



Kimata v Omani & another (Environment & Land Miscellaneous Case E007 of 2024) [2025] KEELC 4626 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E007 OF 2024**

E ASATI, J

JUNE 12, 2025

**IN THE MATTER OF AN APPLICATION UNDER
SECTION 65 (2) OF THE CONSTITUTION OF KENYA**

BETWEEN

EMMANUEL ESADIA KIMATA APPLICANT

AND

FELISTA KAVESA OMANI 1ST RESPONDENT

MARY ROBAI 2ND RESPONDENT

*(Formerly Kakamega High Court Constitutional Application
No. 52 Of 2006, Kakamega ELC Misc. Appl. No 19 Of 2017)*

JUDGMENT

Introduction

2. The court record shows that this action was commenced in the year 2006 vide the Originating Notice of Motion dated 3rd May 2006 expressed to have been brought pursuant to the provisions of Rule 2 of *the Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006.
3. It was first filed in the High Court of Kenya at Kakamega as Kakamega HC Misc. CC No. 52 of 2006. The record shows that later it was assigned a new number as KakamegaELC MiscC. No. 19 of 2019 upon transfer to the Environment and Land Court at Kakamega. It was finally transferred to the Environment and Land Court at Vihiga and given the current case number. The application sought for orders that; -



- a. The court be pleased to set aside the adoption of the decision of the Vihiga Land Disputes Tribunal dated 7/10/1997 by the Senior Resident Magistrate's Court Vihiga in Vihiga SRM Misc ApplNo. 21 of 1997.
 - b. The court be pleased to set aside the adoption of the decision of the Kakamega Provincial Land Disputes Appeal Committee dated 9/9/1999 by the Senior Resident Magistrate's Court Vihiga in Vihiga SRM Misc Appl No. 21 of1997.
 - c. The court be pleased to set aside all the orders and proceedings in Vihiga Misc Appl. No.21 of 1997.
 - d. The court be pleased to order cancellation of the title deed number S. Maragoli/Kegoye656 in the name of Christina Savai and be pleased to order that a new one do issue in the name of the applicant.
 - e. That there be a stay of execution of the decree in VihigaSRM MiscAppl No. 21 of 1997 and more particularly stay of eviction of the applicant from the land parcel number S. Maragoli/ Kegoye656 pending the hearing and determination of the application.
 - f. The application be placed by the Deputy Registrar before the Judge for directions.
 - g. That the matter be heard at Kisumu because Hon. Justice G.B.M Kariuki has dealt with an application in this matter.
 - h. File number VihigaSRM Misc App; No.21 of 1997 and Kakamega Misc. Civil Appl. No. 83 of 1994 be forwarded to this court and be part of the record hereof.
 - i. The costs of the application be provided for.
13. The application was based on the grounds that justice was not being administered by the Vihiga Senior Resident Magistrate and that Vihiga SRM Misc Appl No.21 of 1997 proceeded in contravention of Kakamega Misc Civil Appl No. 85 of 1994.
 14. The application was supported by the averments in the Supporting Affidavit sworn by Raphael Chasimba on 3rd May 2006. He stated that he filed Kakamega Misc Civil Application No. 83 of 1994 and obtained a Grant of Letters of Administration in respect of the estate of his late father by the name of Leo Chasimba. That with the Grant, he got registered as the proprietor of land parcel known as S. Maragoli/Kegoye656. That the Respondents objection to the Grant was dismissed. That subsequently the Respondent instituted proceedings at the Vihiga Land Disputes Tribunal which vide its judgement dated 7/10/1997 awarded the suit land to the Respondent. That he (Applicant) appealed to the Kakamega provincial Land Disputes Provincial Appeals Committee which Committee upheld the decision of the Tribunal. That the decisions of the Tribunal and of the Appeals Committee were adopted by the Magistrate's Court at Vihiga.
 15. That although he did not immediately appeal against the decision of the Appeals Committee because he was sick, he later applied for extension of time to appeal in Kakamega Misc Appl. NO. 155 of 2003 which application was dismissed. That the Respondent has registered the land in her name and that she now wants to evict him (applicant) from the land.
 16. That he is an old man and has nowhere to go. That it was a travesty of justice for the Respondent to have abandoned the succession cause for the Tribunal proceedings when the Tribunal had no jurisdiction.
 17. In the pendency of the suit, the original Respondent Christina Savai passed on and was substituted with Felistus Malobaand Mary Robai.The application was opposed vide the Grounds of Opposition



and filed in court on the same date. The Respondents' case is that the application is an abuse of court process. That the issues raised in the application in respect of land parcel number S. Maragoli/Kegoye656 have been determined to finality interpartes vide Senior Resident Magistrate, Vihiga Misc Appl No. 21 of 1997, Kakamega High Court Misc Appl No. 155 of 2003 and Civil Appeal No. 100 of 1999, that the applicant has come up with the application so as to deny the Respondent peaceful rights as the proprietor of land parcel No. S. Maragoli/Kegoye656 and that the Respondent's land which she holds title is S. Maragoli/Kegoye656 as indicated in paragraph (d) of the application. She therefore prayed that the application be dismissed with costs.

18. The application was disposed of by way of Affidavit evidence and submissions.

Submissions

19. Written submissions dated 19th December 2024 were filed by the firm of Athunga & Co. Advocates on behalf of the applicant. Counsel submitted that the applicant was the registered owner of land parcel known as South Maragoli/Kegoye656 having been so registered in the year 1974. That the late Christina Savai (the original Respondent herein) now deceased and substituted by the current Respondents, sued the applicant in Kakamega High Court Misc. Application No. 83 of 1994 where she objected to succession proceedings done in the year 1974. That the Respondent's claim/objection was dismissed vide court order dated 10/2/1998.
20. Counsel submitted that once the objection was dismissed, the Respondent had no recourse to move to the Land Disputes Tribunal. Counsel submitted further that the Tribunal had no jurisdiction to hear matters concerning title, eviction, cancellation of title and/or transfer of land.
21. That the claim by the late Christina Savai did not fall under any of the claims listed in section 3 of the Land Disputes Tribunal Act. That the applicant's right to property was violated. That the failure of the trial court to note that the Tribunal's decision was ultra vires and null ab initio did not protect the applicant's right to be heard in a forum with jurisdiction and further the court did not dispense justice and did not protect the applicant's right to property.
22. That there was no evidence that Christina Savai – the Original Respondent bought the land. Counsel submitted that the land in question having been unlawfully transferred using orders from incompetent Tribunals the rights of the late Raphael Chasimba were infringed. That all orders given by the Tribunal should be vacated and the land be restored to the name of Raphael Chasimba, deceased. Counsel urged the court to allowed the application with costs.
23. On behalf for the Respondents written submissions dated 14th April, 2025 were filed by the firm of Ben Aduol Nyanga & Co advocates.
24. Counsel submitted that the Land Disputes Tribunal at Vihiga and the Provincial Appeals Committee had jurisdiction under Section 3 of the Land Disputes Tribunals *Act No. 18 of 1990*. That the claim brought before the Tribunal against Raphael Chasimba was for trespass which was well within its jurisdiction. That both the claimant and the objector were heard and the Tribunal reached a verdict. That an appeal to the Provincial Appeals Committee by Raphael Chasimba was dismissed.
25. On whether the applicant's Constitutional rights were violated, Counsel submitted that the applicant has failed to demonstrate with specificity the nature of the rights violated and the manner in which the Respondent occasioned such violation. That the use of regular judicial and statutory process to resolve a dispute including a Tribunal award and adoption by court cannot be construed as unconstitutional conduct.



26. On whether the Respondent holds a valid and lawful title to the suit land, Counsel submitted that Christina Savai the Original Respondent was lawfully registered as proprietor pursuant to the Tribunal award and court order that corrected fraudulent entries. That an appeal by the applicant namely appeal No. Kakamega H.C.C Appeal No. 100 of 1999 was withdrawn at the instance of the applicant. That the Respondent's title was protected by *the Constitution* and section 27 and 28 of the Registered *Land Act*. Counsel submitted that the applicant was not entitled to the relief sought. That the applicant was estopped from re-opening a matter that was previously litigated and conclusively determined.
27. Counsel submitted further that the doctrine res judicata as outlined in *Henderson v Henderson* [1843] 67 ER 313 and in *Uhuru Highway Development Ltd v Central Bank of Kenya & others* Civil Appeal No. 36 of 1996 prohibits the re-litigation of issues that were or ought to have been raised in earlier proceedings. That the current action arises from the same subject matter, same cause of action and involves the same parties.

Counsel prayed that the application be dismissed with costs.

Determination

28. There is no dispute that Raphael Chasimba the original applicant herein was, up to the year 2003, the registered owner of the suit land parcel known as South Maragoli Kegoye/656. There is also no dispute that the land is currently registered in the name of Felista Kaveza Omanion behalf of the estate of Christine Savai Chasimba, deceased the original Respondent.
29. It is common ground that the registration of the suit land in the name of the applicant was cancelled and replaced with that of Christine Savai Chasimba pursuant to the decision of the Land Disputes Tribunal and the Provincial Appeals Committee which were adopted as judgement of the court vide Vihiga SRMC Misc Appl. No. 21 of 1997.
30. The Land Disputes Tribunal was established under section 4 of the Land Disputes Tribunals Act, 1990. Section 3 of the Act limited the Tribunal's jurisdiction. It provided that;
- “ 3 Subject to this Act, all cases of a civil nature involving disputes as to;
- (1) 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.”
34. The claim before the Tribunal was not one based on trespass as contended on behalf of the Respondent. It was a claim of title to the suit land. The decision emanating therefrom led to the cancellation the applicant's title and issuance of a new title in the name of the original Respondent.
35. The Tribunal had no jurisdiction to entertain claims relating to or to cancel title to land.
36. In the case of *Johana Nyokwoyo Buti vs Walter Rasugu Omariba (Suing through his attorney Beutah Onsomu Rasugu) & 2 Others* [2011] eKLR the Court of Appeal held that although the Magistrate's Court had entered judgement in accordance with the decision of the Tribunal, such a decision could be challenged in fresh proceedings if it was obtained by fraud or mistake. The decision that was adopted as a judgement of the court was ultra vires the powers of the Tribunal. Both the Land Disputes Tribunal and the Provincial Appeals Committee had no jurisdiction to handle the matter before them.



The award emanating from them that was filed in court was therefore a nullity. Cancellation of the applicant's title on the basis of the said award amounted to breach of the appellant's constitutional right to land.

37. The court finds that the application has merit and hereby allow it in terms of prayers a, b, c and d as follows:

- i. The adoption of the decisions of the Vihiga Land Disputes Tribunal dated 7/10/1997 and the Kakamega Provincial Land Disputes Appeal Committee dated 9/9/1999 by the Senior Resident Magistrate's Court Vihiga in Vihiga SRM Misc Appl No. 21 of 1997 is hereby set aside.
- ii. All the orders and proceedings in Vihiga Misc Appl. No. 21 of 1997 are hereby set aside.
- iii. Title deed number S. Maragoli/Kegoye656 in the name of Christina Savai Chasimba and subsequent registrations is hereby cancelled and a new title do issue in the name of the applicant Raphael Chasimba, deceased for administration as part of his estate.
- iv. Each party to bear own costs of the application.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 12TH DAY OF JUNE, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

Athunga for the petitioner.

Mwilolo h/b for Willie for the Respondent.

