant's case was not proved, there was no basis upon which he could find that the appellant proved that his constitutional rights to a fair trial under Article 50 of *the Constitution* and the right to a procedurally fair administrative action under Article 47(1) of *the Constitution* had been infringed by the 2nd respondent.

24. This was a matter that went through the process of land adjudication. As this Court observed in *Julia Kaburia vs. Manene Kabeere & Others Civil Appeal No. 340 of 2002* (UR):

> "The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By section 30(1) and (2), the jurisdiction of the courts is ousted once the process of land adjudication has started until the adjudication register has been made final. By section 12(1) of the Act, the Adjudication Officer is required to make a record of the proceedings before him and follow the procedure directed to be observed in hearing civil suits as far as practicable but has absolute discretion to admit evidence which would not be admissible in a court of law. By section 12(2), the proceeding conducted by the Adjudication Officer or by an officer subordinate to him under the Act is a judicial proceeding for the purposes of offences relating to administration of justice and defamation in Chapters XI and XVIII of the Penal Code respectively. Lastly, section 26 of the Act gives to the Adjudication Officer power to hear all objections to the Adjudication register. His decision is subject to appeal to the Minister (for Lands) under section 29(1) of the Act and the decision of the Minister is final. However, the High Court has supervisory jurisdiction over the decision of the Minister or the Adjudication Officer... inter alia, if the decision was made without jurisdiction or in excess of jurisdiction or in breach of the rules of natural justice but not because it was wrong on the merits. The Superior Court acted without jurisdiction by implicitly reversing the decision of the Land Adjudication Officer." [Underlining ours].

25. It is clear to our minds that, apart from the limited supervisory role that the court has over the process, the adjudication process that has undergone all the statutory stages cannot be reversed by the court simply because the court does not agree with the merits of the process. To do that would amount to the court sitting on appeal in a land adjudication process under the guise of undertaking its supervisory

role. The centrality of the adjudication process in ascertaining interest in unregistered customary land tenure was emphasised by this Court in Mbui vs. Mbui [2005] 1 EA 256 where it was held that:

> "The very purpose of subjecting land, hitherto held under customary tenure, to the process of land consolidation under the *Land Consolidation Act* or the *Land Adjudication Act* and subsequently registering it under the Registered Lands Act is ipso facto to change the land tenure system and the assumption is that all rights and interests of persons in the land subjected to such new system would have been ascertained and recorded before registration."

26. The deliberate and lengthy process set out in the *Land Adjudication Act* for ascertaining rights and interests in land held under customary tenure is meant to afford those claiming any right to land sufficient avenues in which to ventilate their claims and, once that process is exhausted, the merits of the claimants' cases are deemed as determined with finality.

27. We have considered the decision of the learned Judge and find no reason to disturb his findings and conclusions.

    Accordingly, we find no merit in this appeal which we hereby dismiss with costs.

28. It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

A. K. MURGOR

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JUDGE OF APPEAL

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

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify this to be a true copy of the original

Singed

DEPUTY REGISTRAR