Topisia & another v Topisia & 4 others (Environment and Land Appeal E002 of 2022) [2023] KEELC 21129 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21129 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E002 OF 2022

CG MBOGO, J

OCTOBER 31, 2023

BETWEEN

KOILEKEN TOPISIA ..... 1ST APPELLANT

NAATESIM TOPISIA ..... 2ND APPELLANT

AND

TIAPUKEL OLE TOPISIA ..... 1ST RESPONDENT

SIRONKA TOPISIA ..... 2ND RESPONDENT

DISTRICT LAND REGISTRAR NAROK NORTH SUB COUNTY ..... 3RD RESPONDENT

DISTRICT LAND SURVEYOR NAROK NORTH SUB COUNTY ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an appeal from the Judgment of Hon. G.N.Wakahiu (Chief Magistrate) in MCELC case no. 70 of 2018 delivered on 6th April 2022)

JUDGMENT

1. The appellants herein being aggrieved and dissatisfied with the judgment of the Hon G.N. Wakahiu in Narok Chief Magistrates' Court ELC Case No. 70 of 2018 delivered on 6th April, 2022 have appealed to this court vide the memorandum of appeal dated 4th May, 2022 against the whole judgment on the following grounds: -

    1. That the trial court had no jurisdiction to ascertain and determine interests in land in a concluded adjudication process which has elaborate dispute resolution procedures laid out in

the *Land Adjudication Act* Cap 284, the learned magistrate erred in law and in fact in arrogating himself jurisdiction and proceeded to hear and determine the matter.

2. That the learned magistrate erred in law and in fact in misapplying the applicable principles of the law on res judicata thereby reaching an erroneous finding.

3. That the learned magistrate erred in law and fact by misconstruing the applicable principles of the law on limitation of actions in respect of execution of judgments thereby reaching an erroneous finding.

4. That the learned magistrate erred in law and fact by entertaining the suit without considering that the proceedings were a nullity, illegal and/or wrongful hence making the judgment erroneous and not enforceable in law or at all.

5. That the learned magistrate erred in law and fact in delivering the judgment on 6th April, 2022 against the appellants and in favour of the 1st and 2nd respondents without taking serious and profound consideration on the fundamental principles of law, the pleadings, submissions and generally against the weight of evidence elucidated and adduced by the appellants at the trial court.

2. The appellants pray that: -

a. The judgment of the trial court in ELC Case No. 70 of 2018 pronounced on 6th April, 2022 and the resultant decree be set aside and be deemed as a nullity.

b. The entire suit and proceedings instituted by the 1st and 2nd respondents against the appellants at the trial court be deemed as a nullity and thereby void ab initio.

c. Any other orders this honourable deem fit and just to grant thereof.

d. Costs of this appeal and that of ELC Case no. 78 of 2018 be borne by the 1st and 2nd respondents.

3. The grounds of appeal were canvassed by way of written submissions. On 4th October, 2023, the appellants filed their written submissions dated 2nd October, 2023. They raised the following issues for determination: -

1. Whether the learned magistrate erred in law and fact in arrogating himself jurisdiction to ascertain and determine interests in land in a concluded adjudication process.

2. Whether the learned magistrate erred in law and fact by misapplying the applicable principles of law on res judicata thereby reaching an erroneous finding.

3. Whether the learned magistrate erred in law and fact by misconstruing the applicable principles of law on limitations of actions in respect of execution of judgments thereby reaching an erroneous finding.

4. Whether the learned magistrate erred in law and fact by entertaining the suit without considering that the proceedings were a nullity, illegal and/or wrongful hence making the judgment erroneous and not enforceable in law or at all.

5. Whether the learned magistrate erred in law and fact by failing to consider the evidence adduced by the appellants at the trial court.

6. Who is to bear the costs of this appeal.

4. On the first issue, the appellants submitted that the suit properties were originally a portion of Olposimoru Adjudication Section which was originally registered in the names of the appellants' and the 1st and 2nd respondents' fathers. That in the eyes of the law, the suit properties were an adjudication process and all parties must have been satisfied with the outcome since no appeal was preferred to the Minister under Section 29 of the *Land Adjudication Act*. They went on to submit that the respondents have never tried to follow the procedure laid out in the *Land Adjudication Act* meaning that they did not have a problem with how the adjudication had been done. Further, that it goes against the spirit of the law for the respondents to develop a dispute twenty or so years after the fact. The appellants relied on the cases of Methodist Church Kenya Trustees & Another versus Rev. Jeremiah Muku & Another [2012] eKLR and Chembe Katana & Another versus Minister for Land and Settlement & Others, Civil Application No. 7 of 2015.

5. The appellants further submitted that the trial court unprocedurally reviewed the decision of the Land Adjudication Officer reached on 24th April, 1992 in the objection lodged on 25th March, 1992 usurping thus the powers vested in the Land Adjudication Officer and the Minister.

6. On the second issue, the appellants submitted that the trial court lacked jurisdiction to hear and determine the matter as it was res judicata for the reason that the cause of action that the respondents sought to raise against the appellants was the same in Narok Misc. Land No. 26 of 2000 Tiapukel Topisia versus Koileken Topisia,Naatesim Topisia & Sironka Topisia. To buttress this submission, the appellants relied on the cases of Njangu versus Wambugu & Another, Nairobi HCCC No. 2340 of 1992, Civil Application No. 49 of 2001 Nairobi High Court; Abok James Odera versus John Patrick Machira and Machakos HCC No. E007/2021 Gladys Nduku versus Letshego Kenya Limited & Another.

7. On the third issue, the appellants submitted that the respondents put reliance on the judgment delivered in Misc. Land Case no. 26 of 2000 on 3rd November, 2000 and the decree dated 27th February, 2003 in support of their case. Further, that it was evident from the proceedings that they had tried to execute the decree in the said Misc Land No. 26 of 2000 vide an application dated 30th March, 2015 but it was dismissed in a ruling delivered on 7th October, 2015. They submitted that the court had no mandate to grant the orders in the subsequent suit because it amounted to abuse of the court process.

8. On the fourth issue, the appellants submitted that the orders issued by the trial court are unenforceable in law for the reason that in the first place, the land was partitioned by consent and it defeats logic that the land having been subdivided and entries made at the adjudication office, that the same should now be altered. They submitted that if the said order is to be executed, it means that parcel known as Cis-Mara/Olposimoru/945 registered in the name of the 1st appellant ceases to be. It was also their submissions that the respondents did not challenge the title deeds on grounds of fraud or any illegal procedures and that no prayer for nullification or cancellation of the title deeds emanating from plot no. 186 was made.

9. On the fifth issue, the appellants submitted that the trial court disregarded the evidence of the appellants and proceeded to order that the land be divided equally among siblings which was not the position and that from the proceedings, the matters in the trial court had been handled in two previous suits and the adjudication process had been done through an elaborate adjudication process that was not appealed against.

10. On the sixth issue, the appellants submitted that there is good reason to award costs and grant the prayers in the appeal.

11. The 1st and 2nd respondents filed their written submissions dated 16th October, 2023. They raised four issues for determination as listed below; -

    1. Whether the trial court was seized of proper jurisdiction to hear and determine the matter.

    2. Whether the suit before the trial court was res judicata.

    3. Whether the 1st and 2nd respondents were entitled to reliefs sought in the trial court.

    4. Who bears the cost of this appeal.

12. On the first issue, the 1st and 2nd respondents submitted that the respondents were within their right when in the year 1998, upon being issued with titles and discovering a dispute had arisen in subdivision of the land held in common, they approached the Lands Dispute Tribunal which had sufficient jurisdiction to entertain their claim and therefore the trial court was within its jurisdiction to issue a decree in Misc No. 26 of 2000. They relied on the case of Public Service Commission & 2 Others versus Eric Cheruiyot & 16 Others, Nakuru Civil Appeal No. 119 of 2017.It was their submission that the Land Dispute Tribunal had jurisdiction in line with Section 7 and 8 of the Land Dispute Tribunal Act (repealed) to remit its decision to the court for adoption as judgment. The 1st and 2nd respondents relied on the cases of Benard Okinyo Ongor versus Nicholas Otieno Oyoo [2021] eKLR and Johana Nyokwonyo Buti versus Walter Rusungu Omariba & 2 Others [2011] eKLR.

13. On the second issue, the 1st and 2nd respondents submitted that the suit before the trial court is not res judicata for the reasons that the orders that were sought in the lower court case were incapable of being granted by the Tribunal in Misc Case No. 26 of 2000 and looking at *the constitution* of the parties before the Tribunal, they are different parties from the suit at the lower court. Reliance was placed in the cases of Suleiman Said Shabhal versus Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR and Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others [2017] eKLR.

14. On the third and fourth issues, the 1st and 2nd respondents submitted that the appellants despite knowing the existence of the decree in Misc Case No. 26 of 2000 filed various boundary disputes in the office of the District Land Registrar whereupon the 1st and 2nd respondent were invited to appear before the Land Registrar for the hearing. Further, that in their desire to protect their interest in the disputed suit land, they equally filed Misc Case No. 26 of 2000 whereupon the 1st respondent sought for conservatory orders and injunction directed to the appellants not to remove or alter the boundaries made by the owners in line with the verdict issued therein. Further, that the only recourse available was filing the suit at the trial court to secure their interests and rights to land and as such they were entitled to the orders sought. The 1st and 2nd respondents urged this court to make a finding that the trial magistrate acted judiciously and dismiss the appeal with costs.

15. I have considered the grounds of appeal and the written submissions filed by the appellant and the 1st and 2nd respondents and in my view, the issue for determination is whether the memorandum of appeal merits grant of the orders sought by this court.

16. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in Mwanasokoni versus Kenya Bus Service Ltd 1982 – 88 I KAR 278.

17. The 1st and 2nd respondents filed an undated amended plaint in court on 29th August, 2017 seeking judgment against the appellants and the 3rd,4th and 5th respondents jointly and severally for: -

    a. An order of declaration of this honourable court that the 1st and 2nd plaintiffs as well as the 1st and 2nd defendants are each entitled to an equal share within that piece of land formerly known as plot no. 186 Olposimoru Adjudication Section previously registered in the names of Sekento Enole Topisia, their mother which was thereafter partitioned by consent into land parcel no. Cis Mara/Olposimoru/945,946, 947 and 947 respectively.

    b. An order of this honourable court directing the District Land Registrar and the District Surveyor, the 3rd and 4th defendants herein to proceed and amend the group map so as to tally with the position on the ground in order to have each individual proprietor have an equal share of land on the ground arising from the subdivision of that piece of land formerly known as plot no. 186 Olokurto Adjudication Section.

    c. A prohibitory order of injunction restraining the 1st and 2nd defendants by themselves, their servants, agents and or any other person(s) whomsoever acting in collusion with and or with the authority of the 3rd and 4th defendants, agents, servants and or authorized agents from trespassing upon, laying claim to, obstructing, constructing upon and or in any other way interfering with the 1st and 2nd plaintiff's quiet possession of land parcel no. Cis Mara/Olposimoru/947 and CisMara/Olposimoru/943 respectively which arose from the subdivision of plot no. 186 Olposimoru Adjudication Section into four portions.

    d. Mesne profits as a result of their loss of user of a sizeable portion out of all that piece of land known as CisMara/Olposimoru/947 and CisMara/Olposimoru/943 respectively.

    e. Costs of this suit.

    f. Interest.

    g. Any other relief that this honourable court shall deem fit and just to grant.

18. Briefly, the gist of the plaint was that prior to subdivision of plot no. 186 into four portions, the plot no. 186 was registered in the names of the appellants as well as the 1st and 2nd respondents' mother who is now deceased. st and 2nd respondents were each registered as proprietors of Cis Mara/ Olposimoru/ 947 and Cis Mara/ Olposimoru/ 943. That initially, they had disagreements which was resolved in objection case no 185 and 391 of 1992 in a ruling delivered on 24th April, 1992 when it was mutually agreed amongst the five of them that the land be partitioned into four equal shares where each of the four sons would be allocated an equal portion on the ground. Later on, the 1st and 2nd respondents noticed that the maps as drawn did not tally with the ground position owing to a boundary claim. They lodged a claim with the Land Dispute Tribunal Olokurto Division who made their findings that was later adopted as judgment of the court in Misc Land Case No. 26 of 2020.

19. The contention by the 1st and 2nd respondents was that following the judgment, a decree was issued requiring the District Land Registrar and the District Surveyor to amend the ground map so as to tally with the position on the ground in order for each individual to have an equal share of the ground on the land but this was not so as the appellants, in collusion with the District Land Registrar and the District Surveyor implemented the position on the map effectively going against the findings of the Tribunal.

20. The appellants filed their amended statement of defence dated 6th March, 2020. They denied that they are brothers with the 1st and 2nd respondents, they also denied that parcel no. 947 and 946 are subdivisions of plot no. 186 and contended that their parcels of land being nos. 945 and 948 have never

been a subdivision or mutation of plot no. 186 by way of objections. According to the appellants, they were registered as members of Olposimoru Adjudication Section and were allocated land by the Adjudication Committee and were subsequently issued with title deeds. Further, that the 1st and 2nd respondents obtained a decree in Misc Land No. 26 of 2000 in February 2003 but never executed as it was fraudulently obtained and had also been overtaken by events.

21. The appellants further stated that they filed Misc App No. 15 of 2014 before the trial court seeking to have the boundaries aligned, the orders were granted and implemented by the Land Registrar. They pleaded res judicata on this issue and further stated that during a ground visit, it was found that the 1st and 2nd respondents had encroached into their parcels of land and removed beacons demarcating the boundaries.

22. The 3rd,4th,5th respondents filed their written statement of defence dated 3rd November, 2020. The matter before the trial court proceeded for hearing which later culminated in a judgment delivered on 6th April, 2022 that is the subject of this appeal.

23. In the judgment, the trial summarized the issues for determination as follows: -

    i. Whether this court is seized of jurisdiction to hear and determine the suit.

    ii. If the answer to issue no. I is in the affirmative, whether the suit is incompetent and fatally defective.

    iii. If the answer to issue no ii. is in the negative, whether the applicant is entitled to the reliefs sought.

    iv. What orders should be made on costs.

24. On the first issue, the trial court observed that on a prima facie basis, there is nothing to suggest that the issues before the court were before the Tribunal in Misc No. 26 of 2000. The court observed that parties to Misc No. 26 of 2000 are Tiapukel Ole Topisia as the plaintiff versus Koileken Ole Topisia and Naatesim Ole Topisia as the defendant and Sironka as the complainant whereas in the suit before it, Tiapukel and Sironka are the plaintiffs while the defendants also include the Land Registrar, the Surveyor and the Attorney General. The court found that the parties cannot be said to be the same and that the issues in the suit have not been determined by any other court.

25. On the second issue, the trial court observed that in the proceedings before the Tribunal, parties submitted statements that the plot was to be subdivided in equal shares among the four brothers and that a statement by Naatesim confirms that the brothers subdivided the land equally and then called the land officers to do the implementation. However, the respondents submitted that the orders in Misc Civil Case No. 15 if 2014 were issued ex-parte which did not touch on parcel no. 943 in respect of which a restriction was sought in the plaint. The trial court observed that the suit is of a peculiar nature, not seeking to reverse the decision made subsequent to the elaborate and substantive procedural steps laid down under Section 26-29 of the *Land Adjudication Act* but the same is a declaratory suit.

26. The trial court affirmed that there are indeed three suits in the history of the land i.e. Land Dispute no. 22 of 1998, Misc Land Case No. 26 of 2000 and Misc. No. 15 of 2014. The court observed that Land Dispute No. 22 of 1998 related to Misc case no. 26 of 2000 which the court found that the 1st and 2nd respondents to be approbating and reprobating in their stand on Misc. no. 26 of 2000 thereby misleading the court. The court in finding that the 1st and 2nd respondents were entitled to the orders in the plaint, analysed the letter dated 22nd September, 2003, letter dated 19th April, 2001 and exhibit 12.

27. On the third and fourth issues, the trial court found the suit to succeed and on a balance of probabilities and proceeded to issue orders and costs.

28. Bearing in mind that this court did not have an opportunity to hear the testimony of the witnesses and check on their demeanour first hand, it would only then serve justice for this court to critically analyse what was presented before court as evidence and the testimony of the witnesses tendered.

29. From the proceedings, the 1st and 2nd respondents' case was that plot no. 186 belonged to their fathers as well as the appellants father where it was agreed that it was to be divided equally. The starting point therefore, for this court and what I presume would have been a point for departure for the trial court as well was plot no. 186 which was the initial parcel of land. The history of how this land was acquired and subsequently disposed would help this court arrive at a fair conclusion on what either party was entitled to. The contention by the 1st and 2nd respondents was that the land was to be divided in four equal shares and to that effect, they sought declaratory orders for equal portion of the land, an injunction against the appellants from dealing with parcel no. 947 and 943 and mesne profits for loss of user of a portion of the said parcels of land amongst other orders.

30. I have looked at proceedings before the Land Dispute Tribunal panel in case no. CisMara/Ilposimoru/186/22/98 which made a finding that the four Topisia sons had subdivided their land and marked boundaries which were well defined on the ground by themselves. The Tribunal made a finding that the subdivision and the boundaries which were made by the owners to remain unchanged. The Senior Magistrates' Court in Misc Land Case No. 26 of 2000 adopted the decision of the Tribunal dated 26th September, 2000 as an order of the court vide a decree issued on 27th February, 2003 by Honourable S.K. Koros.

31. Thereafter, the 1st appellant filed a misc application no. 15 of 2014 against the 1st and 2nd respondents vide a notice of motion application dated 21st March, 2014 seeking ascertainment and fixing of boundaries for parcel no. 945,946 and 947 and annexed thereto a notice of a boundary dispute that was issued by the Land Registrar dated 22nd January, 2014. In this application, the 1st appellant contended that the boundaries of parcel nos. 945,946 and 947 were long fixed and a map drawn indicating the approximate boundaries and upon notice of a ground visit, the 1st and 2nd respondents refused to cooperate with the ground visit on 13th March, 2014. A report was made dated 19th March, 2014 indicating that the 1st and 2nd respondents had hindered the resolution of the boundary dispute. Again the court issued orders directing the District Land Registrar to ascertain the boundaries between parcels nos. 945,946 and 947. It followed that other applications were made either by the appellants or the 1st and 2nd respondents seeking equal subdivision of parcels nos. 944,945,946 and 947 and the ascertainment of boundaries as well. In all these, the parcel nos. 947 and 945 was in contention as to their boundaries.

32. My analysis of the above points to the fact that ownership of parcels no. 945,946,947 and 948 is not disputed. The dispute follows the occurrence of the events that took place after the decision of the Tribunal was adopted as an order of the court. Was the decree served upon the 3rd and 4th respondents to execute? During cross examination, the 1st respondent testified that the orders issued in Misc Case No. 26 of 2000 required the 3rd and 4th respondents to visit the ground and put boundaries and according to him, he was not aware if the order was implemented but he recalled that his previous lawyer Mr. Lel served the orders in the year 2003.The 2nd respondent also testified that the orders were served but he did not know when service was done since he was illiterate. According to him, the 3rd and 4th respondents did not implement the orders. From the proceedings, the 2nd respondent appeared clueless and stated that his brother (1st respondent) was "pursuing those issues". According to PW3, the dispute was not

on boundary but the manner of sharing and it was his testimony that the 1st and 2nd respondents did not supply him with any papers. He testified that the 3rd and 4th respondents visited the ground on 25th February, 2015.

33. The 1st appellant, who was DW1, testified that he did not know whether the 1st respondent went to court for confirmation of the decision of the Tribunal but he recalled that the 3rd respondent visited the ground in the year 2014 and 12 years had not expired since the decree was issued.

34. DW2, who was the District Land Registrar, testified that their office was not served with the decree 27th February, 2003 but were served with a court order dated 16th October, 2014 which they complied with by visiting the ground on 25th February, 2015. The question then is, was the 3rd respondent served with the decree dated 27th February, 2003?

35. Section 4 (4) of the Limitations of Actions Act states as follows:

> " An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due".

36. The purpose of the above section is to eradicate stale claims and stop the vexing of litigants. Where a judgment creditor elects to sleep on a decree, he is estopped from waking up from his slumber after 12 years have lapsed to claim his right. The law bars such claims.

37. Let me point out that the appellants, in my view, intentionally failed to annex the documents they relied on as evidence before the trial court in their record of appeal. I say so because the record of appeal does not contain exhibits and I have sought to refer to the lower court file for analysis. The 1st and 2nd respondents provided evidence showing that the 3rd and 4th respondents were served with the order issued in the year 2000. A perusal of the documents shows that the J. O. Chepkurui, District Land Registrar, wrote a letter dated 22nd March, 2001 informing the Chief- Olposimoru Location of service of the court order to effect the boundaries of the disputed land. There is also a letter dated 1st August, 2002 written to the Provincial Land Disputes Appeal indicating that the court entered judgment dated 3rd November, 2000 which matter stood as determined and finalized. There was also a letter dated 19th April, 2001 addressed to the 1st and 2nd respondents directing them not to interfere with the activities on the parcel of land until the matter was resolved.

38. The aforementioned letters are proof that service was effected upon the 3rd and 4th respondents and, therefore, the Decree was still enforceable as at the time of the filing of the suit. I agree with the trial court that the appellants were approbating and reprobating on their stand in Misc Case No. 26 of 2000 and the 1st and 2nd respondents were entitled to the orders sought.

39. There is no reason whatsoever to disturb the lower court's finding. The memorandum of appeal dated 4th May, 2022 is hereby dismissed with costs to the 1st and 2nd respondents. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 31ST DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

31/10/2023

In the presence of: -

CA:Meyoki