



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 93 OF 2019**

**ABDALLA CHOGO MZINGO.....PLAINTIFF**

**VERSUS**

**NZAKA JOHN NZAKA (DECEASED)**

**JUMA NZAKA (SON).....DEFENDANTS**

**RULING**

1. By this Notice of Motion dated and filed herein on 24<sup>th</sup> October 2019 Abdalla Chogo Mzingo (the Plaintiff) prays for orders: -

1.

*2. That it is only proper that the decision and/or award of the Appeal to the Minister Committee in Appeal Case No. 103 of 2002 and Appeal Case to the Minister Committee in Appeal Case No. 82 of 2015 regarding the cases of LR No. Mgumo Patsa/Mazeras/109 and LR no. Kaliang'ombe/Jimba/536 respectively be moved into this Court for quashing for want of jurisdiction as conferred by law;*

3. ....

*4. That this Honourable Court be pleased to order the Senior Registrar of Titles Kilifi to register the Plaintiff as the owner of those pieces or parcels of land known as Plot Nos. Kaliang'ombe/Jimba/536 and Mugumopatsa/Mazeras/109;*

*5. That this Honourable Court be pleased to order the delivery of the said pieces or parcels of land and any improvement or building standing thereon in vacant possession of the Plaintiff; and*

*6. That the costs of this application be provided for.*

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the ground that: -

*i. The Appeals to the Minister Committee heard the Appeal No. 103 of 2002 on 31<sup>st</sup> August 2016 and ordered that Plot No. Mugumopatsa/Mazeras/109 remains registered in the name of the Defendant herein;*

*ii. The Committee also heard the Appeal Case No. 82 of 2015 on 4<sup>th</sup> October 2017 and ordered that Plot No. Kaliang'ombe/Jimba/536 be sub-divided into three (3) portions;*

*iii. The Proceedings before the Appeals to the Minister Committee were a nullity by virtue of having been conducted in contravention of Section 13 of the Land Dispute- Tribunal Act No. 18 of 1990;*

*iv. By making the orders that were made, the Appeals Committee acted ultra vires to its mandate and the jurisdiction conferred to it by law and especially Section 3(1) of the Land Dispute Tribunal Act No. 18 of 1990.*

3. The application is opposed. In a Replying Affidavit sworn on 11<sup>th</sup> March 2020 as filed herein on 12<sup>th</sup> March 2020, Juma Nzaka (the 2<sup>nd</sup> Defendant) avers that as stated in the title to the claim, his father Nzaka John Nzaka (the 1<sup>st</sup> Defendant) is deceased. The 2<sup>nd</sup> Defendant avers that his father's family is a large one and that the Plaintiff herein has not adhered to the law in joining him in this suit as the 2<sup>nd</sup> Defendant.

4. The 2<sup>nd</sup> Defendant further avers that on 28<sup>th</sup> July 2011, the District Land Adjudication and Settlement Officer Kilifi declared Kaliasang'ombe/Jimba of Kilifi District as an Adjudication Section and that in the process of that adjudication, his father was identified as the owner of Parcel No. 902.
5. The 2<sup>nd</sup> Defendant further asserts that together with Sunday Willy Nzaka, Juma Said Nzaka, Ismael Kurwa Nzaka, and Jumaa Chigulu Nzaka, his deceased father was also identified as the joint owner of Parcel No. 536 Kaliasang'ombe. In regard to the said Parcel No. 536, the Plaintiff lodged a case against his father which was dismissed on 19<sup>th</sup> April 2012.
6. The 2<sup>nd</sup> Defendant avers that in the year 2013, the Plaintiff herein and one Sababu Simba filed objections Nos. 41 and 62 against his father but the same were again heard and dismissed. The Plaintiff then lodged an Appeal to the Minister in **Case No. 82 of 2015** which Appeal was partially allowed.
7. The 2<sup>nd</sup> Defendant avers that over the years, his father and his family have been utilizing the suit property without any interference by the Plaintiff and that they have established a homestead and grave yard thereon without any resistance from the Plaintiff. The 2<sup>nd</sup> Defendant further asserts that the Plaintiff is guilty of inordinate delay in pursuing this claim and that the orders sought are drastic and final and hence not capable of being granted at this interlocutory stage.
8. I have perused and considered the application as brought by the Plaintiff in person as well as the response thereto by the 2<sup>nd</sup> Defendant. I have similarly perused the rival submissions as filed before me by the parties.
9. The Plaintiff herein urges this Court to quash the decisions made by the Ministerial Panel in two Appeals being an Appeal to the **Minister Case No. 103 of 2002 and Case No. 82 of 2015**. He also prays for an order that he be registered as the owner of Plot No. Kaliasang'ombe/Jimba/536 and Mgumopatsa/Mazeras/109. In addition, the Plaintiff is seeking an order of eviction to issue as against the two named Defendants.
10. It was however not in contention that the 1<sup>st</sup> Defendant- Nzaka John Nzaka passed away before the suit herein was filed. The Plaintiff himself in the title of this claim refers to him as deceased, a fact which is confirmed by the 2<sup>nd</sup> Defendant who is a son to the deceased in his Replied Affidavit filed in opposition to this application. It was however not clear when the 1<sup>st</sup> Defendant passed away.
11. From the material placed before me, the dispute between the Plaintiff and the 1<sup>st</sup> Defendant over the two parcels of land commenced many years back in the 1990s. It is also apparent that prior to its sub-divisions, the two parcels of land situated in Kaliasang'ombe area were in actual fact one solid parcel of land.
12. As early as the year 1996, the Plaintiff had instituted a claim for the land against the deceased before the Land Disputes Tribunal at Kaloleni. In a decision rendered on or about 24<sup>th</sup> August 1996, the Tribunal determined that the land belonged to the deceased. The Plaintiff then appealed the decision to the Provincial Appeals Committee. In its decision rendered on 20<sup>th</sup> December 2002, the Provincial Appeals Committee overturned the earlier decision and awarded the land to the Plaintiff.
13. Being aggrieved by the decision of the Provincial Appeals Committee, the deceased proceeded to the High Court at Mombasa whereat he lodged **Mombasa High Court Civil Appeal No. 143 of 2003; Nzaka John Nzaka –vs- Abdalla Chogo Mzingo** and sought to overturn the decision of the Appeals Committee which had since been endorsed as a decision of the Kaloleni Resident Magistrates Court on 3<sup>rd</sup> September 2003.
14. That Appeal was heard by the Honourable Justice JB Ojwang (as he then was) and in a Judgment rendered on 4<sup>th</sup> November 2011, the Learned Judge dismissed the Appeal after observing as follows:
- “From the record of appeal, it is clear to this Court that the Provincial Land Appeals Committee which entered a decision in favour of the respondent herein, was exercising normal powers by virtue of the Land Disputes Tribunals Act, 1990; it is equally clear that the Appeals Committee duly took evidence, and heard witnesses from both sides; it is thus not in doubt, that service of hearing notice had been duly effected, and that no party was occasioned injustice with regard to mode of service.***
- As already noted, the Land Disputes Tribunal Act laid an obligation upon the Tribunal members to give their decision on the basis of evidence, and required them to give reasons for the decision. From the record of Appeal, this Court has no doubt that indeed, those requirements were complied with and this leads to the conclusion that the main part of the Ruling rendered by the Appeals Committee was entirely proper on the merits.***
- Once the substance of the case is thus resolved, it follows that the issues raised in the instant appeal, such as the appeal not conforming to the procedural requirements, or the Provincial Appeals Committee straying into a question such as refunds of monies collected, become secondary, and bear the plain form of technicality.***
- Considering that this is an old matter going back to 1997, and in view of the fact that it is in respect of land interests that had in substance been settled by the Provincial Land Appeals Committee, this Court takes Judicial notice that such a vital economic-social dispute, as a matter of public interest, calls for finality in the resolution...”.***
15. It was apparent that when the High Court decision was rendered, the deceased was still alive and that he neither appealed nor sought a review of the same.

16. It is also apparent that some four (4) months before the High Court rendered its decision, the District Land, Adjudication/Settlement Officer Kilifi one Felix M Kiteto vide a notice dated 28<sup>th</sup> July 2011 declared the Kaliang'ombe/Jimba area of Kilifi District an Adjudication Section pursuant to Section 5 of the Land Adjudication Act Cap 284 of the Laws of Kenya.

17. From annexure JN IV of the 2<sup>nd</sup> Defendant's Replying Affidavit, it is evident that some five (5) months after the High Court decision, his now deceased father appeared ex parte before the Land Adjudication Committee Members on 19<sup>th</sup> April 2012 where again he prosecuted his case. At page 2 of the proceedings, he told the Committee as follows: -

***“My father died in 1987 and his father Abdalla died 1992. I did not find any confrontation from the father of Abdalla or his paternal uncle until 1997 it is when Abdalla started a case with (me) over the Plot in question at the DO's Tribunal Court. Both sides had witnesses and his witness was aunts and the Judgment was that the Plot belonged to me and my paternal uncle Mr. Kola Muruu. He was not at ease with the Judgment and he decided to take the case to the PC's Office. Abdalla won the case at the DC and I appealed at the High Court. The case took a long time upto the time lawyer took the later(sic) to Court requesting the Court to dismiss the case. After this the Court's Judgment that stated that Abdalla had won the case. I went to my lawyer and requested for assistance. I requested that the case should be halted....”***

18. Having heard that testimony in the absence of the Plaintiff herein, the Committee proceeded to dismiss the Plaintiff's case, a position that was then replicated all the way to the Appeals filed before the Ministerial Panel as provided under the Land Adjudication Act.

19. While the 2<sup>nd</sup> Defendant submits that the orders sought in this application are final and draconian, I did not think that the Adjudication Committee having been made aware of the proceedings and findings before the High Court could proceed in the manner that it purported to do. The decision of the Provincial Appeals Committee had not only been endorsed by the Resident Magistrates Court at Kaloleni but the same had been affirmed and upheld by an order of the High Court emanating from the said **Mombasa HCCA No. 143 of 2003**.

20. That being the case, the adjudication process was clearly wrong in overlooking the existing decisions of the Courts. In seeking to re-open the case before the Adjudication Committee, the deceased and the Adjudication Officer were acting in contempt of Court and their decision amounted to nothing but a nullity. It follows therefore that the subsequent registration of the deceased as the proprietor of the suit properties pursuant to the adjudication process was wrongful, misconceived, null and void ab initio.

21. Arising from the foregoing and while it is true that the orders sought herein appear to be final in nature, I was unable to find any reason why the Plaintiff should be denied the fruits of the Judgment obtained a decade ago, any longer. As the Court of Appeal stated in **Sharrif Abdi Hassan –vs- Nadhif Jama Adam (2006) eKLR**: -

*“The Courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case”.*

22. It was clear from the material presented before me that the 2<sup>nd</sup> Defendant remains in the suit premises on account of the irregular adjudication process which purported to grant his deceased father the suit properties.

23. In the premises, I am persuaded that the Plaintiff's application has merit in so far it relates to the 2<sup>nd</sup> Defendant. I allow the same and grant the same as sought in Prayers 2, 4 and 5.

24. The 2<sup>nd</sup> Defendant shall pay the costs of this application.

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of April, 2021.**

**J.O. OLOLA**

**JUDGE**