



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mukowa v Mwaro & another (Civil Appeal 58 of 2020)  
[2023] KECA 496 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 496 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL 58 OF 2020  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
MAY 12, 2023**

**BETWEEN**

**HENRY MWAKAMUSHA MUKOWA ..... APPELLANT**

**AND**

**BAKARI MWEMA MWARO ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, KILIFI ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the Environment and Land Court at Malindi  
(J.O. Olola J.) delivered on 30th January 2020 in Malindi ELC No 207 of 2014)*

**JUDGMENT**

1. Henry Mwakamusha Mukowa, is aggrieved by the dismissal of a suit he filed in the Environment and Land Court (hereinafter “the trial Court”) by way of a Plaint dated November 5, 2014, which was filed on his own behalf and on behalf of the Estate of Mukoa Kalodzi Ngowa (the deceased). He averred that the deceased, who was his father and who died on December 5, 2006, was the registered owner of Plot 529/Kaloleni/Vishakani together with the deceased’s four brothers namely, Sirya Kalonzi, Abdala Tama Kalonzi, Ndeka Kalonzi and Kutiwa Kalonzi, also since deceased, and also of Plot No 799/Kilifi/Nyalani (hereinafter also referred to as “the suit properties”). That in 2001, one Bakari Mwema Mwaro, the 1<sup>st</sup> Respondent herein, filed Case no 36 of 2001 in the Kaloleni Land Dispute Tribunal against the deceased, which Tribunal directed the Land Registrar to cancel the deceased’s titles and issue new titles in favour of the 1<sup>st</sup> Respondent with respect to the suit properties. That the deceased then filed an appeal to the Provincial Land Tribunal which was dismissed. After the Deceased’s demise, the 1<sup>st</sup> Respondent filed citation Cause no 10 of 2012 citing the Appellant herein requiring the Appellant to take out letters of administration, and upon after visiting the land registry in July 2014, the Appellant discovered that the 1<sup>st</sup> Respondent had fraudulently obtained a new title deed for the suit properties long after the deceased had been issued with title deeds.



2. The Appellant argued that the 2<sup>nd</sup> Respondent issued title deeds to the 1<sup>st</sup> Respondent without due regard to the law, and contended that the said registration was fraudulent and that the 1<sup>st</sup> Respondent had not obtained a valid title to the suit properties. The Appellant therefore sought orders in the trial Court as follows: a declaration the Estate of Mukowa Kalodzi Ngowa is the lawful owner of Plot No 529/Kaloleni/Vishikani being one of the first registered owners and the Respondents actions breached his rights under Article 40 of the Constitution; an order that the 1<sup>st</sup> Respondent's deliver up to the Appellant and or the Land Registrar the title deed for the suit properties and the Land Registrar cancels the same; a permanent injunction to restrain the 1<sup>st</sup> Respondent from restrain the Respondent from taking possession of or dealing with the suit properties; and damages for violation of his constitutional rights.
3. The 1<sup>st</sup> Respondent, in his Defence dated September 15, 2015 averred that the deceased was never a registered owner of the two parcels of land. Further, that the 1<sup>st</sup> Respondent exercised due diligence and followed due process of the law in acquiring the said properties and was therefore unaware and not a party to the allegations of fraud and illegalities enumerated in the Plaint. The Attorney General also filed a Defence on behalf of the Land Registrar Kilifi (the 2<sup>nd</sup> Respondent herein) on September 9, 2015, in which he denied that the deceased was the registered owner of the two parcels of land. It was further the position of the 2<sup>nd</sup> Respondent that the Appellant had participated in a Citation Cause where the subject matter of the dispute was resolved and that he ought to have appealed if not satisfied with the outcome.
4. During the hearing in the trial Court the Appellant testified as PW1 and called one other witness, one Timothy Kiringi Kidzao (PW2), who was his relative. The Appellant produced copies of titles as evidence to show that the suit properties were registered in favour of his father and uncles in 2000, and testified that the Land Dispute Tribunals decided in favour of the 1<sup>st</sup> Respondent in 2009 because the Appellant and his family members were not heard, nor was he invited to Court for the hearing of the application for a vesting order made by the 1<sup>st</sup> Respondent. PW2 on his part stated that in 2013 he was asked by the police to hand over the original titles to the suit properties after having been shown a copy of a vesting order, and was detained when he refused. He was of the view that the procedure of procuring of the vesting order by way of a citation and issuance of new titles to the 1<sup>st</sup> Respondent was not proper.
5. The 1<sup>st</sup> Respondent testified as DW3 and gave a background of the dispute in relation to the suit properties, including the decisions by the Land Dispute Tribunals and his application of a vesting order as a result of which he was issued with a title. He called two witness, Edward Tsuma Tewa (DW1), a friend, who stated he attended the proceedings in the Provincial Lands Disputes Committee in which the suit properties were awarded to the 1<sup>st</sup> Respondent; and Gibson Sirya Kalonzi (DW2), the son of Sirya Kalonzi, who had been registered as proprietor of one of the suit properties which the Land Disputes Tribunal ordered be returned to the 1<sup>st</sup> Respondent. DW2 confirmed that he was aware of the Tribunals' decisions and testified that the 1<sup>st</sup> Respondent was entitled to the suit properties, but that PW2 who was the clan's chair, refused to release the titles.
6. After hearing the parties, the Learned trial Judge (Olola J) held that when the Appellant's father and four uncles caused the titles to the suit properties to be registered in their names on February 18, 2000, the 1st Respondent already had a Land Dispute Tribunal's decision in his favour, which decision the Appellant's father appealed to the Provincial Land Disputes Tribunal in Appeal Case No 183 of 2002 and the Provincial Land Tribunal upheld the decision of the Land Dispute Tribunal and ordered the Appellant's father's title deed to be revoked. Therefore, that there was no valid registration that was done in the year 2000 and the resulting titles issued to the Appellant's father and his uncles had no legal



basis. In addition, that the decision of the Tribunal was adopted as an order of the Court *vide* Kaloleni SRMC Land Award Case No 36 of 2001 and a decree issued therefrom on June 30, 2009, which still stands and has neither been appealed nor set aside. On the contention that the vesting orders used to procure the 1st Respondent's registration were not genuine, the trial Court held that the Appellant was served with notice of the Citation Cause and entered appearance through an Advocate on November 19, 2012, and that having been so served, it was incumbent upon the him to take out the requisite Letters of Administration so as to participate in the said Citation. Lastly, that other than the fact that the Court file went missing, nothing was placed before the trial Court to demonstrate that the vesting orders were not granted by the Court or of any efforts to reconstruct the Court file which was said to be missing.

7. Being dissatisfied with the decision in the trial Court, the Appellant proffered this appeal and has raised six grounds in his Memorandum of Appeal dated August 20, 2020 and lodged on August 21, 2020, that mainly fault the learned trial Judge's findings on the validity of the registration of the suit properties in the Appellant's father, of the awards by the Land Dispute Tribunal's as adopted by the Court in Kaloleni SRMC Land Award No 36 of 2001, and of the vesting orders procured by the 1<sup>st</sup> Respondent. We heard the appeal on the Court's virtual platform on November 21, 2022, and learned counsel Mr Sharia Nyange appeared for the Appellant, while learned counsel Ms Lutta, appeared for the 2<sup>nd</sup> Respondent. There was no appearance for the 1<sup>st</sup> Respondent despite his advocate having being duly served with the hearing notice, nor did he file any submissions.
8. Mr Nyange relied on written submissions he filed in Court dated November 11, 2022, while Ms Lutta submitted that the dispute was substantially between the Appellant and 1<sup>st</sup> Respondent, and she did not thereby file any submissions. The Appellant' counsel in this respect raised four issues for determination in his submissions, namely: whether or not Kaloleni Land Tribunal had jurisdiction to cancel title no Kilifi / Nyalani/ 99 and Kaloleni/ Vishakani/529; whether there was a proper defence on record; whether the vesting orders were caught up by the limitation period and whether the vesting orders issued in Citation Cause no 10 of 2012 were fraudulently procured.
9. Our duty in this appeal as the first appellate Court as set out in *Selle and another vs Associated Motor Boat Co Ltd & others* (1968) EA 123, which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the finding by the trial Court if they were not based on the evidence of record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* (1986) KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & another v Shah* (1968) EA. This having been noted, and after reconsidering the pleadings and evidence presented to the trial Court, we are compelled to address a preliminary issue touching on procedural and substantive irregularities in the manner the suit in the trial Court and this appeal have been brought.
10. It is not in dispute that there was an award made by the Coast Provincial Land Appeals Tribunal on July 24, 2007 in Land Appeal Case No 183 of 2002 in favour of the 1<sup>st</sup> Respondent, that dismissed the Appellant's father's appeal from a decision of the Kaloleni Land Disputes Tribunal, and ordered that his title be revoked and a new title issued to the 1<sup>st</sup> Respondent with respect to the suit properties. The award was adopted by the Senior Magistrates Court in Land Award Case No 36 of 2001 and a decree to this effect issued on October 2, 2009. The then *Land Disputes Act* (since repealed) provided as follows in section 9:
  9. Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided



that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.

10. A question of customary law shall for all purposes under this Act be deemed to be a question of fact.
11. The jurisdiction to hear appeals from the Land Disputes Tribunals is now vested in the Environment and Land Court by virtue of section 13(4) of the Environment and Land Court Act. The Appellant filed the suit in the trial Court and is prosecuting this appeal in his capacity as the administrator of his father's estate and is therefore legally litigating under the title of, and in the place of his father. He is therefore in law deemed to have been a party in the proceedings before the Kaloleni Land Dispute Tribunal and Coast Provincial Land Appeals Tribunal, and he cannot legally be allowed to raise the issue of the Tribunal's jurisdiction or violation of his constitutional rights by the decisions of the Tribunals by way of a fresh suit. It is clear that under the Land Dispute's Tribunals Act, such issues of law arising from the Tribunals' decisions ought to have been brought by way of an appeal within a specific timeline. The Appellant cannot therefore be allowed to mount a collateral attack on the Tribunal's decisions and findings by the proceedings in the ELC and in this appeal, as noted by the trial Court.
12. Similarly, the vesting order that was the subject of the challenge of the suit in the ELC was exhibited, and showed that it was given by the High Court in Mombasa in Citation Cause No 10 of 2012. Any challenge to the said vesting order ought to have been made by way of review of or appeal from Citation Cause No 10 of 2012, and not by way a fresh suit. The High Court at Mombasa hearing that citation was the right forum to raise and address the concerns raised by the Appellant as regards the propriety of the vesting order and missing Court records, which the ELC did not and could not have addressed, nor procedurally or substantively verified, as the vesting order was given in a different suit. The trial Court therefore did not err when it made findings to this effect.
13. The long and short of our preliminary observations is that the suit in the trial Court and this appeal are in abuse of the process of Court, and this appeal should therefore not be countenanced and given validation by a consideration of the merits thereof. The result is that we dismiss this appeal in its entirety for this reason, with costs to the 1<sup>st</sup> Respondent.
14. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF MAY, 2023**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**J. LESIIT**  
.....  
**JUDGE OF APPEAL**

**G. V. ODUNGA**  
.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*



**DEPUTY REGISTRAR**

