



**Tsuma v Mukabana (Environment and Land Appeal E27 of 2021)
[2022] KEELC 3796 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3796 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E27 OF 2021**

DO OHUNGO, J

JUNE 28, 2022

BETWEEN

ROSEMARY TSUMA APPELLANT

AND

LIVINGSTONE BETTY MUKABANA RESPONDENT

*((Being an appeal from the ruling of the Senior Principal Magistrate's Court at Kakamega
(D Alego, Senior Principal Magistrate) delivered on 7th June 2021 in Kakamega
CM Civil Award No 65 of 2009 Livingstone Betty Mukabana v Rosemary Tsuma))*

JUDGMENT

1. The appellant filed before the subordinate court, an application by way of chamber summons dated September 17, 2020, seeking cancellation of registration of the respondent as the owner of land parcel number Butso/Butsotso/Bukura/678 and an order that the said property do revert to and be registered in the name of Brown Aleka Tsuma (deceased). The application was heard on 15th February 2021 by D Alego, Senior Principal Magistrate who scheduled delivery of ruling on May 17, 2021. Ultimately, however, the ruling was delivered on June 7, 2021. Consequently, even though the memorandum of appeal herein refers to a ruling delivered on 17th May 2021, the correct date is June 7, 2021. Indeed, the record does not reveal delivery of any ruling on May 17, 2021.
2. Aggrieved by the above ruling, the appellant filed this appeal. The grounds listed on the face of the memorandum of appeal are that the learned magistrate erred in law and in fact in holding that she had no jurisdiction to grant the orders sought whereas the substantive case (Civil Award No. 65 Of 2009) was filed and originated in her court and several orders were issued by her predecessors in the same court on the same case; that that the learned magistrate erred in law and in fact in holding that the High Court in Kakamega had handled the case and passed judgment thereon whereas the Kakamega High Court had only handled the Appeal referred to it from the Western Province Land Disputes Appeals Committee when these committees and their subordinate Land Disputes Tribunals were disbanded;



that that the learned magistrate did not read the file fully or adequately and did not fully or adequately address the substance of the chamber summons before her and the orders sought therein; that that the learned magistrate erred in law and in fact in not realizing that the transactions in respect of the suit-land offended section 45 (1) of the *Law of Succession Act*, cap. 160, Laws of Kenya in that the suit land is part of the estate of a deceased person (the previous owner) and waited a succession thereto before any transaction in the suit-land could be registered; and that the record of the court file does not support the holding finding and or ruling of the Learned Senior Resident Magistrate and the said holding finding and or ruling disinherits the family of the deceased previous owner and is thereby unfair and unjust and oppressive.

3. Based on those grounds, the appellant prays that the order be set aside and that in its place, this court orders that the registration in the Kakamega Land Register of Livingstone Betty Mukabana as the owner of land parcel number Butsotso/Bukura/678 be cancelled; that the tile deed issued to Livingstone Betty Mukabana be cancelled; that the land parcel/number Butsotso/Bukura/678 revert to and be registered in the name of Brown Aleka Tsuma; and that the respondent do pay the appellant's costs both in the High Court and in the lower court.
4. The appeal was canvassed through written submissions. The respondent did not file any submissions.
5. The appellant argued that by his application dated 13th July 2009, the respondent sought adoption of a decision of the Lurambi Land Dispute Tribunal but by its ruling of 7th June 2012 the Subordinate Court stayed hearing of the application pending hearing and determination of Western Province Provincial Land Disputes Appeals Committee Appeal No. 81 of 2009 filed by the appellant. That due to a perennial lack of funds, the said appeal and many other appeals were never set down for hearing and that when the Appeals Committee and the Land Disputes Tribunals below it were disbanded, all appeals then pending before it were transferred to Kakamega High Court and given new registration numbers, with Appeal No. 81 of 2009 being registered as Kakamega ELC Appeal No. 1 of 2014. That the said appeal was heard and allowed and the verdict of the Lurambi Land Disputes Tribunal respecting Butsotso/Bukura/678 quashed on 15th November 2017. That the decree and order extracted on 7th March 2018 were filed in the application in order to dismiss the respondent's application for adoption of the tribunal's award as a judgment of the court and that had the learned Magistrate fully or adequately addressed the substance of the application that was before her, she would not have reached the decision she reached, nor based it on a High Court decision that handled a totally different aspect of the matter. That jurisdiction over the substantive application in Kakamega CM Civil Award No 65 of 2009 remained with the Subordinate Court which had dismissed the substantive application with costs on September 19, 2018. That the entire exercise of the Land Disputes Tribunal offended section 45(1) of the *Law of Succession Act*, in that Butsotso/Bukura/678 was and is part of the estate of a deceased person. The appellant therefore urged this court to allow the appeal.
6. This appeal is against an order made in exercise of discretion. The circumstances in which an appellate court can interfere with exercise of discretion were discussed by the Court of Appeal in *Mbogo and another v Shah* [1968] EA 93. Simply put, an appellate court should not interfere with the exercise of discretion unless it is satisfied that the court appealed from has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court appealed from has been clearly wrong in the exercise of discretion and that as a result there has been mis-justice.
7. I have considered the appeal and the submissions. The issues that arise for determination are whether the Subordinate Court had jurisdiction and whether the appeal is merited.



8. Jurisdiction is the very lifeblood of any proceedings. Without it, the proceedings come to a certain end and the court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. The Supreme Court emphasised the importance of jurisdiction in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where it stated as follows:

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

9. The Court of Appeal also echoed the Supreme Court when it recently stated in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR as follows:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction to itself. ...

10. The proceedings in the Subordinate Court were commenced through the respondent's chamber summons dated July 13, 2009. In filing the application, the respondent essentially invoked section 7 of the *Land Disputes Tribunals Act*, 1990 (repealed) with a view to enforcing the decision of Lurambi Land Disputes Tribunal dated July 9, 2009. The tribunal had ordered cancellation of title in respect of parcel number Butsotso/Bukura/678 which was then in the name of Brown Aleka Tsuma (deceased) and that in its place a new title be issued in the name of the respondent. While the application was pending before the Subordinate Court, this court (N A Matheka J) quashed the tribunal's decision on November 15, 2017 in Kakamega ELC Appeal No. 1 of 2014 Rosemary Tsuma v Livingstone Betty Mukabana. Ultimately, the Subordinate Court dismissed chamber summons dated July 13, 2009 on September 19, 2018 and ordered the file closed. Some two years later, the appellant filed chamber summons dated September 17, 2020, seeking cancellation of registration of the respondent as the owner of land parcel number Butsotso/Bukura/678 and an order that the said property do revert to and be registered in the name of Brown Aleka Tsuma (deceased). Upon hearing the application, the Subordinate Court (D Alego, Senior Principal Magistrate) came to the conclusion that she did not have jurisdiction and therefore "downed her tools".
11. The proceedings before the Subordinate Court, which were commenced through chamber summons dated July 13, 2009, were purely miscellaneous proceedings geared at adoption and enforcement of the tribunal's award. There was no other substantive relief sought in the proceedings. Chamber summons dated July 13, 2009 having been dismissed on September 19, 2018, and taking into account that the tribunal's decision was quashed by this court, there was nothing left to enforce and the proceedings came to a close, as indeed the Subordinate Court ordered on September 19, 2018.
12. Once a court renders its final order, it becomes functus officio in so far as its power to determine the parties' respective claims in the matter goes. Once such a decision has been made, it is final and conclusive, subject to any right of appeal. The court does not have jurisdiction to reopen the case to consider granting new relief that was neither sought nor granted. See *Raila Odinga & others vs. IEBC & others* [2013] eKLR.
13. When the appellant filed chamber Summons dated September 17, 2020, she was seeking new relief which was neither sought nor granted when the Subordinate Court dealt with chamber summons dated July 13, 2009. The Subordinate Court did not have jurisdiction to reopen the case to consider



granting the new substantive relief. Any proceedings filed in a court without jurisdiction are dead on arrival and cannot be remedied. See *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* (supra). The learned magistrate cannot be faulted for reaching the conclusion that the Subordinate Court did not have jurisdiction to hear and determine chamber summons dated September 17, 2020. If anything, the court ought to have gone a step further and struck out the application.

14. In view of the foregoing discourse, this appeal is bereft of merit. I make the following orders:
- a. Chamber Summons dated September 17, 2020 is struck out.
 - b. This appeal is dismissed.
 - c. Considering that the respondent did not file any submissions in response to the appeal, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF JUNE 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Olucheli for the appellant

No appearance for the respondent

Court Assistant: E. Juma

