M'rutere - Deceased (Substituted by Rose Njiru, the Legal Representative of his Estate) v Kathurima (Civil Appeal 232 of 2018) [2023] KECA 1057 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1057 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 232 OF 2018

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

SEPTEMBER 22, 2023

BETWEEN

M'NCEERI M'RUTERE - DECEASED (SUBSTITUTED BY ROSE NJIRU, THE LEGAL REPRESENTATIVE OF HIS ESTATE) ..... APPELLANT

AND

NICHOLAS KATHURIMA ..... RESPONDENT

(An appeal from the judgment and decree of the ELC Court at Meru (M. Njoroge, J.) dated 1st August 2018 in ELC No. 136 of 2017 (formerly HCCC No. 156 of 1995)

JUDGMENT

1. Before the High Court at Meru in Civil Suit No. 156 of 1995 the deceased M'Nceeri M'Rutere sued the respondent Nicholas Kathurima seeking a declaration that he was the rightful owner of parcels Nos. Ruiri/Nkando/576 and 676 and that there be a permanent injunction restraining the respondent from interfering with the said parcels. It was not in dispute that in Kiirua/Nkando/Adjudication area there was a dispute between the parties over land parcel No. Kiirua/Nkando/576 which measured 43.95 acres, or thereabouts. The deceased claimed that through the ballot process in 1969 he had been allocated the parcel of land but that the respondent was claiming the same. The dispute was heard by the Land Adjudication Committee in Committee Case No. 9/83/83. It was resolved in favour of the deceased who was awarded the entire parcel of land. The respondent was aggrieved by the decision, and the matter went before the Land Arbitration Board in Arbitration Case No. 13 of 1985. The Board resolved that 20 acres go to the respondent and the deceased gets 23.95 acres. The respondent, still aggrieved, appealed to the Minister who on 14th December 1994 awarded the respondent 30 acres and the deceased 13.95 acres. This is the decision that aggrieved the deceased who filed the suit in the High Court. His case was that the Minister's decision was unlawful and illegal as the whole land was his; that he had extensively developed the land, having occupied it since 1971. It was after the Minister's decision

that the parcel had been subdivided and parcel No. Kiirua/Nkando/576 registered in the name of the deceased and parcel No. Kiirua/Nkando/676 registered in the name of the respondent.

2. In the amended statement of defence and counterclaim, the respondent denied that the deceased had ever been the lawful proprietor of the whole land either under written law or under customary law. He denied to have trespassed on the land, as alleged or at all. He pleaded that the decision of the Minister over the dispute was final, and was incapable of challenge in the manner sought in the plaint. In the counterclaim, the respondent stated that he was the lawful owner of parcel No. Kiirua/Nkando/676 following the Minister's decision made during the adjudication process; that the Minister's decision had not been challenged; and that, therefore, he sought to have the deceased evicted from the parcel and an order of permanent injunction issued against the deceased over this parcel of land.

3. The suit was taken over by the Environment and Land Court(ELC) in ELC No. 136 of 2017 at Meru. The dispute was heard by Mwangi Njoroge, J. on the following agreed issues for determination:-

> " 1) Who is the owner of land parcel Nos. Kiirua/Nkando/576 and 675 situated in Kiirua/Nkando adjudication section.
>
> 2. Was the defendant illegally and unlawfully awarded thirty acres of land from the plaintiff's land by the Minister for Lands and Settlement?
>
> 3. Who is in possession of the said parcels of land?
>
> 4. Has the plaintiff extensively developed the said land?
>
> 5. Are the parties entitled to the orders sought?
>
> 6. Who pays the costs of the suit?"

4. Following the death of the deceased on 4th August 1999, his widow Rose Njiru became the plaintiff in the suit, and she is the appellant in this appeal.

5. The learned Judge considered the evidence tendered by either side, and on 29th August 2018 rendered a judgment in which it was found that, although the appellant was the one in occupation of parcel No. Kiirua/Nkando/676 the occupation was unlawful because the respondent had become entitled to the land following the dispute resolution mechanism under the *Land Adjudication Act* which had culminated in the Minister's decision which under section 29 of the Act was final. On the basis of these findings, the appellant's suit was dismissed with costs, and the counterclaim was allowed. Each party was asked to pay own costs of both the suit and the counterclaim.

6. These are the findings that aggrieved the appellant who filed this appeal to this Court.

7. This is a first appeal. Our remit is to reconsider and evaluate the evidence that was tendered before the trial court and arrive at our own conclusion thereon while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses as they testified before it (*Selle and another –v- Associated Motor Boat Co. Ltd and others* [1968] EA 123). We further are mindful of the fact that before coming to a conclusion different from that of the trial court, we should be satisfied that the advantage that the trial court had of seeing and hearing the witnesses was not sufficient to explain or justify the conclusions that it arrived at in the judgment or decision subject of the appeal (*Hahn –v- Singh* [1985] KLR 716).

8. It was a ground in the Memorandum of Appeal that the respondent's counterclaim was allowed yet it was incompetent because, one, it was statutorily-barred by limitation under section 7 of the *Limitation of Actions Act*; two, it was fatally defective because it was not accompanied by a verifying affidavit as was required by order 7 rule 5(a) of the *Civil Procedure Rules*; and, three, it was bad in law and fatally

defective because the respondent had not obtained the mandatory consent as was required by section 30 of the *Land Adjudication Act*.

9. Our considered view of the appellant's complaint regarding the competence of the counterclaim on any of the above grounds is that, the parties, who were represented, placed before the learned Judge issues that they wanted it to resolve for them. The competence of the counterclaim on any of the three grounds, or at all, was not one of the issues to be resolved. In the learned Judge's judgment, the issue did not form the basis for the determination. We cannot therefore concern ourselves with the issue of the competence of the counterclaim, as the same was not an issue in the ELC and no decision was made on it that can properly form the basis of this appeal.

10. The appellant complained that her case was dismissed without considering the evidence which she had placed on record to show that the deceased was the owner of land parcel No. Kiirua/Nkando/576, and also that the counterclaim was allowed on insufficient evidence. The other complaint related to the learned Judge's determination that the decision of the Minister under section 29(1) of the *Land Adjudication Act* was final, yet that finality was in respect of the adjudication process only and did not oust the jurisdiction of the ELC. Reference was made to article 162(2)(b) of *the Constitution* and section 13(1), (2) and (7) of the *Environment and Land Court Act*, No. 19 of 2011. We were addressed on these issues, both in written submissions and orally, by Mr. Kirimi and Ms. Swaka for the appellant and Mr. Ringera for the respondent.

11. We wish to reiterate that the *Land Adjudication Act* guided the process of ascertainment and recording of rights and interests in community land leading to the compilation of an adjudication register which was then to form the basis of the registration and issuance of individual titles. The Act has a dispute resolution mechanism that ends with an appeal to the Minister under section 29 of the Act. The decision of the Minister brings to an end any dispute between parties regarding their rights and interests over the land in question. Section 29(1) of the Act provides that the decision is final. It is common ground that the dispute between the appellant's late husband and the respondent over the ownership of the 43.95 acres went through this dispute resolution process, upto the Minister who determined that 30 acres of it belonged to the respondent. The land was then registered as parcel No. Kiirua/Nkando/676. The record shows that when the respondent testified he produced his title to the 30 acres. The land had, following the Minister's decision, been registered in his name. He called the Sub-County Land Adjudication and Settlement Officer who confirmed that the Minister's decision to subdivide the 43.95 acres and to give the respondent the 30 acres had been implemented through the process of survey and registration.

12. Now that the Minister's decision took effect and the respondent became the registered proprietor of parcel No. Kiirua/Nkando/676, the registration of ownership vested into him absolute and indefeasible rights under sections 24, 25 and 26 of the *Land Registration Act*. Under section 26 of this Act such registration could only be impeached on the ground of fraud or misrepresentation to which the respondent was proved to be a party, or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. In the instant case, the plaint was quite bare. It simply alleged that the decision of the Minister that gave the 30 acres to the respondent was unlawful and illegal. No particulars were given. It was not alleged that the decision was based on any fraud or misrepresentation to which the respondent was a party. No corruption was alleged or proved in the dispute.

13. We hold that, firstly, if the appellant felt aggrieved by the Minister's decision, and now that the parties had subjected themselves to the dispute resolution mechanism under the *Land Adjudication Act*, what was open to him was to file a judicial review application to set aside the decision. Secondly, if the appellant chose to attack the Minister's decision and also attack the respondent's title through this

declaratory suit, the minimum was to join the Minister for him to defend his decision to award the land to the respondent. More important, the appellant, if she sought to impeach the respondent's title to the land, had to come under section 26 of the *Land Registration Act* and lay a basis for the claim and give sufficient particulars. The record does not show that the necessary pleading was done. When the appellant testified before the learned Judge, there was nothing in her evidence that came close to attacking the absolute and indefeasible title that the respondent held. We hasten to add that, the learned Judge considered the evidence that the Minister had relied on to make the award. The learned Judge noted that the Minister's award was well reasoned, and that he had considered the available evidence.

14. The appellant took issue with the following passage in the judgment:-

> " 29. In my view the dispute herein revolves around the issue of ownership of the land. There are statutory mechanisms for the resolution of such disputes on the issue of ownership of land in a land adjudication area and to which the *Land Adjudication Act* has been applied. The mechanisms culminate in an appeal under section 29 of the Act. That section provides that the Minister's award is final. This court cannot sidestep the provisions of that section and grant the plaintiff land she is otherwise not entitled to out of the suit land. It would appear that the task was completed when the appeal decision was made. I, therefore, find that the plaintiff is the lawful owner of plot number Kiirua/ Nkando/ 576 while the defendant is the rightful owner of plot number Kiirua/ Nkando/ 676. The plaintiff's occupation and use of parcel number Kiirua/ Nkando/676 has therefore been in contravention of the appeal decision and therefore unlawful."

15. Whereas in the written submissions by learned counsel for the appellant emphasis was placed on the protective nature of the registered title and correctly cited the decision in *Elijah Makeri Nyang'wara –v- Stephen Mungai Njuguna & Another* [2013]eKLR on the two instances when such title can be challenged, he did not address the court on the ways the Minister's award can be challenged. In other words, he did not substantiate what was pleaded in the grounds in the Memorandum of Appeal. Our considered view is that, the Minister's decision under section 29(1) of the *Land Adjudication Act* can be challenged by way of judicial review, but can also be challenged by a declaratory suit before the ELC. We agree with the similar view taken by this court in *Nicholas Njeru –v- Attorney General & 8 others* [2013]eKLR.

16. We hope we have said enough to show that this appeal has no merit. The same is dismissed with costs.

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

W. KARANJA

.....

JUDGE OF APPEAL

L. KIMARU

.....

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