



**Wekesa (Suing as the Legal Representative of the Estate of Zakayo Wekesa Mukhalisi) v Wekesa (Environment & Land Case 1 of 2020) [2024] KEELC 5115 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5115 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 1 OF 2020**

**EC CHERONO, J**

**JULY 4, 2024**

**BETWEEN**

**JACK NYONGESA WEKESA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ZAKAYO WEKESA MUKHALISI) ..... PLAINTIFF**

**AND**

**CHARLES WALIBWA WEKESA ..... DEFENDANT**

**JUDGMENT**

**A. Introduction and Pleadings**

1. By way of a plaint dated 19<sup>th</sup> October, 2019 the Plaintiff seeks against the Defendant the following orders;
  - a. A declaration that titles the proceedings and verdicts of the tribunal that led to the sub-division of that title number East Bukusu/East Sangalo/267 and the subsequent issuance of title number East Bukusu/East Sangalo/2035 were without jurisdiction, irregular and unconstitutional.
  - b. A declaration that all material the defendant held in trust and continues to so hold that parcel of land equivalent to the share of the deceased that was in the parent title and that he shared out in various portions to some of the beneficiaries to his estate.
  - c. A declaration that at all material times the defendant was and is entitled to only 2 acres of land out of the title that he jointly held with the deceased. Consequently, any acreage that is in excess of the two acres as comprised in the title that he caused to be registered in his name is held in trust for the beneficiaries of the estate of the deceased and should be transferred back to the estate.



- d. A declaration that the creation of new numbers out of the aforesaid parent number in favour of the other sons of the deceased was, without their involvement and knowledge, irregular, unprocedural and unlawful, therefore null and void.
  - e. Costs of the suit.
2. The Plaintiff's case is that he is the legal representative of the estate of Zakayo Wekesa Mukhalisi (deceased) and that the Defendant herein is his brother. He averred that the said Zakayo Wekesa (deceased) and the Defendant were the first registered owners of all that parcel of Land comprised in title number East Bukusu/East Sang'alo/267(herein after referred to as the 'suit land'). It was further averred that prior to the death of the deceased on 16/09/1992, he showed his sons their respective shares to occupy with clear boundaries and the said sons utilized their allocated portions with the Defendant being entitled to 2 acres. The Plaintiff further stated that sometime on or about 07/10/1996, one of his brothers namely Luka M. Wekesa lodged a complaint at the Kanduyi Land Dispute Tribunal (hereinafter 'the tribunal') whose outcome the Plaintiff avers adversely disturbed and affected the estate of the deceased. He averred that he was not a party in the proceedings before the said tribunal.
  3. The Plaintiff states that when he got to know of the said proceedings and the resulting decree, he filed a suit at Bungoma High Court Misc. Application No. 64 of 1998 seeking leave to appeal the tribunal's award out of time and for prohibitory orders inhibiting any dealings in respect of the title pending determination of the intended appeal. The plaintiff further averred that an appeal was preferred at the Provincial Appeals Committee which appeal was unsuccessful. He filed a further appeal in the High Court being Civil Appeal No. 111 of 2010 which appeal was also dismissed with the court noting that he was a stranger to the proceedings and therefore lacked locus standi. It is also averred regardless of the interests of the other beneficiaries, the Defendant transferred title of the suit land to himself and thereafter sub-divided the same into four portions. The Plaintiff further states that the Defendant registered himself as the registered owner of land parcel NO. E.Bukusu/E.Sang'alo/ 2035 measuring 8.1ha which was more than the 2 acres he is entitled to. It is averred that the Defendant now threatens to remove the boundaries in place to accommodate the new sub-divisions.
  4. The plaintiff contends that the Defendants hold in trust a portion of land measuring approximately 4.5acres comprised in E.Bukusu/E.Sang'alo/ 2035. He set out elements of the particulars of the alleged continuing trust and asked the court to grant the orders sought in the plaint.
  5. In his defence, the Defendant filed a statement of defence and counter-claim dated 14<sup>th</sup> October, 2020 in which he averred that the suit herein was time barred having been filed 21 years six months later and res-judicata since the issue herein was materially and substantially in issue before the Kanduyi Land Dispute Tribunal whose verdict was adopted as judgment in Bungoma SPMC Misc. Application No. 71 of 1997 on 11/12 1997. He stated that the appeals preferred were dismissed by the Provincial Land Dispute Tribunal and Bungoma High Court on 22/07/2010 and 15/11/2018 respectively. The Defendant argued that the claim by Luka W.Mukhalisi for sub-division before the tribunal was done on behalf of the other beneficiaries. He averred that the land disputes Tribunal gave an award for sub-division of the suit land into four portions being East. Bukusu/ East. Sang'alo/ 2035,2036,2037 & 2038 measuring 4.5, 3.1,3.1 and 3.1 acres respectively.
  6. The Defendant argued that the suit land was registered jointly in his name and that of Zakayo Wekesa Mukhalisi-deceased and that upon his demise, he (the Defendant) remained the sole registered owner. He averred that the Plaintiff, Luka Mukhalisi and Richard Masika Wekesa who lived on the suit land through Zakayo Wekesa Muhalisi 2 acres were awarded 3.1 acres each by the tribunal while he got 4.5acres. The Defendant refuted the Plaintiff's claim and put him on strict proof adding that he does



not hold any property in trust for the Plaintiff or anyone else. He therefore denied the Plaintiff's claim and sought for judgment in terms of his counterclaim as follows;

- a. That the Plaintiff suit dismissed with costs.
  - b. That judgment over the counterclaim be entered in favour of the defendant.
  - c. The Plaintiff be ordered to forthwith vacate the Defendant's land comprised in Title No. East. Bukusu/ East. Sang'galo/4009 and further that the Plaintiff be permanently enjoined from trespassing or using the land comprised in the said parcel.
  - d. Costs.
  - e. Interest.
  - f. Any other relief or order that the Court may deem fit to grant.
7. During pre-trial directions, the Parties confirmed compliance and agreed that the matter proceeds for hearing by way of viva voce evidence. The plaintiff called two witnesses while the defendant called one witness.

## **B. Parties Evidence**

8. PW1 Jack Nyongesa Wekesa Was referred to his witness statement dated 19<sup>th</sup> October, 2019 which he adopted as his evidence in chief. He also referred to his list of documents of even date which he produced in evidence as P-Exhibit 1-15. It was his further testimony that after his father's death in 1992, his name was deleted from the title of the suit land where he was jointly registered with the Defendant. It was his evidence that When Luka Wekesa filed a complaint before the tribunal, 4 siblings living in the suit land were awarded portions leaving out 4 others who were not in the suit land. PW1 stated that prior to his death, his late father called for a family meeting on 10/06/1994 and distributed the suit land where the Defendant was allocated 2 acres. He sought to have the decision by the tribunal awarding the Defendant 4.5 acres ultra vires and the 2.5 acres held by the Defendant be returned to the estate.
9. During cross-examination, the plaintiff broke down the entries in the green card produced as P-Exhibit 4. It was his evidence that he was not a party to the case before the tribunal and that the complainant therein did not prefer an appeal against the award to the Provincial appeals committee nor did he file a judicial review in the High Court. He stated that he filed an appeal against the award in the Western Province Appeals Committee and the High Court but his appeals were dismissed. He testified that Land Parcel No. 2035 measuring 4.5 acres belongs to the Defendant while Land Parcel No. 2036 belongs to Shadrack Simiyu Wekesa. He testified that he had no issue with the other allocations of 3.1 acres. The plaintiff testified that the Defendant has sub-divided his portion of Land Parcel No. 2035 into three plots namely 4007, 4008 and 4009. He stated in his evidence that he is in occupation of the portion allocated to him by his father and he denied being in the Defendant's Land and that he was not involved in the sub-division.
10. In re-examination, the plaintiff testified that the case before the tribunal was filed in the year 1996 while sub-division was done in the year 1984. It was his evidence that he is not certain which plot number he is occupying since he was not involved in the sub-division. Finally, the plaintiff stated that his father allocated them more than the 3.1 acres awarded by the tribunal and that he will share the 2.5 acres among his other siblings if returned by the Defendant.
11. PW2 Joseph Mukhalisi identified himself as an uncle to both the plaintiff and the Defendant. He was referred his witness statement dated 14/11/2019 which he adopted in his testimony-in-chief. On cross-examination, he testified that he was not aware of the joint registration of the suit land in the name



of the defendant and the deceased. It was his testimony that prior to the death of Zakayo Wekesa, the family had visited the Land Control Board for sub-division of the suit land but the sub-division did not materialize. He gave the history of litigation as discussed above and stated that the award of the tribunal as adopted by the Magistrate court stands to date. In re-examination, it was his testimony that the Defendant was allocated 2 acres by his deceased father and not 4.5 acres. Lastly, he testified that apart from the four, the other children of the deceased were allocated plots elsewhere.

12. PW3 Luka Wamalwa Mikhalisi Wekesa Identified himself as a brother to both the plaintiff and the Defendant. He was referred his witness statement dated 19/10/2019 which he adopted as his testimony-in-chief. In cross-examination, he testified that he is the one who filed a complaint before the District Land Disputes tribunal and that the tribunal did not issue an award and none was adopted by the Magistrate's court and as such, he could not appeal.
13. PW4 Mabakanya Namukholi alias Peter Namukholi Identified himself as cousin to the plaintiff and the defendant herein and was referred his witness statement dated 19/10/2019 and 12/09/2023 which he adopted as his testimony-in-chief. In cross examination, he testified that the suit land belonged to the late Zakayo Wekesa where he was jointly registered with the Defendant. He stated that the late Zakayo Wekesa sub-divided the suit land amongst his four children on 10/06/1984. He testified that he was aware that Luka Malakhasi filed a case before the tribunal against the Defendant but he was not aware of the findings of the tribunal.
14. PW5 Peter Mukhalisi Identified himself as a nephew to the plaintiff and the defendant. He was also referred to his witness statement dated 19/10/2019 which he adopted as his testimony-in-chief. He testified that his father was Shadrack Simiyu Wekesa who was a brother to the parties herein. In cross-examination, he associated himself with the evidence as adduced by the plaintiff witnesses.
15. DW1 Charles Walimbwa Wekesa Was referred his witness statement dated 01/03/2021 which he adopted as his testimony-in-chief. He was also referred his list of documents of an even date containing 9 items which he produced as D-Exhibit 1-9. He testified that his brother filed a case against him at Kanduyi District Land Disputes Tribunal and that he was awarded 4.5 acres of the suit land while his 4 other brothers were awarded 3.1 acres each. DW1 testified that the award was adopted by the Bungoma Magistrates Court. It was his evidence that attempts to set aside the said award at the Provincial appeals committee and the High Court were dismissed with costs. It was his further testimony that thereafter, he engaged a surveyor who sub-divided the suit land into four portion being Land Parcels No. E.Bukusu/E.Sang'alo/2035-2038. He testified that he subsequently subdivided his land E.Bukusu/E.Sang'alo/2035 into E.Bukusu/E.Sang'alo/4007-4009. It was his testimony that E.Bukusu/E.Sang'alo/4009 is now being occupied by the Plaintiff and he asked the court to grant his counter-claim.
16. In cross-examination, it was his testimony that his late father temporarily shared the suit land between him and his brothers, Shadrack, Luka and Jack and he was allocated 2 acres though now he holds 4.5 acres after the decision of the tribunal. It was his evidence that the tribunals sharing form of the award should stand as final. In re-examination, he testified that it is his brother who filed a complaint before the tribunal.

### **C. Parties Submissions**

17. The plaintiff through his submissions dated 3<sup>rd</sup> May, 2024 argued that under section 3 as read with section 6 of the Land Disputes Tribunal, Kanduyi Land Tribunal lacked jurisdiction to hear and determine the dispute that had been lodged before it. It was further argued that the resultant award was null and void and that the suit herein cannot therefore be said to be time barred. He argued that



the issue in question is one touching on a deceased's estate and therefore, time does not start running until the same is lawfully administered. The Plaintiff faulted the Defendant for taking over the suit land without undergoing the succession process. It was their contention that they were condemned unheard by the tribunal and that the argument that Luka Wekesa represented them in the Tribunal case was baseless. They argued that the right to ownership of property and the right to be heard are protected under the Constitution and cannot be wished away. He relied in the case of Chief Land Registrar & 4 Others vs. Nathan Tirop & 4 Others (2018) eKLR.

18. On the counter-claim, the Plaintiff argued that he has instituted the current suit as a legal representative of the estate of the deceased and not in his own capacity and as such, the orders sought therein cannot be available to the Defendant as they would amount to evicting the entire estate from the suit land. Further, it was submitted that having obtained the impugned award in 1996, the defendant cannot seek to implement the same more than 12 years later. Reliance was placed in the case of Michael Rabare Ramoya & 2 Others vs. Stephen Okota Barasa (2020) eKLR.

### **Defendants' Written Submissions**

19. The Defendant on the other hand filed his submissions dated 3<sup>rd</sup> May, 2024 where he submitted that the suit land which was jointly registered in his name and that of Zakayo Wekesa (deceased) and is subject to the rules of survivorship and as such, the deceased ceased to be entitled to the property upon his death. He argued that the suit land did not therefore form part of the estate of the deceased available for distribution amongst the beneficiaries. Reliance was placed on Section 102(1) of the RLA, Cap 300(repealed) and in the case of Meru High Court Succession Cause No. 129 of 2015 (2016) eKLR. In the Matter of the Estate of Markson Kimathi Mutuma-Dcd and Kericho ELC Case No. 8 of 2014(215) eKLR. It was therefore his argument that the Plaintiffs claim was misconceived, bad in law and the prayers sought cannot be granted.

### **Legal Analysis and Decision.**

20. I have considered the pleadings and the evidence adduced by the parties and their witnesses. The Plaintiff's claim is that the Defendant holds the suit land in trust for some of the beneficiaries of the estate of Zakayo Wekesa (deceased). His claim is that the Defendant's entitlement, if any, is to the extent of 2 acres allocated to him during the lifetime of their father, the late Zakayo Wekesa. The Defendant on the other hand claims that he does not hold the suit in trust for the Plaintiff or anyone else. It is his claim that the complaint before the Kanduyi District Land Disputes Tribunal was made on behalf of the Plaintiff and other beneficiaries and the Tribunal gave an award which was subsequently adopted as an order of the Court. Having failed to prefer an appeal against the said award makes it stand as valid Judgment/Decree of the Court.
21. From the evidence presented by parties herein, it is common ground that, one Luka Muhalisi, a brother to the parties herein filed a complaint against the Defendant as the registered proprietor of the suit land in the Kanduyi Land District Tribunal and the award of the said tribunal was adopted by the Senior Principal Magistrates Court in Bungoma in Miscellaneous Application No. 71 of 1997. The award of the tribunal was for the suit land E.Bukusu/E.Sang'alo/267 to be divided into 4 portions of 4.5 acres, 3.1 acres, 3.1 acres and 3.1 acres. The Defendant herein was to take up the 4.5 acres while the Plaintiff and his two other brothers were to have 3.1 acres each. It is also evident that the Plaintiff appealed against the said award to the Provincial appeals committee and later sought leave to file an appeal out of time in the Environment and Land Court at Bungoma but he was unsuccessful since the court held that he was a stranger to the proceedings having not taken part in the initial case.



22. I have keenly re-evaluated all the pleadings, the oral and documentary evidence, the written submissions on the subject matter by the parties, the cited authorities and the relevant provisions of the law hereof.
23. In order to arrive at an informed and just decision, I find four (4) salient issues commend for determination in this appeal as follows:-
- a. Whether the decision of Kanduyi Land District Tribunal and the resulting judgment Bungoma in Misc. Application No. 71 of 1997 adopting the award of the Land Disputes Tribunal and Decree was a nullity in law, null and void ab initio.
  - b. Whether the plaintiff is entitled to the orders sought;
  - c. Whether the Plaintiff should be evicted from land parcel E.Bukusu/E.Sang'alo/4009; and
  - d. Who bears the costs of the suit?
24. On the first issue, the Plaintiff argued that the Kanduyi Land Disputes Tribunal did not have jurisdiction to determine matters that would affect registered land under Section 3 as read with Section 6 of the Land District Tribunal Act no. 18 of 1990 (repealed) and thus the award thereof was null and void. The jurisdiction of the Land Disputes Tribunal is established under Section 3(1) of the Land Disputes Tribunal Act NO. 18 of 1990 (CAP 303) (repealed) which states as follows:
- “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. In James Alukoye Were...Vs...Lurambi Division Land Disputes Tribunal, Misc. Civil Appl. No.165 of 2005, the Court held:-
- “The Land Disputes Tribunal has no powers to arbitrate on matters involving title to land or give such order to grant specific performance to rectify the register”.
26. It is trite that under the Land Disputes Act NO.18 of 190 (repealed), Tribunals were conferred with jurisdiction to hear and determine disputes relating to title to land and conversely could not entertain a dispute where their decision would result to an order affecting title to registered land. The High Court under Section 159 of the Registered *Land Act*, Cap 300 Laws of Kenya (repealed) was the entity conferred with jurisdiction to hear and determine disputes relating to title to land. Section 159 states as follows;
159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident magistrate's Court, or, where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunals Act in accordance with that Act.



27. This Court concurs with the submissions by Counsel for the Plaintiff on the place and importance of the issue of jurisdiction. The locus classicus case of Owners of the Motor Vessel Lilian “S” V Caltex Oil (Kenya) LTD 1989 KLR 1 clearly outlines the importance of jurisdiction and the consequences of actions taken without jurisdiction.
28. The Land District Tribunal Act No. 18 of 1990 under Section 7(repealed) gives the Magistrates Court jurisdiction to adopt awards of the tribunal and provides as follows;
- “The Chairman of the tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal. (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.”
29. In exercising the powers as donated above, the Magistrates Court is only mandated to adopt the award of the Tribunal and issue a decree. This position was affirmed by the Court of Appeal in the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011 [2014] eKLR) held that;
- “In any event I do not think that the SRM’s court at Keroka has jurisdiction under the Land Disputes Tribunals Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is bad in law and therefore void ab initio”
30. It is from this decree that an aggrieved party is at liberty to lodge an appeal before the High Court. From the evidence before this court, the Plaintiff herein filed an appeal against the award by Kanduyi LDT to the Provincial Appeals Tribunal at Kakamega vide Case No. 70 of 1998 which appeal was disallowed on grounds of lack of new evidence. The plaintiff thereafter proceeded to file an application for leave to file appeal out of time before the High Court vide Bungoma HCA No. 111 of 2010. However, the court High Court declined and struck out the application to appeal out of time stating that the Plaintiff herein was a stranger to the proceedings. The procedure for lodging an appeal against a decision of the LDT is clearly set out under Section 8 and 9 of the Land Disputes Tribunal Act. Based on the evidence presented, the complainant before the tribunal, Luka W. Mukhalisi, who testified as PW3, did not appeal against the judgment and decree of the Magistrate’s Court. Consequently, it is improper for him to now claim before this court that he was dissatisfied with the Tribunal’s award. If PW3 was disagreed with the award and wished to challenge it, he was required to follow the procedures outlined in the Land Disputes Tribunals Act before seeking recourse elsewhere. This court has not been approached as an appellate court regarding the decree issued by the Magistrate’s Court, and therefore, the decision of the subordinate court cannot be contested in the current suit.
31. The same issue was the subject of the decision in the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil (supra) where the learned Judge stated as follows: -
- “..... 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.



32. This Court agrees with the pronouncements in the case of Sally Jemeli Korir & Another v William Suter & 2 others [2020] eKLR where the court held:

“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 Act. They remain valid judgments of the courts. The resultant decrees remain valid binding instruments capable of execution”

33. The 2<sup>nd</sup> issue is whether the Plaintiff is entitled to the declaratory orders sought. In the present case, a valid judgement of the Court exists vide Senior Principal Magistrate’s Court at Bungoma Misc. Application No. 71 of 1997 Land Case 132 of 2006 between Charles Walimbwa Vs. Luka W. Mukhalisi and a decree issued in terms of the judgement. The said judgement makes a determination and it is not for this court to vary that determination on ownership of the suit parcel of land reference title number East Bukusu/East Sang’alo/267. The said judgement has not been overturned through the legal process provided by law. The declaratory order sought by the Plaintiff seeking determination of ownership of the suit parcel of land has already been made and as such, this Court cannot revisit the issue.

34. The third issue is whether the Plaintiff should be evicted from land parcel E.Bukusu/E.Sang’alo/4009. Having found that there is a valid judgment and decree of the Magistrates court on record, there is no justifiable reason to prevent the Defendant from enjoying all rights appurtenant to his ownership of the suit land, including having quiet possession and occupation of E.Bukusu/E.Sang’alo/2035 which was subsequently subdivided into plots no’s 4007, 4008 and 4009.

35. In the premises therefore, I find that the defendant has established his claim as pleaded in his counterclaim. Consequently, I hereby enter Judgment in favour of the defendant against the plaintiff as prayed in the counterclaim. The plaintiff is also ordered to give vacant possession of land parcel No. E.Bukusu/E.Sang’alo/4009 which he is currently in occupation within sixty (60) days from the date of this Judgment failing which he shall be evicted.

36. Noting that the parties herein are family members, I order each party to bear their own costs.

37. Orders accordingly.

**DATED AND SIGNED AT BUNGOMA THIS 04<sup>TH</sup> DAY OF JULY, 2024.**

.....

**HON.E.C CHERONO**

**JUDGE**

In the presence of;

1. Mr. Angima for the plaintiff
2. Mr. Kiarie for the defendant
3. Bett C/A.

