



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 209 OF 2008

MUTULU NZALU1ST PLAINTIFF

WAIU NZALU2ND PLAINTIFF

VERSUS

JAMES NGOMO MBWIKA.....1ST DEFENDANT

MAKUENI LAND DISPUTES TRIBUNAL2ND DEFENDANT

JUDGEMENT

The Plaintiff filed this claim against the Defendant on 17th November, 2008.

The Plaintiff seeks the following orders within the Plaint:

- a) A declaratory Order that the Judgement or decision in the Makueni Land Disputes Tribunal case No. 211 of 1998 and subsequent orders in SRM L.D.T.C No. 38 of 2006 arising out of tribunal case No. 211 of 1998 and any subsequent execution and orders are nullity ab initio
- b) An order that Kaimoni Land Adjudication section plot 1040 is a property of estate of Justus Nzalu Kinyae and transfer (if any by virtue of Land Disputes Tribunal Award in Case No. 211 of 1998 is a nullity and property should revert to the estate of Justus Nzalu Kinyae.
- c) Costs of this suit and interest

The 1st Defendant entered appearance and filed a Defence through Messrs. J.N. Kimeu & Company Advocates. The 1st Defendant denied the allegations in the Plaint and stated that the Plaintiffs' suit is bad in law, incurably defective, incompetent and an abuse of the process of the court. He stated that in the first instance he intended to raise a preliminary point of law.

On 30th January, 2009, The Plaintiffs filed an application under Order IX A Rule 7 of the Civil Procedure Rules seeking to have judgment entered against the 2nd Defendant for failure to enter appearance and file a defence to the suit, but the application was dismissed. On the 17th August, 2012 the Plaintiffs filed another application to enter judgment against the 2nd Defendant, but this application was further dismissed.

The Plaintiffs' claim in the Plaint that the 1st Defendant purportedly with one Mbwika Ngumbau who had passed away on 17th May, 1995 filed a case No.211 of 1998 claiming recovery of land purported to have been purchased by the late Mbwika Ngumbua, father of the 1st Defendant from one Justus Nzalu Kinyae now deceased. The land purchased was plot No. 1040 under Kaumoni Adjudication Section

registered in the name of Nzalu Kinyae. The Plaintiffs' further claim that the disputed land that is situated within Kaumoni Adjudication Section is excluded from being subjected to the Land Disputes Tribunal. The Plaintiffs' aver that on the 21st August, 2006 the 2nd Defendant made a decision in the case No. 211 of 1998 awarding Plot No. 1040 Kaumoni Adjudication Section to the 1st Defendant when the said Tribunal lacked the jurisdiction for want of consent of the Land Adjudication Officer, when even if the consent was given, the Tribunal was not mandated to deal with any land under the Land Adjudication Section. Further that the Tribunal did not have jurisdiction to determine issues arising from breach of contract and its decision was hence void *ab initio*.

The Plaintiffs' state that the 2nd Defendant wrongfully and unlawfully forwarded the Award to the Senior Resident Magistrate's Court at Makueni being LDTC No. 38 of 2006 James Ngomo Mbwika versus Nzalu Kinyae and on 11th October, 2006 the said Award was adopted as Judgement of the court. They aver that the said Judgement is a nullity for want of jurisdiction on part of the Makueni Land Disputes Tribunal.

That Justus Nzalu Kinyae died on 24th June, 2008 and on 15th July, 2008 without Grant of Letters of Administration Intestate to his estate and substitution of his legal representative, the 1st Defendant purportedly in company of a surveyor and in executing the Makueni Land Disputes Tribunal Award Tribunal Case No. 211 of 1998 proceeded to the deceased estate and purportedly excised a portion from the deceased land that formed part of plot No. 1040 Kaumoni Adjudication Section; which portion had not been subject of Land Disputes Tribunal Case and on which the Plaintiffs' houses and homestead of the late Justus Nzalu Kinyae is situate. They claim that the 1st Defendant's acts and those of the surveyor are a nullity for being based on a decision which is a nullity. They pray that if the Award from the Makueni LDTC No 38 of 2006 is not stayed nor annulled, the 1st Defendant is threatening to evict the family of the late Justus Nzalu Kinyae and take over the deceased estate.

The matter proceeded to full hearing on the 28th March, 2017. The Plaintiffs' had two witnesses while the 1st Defendant did not participate at the hearing although he was served. The hearing hence proceeded with only the Plaintiffs' case.

The 2nd Plaintiff Paul Mutulu Nzalu who was PW1 is the son of the 1st Plaintiff. He stated that Plot No. 1040 Kaumoni Adjudication Section belonged to his father Nzalu Kinyae. He said his father died on 24th June, 2008 and produced the death certificate as Plaintiffs exhibit 'P1'. They obtained Limited Grant of Letters of Administration Intestate vide Machakos HCCC No. 600 of 2008 to institute this suit. He produced the Limited Grant of Letters of Administration intestate as Plaintiffs Exhibit' P2'. He averred that they instituted a suit against the two Defendants because the 1st Defendant James Ngomo Mbwika sued their father at the Makueni Land Disputes Tribunal vide case number 211 of 1998 seeking the father's land namely plot No. 1040 Kaumoni Adjudication Section. The 1st Defendant was claiming his father had purchased the suit land from the deceased. PW1 claimed he was not present at the Makueni Land Disputes Tribunal but they ruled that the 1st Defendant be given the suit parcel of land. The 1st Defendant then proceeded to Makueni Magistrate's Court where the said Award of the Makueni Land Disputes Tribunal was adopted as judgment of the court. He produced the proceedings and judgement as Plaintiffs' Exhibit 'P3' and 'P4' respectively. PW1 further stated that the 1st Defendant then came with surveyors to the suit parcel of land claiming the court had ordered he is the owner of the said suit parcel of land. The surveyors gave them a letter dated 10th July, 2008 from the District Land Adjudication and Settlement Officer, Makueni District indicating that there were officials who were to come to the suit parcel of land and map out the boundary. He produced the said letter as Plaintiffs exhibit 'P5'. PW1 also stated that during this period, the land was still in his father's name but the father had already died. The surveyor came surveyed the suit parcel of land and left. The 1st Defendant has never take possession of the suit parcel of land nor used it. It is Nzalu Kinyae's family who have been in actual possession of the suit land and use it. He averred that the 1st Defendant was claiming purchaser's interest and trying to enforce a sale agreement. He prayed that the court to quash the judgment of the Makueni Land Disputes Tribunal as they did not have jurisdiction to deal with sale and purchase of land. He further prayed that the land was to be registered in his father's name to enable them undertake succession cause over the estate.

PW2 who is the 1st Plaintiff stated that Mutuku Nzalu is her son while Nzalu Kinyae was her husband.

The husband who was the owner of Kaumoni Adjudication Section plot 1040, passed on in June 2008. She has been in actual possession of the suit parcel and use the land ever since she was married over 40 years ago. She stated that she came to know the 1st Defendant James Ngomo came to know him after her husband died in 2008. She knew the 1st Defendant when he came to claim purchaser's interest but was not aware of the sale. She reiterated that the 1st Defendant has never been in actual possession of the suit parcel of land nor used it. She reaffirmed that she has been in actual possession of the suit parcel of land and has used it to date. She stated that the person registered as the proprietor of Plot No. 1040 Kaumoni Adjudication Section is her late husband Nzalu Kinyae. She confirmed that they obtained Limited Grant of Letters of Administration Intestate to institute the instant suit. She reiterated that she never knew that her late husband sold the suit parcel of land as alleged and she disagrees with the decision of the Makueni Land Disputes Tribunal that awarded the suit parcel of land to the 1st Defendant James Ngomo. She sought the Court's assistance to quash the decision of the Makueni Land Disputes Tribunal and to have her land back.

The Plaintiffs' thereafter closed their case. Although the Defendants' were served, they were not present at the hearing of the instant suit and their case was hence marked as closed. The Court thereafter ordered the Plaintiffs' to file written submissions

The Plaintiff's Counsel filed their written submission on 5th April, 2017. They reiterated what PW1 and PW2 had stated in court. They highlighted the following as the key issues for determination:

- whether Makueni Land Disputes Tribunal overstepped its mandate as found in tribunal case no. 211 of 1998
- Can property of a deceased person be adjudicated by a tribunal

The counsel stated that the Law of Succession Act required that letters of administration intestate had to be obtained first to give capacity and authority to anyone to institute a case for and on behalf of a deceased estate. In the present case the 1st Defendant instituted a case at the Makueni Land disputes on behalf of his deceased father without letters of administration intestate. He referred the court to Plaintiffs' Exhibit 'P3'. He however reiterated that the Plaintiffs' had capacity to institute the instant suit and claim as they are doing so on behalf of their late father's estate. He relied on the Plaintiffs' Exhibit P 2 to prove this. The Counsel averred that by the Surveyor coming to the suit parcel of land, he was intermeddling with the estate of a deceased person. The counsel further submitted that the Land Disputes Tribunal Act (now repealed) , during its existence, did not grant the Tribunal jurisdiction to deal with contracts of buying and selling or enforcing the same. In the instant case, the Tribunal purported to enforce a contract of sale of land between the 1st Defendant's father(deceased) and the 1st Plaintiff and 2nd Plaintiff's husband and father respectively. Further that the particular act of contract is only enforceable in a court of law but not a tribunal. The 1st Defendant and his late father have never used the suit parcel of land.

The Plaintiffs' counsel relied on the following case law:

HCC Nyeri JR 57/2011 - R vs. Chairman Kandara District Land Disputes Tribunal HCC Eldoret JR 13 of 2010 R vs Marakwet Land Disputes Tribunal & others

Analysis and Determination

After perusing the pleadings filed herein and hearing the testimonies of the Plaintiffs', the court finds the following as issues in contention:

- Whether the Makueni Land Disputes Tribunal had jurisdiction to deal with dispute that involves enforcement of a contract relating to buying and selling of land.
- Whether the 1st Defendant had capacity to institute the claim at Makueni Land Disputes Tribunal on behalf of his late father's estate without letters of administration intestate .
- Whether the Makueni Land Disputes Tribunal had jurisdiction to deal with dispute that involved a suit parcel of land situated within an adjudication section.
- Whether the surveyor and 1st Defendant intermeddled with the estate of the deceased Nzalu

Kinyae without letters of administration intestate.

Section 3 (1) of the Land Disputes Tribunal Act (now repealed) stipulates that '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 in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

Although the Land Disputes Tribunal Act was repealed, the case at hand was filed before the said Act was repealed. The Makueni Land Disputes Tribunal was created to deal with civil cases as set out in Section 3 of the repealed Land Disputes Tribunal Act. I find that the claim at the Makueni Land Disputes Tribunal Case Number 211 of 1998 between the 1st Defendant and the 1st Plaintiff and 2nd Plaintiff's father and husband respectively, involved enforcement of a contract for purchase of land. It is alleged by the 1st Defendant that his late father bought land from the 1st Plaintiff and 2nd Plaintiff's husband and father respectively for a purchase price of Kshs. 33,000. Even though the deceased Nzalu Kinyae was alive at the time the claim was heard at the Makueni Land Disputes Tribunal, the said Tribunal did not have jurisdiction to entertain such a claim as stipulated in section 3 of the repealed Land Disputes Tribunal Act. The Makueni Land Disputes Tribunal purported to enforce a contract emanating from sale of land between the 1st Defendant's father and the 1st Plaintiff and Plaintiff's husband and father respectively. At the time the claim was lodged at the Makueni Land Disputes Tribunal, the 1st Defendant's father was deceased. The 1st Defendant did not demonstrate whether he had procured letters of administration intestate to be deemed the legal representative of his father's estate. It is trite law that in any claim involving a deceased estate, it is mandatory that letters of administration intestate have to be obtained first before any claim can be lodged by the personal representatives of the estate. I must say, this should have been the position with the instant case but this was not done.

Secondly, the land in question is part of an adjudication section. Section 13(1) of the Land Adjudication Act stipulates that: 'every person who considered that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the Demarcation Officer in the manner required and within the period fixed by the notice published under section 5 of this Act.'

From the proceedings at hand, it is emerging that the 1st Defendant never lodged a claim with the Recording Officer within the area and yet the suit land was situated within the Kaumoni Adjudication section.

When the matter proceeded in court, the 1st Defendant failed to attend court to rebut any evidence provided by the Plaintiffs'. The 1st Defendant filed a Defence that is noted by the Court amounts to mere denials and did not raise any triable issues. The 2nd Defendant failed to enter an appearance nor file a Defence.

I have no doubt that the Makueni Land Disputes Tribunal erred by dealing with cases emanating from an area which is still under Land Adjudication. An area under adjudication is excluded from being subjected to determination by the Land Disputes Tribunal. The Land Adjudication Officer should have provided his/her consent as stipulated under section 30 (1) of the Land Adjudication Act which states that; 'Except with the consent of the Adjudication Officer, no person shall institute, and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3)'. In the instant case, no consent was granted by the Adjudication Officer.

I find that the Surveyor's attempt to implement the Court Order of the Makueni Magistrates' Court SRM L.D.T.C No. 38 of 2006 by putting boundaries on the suit land was an illegality as the Makueni Land Disputes Tribunal did not have jurisdiction to handle the claim at hand. Since the attempt to establish

boundaries was undertaken after Nzalu Kinyae had died, it is my finding that this amounted to intermeddling with his estate contrary to section 45 (1) of the Law of Succession Act which stipulates that ' Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of , or otherwise intermeddle with, any free property of a deceased person.'

Issues of jurisdiction in the matter at hand is key. The gravamen of the Plaintiffs' case is that the Makueni Land Disputes Tribunal lacked jurisdiction in handling disputes of land situated within an adjudication section and enforcement of contracts relating to buying and purchase of land. I agree with the decision in the case of **Eldoret HCC JR No. 13 of 2010 R versus. Marakwet Land Disputes Tribunal & Others** where Justice Ombwayo held that ' I agree with submissions of the ex parte applicant that the claim of breach of contract is not contemplated in the said section and therefore the Tribunal had no power to deal with a claim based on contract under the said section. Any attempt by a tribunal to deal with such claim would be *ultra vires* and any decision made by the Tribunal on the said claim would be a nullity. '

I concur with Justice Majanja in the case of **Humphrey Kigotho Thiongo Vs. LDT at Makuyu and Others HC JR/ELC No. 21 of 2011** where he held that Land Disputes Tribunal had no jurisdiction to deal with issues of breach of contract to sell land.

I find that the decision of the Makueni Land Disputes Tribunal and thereafter adoption of the Award by the Makueni Magistrate's Court SRM L.D.T.C No. 38 of 2006 was marred with illegality and not procedural. The Court finds that proceedings, Award and the Court Order adopting the said Award offended the provisions of the Land Disputes Tribunal Act (now repealed), the Land Adjudication Act and the Law of Succession Act and are deemed as a nullity.

In the foregoing, and for the reasons I have given above, I find that the Plaintiffs' have proved their case on a balance of probability and allow it with costs.

I further declare that:

a) the Judgement or decision in the Makueni Land Disputes Tribunal case No. 211 of 1998 and subsequent orders in SRM L.D.T.C No. 38 of 2006 arising out of tribunal case No. 211 of 1998 and any subsequent execution and orders are nullity ab initio

b) Plot No 1040 Kaimoni Land Adjudication section is property of estate of the late Justus Nzalu Kinyae and transfer (if any by virtue of Land Disputes Tribunal Award in Case No. 211 of 1998 is a nullity.

DATED AND DELIVERED IN MACHAKOS THIS 23rd DAY OF MAY, 2017

CHRISTINE OCHIENG

JUDGE