



**Mwakulolera & 4 others v Wambua (Miscellaneous Civil Application
1 of 2021) [2023] KEELC 20513 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20513 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

MISCELLANEOUS CIVIL APPLICATION 1 OF 2021

AE DENA, J

OCTOBER 5, 2023

IN THE MATTER OF THE ESTATE OF ALI OMAR MWAKULOLERA [DECEASED]

BETWEEN

MAENDELEO OMARI MWAKULOLERA 1ST APPLICANT

FATUMA OMAR MWAKUZI 2ND APPLICANT

MESAID FOSI MSHIKENI 3RD APPLICANT

SAID MOHAMED OMAR 4TH APPLICANT

MEJUMAA MOHAMED MWAKUZI 5TH APPLICANT

AND

PIUS M WAMBUA RESPONDENT

RULING

1. This court has been called upon to adopt the proceedings, judgement and decree of the lower court in Kwale Land Case No 28 Of 2007 Omari Ali Mwakurorera Vs Pius M Wambua as an order of this court. A brief history of this matter will suffice at this point. This suit was initially adjudicated before the Msambweni Land Disputes Tribunal as per the proceedings dated 31/1/2006. The claim before the tribunal was between Omari Ali Mwakurorera the Claimant and Pius M Wambua the objector [both deceased]. Parties were summoned for hearing of the dispute between them and which was over land parcel no Kwale/diani SS/470 hereinafter referred to as the suit property.
2. The claimant in his evidence before the tribunal testified that he had personally established the suit property in 1966 and had lived thereon before land adjudication commenced in 1978. That he facilitated its registration as Kwale/diani SS/444. The claimant stated that he made several developments on the suit property which included construction of a permanent house and farming. That he further sold one acre of the land to one Armogast Mzozo. That sometime in the year 2004 the



wife to the objector Pius Wambua sent one Abdalla Mwatunu to stop the claimant from using the suit property which he ignored. The objector's wife personally went to the shamba to warn him against using the suit property and then reported the matter to the District Officer Msambweni.

3. The claimant stated that he conducted an official search on the suit property and found that the same had been sub divided into Plot Nos 997,998 and 999 all in the name of Pius Wambua and titles issued. On cross examination by the objector's wife the claimant denied having ever sold the land to her husband the objector. On cross examination by the panel of elders the claimant confirmed that he had been in occupation of the suit property since 1966.
4. The testimony of the objector's wife Petronilla K Wambua before the tribunal was that the claimant had sold 2 acres of the suit property to her husband. She outlined how the payments for purchase of the property had been made. The objector's wife confirmed that indeed the suit property had been sub divided into three plots and later sold to one Richard Njoroge Muiruri. It was further confirmed that the objector had passed on in the year 2002 and it is in 2005 that the claimant started using the land despite having sold the same. It was noted during the proceedings that the objector's wife did not have the sale agreement, consent and transfer forms.
5. On 6/4/2007 the tribunal made a site visit to the suit property where it was established that the claimant was in occupation of the suit property and had made developments thereon. The tribunal rendered its judgement in favour of the claimant on 17/7/2007 which was later adopted by the lower court in Kwale. Vide an application dated 7/5/2021 and filed in court on 22/7/2021 the matter was placed before the ELC court in Mombasa. Directions were issued on 27/7/2021 by my brother Justice Yano for the file to be transferred to Kwale based on territorial jurisdiction and following the posting of an ELC judge.
6. The matter was placed before me on 23/9/2021 and I directed that the same be heard interparties. On 21/10/2021, parties did not appear before court for hearing of the application dated 7/5/2021 and the same was returned to the registry for parties to fix the same at a date of their convenience. The matter came up on two separate occasions thereafter on 4/11/2021 and 2/2/2022 but did not proceed yet again. The court noted that the application had not been served and ordered service of the same. On 9/3/2022, the court noted that the applicant was deceased and ordered that a grant of representation of the estate of the deceased be sought from the Kadhis Court. Subsequently the applicant vide Kadhis Case No 142 of 2022 obtained grant and filed an amended Notice of Motion dated 20/3/2023 which is the subject of this ruling.
7. The Applicant craves the following orders;
 1. Spent
 2. That this honourable court be pleased to adopt the proceedings, judgement and decree from the tribunal as proceedings of this honourable court.
 3. That this amended application be deemed as duly filed in court
 4. That costs of this application be provided for.
8. The Applicant reiterates the facts as earlier set out culminating into the filing of the matter at the tribunal and adoption of the finding of the tribunal by the lower court in Kwale vide a decree dated 22/2/2021. The court is now being asked to adopt the contents of the said decree as an order of this court based on the fact that the subordinate court cannot revoke a title deed. The Notice of Motion is supported by an affidavit sworn by Maendeleo Omari Mwakulolera a son to the deceased. He reiterates the grounds on the application and further states that prior to his death, the deceased sold one acre of



the suit property to one Amogost Mzozo and after sub division the suit property changed to Kwale/diani/SS/470.

9. The decree the subject of this application is dated 22/2/2021 provides as follows;
 1. The district Land Registrar Kwale to immediately revoke and cancel the title deed of plot no Kwale/diani SS/470 and all the subdivided plot numbers 997,998 and 999 be cancelled.
 2. The plot No Kwale/diani SS/470 be reverted to the original number as Kwale/diani SS/444
 3. The plaintiff Omari Ali Mwakurorera be issued with title deed in 2 above in his name
 4. There be a fresh and new subdivision to be applied for one [1] acre from the original plot no Kwale/diani SS/444 and to be registered in the name of Mr Armogast Mzozo Mdamu ID No xxxx/xx
10. I have considered the pleadings filed before court, the main issue for determination is whether this court should grant the prayer for adoption of the proceedings, judgement and decree from the tribunal as proceedings of this honourable court.
11. It is noteworthy that the provisions of Sections 8[1] and 9 of the Land Disputes Tribunal Act[repealed] provide that in the event a party is dissatisfied with the findings of the tribunal they then ought to appeal before the Provincial Appeals Committee constituted for the province in which the suit property is situated. Further if the party is dissatisfied with the decision, they can appeal the same to the High Court or institute judicial review proceedings to quash the decision by the tribunal. Based on the material placed before me I take that there has been no such appeals filed. It has all been quiet. It is clear that the applicant is not dissatisfied or aggrieved with the decision. All that the applicant wants is to regularize the ownership in tandem with the decision of the Msambweni Lands Dispute Tribunal.
12. The proceedings by the tribunal were already adopted by the lower court and a decree issued as outlined earlier. This court is being moved to re-adopt the proceedings, judgement and decree from the tribunal as its proceedings. It is necessary in my view to examine the jurisdiction of the Magistrates court as it relates to adoption of proceedings and decisions of the Land Disputes Tribunal.
13. The jurisdiction of the Magistrates court under the Land Disputes Tribunal Act (repealed) is donated by Section 7 of the Act which provides;

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."

14. The role of the magistrate's court when faced with an application for adoption of an award of the land disputes tribunal has been a subject of several judicial pronouncements. The Court of Appeal in the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011 [2014] eKLR stated as follows;

Once the award of Borabu Land Disputes Tribunal was adopted as a judgment of Senior Resident Magistrate's Court at Keroka, it ceased to exist on its own. It cannot be the subject of a declaration. And even if it remained alive of what use will it be to declare it a nullity if the decree ensuing therefrom, by SRM's court at Keroka does not face the same fate. The plaintiff has not invited this court to do so. I am sure that he was aware that that would have been an uphill task. The award having become a judgment of the court of competent



jurisdiction can only be varied, vacated, set aside or reviewed either by the same court or by an appellate court in appropriate proceedings. That has not been done by the SRM's court at Keroka nor have I been asked to do so in this suit. 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”

15. Applying the law and the above decision the Magistrate had no jurisdiction to vary the orders and rightly so adopted the said orders. The reason why the applicant has moved this court is that the Land Registrar declined to comply with the decree for the reason that the subordinate court cannot revoke a title deed. In other words, the registrar is stating that the orders have no force of law for want of jurisdiction on the part of the resident magistrate. I have already outlined the role of the magistrate's court which was just but to adopt and nothing more. The Magistrate cannot therefore be faulted.
16. Having said the above the court however could not shut its eyes to the concerns raised by the Land registrar. In my view the answer lay in the jurisdiction of the Land Disputes Tribunal. The jurisdiction of the Land Disputes Tribunal is established under Section 3(1) of the Land Disputes Tribunal Act 1990 (CAP 303A (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.”
17. From the above it is apparent that the Msambweni Land Disputes Tribunal decided with respect to ownership of the suit property and the authenticity of the titles that had been issued. Clearly the tribunals decision was well beyond their scope as outlined under Section 3[1] quoted above. It is clear that the proceedings prima facie violated the Land Disputes Tribunal Act (now repealed). I am persuaded by the finding in the case of *Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & Another*, Nairobi, High Court, JR 370 of 2013 [2014] eKLR. In that case, Odunga J held as follows-

In my view the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.

18. I think for me the validity of the order in the present case draws from the fact that the Magistrate had no leeway as per the provisions of section 3(1) of the Land Disputes Tribunal Act herein. But what about the substratum of the same. The substratum is the judgement of the Msambweni Land Disputes Tribunal and which I have shown was rendered without jurisdiction. For me as long as the judgement made is without legal basis, it is of no legal effect. It was in the first place null and void. I find support in the case of *Macfoy vs. United Africa Co. Ltd* (1961) 3 All ER 1169 and which has been applied with approval in our Courts where Lord Denning delivering the opinion of the Privy Council stated ‘If an act is void, then it is in law a nullity. It is not only bad but incurably bad.....And every proceeding which is founded on it is also bad’
19. What is before me is an application to adopt the proceedings and judgement of the Msambweni Land Disputes Tribunal as proceedings of this court and I decline to do so on the basis of my discussions



above. Nothing can come out of an illegality. It is my view that the applicants can consider and exercise other avenues in seeking ownership of the suit property.

20. The upshot is that the amended Notice of Motion dated 20/3/2023 is dismissed with no orders as to costs.

DELIVERED AND DATED AT KWALE THIS 5TH DAY OF OCTOBER, 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Applicant present in person

Maendeleo Omar Mwakulolera –Present

2nd applicant – Fatuma Omar Mwakuzi –Present

4th applicant – Said Mohamed Omar - Absent

5th Applicant – Mejumaa Mohamed Mwakuzi - Absent

Mr. D. Dissi- Court Assistant.

