



**Bichage (Suing as the Legal Representative of the Estate of Rosemary Wanjiku Bichage) v
Ongaga & 4 others (Civil Appeal 48 of 2018) [2023] KECA 684 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 684 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 48 OF 2018
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
JUNE 9, 2023**

BETWEEN

**CHRIS MUNGA BICHAGE (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF ROSEMARY WANJIKU BICHAGE) APPELLANT**

AND

**ZABLON ONGAGA 1ST RESPONDENT
ZABLON ONGAGA 2ND RESPONDENT
MOGAKA ONGAGA 3RD RESPONDENT
SIMEON ONGAGA 4TH RESPONDENT
MOGAKA ONGAGA 5TH RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Kisii (J
M Onyango, J) dated 23rd February, 2018 in ELC No. 1190 of 2016)*

JUDGMENT

JUDGMENT OF KIAGE, JA

1. The appellant's deceased wife Rosemary Wanjiku Bichage (Rosemary) was the duly registered proprietor of Nyaribari/Cache/Keumbu/1702 (suit property) prior to her death. By a Plaint filed at the Environment and Land Court at Kisii, the appellant averred that the respondents filed a claim at the Keumbu Lands Tribunal (the tribunal) against Peter Beta (Peter), Nicholas Beta (Nicholas), Baisiko Beta (Baisiko) and Rosemary. The respondents claimed that Ongaga Okiongo (Okiongo), their late father, purchased the suit property in 1964 prior to its subdivision, at a consideration of 14 head of cattle and Kshs. 2,000 from Mrs. Beta, the deceased mother to Peter, Nicholas and Baisiko. At the time, the suit property was a portion of the original parcel that was known as Nyaribari/Cache/Keumbu/834 (original parcel).



2. Okiongo took immediate possession of the suit property and planted crops therein. Later, a dispute arose between himself and the Beta family. It was alleged that due to the bad blood between the families, the Beta's changed tune and alleged that the suit property did not belong to Okiongo. Thereafter, Peter and his brothers caused the original parcel to be subdivided into Nyaribari/Chache/Keumbu/1252 and 1253. A further subdivision was done on Nyaribari/Chache/Keumbu/1252 which gave rise to Nyaribari/Chache/Keumbu/1699, 1700, 1701 and 1702. The last parcel is the suit property, which Peter sold to Rosemary.
3. The tribunal considered the matter and found in favour of the respondents. That indeed Okiongo bought the suit property from Mrs Beta and was therefore the legitimate proprietor. The award was then adopted as the judgement of the Chief Magistrate's Court at Kisii on June 29, 2008 under Miscellaneous Civil Application No 16 of 2008. In implementation of its judgment, the court executed all the relevant transfer documents consequently effecting the transfer of the suit property in favour of the respondents.
4. The cancellation of Rosemary's title is what led the appellant to seek the ELC's intervention praying for;
 - a. A declaration that the award of the plaintiff's deceased wife parcel of land Nyaribari/Chache/Keumbu/1702 to the 1st, 2nd and 3rd defendants by the tribunal and the subsequent adoption of the same by court and consequential transfer of land parcel Nyaribari/Chache/Keumbu/1702 by the subordinate court to the 1st, 2nd and 3rd defendants is null and void.
 - b. An order cancelling the names of the 1st, 2nd and 3rd defendants as proprietors of land parcel Nyaribari/Chache/Keumbu/1702 and the same to revert back to the deceased's estate.
 - c. A permanent injunction restraining the defendants by themselves, agents, servants and anyone claiming under the defendants from interfering with and/or in any other manner whatsoever dealing with the suit land that is LR No Nyaribari/Chache/Keumbu/1702.
5. It was the appellant's case that Rosemary purchased the suit property from Peter in 1996, was duly registered as proprietor and subsequently obtained good title. To his knowledge, the suit property was free from any encumbrances and at the time of filing suit, they had made developments thereon totalling Kshs 5,000,000 in value. He claimed that the respondents never served Rosemary with summons to appear at the tribunal. Moreover, she was not in a position to attend as she had been hospitalized due to injuries sustained from the infamous 1998, terrorist bombing in Nairobi.
6. He complained that the tribunal was not seized with jurisdiction to determine the claim as the same was res judicata. A claim over the suit property had been filed by Okiongo vide Civil Suit No 8 of 1977 at the Senior Resident Magistrate's Court in Kisii and an appeal to the High Court, being Civil Appeal No 21 of 1977 at Kisii. Both suit and appeal, were heard and dismissed. Accordingly, the proceedings at the tribunal were a nullity it was bereft of jurisdiction to determine a claim that had already been heard and determined by courts of competent jurisdiction. Consequently, all acts done pursuant to that award are null and void.
7. The respondents filed their defence and asserted that Rosemary was not a bona fide purchaser of the suit property. They rehashed their claim as was set before the tribunal. They added that when Okiongo passed away, the appellant came to the suit property and demolished what was left thereon. This prompted a complaint at the Chief's office and after negotiations, it was agreed that the Beta family would pay 5 head of cattle and Kshs. 2,000 as a refund of the purchase price that was paid by their late



- father. An agreement was signed to that effect. However, the Beta family never honoured the terms of the agreement which led to the respondents' claim at the tribunal.
8. It was their persuasion that the tribunal was properly seized with jurisdiction to determine their claim. The lower court's adoption of the award as its judgment and the subsequent transfer of the suit property, to them, was enough proof of the legitimacy of the entire process.
 9. Onyango, J considered the submissions and evidence presented before the court and concluded that Rosemary was a bona fide purchaser of the suit land and therefore had good title. Even though the respondents had locus standi to file the claim at the tribunal, the tribunal acted in excess of its jurisdiction as it entertained a matter that had already been determined by courts of competent jurisdiction. However, the learned Judge's hands were tied as the court had no basis to grant the appellant's prayers since he had failed to invoke the proper channels, which were by way of an appeal to the Provincial Committee against the award of the tribunal or by way of Judicial Review against the adoption of the award by the lower court.
 10. Aggrieved by the judgment, the appellant filed the instant appeal containing 11 grounds which, abridged, are that, the learned judge erred by;
 - a. Dismissing the appellant's case on the basis that the only remedy available to him was through Judicial Review proceedings.
 - b. Failing to consider the appellant's special circumstances prior to erroneously applying the law in a restrictive manner thereby causing an injustice.
 - c. Failing to hold that the transfer of the suit property was illegal, the learned judge violated the appellant's right to own property.
 11. Ultimately, it was prayed that the High Court's judgement be set aside in its entirety and the registration of the respondents as proprietors of the suit property be cancelled so that the title reverts to the lawfully registered owner.
 12. During the hearing of the appeal, Mr Masinde appeared for the appellant, while Mr Momanyi appeared for the respondents.
 13. Mr Masinde contended that the judgment was not in conformity with the evidence that was presented. The learned judge was clear on the fact that the tribunal did not have jurisdiction to entertain the claim. It therefore followed that the decision that emanated from it was a nullity. Given that the award had no force of law, the subordinate court had no capacity to adopt it, let alone order the cancellation of the title and the subsequent transfer of the same to the respondents.
 14. He argued that the dismissal of the suit by the High Court merely because the appellant failed to challenge the adoption of the award as a judgment of the lower court through Judicial Review was erroneous. The appellant should not have been denied the remedy of correcting that illegality through the avenue he chose, the declaratory suit. He maintained that a declaratory order was available to the appellant by virtue of the provisions of Article 22 (1) and 23 (3) of the *Constitution*. He urged this Court to reverse the finding of the High Court and to restore the appellant's title to the suit property that he was unjustly deprived of.
 15. Mr Momanyi was in support of the judgment of the High Court. He stated that the appellant fully participated in the proceedings at the tribunal and was aware of the adoption, but never challenged it in the proper manner as the High Court rightfully pointed out. Counsel submitted that since there was no prayer to nullify the adoption of the award by the subordinate court, the appellant was bound



by his pleadings and therefore the learned judge did not err in arriving at her just conclusion. He urged this Court to dismiss this appeal.

16. We have evaluated the record of the appeal and the submissions by Counsel. As a second appellate Court, our jurisdiction is limited to matters of law. We have said so on many occasions, including in the dicta of Onyango Otieno, JA in [Kenya Breweries Ltd Vs Godfrey Odoyo](#) [2010] eKLR;

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.” (See *Mrao Ltd versus First American Bank of Kenya Ltd & 2 others* [2003] KLR 125)

17. From the record, I perceive the twin issues for consideration to be whether the learned judge erred by dismissing the appellants suit because he failed to follow the proper avenue which was by way of Judicial Review and whether, as a result, she applied the law restrictively and in so doing, denied the appellant his right to own property.

18. The appellants counsel could not fathom how the learned judge failed to exercise her powers in the interest of justice to cure the glaring illegality that occasioned a gross miscarriage of justice against the appellant. Rosemary was a bona fide purchaser, therefore had good title and the same title was stripped off by a process that was null and void *ab initio*, yet the learned judge failed to act judiciously in order to remedy the injustice in order to safe guard the appellant’s right to own property. She erred by her restrictive application of the law in an otherwise special circumstance that demanded her intervention in order to correct a transgression regardless of the technicalities involved, it was contended.

19. It is apparent that the learned Judge relied on [Alfred Sagero Omweri Vs. Kennedy Omweri Ondieki](#) [2015]eKLR a decision of the High Court which stated in part;

“ [T]he tribunal exceeded its mandate as provided for by the law was applicable at the time and therefore the decision of the tribunal was null and void *ab initio*. The Resident’s Magistrate’s subsequent adoption of the same could not sanitize the illegality nor inject any essence of legality into the decision. It remained null and void and no legal effect on that aspect.

....

[T]he learned Judge proceeded to consider the effect of the plaintiff failure to appeal against that decision of the tribunal to the Provincial Appeals Committee and his failed attempt to challenge the decision of the tribunal and its adoption as a judgment of the court in the High Court thorough judicial review. His application for leave was dismissed by Musinga J (as he then was) on October 12, 2009, and the learned Judge held that it followed that the decree that was issued by the Resident Magistrate’s court was not reviewed or set aside. In effect the appellant failed, to invoke the court’s jurisdiction to declare the same invalid or void.

20. It is significant that the decision the learned judge cited was affirmed by by this Court on appeal in [Alfred Sagero Omweri vs Kennedy Omweri Ondieki](#) [2020]eKLR by a bench on which I sat.



21. On the appellant's prayers therein that sought a declaration of ownership of the suit property and a further declaration that the tribunal's award was void, I expressed myself as follows, in what might as well have been a foreshadowing of the present appeal;

“ [T]he learned Judge observed that the decision of the tribunal ceased to exist upon adoption of the same by the Resident Magistrate's Court, as it subsequently was replaced by the decree. Hence the declaration the appellant sought would be futile as it would have no effect since the decree that emanated from was still intact as an unchallenged decree. He correctly held that a court of law will not make “an idle and ineffectual order.”

22. I recognize, and not without sympathy, that the appellant was deprived of the suit property irregularly. I am quite clear that the award of the tribunal that was adopted as a judgment of the court was void ab initio. The subsequent cancellation of Rosemary's title was therefore irregular as both the tribunal and the lower court lacked jurisdiction to determine a matter that was *res judicata*. As has been stated and generally accepted, nullity is a nullity for all intents and purposes and everything founded on it is also incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. See *Macfoy Vs. United Africa Co Ltd* [1961] 3All ER 1169. Since the award by the tribunal was devoid of jurisdiction, it was dead on arrival at the lower court and could not be remedied by its subsequent adoption. See *Phoenix Of E A Assurance Company Limited vs S M Thiga T/a Newspaper Service* [2019] eKLR.

23. It is unfortunate, however, that the appellant not only failed to invoke the High Court's jurisdiction to quash the adoption of the award as judgment of the court by way of Judicial Review, he also failed to challenge the judgment of the lower court in his declaratory suit. Thus, it remains in force to date and a contrary pronouncement by this Court would be a mere gratuitous comfort of no legal efficacy. It cannot be made whilst the decree is still in existence and courts should not make orders in vain. As in my judgment aforesaid, I cite the pronouncement by this Court in *Eric vs J Makokha & 4 Others vs Lawrence Sagini & 2 Others* [1994] eKLR;

“ ... [E]quity would not grant its remedy if such order will be in vain. As is said, ‘Equity, like nature, will do nothing in vain’. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes.”

24. Consequently, I must come to the unhappy conclusion the respondent has victory not only because the law and procedure are on his side but also due to the appellant's deficient pleadings, which he is bound by, and by his failure to adhere to the appropriate channels of redress.

25. In the end, as the law compels it, I find this appeal to be devoid in merit and would dismiss it, but with no order to costs.

As Tuiyott and Joel Ngugi, JJ A agree, it is so ordered.

JUDGMENT OF TUIYOTT, JA

1. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.



JUDGMENT OF JOEL NGUGI, JA

1. I have had the advantage of reading in draft the judgment of Kiage, JA. I entirely concur with his findings and reasoning and I have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F TUIYOTI

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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

