

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

MISC. CAUSE NO. 48 OF 2018

ALI TUNGWA.....APPLICANT

VERSUS

MOHAMED BAKARI MWAVU.....RESPONDENT

RULING

1. The applicant moved this court vide a Notice of Motion dated 15th November 2018 premised on the provisions of Section 3, 3A & 89 of the Civil Procedure Act together with Section 30 of the Registered Land Act Cap 300(repealed). The applicant sought for orders;

(a) That the orders of the Senor Resident Magistrate Court in Kwale in SPMCC Case No. 40 of 2007 be confirmed and made absolute in favour of the Applicant herein Ali Tungwa as the Proprietor of the parcel of land known as Kwale/Kundutsi/B/1402 together with 33 others.

(b) That the title to the parcel of Land Kwale/Kundutsi/B/1402 be nullified as against the Respondent and the same be vested absolutely in favour of Ali Tungwa and the 33 others.

2. The application is supported by the affidavit of Juma Ali Tungwa sworn on the 15th November 2018. Mr Tungwa annexed the decision of the Matuga Land Disputes Tribunal which was adopted as an order of the court in Kwale SRMC Land Cause No 40 of 2007 on 18th February 2008.

3. The application is vehemently opposed by the Respondent via the replying affidavit sworn on 4th March 2019. He deposed that his title can only be cancelled by the High Court upon the filing of a proper suit. He also deposed that the order annexed by the applicant purported to have been issued on 18th February 2008 is fake. Further that the magistrate's Court cannot direct the High Court to do anything. That he never participated in the hearing before the Tribunal. The Respondent urged the court to dismiss the illegal application.

4. I have read through the pleadings as filed together with the annexed documents. I note that the order sought to be adopted as an order of this court was already adopted by a court vide Kwale SRMC Land Case No. 40 of 2008. Whether the order existed or not is not upon this court to investigate within this application. The proceedings and finding of the Land Disputes Tribunal were to be adopted by a Magistrate's Court as per the provisions of Section 7(2) of the Land Disputes Tribunal Act (repealed). Once adopted, what remained was its execution.

5. The Land Disputes Tribunal had no jurisdiction to direct the High Court to nullify a title. In this case where they failed to make appropriate orders as regards the Respondent's title, the only avenue left to the applicant was to file a fresh suit seeking orders of cancellation of the impugned title. The orders being sought cannot be granted in the manner in which the court has been approached since this court cannot be used as a vehicle to execute orders issued by a Tribunal or a Magistrate's Court.

6. Further, in the proceedings of the Land Disputes Tribunal annexed, it referred to 33 persons. The applicant has annexed a list of names of 33 people bearing fresh signatures which appears on the face of it as a freshly constituted list. He ought only to annex the names of people whose names were in the list of the proceedings before the Tribunal. On this account, the court cannot verify the authenticity of this new list merely by way of affidavit evidence. I find that annexing a new list amounts to amending the proceedings as it was before the Land Disputes Tribunal without leave of the court. Consequently the orders sought if granted may tantamount to benefitting parties some of whom were not parties in the case before the Land Disputes Tribunal.

7. Lastly, the application is also seeking orders to cancel the Respondent's title which order is mandatory in nature. The Respondent has deposed that his title is a first registration thus indefeasible. He also said that he never participated in the proceedings before the Tribunal. What was annexed by the applicant as "JAT-1" only contains names of board members and the judgement. The applicant in his further affidavit sworn on 13th March 2019 stated that the Respondent was summoned but he did not go far to admit or deny, that the Respondent did not attend the hearing.

8. The applicant deposed that it was too late in the day for the Respondent to raise the issue of the indefeasibility of his title and non-attendance before the Tribunal now. However these are issues that ought to be thrashed out before any final orders are granted. In light of this, it does not make the application fall under the category of simple and clear cases. Once the orders are granted, the Respondent would not have an opportunity to defend himself since there will be nothing remaining for determination.

9. In conclusion, I find that this application is frivolous and incompetent. The same be and is hereby struck out. Each party to bear their ensuing costs.

Dated, Signed and Delivered at Mombasa this 14th day of August 2019.

A. OMOLLO

JUDGE.