



REPUBLIC OF KENYA



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**Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 others
(Civil Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1280 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E033 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 27, 2023**

BETWEEN

**GORAVE AMARNATH (SUING ON BEHALF OF THE ESTATE OF THE LATE
AMARNATH GUPTA) APPELLANT**

AND

PATRICIA KAZUNGU 1ST RESPONDENT

LAND REGISTRAR KILIFI 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Mombasa (C.K. Yano, J.) delivered on 18th March 2021 in ELC Case No 131 of 2019.)

JUDGMENT

1. Gorave Amarnath (suing on behalf of the estate of the late Amarnath Gupta), hereinafter the Appellant, has brought this appeal challenging the Ruling of C. K. Yano, in Malindi Environment and Land Court (hereinafter ELC) allowing a preliminary objection (PO) dated 27th September 2019 brought by Patricia Kazungu, hereinafter the 1st Respondent. The PO challenged the jurisdiction of the ELC to entertain an appeal from the Minister's decision, urging that the same was in violation of Order 53 of the *Civil Procedure Rules* (hereinafter the CPR), and Sections 27 and 28 of the *Land Adjudication Act*, Cap 284 Laws of Kenya (hereinafter the Act). Further, the suit land was privately owned and registered in the name of the 1st Respondent and as such did not form part of the estate of the deceased.

Background

2. By a Plaint dated 12th July 2019, the Appellant suing on behalf of the estate of Amarnath Gupta, (hereinafter the deceased) filed a suit before the ELC seeking several prayers. The prayers included the



setting aside of the Appeal Committees decision, the cancellation of any action taken in compliance to the said decision and an order to the Land Registrar Kilifi (the 2nd Respondent herein) to issue a title for the suit land to the Appellant. In essence, the suit was challenging the decision of the Minister through the Deputy County Commissioner, Kaloleni in Kilifi County, to allow an objection, on appeal to the Minister brought by the 1st Respondent under Section 29 of the Act. The effect of that decision was that the Appellant's ownership of Maraikani Kawala "B" Plot No. 1222, (hereinafter the suit land) was ousted and the land given to the 1st Respondent. The Appellant's position is that the evidence presented before the Appeal Committee was insufficient to form a basis to overturn the finding of the previous Committee, and that the decision was arrived at because of influence, manipulation and bias.

3. Simultaneous with the suit, the Appellant filed a Notice of Motion application dated 12th July 2019 seeking an injunction directed at the 1st and 2nd Respondents restraining them by themselves, their agents, servants or any other person acting on their instructions from transferring, selling, registering, mortgaging of the suit land until the suit is heard and determined.
4. In response to the Motion the 1st Respondent filed a Preliminary Objection dated 27th September 2019. She also filed her Defence dated 30th December 2019. In the PO among other grounds, the 1st Respondent pleaded that the ELC lacked the administrative and pecuniary jurisdiction to entertain the suit, that it was in violation of Order 53 of the CPR and Sections 27 and 28 of the Act.
5. The learned ELC Judge, after hearing the application and the PO found that he had no jurisdiction to sit on appeal against the Minister's decision. The Appellant's suit and the application for an injunction dated 12th July 2019 were struck out with costs.

Grounds of Appeal

6. In the Appellant's appeal he faults the learned ELC Judge of falling afoul the law and facts on 9 grounds of appeal, which we summarize as follows:
 - i. For upholding the PO in reliance to Order 53 of the CPR and Section 27 and 29 of the Act;
 - ii. For wrongly concluding that the Appellant's suit was an appeal against the Minister's decision;
 - iii. For failing to find that there was nothing in the Act barring the High Court in exercise of its original jurisdiction from hearing civil cases which have already been determined by the Minister;
 - iv. For failing to note that what was before the Court was a Complaint and not an Appeal;
 - v. For failing to find that there was nothing in the Act barring the High Court in exercise of its original jurisdiction to hear cases which have already been determined by an appeal to the Minister, and for failing to find that the finality of the Minister's decision related to appeals arising from appeals under the Act;
 - vi. By failing to examine the Appellant's document where he complained that the appeal to the Minister was secretive and that he was not made aware of it;
 - vii. Failing to hold that the PO could not be successfully argued without records of the to the Minister;
 - viii. Failing to find that upon completion of the dispute resolution process by the Minister, an aggrieved party could still move to the High Court for redress which is what the Appellant did; and,



- ix. The Appellant has been shut out of the seat of justice in a land matter.
7. The Appellant seeks to have the appeal allowed; the ruling of the ELC set aside, the Appellant's suit be re-instated and that costs and interests be awarded to the Appellant.

Submissions

8. This appeal was heard before us through this Court's virtual platform on the 15th June 2023. Present for the Appellant was learned Counsel Ms. Mwanzia, and for the 2nd and 3rd Respondents was learned Counsel Ms. Kiti. There was no representation for the 1st Respondent despite service of the hearing notice on 6th June 2023 served upon her Counsel on record in this matter. The 1st Respondent did not file any submissions.
9. Ms. Mwanzia relied on the filed written submissions dated 2nd March 2022 and list of digest of cases of even date, and did not require to highlight.
10. Ms. Kiti stated that she had not filed any submissions. She made oral submissions in which she urged that her clients were opposing the appeal. Counsel urged that the Appellant should have proceeded by way of Judicial Review. Counsel urged that the appeal was a challenge to the Minister's decision, which could only be challenged by way of Judicial Review. She relied on Section 29 of the Act and urged that under that Section, the decision of the Minister was final.
11. Ms. Mwanzia in response urged that the 2nd and 3rd Respondents had not filed any valid decision of the Minister to warrant filing of Judicial Review proceedings. She urged that the Appellant preferred to file a suit as opposed to Judicial Review proceedings. Counsel urged that the prayers in the Plaintiff contest ownership of the suit land and not the decision of the Minister.

Determination

12. We have considered the rival arguments by Counsel for the Appellant and the 2nd and 3rd Respondents. This is an appeal from an interlocutory application, which had the effect of determining the entire suit. We have considered the issues raised in this appeal. It being the first appeal, this Court's mandate is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned ELC Judge should stand, and give reasons either way. See Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR, Kiruga v. Kiruga & Another [1988] KLR 348 and Peters v. Sunday Post Ltd [1958] EA 424.
13. Having considered the arguments by Counsel and the record, we find that two issues fall for our determination. One, whether the suit was an appeal against the Minister's decision, two, whether the ELC had the requisite jurisdiction to entertain the suit.
14. Regarding whether the suit was an appeal against the Minister's decision. The submissions filed by Messrs. Stephen Odiagga & Company Advocates for the Appellant urge that the Appellant's Plaintiff deserved merit hearing of the issues raised by way of adduction of evidence and that the Appellant was denied the right to demonstrate that the Minister's finding could be challenged by Plaintiff and not solely by way of judicial review. Counsel cited Section 26(b) of the Land Registration Act as well as the case of Elijah Makeri Nyang'wara v. Stephen Mungai Njuguna & Another [2013] eKLR for the proposition that an un-procedurally acquired title could be challenged in court.



15. The Plaintiff sets out the Appellant's case before the ELC. The Appellant, at paragraphs 7, 9, 10 and 27 averred that;

“ a Committee purported to sit and overturn the previous findings was misled and acted without factual evidence...

That the 1st Respondent purported to file an appeal to the Minister out of the decision of the Land Adjudication Committee of 7th December 2012 and the Appeals Committee on behalf of the Minister purported to proceed with and set aside the said decision and awarded Plot Mariakani Kawala “B” No. 1222 to the 1st Respondent...

The Appellant avers that the Minister's decision was without basis and a nullity on the basis the 1st Respondent has never owned the Appellant's plot and that the Appeals Committee failed to consider the evidence of the Appellant and that of his witnesses...

The suit property is subject to the land Court of this Court and as such it has jurisdiction...”

16. These paragraphs sets out the Appellant's case before the ELC. It is clear that the suit land was situate in an adjudication area and that the adjudication process was on going. The [Land Adjudication Act](#) (the Act) governs the process of ascertaining land interests in an adjudication area, complete with in-built dispute resolution mechanism. The Appellant averred that he was challenging the decision of the Ministerial Appeals Committee, and stated that the 1st Respondent filed an appeal against the decision of the Land Adjudication Committee made earlier on 7th December 2012 to the Minister. The Appellant demonstrates he participated in the appeal process and that what he was challenging before the ELC was the outcome/decision of the Ministerial Appeals Committee.

17. That first decision was an objection made pursuant to Section 26 of the [Act](#) which provides:

“26. Objection to adjudication register

- i. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- ii. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.”

18. The appeal to the Minister was made pursuant to Section 29 of the [Act](#) provide:

“29. Appeal

1. Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-



- a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
 2. The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.
 3. When the appeals have been determined, the Director of Land Adjudication shall-
 - a. alter the duplicate adjudication register to conform with the determinations; and
 - b. certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”
19. The prayers sought, among others included the prayer for the setting aside of the Ministerial decision. Even though the Appellant denies that the suit was an appeal, we are convinced that it was one for all practical purposes.
20. In regards to whether the ELC had the requisite jurisdiction to entertain the suit, there is no dispute that the suit was challenging the decision of the Minister made pursuant to Section 29 of the Act. That Section, under Section 29(1) (b) provides:

“(b) and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”
21. In addition to declaring that the decision of the Minister is final, Section 30 of the Act all together ousts the jurisdiction of the Courts, providing as follows:

“30. Staying of land suits

 - (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.”
22. The Act is clear that any person aggrieved by a decision made under the Section 26 of the Act must follow the process under Section 29 and appeal to the Minister. Once the Minister, or the panel delegated to makes a determination, his order is final. That means the Minister’s decision cannot be appealed, whether under the Act or in Court. The option the Appellant had was to pursue Judicial Review process provided under Article 47 of the Constitution, and the Fair Administrative Action Act, 2015 a statute enacted pursuant to the Article 47 of the Constitution. He could not re-open the case



and challenge it except through Judicial Review. The Appellant was attempting to undo the process he participated in using a process that is not provided for, and that is not allowed.

23. In *Julia Kaburia v. Kabeera & 5 Others* [2007] eKLR, this Court commenting on Section 30 of the *Act*, held:

“The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...

In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication.

This protection was availed to the parties herein by the appellate process which culminates with Section 29 of the *Act*;

“(1) Any person who is aggrieved by the determination of an objection under section 26 of this *Act* may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

- a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
- b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

24. The ELC commenting on the role of the Court vis-a-vis that of the adjudicating bodies under the Act in the persuasive authority of *Tobias Achola Osindi & 13 Others v. Cyprian Otieno Ogalo & 6 Others* [2013] eKLR by Okongo J., as follows:

“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the *Act* for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the *Act*, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the *Act*...

The *Act* has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies



set up under the Act to assist in the process of ascertainment of the said rights and interests in land...”

25. Having carefully considered this appeal, we find no fault with the finding and holding of the ELC Judge that it had no jurisdiction to entertain the Appellant’s suit. The process of land adjudication had effectively come to its logical conclusion and could not be re-opened otherwise than in the manner contemplated by the law. In the circumstances, the ELC properly struck out the Appellant’s suit. The Appellant did not have any separate cause of action against the 1st Respondent other than the matters which were adjudicated upon and determined by the Ministerial Appeals Committee during the appeal to the decision of the objection proceedings. That decision was final.
26. The result is that we find no merit in this appeal. Consequently, we dismiss it with costs to the 2nd and 3rd Respondents.
27. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

