



**Wekesa v Suleiman (Environment & Land Case 295 of 2015)  
[2023] KEELC 18150 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18150 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 295 OF 2015  
DO OHUNGO, J  
JUNE 21, 2023**

**BETWEEN**

**ROBERT WANJALA WEKESA ..... PLAINTIFF**

**AND**

**ABDALLA A. SULEIMAN ..... DEFENDANT**

**JUDGMENT**

1. By plaint filed on November 17, 2015, the plaintiff averred that he was the administrator of the estate of Eliud W. Waswa (deceased) who was the registered proprietor of land known as Kakamega/Lumakanda/186 (suit property) and that the defendant had without any colour of right trespassed onto the suit property thereby causing loss and damages.
2. The plaintiff therefore prayed for judgment against the defendant for:
  - a. General damages.
  - b. Declaration that the defendant's act of trespassing and cutting down trees, ploughing and occupying the deceased's parcel of land known as Kakamega/Lumakanda/186 is/was unlawful and unjustified.
  - c. An order that the defendant be forcefully evicted from the parcel of land known as Kakamega/Lumakanda/186 and to render vacant possession of the same to the plaintiff.
  - d. Costs of this suit.
  - e. Interest on (a) and (d) above.
  - f. Any other relief this Honourable court may deem just to grant.
3. The plaintiff passed away on April 3, 2020 and was substituted with Fred Lusweti Wafula pursuant to an order made on June 14, 2021. The plaint was however not amended following the substitution.



4. The defendant filed defence and counterclaim dated January 25, 2022 in which he admitted that Eliud W. Waswa was the registered proprietor of the suit property but added that Eliud W. Waswa obtained registration fraudulently. He averred that he was the bona fide proprietor of the suit property and prayed for declarations that he is the sole owner of the suit property and that the registration of Eliud W. Waswa as the proprietor of the suit property was illegal, that the same be revoked and that the record be changed to reflect him as the registered owner. He further sought costs and interest.
5. The plaintiff filed a reply to defence and counterclaim on April 1, 2022 in which he prayed that his suit be allowed, and the defendant's counter claim be dismissed with costs.
6. At the hearing, Fred Lusweti Wafula testified as PW1. He adopted the plaintiff's witness statement dated October 16, 2015 as his evidence in chief. In the said statement, the plaintiff stated that he was the administrator of the estate of Eliud W. Waswa (deceased) which included the suit property, and that the defendant had trespassed onto the suit property and started cutting down trees, ploughing and even occupying the same.
7. Under cross examination and re-examination, PW1 stated that Eliud W. Waswa purchased the suit property from the defendant in 1970 and that in High Court Civil Case No. 437 of 1993, the court ordered Eliud W. Waswa to vacate the land. That Eliud W. Waswa vacated and did not return to the suit property. He further stated that there was a tribunal case filed by Eliud W. Waswa against the defendant herein in which Eliud W. Waswa was claiming the suit property. That the tribunal's award was adopted thus enabling Eliud W. Waswa to obtain title in 2013.
8. The plaintiff's case was then closed.
9. During defence hearing, the defendant testified as DW1 and adopted his witness statement dated January 25, 2022. He stated in the statement that he was the registered proprietor of the suit property having purchased it in 1965 and the property registered in his name in 1993. That he immediately took possession and continued residing in the suit property as of the date of his statement. That he learnt in 1973 that Eliud W. Waswa had encroached into the suit property thus causing him to file Kakamega HCCC No. 437 of 1993 seeking to evict Eliud W. Waswa and that judgment was delivered in the matter that Eliud W. Waswa be evicted.
10. DW1 further stated that on August 17, 2005 Eliud W. Waswa filed Lugari a case before the Lugari Land Disputes Tribunal claiming that the suit property belonged to him, and that the tribunal delivered its verdict on November 21, 2006 faulting the eviction orders granted by the High Court. That being dissatisfied with the tribunal's decision, he appealed to the Provincial Land Dispute Appeals Tribunal and a verdict was delivered on July 5, 2007 upholding the decision of the Lugari Land Disputes Tribunal. That following the said decisions, Eliud W. Waswa filed Kakamega CMCC Misc. Application No. 166 of 2006 seeking to adopt the awards and that the Subordinate Court adopted the award on January 15, 2013, after which the suit property was transferred to Eliud W. Waswa and title deed issued to him on February 27, 2013. He added that the suit property was transferred illegally to Eliud W. Waswa since the tribunal lacked jurisdiction and that he appealed to the High Court against the decision of the Provincial Appeals Tribunal and that the appeal was never determined. That sometime in 2013, he discovered that he was no longer the registered proprietor of the suit property, and that he lodged a caution.
11. Other defence witnesses were Mwangazenge Abdalla Hassan (DW2) who stated that the defendant has lived on the suit property since commencement of the settlement scheme and that upon being evicted, neither Eliud W. Waswa nor Robert Wanjala Wekesa returned to the suit property. Khainga Mzee



- Omari (DW3) stated that he is a surveyor and that he demarcated the suit property for the defendant in 2013.
12. Defence case was then closed. Parties thereafter filed and exchanged written submissions.
  13. The plaintiff submitted that the transfer of the suit land from the defendant to the late Eliud Wekesa Waswa was through a judicial process which was never challenged by the defendant and that the proceedings at the tribunal never amounted to overturning the High Court's decision as the proceedings in the tribunal's court were based on different facts and evidence. It was the plaintiff's further submissions that the tribunal had jurisdiction to entertain the suit and that the defendant had the option of reviewing the tribunal's decision which he failed to and further submitted that the suit property was transferred through a legal process which the defendant had an option of appealing against. He therefore submitted that he had proved his case on a balance of probabilities and urged the court to grant the orders sought.
  14. The defendant filed his submissions on December 21, 2022 and argued that Eliud Wekesa Waswa acquired title to the suit property by fraudulently, unlawfully, through misrepresentation and corrupt scheme since the tribunal lacked jurisdiction to determine issues touching on title to land. He relied on *Gibson Sengete Matolo v Eastern Provincial Land Committee & 3 others*, HCC Misc Application No 33 of 2003 as cited in *Rose Wambui Wanyoike v Land Dispute Tribunal Kakuzi & another; Mwea Mwathe & another (Interested Parties)* [2019] eKLR. He further argued that the plaintiff failed to prove trespass and thus not entitled to general damages. That the plaintiff's response to the counterclaim is marred with general denials and does not controvert the defendant's averments. That Eliud Wekesa Waswa was party to an illegal, unprocedural and invalid process toward acquisition and registration of the suit property in his name and that the counterclaim has been proven and should be allowed as prayed.
  15. I have considered the parties' pleadings evidence and submissions. The issues that arise for determination are whether Eliud Wekesa Waswa title is valid and whether the reliefs sought by the parties should issue.
  16. There is no dispute that Eliud Wekesa Waswa (deceased) is the registered proprietor of the suit property, having been registered as such on February 27, 2013 pursuant to an order issued on January 24, 2013 in Kakamega CM Misc Award Number 166 of 2006. Kakamega CM Misc Award Number 166 of 2006 was itself filed following proceedings before the Lugari Land Disputes Tribunal as well as in Provincial Appeals Tribunal Appeal Number 72 of 2007 in which the defendant's title in respect of the suit property was cancelled. Based on his title, Eliud Wekesa Waswa (deceased) moved this court through the plaintiff, claiming that the defendant had trespassed onto the suit property and seeking the defendant's eviction. There is no dispute that the defendant is in possession.
  17. As a registered proprietor of land, Eliud Wekesa Waswa (deceased) and his estate would ordinarily be entitled to the rights, privileges, and benefits under section 24 of the *Land Registration Act*. Further, section 26 of the Act obligates the court to accept a proprietor's certificate of title as conclusive evidence of proprietorship, unless of course the provisos under section 26 (1) (a) or (b) are established. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
  18. The defendant has challenged Eliud Wekesa Waswa (deceased)'s title inter alia on the ground that it was acquired illegally and unprocedurally since the tribunal did not have jurisdiction to cancel title to land. From the material on record, it is not contested that the defendant was registered as proprietor of the suit property on March 19, 1992 and that his title was cancelled by the tribunal as we have noted.



There are many decisions emphatically stating that the tribunal which was established pursuant to section 4 of the *Land Disputes Tribunals Act*, 1990 (repealed) did not have jurisdiction to determine title to or ownership of registered land. Suffice it to mention the case of Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR where the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal when it comes to ownership of registered land as follows:

On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the *Land Disputes Tribunal Act* (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

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- (1) subject to this Act, all cases of a civil nature involving a dispute as to:-
  - (a) The division of, or the determination of boundaries to land, including land held on in common,
  - (b) A claim to occupy, or work land or
  - (c) Trespass to land.”

Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity....

19. Thus, the verdict of the Lugari Land Disputes Tribunal and that of the Provincial Appeals Tribunal, although implemented through Kakamega CM Misc Award Number 166 of 2006. Kakamega CM Misc Award Number 166 of 2006, was a nullity. As Lord Denning stated in *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

20. It follows therefore that the proceedings before the Lugari Land Disputes Tribunal and the Provincial Appeals Tribunal including the adoption in Kakamega CM Misc Award Number 166 of 2006. Kakamega CM Misc Award Number 166 of 2006 were incurably defective and equally void and incapable of conferring a valid title upon Eliud Wekesa Waswa (deceased). As has often been stated, a title deed is an end product of a process and a proprietor cannot justify his proprietorship by simply waving his title document. See *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR.



21. Eliud Wekesa Waswa (deceased)'s title to the suit property having been acquired illegally and unprocedurally, it is invalid and liable for nullification. It follows that the plaintiff is not entitled to the reliefs that he seeks, which are founded on the impugned title. On the other hand, the defendant has established his counterclaim and merits reliefs sought. Any claim by the estate of Eliud Wekesa Waswa (deceased) to ownership of the suit property would have to be validly mounted and prosecuted.
22. In view of the foregoing, I make the following orders:
  - a. The plaintiff's case is without merit and is dismissed.
  - b. The registration of the parcel of land known as Kakamega/Lumakanda/186 in the name of Eliud Wekesa Waswa is hereby cancelled so that proprietorship thereof reverts to the defendant herein.
  - c. Considering the circumstances, each party shall bear own costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF JUNE 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

No appearance for the plaintiff

Mr Kirui for the defendant

Court Assistant: E. Juma

