



**Suyanka & another (Suing as representatives of the Estate of Doorie Ole Suyanka) v Kepas & another (Environment & Land Case 886 of 2017) [2024] KEELC 5401 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5401 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 886 OF 2017**

**LC KOMINGOI, J  
JULY 11, 2024**

**BETWEEN**

**KIREMES ENE DOORIE SUYANKA AND NOAH KIAKO DOORIE  
(SUING AS REPRESENTATIVES OF THE ESTATE OF DOORIE OLE  
SUYANKA) ..... PLAINTIFF**

**AND**

**NKINI MAMA OLE KEPAS ..... 1<sup>ST</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By the Plaint dated 24<sup>th</sup> November 2009 and Amended on 26<sup>th</sup> June 2018, as personal representatives of their late father Doorie Ole Suyanka, claim that sometime in the year 2009, a group of persons claiming to be from the District Survey Office visited their father’s land namely Kajiado/Kaputiei North/886 measuring approximately 65.16 hectares. The said persons purported that they had a court order granting them the right to subdivide the land into two equal portions, and one of the portions to be transferred to the 1<sup>st</sup> Defendant.
2. Upon enquiry, it was discovered that sometime in the year 2008, the 1<sup>st</sup> Defendant had filed a claim with the Kajiado District Land Dispute Tribunal (herein after referred to as “the Tribunal”) against the Plaintiff. The Tribunal issued an award on the 25<sup>th</sup> September 2008 which was forwarded to the Senior Resident Magistrate Court at Kajiado as Kajiado Land Dispute Tribunal Case No. 41 of 2008. The award was adopted as Court’s judgement on the 4<sup>th</sup> December 2008 and a Court Decree issued. It is their case that, by the time they learnt about this, time to file an appeal against the award as provided for under the Tribunal’s Act or file a Judicial Review had lapsed.



3. The Plaintiffs claim that the ruling and award by the Tribunal was unlawful and contrary to rules of natural justice because their late father was never served with any notice about the 1<sup>st</sup> Defendant's claim; the Tribunal acted without jurisdiction in determining questions of ownership of land; the Tribunal acted contrary to Section 3(8) of the Tribunal's Act in failing to give a summary of the issues determined on in its ruling; the issue of land determined by the Tribunal was already time barred. As such, the Plaintiffs prayed for:
  - a. A declaration that the Kajiado Land Disputes Tribunal acted ultra vires by purporting to adjudicate on matters ownership of the suit land;
  - b. A declaration that the proceedings before the Kajiado Land Disputes Tribunal, its purported award and its subsequent adoption as judgement of the Court by the Kajiado Senior Resident Magistrate were irregular, null and void ab initio;
  - c. A declaration that all orders, proceedings and/or acts done subsequent to the award and judgement are null and void and of no legal effect.
  - d. A permanent injunction restraining the 1<sup>st</sup> Defendant either by himself, his agents and or servants from transferring, selling, alienating, encumbering, or in any way dealing with the Plaintiffs' parcel pending further orders of the court;
  - e. An order that the purported award of the Kajiado Land Disputes Tribunal made on 25<sup>th</sup> September 2008 and the judgement of the Senior Resident Magistrates Court made on the 4<sup>th</sup> December 2008 and any other orders arising from the award be set aside.
  - f. Costs of the suit.
4. The 1<sup>st</sup> Defendant in his statement of defence sought dismissal of the suit on grounds that it was brought in bad faith because it was based on false claims.
5. The 2<sup>nd</sup> Defendant in its Statement of Defence contested the suit on grounds that the Magistrate's Court acted within its mandate and as such, the suit should be dismissed with costs.

### **Evidence of the Plaintiff**

6. PW1, Noah Kiako Doorie adopted his witness statement as part of his evidence in chief and produced his bundle of documents as P. Exhibits 1-8. In testimony, he confirmed that he was the son of the late Doorie Ole Suyanka and that he was the legal representative of his estate. He stated that when the dispute was filed at the Tribunal, his late father was not notified and only became aware when some people went to the suit property to subdivide it. He stated that the land measures 65.16 hectares and his family has been residing on it since he was born.
7. On cross examination he stated that the ruling by the tribunal was issued in the year 2008 and the instant suit was filed by his late father in 2009. He confirmed that his father was unaware of the case against him at the Tribunal because he was never served with any documents or a hearing notice. He confirmed that his father was given the land by Emboliel Group Ranch and was also issued with a titled deed.
8. On re-examination he stated that he took over the suit upon the demise of his father and was not aware of what transpired before that. He however confirmed that the 1<sup>st</sup> Defendant had his own property which was title number Kajiado/Kaputiei North/905. He reconfirmed that they learnt of the dispute at the Tribunal in the year 2009 when surveyors entered their land with an intention of subdividing it.



## Evidence of the Defendant

9. DW1 Nkini Mama Ole Kepas adopted his witness statement as part of his evidence in chief. He stated that he was a member of Emboliel Group Ranch and he owned parcel number 905, which is adjacent to the Plaintiff's land. He stated that there was an issue with the boundary between his land and that of the Plaintiff's and he sought to have the surveyor visit the land to confirm the boundaries.
10. On cross examination he confirmed that this was a boundary dispute and that he filed a claim before the Land Dispute's Tribunal but when the late Doorie Ole Suyanka was summoned, he refused to attend. He did not produce the said summons in court. He confirmed that he similarly did not give the Plaintiff the summons because they were not in talking terms.
11. At the close of the oral testimonies, directions were given for parties to put in final written submissions.

## The Plaintiff's Submissions

12. On whether the proceedings at the Tribunal were valid, counsel submitted that the Tribunal in its ruling directed that the suit land be subdivided into two equal portions and that the Land Registrar registers the new portions in the 1<sup>st</sup> Defendant's name. It is submitted that this determined an issue of title to land which was beyond mandate of the Tribunal as per Section 3(1) of the Land Disputes Tribunal Act (repealed). Counsel made reference: In the Matter of an Application by Kakunyu Mulwa for orders of Certiorari and Prohibition Machakos Misc. Civil Case No. 295 of 2007 where Lenaola J. (as he then was) held: "... the implementation of the decision of the tribunal entails subdivision of the suit land into two parcels and opening a register in respect of each subdivision... Such a dispute is not, in our view, within the provisions of Section 3(1) of the Land Disputes Tribunal Act..."
13. On the Plaintiff's right to a fair trial, counsel submitted that the Plaintiff was not given a fair hearing contrary to the stipulations of Section 3(4) of the Land Disputes Tribunal Act (repealed). As such, the proceedings were a nullity as held in *Mailua Estates Ltd v Pusham Miato & 5 others* [2019] eKLR and *Simeon Kinyua Ole Lekasi v Senior Resident Magistrate Kajjado & 2 others* [2017] eKLR among others.
14. Counsel also submitted that the 1<sup>st</sup> Defendant's claim was time barred and the Tribunal should not have entertained it on grounds that the Plaintiff acquired the suit property in 1987 and it was only until 2008 when the 1<sup>st</sup> Defendant filed the claim. As such, by the year 2008, the claim was time barred under Section 7 of the *Limitation of Actions Act*. Reference was once again made to the holding of Lenaola J. (as he then was in) In the Matter of an Application by Kakunyu Mulwa for orders of Certiorari and Prohibition (Supra). Therefore, the proceedings and consequent ruling should be set aside.
15. On whether the Plaintiff was entitled to the orders sought, counsel submitted that the Plaintiff filed this declaratory suit because by the time the late Doorie Ole Suyanka became aware of the proceedings at the Tribunal and consequent orders, he could neither appeal the decision nor file judicial review proceedings due to lapse of time. The Plaintiff was therefore entitled to the prayers sought as he had shown that the Tribunal's award was null and void ab initio.

## 1<sup>st</sup> Defendant's submissions

16. On the 6<sup>th</sup> March 2024, Mr. Mbeche counsel for the 1<sup>st</sup> Defendant intimated to the court that they did not wish to file written submissions.
17. The 2<sup>nd</sup> Defendant despite entering appearance and filing a statement of defence, did not participate in these proceedings. The 2<sup>nd</sup> defendant did not file written submissions.



## Analysis and Determination

18. I have considered the pleadings, the evidence on record, the written submissions and authorities cited. The issues for determination are:
- i. Whether the proceedings at the Land Disputes Tribunal and the consequent award issued on 25<sup>th</sup> September 2008 were lawful;
  - ii. Whether the Plaintiff is entitled to the prayers sought;
  - iii. Who should bear costs of the suit?
19. The Plaintiff approached this court seeking to quash and set aside the award of the Kajiado Land Disputes Tribunal issued on 25<sup>th</sup> September 2008 and the judgement of the Senior Resident Magistrates Court issued on the 4<sup>th</sup> December 2008 and any other orders arising from the award. The grounds for this application are that the Plaintiff was never afforded a fair trial and that the Tribunal exceeded its jurisdiction in issuing the award.
20. On whether the Plaintiff was granted a fair hearing, PW1 stated that they only became aware of the proceedings at the Tribunal and the Judgement of the court when individuals entered the suit property with the intention of subdividing it. PW1 testified that his father was never summoned or informed of the dispute. DW1 stated that he was the owner of property Kajiado/Kaputiei North/905, which is adjacent to (the suit land). DW1 admitted that he never served the late Ole Suyanka with summons to attend the Tribunal hearing due to their strained relationship. DW1 was not able to demonstrate that Tribunal had summoned the late Doorie Ole Suyanka.
21. The right to a fair trial and the right to be heard are not only enshrined in *the Constitution* under Article 50(1) but were also guaranteed under Section 3(4) of the repealed Land Disputes Tribunals Act, which was the effective law at the time. Article 50(1) of *the Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Similarly, Section 3(4) of the repealed Land Disputes Tribunals Act mandated that all parties to a dispute must be given an opportunity to present their case and to respond to any allegations made against them. It reads;
- “Section 3(4) Every claim shall be served on the other party, or, where there are more than one, on each of the other parties to the dispute and the provisions of the *Civil Procedure Act* as regards service of summonses.”
22. It is well-established principle under Section 109 of the *Evidence Act* that the burden of proof rests on the individual who seeks the Court's belief in the existence of a particular fact. It provides that;
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
23. Without evidence to show that the late Plaintiff was summoned to participate in the proceedings before the Tribunal, the Court has no basis to conclude otherwise. The principle of “audi alteram partem”, “no person should be condemned unheard”, is the epitome of justice. This principle ensures that all efforts must be made to secure the appearance of a party before any proceedings. Only if a party has out rightly failed or neglected to attend despite these efforts can the proceedings continue in their absence.



In this case, there is no indication that such efforts were made, and therefore, I find that the Plaintiff was not afforded a fair hearing at the Tribunal.

24. Regarding the Tribunal's jurisdiction to determine the dispute, DW1 stated that he filed the claim with the Tribunal in 2008 as a boundary dispute. Prior to the enactment of the *Environment and Land Court Act*, which gave effect to Article 162(2) of *the Constitution*, the Land Disputes Tribunals had the mandate to determine boundary disputes. This authority was conferred under the repealed Land Disputes Tribunals Act Section 3 (1) which provides;

“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.”

25. I have perused the said ruling of the Tribunal issued on 25<sup>th</sup> September 2008. The ruling indicates that the Objector, Doorie Ole Suyanka, had been called severally by the Tribunal but refused to come and defend himself. The ruling also reads, “Upon carefully considering the facts adduced by both parties, the documental evidence and witnesses, the members of the tribunal...”

26. The ruling went on to order the District Surveyor to enter the disputed parcels and subdivide them into equal portions and register the apportioned portions in favour of the parties.

27. I note that, the ruling does not give a summary of the dispute, issues for determination before it or people present during the hearing. It proceeds to assert jurisdiction and issue orders. Secondly, the ruling indicates that the Plaintiff had severally been summoned but failed to attend the hearings. However, it simultaneously goes on to indicate that “after carefully considering the facts adduced by both parties...” This raises the question of who these ‘parties’ were if the Plaintiff never attended the hearing. Thirdly, the Tribunal directs that surveyor enters parcels 905 and 886 and subdivide them into two equal portions and the District Land Registrar to register the apportioned documents in favour of Doorie Ole Suyanka and Nkini Mama Ole Kepas.

28. This ruling made a declaration on ownership of property by asking the surveyor to divide the property into two equal portions and have it registered in the parties' names. It is clear that the Act did not clothe the Tribunal with authority to handle issues relating to ownership of land, title deeds, or land registration issues.

29. In a similar matter *Mutungi J. in Mary Kerubo Ogoti v Chief Magistrate's Court, Kisii Law Courts & 5 others* [2016] eKLR held:

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- “12. ... The Kiogoro Land Disputes Tribunal in the premises made a decision on a matter that it had no jurisdiction to deal with and consequently such decision or determination was a nullity. There was in consequence no decision that the 1<sup>st</sup> respondent could lawfully adopt as a judgment. The 1<sup>st</sup> respondent could not as it were validate that which was a nullity or an illegality. It is true that the 1<sup>st</sup> respondent was mandated to adopt decisions emanating from Land Disputes tribunals under Section 7 of the Land Disputes Tribunal Act



but what was contemplated was that such decisions would be valid and in accordance with the Act. If the decisions were made without jurisdiction, they could not be cleansed by the 1<sup>st</sup> respondent simply by receiving and adopting them. If the decision was made without jurisdiction, it is in essence not a decision to be accorded the force of law.

...

17. As I have come to the conclusion and holding that the Kiogoro Land Disputes Tribunal lacked the jurisdiction to deal with the matter of title relating to the registration of the petitioner as owner of land parcel ... its decision recommending the revocation and/or cancellation of the title was null and void and equally the adoption of the decision by the 1<sup>st</sup> respondent as judgment of the court and issue of the decree was a nullity and of no effect.

In the case of *Macfoy –vs- United Africa Co. Ltd* [1961] 3ALL ER 1169 at page 1172, Lord Denning succinctly stated thus:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

30. Given these considerations, the Tribunal went beyond its jurisdiction and the proceedings are therefore null and void. Consequently, the Senior Resident Magistrate’s Court in Kajiado Land Disputes Tribunal case No. 41 of 2008 adoption of that award as judgement of the court is unlawful and of no legal consequence.
31. In conclusion, I find that the late Doorie Ole Suyanka, was not served with summons to attend the proceedings before Land Disputes Tribunal. This means he was condemned unheard.
32. D.W.1 when he was cross-examined stated; “I could not give him the summons as were not in talking terms. I don’t know why he was not served.”
33. I find that the Plaintiffs have proved their case against the Defendants on a balance of probabilities.
34. Accordingly Judgement is entered in favour of the Plaintiffs as against the Defendants as follows.
- i. That a declaration is hereby issued that the Kajiado Land Disputes Tribunal acted ultravires its powers by purporting to adjudicate on matters of ownership of the suit land.
  - ii . That a declaration is hereby issued that the proceedings before the Kajiado Land Disputes Tribunal its purported award and the subsequent adoption of the award as a Judgement of the court of Kajiado SRM’s were irregular, null and void ab initio.
  - ii i. That a declaration is hereby issued that all orders, proceedings and/or acts done subsequent to the award and judgement we null and void and of no legal effect.
  - iv . That the purported award of Kajiado Land Disputes Tribunal made on 25/9/2008 and the Judgement of the SRM’s Court made on 4/12/2008 and any orders arising from the award are hereby set aside.



v. That an order of Permanent Injunction is hereby issued restraining the 1<sup>st</sup> Defendant either by himself, his agents and or servants from interfering with the Plaintiff's possession of the suit land in any manner.

vi . As the Plaintiffs and the 1<sup>st</sup> Defendant are neighbours I order each party to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11<sup>TH</sup> DAY OF JULY 2024.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Ms. Katao for Mr. Sankale for the Plaintiff.

Mr. Mbeche for the 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> Defendant.

Court Assistant – Mutisya.

