



**Kitili v Malusi & 2 others (Environment and Land Appeal
29 of 2021) [2023] KEELC 156 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 29 OF 2021
LG KIMANI, J
JANUARY 19, 2023**

BETWEEN

PHILIP MWAANGI KITILI APPELLANT

AND

WINFRED MALIA MALUSI 1ST RESPONDENT

PAUL MUMO MWAANGI 2ND RESPONDENT

JOSEPH MUTETI MBWIKA 3RD RESPONDENT

(Being an appeal from the order of the Learned Senior Principal Magistrate Margaret Kasera sitting at Kitui in her Environmental and Land Case No. E006 of 2020 dated 6.5.2021)

JUDGMENT

1. The appellant herein was the plaintiff in Kitui Chief Magistrates Land Case No E006 of 2020. The appellant appeals against the court order issued on May 6, 2021 and relies on the following grounds;
 1. The learned trial magistrate abdicated her judicial duties when she adopted an alleged decision by a clan dated December 15, 2018 as the order of the court.
 2. The learned trial magistrate erred in law when she failed to discharge her judicial duty to make an independent decision.
 3. The trial magistrate erred in law by not allowing the parties prosecute the application before her in accordance with the rules of procedure.
 4. The trial magistrate erred in law when she converted herself into a mediator, which error led to make an order that is contrary to law.



5. The learned trial magistrate erred in law when she failed to discharge her judicial function, a failure which led her make an order that failed to determine the material issues of law raised in the appellant's case.
 6. The learned trial magistrate acted in open bias against the appellant by making an order that was clearly against the law.
 7. The learned trial magistrate erred in law when she made the order adopting the alleged decision of the clan, which order disposed the suit summarily at an interlocutory stage.”
2. Before the trial court the plaintiff filed a plaint dated August 28, 2020 where he claimed to be the registered proprietor of land parcel No 1264, Museve Adjudication Section which was in the final stages of registration as Land Parcel Kyanguthya/Museve/1264. That the 1st defendant is the plaintiff's estranged wife having separated in 2004 and that she re-married. The plaintiff further claimed that the 2nd and 3rd defendants have no recognized or cognizable interests and or rights to the suit land. That on November 14, 2016 the 1st defendant encroached on a portion of the suit land measuring 52 ft by 71 ft but when served with a demand notice, the encroachment ceased.
 3. The plaintiff complained that on August 17, 2020 the defendant jointly and severally encroached on a portion of the suit land and commenced construction of a building. The plaintiff claimed that the defendant had violated and/or infringed on his proprietorship interests and rights over the suit land by commencing construction without his consent, let or permission thus occasioning him loss and damage.
 4. The plaintiff prayed for a declaration of ownership of the suit land and that the defendants' acts described in the plaint were actionable trespass and an attempt to alienate the portion of the land in dispute. The plaintiff further sought orders of permanent injunction restraining the defendants from continuing with any further acts of trespass and a mandatory injunction requiring the defendants to demolish the building and/or structure constructed on the land.
 5. The plaintiff filed an application under certificate of urgency dated September 1, 2020. The said application sought the orders restraining the defendants; jointly and severally, their servants agents employees and any other person acting on behalf of the defendants from constructing and/or continuing to construct on any portion of land parcel number 1264, Museve Adjudication Section until final determination of the application and the suit.
 6. The application was supported by the affidavit of the plaintiff sworn on August 28, 2020 where he reiterated the matters stated in the plaint and summarized above. The applicant stated that unless the defendants were restrained by an order of the court they would continue with construction on the suit land and this would lead to irreparable injury and loss to him that cannot be compensated by an award of damages. He further stated that he had a legitimate *prima facie* claim against the defendants that had a high probability of success and that it was in the interests of justice that the suit property be preserved pending hearing of the suit.
 7. Upon service, the defendants appointed the firm of M M Kimuli & Co Advocates who filed two preliminary objections dated 23rd September, 202 both filed on September 24, 2020 and grounds of opposition dated September 24, 2020 and filed on the same date. The preliminary objection and grounds of opposition challenged inter alia the courts jurisdiction by virtue of section 30 of the [Land Adjudication Act](#). They also raised issues of fact stating that the suit land is ancestral land given to the plaintiff and first defendant who are husband and wife by their father and father-in-law respectively.



The defendants claim that the 2nd defendant is a son together with others of the plaintiff while the 3rd defendant is a stranger to the suit land.

8. When the matter came up for hearing of the application dated August 28, 2020, counsel for the defendants indicated that the dispute involved a family home and was between a man, his wife and their children and that mediation or any other form of alternative dispute resolution mechanism would better resolve the matter. The court recorded that the case would be mentioned on October 8, 2020 for alternative dispute resolution. In the course of time it appears that the respondent was prevailed upon to make a choice on whether to proceed with the preliminary objection or to pursue alternative dispute resolution of the suit. On November 12, 2020 the court noted that:

“The preliminary objection is touching on the court’s jurisdiction. The court therefore cannot proceed on mediation before the preliminary objection is discharged. The respondent to withdraw the preliminary objection to pave way for mediation or to take a hearing date for the preliminary objection.”

9. Mr Kimuli for the defendant then withdrew the preliminary objection and the court ordered the matter to proceed for mediation and set a date to meet with the plaintiff and her sons on January 28, 2021. On the said date the court heard the 1st born Samuel, 2nd son Paul and 3rd born Daniel and the plaintiff herein recorded only as Philip. There is no record of the defendants having been heard. The court then directed that a letter by the grandfather of Samuel be brought to court by the clan chair. Summons was issued to the chair, vice chair and secretary of the clan to attend court on May 6, 2021. On the said date the secretary by the name Stephen Muinde Munyalo attended court and was heard.

10. At the end of the proceedings, the court stated as follows;

“Court: Sees the report by the clan, the same is adopted as the order of the court since the clan deliberately deliberated on the matter.”

It is the above order of the court that forms the basis of this appeal.

The Appellant’s Submissions

11. The appellant’s counsel filed submissions dated November 11, 2022 and November 23, 2022 where he reiterated the contents of the claim in the plaint. He claims the respondents had trespassed on his land parcel Kyanguthya/Museve/1264.
12. He further claimed that the respondents filed preliminary objections but later withdrew the same and that the court directed that the matter be subjected to mediation. He complained that the Magistrate converted herself to a mediator and in the session on January 28, 2021 she met the plaintiff and his Sons and the mediation ended on May 6, 2021 when the court made the order appealed from.
13. The appellant confirmed that article 159 2 (c) of the Constitution of Kenya 2010 allows for Alternative Dispute Resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. However, the constitution provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the bill of rights or is inconsistent with the constitution or any written law. Counsel submitted that the appellants right to the suit land is protected under section 28 of Land Adjudication Act and there was no dispute pending on the land.
14. Counsel further submitted that what was before court was an application dated September 1, 2020 seeking preservative orders and that the mediation proceedings ought to have been confined to issues raised in the application.



15. The appellant submitted that the report adopted by the trial court was not produced in court either through an affidavit or by evidence and was not subjected to cross-examination and the source was not disclosed. Further, that the order determined the suit in a summary manner without giving parties an opportunity to make presentations. That the report related to a dispute between one Francis Kitili Mwaangi and his Son Philip Kitili the plaintiff herein and was determined on June 29, 2002 and did not relate and had no bearing to the case before the court.
16. Counsel submitted on grounds 5 and 7 that the court erred in converting itself into a mediator and at the same time conducting formal proceedings. He stated that the law on mediation is that the parties agree on a mediation and the mediation agreement is signed by both parties and filed in court. This process was not followed thus rendering the proceedings and order untenable and flawed.
17. The appellants counsel withdrew ground 4 of appeal.

The Respondents Submissions

18. The respondents' Counsel submitted that he initially filed preliminary objection on the court's jurisdiction as relates to section 30 of the [Land Adjudication Act](#). However, they withdrew it to enable parties go for Alternative Dispute Resolution since this was a family matter involving ancestral land. The Respondent urges the court to dismiss the appeal based on the ground that indeed there was no consent from the Land Adjudication Officer to institute the suit under section 30 of the [Land Adjudication Act](#). Further that the court attempted to resolve the matter through discussions with the parties in absence of the advocates and the advocates accepted this method of mediation. The court heard the parties, clan and family members and found that the findings of the clan were apt and adopted them. That the procedure adopted was agreed upon and submitted to by the parties and their lawyers and the court would not have proceeded with this manner of mediation had the parties objected.
19. Further, the respondents' counsel submitted that the appellant is estopped from challenging the process only when the outcome did not favour him having willingly participated and ratified the method of dispute resolution. He urged the court to ensure that justice is done without undue regard to technicalities.

Analysis and Determination

20. I have considered the grounds of appeal set out in the memorandum of appeal dated May 12, 2021, the record of appeal, the supplementary record of appeal dated February 4, 2022 and the further supplementary record of Appeal dated August 1, 2022. I have further considered the submissions by counsel for the appellant dated November 11, 2022 and November 23, 2022. In my view the grounds of appeal No 2, 3 and 5 deal with similar issues, grounds 1 and 7 deal with similar issues while ground 5 deals with an issue on its own. As noted the appellant withdrew ground 4.

Grounds 2, 3, and 5

21. A summary of the above grounds of appeal reveal that the appellant faults the court for failure to discharge its judicial duty by not allowing the parties to prosecute the application before the court in accordance with the rules of procedure and for failure to determine the material issues of law raised in the appellant's case and failure to make an independent decision.
22. The proceedings of the trial court show the course the case took in arriving at the orders issued on May 6, 2021 which form the basis of this appeal. The said proceedings have been summarized hereinbefore and I need not restate them. When this suit came up for hearing of the application dated August 28, 2020, counsel for the defendants had filed preliminary objections and grounds of opposition. Counsel



indicated to the court that the dispute involved a man, his wife and their children and it related to a family home being constructed on the suit land. The court stated that the case would be mentioned on October 8, 2020 for Alternative Dispute Resolution. On November 12, 2020 the court noted that:

“The preliminary objection is touching on the court’s jurisdiction. The court therefore cannot proceed on mediation before the preliminary objection is discharged. The respondent to withdraw the preliminary objection to pave way for mediation or to take a hearing date for the preliminary objection.”

23. When counsel for the defendant withdrew the preliminary objection the court ordered the matter to proceed for mediation. It is noted that what led to the withdrawal of the preliminary objection was the submissions by Counsel for the plaintiff/applicant who insisted that counsel for the defendant needed to withdraw the preliminary objection to pave way for mediation. It is further noted that counsel for the plaintiff was present throughout when the court ordered that the matter was to go for Alternative Dispute Resolution.
24. Alternative Dispute Resolution process is anchored in law and in particular article 159 (2) (c) of the Constitution of Kenya 2010 which provides as follows;

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- a. justice shall be done to all, irrespective of status;
- b. justice shall not be delayed
- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

Further article 11 of the Constitution states that;

- “ 1. This constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.
2. The state shall-
 - a. promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage:

Article 60 (1) (g) further provides for principles of land policy and states that:

1. Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles
 - “(g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.”



25. Further Alternative Dispute Resolution is provided for under section 20 of the ELC Act and the same states as follows;
1. Nothing in this Act may be construed as precluding the court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with article 159 (2) (c) of the Constitution.
 2. Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the court, the court shall stay proceedings until such condition is fulfilled.”
26. I therefore find that reference of the dispute at hand by the court for determination through Alternative Dispute Resolution mechanism was within the mandate of the court and should be promoted as provided under article 159(2)(c) of the constitution of Kenya. I further find that the court did not err in referring the dispute to mediation or for any other form of alternative dispute resolution mechanism. Further, that the court could not at the same time as the said process was going on hear the dispute in the normal way.

Grounds 1, 6 and 7

27. According to Black’s Law Dictionary the meaning of mediation is “A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”
28. The Civil Procedure (Court-Annexed Mediation) Rules, 2022 define mediation as;
- “mediation” means an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto;
29. My understanding of the above definitions of mediation is that the mediator assists to guide parties towards their own resolution of the dispute. A neutral intermediary, the mediator, helps the parties to reach a mutually, satisfactory settlement of their dispute. The mediator facilitates rather than directs the process which is private and confidential. Unlike in arbitration and in court, the mediator is not a decision maker. In the present case, there is no evidence that the trial court encouraged or tried to facilitate resolution of the dispute between the two parties or encouraged them to reach an agreement.
30. The trial court heard the plaintiff and the three sons. In the middle of recording their presentation, the court called for the letters by the “grandfather” which one of the sons of the plaintiff was talking about to be brought to court by the clan chair. When the matter came up for mention on May 6, 2021, the court heard the clan secretary who said he was the brother of Samuel’s grandfather by the name Stephen Muinde Munyalo. At the end of the proceedings, the court stated as follows;
- “Court: Sees the report by the clan, the same is adopted as the order of the court since the clan deliberately deliberated on the matter.”



31. In my view the proceedings do not show that what the court was doing was mediation in the strict sense of the word. The final finding of the court was not a result as would have been envisaged in mediation proceedings. The result of mediation would have been an agreement between the parties or a report that no agreement had been reached and consequently the matter would have been referred back to court for hearing. On this I do agree with the appellants submission in grounds 2, 3, and 5 that after the parties were unable to agree on the settlement of the dispute, the matter ought to have been referred back to court for hearing and determination in the normal way.
32. On the issue of confidentiality, the issues discussed in mediation are not to be disclosed and documents referred to are not to be admitted in court. In this case, it would break the rule on confidentiality for the court to have heard the issues raised in mediation and at the same time preside over the hearing if the parties do not agree. Further, in the present case the trial court took notes of the presentations by the parties and the same form part of the court record. This procedure goes against the principal of confidentiality of mediation proceedings which are to be disclosed only if an agreement is reached.
33. In my view what the court attempted to do was make efforts to have the parties settle a dispute within the course of judicial proceedings. However, the end result was not a settlement of the dispute but a finding by the court based on a report by the clan. Did the court err in making an order adopting the decision of the clan said to have been dated December 15, 2018 which order disposed of the suit summarily at an interlocutory stage?
34. The report filed through a supplementary record of appeal indicates that the clan meeting was held on June 26, 2002 and was signed on different dates by the Chairman and Secretary. The report relates to a dispute between the plaintiff herein and his father Francis Kitili Mwaangi. It is noted that the contents of the report do not reflect the evidence given by the clan secretary especially of note is the part where the Secretary stated that the plaintiff's children had reported to the clan a dispute concerning the land and that their grandfather Francis Kitili Mwaangi had shown them the suit parcel of land to construct on.
35. The said decision does not address the issues at hand in the present suit. The said document makes a raft of findings involving persons not party to this suit and the only part that relates to this suit is paragraph 10 which states as follows;

“ 10. The clan has seen the land Kitili has given his Son number 1264.”
36. Indeed, looking at the above portion of the clan decision, it is not clear why the appellant filed this appeal since the said decision appears to confirm his ownership of the suit land. In my view, there was procedural impropriety for the reason that the court did not in the 1st instance refer the dispute for determination and resolution by the clan. There is no indication in the decision that the parties to the present suit were parties to the dispute before the clan. There is further no indication that the issues raised in the present suit were issues in the dispute before the clan. I agree with the submissions of the appellant that parties ought to have been given an opportunity to interrogate the said decision since they were not parties to it and may not have been present when the dispute was heard. Further, the decision has not dealt with any claimed rights of the defendants to the suit land and the question of the ownership and ongoing construction by the respondents. I therefore find that adoption of the said decision as an order of the court was erroneous. I have further considered the proceedings and have not found anywhere that the court referred the dispute herein for determination by the clan
37. For the foregoing reasons I do find that the appeal herein has merit and make the following orders;



- A. The appeal is hereby allowed and the order of the trial court dated May 6, 2021 is hereby set aside.
- B. Each party to bear their own costs of the appeal.
- C. The trial courts file to be returned for hearing and final determination of the suit.

DELIVERED, DATED AND SIGNED AT KITUI THIS 19TH DAY OF JANUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read virtually and in open court in the presence of-

Musyoki: Court Assistant

K. Musyoki Advocate for the Appellant

Kasimu Advocate holding brief fo Kimuli for the Respondent

