



REPUBLIC OF KENYA



KENYA LAW
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**Kandau v Matenzwa (Civil Appeal 170 of 2018)
[2023] KECA 1119 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1119 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 170 OF 2018
HA OMONDI, GWN MACHARIA & JM MATIVO, JJA
SEPTEMBER 22, 2023**

BETWEEN

JOHN MUTUA KANDAU APPELLANT

AND

NDOO MATENZWA RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Garissa (Cherono, J.) dated 31st July 2017 in Civil Appeal No. 26 of 2012)

JUDGMENT

1. The matter traces its roots to the trial court in the Senior Resident Magistrate's Court at Mwingi (Nyaberi, PM.), in which John Mutua Kandau, the appellant herein, being the plaintiff in the Magistrate's court, had sued Ndoos Matenzwa, the respondent, then the defendant in Mwingi PMCC No 56 of 2012, seeking a permanent injunction to restrain the respondent, his entire family members or agents, from burying the remains of the respondent's late wife, Makaa Ndoos on land parcel number 323, Nzawa adjudication section. He termed the intended burial unlawful, and constituting an act of trespass and malicious attempts to grab the property by erecting graves; and if the respondent was to be allowed to inter the remains of his wife, that would result in irreparable loss and damage.
2. He denied the respondent's claims that he had lived on the suit land for 20 years, saying that the respondent had never objected to his ownership, until the year 2003, when the respondent's late father trespassed onto the land; and he filed Civil Case No 85 of 2003, seeking eviction orders; and Civil Case No 38 of 2009, to stop the burial of the respondent's father on the suit land and it was after the death of the respondent's father who was buried on the respondent's land, that the appellant started laying claim over the suit land. He produced a letter from the Land Adjudication office in Mwingi to support his claim of ownership of the suit land, describing himself as the 'demarcated and recorded' owner of the suit land which he obtained from his late father in 1931.



3. The respondent rejected the appellant's claims, saying he had been in occupation of the suit land for over 20 years, having inherited it from his late father, before moving out of his late father's compound and setting up a home, just 100 metres away; and that the consent issued from the Land Adjudication office was as a result of the appellant's fraudulent manipulations.
4. After the hearing, the trial court, whilst issuing a permanent injunction on grounds that the appellant had established a prima facie case with probability of success, held that the land in issue was distinct from the one claimed by the respondent; in any event even the purported inherited parcel did not belong to the respondent's late father, whom the trial court found to have encroached onto the appellant's parcel; the evidence established that the land belonged to the appellant; and that to allow the respondent to bury his wife on the suit land, thus have a permanent grave thereon, would result in waste of the property, and cause irreparable injury that no amount of damages could be computed as compensation.
5. Being aggrieved by the outcome, the respondent challenged the decision in the Environment and Land Court (ELC) on grounds that the learned trial Magistrate erred in holding that the appellant did not have possessory rights because the land belonged to the respondent; the total evidence offered by the appellant was not considered, particularly the fact that there had been several determined land disputes in court, between the parties, thus rendering the suit *res judicata*; and there was no basis for grant of an injunction.
6. The respondent's contention at the first appeal was that the issue before the trial court was not to determine ownership rather, it was whether he had a right to inter the remains of his wife on the suit land; therefore the *Giella v Cassman Brown* case did not apply.
7. On the other hand, the respondent argued that the only issue that was before the court for determination was whether he was entitled to an injunctive relief against the appellant in respect to the suit land.
8. The court, (Cherono, J.), noted that the suit land was a parcel under adjudication pursuant to section 5 of the *Land Adjudication Act*, CAP 284; that the purpose of establishment of adjudication sections was to ascertain individual or group interest in land within a particular adjudication system; and the issue sought to be determined in the magistrate's court were the same pending before the land adjudication and settlement officer and as such the trial court lacked jurisdiction.
9. The ELC also noted that the nature of suits contemplated under section 30 of CAP 284 were judicial review proceedings, and that the court was thus mandated to issue judicial review reliefs, which reliefs only dealt with the process of making a decision and not ownership of disputed property. In allowing the appeal with costs, the court then found appellant's suit in Mwingi PMCC No 56 of 2012 was filed in contravention of section 30 of the *Land Adjudication Act* CAP 284 as the issues were the same ones pending before the Land Adjudication and Settlement officer. However, each party was to bear their own costs in the lower court.
10. Dissatisfied with that outcome, the appellant moved to this Court, challenging the judgment of the ELC on 5 grounds which he consolidated as follows: that the learned Judge failed in his primary role as the 1st appellate court, to re-evaluate and re-analyze the extracts on the record, and make his own conclusion, instead, he misconstrued section 30 of the *Land Adjudication Act*, thus introducing the issue of jurisdiction which was not pleaded in the lower court; that the issue before the trial court was simply whether the appellant was entitled to injunctive relief against the respondent, and to that extent, the lower court was correct in finding that the appellant was the demarcated and recorded owner of the suit land and as such the respondent could not bury his wife thereon.



11. It is the appellant's contention that the learned Judge failed to understand the fundamental issue that the appellant was the 'demarcated and recorded owner' of the suit land and in turn replaced it with ownership and possession thereby coming up with the issue of jurisdiction; that consent was not an issue before the lower court and that if it were to be taken into consideration, then it would mean that any person instituting suit should first acquire consent from the Land Adjudication Officer; and that in any event there was a consent letter dated 28th June 2018, which had been issued to the appellant, and even produced in the lower court.
12. The other ground deals with costs in the ELC, the contention being that each party ought to bear their own costs in the 1st appeal as the court determined the matter of jurisdiction which was not pleaded.
13. This being a second appeal, section 72(1) of the *Civil Procedure Act* restricts this Court to consider only matters of law. This position has been amplified in several decisions among them *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No 127 of 2007 and *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR which held inter alia that, a second appellate court ought to confine 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.
14. In our view, one main issue of law in this appeal is whether the learned Judge erred in finding that the lower court lacked jurisdiction. We echo the now popular remarks by Nyarangi, J, in the celebrated case of *Motor vehicle M.V. Lilian S. v Caltex Oil (Kenya Limited)* [1989] KLR 1 to the effect that jurisdiction is everything, and once a court notes that it has no jurisdiction it ought to down its tools and hear the matter no more. It is a critical element in litigation before the courts, and cannot be ignored or wished away. The crux of the appellant's case is that the learned Judge instead of re- evaluating evidence came up with his own issue revolving around jurisdiction thereby missing completely the point of the appeal.
15. Looking at the evidence as tendered by Joseph Ndung'u Kamau, the Senior Land Adjudication Officer Mwingi District these are the salient points:
 - (i) That the suit land falls in Nzawa Adjudication Section, Mwingi Adjudication Area.
 - (ii) The said adjudication section is still undergoing implementation of objection and checking of records; and that the suit land was demarcated to John Mutua Kandau, the appellant herein.
 - (iii) That there had not been any objection on the land save the appellant's complaint of the respondent's intent to bury his wife on the suit land.
 - (iv) That the appellant was seeking consent to sue for restraining orders against the respondent.
 - (v) That the appellant was issued with a consent vide letter dated 28th June 2012.
 - (vi) That the said consent did not give the court authority to determine ownership as the land adjudication and settlement officer was best placed to determine ownership.
16. Now the appellant claims that the issue of jurisdiction was raised by the Judge of his own motion. We need to underscore that a court can on its own motion raise an issue of jurisdiction and determine it. However, in this case, the issue of jurisdiction was raised by the appellant's witness who stated that the consent of 28th June 2012 did not give the court authority to determine ownership, but rather the land adjudication and settlement officer.



17. As a result of this, it was then imperative for the 1st appellate court to have a look at the provisions of the [Land Adjudication Act](#), and determine the issue. The procedure for acquisition of land is set out clearly in Section 5 of said Act, as was correctly set out by the learned Judge at page 5 of his judgment.
18. We note that section 26 of the Act provides for objections to the adjudication register. It is also noteworthy that the Senior Land Adjudication officer in his evidence noted that there were no objections on the suit land.
19. Section 30 of the Act provides in part that no suit shall be entertained by the court without consent. On this issue, as confirmed by the Senior Lands Adjudication officer, there was a consent obtained. The catch here however is that the witness was very clear that despite the existence of the consent, the same did not give court the authority to determine ownership but that was the preserve of the land adjudication and settlement officer; that the said adjudication section is still undergoing implementation of objection and checking of records and that the suit land was demarcated to John Mutua Kandau, the appellant herein. Our comprehension is, that would mean that the issue of ownership of the suit land by the appellant had not yet been completed with finality; as such the issue of ownership was pending before the land adjudication and settlement officer. We say so, taking into consideration that section 29 of the Act provides for appeal on any determination of objection under section 26 of the Act, which gives aggrieved parties remedies provided for in the Act.
20. By virtue of the appellant in the lower court calling witnesses and producing documentation to prove ownership of the suit land, it would then follow that the decision of the land adjudication settlement officer on ownership had been rendered with finality. Subsequently, the suit filed by the appellant in the lower court would be a bid to challenge the said decision, which would offend the provisions of section 26 which provided other exhaustive avenues of redress before the jurisdiction of the ELC for prerogative orders could be invoked to challenge any decision. See [Republic v District Land Adjudication Officer, \(Transmara District\) Samson Kiserian Kilerai](#) [2012] eKLR and [Nicholas Waweru v Attorney General & 8 others](#) [2013] eKLR.
21. From the evidence on record, this is not the case as the appellant's own witness testimony was to the effect that the said adjudication section was still undergoing implementation of objection and checking of records.
22. It is our finding that the appellant, having failed to start and/or exhaust all the remedies laid down in the Act was estopped from pursuing any perceived interest in the suit land through his case in the lower court. The appellant has not established, as required under section 24 of the Act, that the adjudication record was completed nor has, he shown a copy of said adjudication register. In addition, he has failed to show that the 'No Objection Register' and a copy of the duplicate adjudication register was forwarded to the Chief Land Registrar for purposes of registration.
23. We further note that there was no evidence on record that the processes under sections 26 - 29 of the Act were followed. The effect of section 30(1) is that unless the register has become final under section 29(3) of the Act, then, all courts are mandatorily prohibited from entertaining disputes concerning land falling within adjudication areas. In the present instance, it is clear the register was not final.

Section 30(1) provides:

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 the Act.



24. Ultimately, it is apparent that the appellant has not controverted in any way, that the suit land is within an adjudication section and that it is also clear that the appellant did not exhaust the laid down procedure in the Act, neither has the appellant challenged the decision by invoking the supervisory jurisdiction of the ELC court in the form of Judicial Review.
25. We are thus in agreement with the finding of the 1st appellate court that the lower court lacked jurisdiction to hear and determine Mwingi PMCC 56 of 2012. Accordingly, the appeal lacks merit and is struck out with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

H. A. OMONDI

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

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G. W. NGENYE - MACHARIA

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

