



REPUBLIC OF KENYA



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**M'mutunga v M'nkanata & another (Environment & Land Case
E081 of 2022) [2023] KEELC 22209 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E081 OF 2022
CK NZILI, J
DECEMBER 13, 2023**

BETWEEN

STEPHEN GIKUNDA M'MUTUNGA APPELLANT

AND

BEATRICE KANYUA M'NKANATA 1ST RESPONDENT

M'ARIMI M'MUNA 2ND RESPONDENT

*(Being an appeal from the ruling of Senior Magistrate's court at Githongo by
Hon. S. Ndegwa in Githongo SPM ELC NO. 25 of 2018 delivered on 8.12.2022)*

JUDGMENT

1. The appellant has by a memorandum of appeal dated 21.12.2022, challenged the ruling delivered by the lower court on 8.12.2022 on the ten grounds that the trial court -;
 - a. Was wrong to hold that the seller of L.R No. Abothuguchi/Mariene/499 to the 2nd respondent had no valid title since it was subject to overriding rights.
 - b. There was an error in law and, in fact, in holding that whether the sale was before the decree or after was not a substantive issue.
 - c. For failing to find an error apparent on the face of the record to review the orders made on 26th September.
 - d. Holding that when the subdivision occurred did not matter in determining the dispute.
 - e. Holding that the appellant was not a necessary party and failing to join him in E.L.C. No. 25 of 2018.



- f. For entering judgment for the 1st respondent without sufficient evidence and ordering the titles to L.R. No's Abothuguchi/Mariene/1278 and 1279 be canceled to revert to LR No. Abothuguchi/Mariene/499.
 - g. For failing to set aside Land Dispute Tribunal Award No. 49 of 2002.
 - h. For ruling against the weight of evidence before it and disregarding his evidence and written submissions.
 - i. For being biased against him, falling into errors amounting to a travesty of justice.
2. As a first appellate court, the role is to look into the lower court record with a fresh perspective and an open mind, come up with independent findings on facts and law while giving credit to the lower court, which had an opportunity to hear witnesses firsthand. See *Peters vs Sunday Post* (1958) E.A 424, *Gitobu Imanyara & others vs AG* (2016) eKLR.
 3. This matter has a long history from the record of appeal and the original court file. It predates what is contained in the record of appeal. For instance, the proceedings between 14.11.2002 and 22.6.2016 are omitted. The appeal record is, therefore, in conflict with the law, rendering the appeal incompetent.
 4. The suit started at the Chief Magistrates Court as Land Dispute Tribunal No. 49 of 2002, brought by Beatrice Kanyua as the claimant against M'Arimi M'Muna as the respondent. The claimant had sought for a Land Dispute Tribunal Award to be adopted. The court on 4.11.2002 adopted the award. The right of appeal was given to the respondent for 30 days.
 5. On 15.10.2009, the court entered judgment as per the award following an application dated 28.2.2009. The file was later revived by an application dated 28.5.2013. In a ruling delivered on 11.7.2014, the court allowed the Executive Officer of the court to sign a transfer form for L.R. No. Abothuguchi/Mariene/1279 and the Land Registrar to dispense with the production of the original title in favor of the claimant, Beatrice Kanyua.
 6. By an application dated 17.7.2014, the court was asked to set aside the ruling delivered on 11.7.2014 by an objector. The same was dismissed on 20.11.2015. Another application dated 4.12.2015, seeking a stay and review of the order or ruling dated 11.7.2014 was lodged. The trial court held that an error on the face of the record had occurred in awarding orders against L.R. No. Abothuguchi/Mariene/1279 instead of L.R. No. Abothuguchi/Nyweri/499. So, the trial court reviewed the ruling and dismissed the application dated 28.5.2013.
 7. Other applications were brought dated 16.1.2018, 23.10.2018, and 25.2.2019. The court was told the claimant had passed on on 17.2.2019, and substitution was needed. On 17.2.2021, the court marked the suit as abated since no substitution had occurred after passing on 17.2.2019. The court marked the file as closed.
 8. Another application dated 25.2.2021 was brought, and a date was fixed for 25.2.2021. The court was informed on the hearing date that the suit had abated, so it ordered that without the revival of the suit, the application before events overtook it. By a ruling dated 15.4.2021, the suit was reinstated. So, an application dated 12.1.2022 was filed. A preliminary objection was filed to oppose the application. The matter came for directions on 11.7.2022 when Miss Gikundi for the claimant, told the court there was an application dated 23.10.2018, which should be heard, given the ruling dated 1.4.2021.
 9. Another application dated 27.7.2022 was filed, and an issue was raised that the applicant in the application dated 27.7.2022, lacked locus standi. The trial court gave a ruling date on the two pending applications for 19.9.2022. By a ruling dated 26.9.2022, the court ruled that the appellant herein was



not a necessary party to the suit since he claimed to have bought L.R. No. Abothuguchi/Mariene/1278 in 2001 from M'Arimi M'Muna, yet he was not a party to Land Dispute Tribunal No. 49 of 2002.

10. On the application dated 25.2.2019, the trial court made several findings that the adoption of the award as a court decree on 4.11.2002 was still valid; any subdivisions of L.R. No. 499 on 15.3.2001 into L.R. No.1278 and 1279 and the sale of L.R. no.1278 was invalid since it was aimed at defeating the award or decree. The trial court, therefore, allowed the application dated 23.10.2018. On prayer number 2 of the application, the trial court ordered that upon the reversal of the subdivisions alluded to above, the Executive Officer of the court signs the transfer form in favor of the claimant. The application dated 27.7.2022, it was dismissed.
11. By an application dated 11.10.2022, the trial court was asked to review its orders dated 26.9.2022 and set aside the award entered as a court judgment on 15.10.2009. In a ruling delivered on 8.12.2022, the court declined the invitation since no error was apparent on the face of the record. It is this ruling which is the subject matter of this appeal.
12. To buttress his appeal, the appellant relies on written submissions dated 27.10.2023 where he has isolated four issues for the court's determination. Whether he was a bona fide purchaser, the appellant submitted that he had bought the land from the 2nd respondent for Kshs.50,000/=. Reliance was placed on Black's Law Dictionary, Sections 3 of the Law of Contract Act, Lawrence Mukiri vs Attorney General & others (2013) eKLR, Katende vs Harinder (2008) 2 E.A 173.
13. On proof of his claim or appeal on a balance of probabilities, the appellant relied on Gitobu Imanyara vs. AG (2016) eKLR, Peters vs Sunday Post (supra), Abok James Odera vs J.P Machira (2013) eKLR, Hellen Wangari vs Wangechi vs Muthoni Gathua (2015) eKLR.
14. On whether the court erred in not joining him as a party, the appellant submitted that he was a necessary party and should have been joined. Reliance was placed on Communication Commission of Kenya vs. Royal Media Services Ltd & 7 others (2014) eKLR, Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR, Francis Muruatetu another vs Republic & 5 others (2021) eKLR, Republic vs. A.D.C. & another (2015) eKLR.
15. The 1st respondent relied on written submissions dated 9.11.2023. It was submitted that the award was not set aside since the attempt by the 1st respondent to do so was thwarted by the High Court when it dismissed his judicial review case. The 1st respondent submitted that the trial court's role in this case was restricted to assisting in the implementation and execution of the award and could not set aside the award or review it. Reliance was placed on Desai vs Warsame (1967) E. A 351 Samuel Kamau Macharia & Another vs K.C.B. Ltd (2012) eKLR, Florence Nyaboke Machani vs Mogere Amos Ombui (2018) eKLR.
16. Regarding whether the appeal should be allowed since orders were issued for the land to revert, the appeal was an attempt to re-open the suit, which the court was functus officio. Reliance was placed on Telkom (K) Ltd vs John Ochanda (2014) eKLR, Raila Odinga & others vs IEBC 8 others (2013) eKLR.
17. The 2nd respondent relied on written submissions dated 3.11.2023. It was submitted, the 1st respondent was not supplied with the written submissions and the memorandum of appeal. Further, the titles for LR No. Abothuguchi/Mariene 1278 were unimpeachable by the award, which was read and adopted 18 months after the subdivision of L.R No. 499; hence, the decree was invalid since such a title did not exist.



18. The 2nd respondent submitted that the sale agreement with the 1st respondent was legally valid and not challenged under Sections 24, 25, 26, and 28 of the [Land Registration Act](#). Reliance was placed on Harrison Kiambuthi Wanjiru and another vs. District Land Registrar (N.R.B.) & others (2022) eKLR and Githinga Kibutha vs Caroline Nduku (2018) eKLR.
19. The court has carefully and painstakingly reviewed the entire lower court file, the grounds of appeal, written submissions, and the law. The issues for determination are:
 - i. If there is a competent record of appeal before the court.
 - ii. If the appellant has raised new grounds of appeal which were not canvassed before the trial court.
 - iii. If the appellant could apply for review at the lower court and by extension to appeal before this court.
 - iv. Whether the appeal has merits.
20. It is trite law that parties are bound by their pleadings, and issues flow from the pleadings. Further, it is trite law that at the appeal stage, a record of appeal must contain the memorandum of appeal, the pleadings, notes of the trial court, transcript of any notes made during the hearing, all affidavits maps, and other documents whatsoever put in evidence before the trial magistrate, judgment order and decree.
21. In this appeal, the record of appeal is almost 1/8 of the history and documentation in the lower court file. The written notes of the trial court file were never included in the record of appeal. The adoption of the award commenced with Meru CMC LDT No. 49 of 2002, which was opened on 15.10.2002. All these notes are missing in the record of appeal. The typed certified copies were never included in the record of appeal. The proceedings were typed from 15.10.2002 to 2018 but were not included in the record of appeal. On that account only, I find the appeal incompetent.
22. On the capacity of the appellant to file the appeal, by a ruling dated 26.9.2022, the trial court ruled that the appellant was not a necessary party. This ruling was never appealed against. From the record, it is apparent that the appellant was never a party to the suit. The trial court thwarted his attempts to do so. Be that as it may, the respondents did not raise the issue before this court.
23. As to whether the appellant has raised new grounds of appeal not canvassed at the lower court, he appeals before the court against a ruling for review of orders dated 26.9.2022 and the second prayer is to set aside the award made a judgment on 15.10.2009. The grounds set were that he was a bona fide purchaser of a subdivision of the mother title and a transferee of the land on 9.4.2001 with a title deed issued on 26.6.2001. He claimed that the reversal of the initial suit land to its original L.R No. 499 was based on misapprehension of facts and constituted an error apparent on the face of the record requiring cure by way of review; otherwise, the decree came when such a title was non-existent, matters which the 1st respondent ought to have disclosed to the trial court. He had urged the trial court to review the orders of 25.11.2009 and dismiss the application dated 25.2.2022.
24. There is no dispute that the appellant did not appeal against the ruling of 26.9.2022. Through this ruling, the trial court revoked titles L.R. No's. 1278 and 1279 to revert to L.R. No. 499. The trial court also ordered that the Executive Officer to sign the transfers in favor of the claimant and the Land Registrar to dispense with the production of the original title deed.
25. The power to review a decree or order is governed by Order 45 of the Civil Procedure Rules and Section 80 of the [Civil Procedure Act](#). A party must, without unreasonable delay, apply for review. The



appellant was applying for the review of the order made on 26.9.2022. He was also seeking to set aside the decree entered on 15.10.2009.

26. The 1st respondent has submitted that the trial court had no jurisdiction to vacate the award. Reliance was placed on *S.K Macharia & another vs. Kenya Commercial Bank (2012) Lawrence & 6000 vs Kenya Breweries (2012) eKLR*. In his view, the 1st respondent submitted that the trial court could only implement and execute the award and not set it aside as the appellant had asked to do so.
27. In *Jodhan Amunavi vs Chairman Sabatia Division & L.D.T. & another C.A Civil Appeal No.256 of 2002*, the court said a L.D.T. had no jurisdiction under Section 3 (1) of L.D.T. Act, to hear and determine disputes on titled land since such disputes could only be handled under Section 159 of the Registered *Land Act* (repealed) by the High Court or by the Magistrate's Court, which had pecuniary jurisdiction.
28. In *Owners of Motor Vessel Lillian "S" vs Caltex Oil (K) Ltd (1789) K.L.R. 1*, the court said jurisdiction was everything, and without it, a court of law downs its tools. In *Desai vs Warsame (supra)*, the court said it could not confer jurisdiction to itself where none existed, and therefore, any proceedings and determination without jurisdiction were null.
29. In making the award an order of the court from the copy of records title for L.R. No.499 was open in 1965, the court was adopting an award whose effect was to revoke a title deed.
30. The tribunal had no such jurisdiction. It had acted outside its mandate. The award was a nullity and of no legal effect. In *Dominic Wamuyu Kihu vs Johana Ndura Wakaritu Nyeri C.A No. 269 of 2007*, the court said disputes on ownership of titled land were beyond the jurisdiction of L.D.T. In *M'Muthaura M'Mukua vs Senior Resident Magistrate & another Meru H.C. Misc Application No. 75 of 2006*, Ouko J, as he then was now Supreme Court Judge, cited with approval *Makau Philip Mutiso vs Kauko Ole Lepen H.C.C. Appeal Machakos No. 163 of 1999* that section 7 of L.D.T. Act did not require a Magistrate other than receiving and entering judgment to undertake of any other proceedings. The court said other orders apart from entering the decree were beyond the Magistrate's jurisdiction or the High Court as it was asked to compel the Land Registrar to deal with the property. On the question of the property having been overtaken by events, the court said that since the suit property no longer existed following subdivision and eventual transfer of a portion to a third party, through an order made without jurisdiction by the trial court, an order made without jurisdiction as per Halsbury of Laws of England 3rd edition Vol.9 page 351 was *ex nihilo nihil* (out of nothing comes nothing).
31. In this appeal, I think the issue raised by the appellant on an error on the face of it was clear, evident, patent, apparent, and conceivable. In *Nyamogo and Nyamogo Advocates vs Kogo (2001) E.A 174*, the court said an error on a substantial point of law stares one in the face with no two opinions and should not require a long-drawn reasoning process. In *National Bank of Kenya Ltd vs Ndungu Njau (1997) eKLR*, the court said an error or omission must be self-evident and should not require an elaborate argument to be established.
32. In *Wachira Wambugu and 2 others vs District Land Disputes Tribunal Othaya and 3 others (2013) eKLR*. The court cited with approval *Wamwea vs Catholic Diocese of Muranga Registered Trustee (2003) eKLR*, that disputes over titled land was outside the power of the land dispute tribunal. The court invalidated such an award, which had canceled titles to land from the previous award adopted in 2009, and the subsequent proceedings after that amounted to nullities, including the subsequent rulings by the trial court.
33. The proceedings, rulings, and orders made by the trial court remain null and are of no effect, notwithstanding the incompetence of this appeal.



34. In the exercise of the supervisory jurisdiction of this court, I find the directions of the lower court unlawful. See Joyce Mutindi Muthama and another vs Jefferson Kyololo Wambua & others (2018) eKLR. There will be no orders as to costs since the apparent error was on the trial court's part. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH DAY OF DECEMBER 2023

In presence of

C.A Kananu/Mukami

Mr. Ken Muriuki for Rimita for 2nd respondent

Kiome for 1st respondent

Miss Gikundi

Miss Kerubo for the appellant

HON. CK NZILI

JUDGE

