



**Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019)
[2022] KECA 119 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 119 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 139 OF 2019
P NYAMWEYA, JW LESSIT & S OLE KANTAI, JJA
FEBRUARY 18, 2022**

BETWEEN

NOORDIN BHAIJEE 1ST APPELLANT

SAIFUDEEN BHAIJEE 2ND APPELLANT

AND

DAMARIS AKINYI NONDI 1ST RESPONDENT

**CHARLES DUCE OPONDO (SUING AS ADMINISTRATOR AND PERSONAL
REPRESENTATIVE OF THE ESTATE OF JAMES OPIYO OPONDO
(DECEASED) 2ND RESPONDENT**

(An Appeal from the decision of the Environment and Land Court (Olola J.) at Malindi dated 20th September 2019 delivered in the ELC Case No. 7 of 2014 (formerly Mombasa High Court Civil Case No. 100 of 2010))

A civil suit concerning an interest in land in an adjudication section which is instituted without the consent of a land adjudication officer renders it a nullity.

Reported by Kakai Toili

Land Law – land adjudication - institution of a civil suit concerning an interest in land in an adjudication section - what was the effect of a land adjudication officer giving consent after the institution of a civil suit concerning an interest in land in an adjudication section – Land Adjudication Act (cap 284) sections 4 and 30.

Brief facts

The appellants had been sued in the Environment and Land Court by the respondents in their capacity as administrators and personal representatives of the deceased. The respondents' claim was that the deceased purchased the suit property and that prior to his death, he had constructed a permanent house for the security guards and planted trees on the suit property. The respondents further claimed that the appellants without consent or authority wrongfully entered the suit property, caused damage by demolishing the houses and cutting the trees and committed fraud which they particularized.



The appellants denied entry into the suit property and further denied needing any consent from the respondents, since they claimed the suit property belonged to them. The Environment and Land Court declared the suit property as part of the estate of the deceased and not the property of the appellants. The appellants being aggrieved filed the instant appeal. The grounds for the instant appeal were; the invalidity of the suit for want of jurisdiction and of the land adjudication officer's written content prior to its institution; the respondents' *locus* to institute and continue with prosecution of the suit on behalf of the estate of the deceased and the special procedures/ mechanism that applied to the suit property that fell within an adjudication section, the previous decisions with respect to the suit property.

Issues

- i. What was the effect of a land adjudication officer giving consent after the institution of a civil suit concerning an interest in land in an adjudication section?

Relevant provisions of the Law

Land Adjudication Act, Cap 284

Section 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.*
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.*

Held

1. The court was not bound necessarily to accept the findings of fact by the court below. An appeal to the instant court from a trial by the High Court was by way of retrial. The court had to reconsider the evidence, evaluate it and draw its own conclusions, though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. In particular, the court was not bound necessarily to follow the trial court's findings of fact if it appeared either that the court had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness was inconsistent with the evidence in the case generally.
2. Section 30 of the Land Adjudication Act required consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. The consent was a condition precedent to a valid suit concerning disputes of land in an adjudication section, and specifically required the suits to be discontinued if started without consent. Section 30 therefore affected the power and jurisdiction of courts to hear and determine such disputes.
3. The rationale for section 30 of the Land Adjudication Act was that there was an elaborate process that was laid down by the Land Adjudication Act, on how to determine which persons were, and



- the extent to which, they were entitled to interests in the land under adjudication. It was therefore necessary that section 30 was first employed before resort was made to the courts, and also shielded from unnecessary and unjustified abuses. Where a dispute resolution mechanism existed outside courts, it had to be exhausted before the jurisdiction of the courts was invoked.
4. Section 30 of the Land Adjudication Act required an adjudication officer appointed under section 4 of the Land Adjudication Act to give the consent to institute civil proceedings. Section 4 of the Act in that respect provided that the Minister would, by notice in the Gazette, appoint a public officer to be the adjudication officer for the adjudication area, and the adjudication officer could in writing appoint such demarcation officers, survey officers and recording officers, being public officers, as could be necessary for demarcating, surveying and recording interests within the adjudication area, and they would be subordinate to him. Therefore, quite apart from the fact that the contents of the letter dated April 26, 2010, being a request to some other person to give the required consent, it could not also be construed to be the consent envisaged under section 30, having emanated from a demarcation officer and not the adjudication officer.
 5. The letter dated August 12, 2010, emanated from the Land Adjudication Officer, Kilifi Adjudication Area, and was addressed to the Resident Magistrate Mariakani Law Courts, and gave consent to the institution of civil proceedings involving the suit property between the 1st respondent and the 2nd appellant and was valid for thirty days from the date of the consent. The suit by the respondents was however instituted by a plaint lodged with the High Court on April 8, 2010, before the consent in the letter dated August 12, 2010, was granted. Therefore, at the time of inception of the suit, no consent had been granted by an adjudication officer, and the trial court erred in finding that such consent existed.
 6. The lack of consent rendered the suit and the entire proceedings a nullity. Under section 30(4) of the Land Adjudication Act, the orders given in such proceedings were subject to any appeal process and determination. The orders given by the trial court were null and void *ab initio*.

Appeal allowed.

Orders

All the orders made by the Environment and Land Court in the judgment dated September 20, 2019, delivered in Mombasa ELC Case No. 7 of 2014 (formerly Mombasa High Court Civil Case No. 100 of 2010) set aside; each party to bear their respective costs of the suit in the Environment and Land Court and of the instant appeal.

Citations

Cases

1. Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others (Civil Appeal 191 of 2014 [2017] eKLR) — Mentioned
2. Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (Civil Appeal 10 of 2015 [2015] eKLR) — Mentioned
3. In re the Matter of the Interim Independent Electoral Commission (Advisory Opinion No.2 of 2011 [2011] eKLR) — Mentioned
4. Jabane vs Olenja ([1986] KLR 661) — Mentioned
5. Japhet Mjambili Tsuma & Another vs Dreamgeast Ltd & another (Civil Appeal 50 of 2010 [2012]eKLR) — Mentioned
6. Kenindia Assurance Company Ltd v Otiende ([1991] KLR 38) — Mentioned
7. Lydia Ntembi Kairanya & Another vs Attorney General (Civil Case 618 of 1997 [2009] eKLR) — Cited
8. Macfoy vs. United Africa Co. Ltd ([1961] 3 All E.R. 1169) — Explained
9. Morjaria v Abdalla (Civil Appeal 1 of 1982 [1984] eKLR) — Mentioned
10. Mutanga Tea & Coffee Company Ltd v Shikara Limited & another (Civil Appeal 54 of 2014 [2015] eKLR) — Mentioned



11. Selle & Another vs Associated Motor Boat Co. Ltd.& others ([1968] EA 123) — Explained

Statutes

1. Land Adjudication Act (Cap. 284) — section 4, 30, 30(4) — Interpreted

Advocates

None mentioned

JUDGMENT

1. Noordin Bhaijee and Siafudin Bhaijee, the appellants herein, are aggrieved by the decision of the Environment and Land Court (ELC) in relation to the land situated at Kabenderani Mariakani measuring 2.4 acres (0.99 hectares) or thereabout, currently known as plot Number 98 Kawaa B Adjudication section (hereinafter referred to as “the suit property”). The ELC (Olola J.) declared the suit property as part of the estate of the deceased James Opiyo Opondo, and not the property of the appellants. The ELC in addition issued a permanent injunction restraining the appellants from trespassing onto the suit property, obtaining title thereto, disposing or developing the same, or in any other manner whatsoever and however interfering or intermeddling with the ownership, possession, quiet enjoyment and use thereof. Lastly, a mandatory injunction was issued compelling the appellants to forthwith remove at their own cost the building materials they had deposited on the suit property, and to cover the foundation they had dug thereon.
2. The appellants had been sued in the ELC by Damaris Akinyi Nondi and Charles Duce Opondo, the respondents herein and plaintiffs in the trial Court, in their capacity as administrators and personal representatives of the Estate of the late James Opiyo Opondo (the deceased). The respondents claim was that on August 3, 1989, the deceased purchased the suit property from one John Walter Odiwour at a consideration of Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-). Further that prior to his death, the deceased constructed a permanent house for the security guards and planted trees on the suit property. However, that on diverse dates between January 2009 and March 2010, the appellants without consent or authority wrongfully entered the suit property, caused damage thereon by demolishing the said houses and cutting the trees thereon and committed fraud which they particularised.
3. The appellants filed an amended Defence in the ELC dated September 15, 2011, wherein they denied entry into the suit property and further denied needing any consent from the respondents, since the suit property belonged to them.
4. The appellants being aggrieved by the judgment in the ELC have preferred the present appeal, and have raised eight grounds of appeal in their Memorandum of Appeal dated October 17, 2019. The grounds are on four broad areas, namely, the invalidity of the suit for want of jurisdiction and of the land adjudication officer’s written content prior to its institution; the respondents’ locus to institute and continue with prosecution of the suit on behalf of the Estate of the late James Opiyo Opondo in respect to the suit land; the special procedures/ mechanism that applied to the suit property that fell within an adjudication section , the previous decisions with respect to the suit property.
5. When the appeal came up for hearing on July 28, 2021, Mr. Mogaka, the learned counsel for the appellants, was present and ready to proceed with the hearing. The respondents’ advocate was not present and had not filed any submissions on the appeal. We proceeded with the hearing of the appeal after confirming that the respondents’ advocate on record had been duly served with the hearing notice.



6. On the first area of the jurisdiction of the trial Court and validity of the suit therein, the appellants submitted that it is evident from the respondents' pleadings in the trial Court the suit property is situated within Kawala Adjudication Section, whose adjudication register had not become final in all respects, and the [Land Adjudication Act](#) under section 30 prohibits in mandatory terms, any person from instituting a suit, any court from entertaining civil proceedings concerning an interest in land within an adjudication section without the Adjudication Officer's written consent. Furthermore, that the letter relied upon by the trial court dated August 12, 2010 from the District Land Adjudication Officer permitted the institution of a suit effective from that date and was only valid for 30 days, and did not validate the respondents' suit that was filed on April 8, 2010, nor the amended plaint filed over a year later on August 25, 2011. The appellants in this respect made reference to the case of [Kenindia Assurance Company Ltd v Otiende](#) (1991) KLR 38 and [In the Matter of Interim Independent Electoral Commission](#) [2011] eKLR that jurisdiction is regulated by law and parties cannot confer jurisdiction on the courts where none exists.
7. The second area of contestation by the appellants was that the Limited Grant of Letter of Administration *ad Colligenda Bona* obtained by the respondents on February 26, 2010 did not confer any locus upon them to institute and prosecute the suit before the ELC, and the proper grant ought to be the limited grant ad litem. The appellants cited the decisions in [Morjaria vs Abdalla](#) [1984] eKLR, [Lydia Ntembi Kairanya & Another vs Attorney General](#) [2009] eKLR and [Japhet Mjambili Tsuma & Another vs Dreamgeast Ltd & another](#) [2012] eKLR on the purpose and limits of the Limited Grant of Letter of Administration *ad Colligenda Bona*.
8. On the special procedures applicable to the determination of disputes falling within an adjudication section, the appellants submitted that the [Land Adjudication Act](#) provided for elaborate procedures for determination of disputes involving such property. Furthermore, that while the matter was pending before the trial Court the respondents in abuse of justice system and court process undeniably engaged in forum shopping by commencing proceedings before the tribunal, being Land Case No 19 of 2010. Therefore, that having opted to pursue the tribunal route in which is the proper forum, the respondents were obligated to withdraw the suit in the ELC to avoid duplicity and likely conflicting decision from the justice system over the same subject matter. Reference was made to the decisions in [Bethwell Allan Omondi Okal vs Telkom \(K\) Ltd Founders & 9 others](#) [2017] eKLR and [Geoffrey Muthinja & Anor vs Samuel Muguna Henry & 1756 others](#) [2015] eKLR that alternative dispute resolution methods were to be applied first.
9. Lastly, the appellants submitted that the trial Judge in his determination erroneously placed undue reliance on the proceedings in Land Award Case No 13 of 1985 when none of the parties herein were party or witnesses in that case.
10. This is a first appeal from the decision of the ELC, and this Court's role is in this regard expressed in [Selle & Another vs Associated Motor Boat Co Ltd & others](#) [1968] EA 123 as follows;

“..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence



or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”

11. We shall therefore proceed to consider the issues raised in this appeal by re-evaluating the evidence adduced in the ELC, and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the said Court if they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.
12. In this respect we will first consider the issue of the jurisdiction of the ELC as a preliminary issue, since our findings in this respect will determine whether we can proceed to address the other issues raised by the appeal. In this regard, section 30 of the *Land Adjudication Act* provides as follows as regards institution of suits over land that is the subject of an adjudication process:
 - 30 Except with the consent in writing of the adjudication officer, no person shall
 - (1) 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.
13. The section therefore requires consent to be given before 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 suits to be discontinued if started without consent. The section therefore 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, and it is therefore necessary that it is 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] e KLR.

14. In the present appeal, the ELC held as follows on the issue of consent to institute the proceedings towards the end of its judgment, and after addressing the merits of the respondents' case:

“44. The Defendants attacked these proceedings on the basis that the area in question was under adjudication and that the plaintiffs had no consent to institute these proceedings. I have perused the Letters dated April 24, 2010 and August 12, 2010 from the District Land Adjudication Officer (Pexh 4A and 4B) and I am satisfied that the Plaintiffs obtained the necessary consent under the Land Adjudication Act prior to the institution of this suit.”

15. There was no letter among the respondents documents on record dated April 24, 2010, but there is one dated April 26, 2010 by one Lewis Nyangau, Demarcation Officer in charge, addressed to a “DLASO”, and the reference is shown as “Land Dispute”. It read as follows:

“Please allow Miss Damaris Nondi to file a land committee case Saifudin Abdoulhussein Bhajibhai of plot number 98 in regard to the above dispute within KAWALA “B” Adjudication section, Thank you”.

16. Section 30 of the *Land Adjudication Act* requires an adjudication officer appointed under section 4 of the *Land Adjudication Act* to give the 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. Therefore, quite apart from the fact that contents of the letter dated April 26, 2010 clearly being a request to some other person to give the required consent, it cannot also be construed to be the consent envisaged under section 30, having emanated from a demarcation officer and not the adjudication officer.

17. The letter dated August 12, 2010 on the other hand emanated from the Land Adjudication Officer, Kilifi Adjudication Area, and was addressed to the Resident Magistrate Mariakani Law Courts, and gave consent to the institution of civil proceedings involving the suit property between Damaris Nondi and Saifudid Abdul Hussein Bhajee, and was valid for thirty days from the date of the consent.

18. The suit by the respondents was however instituted by a plaint lodged with the High Court on April 8, 2010, before the consent in the letter dated August 12, 2010 was granted. Therefore, at the time of inception of the suit, no consent had been granted by an adjudication officer, and the trial Judge erred in finding that such consent existed. The lack of consent rendered the said suit and the entire proceedings thereunder a nullity. 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, and we hereby find the said orders given by the ELC to be null and void ab initio. 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.”

19. It is our view that our holding hereinabove on the issue of the jurisdiction of the ELC is sufficient to dispose of this appeal, and in any event, we are also precluded by our findings from going into the merits of the parties’ respective cases as urged in the ELC, having found that the said Court had no jurisdiction, and the proceedings before it were a nullity.
20. We accordingly allow this appeal and set aside all the orders made by the Environment and Land Court in the judgment dated September 20, 2019 delivered in Mombasa ELC Case No. 7 of 2014 (formerly Mombasa High Court Civil Case No. 100 of 2010). In light of the circumstances giving rise to the said suit and this appeal, each party shall bear their respective costs of the suit in the Environment and Land Court and of this appeal.
21. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

S. ole KANTAI

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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

