Arithi Self Help Grazing Group v Buuri & another (Civil Appeal 213 of 2019) [2022] KECA 665 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 665 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 213 OF 2019

W KARANJA, F SICHALE & KI LAIBUTA, JJA

JULY 8, 2022

BETWEEN

ARITHI SELF HELP GRAZING GROUP .... APPELLANT

AND

LAND ADJUDICATION OFFICER, IMENTI NORTH/SOUTH/MERU CENTRAL & BUURI .... 1ST RESPONDENT

ATTORNEY GENERAL .... 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Meru (Lucy N. Mbugua, J.) delivered on 25th July, 2018 in Environment and Land Court Petition No. 28 of 2015)

JUDGMENT

1. The exercise by courts and tribunals of judicial authority pursuant to Article 159(1) and (2) of *the Constitution* is predicated on the principle that proceedings brought before them are founded on identifiable rights of claim that are justiciable at law, including the right to enforce corresponding obligations imposed on the State to facilitate the realisation of those rights. For instance, Article 40 of *the Constitution* guarantees protection of the right to property subject, however, to proof that such rights exist as against real and

   identifiable persons, the term "persons" being used here within the meaning of

Article 260 of constitution the Constitution.

2. By a petition filed at the Environment and Land Court at Meru in ELC Petition No. 28 of 2015, the appellant (Arithi Self Help Grazing Group) – through its Chairperson, Secretary and Treasurer) prayed for: a declaration that the petitioner's fundamental rights and freedoms as guaranteed under Article 40 of *the Constitution* of Kenya, 2010 were contravened by the 1st and 2nd respondents (the Land

Adjudication Officer, Imenti North/South/Meru Central and Buuri, and the Attorney-General); a permanent injunction restraining the 1st respondent by themselves, their agents, employees, servants, assignees or anyone else claiming on their behest from alienating, allocating the suit land to other parties or interfering with the said land in any way; a declaration that the petitioners are the sole and rightful legitimate owners of all that parcel of land measuring 1,000 Acres in the approximate and known as Kiirua/Kisima bordering Laikipia and the Islamic Foundation; any other relief that the Court may deem fit to grant; and that the costs of the petition be borne by the respondents jointly and severally.

3. Though not expressly stated in the appellant's petition, we presume that the same was also supported by the affidavit of M'Inoti M'Rukaria (the appellant's Chairperson) sworn on 27th October 2015 and filed specifically in support of the appellant's Notice of Motion of even date, and which accompanied the petition. In its Motion, the appellant sought: a temporary injunction restraining the 1st respondent from entering into, alienating, subdividing, altering boundaries, allocating or in any other way interfering with the suit property pending the hearing and determination of the Motion and the petition; in the alternative, a conservatory order prohibiting the respondents from allocating the suit property to anyone claiming either on their own behalf or on the behest of the respondents pending hearing and determination of the application and petition; and that costs of the application be borne by the respondents. The ELC granted the appellant temporary injunction as sought pending hearing and determination of its petition.

4. Briefly stated, the appellant's case as gathered from the grounds set out on the face of its petition, the Motion and affidavit in support thereof, is that the suit property had been allocated to the appellant by the defunct Meru County Council on 29th June 1982 for their use before the section in issue was declared for adjudication on 18th January 1983; that the property was subsequently subdivided and allocated to unknown persons; that the appellant's objection lodged with the District Land Adjudication and Settlement Officer has never been determined; that, but for the allocations and resultant encroachment, the appellant has been in actual occupation of the suit property; and that the allocation to other persons of portions of the suit property was in contravention of the appellant's right to property guaranteed by Article 40 of *the Constitution*.

5. The respondents opposed the petition vide the replying affidavit of Eric K. Korir (the District Land Adjudication and Settlement Officer) sworn on 5th February 2016 in which he depones that the adjudication section in issue was declared in 1983; that the ascertainment of rights and interests in land progressed well and the adjudication register published in 2003; that the appellant's rights and interests over the suit property were never recorded as mandated by section 13(1) of the *Land Adjudication Act*, 1959; that the disputed parcel was claimed by other persons and subdivided into several parcels; that the appellant did not file any case with the Adjudication Committee or raise any objection against the parcels when the register was published in 2003; that the group did not request to be issued with consent to lodge a claim in court to assert their interests; that it was resolved to demarcate the adjudication section in issue afresh as directed in Civil Appeal No. 129 of 2005; that the appellant is at liberty to register objections against all or any of the persons in occupation of the subdivisions of the suit property after completion of the repeat demarcation and publication afresh of the adjudication register.

6. In response to the respondents' reply, the appellant filed a "Reply to Respondents' Replying Affidavit" sworn by the group's Treasurer on 9th October 2017 in which she stated that the appellant was not party to the Civil appeal No. 129 of 2005 and, therefore, they were not party to the consent orders pursuant to which the repeat demarcation and process adjudication was ordered; that previous allocation of the subdivisions of the suit property was illegal, fraudulent and in contravention of Article 40 of *the Constitution*; that the appellant filed its objection on 25th March 2003, which is yet to be determined;

and that the lands office declined to disclose the identity of the new allottees to enable us obtain consent to file suit.

7. In support of the appellant's claims, learned counsel for the appellant (M/s. John Muthomi & Co.) filed written submissions dated 23rd February 2022, which they highlighted orally when the appeal came up for hearing on the GoTo Meeting virtual platform. However, the respondents did not file any written submissions, and neither did they appear in Court at the hearing of the appeal.

8. Having heard the appellant's petition and the respondents' response thereto, the learned Judge (Lucy N. Mbugua, J.) delivered her judgment on 25th July 2018 dismissing the appellant's petition with costs to the respondents. As the learned Judge correctly observed:

> " Adjudication is a very important process and ought to be given a chance to be finalized so that the community members can have identifiable rights and interests in land. It follows that the dispute resolution mechanism provided under the applicable statute ought to be followed."

9. Aggrieved by the judgment and decree of the ELC (Lucy N. Mbugua, J.), the appellant lodged this appeal on the 8 grounds set out in its Memorandum of Appeal dated 19th August 2019. According to the appellants –

   1. The Learned Judge of the Superior Court erred in law in holding that the Appellant was not telling the truth that they were not parties to the Nairobi Court of Appeal Civil Case No. 129 of 2005.

   2. The Learned Judge of the Superior Court erred in law in holding that the dispute before her was before other courts and a consent was apparently arrived at in the court of appeal case to wit, Nairobi Court of Appeal Civil case No. 129 of 2005.

   3. The Learned Judge of the Superior Court erred in law in holding that the Appellant's petition was wanting for non- disclosure that there were no other suits that have ever been filed in respect of the dispute.

   4. The Learned Judge of the Superior Court erred in law in holding that she was reluctant to determine the dispute less she contradicted the decision of parallel and superior courts.

   5. The Learned Judge of the Superior Court erred in law in holding that the Appellant's rights and interests in the suit land had not been ascertained and crystalized.

   6. The Learned Judge of the Superior Court erred in law in holding that the Appellant ought to follow the dispute resolution mechanism provided under the applicable statute which she failed to invoke.

   7. The Learned Judge of the Superior Court erred in law in finding that the Appellant's petition was unmerited and dismissing the same.

   8. The decision of the learned Judge of the Superior Court is bad in law and a travesty of justice."

10. On the foregoing grounds, the appellant asks us to allow the appeal and grant the orders sought in its petition to the ELC. We need to point out at the onset that, this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.

11. In Selle's case (ibid), the Court held that:

> " 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 demeanor of a witness is inconsistent with the evidence in the case generally."

12. Having considered the record of appeal, the written and oral submissions of learned counsel for the appellant in the absence of the respondents, we are of the considered view that the appeal herein stands or falls on our findings and answers to four main questions, namely: whether the appellant's right of claim over the suit property had accrued so as to found an action for the orders sought in the ELC; whether the ELC had jurisdiction to hear and determine the appellant's petition; whether the appellant is entitled to the orders sought in this appeal; and what orders ought we to make, including orders as to costs.

13. Before we pronounce ourselves on the 4 main issues on which this appeal turns, it would be remiss of us not to comment on the 8 grounds advanced by the appellant as the foundation for its appeal. Regarding the 1st ground, we are unable to ascertain its veracity in the absence of any material to suggest that the appellant was or was not party to the Nairobi Court of Appeal Civil Case No. 129 of 2005.

14. Whether or not the appellant or its members were party to the proceedings leading to the consent order recorded in the above-mentioned appeal, that decisive consent turned back the clock, so to speak, in that the Court's decision, by consent of the parties, laid the ground for fresh demarcation and adjudication to which the appellant and its members were at liberty to submit. In our considered view, it matters not whether the appellant was party to those proceedings. However, the 2nd ground holds on account of the fact that the consent recorded in that appeal settled a dispute relating to the boundary between the proposed adjudication sections, a subject matter significantly different from the appellant's petition determined by the impugned judgment. Be that as it may, that finding is of no consequence to the real issues falling to be determined in the appeal before us the same can be said of the 3rd ground about which we need not say more.

15. With regard to the 4th ground, we form the respectful view that, though correct in principle, the learned Judge lacked the jurisdiction to consider the merits of the appellant's petition, an issue to which we will shortly return. We must point out, though, that the learned Judge was correct in holding that the appellant's rights and interests in the suit land had not been ascertained and crystalized. As we will shortly demonstrate, those rights and interests had not accrued. That settles the 5th ground. Having so concluded, the learned Judge was equally correct in in holding that the appellant ought to follow the dispute resolution mechanism provided under the applicable statute. In effect, the 6th ground also fails, and so does the 7th and the 8th. Consequently, the appellant's petition had no merit.

16. Turning to the 1st of the 4 issues on which we must pronounce ourselves, it is common ground that the suit property is the subject of the ongoing process of adjudication in the adjudication section known as Imenti North/South/Meru Central and Buuri in the Kiirua/Kisima area of the Meru County, and bordering the Laikipia County. It is not in dispute that the adjudication process is still ongoing, and that the objections raised with the 1st respondent pursuant to section 29(1) of the Adjudication Act,

1968 are yet to be determined with finality before closure of the adjudication register, which would pave way to registration of titles under the *Land Registration Act*, 2012.

17. The decisive question is whether the appellant can assert claims that are in the nature of property rights of a registered proprietor before registration upon completion of the process of adjudication. To our mind, it cannot do so. Indeed, it is not until completion of the demarcation and adjudication process, and the ultimate registration of the appellant as a registered proprietor, that the appellant would be well placed to assert any property rights and interests capable of protection at law beyond recognition as a usufruct pending completion of the adjudication process and registration as a proprietor. For now, the suit property remains unregistered. It constitutes part of community land in respect of which the appellant enjoys usufructuary rights that cannot be asserted in the manner sought in its petition to the ELC. For the sake of clarity, a "usufruct," as defined in the Merriam-Webster Dictionary of Law, is "the legal right of using and enjoying the fruits or profits of something belonging to another". Put differently, it is a legal right accorded to a person or party that confers the temporary right to use and derive income or benefit from someone else's property. In the circumstances, we are of the considered view that the appellant's right of claim over the suit property had not accrued so as to found an action for the orders sought in its petition to the ELC.

18. In view of the foregoing, an issue arises as to whether the ELC had jurisdiction to entertain the appellant's petition and grant the orders sought. With due respect to learned counsel for the appellant, it did not. The appellant concedes that the process of adjudication was ongoing; that it had lodged an objection on 25th March 2003; and that its objection was yet to be determined in accordance with section 29(1) of the Adjudication Act. The appellant's case is that it lodged the petition in the ELC seeking the declaratory and prohibitory orders sought as aforesaid because certain persons had began encroaching on the portion allocated to them.

19. Learned counsel for the appellant also submitted that members of the appellant feared that the 1st respondent might subdivide and allocate to unknown persons portions of the 1,200 or so Acres said to have been allocated by the defunct Meru County Council on 29th June 1982 for their use before the section was declared for adjudication. Those fears are precisely what the process of adjudication governed by the *Land Adjudication Act* seeks to allay. We agree with the learned Judge that adjudication is a critical process by which the appellant's property rights and interests would be ascertained. Submission to adjudication under the Act is not optional, unless one elects to abandon their claims in respect of land that is subject to the process.

20. With all due respect, courts of law cannot sit to try mere intentions of any person, including those of the 1st respondent. As the immutable age-old common law principle holds, De Minimis Non Curat Lex - the law does not govern trifles, matters of little or no value. Simply put, the law ignores insignificant details or trivial transgressions, such as the fears and suspicions that ran through the minds of some of the members of the appellant that their interests in the suit property might be compromised in the process of demarcation, adjudication and registration of land in their adjudication section. We hasten to observe that such fears and suspicions do not merit judicial intervention. Judges will not sit in judgment or take notice of extremely minor transgressions or violations of the law or social convention, which are not justiciable.

21. As the High Court correctly observed in *Republic vs. National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited* [2018] eKLR –

"A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory."

22. In the South African case of *Transvaal Coal Owners Association vs. Board of Control* 1921 TPD 447 at 452.

> " It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed."

23. As regards the alleged encroachment on the suit property, which was pleaded as one of the reasons for the petition, it is noteworthy that the appellant did not join in its petition any of the persons alleged to have encroached onto the suit property. Be that as it may, the adjudication register having been closed and published sometime in 2003, but re-opened for fresh adjudication, it was incumbent upon the appellant to register its interests (if any) and raise its objections against its adversaries in accordance with the Act. As long as the process is ongoing, judicial intervention must be withheld for want of jurisdiction, except only in support of the process.

24. As the High Court at Kisii correctly held in *Tobias Achola Osindi & 13 others vs. Cyprianus Otieno Ogalo & 6 others* [2013] eKLR –

> " 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. It is noteworthy that the provision of section 26(1) of the Act is couched in no uncertain terms. Any objection to the entries in the adjudication register is to be lodged with the Land Adjudication Officer for determination by the Adjudication Committee. Resort to litigation in court as the first port of call is not an option. Section 26(1) of the Act reads:

> " 26. Objection to adjudication register
>
> 1. Any person named in or affected by the Adjudication Register who considers such Register to be inaccurate or incomplete in any respect, or who is aggrieved by the allocation of land as entered in the Adjudication Register, may, within sixty days of the date upon which the notice mentioned in section 25 of this Act is published at the office of the Regional Government Agent within whose district the adjudication area to which such Register relates is situated (and such date shall be endorsed upon the said notice), inform the Adjudication Officer, stating the grounds of his objection, and the Adjudication Officer shall consider the matter with the Committee and may dismiss the objection, or, if he thinks the objection to be valid, order the Committee to take such action as may be necessary to rectify the matter and for this purpose the Committee may exercise all or any of the powers conferred by section 21 of this Act."

26. It goes without saying that one has an option to raise or not to raise an objection.

On the other hand, any decision of the Land Adjudication officer or Committee made in determination of an objection lodged pursuant to section 26(1) is subject to appeal, not to courts of law, but to the Minister responsible for matters relating to land. Section 27(2) reads:

> " 27. Finalization of adjudication register, subject to appeals
>
> 2. If the adjudication officer considers that to alter the adjudication register would incur unreasonable expense, delay or inconvenience, he may, instead, recommend to the Minister that compensation be paid and the Minister may make such payment of compensation out of moneys provided by Parliament as he thinks fit."

27. After determination of an objection pursuant to section 26(1), a party aggrieved by the outcome may appeal to the Minister in accordance with section 29(1), which reads:

    29. 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."

28. It goes without saying that the procedure for lodging objections during the process of adjudication, and appeals therefrom, must be adhered to. This Court in *Speaker of the National Assembly vs. Karume* [1992] KLR 21, had this to say on the mandatory requirement to exhaust alternative dispute resolution mechanisms before seeking court intervention:

> " Where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

29. Likewise, the Court of Appeal at Nyeri in *Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others* [2015] eKLR observed:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews .... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts."

30. In view of the foregoing, we arrive at the inescapable conclusion that the ELC had no jurisdiction to entertain the appellant's petition except, perhaps, for the purpose only of playing its rightful role in support of the process. Moreover, jurisdiction is everything and, without it, a court has no power to take any step in the matter (see The *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd.* (1989) KLR 1). As was held in *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

> " A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

> We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

31. Having carefully considered the record of appeal and the grounds on which it is anchored, the written and oral submissions of learned counsel for the appellant, and the relevant statute and case law, we reach the inescapable conclusion that the ELC had no jurisdiction to entertain the appellant's petition, and that the appellant was not entitled to petition the court for the orders sought. In conclusion, we hereby order and direct that the appellant's appeal be and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR