Mberia & another v M'Naingabu & 2 others (Civil Appeal 243 of 2019)
[2024] KECA 1134 (KLR) (6 September 2024) (Judgment)

Neutral citation: [2024] KECA 1134 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 243 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

SEPTEMBER 6, 2024

BETWEEN

KARUTA MBERIA ..... 1ST APPELLANT

FRIDAH KAMBAJA MBERIA ..... 2ND APPELLANT

AND

M'MUGAINE M'NAINGABU ..... 1ST RESPONDENT

THE LAND ADJUDICATION OFFICER TIGANIA EAST/WEST DISTRICT ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an Appeal from the Decree and Judgment of the Environment and Land Court of Kenya at Meru (M. Njoroge, J.) dated 29th August 2018 in ELC Petition No. 28 of 2013)

JUDGMENT

1. Land parcel No. 1417 (the suit property) located within Kitharene Adjudication Section was registered in favour of Limberia Kirera. On 26th March 1994 the 1st respondent M'Mugaine M'Naingabu filed Objection No. 647 against Limberia Kirera claiming 1.50 acres of the suit property. The objection went before the Land Adjudication Officer Tigania, East/West District (the 2nd respondent) for resolution. On 21st April 1998 the parties appeared before the 2nd respondent. Limberia Kirera had shown the 1st respondent one acre of land at Nguthuine Area unregistered in compensation for the claimed land. The 1st respondent withdrew his objection and the objection was marked as dismissed with the suit property remaining with Limberia Kibera.

2. Following a letter dated 11th February 2006 to the 2nd respondent, Limberia Kirera gave the suit property to his wife Karuta Mberia (the 1st appellant) and his daughter Fridah Kambaja Mberia (the

2nd appellant) in equal shares. The register was amended to reflect this. The new parcels were 1417 (to the 1st appellant) and 3241 (to the 2nd appellant).

3. The 1st respondent went back to the 2nd respondent and filed Objection No. 649 against Limberia Kirera claiming 1.50 acres of the suit property. His case was that he was re-opening his objection that had been compromised and/or dismissed on 21st April 1998. The parties were heard and the 1st respondent's claim of 1.50 acres of the suit property was allowed on 11th February 2008.

4. Limberia Kirera died on 9th May 2008. He is the one referred to as the deceased in the proceedings.

5. When the decision in Objection No. 649 was not effected, the 1st respondent filed a constitutional petition before the Environment and Land Court at Meru claiming that his constitutional right to the 1.50 acres had been violated. He sought a declaration that he had been deprived of the land and an order that the decision in the objection be implemented. The appellants opposed the petition, contending that Objection No 649 and the subsequent proceedings were a nullity, the dispute having been heard and determined in Objection No. 647. According to the 2nd respondent, the decision in Objection No. 647 superseded that in Objection No. 649; that the deceased was no longer the owner of the suit property, it having been registered in the names of the appellants. This is the dispute that was heard by the learned M. Njoroge, J. and determined on 29th August 2018.

6. The learned Judge declared that as long as the 2nd respondent had not implemented the decision in Objection No. 649 and given the 1st respondent the 1.50 acres, the constitutional right of the latter to the land had been violated. The learned Judge observed as follows:-

> " As long as that decision stands I think that it is not the task of this court to consider whether there was any other decision made there before concerning the suit land. Furthermore it appears that the 1st and 2nd respondents, being the persons entitled to the 2nd respondents, being the persons entitled to the second parcel of land that the deceased would get at Nguthaine when demarcation began, would unfairly benefit from the acquisition of the deceased's second portion while the petitioner would go without any land. If the petitioner had already been given land from the new adjudication section as was intended in the objection proceedings, then there would not have been anything easier than for the 1st and 2nd respondents to expressly say so in their replies. That however was not done and, in my thinking, putting an end to this dispute without any remedy being accorded to the petitioner would leave the petitioner quite disadvantaged."

7. To put it briefly, the learned Judge found that, because the deceased's undertaking in Objection No. 647 to give the 1st respondent one acre in Nguthuine was not honoured, the 1st respondent was entitled to receive his claim through Objection No. 649 to get 1.50 acres of the suit property as had earlier been claimed; that when the 2nd respondent failed to implement the decision in Objection No.649 he violated the 1st respondent's constitutional right to the land in question.

8. The appellants were aggrieved by the decision, and came before this Court on appeal. Their grounds were as follows:-

> " 1) That the learned Judge erred by failing to find that the 1st respondent's objection no. 649 against parcel no. 1417 Kitharene Adjudication section, was heard and determined on 21/4/1998.
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> 2) That the learned Judge erred by failing to find that under the *Land Adjudication Act*, there is no provision for a re-hearing of an objection since

the only redress after a hearing is an appeal to the minister or to file a judicial review suit to quash such decision or to file a judicial review application for an order of mandamus.

1. That the appellants have been deprived of their lawful properties through an improper and illegal determination dated 11/2/2008.

2. That the trial court erred in completely ignoring the findings of the end respondent dated 21/4/1998 and thus resulted into taking away the appellants' lands.

3. That once the 1st respondent herein confirmed that he had been shown his one (1) acre by the deceased before withdrawing his objection, then the only remedy available to the 1st respondent was to follow his one acre as shown and not to revive an objection that had been already determined."

The appellants asked that their appeal be allowed, the petition before the trial court be dismissed, and that they be awarded the costs of the appeal.

9. During the hearing of this appeal. Learned counsel Mr. Kaburu represented the appellants. He had filed written submissions which he highlighted. The 1st respondent was served, but neither attended nor filed submissions. Learned counsel Mr. Njeru appeared for the 2nd and 3rd respondents. The 3rd respondent is the Attorney General. He did not file submissions.

10. It was submitted on behalf of the appellants that once the dispute between the 1st respondent and the deceased over the suit property was heard and determined by the 2nd respondent through Objection No. 647, there was no jurisdiction on the part of the 2nd respondent to re-open or re-hear the same dispute between the parties in Objection No. 649. Citing the decision in Samwel Kamau Macharia & Another -vs- Kenya Commercial Bank & 2 Others [2012]eKLR, learned counsel Mr. Kaburu submitted that both under the *Land Adjudication Act* (Cap. 284) and *Land Consolidation Act* (Cap. 283) the 2nd respondent's jurisdiction to hear and determine the objection filed in Objection No. 647 became exhausted when the claim was compromised through agreement for the deceased to compensate the 1st respondent with one acre in Nguthuine. The 1st respondent could not bring the same dispute, now contained in Objection No. 649, making the same claim; that if he was not given the one acre in Nguthuine he ought to have sued the deceased to recover the same. It was submitted that the proceedings contained in Objection No. 649 were a nullity for want of jurisdiction, and therefore the learned Judge had fallen into error when he entertained the objection.

11. We have reconsidered the evidence and material that was placed before the learned Judge. The learned counsel for the appellants had submitted before the learned Judge that, the decision of the 2nd respondent in Objection No. 647 determined the rights of the deceased and the 1st respondent in respect of the suit property; and the determination was final as the interests of the parties in the suit property had been ascertained. When the deceased failed to give the 1st respondent the one acre that he had undertaken, that was a claim to be filed in court but not the subject of a fresh objection. This was because the *Land Adjudication Act* and the *Land Consolidation Act* did not provide for the revival of the Objection No. 647.

12. Quite unfortunately, we observe, the trial court did not deal with this question of jurisdiction. Once this question was raised, the learned Judge was obligated to determine it before delving into the merits of the claim. (See Owners of the Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd [1989]eKLR). If the court found that it did not have jurisdiction it was bound to down its tools, as it were.

13. It is our considered view that under sections 5 to 26 of the *Land Consolidation Act*, a mechanism was provided to the 2nd respondent to hear and determine any objections relating to ascertainment of rights in the suit property. Indeed, the 2nd respondent heard the dispute. It was compromised on the basis that the deceased would retain the suit land and give the 1st respondent alternative land in compensation in Nguthuine area unregistered. The one acre had been shown to the 1st respondent. One does not know what became of the one acre, but from the proceedings the 1st respondent did not get it. Whatever the case, his claim to the 1.50 acres was exhausted once he accepted a lesser parcel in compensation elsewhere. The legislations under which his claim in Objection No. 647 was heard and determined through the compromise did not provide for the re-opening of the matter. Any grievance, if at all, was reserved to be taken before the Minister on appeal.

14. In other words, the proceedings in Objection No. 649 that sought to revive that 1st respondent's claim over the 1.50 acres of the suit land were a nullity for want of jurisdiction on the part of the 2nd respondent. It follows that, in allowing the petition, the learned Judge fell into error as the suit was for dismissing.

15. Consequently, we allow the appeal with costs and set aside judgment and decree by the learned Judge. In its place, there will be a judgment dismissing the petition with costs.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR