



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC APPEAL NO. 3 OF 2020**

**AMOS ALUMADA KEYA.....APPELLANT**

**VERSUS**

**ZEBEDAYO ATONGA MUKONAMBI...RESPONDENT**

**Being an Appeal from the Order arising from the Ruling delivered by Hon. V.W. Wandera (CM) on 31<sup>st</sup> May, 2019 in Kitale Chief Magistrate's Court Land Case No. 16 of 2008.**

**JUDGMENT**

1. The instant appeal arises a suit that was heard and a Ruling delivered by the Chief Magistrate's Court at Kitale in **Kitale Land Case No. 16 of 2008**.
2. For clarity the parties will be referred to only by their capacities as appellant and respondent in this appeal. This court will also first give a background to the instant application.
3. The dispute herein first went to the Land Disputes Tribunal (hereinafter referred to as L.D.T.) where the appellant was the then claimant. He claimed to have purchased **2 acres** from the respondent. The respondent later claimed additional monies for development expenses. A second agreement was entered into by both parties which the appellant is said to have failed to honour which default prompted the unprocedural repossession by the respondent of a half-acre from the two acres sold and later on, the repossession of the full remainder by the respondent. The tribunal ruled in favour of the appellant, stating that he should be freely allowed to settle on the two acres and develop it and that the development expenses claimed by the respondent should be paid.
4. Consequently the appellant moved the Chief Magistrate's Court in **Kitale Land Case No. 16 of 2008** for adoption of the L.D.T. award which was done on **14/7/2008** after which a decree issued.
5. Meanwhile, the respondent appealed vide **Appeal No. 31 of 2008** before the **Provincial Land Disputes Appeals Committee** by way of a memorandum of appeal dated **11/8/2008**. He claimed that the Land Disputes Tribunal acted *ultra vires* and pointed out various alleged procedural irregularities in its proceedings, chief among which were the non-production of the agreement, improper recording of proceedings and breach of natural justice. The respondent also alleged that the Land Disputes Tribunal erred in failing to find that it was the appellant herein who breached the contract. Vide an order dated **15/4/2010**, the Magistrate's Court (D.M. Ochenja) granted a stay of execution pending the hearing and determination of that appeal.
6. The respondent appears not to have prosecuted his appeal within time and the **Land Disputes Tribunals Act No 18 of 1990** was repealed in **2012** and vide an application dated **14/1/2014** and filed on **31/1/2014** the appellant sought a vesting order in the same suit **Kitale Land Case No. 16 of 2008** which application the respondent herein opposed. At around the time of that application both parties engaged counsel to act for them. However the application was partially argued on **19/12/2014** before V.W. Wandera, CM with the two parties representing themselves in person. Subsequently on **17/3/2015** advocates for the parties appeared before court and entered into a consent to dispose of the application by way of written submissions. On **21/4/2015** the parties confirmed submissions were filed and the ruling date of **5/5/2015** was set. In the ruling that he delivered on that date the Chief Magistrate dismissed the application on the ground that the appeal before the Provincial Land Disputes Appeal Tribunal had not ceased to exist by virtue of the repeal of the **Land Disputes Act No. 18 of 1990**.
7. Soon thereafter, vide an application dated **20/7/2015**, the respondent applied vide **Kitale Environment and Land Court Misc. Application No. 49 of 2015** to have the Appeal transferred to this court and an order of transfer as sought was granted by Obaga, J on **16/9/2015** and the appeal issued with the title **Kitale Civil Appeal No. 2 of 2016**. In its judgment dated **20/12/2017** this court dismissed the said appeal with costs. Soon thereafter the appellant herein moved the Magistrate's Court in an application dated **6/8/2018** seeking an order that the County Surveyor do visit the respondent's land and carve out **2 acres** therefrom in favour of the appellant. Naturally the respondent objected to the application, citing various technical grounds. He also alleged that the land is yet to be transferred to him by the Settlement

Fund Trustees (hereinafter referred to as "S.F.T.") and that this had the effect of voiding the sale agreement. He averred that the decree held by the appellant was incapable of enforcement. The appellant on the other hand pleaded with the court to allow him enjoy the fruits of his judgment. The application was disposed of by way of written submissions and a ruling issued by the Chief Magistrate on **31/5/2019** in which he struck out the application with each party bearing own costs on the basis that the decree had alterations not countersigned against and that the decree can not be enforced while the land was still registered under the S.F.T.. He opined that the interests of the S.F.T. ought to have been addressed first before the decree could be enforced. That decision precipitated the instant appeal.

8. The Appellant, being dissatisfied with the Ruling of the Trial Magistrate, appeals to this court against the whole of the said ruling and the order arising therefrom on the following grounds which the Appellant has raised in his Memorandum of Appeal:-

**1. The subordinate court, having adopted the award of the Kwanza Land Disputes Tribunal as a judgment of the subordinate court, erred in law in enquiring into the alleged interests of the Settlement Fund Trustees in the suit land as it did not have jurisdiction to conduct such an inquiry.**

**2. The subordinate court, having adopted the award of the Kwanza Land Disputes Tribunal as a judgment of the subordinate court, erred in law in ordering that the Settlement Fund Trustee which was not a party in the proceedings before the Kwanza Land Disputes Tribunal be heard before the decree arising from the judgment is executed as it did not have jurisdiction to make such an order.**

**3. The subordinate court, having adopted the award of the Kwanza Land Disputes Tribunal as a judgment of the subordinate court, erred in law in finding that the decree arising from the said judgment is not enforceable as it is as it did not have jurisdiction to make such a finding.**

**4. The subordinate court erred in law and in fact in finding that the appellant's application for execution of the decree was premature when it was not.**

**5. The subordinate court erred in law and in fact in finding that the decree was not enforceable owing to an amendment thereon which had not been countersigned when the said amendment was not in the substantive part of the decree.**

**6. The subordinate court erred in law and in fact in considering extraneous matters which it ought not have considered.**

9. The Appellant thus prays that this appeal be allowed; that the ruling of the subordinate court and the order arising therefrom be set aside; that the appellant's application dated **6/8/2018** filed in the subordinate court be allowed as prayed and the costs of this appeal be awarded to the appellant.

10. On **15/10/2020**, this Appeal was admitted for hearing. On **2/12/2020** the court gave directions that the appeal be heard by way of written submissions. The appellant filed his submissions on **23/11/2020**. I have perused the court record and I have found no submissions filed on behalf of the respondent.

#### **Analysis and Determination**

11. On a first appeal, this Court's duty is to reconsider the evidence, re-evaluate it and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held *inter alia*, that:-

**"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".**

12. I have considered the grounds of appeal and the submissions of the parties and I have found that the broad issues for determination are as follows:

**a. Whether the Magistrate's court erred in inquiring as to the alleged interests of the SFT in the suit land and whether he had jurisdiction to do so;**

**b. Whether the magistrates court erred in finding that the decree was not enforceable;**

**c. Whether the magistrate's court erred in finding that the application for execution of the decree was premature; and**

**d. Who should bear the costs of the instant appeal?**

13. The issues are addressed as hereunder:

14. On the first issue as to whether the Magistrate had jurisdiction to inquire into the alleged interests of the SFT the appellant urges that he had none since the SFT was not a party to the proceedings before the Kwanza Land Disputes Tribunal.

15. It is correct that the Settlement Fund Trustees have never featured at any of the previous fora in this dispute. The assumption all along has

therefore been that the land belonged to the respondent and he had authority to sell the same. All through the various stages of the dispute, he has never disabused either the court or his adversary of this notion until he responded to the application dated **6/8/2018** when he raised that allegation. The consequence was that by his conduct, he divested himself of that defence in the matter. He can not evade the enforcement of the decree in respect of land that he is in physical possession of by now alleging that a third party owns the land.

16. Further the court notes that where the Settlement Fund Trustees have already allocated the land as in this case, its interest is reduced to following up to ensure that the dues owed to it are paid by the allottee. That interest is quite distinguishable from the interest of an individual landowner settled on the land. No encumbrances were envisaged by the parties at the transaction stage. The dispute between the appellant and the respondent related to sale of the respondent's rights and interests in part of the respondent's land and these included the rights transferred or pending transfer by the Settlement Fund Trustee to the respondent. It is clear to this court that this was the assumption of the parties all along from the date of their first transaction and it would be unfair and indeed against the interests of justice to entertain the respondent's claim regarding interests of the SFT at the tail end of the execution proceedings in this dispute. I find that the magistrate erred in inquiring as to the alleged interests of the SFT in the suit land and that he lacked jurisdiction to do so at the execution stage, more so when an appeal by the respondent herein challenging the LDT award had been dismissed earlier by this court.

17. Regarding the second issue listed for determination above, it is noteworthy that during the pendency of the dispute at other fora, various orders were issued against the respondent herein. These orders include the LDT award, the Magistrate's Court order adopting the LDT award into a judgment and the order dismissing his appeal in **Kitale ELC Appeal No. 2 of 2016**. After all the past proceedings the decree issued by the magistrate's court remained in the record, valid, and it has never been quashed.

18. A decree issued by a court of law must be respected and obeyed until set aside. Further, courts are not given to issuing orders and decrees in vain. Once a decree is issued it must be deemed enforceable and a party who thinks it is not must counter it by way of an appeal. The respondent herein appealed against the decision that birthed the decree referred to, and he did not convince the court as to the merits of his appeal and it was dismissed, in effect leaving the decree intact. The substance of the unsigned alterations on the decree alleged by the respondent was not effectively presented to this court and this court can only resort to stating clearly that it will be the duty of the person executing the decree to ensure that he implements the proper copy of the decree in order to avoid adverse consequences. The claim regarding alterations on the decree is in the light of the foregoing of little or no consequence in this appeal, and it should not have mattered in the court below. In the circumstances outlined above I find that the decree is enforceable.

19. The third issue is whether the application for execution of the decree was premature. This issue is closely linked to the first issue. For the reason that this court has already found that the magistrate's court lacked jurisdiction to entertain the controversy as to whether S.F.T. had interests in the land or not, I also find that the application for the execution of the decree was not premature.

20. Finally on the issue of costs I find that the dispute herein has all along been occasioned by the respondent who was not willing to release what he had sold to the appellant and unprocedurally repossessed land and retained it illegally and irregularly to the detriment of the appellant. Consequently the respondent should meet the costs of the appeal herein and the costs of the suit in the court below.

21. I therefore allow the instant appeal and I issue orders as follows:-

**a. The appellant's appeal succeeds.**

**b. The order of the Chief Magistrate's Court issued in Kitale Land Case No. 16 of 2008 on 31/5/2019 in respect of the application dated 6/8/2018 dismissing the application is hereby set aside and is substituted with an order of this court granting the application dated 6/8/2018 in terms of prayers Nos. (1), (2) and (3) thereof.**

**c. The costs of this application and the costs of the suit in the court below shall be paid by the respondent herein.**

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 3<sup>rd</sup> day of February, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**