



**Mokua & 2 others v Mokua & another (Environment and Land Appeal  
175 of 2011) [2023] KEELC 16020 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16020 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL 175 OF 2011**

**M SILA, J**

**MARCH 9, 2023**

**BETWEEN**

**JEREMIAH OMBWORI MOKUA ..... 1<sup>ST</sup> APPELLANT**

**GIDION MIYOGO MOKUA ..... 2<sup>ND</sup> APPELLANT**

**IBRAHIM SAMMY MOKUA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JAPHET BARONGO MOKUA ..... 1<sup>ST</sup> RESPONDENT**

**ALFRED SAMMY MOKUA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of the Senior Resident Magistrate's Court, Keroka,  
delivered on 26 August 2011, in Keroka Miscellaneous Application No. 14 of 2011)*

**JUDGMENT**

1. The genesis of this appeal is a dispute between the parties, who are brothers, which was presented at the Masaba South Land Disputes Tribunal, with the respondents herein as the claimants and the appellants as the objectors. The respondents presented that before their father died, he had subdivided his land amongst his five sons but reserved two parcels of land for himself, being the parcels East Kitutu/Botabori II/243 and 1555. It was averred that according to Abagusii custom, when a father subdivides his land, he leaves a portion for his own use until his death, which portion is known as 'emonga'. It was the case of the respondents that upon the demise of their father, the appellants proceeded to subdivide the land parcel No. 1555 and created the parcels No. East Kitutu/Botabori II/2062, 2063 and 2064. They then shared out these subdivisions and the parcel No. 243 amongst themselves leaving out the other two brothers (the respondents). The two brothers who were left out were of opinion that this was unfair and contended that the 'emonga' ought to have been subdivided equally into five.



2. The defence of the appellants was that when their father distributed his land, they got a smaller share. Thus, after his death, they subdivided the 'emonga' between them and left out their two brothers as their land was already bigger. Upon hearing the case, the tribunal, in an award dated 4 April 2011, ordered the parcels No. 2062, 2063, 2064 and 243, to be shared equally amongst the five brothers and they proceeded to nullify the titles of the appellants. The award was placed before the Senior Resident Magistrate in Keroka and was duly adopted in Keroka Miscellaneous Case No. 14 of 2011. The adoption was on 19 April 2011.
3. The record shows that on 27 July 2011, the Chairman of the tribunal sought an order to have the Executive Officer sign the requisite documents. This was opposed, culminating in a ruling delivered on 26 August 2011. It would appear that it is this ruling which has provoked the appeal. The appeal is based on the following grounds:-
  1. That the learned trial Magistrate erred in law and in fact in re-opening a matter to which the court had become functus officio.
  2. That the learned trial Magistrate erred in law and in fact in deciding to allow an application which was not before court.
  3. That the learned trial Magistrate failed to appreciate that the court had no jurisdiction to amend its judgment
  4. That the learned trial Magistrate failed to appreciate that what was filed before it did not constitute an award.
  5. That the learned trial Magistrate erred in law and in fact in allowing an application to which the appellants were not party.
4. In the appeal the appellants pray that the decision of 26 August 2011 be set aside and judgment earlier entered be sustained.
5. The appeal was argued through written submissions which I have considered. Much of what is in the submissions does not really address the appeal but I see that in their submissions the appellants have introduced the issue that the tribunal did not have jurisdiction.
6. It is trite that jurisdiction is everything and the issue of jurisdiction can be raised at any time. I have not seen anywhere in the submissions of the respondent where they address this issue of jurisdiction.
7. The jurisdiction of the Land Disputes Tribunal was set out in section 3 (3) of the *Land Disputes Tribunal Act*, cap 303A which provided as follows :-
  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.
8. It will be seen from the above that the tribunal's jurisdiction was only to hear issues related to boundaries, claims to work or occupy land, and/or trespass to land. There was no jurisdiction to hear disputes over ownership of land nor jurisdiction to order the cancellation of titles. On my part, I am persuaded that the tribunal had no jurisdiction and everything flowing from the award of the tribunal



was a nullity. There was no substance capable of being tried at the tribunal and if the tribunal ventured to hear the subject dispute it had no jurisdiction to do so. The decree is not one that is capable of being executed as it is based on an award which is null and void. There is even no need of going into the merits or otherwise of the ruling of 26 August 2011. It would be a nullity. As was mentioned in the case of *McFoy v United African Company Limited* [1961] 3 All ER 1169 as cited in the case of *Henry Nyongesa v Hudson Wanjala Bitonyake & another* [2022] eKLR :

“If an act is void, then it is in law a nullity. It is not bad but incurably bad. There is no need for an order of the court to set it 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 anything on nothing and expect it to stay there.”

9. The entire proceedings before the tribunal were a nullity. The award and the decree are a nullity. That award and the decree are incapable of being executed for being a nullity. For this reason, I proceed to set aside the award and the decree in Keroka Miscellaneous Suit No. 14 of 2011. If any party wishes to pursue the cancellation of the titles of the appellants, they need to file an appropriate suit before a court with competent jurisdiction.
10. The last issue is costs. The parties are brothers and in light of that, each party to bear his/her own costs of this appeal and of the proceedings in the tribunal and subordinate court.
11. Judgment accordingly.

**DATED AND DELIVERED THIS 9 DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

