



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 42 OF 2012 (OS)**

**IN THE MATTER OF:   LAND PARCEL NO. BEDZOMBO/KITSOENI/829**

**AND**

**IN THE MATTER OF:   SECTION 143 OF THE REGISTERED  
LAND ACT CAP 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF:   KILIFI LAND DISPUTE TRIBUNAL CASE NO.  
35/89-90**

**BETWEEN**

**ZIA MGUNYA CHILOMO.....PLAINTIFF**

**=VERSUS=**

**ZIRO KAI MWASAMBU.....1<sup>ST</sup> DEFENDANT**

**KITI RIMBA.....2<sup>ND</sup> DEFENDANT**

**GEOFREY NGALA ZIRO.....3<sup>RD</sup> DEFENDANT**

**DAVID GAMBO POLE.....4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. In this suit, the Plaintiff is claiming that parcel of land known as Bedzombo/Kitsoeni/829 (the suit property) within Kilifi county be vested in him. The Plaintiff's main ground for the relief of a vesting order is that as the Plaintiff, he was the claimant in the Chonyi Land Dispute Tribunal case number 35/89-90 and the Tribunal decided the case in his favour; that the decision of the Tribunal was adopted by the Senior Resident Magistrate's Court at Malindi on 5<sup>th</sup> June 2001 and that there is no appeal that was preferred against the decision.
2. The 4<sup>th</sup> Respondent on his part stated that the 1<sup>st</sup> Respondent is the absolute and the registered owner of the suit property.

## Preliminary Objection

3. The Defendant's advocate filed a Preliminary Objection dated 6<sup>th</sup> June 2013 and stated that this court lacks jurisdiction to hear and determine this matter because the suit is *pendent lite*; that Malindi High Court Misc. Application Number 36 of 2009 touching on the same subject matter is still pending and that the suit is in violation of section 29 of the Land Adjudication Act and that there is no award from any Tribunal to warrant the issue of a vesting order.
4. The parties agreed to dispose of the Preliminary Objection by way of written submissions. The Plaintiff's/Respondent's advocate filed his submissions on 21<sup>st</sup> August 2013 while the Defendants/Applicants' advocate filed his submissions on 15<sup>th</sup> July 2013.

## Submissions

5. The Defendants'/Applicants' counsel submitted that the issues herein are similar to the issues that have been raised in Malindi HCCC No. 36 of 2009 involving the same parties; that the jurisdiction of the court is limited to enforcement and execution of the orders of the appeal of the Minister pursuant to the provisions of Section 29 of the Land Adjudication Act.
6. Counsel finally submitted that the proceedings herein are not subject to the Land Disputes Tribunals Act (repealed) and that there is no award from any Tribunal to warrant the issue of a vesting order.
7. The Plaintiff's/Respondent's counsel submitted that the issues raised by the Defendants can only be ascertained by way of evidence and that whether High Court Civil Application no. 36 of 2009 is still pending for hearing and determination is a matter of fact and not of law. Counsel relied on the cases of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd; (1969) EA 696 Mark Cox Vs Roy Damerall Ndisi & Another; HCCC No. 40 of 2006 and Chebalungu Korasis Trading Co Vs Livingstone Milgo.**

## Analysis

8. The Plaintiff moved this court by way of an Originating Summons seeking for a vesting order in respect of the suit property. The only ground that the Plaintiff is relying on for an order of the rectification of the title is the award of the Chonyi Land Disputes Tribunal which was subsequently adopted by the Magistrate's Court on 5<sup>th</sup> June 2001.
9. The substantive order in the Originating Summons is for the rectification of the register in respect of Bedzombo/Kitsoeni/829. The title deed was issued pursuant to the provisions of the Registered Land Act, Cap 300 (repealed).
10. The rectification and cancellation of a title deed issued under the provisions of the Registered Land Act can be ordered by the court pursuant to the provisions of Section 143 of the said Act.
11. Order 37 Rule 8 allows parties to file Originating Summons under the Registered Land Act other than under sections 120, 128, 133, 138, **143** and 150.
12. It therefore follows that a party is required to commence a suit for the rectification by cancellation of a title by way of a Complaint and not an Originating Summons.
13. However, it would appear that even in situations where a party commences a suit for rectification by cancellation of a title by way of an Originating Summons, the Originating Summons can still be sustained by dint of the provisions of Order 37 Rule 19(1) of the Civil Procedure Rules 2010.
14. Under Order 37 Rule 19(1), if it appears to the court at any stage of the proceedings that the proceedings should for any reasons be continued as if the cause had been begun by filing a Complaint, the court is obliged to order the proceedings to continue as if the cause had been so begun, and the affidavits filed shall stand as pleadings.
15. The document that the Plaintiff attached on his affidavit is not an award by the defunct land dispute tribunal but an award by the Arbitration Board pursuant to the provisions of Section 10(1) of the Land Adjudication Act, Cap.283.
16. The Land Arbitration Board hears and determines Appeals from the Land Adjudication Committee which is established pursuant to the provisions of sections 6. It is the Land Adjudication Committee that determines claims in land in accordance with African Customary

- Law.
17. It would appear that the Defendants filed an appeal against the decision of the Land Arbitration board. It is not clear from the documents annexed on the Replying Affidavit the decision that was arrived at after the Defendants filed the Appeal.
  18. In view of the elaborate procedure that the Land Adjudication Act has provided in the ascertainment of customary land rights, and in view of the decisions that were made by the different committees under the said Act in respect to the suit property, it would not be right for the Applicant to argue at this stage, and on a preliminary point of law, that this court lacks jurisdiction.
  19. The issue as to whether the court has jurisdiction will only be determined after the evaluation of the evidence. Each party should be given an opportunity to ventilate his case by producing evidence before this court.
  20. The last issue that the Applicant raised is that there is a matter before this court involving the same parties and the same suit property.
  21. The Plaintiff/Respondent advocate has submitted that the said suit was withdrawn on 17<sup>th</sup> May 2011 and the suit cannot be said to be pendent lite. I have perused Miscellaneous Application Civil Suit NO. 36 of 2009 and confirmed that indeed the suit was withdrawn.
  22. It would have been an abuse of the court process if indeed High Court Miscellaneous Application Civil Suit NO. 36 of 2009 was still pending. However in view of the fact that the said suit was withdrawn by the Plaintiff, the current suit is properly before this court.
  23. In the circumstances and for the reasons I have given above, I dismiss the Defendants Preliminary Objection dated 6<sup>th</sup> June 2013 with costs.

Dated and Delivered in Malindi this 25<sup>th</sup> day of **October**, 2013.

**O. A. Angote**

**Judge**