IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

Civil Appeal No. 110 Of 2011

NICHOLAS NJERU suing for himself and as representative of MUKERA CLAN OF MBEERE.....**APPELLANT**

VERSUS

THE HONOURABLE, THE ATTORNEY GENERAL

AND 8 OTHERS….....**RESPONDENTS**

(Being an Appeal from the Judgment of the High Court of Kenya at Embu, (Karanja, J.) dated 15th March, 2011

In

HCCC No. 165 of 2008)

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JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of Karanja, J., (as she then was), dated 15th March, 2011, in Embu HCCC No. 165 of 2008. The dispute in this appeal has had a chequered history which is well captured in the judgment, the subject matter of this appeal. This dispute goes back to 1964, when Mukere clan represented then by; Nyaga Mutumbi, Nyaga Mwongonge filed a Land dispute being Case No. 10/64 before the Mbeere African Court against Nditi Clan then represented by Lameck Gichangi, Nyaga Gathathi, Mathew Mugo Ngari, Erasmus Ireri, Jamlick Njiru and John Mutitu Ngacha. The original parties from both clans have since died but they have been substituted over the years by their successors' in title. Nonetheless the character of the dispute has never changed, it remains a dispute over parcels of land in an area called Evurori within Nguthu Adjudication area between Mukera Clan on one hand and Nditi clan on the other.

[2] The records before us show that after the matter was decided by the Mbeere African Court, some parties who were dissatisfied with the outcome filed an appeal before the Embu District African Court and the appeal was allowed. There was a further appeal before the then African Court of Review which at the time had jurisdiction to determine appeals in regard to land matters. That review court upheld the decision of the Embu African Court.

[3] Sometimes in 1972, the Evurori area of Nguthi and the parcels of land affected by the said dispute was declared an adjudication area thus the issues of ascertainment and recording of land rights were to be carried out according to the provisions of the Land Adjudication Act. This process of adjudication now saw the dispute herein snowball into adjudication disputes which were determined according to the various mechanisms set out in the Act but the matter did not end as it was finally referred to the Minister for Lands and Settlement whose decision was to be final as per the provisions of the Land Adjudication Act.

[4] It appears the dispute was heard as Appeal No. 1 of 1976 and a single judgment by the then Minister for Lands and Settlement seems to be truncated into two portions. The preamble, the proceedings and part of the findings are similar except the first portion of the judgment goes up to page 31 and the last orders reads as follows:

"This appeal is res judicata. The decision of the Court of Appeal in Case No. 8 of 1965 be confirmed.

Parcels numbers 2303, 2302, 2305, 2317, 1304, 1305, 1252, 1253, 1272 and 1255, are to be registered in the name of Hesphon Nthuri and any other names appearing against those parcels to be deleted.

The respondent to pay costs to the appellant on application to the Minister.

Signed

(J. H. Angaine)

Minister for Lands and Settlement"

[5] The second judgment which is similar except for the orders continues to make very elaborate and specific orders of the persons who are entitled to specific parcels of land from this adjudication scheme. It is also signed by the same minister and although there is no date, there seems to be some concurrence by both parties that the decisions by the Minister were dated 27th May 1976. There were several attempts by dissatisfied parties to quash the decision of the Minister by way of Judicial Review Proceedings filed in the High Court in Miscellaneous Civil Application No. 201 of 1976. For example Nditi Clan through Hesbon Nthuni applied to quash the decision of the Minister but the suit was dismissed as it was filed out of time. They filed Civil Appeal No. 96 of 1976, which they subsequently withdrew on 24th November, 1984.

[6] By a plaint dated 13th November, 1998, the appellants representing Mukera clan filed a suit before the High Court Nairobi, which was subsequently transferred to the High Court, Embu and it fell for hearing before Karanja, J. In that suit, it is alleged that in 1992, the Chief Registrar unlawfully entered restrictions on the titles falling within Evurori Nguthi Adjudication Section including the titles of the plaintiffs. The restrictions were entered under Section 28 of the Land Adjudication Act pursuant to a decision of the Minister in Land Appeal No. 1 of 1976. It is further alleged that the Director of Land Adjudication and Settlement and the Chief Land Registrar cancelled the names of the persons belonging to Mukera Clan from their respective titles and substituted them with strangers.

[7] The appellants claimed that the Minister had no powers or jurisdiction to make the second ruling which introduced strangers and which is in contradiction of the earlier ruling that upheld the decision of the Embu District African Court. They claimed that the Land Registrar had no powers to cancel titles issued on first registration; they claimed their titles were issued in August, 1979 and they therefore prayed for the following specific orders:

a. ***A declaration that the Minister's second ruling comprising of pages 1 to 41 is unlawful and, therefore, null and void.***

b. ***A declaration that any action taken or decision made by the Director of Land Adjudication and Settlement and/or the Chief Land Registrar on the basis of the said second ruling comprising of***

pages 1 to 41is and/or are null and void.

c. ***A declaration that entries made against the titles to the Lands falling within the hithertofore NGUTHI ADJUDICATION SECTION pursuant to the Minister's said second decision are null and void and should be cancelled forthwith.***

d. ***An order directing the Chief Land Registrar to rectify the registers affecting the said parcels to the State the registers stood on the 3rd day of August, 1979, in so far as the proprietorship Section (Part B) thereof is concerned.***

e. ***An order directing the Chief Land Registrar to remove all the restrictions entered by him against the said titles.***

[8] The Attorney General filed a defence as one of the parties sued and also on behalf of the Director of Lands Adjudication and Settlement and the Chief Registrar in which all the allegations were denied. Nditi Clan through Lameck Gichangi, and Nyaga Chiathathi and other co defendants who joined in the suit defended themselves against the allegations. By the amended defence and counterclaim, they alleged fraud on the part of the appellants and they sought a specific order that the appellants be ordered to transfer the land they had grabbed from Nditi Clan. There was no mention of the counterclaim in the judgment being appealed against, and there being no cross appeal, we will say no more on the said counter claim.

[9] The Attorney General, the Director of Adjudication and the Chief Land Registrar did not give evidence in support of their defences. The

appellants' case was supported by Njeru Mukundi, the 1st appellant who testified on his behalf and that of the members of his Mukera clan. He contended that all the disputes regarding the suit land were finalized by the African Court, the adjudication process by 1979 which resulted in them being registered as proprietors of their various parcels of their land. He was registered as proprietor of Evurole Nguthi / 1319 while his fellow clan members were registered over 219 parcels of land which he claimed were illegally cancelled by the Chief Land Registrar and titles issued to strangers. He stated that the Chief Registrar had no powers to purport to implement a Ministers second decision that had no legal basis.

[10] Nicholas Ngechi Njeru, a son of the 1st appellant told the trial Judge that the adjudication of the suit land was finalized in 1976, culminating with the decision of the Minister who affirmed the previous decisions by which Mukere clan was given about 2000 acres of land and Nditi was given 139 acres. He claimed that he was given his title but a restriction was placed thereon and in 1998 the Chief Land Registrar purported to cancel his title alongside others of his clan members. John Mutitu Ngacha testified that although not a member of Mukere clan, he bought a parcel of land from the Mukere clan in 1978; he was registered as proprietor and issued with his title in 1979, but the Chief Land Registrar purported to cancel his tile in 1998.

[11] On the part of Nditi clan, Peter Marori Njuki gave evidence and reiterated the long journey his clan had followed to wrestle their land from Mukera clan. Due to high levels of corruption in the Ministry of Lands, he claimed that their land was grabbed and dished out to strangers; he claimed that the titles were rectified according to the orders of the minister who heard the parties and arrived at a determination which was being implemented by the Chief Land Registrar.

[12] After hearing the evidence from both parties, and extensive submissions filed by the respective counsel, the learned Judge was of the view that the parties had resurrected a matter that was determined over 40 years ago, moreover, not only did they come to court late in the day, but the procedure they adopted in challenging an order by the Minister was wrong. The suit was therefore dismissed and this is what the learned Judge posited in a pertinent portion of the judgment:

> ***"As stated earlier on in this judgment, a decision of the Minister given pursuant to Section 29(1) of the Land Adjudication Act is final. Its merits or contents cannot be challenged before this court. That being the case, I would be overstepping my jurisdiction sitting as a Civil Court if I***

were to try and re-analyze what happened before the Minister and whether his decision was meritorious or not. I shall not, therefore, attempt to do that. As stated earlier also, the only way the Minister's decision can be challenged before this court is by way of Judicial Review. That was attempted but it did not succeed. The dismissal of Judicial Review proceedings and the subsequent withdrawal of the Appeal left the Minister's decisions intact. Does this Court in its civil jurisdiction have the power to nullify the said decisions through a declaratory suit?

My finding is that this court is divested of any such power by Section 29(1) of the Land Adjudication Act. On this stand, I am buttressed by the ruling of MASIME J.A. in Civil Application No. Nai. 14 of 1989, PETER OLILO OGWEYO VERSUSJOANES MBAJAJ WAMBOGO, where they supported Judge Omollo's finding to the effect that:

> ***"The High Court is not empowered to hear cases arising out of the Land Adjudication Act. It has only supervisory jurisdiction by way of prerogative writs and that being so, the plaintiff's suit must be dismissed as it discloses no reasonable cause of action."***

My considered finding on the issue, therefore, is that this court has no jurisdiction through a declaratory judgment to fault the judgment of the Minister which it has otherwise no Civil Jurisdiction to impugne. The plaintiff's missed that chance when they failed to move the court in time on Judicial Review in its "sui generis" jurisdiction".

[13] Being aggrieved by that judgment, the appellants have appealed before us and in their memorandum of appeal, they raised a total of 16 grounds of appeal which were all argued together. To avoid obvious prolixity, grammatical, spelling and repetitions we recast them as follows;

Whether the learned judge erred in law and fact by;

1. ***Failing to recognize that a claim challenging a cancellation of title of a first registration of land can only be pursued by way of judicial review.***

2. ***Failing to appreciate that the decision of the Minister was implemented under the provisions of section 29 (1) of the Land Adjudication Act in 1979 but the issue was re-opened in 19 years later based on a void decision of the minister.***

3. ***Dealing with the issue of jurisdiction that was never before the court as the parties had willingly submitted themselves to the jurisdiction of the court.***

4. ***Failing to determine the issues of illegality by the Chief Land Registrar by declaring the cancellation of the titles a nullity.***

5. ***Failing to take into account relevant facts and law into account and considering extraneous matters.***

[14] In further arguments to support the above grounds, Mr. Mutito teaming up with Mr. Kiome, learned counsel for the appellants put up formidable arguments in support of the above grounds. They submitted that the records consistently show the respondents were given 139 acres of land while the rest of the land measuring about 2000 acres was left for the appellants. This determination of the allocation of the suit land was reiterated by the Minister for lands when he observed that the matter was *res judicata* thereby affirming the previous decisions. After the adjudication process, the titles were registered in 1979, and the parties got their respective titles which were by way of first registration. The parties were satisfied until 1982, when the Chief Registrar placed a restriction on all the titles of the appellants. The appellants attempted to challenge the restriction through Nairobi Miscellaneous Application No. 19 of 1990. However, the restriction was removed by the Chief Land Registrar even when the aforesaid suit was still pending.

[15] The Chief Land Registrar after removing the restrictions proceeded to cancel the title and issued the same to other people that are when the appellant filed the suit the subject matter of this appeal. According to Mr. Mutito, the trial Judge misdirected herself when she observed that the suit was meant to undo what was done 40 or so years ago. The suit was meant to undo what the registrar had done in 1998. Counsel conceded that although the appellants may have sought for wrong orders, nonetheless, they did not open the old cases. He contended that there was a fresh cause of action which *inter alia* sought to direct the Chief Registrar to restore the registers; the appellant did not move to court by way of Judicial Review because they were not challenging the order by the Minister that was implemented in 1979, but the order lifting the restrictions which was purportedly in a second judgment of the Minister where their titles to land were illegally cancelled and new titles were thereby issued to strangers who are not from Mukera clan.

[16] Mr. Kiome further submitted that the Chief Land Registrar was wrong when they purported to cancel the titles; the order by the Minister did not order the cancellation of names: In any event, the Minister was referring to only 9 parcels of land and a portion of 139 acres, that was allocated to the respondents from Nditi Clan, while the balance of 2000 acres were to remain with the appellants; however, their names were cancelled in January, 1998 and replaced with strangers. Counsel urged us to allow the appeal.

[17] This appeal was opposed by Mr. Mugo, learned counsel for the respondents (Nditi Clan). His submissions were short that according to the judgments from the African Court, the Review Court and the decision of the Minister, no land was ever given to the appellants. Their claim was also found to have been settled in previous decisions of the court and hence it was res judicata. Regarding the present suit, Mr. Mugo was of the view that the claim for land was statute barred. The decision by the Minister was final; it was elaborate in its findings, that the appellants were found by the Minister dishonest people who had interfered with the due process by corruptly dishing out land to public officers in a bid to influence them. Counsel referred to various portions of the Minister's judgment to that effect.

[18] According to Mr. Mugo, the Minister is empowered under Section 28 of the Land Adjudication Act to alter the parcels of land and this is what was done after hearing the matter, the Minister found the appellants had cunningly grabbed land and issued it out irregularly to public officers in order to influence them. The Minister distributed the land and the registration was effected after the Minister concluded the appeal. He urged us to dismiss the appeal, as allowing it will go against public policy of re-opening a matter that was settled over 40 years ago.

[19] This is a first appeal, and that being so, we are required to re evaluate the evidence and arrive at our own independent findings and conclusions of the matter. That is why we have attempted to summarize albeit briefly the facts forming the background of this dispute. In the case of ***SELLE & ANOTHER V ASSOCIATED MOTOR BOARD COMPANY LTD AND OTHERS [1968] 1 EA 123,*** the Court of Appeal for East Africa set out the principles to be considered when determining an appeal from the High Court as follows:

> ***"An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally."***

In a similar case this court held in ***HAHN V SINGH [1985] KLR 716*** that:

> ***"On appeal of course, before coming to a different conclusion on the typed evidence this court should be satisfied that the advantage enjoyed by the trial judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion."***

[20] We think the first issue to address is whether the Judge was wrong in finding that the appellants could only challenge the decision of the Minister by way of judicial review. It is well settled principle of law that the High Court is given supervisory powers to check the excess of jurisdiction and compliance

with the rule of law by inferior tribunals and other public bodies or persons discharging such public acts. For example an order of certiorari is a quashing order issued by the High Court to quash decisions of an inferior court or tribunal, public authority or other body which is susceptible to Judicial Review.

[21] An order of prohibition order is an order by the High Court directed at an inferior tribunal, public authority forbids that body to act in excess of its jurisdiction or contrary to law; whereas an order of mandamus is an order in form of a command directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty. See HALBURY's LAW OF ENGLAND 4TH EDITION VOL. 1 paragraph 119.

[22] The trial Judge observed in her judgment that she had no jurisdiction to supervise the Minister's decision other than by way of the set procedure which is by way of judicial review. This explains why the Judge did not analyze the bulk of the evidence before her. The appellants in the suit before the Judge had mainly prayed for orders declaring the 2nd judgment by the Minister a nullity and an order directing the Chief Land Registrar to rectify the registers affecting the suit property as they were on 3rd August 1978. Mr. Mutito in his address to us admitted that the prayers in the plaint were slovenly drawn, but that notwithstanding, he urged us to find that the Chief Land Registrar had no powers or jurisdiction to cancel the registered lands titles.

[23] We agree these prayers could have perfectly fitted the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However we do not entirely agree with the learned Judge's observation that the court had no jurisdiction to grant a declaratory order. We know of no limit to the powers of the court to grant a declaratory order except such limit as it may in its discretion impose upon itself. See the English case of **PYX GRANITE CO. LTD V MINISTRY OF HOUSING & LOCAL GOVERNMENT [1958] 1 QB 554**

In that case the Statute made provision for a determination by the Minister which was expressly made 'final'. The Pyx Company did not go to the Minister; instead they sought a declaration in the High Court. The Minister argued the Court had no jurisdiction to entertain a claim for declaration. Lord Denning said

'I take it to be settled law that the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words'.

As aforementioned we are not aware of any statutory underpinning that bars parties from seeking redress by way of declarations save that it must be done according to the set down procedure. We must point out that this case could not only be settled on procedure, there were other issues that the Judge considered such as the issue of *res judicata* and the appellants had to discharge the burden of proof as required in civil matters.

[24] Back to the judgment by the learned Judge, she traced the long history of this matter and rightly observed it was a daunting task for her to go through the incomprehensible records that dated back to 1964 when the matter was first filed before the African Court; parties did not relent, they went all the way to the District African Court of Review; the dispute then metamorphosised itself into an adjudication dispute, when the area fell under the adjudication. The dispute was also heard by various committees as set out in the Act and ended up before the Minister for Lands and Settlement. Here we agree with the Judge that the parties subjected themselves before the Minister and those who were dissatisfied with the Minister's decision applied to set aside the Minister's decision by way of Judicial Review; the question that we have asked ourselves is whether the same parties can now seek declaratory orders against the same decision?

[25] The records before us show the Judicial Review application was pursued in the High Court in Misc. Appl. No 201 of 1976 by the parties who were dissatisfied with the Minister's decision. That suit was dismissed and an appeal before the Court of Appeal was withdrawn. To some extent, we understand why the Judge posited in part of her judgment that:

"The suit as at the time of filing was, therefore, seeking orders to undo what had been done almost 20 years earlier. As at the date of this judgment the plaintiffs are seeking to undo what was done 30 years ago."

[26] Was the Judge wrong in the exercise of her discretion to dismiss the claim? The claim as we understand it, was dismissed for two principal reasons, one it was *res judicata* and secondly the judge was of the view that the court lacked jurisdiction. We have already dealt with the issue of jurisdiction as above. The arguments that the matter was *res judicata* was advanced by counsel for the respondents and due to the long history of this matter we will examine this argument further. The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation (See Mulla, the Code of Civil Procedure, 16th Ed. Vol. 1 – pg 161). ***Section 7*** of the Civil Procedure Act, Chapter 21, Laws of Kenya Provides that:-

"***No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."***

[27] This doctrine has been applied in a number of cases including; ***Reference No.1 of 2007, James Katabazi and 21 Others -vs- The Attorney General of the Republic Of Uganda EACJ*** where the Court stated that for the doctrine to apply:

- ***the matter must be 'directly and substantially' in issue in the two suits,***
- ***the parties must be the same or parties under whom any of them claim, litigating under the same title; and***
- ***The matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd. - v- Central Bank & 2 Others – Civil Appeal No. 36 of 1996).***

[28] Was the matter *res judicata*? The trial Judge opined that the matter was *res judicata*, and on our part we appreciate that due to the many cases involving the same parties there is a very thin line to draw with absolute certainty and say the matter was not *res judicata* for the following reasons.

- ***The same dispute which is over the same subject matter and the same parties has been in the courts since 1964.***
- ***The decision by the Minister although it was supposed to be final, according to the provisions of Section 29 of the Land Adjudication Act, was unsuccessfully challenged by way of Judicial Review by the disputing parties. That was the prescribed procedure for challenging the decisions by a public body, or acts of persons discharging public duty. (unlike in the case of PYX Company (supra) that never went to the Minister or sought judicial review, these parties engaged all the remedies)***
- ***A suit being Miscellaneous Number 13 of 1990, Nairobi was filed by the appellants seeking the removal of restrictions placed on the suit property by the Chief Land Registrar while purportedly waiting for the ruling of the Minister. The fate of this suit is not known and there is no explanation given by the appellants why that suit was never prosecuted***.

[28] We agree with the trial Judge that during the various proceedings the issues in this appeal were perhaps thrashed almost to the pulp and the dispute over which clan owned the suit property had long been determined. We will also look at what the appellants referred as '*the new cause of action'*. According to the appellants, the suit raised a new cause of action which arose in 1979 when the Chief Land Registrar removed the restrictions and cancelled their titles. They therefore argued that the matter

was not *res judicata* and it was not time barred. They argued most eloquently that the 1st decision by the minister was implemented thereby giving rise to their titles which were cancelled when the Chief Land Registrar removed the restrictions on the title and issued land belonging to the appellant's clan to strangers. We have gone through the evidence, and the records before us, we are not persuaded from our own reading of the material before us that the Minister's decision of May 1976 or whichever date it was, had been implemented in 1978. This is because the Chief Land Registrar imposed restrictions on over 200 titles falling within the suit land awaiting the implementation of the Minister's decision. The appellants' filed a suit, that is Misc Appl. No. 13 of 1990 to challenge these restrictions but never prosecuted the suit. If the Minister's decision was implemented in 1978, then what gave rise to the restrictions that were registered over the title pending the decision of the same Minister?

> [29] It is common ground that under the provisions of Section 28 of the Registered Land Act the rights of a proprietor acquired on first registration cannot be defeated except as provided in the Act. Those rights are nonetheless subject to-:
>
> (a) ***"to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register…"***

The appellant's titles were not absolute as they could not deal with the titles as they pleased; the titles had restrictions that were placed by the Registrar pending the decision of the Minister. The decision of the Minister could not have been implemented in 1978, because the restrictions were placed in the title pending its implementation. We are reinforced in this view by the fact that the appellants attempted to challenge the restrictions but abandoned the matter and decided to file a fresh cause of action.

[30] Was the Judge wrong in failing to determine the merit of the matter? Perhaps the trial Judge should have gone into the merit of the matter which we are entitled to do as the 1st appellate court. The evidence before the court was that the appellant's titles for their clan members were cancelled and they listed over 200 titles that were given to strangers. We have already noted that the appellants were not absolute owners as their titles were subject to restrictions. They challenged those restrictions but abandoned that suit and proceeded to file a fresh suit which can easily be construed as an abuse of the court process. This is because even if a new cause of action arose within an existing suit, parties normally apply to amend an existing suit. Be that as it may, this matter is further compounded by the fact that the persons whose titles were cancelled were not named and worse still the parties who were allegedly issued with the over 200 titles that the Court is asked to cancel were not also named. It is a cardinal principle of law that a court of law is supposed to hear parties before making orders that affect them.

[31] The appellant's claim is made on behalf of the clan whose membership is not named and against persons who were issued with titles and they are not named. The land was not registered in the name of a clan but individuals. Similarly, the land given out to the respondents' clan was also given to individuals who needed to be sued in their personal capacities as the land was not registered in the clan name. Although they claim this was clan land it was not registered as such, it was in individual names who ought to have been made parties in this matter. For the aforesaid reasons even if the judge analyzed the evidence, the appellant's evidence failed to prove on a balance of probability that the restrictions paced by the chief registrar were wrongly removed and that the court could cancel titles by parties who were not named in the suit.

[32] For the aforesaid reasons we find no merit in this appeal, it is dismissed with costs to the 4th to the 8th respondents who defended this appeal.

Dated and delivered at Nyeri this 10th day of October, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a true copy to the original.

DEPUTY REGISTRAR