



IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 28 OF 2015

BETWEEN

PETER KIMANDIU.....APPELLANT

AND

**LAND ADJUDICATION OFFICER, TIGANIA WEST DISTRICT.....1ST
RESPONDENT**

ZAVERIO MITHIKA.....2ND RESPONDENT

JAMES MWINGILIA.....3RD RESPONDENT

CHARLES KINGEERE.....4TH RESPONDENT

DANIEL M'RITHIRA.....5TH RESPONDENT

*(An Appeal from the judgment of the High Court of Kenya Environment and Land Court at Meru
(Njoroge, J.) dated 21st November, 2014*

in

H. C. MISC. (J.R.) APPL. No. 22 of 2010)

JUDGMENT OF THE COURT

Introduction

1. The appeal before us involves the applicability of the **Land Consolidation Act** (Cap 283) (**LCA**) and the **Land Adjudication Act** (Cap 284) (**LAA**) to land adjudication areas, and the interpretation of the dispute resolution mechanisms set up in the two Acts. More specifically, the two issues that fall for our consideration are, firstly, depending on the applicable Act, whether, in a dispute relating to a completed Adjudication Register (**the Register**), the Land Adjudication Officer (**LAO**) has the power to sit and decide on his own or he must do so with the assistance of a committee. Secondly, whether a decision made by the Arbitration Board (**the Board**), under either Act, can be overturned by the LAO after the close of the Register.

2. The appeal arises from the decision of the High Court (**P. M. Njoroge J.**) sitting in Meru, made on 21st November 2014, in which the court refused to grant the Judicial Review order of *certiorari* to remove to the court for quashing the decision of the LAO, Tigania District in respect of three parcels of land:- Nos. **1196, 1249** and **2286**, within Antuamburi Adjudication section. The appellant here, **Peter Kimandiu** (Peter) was the applicant and is represented before us by learned counsel **Mr. Carlpeters Mbaabu** of Carlpeters Mbaabu & Co advocates. The 1st Respondent is the LAO, Tigania West District represented before us by learned state counsel, **Mr. Kiongo**, while learned counsel **Mr. D.M. Rimita** appeared for the 5th respondent, **Daniel M'Rithara** (Daniel) and held brief for **M/S J. O. Ondieki & Company** Advocates for the 2nd Respondent (**Zaverio**) and **M/S Muia Mwanzia & Co**, Advocates for the 3rd and 4th respondents (**James & Charles**).

Background

3. It is common ground that in the 1960s, Tigania Area was undergoing a process of ascertaining rights and interests in land or land adjudication, but it is not common ground which statute governed that exercise. This is an issue we have to decide. But Peter filed his application for judicial review on 26th March 2010 asserting that he was the lawful trustee for his family's ancestral land in Tigania West which was gathered by his late father, Thiringi Kitharia, during the land consolidation process in the area. A dispute arose between his late father and Joseph Baimuta (or Thaimuta), the late father of Zaverio, who claimed he belonged to the same family through the larger clan known as Ruyo (or Ruuju), and was therefore entitled to a share of it. The dispute went before the land adjudication committee (**the Committee**) in 1968 (**Case No. 60/68**) and the committee decided that the land be shared by the larger family. Peter's father appealed the decision to the Arbitration Board in 1985 (**case No. 2/76/77**) which decided that the two families were not related and overturned the decision of the Committee, giving the entire parcel of land to Peter's family.

4. When the Adjudication Register was complete and objections to the register became due in 2009, Zaverio filed an objection before the LAO seeking to have parcel no. 2286, then in the name of Peter, shared with his family. Other objections were also filed by James, Charles and Daniel on behalf of their family known as Kimayo, in respect of parcel nos. 1196 and 1249 which were also held by Peter. Peter claimed that all the objectors were strangers and were not part of his family. But the LAO, who sat and heard the dispute on his own or with an improperly constituted Board as claimed by Peter, allowed the objections and held that the land belonged to the larger family or clan and ought to be shared out in the manner he directed. He reversed the decision of the Board and reinstated the decision of the Committee.

5. The specific complaints made by Peter before the High Court were these:

“(a) That the board chaired by the Respondent was not properly constituted.

(b) The dispute had already been determined by a competent tribunal and the respondent lacked jurisdiction.

(c) The decision was outrightly biased against the ex-parte applicant and was made in consideration of matters that were not placed before the board.

(d) The decision was unreasonable and untenable in law.”

6. In its decision, the High Court held that the applicable law was the LAA which in **Section 26** did not require the LAO to sit with any committee to consider objections to the Register; that the LAO did not reopen a dispute decided by a competent tribunal, as alleged, but lawfully proceeded under **Section 26** of LAA; that there was no bias exhibited by the LAO since it was evident that the objectors had resided on the disputed land as members of the same clan since 1968; that the decision of the LAO was neither unreasonable nor untenable in law; that the complaint relating to parcel 2286 was not before the LAO and an order of *certiorari* cannot therefore be sought to quash any decision thereon; and that the decided cases relied on by Peter, where orders of *certiorari* were issued for similar claims were not relevant to the

issues before the court. Those are the findings which aggrieved Peter, hence the appeal before us.

The appeal and submissions of counsel.

7. The memorandum of appeal listed 8 grounds but they were argued in four tranches by Mr. Mbaabu. They may be summarized, thus:-

The High Court erred in both law and facts in:

- i. ***Failing to appreciate and hold that the LAO's decision was made under section 26 of the LCA, and in disregarding the fact that the same issues laid before the LAO had been decided on before by a competent authority and there was no appeal against that decision.***
- ii. ***Finding that the LAO proceeded under the LAA and ignoring the distinction between sections 26(1) of both Acts of Parliament which are different regimes of law.***
- iii. ***Dismissing the appellant's claims of bias, unreasonableness and illegality when there was ample evidence and supporting authorities to prove the same***
- iv. ***Considering irrelevant matters like long occupation of the land by the respondents when the only issue before the court was the process and not the merits of the LAO's decision.***

8. Mr. Mbaabu submitted on the first ground, which really encompasses the second ground, that the matter before the LAO was a claim for ownership of land which could only lie under **Section 26(1)** of the **LCA**. That is in contra-distinction with **Section 26(1)** of the **LAA** which deals with correction of errors and incompleteness of the register, and that is why under the LAA, there is no requirement for the LAO to sit with a committee. The court therefore misdirected itself when it did not appreciate the issue before the LAO. If it had, counsel submitted, it would have readily found that the issue of ownership could not be dealt with by the LAO on his own but it was mandatory to sit and decide with the committee defined in **Section 9(1)** of the **LCA**. In his view, the objections made by the respondents before the LAO, were under **Sections 17** and **18** of the **LCA** which require the participation of the committee. In any event, counsel added, the application of the LCA was conceded by the 1st respondent (the LAO) in affidavits on record and it was erroneous for the High Court to ignore such admissions. He cited for support of these submissions, two High Court decisions; **Republic vs. Land Adjudication Officer & Josphat M'Nchebere, HC Judicial review No. 101 of 2008 (Meru)** and **Republic vs. Tigania East District Adjudication Officer & Another HC Judicial Review No. 58 of 2009 (Meru)** where orders of *certiorari* were issued in similar circumstances. According to counsel, these authorities were misunderstood by the High Court when it found them distinguishable.

9. Mr. Mbaabu further submitted that the LAO had no authority to reopen the same matter which was finally decided by the Arbitration Board in 1985 under Arbitration Board case no. 2/76/77 which held that the land belonged to the appellant and reversed the decision of the land adjudication committee made in 1968. He referred to copies of the proceedings and findings in those two cases which were exhibited with the application. So were the proceedings and orders of the LAO made on 22nd January 2010 which were sought to be quashed. In counsel's view, the revisiting of the matter amounted to bias on the part of the LAO and the High Court should have so found.

10. Finally, Mr. Mbaabu submitted that the fair trial rights of the appellant under **Articles 25(c)** and **50(1)** of the Constitution were breached when the right forum which should have determined the dispute was not allowed to do so, instead, allowing an unlawful process before the LAO to have the force of law. The finding by the High Court that the respondents had been in occupation of the disputed land was also contrary to the law, since the merits of the case were not in issue before the High Court.

11. Responding to those issues, Mr. Kiongo for the LAO, in a brief submission, supported the High Court's finding that the LAA applied and that **Section 26(1)** of the Act talks about correctness and incompleteness of the register, which two elements also determine ownership of land. They cannot be considered separately.

12. For his part, Mr. Rimita raised some technical objections to the propriety of the Judicial review

application filed before the High Court pointing out that the statements of facts in the chamber summons for leave and the Notice of motion filed thereafter were at variance. That is because three parcels of land nos. **1196, 1249 and 2286** were referred to in the motion but the decision of the LAO which was sought to be quashed did not involve **parcel 2286**. Without exhibiting the decision, he submitted, there was no jurisdiction to quash it. The High Court was therefore right to make a finding that parcel 2286 was not involved and in all probability, the proceedings exhibited on record showing that the LAO made a decision on parcel 2286 were sneaked into the record subsequent to the hearing of the case.

13. Secondly, counsel submitted, the applicable law was the LAA since there was no Gazette notice exhibited to show which Act applied. In this case, both the Committee and the Board had done their work and the matter was at Objections stage. **Section 26(1)** of the LAA thus applied and the LAO could decide alone after giving the parties a hearing. There was therefore no bias. It was only under **Section 26(1)** of the **LCA** that a requirement for a committee is made at the stage of Objections. The justice of the matter, which the LAO meted out, was the sharing of the disputed land to all members of the same family as the evidence established, and he was right.

Analysis and determination

14. We have considered the matter and the submissions of counsel fully. The issue before us is basically one of law as it is trite that Judicial Review, which is the genesis of the appeal, is not concerned with the merits of the case but the decision making process- see **Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [2013] eKLR**. We are thus not called upon to pronounce in this appeal who, between the appellant and the respondents is the rightful owner of the disputed land or lands. The crucial issue upon which the appeal turns, as earlier stated, is to determine which statute was applicable to the dispute between the parties before the LAO - was it the LCA (Cap 283) or the LAA (Cap 284)? We shall then examine the relevant sections of the applicable statute relating to dispute resolution. Where necessary however, we are bound, as a first appellate court, to re- examine the matter by way of a retrial, reconsidering the entire evidential material on record and arriving at our own conclusions- see **Selle v. Associated Motor Boat Company [1968] E.A. 123**.

15. To answer the main issue, we have examined both Acts and found that the LCA was enacted in 1959 and commenced operation on **28th July 1959**. That was before independence, but there have been amendments along the way through other Acts of Parliament and Legal Notices. Its purpose according to the preamble was:

“...to provide for the ascertainment of rights and interests in, and for the consolidation of land in the special areas; for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas; and for purposes connected therewith and incidental thereto” (Emphasis added)

The LAA on the other hand, was enacted in 1968 and came into operation on 28th June 1968:

“to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto.”(Emphasis added).

The emphasis underscores the similarity that both Acts relate to ascertainment and recording of rights and interests in land or generally land adjudication, but also the differences in the manner of ascertaining those rights and interests as well as the geographical application of the two statutes. And therein lies the clue to the solution of this conundrum.

16. It would have been clinical and easier for a Legal Notice to have been exhibited by any of the parties to show which Act applied to the disputed land and when Tigania District was declared a land adjudication area. But none is on record. Nevertheless, we cannot wring our hands in desperation when the issue can be determined on a balance of probabilities on the basis of the material on record and we shall proceed to do so. The starting point is the commencement dates of both Acts as stated above. The LCA was first in time and was applied to special areas soon after independence for consolidation of land.

Peter himself alluded to this in his verifying affidavit and submissions when he stated that the ancestral land was gathered by his late father as trustee on behalf of the entire family during land consolidation. Secondly, there is an admission in sworn affidavit by the 1st respondent (the LAO, Tigania) confirming that Antuamburi adjudication section was placed under the LCA, Cap 283. That affidavit was not controverted by any other party. Indeed, the other respondents and their Advocates before the High Court alluded to the application of the LCA, only submitting that there was no requirement under the Act for the LAO to sit with a committee. It is clear to us therefore, that the applicable statute in this matter was the LCA.

17. The High Court, in making the finding that it was the LAA that was applicable simply reproduced **Section 26(1)** of the LAA and stated as follows:

“It is clear that any proceedings under Section 26 of the Land Adjudication Act do not require the Land Adjudication Officer to sit with a Committee. But the question is: did the Land Adjudication Officer, when he made the impugned decision hear the objection under the provisions of Section 26 of the Land Adjudication Act? The decision being challenged by the applicant is in the following form:

“JUDGMENT/ORDER

- *Parcel No. 1196 and 1249 sub-divided*
- *On parcel NO. 1196 two acres awarded to Kimayo family and recorded to James Mwingilia and Charles Kingeere M'Lingulu and issued a new parcel No.*
- *From P/No. 1196 again two acres awarded to Daniel M'Lithara and issued a new Parcel No.*
- *Parcel No. 1249 sub-divided*
- *Kimayo family awarded three acres and same recorded to James Mwingilia and Charles Kingeere M'Lingulu.*

LAO

22.1.2010”

It is clear that the Land Adjudication Officer does not purport to be hearing the objection with a Committee or a board. It is indicated that the applicant took part in the proceedings. It is clear that the Land Adjudication Officer was proceeding under the auspices of Section 26 of the Land Adjudication Act. He therefore did not need the assistance of board members.”

With respect, there was no basis for arriving at that conclusion. The record also shows that there was a decision by the LAO relating to parcel 2286 but no reference was made to it. We have no reason to believe it was sneaked into the record after the judgment as contended by Mr. Rimita. In our view, it was incumbent on the trial court to interrogate the relevant provisions of both Acts in order to answer the question posed, but it did not. We now proceed to do so.

18. The LCA in **PART II** provides for **“ASCERTAINMENT AND RECORDING OF RIGHTS AND INTERESTS IN LAND; CONSOLIDATION AND DEMARCATION; AND CREATION OF ADJUDICATION REGISTER”**. The Land Adjudication Officer (LAO) is appointed by the Minister to superintend the whole process with the assistance of Demarcation Officers and Recording Officers (**Section 6**). A very important organ known as **“the Committee”** must then be constituted by the LAO under **Section 9** as follows:

“The Adjudication Officer within whose district an adjudication section is situate shall appoint a Committee for each adjudication section from amongst persons resident in the adjudication section and each Committee shall consist of not less than twenty-five members”.

For the District, the Minister appoints an **Arbitration Board** consisting of :

“..not less than six and not more than twenty-five persons resident within the district within which any adjudication area is situate to form a panel from which the Adjudication Officer may from time to time select not less than five persons to form an Arbitration Board for any adjudication area within his district”.

We say the committee is a crucial organ because it is the one which has the mandate under **section 11** to “*..adjudicate upon and determine in accordance with African customary law the claim of any individual person to any right or interest in any land within the adjudication section.*” Only when it is unable to reach an adjudication in accordance with African customary law will it refer the matter to the Arbitration Board, and even then, the Board has to inform the committee of its decision. The committee also has the responsibility of preparing a “**Record of Existing Rights**” under **Section 15** showing whether the land is owned by an individual, or the County Council or is set aside under the Constitution. The committee further has the power to set aside land to cater for the needs of the community, consolidate different parcels of land to which a land owner is entitled, and to create rights of way.

20. Upon completion of the ‘**Record of Existing Rights**’, the committee gives notice under **section 16** and an opportunity for **Objections** under **Section 17** which provides:

“Any person named in or affected by Part I of the Record of Existing Rights who considers the Record to be inaccurate or incomplete in any respect may, within sixty days of the date upon which the notice mentioned in section 16 of this Act is published... lodge an objection with the executive officer of the Committee concerned, stating in what respect the Record is alleged to be inaccurate or incomplete”. (Emphasis added)

The LAO would then consider the “Objections” with the Arbitration Board and make the final decision in the matter at that stage. The Record of Existing Rights becomes final after the Objections are determined and is “*.. deemed to be a true and complete record of all existing rights and interests in the adjudication section to which the Record relates*”.

21. The committee thereafter turns to assist the Demarcation officer who under **Section 23** “*.. shall demarcate or cause to be demarcated by such means or in such manner as he may direct the boundaries of all parcels of land within the adjudication section in accordance with the Record of Existing Rights*” and prepares a Demarcation Plan of the adjudication section, showing the separate parcels into which the same is divided. After that, the committee takes over and prepares the “**Adjudication Register**” which it sends to the LAO, gives notice of completion of the Adjudication Register, and invites any objections thereto.

22. We consider that the matter before us had gone through the stages of committee adjudication and LAO/Arbitration Board objections under the foregoing provisions. In the latest dispute, the parties were invoking **Section 26(1)** of the Act which comes into play after completion of the Adjudication Register and provides in relevant parts as follows:

“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 .. 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”. (Emphasis added)

23. From the foregoing examination of the scheme of the Act, it is manifestly evident that the centrality of the committee is maintained throughout and it is mandatory for the LAO to sit with the committee even after the completion of the Adjudication Register, albeit the final arbiter remains the LAO, who may also on his own “*..correct any clerical error or error of a like nature in the Adjudication Register.*” As

Section 26(3) states:

“No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be...”

24. Turning now to the LAA, “**Ascertainment of interests in land**” is covered under **Part III** of the Act. Like the LCA, the LAO superintends the process of land adjudication and there is a “Committee” and an “Arbitration Board”. In both, there are two stages of dispute resolution by the Committee and Arbitration Board before preparation of the **Adjudication Register**. But the similarities end there. The LAA relates to Trust lands and the centrality of decision making lies with the LAO and not the Committee. The LAO has the power under **Section 4** to “..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.” He has the power under **Section 6** to appoint “.. not less than ten persons resident within the adjudication section to be the adjudication committee for that adjudication section.” Finally, he has the power under **Section 7** to appoint not less than five persons from a panel of six to twenty five “..to form an arbitration board for a particular question arising in an adjudication section within the adjudication area.” In sum, the LAO has immense and express powers as exemplified under **Sections 9,10 and 11** of the Act. **Section 9** states:

“(1) The adjudication officer shall be in charge of and shall exercise general supervision and control over the adjudication.

(2)The adjudication officer shall hear and determine—

(a)any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer; and

(b) any objection to the adjudication register which is submitted in accordance with section 26 of this Act”.

25. **Section 26** states as follows:

“Objection to adjudication register

(1) 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.

(2) 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.” (Emphasis added).

The High Court cited that section and held, correctly so, that there was no requirement for the LAO to sit with any member of the Committee or Arbitration Board before making a decision. An appeal against the decision of the LAO would go to the Minister.

26. Having found, as we have, that the dispute in this matter was governed by the LCA and that the LAO was required to determine the dispute submitted to him in conjunction with the committee, and there being no dispute that the LAO in this matter made the decision on his own, it follows that the decision making process was contrary to the law and thus amenable to the corrective powers of the High Court. A determination of that issue is sufficient to dispose of this appeal and we need not examine the propriety of the decision made by the LAO.

27. The upshot is that this appeal has merits and is allowed. We set aside the decision of the High Court made on the 21st November 2014 and substitute therefor an order granting the order of *certiorari* to issue

forthwith to bring before the High Court for quashing the decision of the Land Adjudication Officer, Tigania made on 22nd January 2010 in respect of land parcels numbers. **1196, 1249** and **2286** within Antuamburi Adjudication Section. The dispute shall be remitted back to the Land Adjudication officer for hearing and determination in accordance with the law. The costs of the appeal shall be borne by the 1st respondent. We so order.

Dated and delivered at Nyeri this 2nd day of March, 2016

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR