



REPUBLIC OF KENYA



**Tonde v Ngove & another (Environment and Land Appeal 21 of 2019)
[2024] KEELC 7120 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 21 OF 2019
TW MURIGI, J
OCTOBER 29, 2024**

BETWEEN

SAMMY TONDE APPELLANT

AND

PRISCILLA KAMENE NGOVE 1ST RESPONDENT

JOHN KAVAI 2ND RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 31st July 2019, the Appellant appealed against the Ruling of Hon. E. Muiro (SRM) delivered on 11th July, 2019 in Kilungu PMCC No. 75 of 2012 and set out six grounds of appeal.

Background

2. The Appellant filed a Notice of Motion dated 10/4/2019, seeking the following prayers: -
 - i. That the Court be pleased to set aside its dismissal order dated 7/3/2019 and have the suit reinstated pending the conclusion of the determination of the ownership rights pertaining to Plot No. 1704 Musalala Adjudication Section and the issuance of the relevant consent thereto.
 - ii. That costs of the application be provided for.
3. The Respondent opposed the application through the grounds of opposition dated 13th May 2019 and raised the following grounds:-
 - a. The application lacks merit and is incompetent.
 - b. The suit being prosecuted without consent of the Land Adjudication Office given pursuant to Section 30 the same cannot be entertained and this court lacks jurisdiction.



- c. During the trial the Plaintiff was present in court and opted not to prosecute the suit consequently this is not a case of non-attendance but want of prosecution and this application is incompetent being based on the wrong provision of the law.
4. In the proceedings before the lower court, the Appellant was the Plaintiff while the Respondents were the Defendants. The application was dismissed vide the ruling dated delivered on 11th July, 2019 giving rise to the present Appeal.
5. Aggrieved by the decision, the Appellant appealed on the following grounds: -
 - i. That the court's decision to dismiss the Appellant's application dated the 10/4/2019 is based on erroneous understanding of the clear provisions of the law, particularly Section 30 of the [Land Adjudication Act](#).
 - ii. That the court failed to consider that the suit had been prematurely set down without following the provisions of Order 11 of the Civil Procedure Rules particularly on the provisions on pre-trial directions.
 - iii. That the court dismissed the suit prematurely as the Appellant was pursuing the necessary consent from the Land Adjudication Officer to prosecute the suit which information was in the knowledge of the court.
 - iv. That the Appellant was driven out of the seat of justice on the basis of a last adjournment given to him whilst the court knew very well that the consent to prosecute the suit was still awaited from the lands office and thus the court wrongly and abusively exercised its powers.
 - v. That the court having erroneously read the contents of the letter dated 27/2/2019 from the Sub-County Land Adjudication and Settlement Officer, misdirected itself and dismissed the Appellant's application.
6. The Appellant prays for:
 - a. That the appeal be allowed and that an order reinstating and staying the suit pending the conclusion and determination of the ownership of the land parcel No. 1704 Musalala Land Adjudication Section and the issuance of the consent to prosecute the suit.
 - b. That costs of the Appeal be granted
7. The Parties were directed to canvass the appeal by way of written submissions.

The Appellant's Submissions

8. The Appellant filed his submissions dated 6th June 2024.
9. On ground Nos. 1, 3 and 4, Counsel submitted that although this matter initially raised a claim of defamation and trespass, the dispute escalated into an ownership tussle after the suit property was declared as being within Musalala Adjudication Section. Counsel further submitted that the Land Adjudication Officer's letter dated 27/2/2019, clearly states that the 1st Respondent had lodged an appeal with the Arbitration Board claiming ownership over the suit property. Counsel argued that the Land Adjudication Officer neither granted nor declined to grant consent but was desirous to have the appeals heard first.
10. According to Counsel, the trial magistrate ought to have stayed the suit pending the grant or refusal of the consent since the suit had already been filed.



11. On ground No. 2, Counsel submitted that the failure by the subordinate court to conduct pretrial proceedings violated the law as set out in Order 11 Rules 7 and 8 of the Civil Procedure Rules. Counsel argued that the Appellant was prejudiced by being shut out from ventilating the issue of consent at pretrial stage.
12. On ground No. 5, Counsel submitted that since the issue of ownership was yet to be determined, the subordinate court ought to have stayed the suit in accordance with the provisions of Section 30 of the [*Land Adjudication Act*](#).
13. Counsel urged the court to allow the appeal with costs.

The Respondent's Submissions

14. The Respondent filed his submissions on 8th November, 2021. On his behalf, Counsel submitted that the appeal herein is devoid of merit as the suit was filed contrary to the express provisions of Section 30 of the [*Land Adjudication Act*](#). Counsel submitted that the Appellant filed this suit without the mandatory consent of the Land Adjudication Officer.
15. Counsel further submitted that a court lacking jurisdiction cannot entertain a suit filed before it and must lay down its tools. Counsel contended that an intention harboured by a prospective litigant to obtain a belated consent does not clothe the court with jurisdiction. Concluding his submissions, Counsel urged the court to dismiss the Appeal with costs. To buttress his submissions, Counsel relied on the following authorities: -
 - i. Benjamin Okwaro Estika v Christopher Antony Ouko & another [2013] eKLR
 - ii. Thomas Kinyori Hussein & 3 others v Mokha Mghanga & 2 others [2018] eKLR

Analysis And Determination

16. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another Vs Associated Motor Boat Company and Others* (1968) 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a 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 itself and derive 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 finding 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 on the demeanour of a witness is inconsistent with the evidence in the case generally.
17. The seven grounds of appeal can be condensed into one ground namely:-
 - i. Whether the learned trial magistrate erred in law by dismissing the Appellant's Notice of Motion dated 10/4/2019.
18. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 8th October 2012, which was subsequently amended on 9th October, 2012 seeking the following orders:-
 - a. General damages for both trespass and defamation.



- b. Costs of the suit.
19. At paragraph 3 of the Amended Plaintiff, the Plaintiff described the suit property as a “certain unsurveyed land known as Ikangaani situated at Musalala Sub-location Kilungu Location Makueni County...” At paragraph 2 of the 1st Defendant’s statement of defence filed in court on 6th July, 2018, the Defendant admitted the Plaintiff’s description of the suit property as an unsurveyed parcel of land in Ikangaani, Musalala Sub-location, Kilungu Location, Makueni County.
20. Reference to the suit property as land Plot No. 1704 Musalala Adjudication Section appeared much later in the pleadings in the subordinate court. From the foregoing, it is crystal clear that the suit herein was filed before the area within which the suit property is situated was declared an Adjudication Section.
21. The record shows that on 7th March 2019, the Appellant’s suit was dismissed for want of prosecution. Subsequently, the Appellant filed the application dated 10th March 2019 seeking to set aside the dismissal order made on 7/03/2019. At paragraph 7 of the affidavit in support of the application, the Appellant averred as follows: -
- “That in 2017 the area was declared an adjudication area and the suit was caught up by the provisions of Section 30 of the Land Adjudication Act and Section 8 of the Consolidated Land Act and thus could not proceed without the consent of the Land Adjudication Officer.”
22. The 1st Defendant did not rebut the above averment with evidence but instead, relied on the grounds of objection dated 13th May, 2019. He contended that the suit offends the provisions of Section 30 of the Land Adjudication Act in that the Plaintiff did not obtain consent to institute this suit from the Land Adjudication Officer.
23. In the ruling dated 11th July, 2019 the learned trial magistrate states as follows in part: -
- “Further Section 30(1) of the Land Adjudication Act does provide that; 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. Whereas Section 30(2) of the said section does stipulate that; 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. The said provisions illustrate that it is mandatory for a consent to issue to enable a court handle an issue arising out of an adjudication section. Further the provisions illustrate that where a case is already in court the same should be mandatorily discontinued.... Having considered all the foregoing, I find that the Plaintiff’s application lacks merit and I do hereby dismiss the same with costs to the Defendants.”
24. It is apparent from the ruling that the court found that it lacked jurisdiction to entertain the suit as the Appellant had not obtained the mandatory consent from the Land Adjudication Officer before approaching the court. Section 30 (1) of the Land Adjudication Act provides as follows: -
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.

25. The wordings in Section 30(1) of the Act are mandatory. It sets out the conditions under which a party can approach the court before the adjudication process is complete. The said condition is that consent must be obtained from the Land Adjudication Officer before a suit can be filed is a statutory requirement
26. Section 30(2) of the Act provides as follows:- 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.
27. It is crystal clear that the suit herein was filed before the area was declared as an adjudication section. The Appellant annexed a letter dated 27th February 2019 in his affidavit in support of the application dated 10/04/2019. The letter from the Sub County Land Adjudication and Settlement Officer Makueni confirmed that P/No. 1704 is affected by an Arbitration Board Appeal filed by Priscilla K. Ngove. From the foregoing, it clear that the parties have subjected themselves to the dispute resolution mechanism provided under the Land Adjudication Act. In the circumstances, the learned trial magistrate ought to have invoked the provisions of Section 30 (2) of the Land Adjudication and discontinued the suit as opposed to dismissing the same.
28. In the end, I find that the Appeal has merit and the same is hereby allowed in the following terms:-
 1. The dismissal order dated 07/03/2019 is hereby set aside and the suit is hereby discontinued pending the conclusion of the determination of ownership rights pertaining to Plot No. 1704 Musalala Adjudication Section.
 2. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF OCTOBER, 2024.

In the presence of:

Mbulo for the Appellant.

Ms. Theuri for the Respondent.

Court assistant Steve

