



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC MISC APPL. 5 OF 2018**

MUNYWOKI KISESE.....1<sup>ST</sup> APPLICANT

MORRIS MULI.....2<sup>ND</sup> APPLICANT

PAUL M. KIOKO.....3<sup>RD</sup> APPLICANT

**VERSUS**

JOHN MASWILI MULWA.....1<sup>ST</sup> RESPONDENT

JOSEPHAT MUEMA MUIA.....2<sup>ND</sup> RESPONDENT

GRACE MUSENGYA KISILU.....3<sup>RD</sup> RESPONDENT

MUKULU KIVISI.....4<sup>TH</sup> RESPONDENT

SIKUKU MAILU.....5<sup>TH</sup> RESPONDENT

KATINDA MAILU.....6<sup>TH</sup> RESPONDENT

**RULING**

1. There is before me is a notice of motion application expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Rules and all enabling provisions of the law for order:-

**1. That the respondents herein be compelled by an order of this court to deliver to the land Registrar Makueni the original titles to LR, Nos. Nzaiu/Mumbuni/210, Nzaiu/Mumbuni/211, Nzaiu/Mumbuni/214, Nzaiu/Mumbuni/212, Nzaiu/Kilili/616 and Nzaiu/Mumbuni/471 for the purpose of giving effect to the judgment in Makueni Senior Resident Magistrate's Court LDTC 39 of 2006 within such timelines as the court may deem fit.**

**2. That in default of the said delivery and upon expiry of the said time frame as shall be fixed by court, the land registrar Makueni be compelled to cancel the said titles and rectify the registrar accordance with the judgment issued in Makueni Senior Resident Magistrates court LDTC 39 of 2006.**

**3. That the costs of the application be provided for.**

2. It is predicated on the grounds on its face and is supported by the supporting and further affidavits of MunywokiKiseese, the first Applicant herein, sworn at Makueni on the 31<sup>st</sup> May, 2018 and 12<sup>th</sup> July, 2018 respectively. The application itself is dated 31<sup>st</sup> May, 2018 and was filed in court on even date.

3. The Respondents have opposed the application vide their grounds of opposition dated 7<sup>th</sup> June, 2018 and filed in court on 8<sup>th</sup> June, 2018. The Respondents have also filed a replying affidavits sworn by John MaswiliMulwa at Machakos on the 7<sup>th</sup> June, 2018.

4. The Respondents grounds of the objection are:-

**1. That the application herein contravenes the terms of the Award of the LDTC 39 OF 2006.**

2. That the Applicants herein are purporting to cancel legal titles deeds through an application.
3. That the Respondents title deeds have never been challenged in any Court of Law.
4. That the grounds for cancelling title deeds are very clear but have not been made in the instant case.
5. That the order being enforced is not annexed.
6. That the instant application herein should have been filed in LTDC 39 OF 2006.
7. That the Applicants have included people who were not parties to the Award nor registered owners of the titles being demanded.
8. That there is an appeal at the Court of Appeal regarding the parcels herein hence any purported revocation of titles is likely to render the Appeal nugatory.
9. That the order of the tribunal only touched on parcel Nos. 610, 616 and 623
10. That it is fair that the application be dismissed with costs.

5. The first Applicant has deposed in paragraphs 3, 4 and 5 of his affidavit that the properties herein were the subject of land dispute in tribunal case no. 26 of 2004 whose award was adopted in Makueni SRMC LDTC No. 39 of 2006. That the Respondents filed judicial review proceedings in Machakos Misc Civil Application no. 25 of 2006 which was subsequently dismissed. That there are no other proceedings to stop the implementation of the order issued in LDTC 39 of 2006. The Applicant has further deposed in paragraph 6 that they have visited the Land Registrar seeking to implement the said order but have been informed that unless the original titles are returned then the implementation cannot be done.

6. In the further affidavit, the first Applicant has deposed in paragraphs 5 and 6 that the Respondents had also filed Makueni ELC 190 and 191 of 2017, which were also equally dismissed for being res judicata. That by the time of the dismissal of ELC 190 and 191 of 2017, titles had already been issued to the Respondents. The first Applicant has also deposed in paragraphs 9 and 10 that the orders sought in this application are to ensure that the order of court in LDTC no. 39 of 2006 and ELC 190 and 191 of 2017 are given effect. That failure to grant the orders sought would render the earlier orders nugatory and of no effect.

7. The Respondents through the replying affidavit of the first Respondent have contended in paragraph 1 of their replying affidavit that the application is an abuse of the court process and that it is one of the many applications that have been made in this court. In paragraph 4, the first Applicant has deposed that the decree of the tribunal is clear on what ought to be done as can be seen from annexure JMM 1.

8. In paragraph 6 of the replying affidavit, the first Respondent has deposed that it is shocking that the Applicants are purporting to enforce Misc Civil Application no. 257 of 2006 and not the award of the Tribunal.

9. In his submissions, the counsel for the Applicants submitted that section 3A of the Civil Procedure Act states that nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

10. The counsel added that court orders cannot be and are not issued in vain. The counsel cited the case of Ann Woki Karanja V Ndichuch Muragani [2013] e KLR where the court stated that the express reading of the decree confirms the clear meaning of the original award and the original judgement and decree of the lower court adopted them. The counsel added that the order was issued by court of competent jurisdiction and the Respondents did not challenge the award of the court of law.

11. On the other hand, the counsel for the Respondents submitted that the award of the Tribunal was adopted as judgment of the court on the 11<sup>th</sup> October, 2006 and issued on the 16<sup>th</sup> August, 2012 read as follows:-

*“ that being a land Dispute Tribunal case no. 26 of 2004 in respect of plots nos. Nzau/Kilili/610, Nzau/Kilili/616, Nzau/Kilili 623, the same having been heard and determined and upon confirmation of the decisions as judgment of this court*

**IS IT HEREBY DECREED**

*That the Makueni District Surveyor to redraw the boundary betweenland parcels nos. Nzau/Kilili/ 610, Nzau/Kilili/616 and Nzau/Kilili/623 as provided in no. 3 of the observations of the tribunal and follow the marks on the ground as stated thereof*

*That the claimant’s costs are to be borne by the objectors”*

12. The counsel further submitted that the decree relates to only 3 parcels namely 610, 616 and 623 and that the District Surveyor was to redraw boundary between them.

13. The counsel wondered why the Applicants are varying the terms of the said orders. He added that an order for cancellation of title deeds is a substantive order that should be brought by way of a suit (plaint) and not a miscellaneous application.

14. Having read the application together with the supporting and further affidavits as well as the replying affidavit and the grounds of objection and having read the submissions that were filed by the counsel on record, my finding is as follows;

Firstly, under the Land Disputes Tribunal Act chapter 302A of the Laws of Kenya (now repealed) the limitation of the jurisdiction of the Disputes Tribunal is set out as hereunder:-

*“Section 3(1) subject to this Act, all cases of a civil nature involving a dispute to*

*a) The division of, or the determination of boundaries to land, including land held in common.*

*b) A claim to occupy as work land; or*

*c) Trespass to land, shall be heard and determined by a tribunal established under section 4”*

15. It follows therefore that the tribunal could only make its determination based on the jurisdiction donated to it by the said section 3. That jurisdiction did not extend to cancellation of title deeds. The Applicants herein have not annexed the decree that was issued by the Principal Magistrate's court in LDTC 39 of 2006. A perusal of the award by the tribunal's proceedings annexed as MK1 in paragraph 3 of the Applicant's further affidavit shows that the tribunal only dealt with the issue of drawing of the boundary in respect of Nzai/Kilili/610, 616 and 623.

16. Secondly, based on the foregoing, the Applicants herein should enforce the decree that was issued in Makueni LDTC 39 of 2006. The same did not provide for cancellation of title deeds. It is the marking of the boundaries that was to determine whether there will be need to rectify the respective title deeds so as to comply with their acreages. To that extent, therefore, I am in agreement with the Respondents' counsel that the application is misconceived so long as it seeks to enforce that which was not awarded in Land Disputes Tribunal Case no. 26 of 2004 and adopted as judgement of the court in Makueni LDTC no. 39 of 2006. I, therefore, hold that the application has no merits and same is dismissed with costs to the Respondents. It is so ordered.

**SIGNED, DATED and DELIVERED at MAKUENI this 26<sup>TH</sup> NOVEMBER, 2018.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF :**

Ms Kyalo for the Applicants

Mr. Hassan holding brief for Mr. Tamata for the Respondents

Mr. Kwemboi Court Assistant

**MBOGO C.G, JUDGE**

**26/11/2018**