



REPUBLIC OF KENYA



**Tallam & 4 others v Kibingor (Environment and Land Appeal 41 of 2019)
[2023] KEELC 19997 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 41 OF 2019
JM ONYANGO, J
SEPTEMBER 26, 2023**

BETWEEN

**CHARLES KIPKOECH TALLAM 1ST APPELLANT
KIPNGOK ARAP TALLAM 2ND APPELLANT
KIPKEMOI MARINOY & TESSY MARINOI (APPEALING AS
THE ADMINISTRATORS OF THE ESTATE OF KIPTIM ARAP
MARINOI) 3RD APPELLANT
GIDEON KIPKOSGEI CHEPSOM (APPEALING AS THE ADMINISTRATOR OF
THE ESTATE OF KIPCHOLIO CHEPSOM) 4TH APPELLANT
JOHN KIPCHUMBA TALLAM (APPEALING AS THE ADMINISTRATOR OF
THE ESTATE OF KIPRONO SAMOEI TALLAM) 5TH APPELLANT**

AND

ELAKANA KIBINGOR RESPONDENT

JUDGMENT

1. The appeal herein arises from the ruling of Hon. J. Tamar PM delivered on 16th October, 2019 in Eldama Ravine RMC Land Dispute No. 2 of 2008.
2. The suit commenced in 2008 at Eldama Ravine Ravine Land Disputes Tribunal where Elkana Kibingor the Respondent herein sued Charles Kipkoech Tallam, the 1st Appellant claiming that he had purchased the suit land known as L.R No. 498 /121 but he later discovered that it was registered in the name of the 1st Appellant and that of his brothers Kiptim Arap Marino (Deceased), Kipholio Chepsom (Deceased), Kipngo'nk Tallam and Kiprono Samoei(Deceased). The deceased persons have been substituted by the 3rd, 4th and 5th Appellants. The Appellants have been carrying business on the suit property since the mid- sixties.



3. After hearing the case the Tribunal arrived at the following decision:-
 - a. Elkana Kibigor was kind enough to invite his relatives and friends into his company business.
 - b. Kibigor has to be included in the ownership of the company.
 - c. He has all the right to receive the company shares (rent) etc.
 - d. Kibigor should be rejoined to the company unconditionally.
 - e. Kibigor must be reinstated into the business harmoniously and they should live as friends.
 - f. That they should organize a meeting of all shareholders and elect a chairman and treasurer. Appoint a caretaker and appoint an auditor to audit the assets of the company, plots, buildings and finances.
 - g. The parties were given a right of appeal
4. The said award was adopted as a judgment of the court vide Eldama Ravine RM Land Dispute Case No. 2 of 2008 where the court issued the following order on 27th July, 2008:
 - a. That Kibigor has to be included in the ownership of the company
 - b. That Elkana Kibigor has all the right to receive the company shares (rent) etc.
 - c. That Elkana Kibigor should be rejoined to the company unconditionally.
 - d. That Elkana Kibigor must be reinstated into the business harmoniously and they should live as friends.
 - e. That they should organize a meeting of all shareholders i.e;
 - i. Elkana Kibigor
 - ii. Kiptim Marinoi
 - iii. Charles Tallam
 - iv. Kipchorio Chepsom
 - v. Kiproono Samoei
 - vi. Kipng'ok Tallam
 - f. They should elect the Chairman, Secretary and Treasurer
 - g. They should appoint a caretaker and appoint an auditor to audit all the assets of the company i.e
 - i. Plots
 - ii. Buildings /premises
 - iii. Finance
 - iv. Any party aggrieved or dissatisfied has a right of appeal within 30 days.
5. In 2013 the Respondent filed ELC Case No. 45 of 2013 Elkana Kibigor v Charles Tallam & 4 Others in an attempt to execute the above order but the court held that it did not have jurisdiction to execute an order of the Magistrate's Court and dismissed the Respondent's case. Following the dismissal of



his case, the Respondent filed a Notice of Motion dated 5th June, 2019 in Eldama Ravine RM's court seeking the following orders:

- a. That a forensic audit of the accounts and assets of the company be undertaken by the court.
 - b. The amounts due to the decree holder be certified.
 - c. Upon accounts being ascertained, the business be dissolved and the business assets distributed amongst the proprietors.
 - d. The costs of the application be awarded to the Decree Holder.
6. The Respondents opposed the application through the 2nd Respondent's Replying affidavit sworn on 18th July, 2019 in which he deponed that the Respondents had not been served with a decree and that the orders sought were alien to them.
7. Upon hearing the application the court delivered its ruling dated 16th October, 2019 allowing the application. The court made the following orders:
- i. The Applicant shall be registered as a joint proprietor of Plot L.R No. 498/121 with equal shares therein.
 - ii. An audit of all income generated from the use of the (sic) erected thereon from 4th June 2008 to date shall be made by an audit firm to be agreed by the parties failing which the court shall make the appointment.
 - iii. The appointment aforesaid shall be within 60 days of this order.
 - iv. Upon the audit being completed the Respondent/Judgment Debtor shall pay the applicant/Decree Holder his proportionate share of the income immediately.
 - v. Failure to pay under (iv) above shall entitle the Applicant/Decree Holder to such lawful recourse as he may think fit.
 - vi. The costs of the application shall be borne by the Respondent/Judgment /Debtor.
8. Being dissatisfied with the said ruling, the Appellants filed this appeal citing the following Grounds of Appeal:
- i. The honourable trial magistrate erred in law and in failing to find that the orders sought in the application dated 5th June 2019 were at variance with the orders granted on 29th July 2008.
 - ii. The Honourable trial Magistrate erred in law and in fact in failing to find that the orders sought were fatally defective.
 - iii. The Honourable trial Magistrate erred in law and in fact in failing to find that the orders arising from the award were incapable of being executed.
 - iv. The Honourable trial Magistrate erred in law and in fact in disregarding the Appellant's submissions without giving reasons.
 - v. The Honourable trial Magistrate erred in law in granting orders that were not sought by the Respondent
 - vi. The Honourable trial Magistrate erred in law in granting orders for execution of non-existent orders.



9. The court directed that the appeal be canvassed by way of written submissions and both parties filed their submissions.

Issues For Determination

10. Having considered the entire Record of Appeal and the rival submissions the following issues fall for determination:
- i. Whether the court erred in granting orders against the 2nd to 5th Appellants
 - ii. Whether the orders sought in the Notice of Motion dated 5.6.2019 are at variance with the orders issued on 27th July, 2008.
 - iii. Whether the orders granted are enforceable.

Analysis And Determination

11. Learned counsel for the Appellant submitted that the proceedings in the Land Disputes Tribunal that gave rise to the award in issue herein was between Elkana Kibingor and Charles Tallam and it was erroneous for the Applicant to include the 2nd to 5th Appellants when they were not parties to the tribunal proceedings. He relied on the case of *Julius Kigen Kibiego v Angeline Korir & another* (2012) eKLR where the court held that an order even if it is by consent cannot bind an individual who is not party to the suit.
12. On his part learned Counsel for the Respondent submitted that the 2nd to 5th Appellants participated in the tribunal proceedings as witnesses and when the award was passed, they knew that their rights were affected but they never applied for review or setting aside of the award. He contended that not having challenged the decision of the tribunal on appeal or by way of Judicial Review, the 2nd to 5th Appellants could not raise the issue of their no-joinder on appeal. He relied on the case of *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others* (2014) eKLR where the Court held as follows:
- “The Appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the *Act*. Neither were judicial Review proceedings taken to quash the award. The Appellant instead chose to file suit for declaratory orders and compensation”
13. With greatest respect to counsel for the Respondent, the above authority is distinguishable from the present suit as the *Florence Nyaboke case* (*supra*) did not involve the enforcement of a decree against persons who were not parties to the proceedings.
14. It is a cardinal principle of natural justice that one should not be condemned unheard. The fact the 2nd to 5th Appellants were witnesses in the tribunal case did not make them parties against who a judgment could be enforced. The court Magistrate’s court therefore fell into error by issuing orders against persons who were not parties in the Tribunal case.
15. I will now determine whether the orders sought in the Notice of Motion dated 5th June, 2019 are at variance with the orders issued on 27th July, 2008. Earlier in this ruling I set out the orders issued on 27th July, 2008 as well as the orders sought in the application dated 5.6.2019. A keen look at the orders sought in the application dated 5th June, 2019 reveals that whereas in the award, the tribunal stated that the 1st Appellant be reinstated to the company and given his rightful share of the business, the application seeks to dissolve the company and distribute the assets thereof.



16. The tribunal ordered that the parties appoint a Chairman and treasurer as well as a caretaker and an auditor to audit the company's assets including the plots, buildings and finances. However, in the Notice of Motion the Applicant seeks an order that the court undertakes a forensic audit of the company's assets and accounts. A forensic audit is different from an ordinary audit as a forensic audit seeks to unearth some fraudulent activities. This is at variance with the orders in the award of the Tribunal.
17. In the case of Peter Wafula Welimo (suing as the legal representative of the estate of *Welimo Mukati v Mukbwana Walucho Kituyi* (2020) eKLR the court declined to issue an order for cancellation of the title as the decree arising from the award of the Tribunal did not provide for cancellation of the title.
18. Similarly, in *Ignatius Ndirangu v Njugura J Kuria* (2009) eKLR it was held that the court has no jurisdiction to issue a decree that is at variance with the judgment contrary to the provisions of Order 20 Rule 6 of the *Civil Procedure rules*) (currently Order 21 Rule 3) which provides as follows:
- (3) A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the *Civil Procedure Act*.
19. The third issue that I have to determine is whether the orders issued by the court are capable of being enforced. In its ruling delivered on 16.10.2019 the court issued a raft of orders ostensibly flowing from the award of the tribunal. The first one was that the Applicant be registered as a joint proprietor of Plot L.R No. 498/121 with equal shares therein. What the tribunal ordered was that the Respondent ought to be included in the ownership of the accompany. Nowhere in the proceedings of the tribunal was the parcel number mentioned nor was the title deed produced.
- Order 2 rule 10 of the *Civil Procedure Rules* provides as follows:
- Rule (10)
Decree for recovery of immovable property
- “Where the subject matter of the suit is immovable property, the decree shall contain a description of such property, sufficient to identify the same, where such property can be identified by boundaries or by numbers in a government record or survey, the decree shall specify such boundaries or number”.
20. In the absence of the title number and size of the land in question it would be impossible to enforce the order.
21. Secondly, the court directed that an audit of the income from the use of the (structures) erected on the suit property be conducted without establishing whether the Appellants had a bank account where the proceeds from the suit property were being deposited. As correctly submitted by counsel for the Appellants, the court assumed that there was a company in which the Appellants were shareholders or directors yet no such company exists. The court also issued an order for the assets of the company to be audited without establishing whether there existed a company with assets in its name.
22. In the case of *Eric Kyalo v Wiper Democratic Party Movement Kenya & another* (2017) eKLR the court held that:
- “A judicial order ought to be precise and unequivocal, further that ...an imprecise and apparently inconclusive order will not help either party or even the process of administration of justice”.



23. Similarly, in the case of *Timothy Mukuru Githungu v Wendy Kamwende Mukuru (2003) eKLR* the court held that if orders are uncertain and vague, they are unenforceable. Additionally, the court in the case of *Orieno Ragot & Co Advocates v National Bank of Kenya Ltd (2020) eKLR* it was held that the court has no power to grant orders that were not prayed for.
24. In the present case, the orders issued by the court are unenforceable.
25. It is also noteworthy that after the award of the tribunal was adopted as a judgment of the court, the Respondent did not extract a decree before seeking enforcement as required by Order 21 Rule 7. The said rule provides as follows:
- Rule 7
- “ The decree shall agree with the judgment; it shall contain the number of the suit, the names and description of the parties, and particulars of the claim and shall specify clearly the relief granted or other determination of the suit”
26. To the extent that the Applicant’s application dated 5th June, 2019 seeks to enforce the order issued on 27th July, 2008, the same is irregular and premature.
27. For the foregoing reasons, the appeal is merited and it is hereby allowed.
28. The orders issued by the Magistrate’s Court on 16th October, 2019 are hereby set aside.
29. The Respondent shall bear the costs of the appeal.

DATED SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER, 2023.

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J.M ONYANGO

JUDGE

In the virtual presence of;

1. Mr. Esikuri for the Appellants
2. Mr. Siboe for the Respondent

Court Assistant: A. Oniala

