



REPUBLIC OF KENYA



KENYA LAW
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**M'Aburuki v Rukunga & another (Environment and Land Appeal
E038 of 2023) [2024] KEELC 4460 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4460 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E038 OF 2023**

CK NZILI, J

MAY 29, 2024

BETWEEN

KAARO M'ABURUKI APPELLANT

AND

JOSHUA RUKUNGA 1ST RESPONDENT

KAUNGA NYIIRU 2ND RESPONDENT

JUDGMENT

1. The appellant, as the plaintiff at the lower court has appealed against a ruling of the trial court dated 3.12.2019 declining jurisdiction to hear and determine the suit. By a memorandum of appeal dated 19.1.2023, he wants the court to find the trial court has requisite jurisdiction since his suit was based on breach of trust, which was ignored or overlooked during the adjudication process, failed to ascertain which law was applicable to the suit and as a result drove him out of the seat of justice.
2. The role of the appellate court of the first instance is to re-analyze, reappraise and review the record of the lower court and establish whether the findings of fact of the law reached by the trial court ought to stand. In *Gitobu Imanyara & 2 others v AG* (2016) eKLR, the court held that a court must reconsider the evidence, evaluate it, and reach its conclusion while giving due allowance to the trial court that had an opportunity to see and hear the witnesses.
3. The primary pleadings at the lower court were the amended plaint dated 7.8.2012, the amended statement of defence dated 27.8.2012, the preliminary objections dated 18.6.2019 and 2.10.2019, and the reply to defence dated 22.11.2011. The appellant had pleaded in paragraph 4 of the amended plaint that she sold 1 acre of land from Parcel No. 4640 Kianjai Adjudication Section to the 1st respondent in 1996.



4. The appellant averred that instead of executing her instructions to transfer the portion, the 1st respondent colluded with his father, the 2nd respondent and instead subdivided her entire land into two portions and transferred to themselves.
5. The appellant averred that the respondents had breached her trust then illiterate and fraudulently took away her entire land. She sought an order that the 0.80 acre out of Parcel No. 4640 Kianjai Adjudication Section be retransferred to her. The initial plaint as dated 24.11.1011 and was accompanied by a consent to sue dated 7.9.2011 under Section 8 (1) The *Land Consolidation Act* (Cap 283) and 30 of (Cap 284) the *Land Adjudication Act* and two letters dated 20.11.2010 and 26.7.2011 from the District Land Adjudication and Settlement Officer (DLASO) confirming that the 1st respondent's mother had made a complaint over the transfer without her authority.
6. In an amended statement of defence dated 27.8.2012, the respondent denied the claim on an alleged breach of trust or fraud. Instead, it was averred that the transfer of the two portions of the suit land was in line with a lawful agreement freely entered between the parties. They termed the claim as unfounded, flawed in law, contradictory and defective.
7. In a reply to the amended defence dated 6.9.2012, the appellant insisted that there was a breach of trust and fraud that led to the respondent stealing her land beyond what she had lawfully sold to the 1st respondent.
8. From the court record, it appears that this suit was filed initially as Meru Chief Magistrates Civil Suit No. 343 of 211. It was by an order made on 13.6.2013 transferred to Tigania Law Courts on account of the locality of the land. The respondents filed a notice of preliminary objection dated 2.10.2019 on the basis that the court lacked jurisdiction to hear the matter; it was an abuse of the court process, bad in law and fatally defective.
9. By written submissions dated 7.10.2019, the respondents submitted that the suit land was subject to A/R objection No. 2435 and, therefore, the appellant ought to have appealed to the Minister if dissatisfied with the A/R Objection decision. On the other hand, by written submissions dated 15.10.2019, the appellant took the view that she had obtained consent to sue by the land adjudication office dated 9.9.2011. Reliance was placed on *Stephen Kungutia & 2 others v Severina Nchulubi Nyeri Civil Appeal No. 221 of 2010*. In a ruling dated 3.12.2019, the trial court struck out the suit.
10. With leave, parties agreed to canvass this appeal through written submissions, which were to be filed by 27.3.2024. A preliminary objection consists of a pure point of law which has been pleaded or arising by clear implication out of the pleadings and which, if agreed, may dispose of a suit. It includes a plea of limitation or jurisdiction. See *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors* (1969) E.A 696. In *Owners of Motor vessel Lillian "S" v Caltex (K) Oil Ltd* (1989) KLR 1, the court said that jurisdiction was everything, and without it, a court downs its tools.
11. Jurisdiction arises from the *Constitution* or a statute. The appellant's claim was based on alleged irregularities during the adjudication process, where her son and husband, the respondents, allegedly acted contrary to her wish, subdivided and transferred to themselves the entire land instead of the 0.80 acres, she had lawfully sold and authorized the 1st respondent to go and transfer on her behalf at the land adjudication offices. The respondents, in their statement of defence, admitted that there was a sale agreement but refuted the alleged breach of trust or fraud.
12. The jurisdiction of an Environment and Land Court on land subject to the land adjudication process was dealt with in *Tobias Achola Osindi & others v Cyprianus Ogalo & 6 others* (2013). The court



observed that it has a supervisory, enforcement and interpretative role to ensure that the ascertainment of interests and rights under Caps 283 and 284 adheres to the law.

13. In the statement of defence filed by the respondents, it was not pleaded that the appellant's complaint was a result of a decision made by A/R objection No. 2435, determined on 28.10.1996. The respondents took out two preliminary objections dated 7.10.2019 and 18.6.2019.
14. In the one dated 18.6.2019, the respondents averred that the suit was subject to Nyambene A/R Objection No. 2435, between the appellant and the 2nd respondent, the suit was time-barred under Section 7 of the *Limitation of Actions Act* (Cap 22) and by virtue of Section 17 of (Cap 22), any title belonging to the appellant had extinguished before the suit was filed. Other than the statement of the defendant and the two preliminary objections respondents had not filed any list of witness statements and documents.
15. The alleged A/R proceedings and decision had not been attached as part of the respondent's list of documents to be relied upon at the hearing. As held in Mukhisa (*supra*), a preliminary objection is based on pleaded facts and the law. It cannot be raised where facts have to be ascertained or where what is sought is an exercise of a court's discretion. See *Nitin Properties Ltd v Jagjit S. Kalsi & another* (1995) eKLR. In *Oraro v Mbaja* (2005) 1 KLR 141, the court said a point of law must not be blurred with factual details liable to be contested and which have to be proved through evidence.
16. The issues raised by the respondents required ventilation by way of evidence. For instance, the existence or non-existence of an A/R decision required evidence. The question of when the cause of action arose had not been pleaded by the respondents. Similarly, the question of Section 17 of Cap 22 relating to the extinguishing of title had not been pleaded. The appellant had been issued with consent to sue by the land adjudication officer. So also, the question of Caps 283 and 284 application to the disputed land, was for the court to determine and not the Minister.
17. In *Stephen Kungutia & others v Severina Nchulubi* (*supra*) the Court of Appeal observed that a claim for an enforcement of the right to the land was competently before the court. In my considered view and looking at the pleadings I think the two preliminary objections were not pure points of law. They were also made without any basis. The trial erred in declining jurisdiction. There was no land adjudication decision in place in the trial court, which the appellant ought to have appealed against to the minister.
18. Written submissions do not amount to pleadings or evidence. See *Daniel Toroitich Moi v Stephen Murithi & another* (2014) eKLR. Stating facts through written submissions did not amount to pleadings or evidence.
19. The appellant was seeking the enforcement of just rights to land fraudulently taken away and in breach of trust during the adjudication, now falling on titled land. She was, therefore, entitled to her day in court.
20. The upshot is that the appeal is allowed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 29TH DAY OF MAY, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu



Laikuru for the 1st respondent

Mwirigi for the appellant

