



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 89 OF 2019

SAMUEL WANGUCHA.....APPELLANT

VERSUS

KAWIRA KARAU.....1ST RESPONDENT

MURUGU MARTIN.....2ND RESPONDENT

JOSEPH KANAA M'LINTARI.....3RD RESPONDENT

KANEE M'KARAU.....4TH RESPONDENT

KAIMENYI EDWARD.....5TH RESPONDENT

PAUL NTONGAL.....6TH RESPONDENT

ICHENGI LIMUNYI.....7TH RESPONDENT

MARY MWENDWA.....8TH RESPONDENT

LAND ADJUDICATION OFFICER,

TIGANIA DISTRICT.....9TH RESPONDENT

THE HON. ATTORNEY GENERAL.....10TH RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.)

delivered on 6th June, 2019, in Tigania PM ELC No.9 of 2019)

JUDGMENT

A. PLEADINGS

1. The appellant at the lower court had sued the respondent alleging his father had owned **Parcel No. 547 Akithi III adjudication section** which the 1st respondent and 9th respondent colluded and or fraudulently through **A/R Objection No. 183** subdivided the

land into **Parcel No. 3379, 3551, 3552, 547 and 3550** in favour of the 2nd – 6th respondents respectively and which 4th and 5th respondents allegedly transferred to 7th and 8th respondents. He sought for an order that the 1st – 8th respondents do transfer the aforesaid parcels to him.

2. The 1st – 8th respondents filed a defence dated 4.1.2010 denying any alleged fraudulent subdivisions and or eventual transfer, insisted the 1st respondent had been in occupation of the suit parcels for decades; stated the previous land committee **Case No. 225/1981** was lawfully set for retrial and hence there was nothing fraudulent as alleged or at all.

3. Further, the 1st – 8th respondent averred land cases were still pending before the land adjudication officer Tigania hence the court lacked jurisdiction to hear and determine the suit.

4. The 9th and 10th respondents filed a defence dated 25.5.2010 in which they averred the appellant lacked capacity to bring the suit and denied any alleged fraud or receipt of a notice to sue.

B. COMPLIANCE WITH ORDER 11 CIVIL PROCEDURE RULES

5. In compliance with **Order 11**, the appellants filed a list of documents dated 22.8.2011 and 21.11.2011 respectively.

C. SUBMISSIONS ON JURISDICTION

6. On 11.4.2019, the trial court directed parties to SUBMIT the on **Section 20 (3) and 29 (1) of the Land Consolidation Act Cap 283 and Land Adjudication Act Cap 284** respectively. Through a ruling dated 6.6.2019, the suit was struck out with costs.

D. GROUNDS OF APPEAL

7. The grounds of appeal are that:- the trial court misinterpreted **Sections 26 and 29 of the Land Adjudication Act**; it dismissed the suit without going deeper to understand what the dispute was all about and lastly the court erred in law in finding it had no jurisdiction.

E. WRITTEN SUBMISSIONS

8. With leave of court, parties agreed to canvas the appeal through written submissions dated 6.12.2021 and 7.1.2022 respectively.

9. This being a first appeal, the court has to rehearse and reassess the lower court's record and come up with its own independent findings and conclusions.

10. The appellant submits the claim was based on fraud as set out under paragraph 6 of the plaint arising out of a decision of the land committee which resulted to the transfer and registration of **Parcel No's 547, 355, 3552 and 3550 in favour of the 1st – 8th respondents.**

11. In other words, the appellant submitted its case was about the illegal implementation of an award and was not challenging a decision of a land adjudication officer.

12. On the other hand, the 1st – 8th respondents submitted the trial court was in order to find it had no jurisdiction under **Sections 26 (3) of Land Consolidation Act and 29 of the Land Adjudication Act** given the appellant's claim was that the 2nd appellant was the registered owner of **Parcel No. 547** which parcel he alleged was fraudulently registered in favour of 1st respondent who went ahead to subdivide the land and transfer the same to the 2nd – 8th respondents.

13. The 1st – 8th respondents submitted that what was being challenged by the appellant was the decision of the land adjudication officer. In their view, if the appellant had been aggrieved by such decision, his only recourse was to take the claim to the adjudication officer and since there was no evidence on record that the appellant referred the matter to the arbitration board in

accordance with **Section 22** or filed an **A/R Objection** under **Section 26** or finally proffered an appeal to the Minister, the court lacked jurisdiction to entertain the suit. Reliance was made over *Abdullah Mangi Mohamed –vs- Lazarus Beja & 5 Others [2012] eKLR* on the implication for non-exhaustion of the internal statutory mechanism under the law.

F. ISSUES FOR DETERMINATION

14. Having looked at the pleadings, the grounds of appeal and written submissions, the issue for determination is whether the appellant's claim should have been entertained by the trial court.

15. The appellant's case was that his land has been fraudulently registered in the name of the 1st respondent after the latter had in collusion with the 9th respondent filed an **A/R Objection No. 183** in 1996 whose outcome was subdivisions and transfers in favour of the 1st – 8th respondents.

16. In support of his claim, the appellant had filed a list of documents namely: - a letter dated 18.7.2008 seeking for a consent to sue, demand letter dated 11.11.2008, consent to sue dated 22.11.2010, investigation proceedings of the land adjudication committee and a map, letter dated 26.9.1998 by an adjudication officer and a letter dated 25.6.2009 by District land adjudication officer.

17. From the record, the land committee's decision dated 10.8.1981 was with regard to **Objection No. 225** brought by Anyuki Gitiye who was the 2nd plaintiff in the lower court and the father to the appellant.

18. In a letter dated 25.6.2009, the District land adjudication and settlement officer categorical that the aforesaid decision had not been implemented and that there had been no appeal over the A/R objection meaning the said decision remained unchallenged by the 1st respondent. Further, the District land adjudication and settlement officer had indicated the position or the ground was not well demarcated.

19. Turning to the defence dated 4.1.2010, the respondents had denied the alleged fraudulent subdivisions and or transfers. Instead, they admitted that there was a case, though not (specified) in which it was ruled in favour of the 1st appellant but later a tribunal had allegedly ordered for a retrial (**Case No. 228 of 1981**). Looking at the defence, the respondents particularly the 1st respondent had failed to plead when she was first recorded as the owner of **Parcel No. 547**.

20. The 9th – 10th respondents had filed a list of documents amongst them a letter from the land adjudication officer dated 22.11.2010, proceedings of land adjudication committee, a map and a letter by the District land adjudication and settlement officer dated 25.6.2009. The record of appeal did not however include the said documents.

21. The appellant had filed a list of issues dated 21.2.2014 whereas the 1st – 8th respondent's filed the one dated 20.3.2014. In both sets of issues, the golden thread was the issue of fraud regarding **Parcel No. 547** and the subsequent subdivisions and or transfers.

22. The appellant had been granted a consent to institute the suit dated 16.10.2009 both under **Sections 8 (1) and 30 of Land Consolidation Act and Land Adjudication Act** respectively regarding **Parcels No's 547, 3379, 3551, 3552 and 3550 Akithi III adjudication section**.

23. As indicated above, the appellant was not complaining about any decision arising out of an appeal but the illegal and fraudulent registration, subdivisions and transfers regarding **Parcel No. 547**. He had specifically pleaded fraud, illegalities, irregularities and collusion.

24. In the letter dated 27.10.2010, the District land adjudication and settlement officer a Mr. Makori had confirmed Objection No. 225 was ruled in favour of Anyuki Gitiye which decision had not been implemented both on the adjudication records and on the ground.

25. At paragraph 20 of the defence by 9th and 10th respondents, denied the alleged fraud, illegalities and or collusion.

26. It is trite law that issues flow from pleadings and parties are bound by their pleadings. See *Stephen Mutinda Mule & 3 Others*

-vs- Independent Electoral and Boundaries Commission [2014] eKLR.

27. What was before the trial court was not the ascertainment of interests and rights over the suit land. The trial court was being called upon to determine if the land adjudication process had been done in accordance with the law. See **Tobias Achola Osindi & 13 others -vs- Cyprianus Otieno Ogalo & 6 others [2013] eKLR.** It had been alleged that decision in favour of the appellant remained un-implemented leaving a loophole for the 9st respondent to unjustly and fraudulently subdivide and transfer portions of **Parcel No. 547** to the 1st – 8th respondents which they had no justification in law to own and or transfer. See **Tobias Achola Osindi & 13 Others -vs- Cyprianus Otieno Ogalo & 6 Others [2013] eKLR.** Such issues in my view fell within the jurisdiction of the court to determine and not elsewhere as held by the trial court.

28. Further, the issues raised in my view were not pure points of law and could not be ascertained without delving into the factual evidence. See **Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd (1969) EA and Oraro -vs- Mbaja eKLR [2005] 1 KLR.**

29. I find the appeal with merits. The same is allowed with costs to the appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF MARCH, 2022

In presence of:

Anampiu for petitioner – present

Orimbo for 1st – 8th respondents

Kieti for 9th and 10th respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE



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