



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC MISC CASE NO. 52 OF 2017**

**(Formerly Kisii Elc Misc. Case No. 285 of 2017)**

**JOSEPHAT MOSE MAIRONGI.....APPLICANT**

**VERSUS**

**THE CHAIRMAN LAND DISPUTES TRIBUNAL RACHUONYO DISTRICT.....1<sup>ST</sup> RESPONDENT**

**JENIPHER AUMA AWENDO.....2<sup>ND</sup> RESPONDENT/INTERESTED PARTY**

**JUDGMENT**

**A. Introduction**

1. The genesis of the instant case is the decision of the defunct Rachuonyo District Land Disputes Tribunal (The Tribunal) delivered on 22<sup>nd</sup> January, 2007 with regard to a dispute of ownership of land reference number Kabondo/Kasewe/612 measuring 2.8 hectares in area (the suit land) situate within Homa-Bay County. By the said decision, the Tribunal recognized that the title to the suit land was acquired fraudulently and awarded the land to the interested party, Jenipher Auma Awendo who was the claimant before the tribunal. Thus, it provoked this case.
2. On 21<sup>st</sup> March, 2007, leave of the court (Emukule, J) was granted to initiate the instant proceedings further to chamber summons application dated 21<sup>st</sup> March 2007. So, the applicant, Josephat Mose Mairongi proceeded accordingly.
3. On 29<sup>th</sup> July, 2008, this case was transferred from Nairobi High Court to Kisii High Court for hearing and determination. Further, on 17<sup>th</sup> July, 2017, the matter was transferred to this court for hearing and determination.
4. The applicant is represented by learned counsel, Mr. James Nyakundi.
5. The respondent is not represented herein.
6. Learned counsel, Mr. H. Obach is on record for the interested party.

**B. The applicant's case**

7. By a notice of motion application dated 12<sup>th</sup> April, 2007 and filed in court on 13<sup>th</sup> April, 2007 under Law Reform Act Chapter 26, Order LIII Rule 3 of the Civil Procedure Rules ( prior to 2010 Rules) The applicant is seeking the following orders:-

**a. An order of Certiorari to remove into the High court of Kenya at Nairobi and quash the proceedings and decision by the Rachuonyo District Land Disputes Tribunal delivered on 22<sup>nd</sup> January 2007 involving a dispute of ownership of the parcel of land known as KABONDO/KASEWE/612.**

**b. The costs of this application be proved for.**

8. The application is anchored on the matters set out in the applicant's statutory statement dated 20<sup>th</sup> March 2007 and the affidavit sworn on same date. Briefly, the applicant claims that in 1973 he lawfully purchased the suit land from Yuda Awendo, Alphose Mbola, Christopher Mbola and one Okoth and that since then, he has been in possession and occupation of the same. That upon demarcation of the suit land in 1975, he was registered as its proprietor and issued with a title deed on 4<sup>th</sup> May 1977.

9. The applicant further claims that in the year 2006, the interested party invaded the suit land, started its cultivation and erected temporary structure thereon. That he immediately made a formal complaint to the police whereby the interested party was arrested and charged with a criminal offence of trespass at Oyugis law courts namely criminal case No. 228 of 2006. That as the criminal case was pending before the court, the interested party filed a claim with the Tribunal claiming that the suit land belonged to her late husband Manaseh Awendo who had inherited it from his father, Yuda Awendo Anoko. That the Tribunal heard the complainant ex-parte and rendered the impugned decision.

10. The applicant also claims that since he was the registered proprietor of the suit land, the rights under customary law as claimed by the interested party, are not overriding interests under the **Registered Land Act Chapter 300 Laws of Kenya (the repealed RLA)**. That the Tribunal did not have jurisdiction over disputes concerning title of registered land. That the interested party does not have a claim over the suit land known by any law and that she originated the claim at the Tribunal to achieve her malice and mischief.

11. In his submissions dated 5<sup>th</sup> August 2019 and filed on 7<sup>th</sup> August 2019, learned counsel for the applicant gave the introduction and brief background of the dispute and identified as well as analysed three (3) issues for determination namely:-

**a. Whether the applicant is the absolute proprietor of the suit land Kabondo/Kasewe/612.**

**b. Whether the Rachuonyo Land Dispute Tribunal had jurisdiction to adjudicate land ownership of the suit land.**

**c. Whether the interested party has locus standi/audience before this Honourable court.**

12. Counsel submitted that the applicant is the absolute proprietor of the suit land and that the interested party has not strictly proved fraud as required under section 107 of the Evidence Act (Cap 80 Laws of Kenya) and the decision in **Mirko Blaekterman and another –vs- David Mwangi Muiruri and 2 others (2015) eKLR**. That the registration of the applicant as the proprietor of the suit land extinguished customary law rights which are not overriding interests under section 30 of the repealed Registered Land Act (**now section 26(1)**) of the Land Registration Act, 2016 (2012) and as observed in the case of **Monica Mukulu Muteti –vs- Mutava Maingi (2019) eKLR**.

13. Counsel further submitted that in view of the decision in **Owners of Motor Vessels Lilian S” –vs- Caltex Oil (K) Ltd (1989) eKLR** and **Republic –vs- Meru Central District Land Disputes Tribunal and others ex-parte Julius Kirima M’Ndewa (2007) eKLR**, the Tribunal did exceed its mandate in attempting to resolve a land ownership dispute. That the interested party does not have any Locus standi over the suit land as she does not occupy or use the same and that by court order of 23<sup>rd</sup> March 2007, she was directed to relinquish it to the applicant. Counsel urged this court to grant orders sought in the application.

14. In his further affidavit sworn on 29<sup>th</sup> June 2019 and filed on 2<sup>nd</sup> July, 2019, the applicant reiterated the contents of his affidavit. He relied on orders issued herein on 22<sup>nd</sup> March 2007 (JMMI) and a land certificate (JMM2) in support thereof.

### **C. The respondent’s case**

15. The respondent was duly served on 11<sup>th</sup> July, 2008 as shown in an affidavit of service sworn on 15<sup>th</sup> July, 2008 by Stephen Oluoch Nyagoi a court process server and filed on 29<sup>th</sup> July, 2008. Again, on 30<sup>th</sup> November 2017 the respondent was duly served as per an affidavit of service sworn on 7<sup>th</sup> December 2017 by Kefa Nyakundi Kibeti, an authorized process server. The respondent was also served on 27<sup>th</sup> April, 2018 as revealed in affidavit of service sworn on 7<sup>th</sup> March 2018, and filed in court on 8<sup>th</sup> March 2018 by learned counsel for the applicant.

16. The respondent failed to file any response to the application. The respondent also never filed submissions in this matter.

### **D. The interested party’s case**

17. By a 39 –paragraphed replying affidavit, the interested party opposed the application and sought its dismissal with costs to the respondent and the interested party. He deponed inter alia, that she is third wife of the late Manaseh Awendo who was a son of Yudah Awendo Anoko, the original owner of the suit land. That she was settled on the suit land for over twenty years and that she has cultivated the same having inherited the land from her late husband.

18. The interested party further deponed that the applicant failed to provide the various sale of land agreements as alleged by him herein. That whereas she was charged of trespass in case No. 228 of 2006 at Oyugis Law Courts for the same, the application is made out of malice and mischief meant to disinherit her from the suit and which is her inheritance from her late husband. That thereafter she filed Rachuonyo District Land Tribunal case No. 14 of 2006 in which the dispute was settled in her favour as the applicant ignored to attend the Tribunal’s proceedings as shown in documents marked as “JAA-1” and “JAA-2” .

19. In his submissions dated 30<sup>th</sup> July, 2019 and filed on 14/8/2019, learned counsel from the interested party, gave a brief background and facts of the case including the undisputed facts. Counsel identified four (4) issues for determination and analysed them in favour of the interested party. The issues concern illegal or fraudulent transfer of the suit land to the applicant, lapse of orders of the court granted on 21<sup>st</sup> March 2007 and that the applicant is not entitled to the title and ownership of the suit land and orders sought herein.

20. Counsel relied on authorities including **Arthi Highway Developers Ltd –vs- West End Butchery Ltd and 6 others (2015) eKLR**, sections 97 and 112 of the Evidence Act (Cap 80), the Law of Contract 8<sup>th</sup> Edition by **Traitel and Tweddle –vs- Atkinson (1851) 2 KB 762 and Combe –vs- Combe (1951) 2 KB 215** on fraud, indefeasibility of title and legally binding contracts. Counsel also relied on **Order 53 Rule 2 of the Civil Procedure Rules, 2010**, the case of **Nicholas Salat –vs- IEBC and others (2013) eKLR**, **Zachariah Okoth Obado –vs- Edward Akongo Oyugi and others (2014) eKLR** and **Fina Bank Ltd –VS- Spares and Industries Ltd (2000) eKLR**, to buttress his

submissions.

21. I have thoroughly studied the applicant's case, the interested party's case and the rival submissions together with the issues framed therein. It is trite law that issues for determination in a suit flow from either the pleadings or as framed by the parties for the courts determination generally; see **Great Lakes Company (U) Ltd –vs- Kenya Revenue Authority (2009) 1 KLR 720**.

22. In the foregoing discourse, the issues for determination are compressed as hereunder:

- a. **Was the Tribunal seized of the jurisdiction in respect of the instant dispute?**
- b. **Whether the orders of the court made on 21<sup>st</sup> March, 2007 lapsed and the matter is spent.**
- c. **Is the applicant entitled to the orders sought herein.?**

#### **Analysis and disposition**

23. As regards the first issue, **Black's Dictionary 10<sup>th</sup> Edition** defines the term "**Jurisdiction**" thus:-

- a) "**Jurisdiction**" – A court's power to decide a case or issue a decree
- b) "**Judicial Jurisdiction**"- the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it."

24. It is trite law that jurisdiction of a court or tribunal flows from either the Constitution or statute or both; see **Samwel Kamau Macharia and another –vs- Kenya Commercial Bank Ltd and 2 others** Supreme Court of Kenya application No. 2 of 2011 (2012) eKLR.

25. Article 159 (1) and (2) of the Constitution of Kenya anchors Judicial authority and it provides thus:-

1. "**Judicial authority is derived from the people and vests in, and shall be exercised by the court and tribunals established by or under the Constitution.**
2. **In exercising judicial Authority the courts and tribunals shall be guided by the following principles"**

26. Section 3 of the Land Disputes Tribunal Act No. 18 of 1990 now repealed by section 31 of the Environment Land Court Act, 2015 (2011) provided that jurisdiction of the Tribunal was limited to matters concerning :-

- a. Trespass
- b. Determination of boundaries.
- c. Division and work on land.

27. On 22<sup>nd</sup> January 2007, the Tribunal rendered an award , inter alia;

**" Having considered the evidence adduced before the panel and having made observations on the fact pertaining to the case, the panel unanimously awarded the land in dispute to the claimant by recognizing there existed a proof that the requisition or the land parcel Kabondo/Kasewe/612 was done fraudulently which made the land registration certificate an a normally in it self.**

**The panel requests the Honourable court of Senior Resident Magistrate Oyugis to direct the land Registrar to de-registrar the land Kabondo/Kasewe/612 in the name of the claimant" (Emphasis laid)**

28. In the case of Owner of the Motor Vessel Lilian "S" (supra) the Court of Appeal held that :-

**"Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matte before it the moment it holds the opinion that it is without jurisdiction."**

29. The above position was emphasized by the Supreme Court of the Republic of Kenya in the case of **Republic –vs- Karisa Chengo and 2 others (2017) eKLR** where it was held that:-

**".....As we know jurisdiction goes to the root of any litigation. This position was forcefully reiterated in the locus classicus decision of Nyarangi, J. A in the Owners of Motor vessel Lilian "S" –vs- Caltex Oil Kenya Ltd (1989) KLR 1 that Jurisdiction is everything. Without it a court cannot make a move. Lack of jurisdiction thus renders a court's decision void as opposed to it being merely voidable. When an act is void it is a nullity ab initio. It can not found any legal proceedings**

**and Lord Denning’s decision in the privy Council case of Benjamin Leornard Macfoy United Africa Company Limited (UK (1962) AC 152, succinctly makes this point.....” (Emphasis added)**

30. It is common ground that leave to commence the instant motion was granted on 21<sup>st</sup> March 2007. The application was filed within the prescribed period of time hence the orders made on 21<sup>st</sup> March 2007 did not lapse or at all.

31. Moreover, by a notice of motion dated 27<sup>th</sup> September 2018, the applicant sought orders including a declaration that the present application was properly and timeously filed and is proper before the court. Accordingly, on 25<sup>th</sup> March 2019, this court allowed the said motion.

32. Is the applicant entitled to the orders sought in application? This court is conscious of **section 26 (1) of the Land Registration Act 2016 (2012)** on issuance of certificate of title upon registration or transfer or transmission. The title of the proprietor (applicant in the instant case) can not be challenged except on grounds set out at paragraphs (a) and (b) for section 26 (1) referred hereinabove and the decision in **Combe case (supra)**.

33. It is noted that the applicant had a right to be heard before the Tribunal. He was not served with sufficient notice to be aware of the likely effects of the same before the Tribunal; see **Sceneries Limited –vs- National Land Commission (2017) eKLR**.

34. **Articles 50 (1) and 25 (c ) of the Constitution of Kenya 2010** provide for uncurtailed right to fair hearing. Article 48 of the same Constitution stipulates the right to access to justice.

35. Notably, the remedy of judicial review in concerned with the decision making process and not with the merits of the decision; see **Republic –vs- Kenya Revenue Authority Ex-parte Yaya Tours Limited (2008) eKLR**.

36. It is the finding of this court that the Tribunal was devoid of jurisdiction over the present dispute touching on the validity of title to the suit land. The applicant was not afforded latitude for the hearing of the dispute before the Tribunal. He is entitled to the orders sought in this application, which I find full of merits.

37. A fortiori, the applicant’s notice of motion dated 12<sup>th</sup> April, 2007 in court on and filed on 13<sup>th</sup> April, 2007 is determined thus:-

**a. An order of certiorari be and is hereby granted to remove into this court and quash the proceedings and decision by the defunct Rachuonyo District Land Disputes Tribunal delivered on 22<sup>nd</sup> January 2007 involving dispute of ownership of the parcel of the suit land, KABONDO/KASEWE/612.**

**b. Costs of the motion be borne by the interested party.**

**DELIVERED, SIGNED and DATED** in open court at **MIGORI** this **19<sup>th</sup>** day of **NOVEMBER 2019**.

**G.M.A. ONGONDO**

**JUDGE**

In the presence of :-

Mr. James Nyakundi learned counsel for the applicant

Tom Maurice – Court Assistant