



REPUBLIC OF KENYA



**Kitur v Misoi & 3 others (Environment and Land Appeal
1 of 2022) [2023] KEELC 19025 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19025 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL 1 OF 2022**

MN MWANYALE, J

JULY 24, 2023

BETWEEN

JOEL KIPCHOGE KITUR APPELLANT

AND

DORCAS MISOI 1ST RESPONDENT

LAND REGISTRAR – NANDI COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

KAPSABET LANDS DISPUTE TRIBUNAL 4TH RESPONDENT

(Being an appeal against the judgment and Decree delivered by Hon. Jacinta A. Owiti (SPM) delivered on 12th day of May 2021 in Kapsabet SPMCC No. 257/2015.)

JUDGMENT

1. Vide his Memorandum of Appeal dated 31st May 2021, the Appellant Joel Kipchoge Kitur being dissatisfied by the judgment and Decree delivered by Hon. Jacinta A. Owiti (SPM) delivered on 12th day of May 2021 in Kapsabet SPMCC No 257/2015 penned 6 grounds of Appeal as follows; -
 - a. That the learned trial magistrate erred in law and fact by totally disregarding the fact that the Kapsabet Lands Dispute Tribunal did not have any jurisdiction whatsoever to arbitrate and give an award of subdivision in a dispute whose subject matter was registered land.
 - b. That the learned trial magistrate erred in law and fact by agreeing with the Kapsabet Land Disputes Tribunal, a body that had no jurisdiction *ab intio*, and the 1st Defendant's testimony and proceedings to make a finding and dismissing the Plaintiffs suit in its totality.
 - c. That the learned trial magistrate erred in law and fact by expressly failing to take judicial notice that the Plaintiff is the absolute proprietor of land parcel Nandi/Kamobo/682 and that the



1st defendant never produced any documentary evidence to show that she had purchased the said parcel from the Plaintiff.

- d. That the learned trial magistrate erred in law and fact by failing to appreciate the evidence tendered by the Plaintiff in its case wrongly analyzed the evidence and the law, therefore coming to the wrong conclusion or judgment.
 - e. That the learned trial magistrate erred in law and fact in failing to take in to consideration and solely relying on the fact that the Plaintiff had waived his right to set aside and/or review a declaration that had been made by the Kapsabet lands dispute tribunal in favour of the 1st defendant.
 - f. That the learned magistrate erred in law and in fact by failing to appreciate the totality of the evidence tendered and hence arriving at a decision that is not supported by the evidence of the parties.
2. On the strength of the above grounds; the appellant prays that the appeal be allowed and the judgment be set aside and the same be substituted with an order entering judgment as against the respondent as prayed for in the plaint dated December 3, 2015 as amended on October 16, 2018.
 3. Upon admission of the Appeal, directions were given for the appeal to proceed by way of written submissions and a supplementary record of appeal be filed to bring to the Courts attention a missing document on the record of appeal.
 4. The appellants represented by Mr. Tallam were given 14 days while Mr. Choge appearing for the 1st respondent was given 14 days and Ms. Tigoi for 2nd, 3rd and 4th respondent an equal number of days to file their submissions.
 5. Judgment was initially reserved for July 3, 2023 but due to pressure of work was adjourned to today with notice to the parties.

Appellant's Submission: -

6. The appellant in his submissions converted the grounds of appeal into issues for determination.
7. On issue number 1, it is the Appellants submission that under section 3 (1) of the repealed *Lands Disputes Tribunal Act*; lacked jurisdiction to deal with Registered Land as was before it. In support of his submissions the Appellant submitting that the Tribunal lacked jurisdiction has cited the decision in the case of *M'marete v Republic & 3 others* Court of Appeal Nyeri Civil Appeal No 259/2000 (2004) eKLR.
8. The Appellant further submits that for a Court to exercise jurisdiction, the said jurisdiction must be derived from *the Constitution* or written law.
9. On issue number 2, the Appellant cites that the Learned Magistrate erred in echoing the decision of the Kapsabet Land Dispute Tribunal which did not have jurisdiction abintio.
10. In support of this submissions, the Appellant cites the decision in the case of *Teresia Auma Owino & 2 others v Joshua O. Ochieng* (2020) eKLR. To the effect that the learned magistrate should not have agreed with the Tribunal.
11. On issue number 3, the Appellant faults the learned magistrate, because the trial court upheld the evidence of the 1st Respondent while the title document of Nandi/Kamobo/1682, was registered in



the name of the appellant and as per section 26 of the [Land Registration Act](#), that was conclusive proof of ownership.

12. On issue number 4, the appellant submit that the learned magistrate failed to analyze the evidence before her and thus reached a wrong conclusion.

1st Respondent's Submimsson: -

13. The 1st respondent in her submissions submitted to the Court that the Appeal before court was not an appeal against the adoption of the award of Kapsabet Lands Dispute Tribunal but an appeal against a decision in a new matter.

The 1st Respondent has framed 4 issues for determination and submitted on the same; to wit;

- a. First appeal
 - b. Whether the suit was *res – judicata*
 - c. Land disputes tribunal
 - d. Functus officio
14. On the issue of 1st appeal, the 1st respondent submits that the first appellate court is required to re-evaluate and analyse evidence adduced before the trial Court.

In support of this submissions, the 1st Respondent had cited various decisions including [Selle & another v Associated Motor Boat Company Ltd](#) 1968, EA 123 [Mkabe v Nyamuro](#) and [Ephantus Mwangi v Duncan Mwangi Wambugu](#).

15. On *res judicata*, the 1st respondent while citing section 7 of the [Civil Procedure Act](#) submits that the suit before the trial court was *res judicata*, because under section 7 and 8 of the [Lands Disputes Tribunal Act](#), the Court was required to enter the awards as a judgment of the Court subject of Right of Appeal.
16. The 1st Respondent had cited the decision in the case of [Florence Nyaboke Machani v Mogere Amusi Ombui & 2 others](#) (2015) eKLR. On adoption of the decisions by Land Dispute Tribunals and Lands Disputes Appeal Committee as well as the decisions in [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) (2017) eKLR.
17. On issue 3, the 1st respondent submits that once an award by the dispute tribunal has been given and adopted as a decree of the Court, an aggrieved party could only file an appeal or judicial review. In support of this submissions the 1st Respondent has cited the decision in [Republic v Marakwet District Lands Disputes Tribunal & 6 others exparte Shaban Clan & 3 others](#).
18. The 1st respondent submits that the Honourable Learned Magistrate in the trial court was *functus officio*, since the declaratory suit filed was before the Magistrate Court which had adapted the award hence the Court was thus *functus officio*, The magistrate's court could not review or vary the decision to adopt the award.
19. On the strength of the above submissions the 1st Respondent submits that the appeal be dismissed.

2nd, 3rd & 4th Respondents: -

20. The 2nd, 3rd and 4th respondents represented by Ms. Tigo Learned State Counsel identified and submitted on 3 issues for determination.



- i. Whether the Lands Dispute Tribunal had jurisdiction to grant the orders, hear the matter and it did.
 - ii. Whether the appellant had another recourse against the Tribunal decision apart from filing the appeal before court.
 - iii. Whether the restriction was rightfully placed by the 2nd respondent.
21. On issue number 1, the 2nd, 3rd and 4th respondents submit that the appellant having participated in the proceedings before the Tribunal was estopped from stating that the Tribunal did not have jurisdiction to deal with the matter.
- The 2nd, 3rd and 4th respondent submit relying on the Decision in *Joseph Malakwen Lelei v Rift Valley Disputes Appeal Committee*; that the jurisdiction of the Lands Dispute Tribunal is stated at Section 3 of the Lands Disputes Act, and submits that the Tribunal had jurisdiction.
22. On issue number 2, the 2nd, 3rd and 4th Respondent submit that mechanism available for the Appellant was an Appeal under Section 8 and 9 to the Provincial Appeals Committee as a first port of call, and thereafter a second appeal on points of law to the High Court.
23. The 2nd, 3rd and 4th Respondent submit that since the Appellant did not utilize the said mechanism and based on the decision in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others*, submitted that the remedy of a declaratory suit is not available to the appellant.
24. On issue number 3, whether the restriction was rightfully placed by the 2nd respondent. The 2nd, 3rd and 4th respondent submits that the 2nd respondent was right in placing the restriction, and that section 76 of the *Land Registration Act* empowered the Registrar to place a restriction.
25. On the strength of the submissions the 2nd, 3rd and 4th respondents submits that the Appeal be dismissed.

Issues for Determination: -

26. Upon review of the record of appeal together with the supplementary record of Appeal the submissions of the parties and the authorities relied on; the Court frames the following as issues for determination: -
- i. Whether the lands tribunal had jurisdiction to hear and determine the dispute before it.
 - ii. Where a declaratory suit could be filed in place of an appeal against the decision of the land's dispute tribunal?
 - iii. Whether or not there is merit in the Appeal?
 - iv. What reliefs ought to issue?

Analysis and Determination:

27. From the record of appeal, the appellant as plaintiff before the Lower Court had at paragraph 8 of his plaint pleaded that the decree dated 30/9/2009 was null and void and the Lands Dispute Tribunal had no jurisdiction to award a portion of Plaintiffs land, Nandi/Kamobo/1682 to the 1st defendant and among the reliefs sought was a declaration that the Kapsabet Lands Disputes Tribunal had no jurisdiction to arbitrate over a registered land Nandi/Kamobo/1682. The first and Second issues for determination as captured in the impugned judgment dealt with the issue of jurisdiction of Kapsabet Lands Dispute Tribunal.



28. In the impugned judgment, the Learned Magistrate did not make a determination on the said issue but stated as follows “in the circumstances, the issue of whether Kapsabet Lands Dispute Tribunal had jurisdiction to entertain the matter is not for this Court to handle but the Appellate benches provided for in the defunct Lands Dispute Tribunal Act of 1990.”
29. Bearing in mind the observation of the trial court above, the trial court did not rightly render itself on the issue of jurisdiction.
30. The Appellant submits before this Court, that the Dispute Tribunal did not have jurisdiction to deal with the registered land and cites the decision in the case of M'marete v Republic & 3 others Civil Appeal 259/2000 (2004) eKLR where the Court of Appeal held; “in our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under the Registered Land Act to the Appellant. In our view, the Tribunal acted in excess of jurisdiction.”
31. The 1st respondent submissions are silent on the issue of jurisdiction, save to say that the 1st Respondent submitted that their Appeal before Court was not an appeal against the adaptation of the award but an Appeal against a subsequent decision.
32. The 2nd, 3rd and 4th Respondents in their submission, submit that the Tribunal had jurisdiction to deal with the dispute before it. In support of the submissions, Ms. Tigoi for the 2nd, 3rd, and 4th Respondent had cited the decision of the Court of Appeal in Joseph Malakwen Lelei & Another v Rift Valley Land Disputes Appeal Committee & 2 others.
33. I have read the whole of Joseph Malakwen Lelei decision cited by Ms. Tigoi for 2nd, 3rd and 4th Respondents and contrary to the submission by Ms. Tigoi the said decision actually holds that the Lands Dispute Tribunal did not have jurisdiction to entrain disputes relating to ownership or title to registered land. The Court in the decision held “Evidently the above provision does not include jurisdiction to deal with issues of determination of title or ownership of registered land, or a determination of a trust in favour of a party, which in essence was the basis of the 3rd Respondent’s claim.”
34. It follows therefrom that the Kapsabet Lands Dispute Tribunal did not have jurisdiction to deal with registered land and the dispute before it, and the Learned Trial Magistrate was right not to determine the issue of jurisdiction of the Kapsabet Lands Dispute Tribunal. Having found that Kapsabet Lands Dispute Tribunal did not have jurisdiction, any issue of *res judicata* in respect of the suit before the Learned Magistrate could not also arise.
35. In respect of issue number 2 as to whether a declaratory suit could be filed in place of an appeal? The Appellant did not address this in his submission.
36. The 1st Respondent and the 2nd, 3rd and 4th Respondent have submitted relying on the decisions in Florence Nyaboke Machani v Mogege Amosi Ambusi & 2 others C. A. 184 of 2011, Republic v Marakwet District Lands Disputes exparte Shaban clan & 3 others (eKLR) as well as the decision in Catherine C Kittony v Jonathan Muindi & 2 others) all indicating that a declaratory suit could not be entertained as the Lands Dispute Tribunal Act had contemplated an Appeal firstly to the Appeals Committee, the thereafter a second Appeal to the High Court; on points of law.
37. The decisions in Florence Nyaboke Machani as well as Catherine C. Kittony are decisions by the Court of Appeal and are binding on this Court, as indicated the Appellant did not submit on this, but Court is aware of the recent Court of Appeal decision in Civil Appeal No 127/2017, David Kipleting Chemei



v Kanamoi Cheptoo Komoituk & another (2021) eKLR; where the Court of Appeal allowed an appeal against a decision allowing a preliminary objection on a declaratory suit filed against the adoption of an award of Lands Dispute Tribunal.

38. There are thus conflicting decisions from the Court of Appeal on the issue of filing of declaratory suits against awards of the Lands Dispute Tribunal. Whereas the decision in *Florence Nyaboke Machani* and *Catherine Kittony* abhor the filing of declaratory suits, the decision in *David Kiplating Chemei* holds otherwise.

39. All the above decisions are binding on this Court, however this Court shall follow the decision in the *David Kiplating Chemei* for reasons that the decision in Florence Nyaboke was delivered on September 19, 2014, the decision in *Catherine Kittony* was delivered on November 28, 2019. While the decision in *David Kiplating Chemei* was delivered on January 29, 2020 and hence it is new decision and it must be deemed that at the time of delivery of the said decision, the Court was aware of the previous two decisions on the said issue.

Guided by the said decision in *David Kiplating Chemei*, the Court finds that a declaratory suit as the one filed, would be proper if filed before the ELC Court and not before the Magistrate's Court.

40. As observed in paragraph 28 of this judgment, the Learned Magistrate appreciated that the issue of jurisdiction of Lands Dispute Tribunal ought to have been filed before an Appellate bench, and not before the Magistrate's Court.

41. The Learned Magistrate realizing it had been filed in the wrong Court, ought to have then struck out the suit more so now that this Court has found that the Tribunal did not have jurisdiction in the first place, but instead proceeded to hear the matter on its merits.

Disposition: -

42. The Court finds thus that the learned magistrate ought to have struck out the suit before her and not to hear on merit and dismiss it, and thus allows the appeal by substituting the dismissal order with an order striking out the plaintiffs suit before the lower court.

43. In line with the decision in *David Kiplating Chemei*, the appellant is at liberty to file a fresh suit before the proper Court.

44. Costs in the lower court and in the appeal are awarded to the respondents.

DELIVERED AND DATED AT KAPSABET THIS 24TH DAY OF JULY 2023.

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

1. Mr. Tallam for the Appellant
2. Mr. Choge for the 1st Respondent
3. No appearance for Ms. Tigoi for 2nd, 3rd and 4th Respondents.

