



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ELC CASE NO. 6 OF 2021

THOMAS MUSYOKA MUANGA.....PLAINTIFF

VERSUS

MUTUNGA MUANGA.....1ST DEFENDANT

MULWA MUANGA.....2ND DEFENDANT

JUDGEMENT

INTRODUCTION

1. The Plaintiff filed a suit by way of the Plaint dated 17th January 2017 seeking the following orders:

- i. A declaration that the decision and award by the Land Disputes Tribunal Kitui in Land Case No. 20 of 2006 filed as Kitui Chief Magistrate's Civil Case No. 132 of 2007, read and adopted as judgment of the court and the resulting decree thereof is a nullity in law, null and void ab initio.***
- ii. A declaration that the Land Parcel No Matinyani/Kauma/1446 in its entirety is the property of the Plaintiff.***
- iii. Costs of the suit to be awarded to the Plaintiff.***

2. The 1st Defendant did not enter appearance or file a defence though he was served with summons to enter appearance and file a defence. An affidavit of service to that effect was sworn by one Dominic Mwendwa Muinde and filed in court on 3rd April 2017. The 2nd Defendant filed a document named "Admission of Claim" filed in court on 3rd April 2017. In the said admission of claim the 2nd Defendant states as follows;

"....do hereby ADMIT the Plaintiffs claim in whole. The Plaintiff is my elder brother and indeed Land parcel No. Matinyani/Kauma/1446 is his land though I use a portion of it with his consent."

3. The suit proceeded undefended on 8th October 2020. The Plaintiff adopted his written statement filed in court on 25th January 2017 as his sworn statement and further produced as exhibits the documents filed in court on the same date. Counsel for the Plaintiff filed written submissions on 18th November 2020.

THE PLAINTIFF'S CASE

4. This suit relates to Land parcel number Matinyani/Kauma/1446 which is registered in the Plaintiff's name. A dispute arose regarding ownership of the land giving rise to a claim being lodged before the Kitui Land Disputes Tribunal ("the Tribunal) Claim No. 20 of 10th March, 2006 by one Muthami Muanga against the Plaintiff herein who was the Objector. The two parties to the Tribunal Dispute are step-brothers.

5. The Tribunal heard the dispute and rendered a decision on 28th April 2006 finding *inter alia* that the suit property be sub-divided into four portions amongst Muthami Muanga (Deceased), Musyoki Muanga (the Plaintiff), Mutunga Muanga (the 1st Defendant) and Mulwa Muanga (the 2nd Defendant). The decision of the Land Disputes Tribunal was adopted as a Judgment of the Court in the Senior Resident Magistrate's Court at Kitui Land Case 132 of 2006 on 7th February 2007. Following entry of judgement, a Decree was issued on 12th April 2007 in the following terms;

A) Musyoka Muanga to retain land parcel No. Matinyani/Kauma/956

B) Land parcel No. Matinyani /Kauma/1446 to be subdivided amongst Muthami Muanga-area occupied by Syvetha Muthami and Mbaluka Muthami.

C) Musyoka Muanga-area with houses.

D) Mutunga Muanga-area he has houses and farms.

E) Mulwa Muanga-area with houses.

F) The district land officer to send a surveyor to effect these subdivisions.

G) Each party to be given Title deed.

6. The Plaintiff filed an application dated 26th June 2015 filed on 29th June 2015 before the Magistrates Court seeking to review, vary or set aside the Decree but there is no evidence on record of the outcome of that application.

7. The Plaintiff seeks to have the above decisions of the Tribunal and the Resident Magistrates Court declared a nullity in law, null and void ab initio. Further he seeks a declaration that Land Parcel No Matinyani/Kauma/1446 in its entirety is his property.

8. In support of his claim, the Plaintiff produced a Title Deed issued to him on 12th June 1996 under the Registered Land Act (CAP 300) (now repealed). The Plaintiff further produced in evidence the proceedings before the Tribunal and the decision thereof, the proceedings before the Senior Resident Magistrates Court at Kitui, the judgement entered and the decree issue by the said court.

9. The Plaintiff challenges the jurisdiction of the Tribunal in dealing with disputes relating to, involving or arising out of ownership of registered land. He claims that any decision made by the Tribunal and the consequent orders made thereafter were invalid, *null* and *void ab initio*.

10. Counsel for the Plaintiff submitted extensively on the issue of jurisdiction and relied on the authority of **Owners of the Motor Vessel Lilian "S" V Caltex Oil (Kenya) LTD 1989 KLR1** where the Court of Appeal held that without jurisdiction a court has no power to make one more step and that a court of law does not have jurisdiction in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

11. Counsel further relied on the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** where the Court held that a Court's jurisdiction flows from either the Constitution or legislation or both and further that a Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

12. Further on the question of the Courts jurisdiction, the Plaintiff's Counsel relied on decision of Justice A. Ombwayo in **Republic v Chairman Kandara District Land Disputes Tribunal & Another Exparte Godfrey Mungai {2013} eKLR** for the submission that a body without jurisdiction could not interfere with the ownership of land.

ISSUES FOR DETERMINATION

13. I have considered the suit before this court, all the pleadings and the entire material on record and I am of the opinion that the following issues arise for determination in this matter:

i. Whether the decision of the Land Disputes Tribunal Kitui in Land Case No. 20 of 2006 was a nullity in law, null and void ab initio for want of jurisdiction.

ii. Whether the resulting Judgment of the Senior Resident Magistrate's Court Land Case No. 132 of 2007 adopting the award of the Land Disputes Tribunal and Decree was a nullity in law, *null* and *void ab initio*.

iii. Whether the declaratory orders sought in the Plaintiff's Complaint as relates to issue 1) and 2) above can be granted.

iv. Whether the Plaintiff is the owner of the Land Parcel Matinyani/Kauma/1446

ANALYSIS AND FINDINGS

14. The first issue for determination is -:

“Whether the decision of the Land Disputes Tribunal Kitui in Land Case No. 20 of 2006 was a nullity in law, *null* and *void ab initio* for want of jurisdiction”

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.”

15. The Court concurs with the submissions of the Plaintiffs Counsel on the place and importance of the issue of jurisdiction. The authorities cited **Owners of the Motor Vessel Lilian “S” V Caltex Oil (Kenya) LTD 1989 KLR 1 and Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** clearly capture the consequences of an act taken without jurisdiction. The cases of **Macfoy v. United Africa Co. Ltd 1961 3 All ER 1169, Re Continental Credit Finance Ltd [2003] 2 EA 399; read together with Jonathan Amunavi vs The Chairman Sabatia Division Lands Dispute Tribunal & Another, Kisumu Civil Appeal No. 256 of 2002(unreported)** and in addition to **Section 3(1)** of the Land Disputes Tribunal Act, lead to the undeniable conclusion that the decision rendered by the Kitui Land Disputes Tribunal was arrived at without jurisdiction.

16. The second issue for determination is:

“Whether the resulting Judgment of the Senior Resident Magistrate’s Court Land Case No. 132 of 2007 adopting the award of the Land Disputes Tribunal and Decree was a nullity, in law *null and void ab initio*.”

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 he 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.”

17. The above provision of the law is couched in mandatory terms and it is the courts view that once the documents referred to are received by the Magistrates Court there is no discretion as to whether or not to enter judgement in accordance with the Tribunals award. Indeed, apart from the role given under **Section 7** of the Act, **Section 3 (9)** clearly states that the magistrate’s court has no jurisdiction or powers in cases involving any issues set out in paragraphs (a) to (c) of subsection (1).

18. The above position is supported by the findings of the Court of Appeal in the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011 [2014] eKLR**) where the Court concurred with the Superior courts finding on the role of Magistrates Courts when faced with an application for adoption of an award of the Land Disputes Tribunal. The court had 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”

19. It is clear from the above that the role of the Magistrates Court is limited to what is provided for at **Section 7** of the Land Disputes Tribunal Act. At the time when the matter came before the Magistrates Court, the Plaintiff herein who was the objector before the Tribunal, had not filed an appeal to the Appeals Committee as provided under **Section 8** of the Act. The court was thus bound to adopt the award and enter judgement in terms of the said award. I therefore find no fault with the exercise of jurisdiction by the Magistrates court in entering judgement in terms of the award by the Land Disputes Tribunal.

20. The third issue for determination is:-

“Whether the declaratory orders sought in the Plaint as relates to issue 1) and 2) above can be granted.

21. The Court finds that the Land Disputes Act provided an elaborate and comprehensive dispute resolution mechanism that if the Plaintiff herein had felt aggrieved by the decision of the Tribunal and followed the said process, the issues raised in this suit would have been heard and determined as provided by the law. Section 8 and 9 of the Land Disputes Tribunal Act being the operative sections state; -

“Section 8 (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

Section 9 -Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law

within sixty days from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved”.

22. From the record of the Tribunal the Plaintiff does not appear to have been aggrieved by the decision of the Tribunal. The said decision clearly informs the parties that “whichever party is unsatisfied by this decision is given 30 days to appeal” The Plaintiff did not appeal to the Appeals Committee within thirty days of the decision or at all. Instead the matter was placed before the Magistrates court as envisaged under **Section 7 of the Act**. On 7th February 2007 the Court read the award of the elders to the parties and adopted the same as a judgement of the court. The record shows that the Plaintiff herein was present in court. The Court read to the parties their right to appeal within 30 days. Having failed to follow to the end the dispute resolution process provided in law, the Court finds that the Plaintiff cannot claim to be entitled to the orders sought in this suit.

23. The court is bound by the Court of Appeal decision in **Catherine C Kittony v Jonathan Muindi Dome & 2 others [2019] eKLR** where the court was dealing with a dispute similar to the one in this suit and it held;

“The Land Dispute Tribunal had mechanisms to deal with outcomes such as the one rendered by the 2nd respondent. The award by the 2nd respondent ceased to exist upon adoption by the court as its judgment and a decree. The award cannot be challenged by filing a fresh suit as it is trite law that where a statute establishes a dispute resolution mechanism that mechanism must be followed and exhausted, where a party fails to do so he cannot be heard to say that his rights were denied.”

24. The court further observed that;

“In the instant appeal, it is not in dispute that the appellant was aggrieved by the decision of the 2nd respondent. However, instead of lodging an appeal before the Provincial Appeals Committee constituted for the province in which the land which was the subject matter of the dispute was situated and if still dissatisfied to appeal to the High Court on a point of law (see: Section 8(1) and (9) of the Land disputes Tribunal Act) or institute judicial review proceedings to quash the decision by the 2nd respondent as it was alleged that it acted in excess of its jurisdiction in making the award, the appellant opted to file a fresh suit before the ELC which was not in order. See also Speaker of National Assembly v Njenga Karume [2008] 1 KLR. We reiterate that if indeed the appellant did not agree with the decision of the 2nd respondent and wished to challenge it, it behooved her to follow the route prescribed by the Land Disputes Tribunals Act before proceeding anywhere else.”

25. 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. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

26. It is further the finding of this court that the legal status of decisions made by the Land Disputes Tribunals established under the repealed **Land Disputes Act** is established under **Section 23(3)** of the Interpretation and **General Provisions Act (Cap 2)** In the case of **Sally JemeliKorir& Another v William Suter & 2 others [2020] eKLR** the court the held that:

“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”

27. The fourth issue for determination is:-

“Whether the Plaintiff is the owner of Land Parcel No. Matinyani/Kauma/1446

28. The answer to this question has been considered earlier in this judgement based on the authority of the Court of Appeal in **Florence Nyaboke Machani v Mogere Amosi Ombui& 2 others (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.

29. In the present case a valid judgement of the Court exists vide Senior Resident Magistrate’s Court at Kitui Land Case 132 of 2006 between Muthami Muanga and Musyoka Muanga 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 deterrence on ownership of the suit parcel of land reference Matinyani/Kauma/1446. 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 determined. It is noteworthy that the Claimant in the Land Disputes Tribunal case, Muthami Muanga, alleged to be deceased, was not joined in this suit neither was the administrator to his estate or the beneficiaries of the portion awarded to the said Muthami Muanga.

FINAL ORDER

30. For the foregoing reasons, it is the Court's finding that the Plaintiff's suit lacks merit and the same is hereby dismissed with no order as to costs

DELIVERED, DATED AND SIGNED AT KITUI THIS 7TH DAY OF OCTOBER 2021.

HON.L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT – KITUI

Judgement read in open court in the presence of-

C. Nzioka - Court Assistant

Kamwendwa Advocate holding brief for Kalili Advocate for Plaintiff.

No attendance for the defendant.

HON.L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT - KITUI