



Mbui v Muthuri (Deceased) Substituted by Aileen Kinya Muthuri (Environment and Land Appeal E053 of 2023) [2024] KEELC 5148 (KLR) (3 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E053 OF 2023**

**CK NZILI, J
JULY 3, 2024**

BETWEEN

PAUL MURIUKI MBUI APPELLANT

AND

**GEOFFREY MUTHURI (DECEASED) SUBSTITUTED BY AILEEN KINYA
MUTHURI RESPONDENT**

JUDGMENT

1. Before the court is a memorandum of appeal dated 18.12.2023, where the appellant, who was the defendant at the lower court, faults the decision made by the trial court on 13.7.2023 for:
 - i. Allowing an application seeking to implement a void judgment by virtue of Section 4 (4) of the *Limitation of Actions Act*.
 - ii. Assuming non-existent jurisdiction to handle and allow for enforcement of a time-barred judgment.
 - iii. Allowing entry of a judgment made by a tribunal lacking jurisdiction.
 - iv. Using its discretion in an injudicious manner, hence coming into a wrong finding.
2. The role of an appellate court of the first instance is to review, re-appraise, and reassess the lower court record and come up with independent findings as to facts and the law.
3. The suit herein began with the adoption of a Provincial appeals Land Dispute Tribunal committee ward dated 23.3.2009 as a judgment of the court on 8.10.2009 by the trial court. L.R No. Ntima/Igoki/5542 was decreed to the respondent by a decree issued on 12.11.2009. After the decree-holder passed on on 10.4.2015, he sought to be substituted with his wife, Aileen Kiunga Muthuri, by an application dated 7.4.2016 for purposes of execution following the issuance of a certificate of



- confirmed grant issued on 14.11.2019. An inhibition over the title was lifted by an order issued on 27.10.2020.
4. Through an application dated 31.10.2022, the decree-holder sought an order empowering the land registrar Meru to dispense with the production of the original title for the implementation of the decree issued on 12.11.2009. The title deed was attached as an annexure marked AKM "5", issued to the appellant on 12.12.1996.
 5. The appellant opposed the notice of motion by a replying affidavit sworn by Paul Muiruki Mbui on 23.5.2023. He averred that he was the registered owner of the land; hence, it was wrong for the respondent to be denied the land in a succession cause as it never formed part of the estate of the deceased.
 6. The appellant averred that the decree ought to be executed was time-barred. Additionally, the appellant averred that the tribunal that had issued the award in the first instance lacked jurisdiction for the suit land fell under the Registered *Land Act* Cap 300 Laws of Kenya.
 7. In a supplementary affidavit sworn on 13.6.2023, the respondent maintained that the confirmed grant, the award, and the decree were lawful and regular, for no review or appeal had been made against them. Further, the respondent termed the appellant as out to derail the implementation of the decree.
 8. With leave of court, parties opted to canvass the appeal through written submissions. The appellant relied on written submissions dated 28.5.2024. The appellant submitted that the lower court decree was a statute barred and hence could not be executed outside the 12 years by virtue of sections 4 (4) & 7, 17 of the Limitations of Actions Act Cap 22.
 9. The appellant submitted that the land dispute tribunal had no powers to handle land disputes on titled land seeking for specific performance as per Its mandate under sections 3 of the Land Disputes Tribunal Act (Cap 303) Laws of Kenya. Reliance was placed on Republic vs Kiambu District Land Disputes Tribunal & another exparte Teresiah Wambui Gikuna and another (2014) eKLR and Kungu M'Tuaruchiu vs John M'Impwi M'Muthuri & others (2013) eKLR.
 10. The appellant submitted that the respondent failed, neglected, or omitted to pay the purchase price or obtain a land control board consent; hence, the sale agreement became void under Sections 6 & 7 of the *Land Control Act*. Reliance was placed on Ezekiel Kisorio Tanui vs Jacinta Ekai Nasak (2014) eKLR.
 11. The respondent relied on written submissions dated 28.5.2024. It was submitted that the appeal was incompetent, for it was filed out of time and without leave under Order 43 Rule 1 (1) (K) & (2) of the Civil Procedure Rules.
 12. The respondent also attacked the appeal for being filed by a law firm irregularly on record contrary to Order 9 Rule 9 of the Civil Procedure Rules. On whether the decree was time-barred, the respondent relied on Godfrey Ajuang Okumu vs Nicholas Odera Opinya (2017) eKLR and found that execution had been commenced within 12 years, by the filing of applications dated 18.11.2009, 28.7.2014 and 17.3.2016 only for the appellant to decline to sign the transfers leading to other applications dated 9.3.2020 and 31.10.2022. The court was urged to find that the trial court was correct to interpret Sections 4 (4) of the *Limitation of Actions Act* in permissive and not rigid or mandatory terms.
 13. On jurisdiction, the respondent submitted that the trial court had no powers to interfere with or interrogate the questions of whether or not the Land Dispute Tribunal had jurisdiction to make its decision except to confirm the award as a judgment and enforce it.



14. The respondent submitted that any aggrieved party by the award had 60 days' right of appeal by way of judicial review to the High Court for orders of certiorari. In this case, the appellant failed to do so; hence, the ground has no merits.
15. On injudicious exercise of discretion, the respondent submitted that there being no appeal to the award, it remained unchallenged to date; hence the trial court was in order to complete the execution process.
16. The issues calling for my determination are:
 - i. If the appeal before the court is incompetent
 - ii. If the decree dated of the trial court was stale.
 - iii. If the award was made by a tribunal with requisite jurisdiction to handle the dispute.
 - iv. If the trial court had jurisdiction to adopt an award made by a tribunal without jurisdiction.
 - v. If the appellant's failure to challenge the award and the decree on time or at all estopped him from challenging the jurisdiction of both the tribunal and the trial court.
 - vi. If the first attempt to execute the decree stopped time from running following subsequent attempts to execute it.
 - vii. Whether the appeal has merits.
17. Though a ruling dated 6.12.2023, this court in Meru ELC Misc Appeal No. E002 of 2023 extended the time for the appellant to file and serve an appeal out of time against a ruling delivered by the trial court on 17.7.2023. The appeal was eventually filed on 19.12.2023 which was within 14 days from 6.12.2024. I find no merit in the proposition that the appeal is incompetent.
18. Regarding the law firm's representation of the appellant in this appeal. Order 9 Rule 9 of the Civil Procedure Rules are restricted to any proceedings within the court appealed from. An appellant at the High Court or Court of Appeal, which are different forum from the court appealed against, is at liberty to engage a law firm of his or her choice. *William Audi Ododa and another vs John Yier & another C.A. Civil Appeal No. Nai 360 of 2004*, Mary Nchekei Paul vs Francis Mundia Ruga (2019) eKLR and *Oyugi vs Chief Land Registrar & 7 others (Civil Application No. E159 of 2023)* (2024) KECA 399 (KLR) 19th April 2024 (Ruling).
19. In any event, since there was a notice to act together by M/s Mboos Mutunga Advocates, I see no prejudice occasioned to the respondent.
20. As to the jurisdiction of the land dispute tribunal, jurisdiction is everything and without it, a court or tribunal downs its tools. See *Motor Vessel Lillian "S" vs Caltex oil (K)* 1989 eKLR. The mandate of the Land Disputes Tribunal Act repealed excluded the hearing matters related to ownership of title to land. That preserve belonged to the court. Its jurisdiction under Section 3(1) thereof related to the division of, or determination of boundaries, claim to occupy or work on the land and trespass. See *Bedan M'Chege vs Julius Kabugu Ndung'u* (2018) eKLR. It had no jurisdiction on titled land. See *Aphaxard Njue Mucheke vs Tyres Mbae Kiraithe* (2015) eKLR and *Republic vs Chairman Keiyo Division Land Dispute Tribunal & another Exparte Tabyotin Kabon Ego* (2008) eKLR.
21. In *Republic vs Meru Central District land disputes Tribunal & others exparte Mworja Nkonge* (2018) eKLR, the court observed that jurisdiction flows from either *the Constitution* or a statute. The court said that a tribunal could not arrogate itself jurisdiction it did not possess. The court cited Samuel



- Kamau Macharia & another vs. KCB & others (2012) eKLR on the jurisdiction, and Jonathan Amunavi vs The Chairman Sabatia Division Land Dispute Tribunal Kisumu Civil Appeal No. 256/Of 2002, that revocation of a title to suit property was a reserve of the High Court under Section 159 of the repealed Registered Land Act.
22. In this appeal, the respondent attached a copy of a title deed issued in December 1996 to the respondent. The respondent has not disputed the fact that as of the making of the award and its adoption by the court, as a decree of the court in November 2009, the subject land fell under Registered Land Act Cap 300.
 23. In Sir Ali Bin Salim vs Sharriff Moahmed Santy Civil Appeal No. 29 of 1940, the court said that if a court had no jurisdiction over the subject matter of the litigation, its judgment and orders, however precise, specific and technically correct were mere nullities and voidable.
 24. In Macfoy vs United Africa Co. Ltd (1961) 2 All ER 1169, a nullity was termed as void ab initio and incurably bad. A court of law has no business to aid an illegality whenever one is pointed out to it. It did not matter that the appellant filed an appeal to challenge the award or the decree of the court.
 25. Jurisdiction cannot be conferred by consent of parties or through a waiver on the party's part to omit to raise the issue of jurisdiction. Jurisdiction can be raised at any time, though preferably at the highest opportunity available.
 26. Section 4 (4) of The Limitation of Actions Act provides that an action may not be brought upon a judgment after the end of 12 years. In Willis Onditi Odhiambo vs Gateway Insurance Co. Ltd (2014) eKLR, the Court of Appeal said that the term "action" covers the execution of judgment and that the 12 years could not be extended.
 27. In Hudson Moffat Mbue vs Settlement Fund Trustees & others (2013) eKLR, a decree had been issued on 27.9.1995. the execution was sought by a motion dated 3.2.2004 by way of transfer documents by the Deputy Registrar of the court. Mutungi J held that court orders and decrees were intended to be complied with.
 28. In Isaac Olang Solongo vs Gladys Nanjekho Makokha & another (2021) eKLR, the court observed that the purpose of Sections 4 (4) of the Limitation of Actions Act was to eradicate stale claims and to stop the vexing of litigants. The court said that where a decree holder sleeps on a decree, he is estopped from waking up from his slumber after 12 years have lapsed to claim his right. The court said that a suit does not abate at the execution stage, and where a party to the suit is deceased, guided by Agnes Wanjiku Wang'ondy vs. Uchumi Supermarkets Ltd (2008) eKLR, under Orders 24 & 31 of the Civil Procedure Rules, the requirement for substitution on execution stage ordinarily was not necessary. See also Mueni Kiambu vs Mbithi Kimeu Kimolo (2017) eKLR.
 29. In M'Ikiara M'Rinkanya & another vs. Gilbert Kabeere M'Mbijiwe (2007) eKLR, the Court of Appeal held that the position in Kenya, unlike in English law, was that all post-judgment proceedings, including interlocutory proceedings for execution of judgment become statute-barred after 12 years. The court said that if a judgment is not enforced within the stipulated period, the rights of the decree-holder stand extinguished under section 17 of Cap 22, and the judgment debtor acquires possessory title by adverse possession, which he may enforce in appropriate proceedings.
 30. In this appeal, the decree should have been executed by November 2021. Execution proceedings commenced after the expiry of 12 years were therefore time-barred. Time of 12 years is computed from the date of the judgment and decree and not from the date of commencement of interlocutory applications for execution, as the respondent wants the court to use the word may. Indolence or delay



defeats equity. The respondent's application for recovery of the land was time-barred, coming 12 years after the decree was issued.

31. Execution of a decree of more than one year also required notice to show cause why the judgment should not be issued, for the appellant to be given an opportunity to be heard. As to the provisions of Sections 6 & 7 of the *Land Control Act*, the said issues were not pleaded before the trial court. A party on appeal may not raise new issues or grounds without leave of the court. The upshot is that I find the appeal with merits. It is allowed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 3RD DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Mutungu for Kiara for appellant

Mawira for Mbaabu for the respondent

HON. C K NZILI

JUDGE

