



**Ongatta v Omulo & another (Environment & Land Case 33 of 2021)  
[2022] KEELC 14419 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 33 OF 2021**

**AY KOROSS, J**

**OCTOBER 27, 2022**

**BETWEEN**

**JOAB OKETCH ONGATTA ..... PLAINTIFF**

**AND**

**JOSINTA AKINYI OMULO ..... 1<sup>ST</sup> DEFENDANT**

**JOHN OMULLO OMONDI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By way of a plaint dated 18/01/2021, the plaintiff filed suit against the defendants. The 2<sup>nd</sup> defendant was on 9/9/2020 registered as the owner of land parcel number South Sakwa/Nyaguda/4352 [“the suit property”] pursuant to a court order issued in Bondo SRM Misc.Civil Case No.15 of 2007. The 1<sup>st</sup> defendant is the wife of the 2<sup>nd</sup> defendant.
2. The plaintiff averred that in the year 2006, Bondo Land Disputes Tribunal [“Tribunal”] awarded the defendants the suit property which had previously been registered in the plaintiff’s name. His appeal to the Nyanza Provincial Appeal Committee [“Committee”] was dismissed and his appeal against the Committee’s decision in Kisumu High Court in Civ.Appeal No.179 was struck out. The decision of the Tribunal had been adopted as a judgment of the court. He contended that the Tribunal’s award was a nullity.
3. The reliefs that he sought were inter alia; a declaration that the Tribunal and Committee’s award were nullities for want of jurisdiction and all consequential decrees emanating therefrom be nullified and or set aside, the registration of the defendants as registered proprietors be cancelled, the suit property be reverted back to the plaintiff, costs and interests.
4. In response, the defendants filed a defence dated 8/3/2021. They admitted that they were the registered proprietors of the suit property and largely admitted the averments of the plaint save that the decisions over the suit property were competently and legally rendered, the suit was res judicata and time barred.



### **Plaintiff's evidence**

5. In his exam in chief, the plaintiff testified that the Tribunal awarded the suit property in favour of the defendants and cancelled his [plaintiff's] registration over the suit property. All appellate mechanisms were unsuccessful and were either dismissed or struck out. The Committee dismissed his appeal against the decision of the Tribunal while the High Court struck out his appeal for being filed outside the statutory timelines. He produced the proceedings of the Tribunal, Committee and Bondo Senior Resident Magistrate's Court, Ruling of Kisumu High Court and the suit property's green card.
6. During cross-examination, he contended that the defendants were not the lawful owners of the suit property.
7. During re-examination, he testified that the registration of the 2<sup>nd</sup> defendant was conducted without his knowledge.

### **Defendant's evidence**

8. In her exam in chief, the 1<sup>st</sup> defendant testified that the suit property was registered in the 2<sup>nd</sup> defendant's name and she was not a co-owner. She testified that the plaintiff's appeal having been struck out by the High Court, the only available recourse was for the plaintiff to file another appeal and therefore, the suit was incompetent.
9. On cross examination, she testified that she was the one who initiated the Tribunal's proceedings because the 2<sup>nd</sup> defendant had permitted the plaintiff to use the suit property which was family land.
10. During re-examination, she testified that the 2<sup>nd</sup> defendant never objected to her participation in the Tribunal's proceedings.

### **Parties submissions**

11. As directed by the court, the parties filed their written submissions. The plaintiff's Counsel Ko'winoh & Company Advocates filed theirs on 8/07/2022 while the defendant's Counsel Odongo Awino & Company Advocates filed theirs on 14/07/2022.
12. The plaintiff's Counsel identified and submitted on 3 issues for determination; (i) whether the Tribunal had jurisdiction to entertain the claim in Bondo Land Disputes Tribunal Claim Number BON/25/2006, (ii) if the answer to (i) above was in the negative then, what was the effect of the final award upheld in the Provincial Appeals Committee and adopted in Bondo SRM Misc.Civil Case No.15 of 2007 and (iii) whether the 2<sup>nd</sup> defendant's name as proprietor should be cancelled in the lands register.
13. On the 1<sup>st</sup> issue, the plaintiff's Counsel contended the jurisdiction of the Tribunal was premised on section 3 (1) of the repealed *Land Disputes Tribunal Act*. It was his position that under this section, the Tribunal did not have jurisdiction to hear and determine disputes on title and ownership over registered land or order cancellation of title.
14. On the 2<sup>nd</sup> issue, Counsel contended that jurisdiction was everything and once a court or a tribunal determined that it lacked jurisdiction, it should down its tools. He relied on the case of *Okiya Omtatah v Attorney General & 2 others* [2015] where the court expressed itself that jurisdiction was what gave courts authority to inquire matters before it. Further, jurisdiction could be raised at any time of the proceedings including in the course of an appeal and on this, Counsel relied on the case of *Floriculture*



*International Ltd v Central Kenya Ltd & 3 others* [1995] eKLR. Counsel also relied on the case of *Southern Star Sacco Limited v Vahancio Ntwiga* [2021] eKLR where the court stated thus;

“It is true that jurisdiction is the soul and lifeblood of judicial activity jurisdiction is fundamental and judgement rendered by a court that does not have jurisdiction is void abinitio”

15. In opposition, the defendant’s Counsel identified one issue for determination; whether the reliefs sought by the plaintiff were capable of being granted. Counsel submitted that the plaintiff ought to have challenged the decisions of the Tribunal or Committee by way of an appeal or judicial review and not by filing a fresh suit.

16. Counsel submitted that pursuant to section 7(1) of the repealed *Land Disputes Tribunal Act*, the Magistrate’s Court was to adopt the Tribunal’s award as a judgement of the court and a decree would ensue therefrom. Counsel relied on the case of *Florence Nyaboke Machani v Mogere Amos Ombui* [2018] eKLR where the court expressed itself thus;

“The option of an aggrieved party from a decision of the Tribunal was either to appeal to the Appeals Committee and/or to institute judicial review proceedings to quash the decision of the Tribunal if it is alleged it acted in excess of its jurisdiction...the High Court and Court of Appeal in their turn unambiguously told the appellant she had chosen the wrong forum to challenge the award of the Tribunal...”

17. Counsel also placed reliance on the case of *Peter Karani Nduku (interested party) ex parte Jacob Kipkurui Konga & another* [2020] eKLR where the court was of a similar finding as *Florence Nyaboke Machani v Mogere Amos Ombui* (*supra*). Counsel contended that the suit was an abuse of the process of court and *res judicata*.

### **Analysis and determination**

18. I have considered the parties’ pleadings, evidence and submissions and in my considered view, the issues falling for determination are; (i) whether the plaintiff’s suit was properly before this court and if the answer is in the affirmative, (ii) whether the plaintiff had proved his case and if (i) and (ii) are in the affirmative (iii) what orders should the court issue and lastly, (iv) who shall bear the costs of this case.

19. Section 8(1) of the repealed *Land Disputes Tribunal Act* provides as follows;

“8(1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision appeal to the Appeals Committee for the province in which the land which is the subject matter of the dispute is situated.

8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:-

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved”.

20. My understanding of this section is that any person aggrieved by the decision of the Tribunal was either to appeal to the Appeals Committee and or to institute judicial review proceedings to quash the decision of the Tribunal for one reason or the other including allegedly acting in excess of its jurisdiction.



21. Section 23(3) (e) of the *Interpretation and General Provisions Act* preserves and protects decisions and awards made by the defunct Land Disputes Tribunals. Similarly, it preserves and protects judgments adopted and pronounced by Magistrates' Courts within the framework of the repealed Land Disputes Tribunal ACT.
22. Most of the factual and documentary evidence of this case are not in dispute. It is common ground amongst the parties that there was a dispute between the plaintiff and the 1<sup>st</sup> defendant before the Tribunal in Claim No.BON/25/2006 in which an award was made in favour of the defendants and the plaintiff's proprietorship was cancelled. It is common ground that the plaintiff's appeal to the Committee in Appeal No. 63 of 2008 was unsuccessful and the decision of the Tribunal was upheld. It is common ground that the Committee's award was adopted as a judgment of the court on 11/1/2008. And, it is common ground that an appeal against the Committee's award was struck out by the High Court for being filed out of time.
23. The main point of departure between the parties was on the Tribunal's proceedings and eventual award. The plaintiff on the one hand contended that the entire proceedings were a nullity for two reasons. One, it did not have jurisdiction and two, it entertained the 1<sup>st</sup> defendant who was never a registered owner. While the defendants on the other hand contended that the Tribunal's proceedings were legal and the plaintiff had exhausted all avenues open to him under the repealed *Land Disputes Tribunal Act* and could not have a second bite of the cherry by instituting these proceedings. In my humble view, the crux of the matter in dispute is a legal issue.
24. On jurisdiction, the plaintiff's Counsel relied on several authorities and proffered three of them to this court. Indeed, these decisions reflect the position in Kenya. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal stated thus;
 

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step...'
25. The import of this decision is that the plaintiff had to raise the issue of jurisdiction at the earliest opportunity; which he did not. He participated in the Tribunal's proceedings and even called his witnesses to testify. At his own instigation, he submitted himself to the various appellate mechanisms envisaged under the repealed *Land Disputes Tribunal Act*. He never raised the issue of jurisdiction despite having an opportunity to do so. The issue of jurisdiction has been raised 13 years after the decision of the Tribunal had been adopted as a decision of the court.
26. He also relied on the case of *Floriculture International Ltd v Central Kenya Ltd* where the Court of Appeal held as follows;
 

"It has been held in the case of *Kenindia Assurance Company Ltd v Otiende* (1989) 2 KAR 162 that the normal rule that a party cannot raise for the first time on appeal a point he had failed to raise in the High Court, does not, apply when the issue sought to be raised for the first time on appeal goes to jurisdiction"
27. Unlike the three decisions of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya)* (*supra*), *Floriculture International Ltd v Central Kenya Ltd* (*supra*) and *Okiya Omtatah v Attorney General* (*supra*) where the issue of jurisdiction were either canvassed on appeal or in courts of first instance, the



facts of this case are distinguishable; jurisdiction has been raised by filing another suit; a declaration that the decision of the Tribunal was a nullity.

28. The manner in which the plaintiff approached this court was not novel and has been litigated before Kenyan courts. The case that has been cited by the defendant of *Florence Nyaboke Machani v Mogere Amos Ombui* (*supra*) had been the subject of litigation in the High Court, Court of Appeal and Supreme Court of Kenya before the plaintiff once again tried to revive it in the ELC as per the cited case. The Court of Appeal in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2014] eKLR in upholding the decision of the High Court expressed itself thus;

“It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. ... In the meantime, the 1st defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree”

29. The Supreme Court of Kenya in its *ratio decidendi* affirmed the decision of the High Court and Court Appeal in *Florence Nyaboke Case in Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2015] eKLR when it stated that the superior courts did not depart from settled law when it expressed itself thus;

“Moreover, the applicant has not demonstrated that the High Court or Court of Appeal, in this matter, held a view inconsistent with the recognized jurisprudence on this issue”.

30. After the Committee dismissed the plaintiff’s appeal and its award adopted as a judgment of the court, the plaintiff did not seek for its review but instead filed an appeal. This appeal was struck out by the High Court for being filed out of time. Instead of the plaintiff seeking leave to appeal out of time, he filed this suit 7 years later. From the ruling of the High Court, it is evident that ground of appeal was not on the Tribunal’s jurisdiction but rather on the Committee’s jurisdiction. This court is bound by the decisions of the superior courts. The decision of Bondo SRM Misc. Civil Case No. 15 of 2007 was a valid judgment which had never been set aside.
31. Ultimately, it is my finding that the suit is unmeritorious. It is trite law that costs follow the event. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR., the Supreme Court of Kenya settled the law on the award of costs; costs follow the event and courts have the discretion in awarding it. I hereby dismiss the plaintiff’s suit with costs to the defendants.

**Delivered and Dated at Siaya this 27<sup>th</sup> day of October 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**27/10/2022**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform;**

**In the Presence of**

Mr. Odongo for the defendants.

N/A for the plaintiff.



Court assistant: Ishmael Orwa.

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