



REPUBLIC OF KENYA



KENYA LAW
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**Isaack & 4 others v Gichengo & 7 others (Miscellaneous Civil Application
14 of 2009) [2022] KEELC 3294 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 14 OF 2009**

**M SILA, J
JUNE 16, 2022**

BETWEEN

**SAID HAMISI ISAACK 1ST APPLICANT
ATHMAN DISI ISAACK 2ND APPLICANT
HAMISI DISI ISAACK 3RD APPLICANT
SAID DISI ISAACK 4TH APPLICANT
OMAR DISI ISAACK 5TH APPLICANT**

AND

**NANCY WAMBUI GICHENGO 1ST RESPONDENT
ELVIS WAHOME 2ND RESPONDENT
CHARLOTTE MARIE GICHENGO 3RD RESPONDENT
JACINTA WANGUI GICHENGO 4TH RESPONDENT
JANET WANGECHI WANGUI 5TH RESPONDENT
EUGENIA WAITHERERO GICHENGO 6TH RESPONDENT
WASHINGTON GICHENGO 7TH RESPONDENT
DOMINICA WACHIRA 8TH RESPONDENT**

JUDGMENT

(Suit by applicants seeking to have title of the respondents cancelled on the basis that they have an award in their favour from the Land Disputes Tribunal which has been adopted by the magistrate's court; no basis to move this court for the High Court was not vested with jurisdiction to cancel a title based on an award of the Land Disputes Tribunal; awards of Land Disputes Tribunals were



to be executed in the manner pronounced by the Civil Procedure Act after judgment was entered by the magistrate's court thus no basis for a further suit; suit declared incompetent and dismissed; court however finding that the award of the tribunal and the judgment of the magistrate's court were made without jurisdiction and proceeding to exercise its supervisory jurisdiction to set aside the award and the judgment of the magistrate's court)

1. This suit was commenced through an Originating Summons filed on January 21, 2009, the then order 36 of the Civil Procedure Rules (now repealed) and section 143 (1) of the Registered Land Act (now repealed), and sections 3 and 3A of the Civil Procedure Act, cap 21, Laws of Kenya. The Originating Summons was later amended to rectify the names of the respondents. The applicants seek the following orders :-
 - i. That the land registrar, Kwale district registry be ordered to rectify the register in respect of land parcel Number Kwale/Golini/651 by replacing the names therein, namely Nancy Wambui Gichengo, Elvis Wahome Gichengo, Charlotte Marie Gichengo, Jacinta Wangui Gichengo, Jane Wangechi Wangui, Eugenia Waitherero Gichengo, Washington Gichengo, and Dominica Wachira and entering the names of the applicants herein, namely Saidi Hamisi Isaack, Athman Disi Isaack, Hamisi Disi Isaack, Said Disi Isaack, and Omar Disi Isaack in the register as the duly registered proprietors of the said parcel of land.
 - ii. That the costs of this application be provided for.
2. The Originating Summons is based on the following grounds :-
 - i. That the applicants were the complainants in Matuga Land Disputes Tribunal Case no 41 of 2008.
 - ii. That the said tribunal after trial of the matter determined a decision on September 16, 2008 in favour of the applicants.
 - iii. That the said decision was later adopted by the Senior Resident Magistrate's Court at Kwale on January 6, 2009.
 - iv. That the applicants are currently in possession of the said land parcel Kwale/Golini/651.
 - v. That no appeal has been preferred to date against the decision of the tribunal and the court aforesaid.
 - vi. That as per the provisions of the Registered Land Act}}, cap 300, and particularly the fact that only the High Court has the specific jurisdiction to order cancellation and or rectification and or notification of a title.
 - vii. That the plaintiffs/applicants pray that the orders sought herein be granted to give effect to the decision of the tribunal as adopted by the Senior Resident Magistrate's Court at Kwale.
3. The Originating Summons is supported by the affidavit of Said Hamisi Isaack, who also testified as the sole witness in the matter, for I directed the Originating Summons to be heard through *viva voce* evidence. The respondents were served by way of substituted service through an advertisement in the daily newspapers. They did not enter appearance nor file defence nor participate in any way in the suit. The only



material that I have is therefore that of the applicants (hereinafter referred to as the plaintiffs).

4. The sum total of what is in the supporting affidavit and what was given as evidence in court, is that the Land Disputes Tribunal at Matuga, heard the dispute between the applicants and respondents and delivered an award in favour of the respondents. That award was subsequently adopted by the Senior Resident Magistrate's Court at Kwale and no appeal has been preferred. The applicants aver that as matters stand, they are the bona fide proprietors of the suit land, and it is only appropriate that the register reflects this position and they be issued with the title deed.
5. The proceedings of the tribunal were annexed by the plaintiffs and I have gone through the same. The plaintiffs herein were the claimants and Nancy Wambui & Others (not specified who) were noted as the "objectors". It is not clear from the proceedings whether the respondents therein were served, given that they were in this suit served by advertisement on the basis that they could not be traced, and the proceedings were conducted in their absence. The case therein was that Nancy Wambui (1st respondent herein) inherited the land from her mother Roseline Gachiengo, who it was claimed had grabbed the land from the applicants' father, one Disi Isaack. The narrative was told that the land was initially owned by one Mzee Mwatenga. One Issack married a daughter to Mzee Mwatenga and the latter gave them part of his land. The couple bore a son called Disi. In the year 1968, Isaack left for Rabai and left the land under his son Disi. In the year 1974, land demarcation was done and Disi Isaack became registered as proprietor of the land parcel Kwale/Golini/651 (the suit land herein). Around that time, Roseline Gachiengo made an offer to buy the suit land which was accepted and the land offered to her at kshs 40,000/= . It was claimed that only kshs 4,000/= was paid and that she never turned up to pay the balance. Disi refused to proceed with the transaction but found out that Roseline had transferred the land to herself allegedly with the assistance of the District Commissioner who was the chairman of the Land Control Board at Kwale, and title was issued to her. It was said that Roseline died, and her children (the respondents herein), inherited the land and obtained title in their name in the year 1987. It is said that Disi nevertheless continued being in possession until his death in 1992 and he left his children there. I assume that the children are the defendants herein.
6. Upon hearing this dispute, the tribunal made an award on September 16, 2008. The award is in the following terms, which I quote verbatim :-

“ After having studied the facts from complainant Mr Said Isaack and with the fact that the objector never turned up even a single day in spite of the summons from land disputes tribunal board : The board has therefore no element of doubt that Mrs Roseline obtained this plot no Kwale/ Golini/651 by using unlawful means.

Hence Mr Said Isaack and his brothers are the sole proprietors of this plot in question. The High Court is therefore advised to nullify the title deed no Kwale/Golini/651 under the name of Nancy Wambui and other to Said Isaack and brothers (sic).”
7. This award appears to have been forwarded to the magistrate's court at Kwale for adoption in Kwale Land Case no 34 of 2008. The plaintiffs have presented an order



issued on January 6, 2009 from the said court, and from the document presented, the following orders were made which I copy verbatim :-

- i. That the Land Dispute Tribunal award dated September 16, 2008, to be adopted as Judgment of the Court.
- ii. That the disputed land parcel no Kwale/Golini/651 be transferred to the plaintiffs.
- iii. That it is hereby ordered that the land registrar to nullify the title deed and issue another one to the plaintiffs in connection with the land parcel no Kwale/Golini/651.

8. It will be observed that in this suit, the plaintiffs want this court to give effect to the award of the tribunal and the subsequent adoption by the magistrate's court at Kwale.

9. At the outset, I am at a loss why the plaintiffs are before this court. Under the repealed Land Disputes Tribunal Act, once an award is made, it is filed with the magistrate's court for judgment to be entered in terms of the award. Thereafter, a decree is issued which is enforceable as any other decree of the court pursuant to the provisions of the *Civil Procedure Act*. This was laid down in section 7 of the Land Disputes Tribunal Act, which provided as follows :-

7.

- (1) The chairman of the tribunal shall cause the decision of the tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.
- (2) The court shall enter judgement in accordance with the decision of the tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.

10. It will be seen from the above that the High Court (now succeeded by this court in respect of land matters) did not have any role to play in the execution of the award of the tribunal or the decree of the subordinate court. This court is not vested with any jurisdiction regarding adoption of an award of a tribunal or execution of the decree of the Magistrate's Court. The plaintiffs state that they have brought this suit pursuant to the provisions of Section 143 of the Registered Land Act (repealed), section 3, and 3A of the *Civil Procedure Act*, and order 36 of the *Civil Procedure Rules*. I have looked up at these provisions of the law. Section 143 of the Registered Land Act was drawn as follows :-

143.

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is



satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

11. The court certainly had jurisdiction under section 143 to cancel title but it can only do that after hearing a suit that has been presented to it. What I have before me does not ask for resolution of the ownership dispute but more or less an adoption of what was decided by the Land Disputes Tribunal and the magistrate's court. Section 143 above cannot therefore be invoked. And for the record, it is not correct to state that the magistrate's court had no jurisdiction to cancel title as claimed in ground (6) of the Originating Summons. The magistrate's court had similar jurisdiction to the High Court only that it had a pecuniary limit capped at kshs 500,000/= pursuant to section 159 of the Registered Act. Sections 3 and 3A of the *Civil Procedure Act* have been cited. They are general provisions giving the court discretionary powers on matters that are not addressed by the rules. The same cannot be invoked in this case. There is mention of order 36 of the pre-2010 Civil Procedure Rules, which laid the cases that may be commenced by way of Originating Summons. The applicants herein did not specify under what rule of order 36 they approached the court. I have gone through order 36 and I have not found any clause which gives this court jurisdiction to adopt an award of the Land Disputes Tribunal or a judgment of the magistrate's court arising therefrom. It is therefore patently clear that the invocation of order 36 of the pre-2010 Civil Procedure Rules is misplaced. I must disclose, not without a shade of embarrassment, that at some point, given the invocation of order 36 of the repealed Civil Procedure Rules, I had thought that this was a suit claiming land by way of adverse possession, but I was clearly mistaken in that belief, for this suit actually seeks orders for this court to cancel the title of the defendants given the award of the Land Disputes Tribunal and the judgment of the Magistrate's Court, which I have taken the trouble to demonstrate that this court has no such jurisdiction. I regret the lapse on my part and any hardship that this may have caused.
12. I am not in doubt that this court has no jurisdiction to entertain the prayers sought by the plaintiffs and this suit must be dismissed.
13. Having said that, this court has supervisory jurisdiction over courts and tribunals subordinate to it and it would be neglectful for this court not to exercise such jurisdiction when it is clear that the courts subordinate to it proceeded to exercise jurisdiction that they did not have, and there is risk of a decree that has been unlawfully obtained being executed. I have seen that what was presented before the tribunal was actually a land ownership dispute and what the plaintiffs wanted was an order for cancellation of the title of the defendants, and an award was made pursuant



thereto. However, Land Disputes Tribunal never had jurisdiction to cancel title. Their jurisdiction was set out in section 3 of the Land Disputes Tribunal Act (repealed) which was drawn as follows :-

3.

- (1) 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.

14. From the above, the jurisdiction of the Land Disputes Tribunal was confined to hearing disputes over division and boundaries to land; claims to occupy or work land; and trespass to land. The dispute that was presented before the Matuga Land Disputes Tribunal over the suit land related to none of these categories of disputes. What was presented was a case for determination of ownership to land of which the tribunal did not have jurisdiction. I am unable to shut my eyes and ears to the fact that the tribunal proceeded to hear a dispute and make an award for which it had no jurisdiction. The award and the judgment of the Magistrate's Court were made outside jurisdiction and they are null and void. I have already mentioned my doubts as to whether the respondents before the tribunal were ever served. It would be remiss for this court to let the award and judgment remain despite being clear that they were made devoid of jurisdiction. In exercise of this court's supervisory powers, I proceed to quash the award dated September 16, 2008 in respect of the land parcel Kwale/Golini/651. I also set aside the judgment of the Kwale Magistrate's Court in Land Case no 34 of 2008, which adopted the award as a judgment of the court. They are set aside for reason that they were made without jurisdiction.

15. I am afraid that if the plaintiffs herein wish to have an order vesting the suit land in themselves, then they must move this court properly with the appropriate pleadings. The plaintiffs will need to go back to the drawing board as this court cannot issue title to the plaintiffs based on an illegal award and illegal judgment of the Magistrate's Court.

16. It is for the above reasons that this suit is hereby dismissed. There will be no orders as to costs as no appearance was entered by the respondents.

17. Judgment accordingly.

DATED AND DELIVERED THIS 16 DAY OF JUNE 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT



AT MOMBASA

