



**Ngala v Kitete & another (Environment and Land Appeal
1 of 2018) [2024] KEELC 504 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 1 OF 2018
TW MURIGI, J
JANUARY 31, 2024**

BETWEEN

JONATHAN KITHAKUMU NGALA APPELLANT

AND

PATRICK MUTUA KITETE 1ST RESPONDENT

FREDRICK KITETE MUSEMBI 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the decision of the Eastern Provincial Land Dispute Tribunal Appeal No. 56 of 2007 dated 7/06/2007.
2. The Appeal emanated from the award of the Wote District Land Disputes Tribunal) which was in the following terms:-
 - i. Claimant’s prayer is dismissed with costs
 - ii. The Claimant (i.e) F. Kitete Musembi to leave the Objector Kithakumu Ngala Moko to develop his shamba without interference,
 - iii. The Claimant to meet the expense incurred by the Objector.
3. Being aggrieved by the award the Claimant appealed against the award to the Eastern provincial Appeals committee which made the following findings:-
 1. That the shamba belongs to Joseph Mutua Kitete because he has all the documents.
 2. The Respondent has surrendered the shamba to the Appellant.
 3. The Respondent wants the Appellant to take the shamba through *Kitbitu* (oath).



4. In its judgment, the Committee stated as follows:-

The appeal has been allowed and this court orders that:-

1. The Appellant be given back his shamba No. 225.

5. Aggrieved by the said decision the Appellant filed an amended memorandum of appeal and set out the following grounds: -

1. The Land Dispute Tribunal and the Appeals Committee erred in law in admitting and hearing a case relating to issues of ownership of land and being not one of the issue under which Land Dispute Tribunal and Appeals Committee can deal with as it was not for division of land or claim for trespass and acted beyond their jurisdiction and contrary to Section 3(1) of the *Land Dispute Tribunal Act*.
2. The Land Dispute Tribunal and the Appeal Committee erred in law by conferring to themselves jurisdiction to deal with issues beyond their jurisdiction contrary to Section 13(3) of the Land Dispute Tribunal by admitting and entertaining proceedings in respect of a claim for which the time for hearing claim was and is time barred by the provisions of the *Limitation of Actions Act* under Section 7 and more so in which the cause of action arose in 1944 and in which the claim was brought after the limitation period.
3. The Land Dispute Tribunal and the Appeals Committee erred in law in ordering that land Nzai/Kawala/225 being first registration in favour of the Appellant and which the Appellant has been in occupation and he is in occupation for long period be cancelled and registered in the name of the Respondents and which decision is contrary to the provisions of the *Registered Land Act* Section 143 and which is registration cannot be rectified or cancelled or amended as it is a first registration in favour of the Appellant herein.
4. The Land Dispute Tribunal and Appeals Committee erred in law in assuming jurisdiction to hear dispute over title to land case when superior courts in their decision such as *Wamwea vs Catholic Diocese of Muranga Registered Trustees* (20-03) KLR 389 has held that Tribunal has no jurisdiction to deal with issue relating to title to land.
5. The Land Dispute Tribunal and Appeals Committee decision is bad in law as it is contrary to the decision of Court of Appeal for East Africa Nairobi in Civil Appeal No 29 of 1976 *Ndeto Kimono vs Mavoi Musomba* relating to decision based on matters on *Kitbitu* oath and not on facts as once party invokes *Kitbitu* oath the matter is deemed withdrawn from court or tribunal.
 - i. The Land Dispute Tribunal and Appeals Committee erred in law in taking an appeal against the decision of the Land Disputes Tribunal at Makueni by one Joseph Mutua Kitete who was not a party in the initial Land Tribunal Case No. 8 of 2005 and who was not properly substituted or shown how he came to argue the appeal as the Appellant when initially he was not a party.
6. The Appellant therefore prays for the following orders: -
 1. That the said decision to be declared a nullity and/or be set aside.
 2. The cost of the appeal and court below and before the Tribunal be awarded to the Appellant.

7. The Appeal was canvassed by way of written submissions.



The Appellant's Submissions

8. The Appellants submissions were filed on 16th May 2023.
9. On his behalf, Counsel outlined the following issues for the court's determination: -
 - i. Whether the Dispute Tribunal and Appeals Committee erred in law in admitting and hearing a case relating to the issue of ownership of land and being not one of the issues under which Land Dispute Tribunal and Appeals Committee can deal with.
 - ii. Whether the Appellant is entitled to the prayers sought in the Appeal.
10. On the first issue, Counsel submitted that the dispute before the Makueni Land Dispute Tribunal Case No. 8 of 2005 and the Eastern Province Land Dispute Tribunal was in respect of ownership of Land Parcel No. Nzaui/Kawala/225. It was submitted that the suit property is ancestral land as it initially belonged to the Appellant's grandfather.
11. Counsel submitted that the decision in Case No. 8 of 2005 and in case No. 56 of 2006 was in respect of ownership of land.
12. It was further submitted that the Land Dispute Tribunal and the Appeals Committee lacked jurisdiction to hear and determine the dispute since it was in respect of ownership of land parcel No. Nzaui/Kawala/225.
13. While citing the provisions of Section 3(1) of the *Land Dispute Tribunal Act* (now repealed), Counsel submitted that the jurisdiction of the Tribunal is limited to issues related to division of land, determination of land boundaries, a claim for occupying land or work on the land and a claim on trespass.
14. It was submitted that the Tribunal and the Appeals Committee determined the issue of ownership of land contrary to the provisions of the law. It was further submitted that the judgment of the Appeals Committee sought to cancel a first registration contrary to the provisions of the *Registered Land Act*.
15. Counsel submitted that the Appeals Committee did not withdraw the matter despite having found that the parties invoked the *Kithitu* oath. Counsel argued that by the Appeals Committee not withdrawing the claim, it went contrary to the holding of the Court of Appeal in the case of [*Ndeto Kimono Vs Kavoi Musomba* \[1977\] eKLR](#).
16. Counsel asserted that the Claimant in the Tribunal was Fredrick Kitete Musembi. It was argued that the matter went before the Appeals Committee the Appellant was Joseph Mutua Kitete. Counsel submitted that the Appeal ought to have been instituted by the initial Claimant in the Tribunal case.
17. The Appellant submitted that the decision having been void ab initio the award contained under the Senior Resident Magistrate's Court Makueni LDTC No 17 of 2006 cannot stand.
18. Counsel submitted that the claim before the Tribunal and the Appeals Committee was statute barred by virtue of Section 13(3) of the *Land Dispute Tribunal Act* and Section 7 of the [*Limitation of Actions Act*](#). Counsel argued that the cause of action arose in the year 1944 while the claim was filed in the year 2005, 61 years after the cause of action arose.
19. It was argued that the admission and hearing of the claim by the Tribunal and Appeals committee was an illegality and as such it is void ab initio.
20. On the second issue, Counsel submitted that the Appellant is entitled to the orders sought because he has established that the Tribunal and Appeals Committee lacked jurisdiction to entertain the



claim concerning ownership of land, in addition to the claim being statute barred. To buttress his submissions, Counsel relied on the Appellant's list of authorities dated 16th May 2023.

The Respondents Submissions

21. The Respondents submissions were filed on 8th September 2023.
22. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the Appeals Committee had jurisdiction.
 - ii. Whether the suit is statute barred.
23. On the first issue Counsel submitted that the issue for determination before the Land Dispute Tribunal was a boundary dispute which saw the Appellant occupying his late father's land to the exclusion of the rightful beneficiaries of the Estate of Fredrick Kitete Musembi. It was submitted that the Tribunal upheld the Respondents occupation after he produced documents in support of ownership.
24. According to Counsel, Section 3(b) of the *Land Dispute Tribunal Act* confers jurisdiction on the Committee to determine issues relating to occupation. It was submitted that under Section 3(b) of the *Land Dispute Tribunal Act*, the Appeals Tribunal and by extension the District Land Dispute Tribunal were vested with jurisdiction to hear and determine the matter as the dispute was in respect of a boundary dispute and a claim to occupy or work on land and not on ownership of land.
25. On the issue of *Kithitu* oath, Counsel argued that the court in the case of *Ndeto Kimono Vs Mavoi Musomba* (*supra*) was not against the administration of the oath but rather on the procedure used in administering the same particularly when the matter has been subjected to civil procedure. In the present case, it was submitted that neither party participated in the *Kithitu* oath ceremony. Counsel submitted that it was the Appellant who on Appeal wanted to invoke the administration of the oath.
26. Counsel further submitted that the 1st Respondent has always been a party to the suit and a witness at the Tribunal sitting. It was submitted that the 1st Respondent pursued the Appeal upon the demise of his father so as to safeguard his family interest and that the Appellant did not raise any objection at that time.
27. On the issue of whether the suit is statute barred, Counsel submitted that the parties appeared before Councillor Kamwathi in the year 1951 in a bid to resolve the boundary dispute before they proceeded to the Tribunal in the year 2005. Counsel contended that the Appeal was improperly before the court since it was filed way past the 60 days provided and that no extension was sought. Concluding his submissions, Counsel urged the court to dismiss the appeal with costs.

Analysis and Determination

28. Having considered the proceedings before the Provincial Land Disputes Appeals Committee, the evidence tendered before it, the award, the grounds of Appeal and the submissions filed in respect of this Appeal the main issue for determination is whether the Wote Land Disputes Tribunal and by extension, the Provincial Land Dispute Appeals Committee had jurisdiction to entertain the dispute and the appeal therein.
29. Jurisdiction of a Court or a tribunal flows from the *Constitution* and/or legislation. It cannot be conferred by a party nor can a Court or tribunal confer jurisdiction upon itself.



30. According to Section 3(1) (b) of the *Land Dispute Tribunal Act* (now repealed), the tribunal had powers to deal with the following: -

- “3. Subject to this *Act*, all cases of a civil nature involving a dispute 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;”

31. A perusal of the pleadings before Makueni Senior Resident Magistrate Court shows that on 10/05/2006, the Court read and adopted the award of the Tribunal as the judgment of the court. The Appellant appealed against the award to the Eastern Provincial Land Disputes Appeals Committee.

32. The proceedings show that the Provincial Land Disputes Appeals Committee determined a dispute between the Appellant and the Respondent pertaining to ownership of land. The proceedings before the Makueni Land Dispute Tribunal show that the issue for determination was actually ownership of land parcel No. Nzau/225 but was couched like a boundary dispute which it is not.

33. In view of the provisions of the Act aforesaid the Land Dispute Tribunal did not possess jurisdiction to deal with the issue of ownership. Similarly, the Appeals Committee also did not have jurisdiction to so determine the matter. In *Joseph Malakwen Lelei & another vs Rift Valley Land Disputes Appeals Committee & 2 others* [2014] eKLR the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal and states as follows: -

On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to be labour it. Section 3 of the *Land Disputes Tribunal Act* (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

- “3(1) 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 on in common,
 - (b) A claim to occupy, or work land or
 - (c) Trespass to land.”

Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity....”

34. Similarly, in the case of *M'Marete vs Republic & 3 others* [2004] eKLR, the court of Appeal held that: -

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section



3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] *Registered Land Act* to the Appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

35. Further in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others* [2012] eKLR it was held that a court’s jurisdiction flows from either the *Constitution* or legislation or both. A court of law (tribunal) can only exercise jurisdiction as conferred by the *Constitution* or other written law.
36. From the foregoing, it is crystal clear that the Land Disputes Tribunal and by extension the Provincial Land Disputes Appeals Committee exceeded their jurisdiction. By arbitrating over a matter they had no power to arbitrate, it is the court’s findings that the two Tribunals acted ultra vires and hence their decisions were a nullity in law.
37. The upshot of the foregoing is that, I find that the Appeal herein is merited and the same is allowed in the following terms: -
 - a. The decisions of the Provincial Land Dispute Appeals Committee and the Wote Land Disputes Tribunal are hereby set aside.
 - b. Each party to bear its own costs in the instant Appeal and costs in the proceedings before Tribunal and Appeals Committee.

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAM THIS 31ST DAY OF JANUARY 2024.

HON. T. MURIGI

.....

JUDGE

In the Presence of

Munyasa for the Appellant

Kwemboi court Assistant

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

