



REPUBLIC OF KENYA



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**Gitau & 2 others v Chesire & 35 others (Civil Appeal 156 of 2017)
[2022] KECA 94 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 94 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 156 OF 2017
W KARANJA, MSA MAKHANDIA & S OLE KANTAI, JJA
FEBRUARY 4, 2022**

BETWEEN

JEREMIAH GITAU 1ST APPELLANT

BENARD K. THAIRU 2ND APPELLANT

IRENE KANYI WAINAINA 3RD APPELLANT

AND

BONIFACE JEMUTAI CHESIRE & 35 OTHERS RESPONDENT

*(Being an appeal from the judgment and decree of the Environment
and Land Court at Nyahururu (M.C. Oundo, J.) dated and
delivered on 26th June, 2017 in ELC Petition No. 9 of 2017)*

JUDGMENT

1. This is an appeal from the judgment and decree of the Environment and Land Court (ELC) in Nyahururu (M. C. Oundo J.) delivered on 28th June, 2017 in Petition No. 9 of 2017. The respondents herein (petitioners before the trial court) filed before the ELC a petition seeking orders, inter alia, as follows against the appellants (respondents before the ELC) :-

“i. A declaration that the proceedings both before the South Kinangop District Land Disputes Tribunal, in Case No. 77 of 2008 as well as in Nyahururu Principal Magistrate’s Court Land Dispute Case No. 1 of 2012 contravened the Petitioners’ rights to property, housing, fair administrative action and fair hearing under Articles 40(1) & (3), 43(1) (b) 47(1) and 50(1) of the *Constitution*.

ii. A declaration that the proceedings both before the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 and the Nyahururu Principal Magistrate’s Court Land Dispute Case No. 1 of 2012 contravened rules of natural justice.



iii. A declaration that the rule of law doctrine prohibits taking away of a citizen's property or liberty without being given a chance to be heard.

iv. A declaration that the proceedings both before the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 and the Nyahururu Principal Magistrate's Court Land Dispute Case No. 1 of 2012 are null and void.

v. An order that the judgment entered by the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 and the Nyahururu Principal Magistrate's Court Land Dispute Case No. 1 of 2012 be set aside.

iv. An order that the cancellation of the registration of the petitioners as the registered proprietors of NYAR/S/KINANGOP/5685, 5686, 10845, 6106, 5628, 5634, 6093, 6094, 6095, 6102, 6104, 6090, 6091, 3601, 3602, 3604, 5622, 5673, 5623, 6096, 5663, 5638, 5660, 6108, 5678, 3601, 5661, 5662, 6107, 6101, 5658, 6105, 5682, 6103, 5622, 3578, 5667 and 5633, be reserved.

vii. An order of mandamus do issue to the 2nd respondent to restore the name of the petitioners as the registered proprietors of NYAR/S/KINANGOP/5685, 5686, 10845, 6106, 5628, 5634, 6093, 6094, 6095, 6102, 6104, 6090, 6091, 3601, 3602, 3604, 5622, 5673, 5623, 6096, 5663, 5638, 5660, 6108, 5678, 3601, 5661, 5662, 6107, 6101, 5658, 6105, 5682, 6103, 5622, 3578, 5667 and 5633 respectively."

2. The respondents' case was that they were the registered owners of all parcels of land known as NYA/S/KINANGOP/5685, 5686, 10845, 6093, 6094, 6095, 6102, 6104, 6090, 6091, 3601, 3602, 3604, 5622, 5673, 5623, 6096, 5663, 5638, 5660, 6108, 5678, 3601, 5661, 5662, 6107, 6101, 5658, 6105, 5682, 6103, 5622, 3578, 5667 and 5633, respectively, which resulted from the sub-division of NYANDARUA/SOUTH-KINANGOP/688; that they purchased the same on diverse dates between the year 2000 and 2010, from one Mr. John Ngugi Rubia who was not a party to those proceedings and each of them was issued with their respective titles; that at the time the 3rd - 5th Respondents had also allegedly bought 23 acres of land from the same Mr. John Ngugi Rubia but at the time, the land was still under the Settlement Scheme and the said vendor had not obtained the title deed to the land.
3. The respondents stated further that subsequently upon obtaining of the title to the entire piece of the land, the said Mr. John Ngugi Rubia reserved 23 acres known as parcel No. NYANDARUA/SOUTH-KINANGOP/688 for the 3rd to 5th Respondents; that, however, instead of transferring the land to the respondents, he sub-divided the same and sold it to various people in a bid to defeat the respondents' claim; that as a result of the subdivision and sale, multiple suits were filed against the said John Ngugi Rubia by the 3rd to 5th respondents, which suits were either unsuccessful or failed to produce the 3rd to 5th respondents' desired results causing the respondents to file a dispute before the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008.
4. The tribunal heard the case and ultimately found John Ngugi Rubia, to have acted fraudulently and ordered all subdivisions and transactions made in respect of NYANDARUA/SOUTH-KINANGOP/688 be cancelled and the parcels of land be registered in favor of the 3rd to 5th respondents notwithstanding that the petitioners were in occupation of the land since acquiring the same. The award was filed before the Nyahururu Principal Magistrate's court as Land Dispute Case No. 1 of 2012 and the same was adopted as a judgment of the court and thereafter a decree was issued on the 27th May, 2012. The respondents then applied to execute the said decree which application was allowed and an order issued on the 8th April, 2014 and on the strength of that order the 2nd respondent cancelled the petitioners' title deeds.



5. According to the respondents, the proceedings before the tribunal were conducted in their absence and they were neither represented nor served with pleadings or given an opportunity to be heard as they were not parties to the South Kinangop District Land Disputes Tribunal, in case No. 77 of 2008 as well as in Nyahururu Principal Magistrate's Court Land Dispute Case No. 1 of 2012. The respondents also aver that the tribunal did not have jurisdiction to adjudicate over the ownership dispute and cancel their titles deeds and as such prayed that the decree should be quashed and they be reinstated as the proprietors of the suit land; that their constitutional rights under Article 40(1) & (3) (Section 75 of the repealed constitution) to own property had been violated.
6. The respondents posited that as the tribunal had no jurisdiction to issue the award they issued, similarly, the Principal Magistrate's adoption of such an award and the issuance of the decree thereafter were null and void in the circumstances.
7. The appellants herein who were the respondents in the petition in spite of service of hearing notices and several adjournments for their sake did not participate in the proceedings before the ELC.
8. After considering the evidence placed before her, the learned Judge framed the issues for determination to be:
 - i. Whether the petitioners were granted a fair hearing,
 - ii. Whether the tribunal had the jurisdiction to cancel the plaintiff's title and order that the suit property be registered in the name of the 3rd - 5th respondents.
 - iii. Whether the petitioner's right to property had been, in the circumstance if this case, infringed.
 - vi. Whether the petitioners are entitled to the prayers sought in the petition.

On the first issue, the learned Judge confirmed that petitioners were not parties to the proceedings held at both the South Kinangop District Land Disputes Tribunal, in Case No. 77 of 2008 as well as the Nyahururu Principal Magistrate's Court Land Dispute Case No. 1 of 2012 and yet they were condemned unheard. According to the written submissions, the petitioners more so petitioners 1st, 3rd - 34th having been the proprietors and occupiers of the respective pieces of land since the years 2000 - 2010 when they made the purchases were adversely affected by the orders, and were denied a fair hearing when they were excluded as parties during the proceedings before the tribunal and also before the Principal Magistrate Court where the impugned award was adopted as judgment of the court. The court noted that the tribunal proceeded to cancel the title of the petitioners when they were not parties yet the rule of natural justice, *audi alteram partem*, required a party not to be condemned unheard. The court found that there was clear violation of the petitioners' constitutional right to a fair hearing.

9. On the second issue raised, the court noted that under Section 3(1) of the *Land Disputes Tribunal Act, 1990 (now repealed)*, the jurisdiction of the Tribunal was limited 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.

The court found that as can be seen from the above provision which delineates the tribunal's jurisdiction, the Land Disputes Tribunal did not have jurisdiction to issue declaratory orders on the ownership of land and neither did it have jurisdiction to determine disputes revolving around ownership of land and could not issue orders compelling the cancellation of title deeds as it did in this case. The court agreed with the petitioners that the tribunal acted in excess of its jurisdiction when it



purported to cancel the petitioners' titles and ordered that the suit property be registered in the names of the 3rd to 5th defendants; that the tribunal acted without jurisdiction, and therefore the award was a nullity and void ab initio.

10. Having so found, the learned Judge did not see the need to dwell into the other issues that were framed for determination as jurisdiction was the foundation of all proceedings without which the entire process would be rendered null and void. The court noted that although the petition was unopposed, even if the same was opposed, the court did not see what argument would have been brought forward to sway its findings having found that the tribunal acted in excess of its jurisdiction which resulted into the petitioners' right to own property being blatantly infringed. The petition was allowed with the result that the award of the South Kinangop District Land Disputes Tribunal and the subsequent decree of the Nyahururu Principal Magistrates' Court were quashed. The Court added that the 1st - 34th Petitioners be reinstated as proprietors of the suit property and the registration of the 3rd - 5th respondents as proprietors of the suit property to be cancelled.
11. Aggrieved by that decision, the appellants filed the instant appeal relying on 9 grounds of appeal which in our view revolve around two issues. The first issue was whether there was proper service of the pleadings and court processes on the appellants. Second and most important is whether the learned Judge erred in finding that the tribunal lacked jurisdiction to issue the orders it issued and a peripheral question as to whether the learned Judge should have heard the parties even after finding that the award and proceedings before the Principal Magistrate Court were null and void ab initio.
12. Parties filed written submissions in which they have reiterated their rival positions. The appellants submit that the issues arising for determination in this appeal are whether service of the application and petition was effected; whether there was proper service of the other documents and pleadings in respect to the instant petition; whether the court ought to have given a chance to the appellants before directions were given on disposal of the petition; whether the court ought to have given the appellants a chance to respond to the petition before rendering the judgment; whether the court was overly biased when it indicated that it could not have been swayed by any argument that could have been brought forward by the respondents and whether the interests of the justice requires grant of second chance for the appellants to respond to the petition.
13. In their submissions in opposition to the appeal, the respondents submit that the issues arising for determination are; whether the trial Judge properly evaluated the evidence and facts and therefore arrived at the correct decision and whether the appellants have met the threshold for the orders sought. On the first issue they submit that an appellate court must be hesitant to freely interfere with the factual conclusions based on evidence tendered unless it be demonstrated that the findings are not in congruence with the evidence led or that the finding is just but perverse. On the second issue they submit that the Judge arrived at a proper decision and urge this Court to affirm it and on the last issue, they submit that the appellants did not annex a draft response to the petition in their application thus the Judge did not have anything to consider that could permit her to exercise discretion in favour of the appellants; that the appellants do not deny having been served but their only allegation was that service might not have been proper; that in conclusion the Judge properly exercised her discretion in dismissing the appellants' application.
14. We have considered the record of appeal in its entirety along with the rival submissions by counsel and the relevant law. We decipher three issues that fall for our determination. First and foremost is the issue of jurisdiction of the Land Disputes Tribunal to determine the dispute that was filed before it; was the tribunal seized of jurisdiction to issue the orders that it issued? If the answer to that question is positive, then we can consider the question as to whether the appellants herein were condemned unheard, on account of not being served with the pleadings both before the tribunal, before the magistrate's court



and before the Environment and Land Court. If on the other hand we find that the Land Disputes Tribunal lacked jurisdiction to issue the orders it did, then the matter will rest there as it will be superfluous to determine all the other identified issues.

15. It was a truism that jurisdiction is everything and without it the court cannot advance even a step forward and it should down its tools. The following words of Nyarangi JA in *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR* ring true today as they did on the date they were made:-

“... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

The High Court and this Court too have pronounced themselves on the question of the jurisdiction of the Land Disputes tribunal on several occasions. We have set out earlier in this judgment the jurisdiction of the now repealed Land Disputes Tribunal Act as contained in Section 3 of the said Act. This Court has repeatedly maintained that the Land Disputes Tribunals had no jurisdiction to determine ownership of land let alone cancelling Title deeds, or directing cancellation of title deeds. The Court of Appeal in *Marete vs Republic & 3 others [2004] eKLR* also held:

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

We have no hesitation in pronouncing that in ordering the cancellation of Titles to registered land and thus divesting the registered owners of their proprietary rights to their land, the tribunal’s action was ultra vires its jurisdiction and hence its acts were unlawful and tainted with illegality. Such actions and any orders arising therefrom were therefore void ab initio and for setting aside ex debito justitiae.

16. Having so found, the other issues we had identified for determination fall by the wayside. We agree with the learned trial Judge that hearing the parties on the factual aspect of the dispute was not going to change the law, although it may have left the parties feeling happier that they had been heard. The magistrate was wrong in adopting an award which had been arrived at by a tribunal devoid of jurisdiction. The learned Judge was clear in her mind as to the applicable law and that position was not going to change whether the court went ahead to entertain evidence from the parties.
17. We find no fault in the learned Judge’s decision. We dismiss this appeal and affirm the decision of the Environment and Land Court delivered on 28th June, 2017 and award costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL



S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

