



**Mberia v M'Ambau (Civil Appeal 164'A' of 2017)
[2024] KECA 1555 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1555 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 164'A' OF 2017
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
OCTOBER 25, 2024**

BETWEEN

FRANCIS GITONGA MBERIA APPELLANT

AND

M'ETHARIA M'AMBAU RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Meru (E.C. Cherono, J.) dated 28th September, 2017 in Meru ELC Appeal No. 54 of 2012)

JUDGMENT

Background

1. This is a second appeal from the judgment of the Environment and Land Court (ELC) in Meru (E. C. Cherono, J.) which set aside the judgment of the SRMCC at Tigania entered by B. Ochieng, SPM on 22nd May, 2012 and set aside all consequential orders made in the trial court's judgment.
2. The brief background to the appeal is that vide a plaint dated 21st September, 2010, M'Etharia M'Ambau (the respondent) filed a suit at the Senior Resident Magistrate Court at Tigania, being Civil Case No. 82 of 2010 against Francis Gitonga Mberia (the appellant), The District Land Adjudication Officer and The Hon. Attorney General (as the 1st, 2nd and 3rd defendants respectively, seeking orders in the main:
 - “ 1. A declaration that the plaintiff is the rightful owner of land parcels No.3081 and 3080 Akithi 111 Adjudication Section;
 2. A permanent injunction to restrain the 1st defendant to keep off the plaintiff's parcel of land;



3. An order directing the 2nd defendant to transfer back to the plaintiff plot number 3080 and 3081 Akithi 111 adjudication section;
4. Costs of the suit;
5. Interest thereon at court rates; and
6. Any other or further relief this Court may deem fit and just to grant.”

3. The respondent who was the plaintiff in the suit before the trial court claimed that he was the original registered proprietor of land parcel No. 438 now renamed Land Parcel Nos. 3080 and 3081 (the suit properties), which he had occupied throughout his life. He stated that during the land consolidation and adjudication processes, the 1st defendant in the trial court (the appellant herein) conspired with the District Land Adjudication Officer who was the 2nd defendant at the trial court to fraudulently cause the suit properties to be registered in the name of the appellant as set out in the particulars of fraud appearing in the plaint.

4. The appellant herein (as the 1st defendant in the trial court) through his amended defence and counterclaim filed on 11th January, 2012 stated that he is the registered owner of the suit properties having bought the same from the original registered owners namely, Martha Kangondu and M’Imangi M’Ambau in 2002. Further, that the respondent and his agents had been forcefully occupying the suit properties thereby trespassing there on. In the counterclaim the appellant prayed that the suit by the respondent be dismissed and that a permanent injunction do issue restraining the respondent from entering or in any way interfering with his use and occupation of the suit properties.

5. The trial court heard the matter and ultimately dismissed the respondent’s suit and entered judgment in favour of the appellant against the respondent. The trial court also issued a permanent injunction in favour of the appellant restraining the respondent from entering or in way interfering with the appellant’s use and occupation of the suit properties.

The trial court further awarded costs to the appellant.

6. Aggrieved by this judgment the respondent filed an appeal before the ELC at Meru and raised five grounds of appeal ,to wit, that the trial court erred in law and in fact: in dismissing the respondent’s suit in the lower court on the evidence before it; in entering judgment for the appellant on the basis of the evidence before it; and in failing to consider and to take into account the particulars of fraud and the respondent’s evidence at the time of the compilation of the judgment. The respondent further claimed that the whole of the trial court’s judgment is against the weight of the evidence and the law.

7. The 1st appeal proceeded before the ELC (E. C. Cheronu, J.) who on 28th September, 2017 delivered its judgment in the following terms;

“The suit which the plaintiff/appellant filed before the magistrate’s court being SRMCC No. 82 of 2010 (Tigania) was seeking to determine ownership rights in the suit properties. That court in my view lacked jurisdiction to determine ownership and other interest in land under an Adjudication Section. The same applies to the respondent’s counterclaim over the suit properties which the trial court entered judgment in his favour. For the above reasons, the judgment entered by the learned magistrate on 22/05/2012 and all consequential orders be and is hereby set aside.

In the upshot, this appeal also succeeds with each party to bear her own costs in the proceedings before the trial court and the present appeal.”



8. Aggrieved by the judgment of the ELC, the appellant filed the instant appeal raising seven (7) grounds of appeal essentially faulting those findings to wit; that the ELC misdirected itself in interpretation of Section 30(1) of the *Land Adjudication Act* and Section 8 of the *Land Consolidation Act*; in failing to comprehend the law and the facts and evidence adduced in the trial court and, therefore, arrived at a wrong conclusion; and that having found that the trial court lacked jurisdiction, the ELC as the 1st appellate court ought to have dismissed the respondent's appeal which it failed to do but instead found that the appeal had merit. The appellant further contended that the impugned judgment is not well reasoned and was against the weight of law and evidence. Further, that the ELC did not judiciously exercise its discretion in denying the appellant the costs of the appeal; and that the ELC did not make a final determination of the issues before it.

Submissions by Counsel

9. When the appeal came up for hearing before us, learned counsel Mr. Anampiu appeared for the appellant, while Ms. Mbumbuya appeared for the respondent. Counsel had both filed written submissions, which they orally highlighted.
10. Counsel submitted that Section 30 (1) of the *Land Adjudication Act* and Section 8 (1) of the *Land Consolidation Act* are similar and are both to the effect that unless the Land Adjudication Officer gives a written consent allowing a party to file a suit to claim any right in an adjudication area, the suit will not be entertained. That unless such consent is given, the suit is fatally incompetent. Counsel further submitted that the 1st appellant found that the trial court had no jurisdiction, which was an erroneous finding as there is on record a written consent by an Adjudication Officer dated 16th July, 2010.
11. Counsel further submitted that courts exercise their jurisdiction as conferred by the *Constitution* or other written law and that in the instant appeal; the court exercised its jurisdiction by dint of Section 30 (1) of the *Land Adjudication Act*. Further, that once the Land Adjudication Officer grants consent this gives the court jurisdiction to entertain and decide the matter.
12. Counsel submitted that the ELC misinterpreted Section 30 (1) of the *Land Adjudication Act* and Section 8 of the *Land Consolidation Act*. Further, that the ELC did not evaluate the appellant's evidence adduced in the trial court. Counsel submitted that in the trial court, the appellant gave very cogent evidence and produced ownership documents in respect of the suit properties.
13. Counsel further submitted that the ELC having found that the trial court lacked jurisdiction, it should have dismissed the appeal. Counsel asserted that despite this finding, the ELC went to hold that 1st appeal was successful.
14. Opposing the appeal, counsel for the respondent submitted that the suit properties had been the subject of cases before the Land Adjudication Officer, Akithii and that a decision thereof was made in favour of the appellant. Counsel asserted that to signify the end of the dispute, the Land Adjudication Officer issued a statutory notice pursuant to Section 24 of the *Land Adjudication Act*. Counsel submitted that this notice informed or notified the parties herein that the adjudication register in respect of the suit properties had been heard and closed.
15. Counsel further asserted that under Section 26 of the *Land Adjudication Act*, the aggrieved party was required to file with the office his objections to the notice within 60 days. That after the issuance of the notice, the aggrieved party's only remedy was to file an appeal with the Minister.
16. Counsel further submitted that the Land Adjudication Officer could not issue consent to the court as the dispute had already been heard and finalized by the Adjudication Officer, Akithii. Counsel asserted that the issuance of consent by the Land Adjudication Officer was legally untenable as this was intended



to subject the parties to double jeopardy by being heard twice by the Land Adjudication Officer on the one hand and the trial court on the other. Counsel concluded that the ELC did not therefore err when it held that it lacked jurisdiction to rehear the dispute.

Counsel urged this Court to dismiss the appeal with costs.

Determination

17. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
18. Having set out the background to the appeal and the positions taken by both the appellant and the respondent, we now turn to consider the merit of the appeal. In this respect we will first consider the issue of the jurisdiction of the trial court as had been raised by the respondent as a preliminary issue. Our finding on this aspect will determine whether we can proceed to address the other issues raised in the appeal.
19. In this regard, Section 8(1) of the *Land Consolidation Act* provides as follows regarding institution of suits over land that is the subject of an adjudication process:

“Subject to the provisions of this section, no person shall institute and no court whatever shall take cognisance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given.”

20. Further, Section 30 of the *Land Adjudication Act* provides as follows:

- “30 (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.
2. Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
3. Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty- eight days after the refusal, appeal in writing to the Minister whose decision shall be final.
4. The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land



the order or decision is not the subject of an appeal and the time for appeal has expired.

5. A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.
 6. Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.”
21. The section therefore requires a written consent to be given before the institution of civil proceedings concerning an interest in land in an adjudication section. The said consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section and specifically requires the suit to be discontinued if started without consent. Section 30 of the *Land Adjudication Act*, clearly affects the power and jurisdiction of courts to hear and determine such disputes. The rationale for the said provisions is that there is an elaborate process that is laid down by the *Land Adjudication Act*, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication. That it is therefore necessary that the process be first employed before resort is made to the courts, and also shielded from unnecessary and unjustified abuses. Indeed, it has been severally held by this Court that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the courts is invoked. See in this regard the decisions in *Geoffrey Mutbinja Kabiru & 2 others vs Samuel Munga Henry & 1756 Others* [2015] eKLR and *Mutanga Tea & Coffee Company Ltd vs Shikara Limited & another* [2015] eKLR.
22. In the instant appeal, the ELC held as follows on the issue of consent to institute the proceedings and after addressing the merits of the appellant’s case:
- “My understanding of Section 30 of the *land Adjudication Act* (Cap. 284) as read with Section 8 of the *Land Consolidation Act* (Cap. 283) Laws of Kenya is that no person shall institute and no court whatever shall hear and determine any proceedings in which the ownership interest or right in to or over any land in an adjudication area is called into question or is alleged to be in dispute.
- The Section is couched in such mandatory terms leaving no doubt in the mind of this court that no suit can be instituted seeking the determination of ownership or any interest or right over land in an adjudication Section until all the remedies available on appeal has been exhausted.
- The suit which the plaintiff/appellant filed before the magistrate’s court being SRMCC No. 82 of 2010 (Tigania) was seeking to determine ownership rights in the suit properties. That court in my view lacked jurisdiction to determine ownership and other interest in land under an Adjudication Section. The same applies to the respondent’s counterclaim over the suit properties which the trial court entered judgment in his favour. For the above reasons, the judgment entered by the learned magistrate on 22/05/2012 and all consequential orders be and is hereby set aside.
- In the upshot, this appeal also succeeds with each party to bear her own costs in the proceedings before the trial court and the present appeal”
23. Section 30 of the *Land Adjudication Act* requires an Adjudication Officer appointed under Section 4 of the *Act* to give consent to institute civil proceedings. Section 4 of the Act in this respect provides that the Minister shall, by notice in the Gazette, appoint a public officer to be the adjudication officer for the



adjudication area, and the adjudication officer may in writing appoint such demarcation officers, survey officers and recording officers, being public officers, as may be necessary for demarcating, surveying and recording interests within the adjudication area, and they shall be subordinate to him.

24. In the instant appeal, the letter dated 16th July, 2010 emanated from the District Land Adjudication Officer, Tigania West/East Districts and was addressed to the Resident Magistrate Tigania Law Courts. The said letter gave consent to the institution of civil proceedings involving the suit properties between the parties herein, and was valid for sixty (60) days from the date of the consent. The suit by the respondent was instituted by a plaint lodged with the trial court at Tigania on 28th September 2010, after the consent in the letter dated 16th July, 2010 was granted.
 25. Accordingly, at the time of inception of the suit, an Adjudication Officer had granted consent. The existence of the consent rendered the suit and the entire proceedings before the trial court valid. We therefore find that the 1st appellate court erred in its finding that the trial court had no jurisdiction to entertain the suit before it. With respect, the ELC erred in its interpretation of that section. It is also notable that under Section 30(4) of the *Land Adjudication Act*, the orders given in such proceedings are subject to any appeal process and determination. In the circumstances, we find the orders given by the ELC to be null and void ab initio.
 26. In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning held as follows as regards the effect of a null and void act:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
 27. In the circumstances, our holding on the issue of the jurisdiction of the trial court is sufficient to dispose of this appeal. In the circumstances, we are precluded by our findings from going into the merits of the parties’ respective cases as urged in the ELC, having found that the trial court had jurisdiction, and the proceedings before it were valid.
 28. We accordingly allow the appeal and set aside the orders dated 28th September, 2017 by the ELC Judge. Since the merits of the appeal before the ELC were not dealt with, we remit the matter before the ELC to be heard and determined by a Judge other than E.C Cheronu, J.
 29. Each party shall bear its own costs of the appeal.
- Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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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

