IN THE COURT OF APPEAL

AT NYERI

SITTING AT MERU

(CORAM: GITHINJI, KARANJA & KIAGE, JJ.A)

CIVIL APPEAL NO. 21 OF 2016

BETWEEN

CATHERINE MUTHONI KIRIUNGI.....1ST APPELLANT

DAVID KIMATHI KIRIUNGI.....2ND APPELLANT

AND

THE CHAIRMAN, LAND ADJUDICATION & SETTLEMENT OFFICER, TIGANIA EAST CENTRAL DIVISION.....1ST RESPONDENT

THE TIGANIA EAST AND CENTRAL DIVISION LAND ADJUDICATION & SETTLEMENT OFFICER…….....….2ND RESPONDENT

JOSEPH NKINDUKU M'LIBURU..…3RD RESPONDENT

SARAH KABURO IKUNYUA……..4TH RESPONDENT

(Appeal from the Judgment of the E.L.C. Court of Kenya at Meru (P. M. Njoroge, J) dated 4th June, 2014

in H.C. Misc. (J.R.) Application No. 86 of 2010)

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JUDGMENT OF THE COURT

[1] Land Parcels No. 3158 and 6073, which are the subject in this appeal are within Antuamburi Adjudicating Section in Tigania. As at the time the dispute herein arose, the adjudication process had not been completed. From what we can gather from the record, the grandfather of the 3rd respondent – Joseph Nkinduku M'Liburu, had gathered his pieces of land as was the procedure in the adjudication process, and he was given the parcel described as No. 2280. A dispute arose between the said grandfather and the late Germano M'Amuuru (deceased). The matter was taken to the adjudication committee and the parcel in dispute was awarded to the late Germano; who took possession and continued to utilise the land for a long time.

[2] After some time, Joseph Nkinduku M'Liburu, 3rd respondent decided to re-agitate the matter, and the same went to the Arbitration Board. Joseph won the case and Parcel No. 2280 was returned to their family. According to 3rd respondent however, he came to realise later that some two parcels of the land they were claiming as theirs had been left with Germano. It is this dispute (by way of an objection) Nos. 3209 and 3210 that he now took to the Tigania East and Central Division Land Adjudication Officer for Arbitration. After hearing the parties, the adjudication officer allowed the objection in the following terms:-

> *"6.84 acres are recovered from parcel Nos. 3158 and 6073 as follows. Parcel No. 3158 (5.00 acres) and Parcel No. 6073 (1.84 acres).*

It is important to note that as at the time this dispute/objection was filed, Secondo Kiriungi Germano who is said to have gathered the plots in question had already died. At the proceedings that took away the parcels of land in question, he was represented by his old father, one Germano M'Amuru Arame. The deceased's wife and son, who were the legal representatives of his Estate were not involved. This is one of the complaints before the High Court in the Judicial Review Proceedings.

[3] Following the said award, Catherine Muthoni Kiriungi, and her son David Kimathi Kiriungi, (1st and 2nd appellants respectively), felt aggrieved, and they moved to the High Court by way of Judicial Review proceedings in Misc. Civil Application No. 86 of 2010, seeking the quashing of the said proceedings and the award/decision dated 8th July 2010.

Leave to file the motion for Judicial Review was granted on 17th November 2010. In the notice of motion, the Chairman Land Adjudication Settlement Officer Tigania East and Central Division, and The Tigania East & Central Division Land Adjudication & Settlement Officer are named as the 1st and 2nd respondents, respectively, while Joseph NKinduku M'Liburu, and Sarah Kaburo Ikunyua were listed as the first and second interested parties. They are the 1st to 4th respondents in this appeal.

[4] The exparte applicants sought the following two orders:-

> *1. That the order of certiorari be issued to remove into this Court Tigania East and Central Division Land Adjudication and settlement office objection Nos. 3209 and 3210 and quash proceedings/order/award and/or decision dated 8th July, 2010 with regard to land parcel Nos. 3158 and 6073 within Antuamburi Adjudication section and any other proceedings and orders therein.*
>
> *2. That an order of prohibition be issued against the 1st and 2nd respondents not to issue orders or any further orders with regard to Tigania East and Central Division Land Adjudication Objection Nos. 3209 and 3210 which have the effect of depriving the Ex-parte Applicants portions of their land Known as Land Parcel Nos. 3158 and 6073 Antuamburi Adjudication Section.*

The motion was predicated on the grounds:-

> *a. That the 1st and 2nd Ex-parte applicants are the Administrators of the Estate of Secondo Kiriungi Germano (deceased) which include Land Parcel Nos. 3158 and 6073 within Antuamburi Adjudication Section and comprises of 5 acres and 4.10 acres respectively.*
>
> *b. That the decision/award of the 8th July, 2010 has the effect of taking away the ex-parte applicants two parcels of land in total disregard of their property rights.*
>
> *c. That the transfer of land parcel No. 3158 Antuamburi Adjudication section by the respondents to the 1st interested party and subsequent transfer to the 2nd interested party is illegal, unlawful and fraudulent.*

d. That the award/decision therefore is ultravires, null and void as the panel did not have the jurisdiction.

e. That the award/decision offends the rules of natural justice and denies the ex-parte applicants their constitutional rights.

f. That the award/decision should be quashed.

It is important to note that soon after the impugned award was given, one of the properties in dispute i.e Plot F/No. 11042 measuring 4 acres was transferred to one Sarah Kaburo Ikunyua, who was named as the 2nd interested party in the Judicial Review Proceedings, and the 4th respondent in this appeal.

[5] The thrust of the appellants' grounds and averments in the Judicial Review motion was that they were denied a hearing. They, through the verifying affidavit of the 1st applicant sworn on 4th November 2010 asserted that the plots in question were lawfully gathered and owned by the deceased, and as the administrators of the deceased's estate, and the persons who are in physical possession and occupation of the said properties, they should not have been condemned unheard. They further contended that the transfer of the property to the 4th respondent herein was unlawful and fraudulent.

In their replying affidavits in the High Court, Samson Asande who swore the replying affidavit on behalf of the 1st and 2nd respondents herein remained mute about the issue of the appellants not having been invited to participate during the tribunal hearings in spite of they being the administrator and administratrix of the estate of the late Germano. They however insisted that the transfer of the plot to the 4th respondent was lawful.

[6] After hearing the parties and considering the written submissions, the High Court (Njoroge, J) dismissed the motion. According to the learned Judge, the ex-parte applicants ought to have exhausted the other remedies available to them under the Land Adjudication Act (Cap 283 Laws of Kenya) before moving the court by way of Judicial Review. The learned Judge also found that the prayer for prohibition had already been overtaken by events as the land in question had already been transferred to the 4th respondent and there was therefore nothing to prohibit.

It is against those orders that this appeal was filed.

[7] The memorandum of appeal dated 18th April 2016 has four grounds. Grounds one and two are basically the same, but differently worded. The same assail the learned Judge for failing to find that the objection proceedings excluded the appellants herein who were the legal representatives of the Estate of Secondo Kiriungi Germano, who was the owner of the parcels of land in question.

Ground three faults the learned Judge for failing to hold that the tribunal had failed to comply with **Section 26(1) of the Land Consolidation Act (Cap 283 Laws of Kenya)**, as to the composition of the tribunal, while ground four faults the learned Judge for distinguishing the legal authorities presented to the court from the circumstances pertaining to the case before him.

[8] When the appeal came up for hearing before us, Mr. Carlpeters Mbaabu, learned counsel appeared for the appellants while Mr. Kieti, litigation counsel appeared for the 1st and 2nd respondents. The 3rd and 4th respondents were represented by learned counsel, Mr. Mwenda Mwarania. Mr. Mbaabu reiterated the fact that the appellants, being the legal representatives of the deceased's estate, were the rightful persons to represent his estate at the objection proceedings. He told the Court that the appellants were not even informed about the proceedings contrary to **Section 13(1) of Cap 283** which requires all persons with an interest in any land in respect of which objection proceedings have been filed, must be notified of the existence such proceedings ,and further that the deceased's 94 years old father, who was nominated by the committee to represent the deceased was not mentally astute, and was incapable of effectively representing the appellants.

According to learned counsel, this breach shut out the appellants from proceedings which were determining their right to the property which they were actually occupying and had been in occupation of for a long time. This, submitted counsel, was a breach of the rules of natural justice, and on this ground alone, the appeal should succeed.

On grounds 3, 4, and 5, learned counsel, maintained that under **Section 26**, the committee constituted under **Sections 9(1) and 11(1) of Cap 283** must comprise at least 25 members. In the proceedings in question, the learned Judge had found that there were 21 members present and that the required quorum had been met. Counsel urged us to allow the appeal.

[9] On his part, Mr. Kieti, appearing for the 1st and 2nd respondents submitted that the issue of the composition of the committee had not been raised in the documents filed in the Judicial Review matter. Moreover, the quorum of the committee is half the members plus one and that requirement was met. Mr. Kieti further submitted that the deceased's aged father was the right person to represent the interests of his estate as opposed to his wife, saying that the father was the one with the history and also customarily, he was better suited as this is a patriarchial system. He urged us to dismiss the appeal.

[10] Mr. Mwarania for 3rd and 4th respondents relied on his submissions filed before the High Court. He conceded that the right to be heard is a fundamental one and should not be ignored even by the tribunal. In his view, however, the estate of the deceased was given an opportunity to be heard, through the 94 year old father of the deceased. His argument was that under the Act, where one heir appears, all the other heirs are deemed to have appeared. Since therefore the deceased's father appeared, all the other heirs who had an interest in the land were deemed to have appeared. He maintained that even at 94 years of age, the deceased's father was the best person to represent his late son's estate.

This brings to the fore questions as to whether the deceased's father was an heir to his estate, and if so, what was his standing in terms of priority? We shall advert to this later on.

Counsel also reiterated that the issue of the constitution of the committee was not raised in the statement of facts and the verifying affidavit in support of the Judicial Review proceedings, and should not therefore be an issue here. He informed us that the matter only came up in counsel's submissions. He urged us to dismiss this appeal.

[11] We have considered carefully the record before us, the submissions of all counsel and the cases cited to us. In our view, this appeal is predicated on two broad issues. Firstly, were the appellants, entitled to be heard by the arbitration committee before a decision was made to divest them of any property rights they may have had on the estate of the deceased? Was the deceased's father the right person to represent them, even in view of the fact that they held letters of administration appointing them as administratrix and administrator to the estate of the deceased?

Secondly, and in our view a peripheral issue is that of the composition of the committee. Was that issue properly raised before the High Court? We shall start with this latter issue. We at the beginning of this judgment set out the grounds on which the Judicial Review Application was predicated. It is evident that the issue of the composition of the committee was not raised. It was not therefore part of the pleadings before the High Court.

Judicial Review proceedings are not strictly speaking civil or criminal proceedings. They enjoy a *sui generis* jurisdiction. They are like a straitjacket and do not allow material not pleaded to be infused, or introduced into the proceedings later. **Rule 4 of Order L111 Civil Procedure Rules** (repealed) on which the application was premised was very clear. It provided as follows:-

> *"4(1) Copies of the statement accompanying the application for leave, shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."*

The statement was not amended to include the ground on composition of the committee, and nor was there any application to file any further verifying affidavit to include that issue. It could not be introduced by way of submissions. It was therefore not properly before the Judge, and is not properly before us. We in the circumstances uphold the submission of both counsel for the respondents on that issue, and decline the invitation by learned counsel for the applicant to make any determination on the same.

[12] Having said that, it is clear that this appeal will be determined solely on the ground as to whether the appellants were given a right of hearing, or their rights to land were determined and an adverse decision made against them, without being given an opportunity to be heard. It is not disputed that the appellants were the duly court appointed administrator, and administratrix of the estate of the deceased.

Among the duties of personal representatives of a deceased's estate is to gather and protect the property that forms part of a deceased's estate. All the property of the deceased vests in the personal representatives pursuant to **Section 79 of the Law of Succession Act (Cap 160 Laws of Kenya)**. Such property would even include a chose in action or a pending suit. Among the powers of the personal representative/or administrator under **Section 82 of Cap 160** is;

> *"82(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate."*

In this case, the land in question was said to have been gathered by the deceased. An objection had earlier on been raised. The case had been determined in his favour and so the land was recorded as belonging to him. The deceased and the family lived on that land for many years before the impugned ruling was made. Clearly, this land, with or without Title deed, belonged to the deceased. Nothing affecting the said land could be done without the involvement of the legal representatives of the estate of the deceased.

In his oral submission before us, Mr. Mwarania submitted that as the land was not yet registered, the only rights that existed were *"pre-registration rights which do not form concrete rights which can be administered"*. We beg to disagree with learned counsel on that aspect. The law of Succession Act does not distinguish between *"concrete rights"* and *"other rights"*. Nor does it define what *"concrete rights are"*.

[13] As stated earlier, even a chose is action, though not strictly speaking "concrete" and thus intangible, is still personal property right which is recognized and protected in law. This is so, even though it does not confer any present possession of a tangible object. Counsel cannot therefore correctly state that as the land had not yet been registered after an adjudication process, then the legal representatives had no right to be heard on the same.

Learned counsel further submitted that under **Section 13(4) of the Land Consolidation Act (Cap 283 of the Laws of Kenya)** (hereafter the Act), a person who has an interest in the matter can either appear in person or be represented by an heir of the estate of the deceased. He also submitted, and correctly so, that the arbitration process is conducted in accordance with African Customary Law. That may be so, but this raises several issues. In the first place, under **Section 12 of the Act**, the committee or the Arbitration Board must give notice, or warning to the effect that it intends to carry out arbitration in respect of particular parcels of land. To our mind, although the section says "warning" it must mean notice. This would mean that the interested parties are notified of the arbitration date and venue beforehand.

After being notified, the decision to either appear in person or send an heir to the property to the committee hearing reposes in the interested parties. It cannot be the decision of the committee as to who would be the best person to represent another person before it. In this case, the appellants say they were not notified of the arbitration proceedings, which was contrary to **Section 12 of the Act**.

It was further not their choice to be represented by the 94 year old father of the deceased. Had it been their choice, then their complaint would not carry any weight. The procedure was therefore flouted, and this caused immeasurable prejudice to the appellants who were in physical occupation of the land in question.

[14] Moreover, even if the committee would have on its own motion decided that the deceased's father was an heir as submitted by Mr. Mwarania, and there was therefore compliance with **Section 13(4) of the Act**, still it is arguable whether under African Customary Law, a father inherits a son who is married with sons of his own, or it should be the other way round. Even under the Law of Succession Act, which supercedes African Customary Law, in the event of any inconsistency, a wife and child of a deceased person is ranked higher in order of priority in succession matters, than a father. In this case, the 1st appellant, and 2nd appellant ranked higher in the order of priority than the deceased's father. The committee could not therefore sideline them at will and determine who their best representative was. If the committee needed evidence on the history of the parcels of land in question, then the deceased's father could have been called as a witness.

The case of **Timotheo Makenge v. Manunga Ngochi [1976-80]1KLR 1139**, cited to us by learned counsel for the Respondents is distinguishable from this case, because in that case, the dispute involved two clans, as opposed to this matter where the dispute was between individuals. In the former case, as long as the clan was represented, no individual member of the clan would claim that his/ her right to be heard had been violated. In this case, the land was not in the hands of the clan. Nor was the claim being made by or on behalf of another clan. The parties involved were entitled to be heard.

From this analysis, it becomes clear that the appellants' right to be heard before they could be divested of ownership of the said property was denied them. This was against the rules of natural justice which is one of the cardinal fundamental rights that inhere in every human being.

[15] On that ground alone, we find that this appeal has merit and the same succeeds. We allow the same, with the result that the judgment of the ELC Court in **Misc. Meru H.C. J/R Application No. 86 of 2010** is hereby set aside. In its place we make orders allowing the said application, to the extent that the proceedings/order/ and/or decision of the 1st and 2nd respondents dated 8th July, 2016 are hereby quashed, with the result that all subsequent transactions relating to the suit land, including the transfer of plot No. 11042 (measuring 4 acres) Antuamburi Adjudication Section to the 4th respondent, Sarah Ikunyua, are hereby nullified.

We award costs of this appeal and of the matter in the High Court to the appellants.

Dated and delivered at Meru this 23rd day of March, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR