



**Osiru v Sedan & 3 others (Civil Appeal 104 of 2019)  
[2024] KECA 1116 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1116 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 104 OF 2019  
HM OKWENGU, JM MATIVO & JM NGUGI, JJA  
AUGUST 30, 2024**

**BETWEEN**

**SAMSON ANGOLO TIMOTHY OSIRU ..... APPELLANT**

**AND**

**PARESH NARANDASH SEDAN ..... 1<sup>ST</sup> RESPONDENT**

**THE RESIDENT MAGISTRATE, VIHIGA ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, VIHIGA ..... 3<sup>RD</sup> RESPONDENT**

**CHARLES SIGU OTIENO ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the judgment of the Environment and Land Court  
at Kakamega (Matbeka, J.) dated 11th July 2018 in In original ELC  
Case No. 219 of 2016 (Judicial Review Application No. 34 of 2012)*

**JUDGMENT**

1. A brief account of the history of this protracted litigation as we gather it from the record is necessary so as to properly contextualize and determine the issues urged by the parties in this appeal in support of their respective positions.
2. Samson Angolo Timothy Osiru (the appellant herein), filed a suit against one, Makutsa Pete, at the Resident Magistrate's Court at Vihiga being Miscellaneous Civil Suit No 70 of 1998. The dispute related to ownership of land parcels numbers Bunyore/ Ebusikhale/2153, 2154 and 2209. The court referred the dispute to the Luanda Dispute Land Tribunal for determination. The Tribunal heard the dispute of 21<sup>st</sup> September 1998 and rendered its award on 26<sup>th</sup> October 1998.
3. We have read the tribunal's proceedings. We note that the last page of the proceedings and the award is illegible. However, from the affidavits on record, particularly the 1<sup>st</sup> respondent's affidavit dated 23<sup>rd</sup>



- April 2012 and the appellant's own affidavit filed in Civil Suit No 70 of 1998 on 11<sup>th</sup> April 2012, it is clear the award was that land parcel numbers 2153, 2154 and 2209 be transferred to the appellant. On 4<sup>th</sup> May 2011, the said award was adopted as an order of the court in the above suit.
4. Fortified by the said award, by an application dated 6<sup>th</sup> July 2012, the appellant applied for an order that the executive officer of the Vihiga Resident Magistrate's Court be authorized to sign land transfer documents transferring the said titles in his favour. Upon learning about the said proceedings, Paresh Narandash Sedan (the 1<sup>st</sup> respondent), filed an application dated 20<sup>th</sup> May 2012 at the Kakamega High Court being Judicial Review Application No 34 of 2012 seeking leave to commence judicial review proceedings against The Land Registrar, Vihiga and the Resident Magistrate, Vihiga. The appellant was named as an interested party in the said proceedings.
  5. Specifically, the 1<sup>st</sup> respondent sought leave to apply for judicial review orders of prohibition so as to prohibit the Principal Magistrate, Vihiga Law Courts, or any other magistrate, from authorizing the court's executive officer to sign transfer documents transferring the said titles to appellant. He also sought leave to apply for the writ of mandamus compelling the Land Registrar, Vihiga to cancel entries of court decrees issued in Civil Suit No 70 of 1998 registered in the register of titles for parcels numbers 2153 and 2154. In addition, he prayed for an order that the leave sought, if granted, operates as stay of proceedings or other transactions concerning the said parcels of land pending determination of the substantive application or further orders of the court. Lastly, he prayed for the costs of the application to follow the cause.
  6. The grounds in support of the 1<sup>st</sup> respondent's aforesaid application were:- (a) He was the registered proprietor of the said parcels of land. (b) The Luanda Division Land Disputes Tribunal lacked jurisdiction to entertain a dispute in respect of land registered under the Registered Land Act. (c) That the tribunal exceeded its jurisdiction by entertaining the said dispute. (d) He had developments on the two parcels, which he had been in occupation since 2004. (e) He only learnt about the litigation relating to the two parcels of land on 17<sup>th</sup> April 2012 after he obtained copies of the titles from the Lands Registry showing restrictions registered against the titles pursuant to a decree issued in Vihiga Civil Application No 70 of 1998. (f) He also learnt that the appellant had filed an application in the said case seeking an order authorizing the court's executive officer to sign transfer documents in respect of the said parcels of land to his name.
  7. The 1<sup>st</sup> respondent was granted leave on 23<sup>rd</sup> March 2012 which was to operate as stay of the transactions relating to the said parcels of land. The 1<sup>st</sup> respondent filed the substantive motion dated 2<sup>nd</sup> May 2012 on 14<sup>th</sup> May 2012 seeking orders of prohibition and mandamus as prayed in the leave application. The grounds in support of the substantive motion are essentially similar to the grounds in support of the application seeking leave, therefore it will add no value to rehash them here.
  8. In opposition to the application, the appellant filed a replying affidavit dated 6<sup>th</sup> August 2012. Its key highlights are that there was a dispute between himself and one Makutsa Pete over LR No West Bunyore/Ebusikhale/464 which was adjudicated by the area chief who directed the said Makutsa Pete to surrender the said land to him. That the said Mr. Pete declined to surrender the land as directed, which prompted him to file civil suit number 21 of 1994 seeking orders that the said Mr. Pete held the said land in trust for him since the land belonged to his father. That it is the said land that was subdivided into the parcels of land now the subject of these proceedings and his application seeking to restrain Mr. Pete from subdividing the said land was dismissed.
  9. He also averred that the Luanda Division Land Disputes Tribunal awarded the said parcels to him and any aggrieved party had 30 days as per the law to challenge the said decision. Since no appeal was filed



against the said decision, the award was adopted by the court in Miscellaneous application number 70 of 1998 on 9<sup>th</sup> February 1999.

10. The 4<sup>th</sup> respondent, who was enjoined into the proceedings pursuant to his application dated 21<sup>st</sup> February 2018, claimed that he was the registered proprietor of land parcel number Bunyore/Ebusikhale/ 2209 which he lawfully purchased and had been registered in his name and that, therefore, he was the absolute proprietor of the said land.
11. In the impugned judgment dated 11<sup>th</sup> July 2018, the learned judge held that the Luanda Division Land Disputes Tribunal lacked jurisdiction to act as it did and, therefore, it exceeded its jurisdiction by purporting to determine ownership dispute of land registered under the Registered Land Act (repealed) in violation of section 3 (1) of the Land Disputes Tribunal Act (repealed). Accordingly, the learned judge allowed the application and issued an order prohibiting the Principal Magistrate or any other magistrate at Vihiga Court from granting an order authorizing the Executive Officer of the court to sign the transfer of land documents transferring the said land parcels to the appellant.
12. The learned Judge also issued an order of mandamus compelling the Land Registrar, Vihiga to cancel the entry of the decrees issued in Vihiga Miscellaneous Civil Application No 70 of 1998 in the Register of the above two parcels of land. Lastly, the learned Judge made no order as to costs.
13. In this appeal, the appellant seeks to overturn the above finding. In his memorandum of appeal dated 18<sup>th</sup> June 2019, the appellant cited 11 grounds of appeal, some of which are repetitive. The gist of his grounds are that the learned Judge erred by:- (a) Ignoring the provisions of Order 21 Rule 4 of the Civil Procedure Rules. (b) Ignoring his evidence and submissions; (c) Failing to call for copies of the title. (c) Rendering a judgment that offended Order 21 Rule 6 of the Civil Procedure Rules; (d) Misconstruing section 3 (1) of the Land Disputes Tribunal Act and thereby arriving at the wrong finding that the tribunal had no jurisdiction. (e) Compelling the Land Registrar, Vihiga to cancel the decrees in the register of the said parcels of land contrary to the evidence. (g) Failure to appreciate the facts.
14. In his submissions, the appellant argued that the learned Judge failed to set out a concise statement of the case, points for determination, the decision thereon and reasons for the decision. He maintained that the judgment offends Order 21 Rules 4 and 6 of the *Civil Procedure Rules*. It was his case that the learned Judge failed to appreciate the powers of the tribunal under section 3 (2) of the *Land Disputes Tribunal Act*. He argued that the learned judge erred in failing to call for copies of the titles, and by ignoring his replying affidavit, submissions and his evidence.
15. The appellant also submitted that the learned Judge misinterpreted section 3 (1) of the Land Disputes Tribunal Act and, as a result, held that the tribunal had no jurisdiction over the parcels of land and in the process failed to consider the history of the dispute and the fraudulent transfer of the said titles. He maintained that the tribunal's decision could only be challenged by way of an appeal. Lastly, he argued that the orders of mandamus and prohibition were unmerited since there was no wrong committed by the Principal Magistrate.
16. The 1<sup>st</sup> respondent did not attend court during the virtual hearing of the appeal. However, his written submissions dated 14<sup>th</sup> September 2023 in opposition to the appeal are on record. He argued that judicial review orders are discretionary in nature and cited Madan JA in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A. and *Shah v Mbogo* [1968] E.A. 93 in support of the holding, that an appellate court will not interfere with exercise of a trial court's discretion except in limited circumstances such as if there is proven misdirection in law or misapprehension of facts, or if the court took into account irrelevant considerations, or failed to take into account relevant considerations,



or if the decision is plainly wrong. He contended that there is nothing to show that the trial court improperly exercised its discretion.

17. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file submissions nor did they attend the hearing of this appeal despite being served.

18. The 4<sup>th</sup> respondent argued that he was not served with the record of appeal, yet he was an interested party in the proceedings before the trial court. He argued that the appeal does not raise any triable issues, that the appellant failed to disclose that he was in occupation of parcel number 2209 which he lawfully purchased in 2005, and is jointly registered in his name and his wife. He maintained that the trial Judge considered all the facts and arrived at the correct decision, therefore urged this Court to uphold the trial court's decision and dismiss this appeal.

19. We have considered the grounds of appeal, the parties' submissions, the authorities cited and the impugned judgment. In our view, this appeal will stand or fall on one germane issue, which is, whether the Luanda Division Land Disputes Tribunal acted "without jurisdiction" or "exceeded its powers." The term "acting without jurisdiction" or "exceeding its powers" in the context of administrative law requires little by way of elucidation. The following statement by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo Spa* {2005} UKHL 43 para 24 says it all:-

"But the issue was whether the tribunal "exceeded its powers"...this required the courts... to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have..."

20. The exercise of statutory power is only legitimate where lawful. A tribunal may only act within the powers lawfully conferred upon it by the enabling statute. The objective is to ensure that the statutory body remains within the area assigned to it by Parliament. A decision which falls outside that area can, therefore, be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

21. Pivotal to the answer to the issue under consideration is to find out the jurisdiction of the Luanda Land Disputes Tribunal. The relevant provision is section 3 (1) of the *Land Disputes Tribunal Act* (repealed) which provided as follows:-

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 in common;
- b. a claim to occupy or work land; or
- c. trespass to land.

22. The short title to the above section reads "limitation of jurisdiction," clearly signifying Parliament's intention as far as the jurisdiction of the tribunal is concerned. The jurisdiction conferred to the tribunal under the above section is limited to the matters specified therein. The tribunal has no power to entertain a dispute that falls outside the purview of the above section. The dispute before the tribunal had nothing to do with any of the matters listed in the above provision. The dispute before the tribunal related to ownership of the parcels of land in question. As is evidenced by the copies of the titles for the three parcels of land, the titles were all registered under the Registered Land Act (repealed). The 1<sup>st</sup> respondent is the registered absolute proprietor of Land Reference numbers Bunyore/Ebusikhale/2153 and 2154 while the 4<sup>th</sup> respondent is the registered proprietor of LR No



2209. The tribunal acted ultra vires its statutory mandate by purporting to entertain a dispute that clearly fell outside its statutory mandate.

23. The tribunal committed a fatal “Jurisdictional error.” As was held in *Craig v South Australia* (1995) HCA 58 :-

“Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers.”

24. The proceedings and the ensuing award was ultra vires the tribunal’s statutory mandate. Therefore, its decision was null and void ab initio. Accordingly, we find no reason to fault the learned judge for issuing an order prohibiting the Principal Magistrate or any other magistrate at Vihiga Court from granting an order authorizing the Executive Officer of the court to sign the transfer of land documents transferring the said land parcels to the appellant. We also find no reason to fault the learned judge for issuing an order of mandamus compelling the Land Registrar, Vihiga to cancel the entry of the decrees issued in Vihiga Miscellaneous Civil Application No 70 of 1998 in the register of the aforesaid parcels of land.

25. It is also important to mention that Miscellaneous Civil Suit No 70 of 1998 which was referred to the tribunal involved the appellant and one Makutsa Pete. The 1<sup>st</sup> and 4<sup>th</sup> respondents who are the registered proprietors of the suit properties were not parties in the said proceedings. Therefore, it was a grave misdirection for the tribunal to entertain a dispute, and issue an award that affected parcels of land registered in the names of persons who were not parties to the dispute before it.

26. In conclusion, we find that this appeal is devoid of merit. Accordingly, we uphold the judgment of the ELC delivered on 11<sup>th</sup> July 2018 (Matheka J.) in original Kakamega Environment and Land Court No 219 of 2016 (Judicial Review Application No 34 of 2012). The appellant shall pay to the 1<sup>st</sup> and 2<sup>nd</sup> respondents the costs of this appeal.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF AUGUST, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

