



**Kirui v Keittany & another (Administrators of the Estate of Said K. Keitany - Deceased)
(Civil Appeal 81 of 2013) [2022] KECA 848 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 848 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 81 OF 2013
PO KIAGE, M NGUGI & F TUIYOTT, JJA
APRIL 28, 2022**

BETWEEN

JOSEPH KIRUI APPELLANT

AND

MOHAMMED KIPTARUS KEITTANY 1ST RESPONDENT

SALLY JEPTOO KEITTANY 2ND RESPONDENT

ADMINISTRATORS OF THE ESTATE OF SAID K. KEITANY - DECEASED

(Being an appeal from the ruling of the High Court of Kenya at Eldoret (P. M. Mwilu, J.) (as she then was) dated 27th January, 2011 dated 8th February, 2011 in Constitutional Reference No. 9 of 2008)

JUDGMENT

JUDGMENT OF MUMBI NGUGI, J.A

1. The decision the subject of this appeal arose out of a petition in which Said Arap Keitany (deceased) had petitioned the High Court under section 84(1) and sections 75(1) and 77(9) of the former constitution alleging violation of his constitution rights. The alleged violations were by the Uasin Gishu Land Disputes Tribunal (hereafter ‘The Tribunal’) in a decision pertaining to the respondent’s land reference number 733/17 IR 53970 (‘the suit property’). I note that by an order of this Court made on 19th March 2021, the deceased respondent was substituted with the administrators of his estate, Sally Jeptoo Keittany and Mohammed Kiptarus Keittany.
2. The proximate proceedings leading to this appeal were the petition before the High Court which was determined in favour of the respondent. The matter, however, has a long history. The appellant had filed a claim before the Tribunal alleging that he was entitled to an acre of land out of the suit property, which was registered in the name of the deceased respondent. The appellant alleged that he had, on



diverse dates between 1992 and 1993, entered into an oral agreement with Sally Keitany, the wife of the respondent, for the purchase of one acre of land from the suit property at Kshs. 45,000. The dispute was lodged before the Tribunal in 2005. At the time of his claim, the appellant was in possession of half an acre out of the suit property.

3. In its decision, the Tribunal found that the appellant had not paid the entire purchase price of Kshs.80,000 agreed on in 1992 and was therefore not entitled to an acre from the suit property, but the amount paid was enough for ½ an acre which the appellant was in occupation of. Despite this finding, the Tribunal nonetheless ordered the respondent to refund a sum of Kshs. 5,000 to the appellant, by 20th September 2006. In default, the respondent was to transfer a further ½ acre out of the suit property to the appellant at the price of Kshs 35,000.
4. The award of the Tribunal was adopted as an order of the court in Eldoret CMCC No. of 2006. Upon notice to show cause proceedings being initiated against him to enforce compliance with the order of the Tribunal, the respondent filed the petition the subject of this appeal. His claim before the High Court was that the orders of the Tribunal were unconstitutional, made without jurisdiction, and in violation of his right to property and right to fair hearing. He had not been heard before the decision of the Tribunal was made, or when its order was adopted by the Chief Magistrate’s Court. The effect of the decision of the Tribunal was to arbitrarily take away his land contrary to the provisions of *the constitution*. In any event, the transaction that the appellant was seeking to enforce before the Tribunal was statutorily time barred and was a nullity for want of compliance with the *Land Control Act*.
5. In allowing the respondent’s petition, the High Court found that the decision and orders of the Tribunal were a nullity as it had exceeded its jurisdiction under the provisions of the *Land Disputes Tribunal Act* that was then in force. It further found that the decision was unconstitutional, contrary to the provisions of the *Law of Contract Act* and the *Land Control Act*, and was barred by the provisions of the *Limitations of Actions Act*. The High Court accordingly granted the declarations sought in the respondent’s petition and also awarded the costs of the petition to the respondent.
6. Aggrieved by this decision, the appellant filed a Notice of Appeal dated 21st February 2011 and an Amended Memorandum of Appeal dated 23rd March, 2021 in which it raised seven (7) grounds of appeal. At the hearing of the appeal, however, the appellant’s Counsel, Mr. Nyabuti, in highlighting the appellant’s submissions dated 4th November 2021, condensed the grounds into two: whether the respondent’s right to a hearing had been violated, and whether the Land Disputes Tribunal had the jurisdiction to make the orders that it did.
7. His submission was that the respondent’s right to hearing had not been violated, contrary to the finding of the trial court. The respondent had not provided the particulars of infringement of his right to property and fair hearing, and the right to property is not absolute. Further, that even the right to fair hearing was not absolute under the former constitution. The appellant relied on the decision in *Mumo Matemu v Trusted Society of Human Rights Alliance 5 others* (2013) eKLR in which this Court, according to the appellant, set out the standard of proof in constitutional petitions.
8. The appellant submitted further that while the respondent had decried unfairness and bias before the Tribunal, he had not disclosed the particulars of infringement of the right to fair hearing. The respondent had been heard before the Tribunal; he did not pursue an appeal before the Provincial Land Disputes Appeals Committee and thereafter to the High Court. The appellant relied in support on the Supreme Court decision in *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others Petition 7 of 2018 consolidated with Petition 9 of 2018* [2018] eKLR.



9. It was the appellant's submission that the Tribunal's decision that the respondent forfeits one acre to the appellant upon the appellant paying to him Kshs. 35,000 was not arbitrary and did not unconstitutionally deprive him of property contrary to section 75(1) of the former constitution. The appellant had bought the suit property and it is only when the respondent failed to complete his contractual obligation that the appellant sought the intervention of the Tribunal. In the appellant's view, the Tribunal had followed due process in making its award, which had been endorsed by the Chief Magistrate's Court. He reiterated that the right to property is not absolute, and under section 75 (6) of the *former constitution*, anything done in execution of a judgment or order of a court was not deprivation of property.
10. Regarding jurisdiction, the appellant submitted that what the High Court was seized of was a constitutional reference pursuant to section 84(1) of the *repealed constitution*. In determining the reference, the High Court was neither exercising its appellate jurisdiction through appeal nor supervisory jurisdiction through judicial review. Its jurisdiction in the impugned proceedings was purely to determine the question arising from contraventions of the fundamental freedoms and rights under sections 70 - 83 of the former constitution.
11. The appellant submitted that the High Court had veered off and made findings on the merits or substantive issues before the Tribunal and the Chief Magistrate's Court when it made findings on the question whether a contract existed pursuant to the *Law of Contract Act* and whether the Tribunal had jurisdiction to make the orders which were adopted by the Chief Magistrate's Court. These were clearly outside its jurisdiction under section 84(1) of the repealed constitution. Support for this submission was sought in the case of *Kamau John Kinyanjui vs Attorney General* (2005) eKLR.
12. The respondent filed submissions in reply dated 5th November 2021 highlighted by the respondent's Counsel, Mr. Magare. It was submitted that the respondent owned the suit property. While the Tribunal had found in his favour and held that the appellant had no claim to more acreage than the ½ acre he was in occupation of, it had proceeded to order the respondent to sell an extra ½ acre at Kshs.35,000 if the respondent failed to refund to the appellant Kshs.5,000 which he had allegedly overcharged. This was to be complied with by 30th September 2006 but the report was adopted on 20th November 2006 making compliance impossible.
13. It was further submitted on behalf of the respondent that the High Court was correct in its finding that since the dispute related to a dealing in land, the Tribunal had no jurisdiction to draw an agreement on behalf of the parties. Further, that the Tribunal had dealt with registered land which exceeded its mandate. The proceedings before the Tribunal were therefore a nullity, the Tribunal having taken away the deceased respondent's land without jurisdiction.
14. Reference was made to section 3 (1) of the *Land Dispute Tribunal Act No. 18 of 1990 (now repealed)* under which the Tribunal had no jurisdiction to enter into fresh contracts or to revive cases which were time barred under the *Limitations of Actions Act* or in breach of the *Law of Contract Act* and contrary to the *Land Control Act*. The transaction between the appellant and the respondent had taken place in 1991 and thus became time barred by 2003 by dint of section 6, 7 and 17 of the *Limitations of Actions Act*. The respondent relied on *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others* [1998] eKLR in which the court cited with approval the holding in *Macfoy v United African Co. Ltd* [1961] 3 ALL ER 1169 that any act done without jurisdiction is a nullity.
15. It was further submitted that the Tribunal also breached his right to be heard when it made its decision on 30th August 2006 without hearing him. It had ignored its finding that the appellant bought ½ an acre in 1992 and had ordered a refund. The decision of the Tribunal was then placed before the Chief



Magistrate's Court in October, 2006 and the award of the Tribunal adopted on 10th November 2006 without notifying the respondent.

16. Finally, it was submitted for the respondent that he did not lose at the Tribunal. The Tribunal had found that the appellant had no reason to claim extra acreage from the respondent. The issue in contention was the arbitrary direction by the Tribunal that the appellant pays Kshs. 35,000 to the respondent fifteen years after the initial contract in order to be given one (1) acre by the respondent. Such a self-contradictory judgment, according to the respondent, was not appealable but is unconstitutional for being arbitrary.
17. I have considered the record of appeal and the submissions of the parties at the hearing of the appeal before us, as well as their written submissions and authorities. I have done so while bearing in mind the duty of this Court on a first appeal under Rule 29(1)(a) of the Court of Appeal Rules, which is to re-appraise the evidence before the trial court and to draw inferences of fact.
18. I have re-evaluated the affidavit evidence before the trial court, and the following paragraphs encompass the conclusions that I have reached.
19. The crux of the appeal before us is whether the High Court had erred in its findings regarding the jurisdiction of the Tribunal. The jurisdiction was conferred under section 3(1) of the [Land Disputes Tribunal Act, 1990 \(now repealed\)](#). The section provided that:
 - 3(1) Subject to the 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, shall be heard and determined by a tribunal established under Section 4.
20. The section thus limited the Tribunal's jurisdiction to boundary disputes, claims to use and work land, and questions of trespass to land. In this case, the appellant brought before the Tribunal a claim founded on an alleged oral contract for sale of land. The alleged contract was entered into in 1992, while the claim was brought in 2005. The Tribunal found, quite properly notwithstanding the fact that it had no jurisdiction to entertain the claim, that the appellant's claim for an acre of land from the respondent was unfounded.
21. Regrettably, however, the Tribunal went further and ventured into territory that it had no jurisdiction to enter into. It directed the respondent to transfer a further ½ acre to the appellant. It even set the price that the appellant would pay for this additional ½ acre, being Kshs. 35,000. This decision was clearly outside the jurisdiction of the Tribunal. In [M'Marete v Republic & 3 others](#) (2004) eKLR this Court held that:

“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 the Registered [Land Act](#) to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”
22. The award of the tribunal in favour of the appellant was outside its jurisdiction. It was null and void. Any subsequent orders emanating from it were also null and void. An unfortunate feature of the



law and procedure under the Act, however, was that once the award was placed before the Chief Magistrate's Court, it was adopted verbatim as an order of the Court, without consideration of the merits of the award, or the question of jurisdiction of the Tribunal being raised.

23. In this case, from the respondent's averments in the affidavit in support of the petition sworn on 14th July 2008, he had filed the petition after he was threatened with arrest in execution of the Tribunal's award, yet he had not been served with notice regarding the reading of the award and its adoption before the Chief Magistrate's Court. He did not therefore follow the mechanism provided in the Act for appeal, nor did he bring judicial review proceedings to quash the decision.
24. The appellant's argument before us, as I understand it, is that not having followed the procedure under the Act, the respondent's avenue for justice was closed. That the High Court did not have the jurisdiction to make the findings and conclusions that it did in the ruling the subject of this appeal. This argument suggests, I believe, that the High Court should have accepted the decision of the Tribunal, made without jurisdiction, and permitted the enforcement of the award to transfer a further ½ acre to the appellant, at a price determined by the Tribunal. In other words, the decision of the Tribunal, made without jurisdiction, should have been allowed to stand. This is an outcome that finds no support in law or justice.
25. With regard to jurisdiction, the words of Nyarangi J in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR should be engraved in the mind of any court or tribunal called upon to determine a matter:

“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.”

26. If a court or tribunal decides a matter in which it has no jurisdiction, its decision is void, nullity ab initio. As was stated by the court in *Macfoy v United African Co. Ltd* (supra):

“if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is formed on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

27. I find, further, that the High Court was correct in its finding on a second question before it that goes to jurisdiction. The appellant's claim before the Tribunal was that on diverse dates between the year 1992 and 1993, he entered into an oral agreement with one Sally Keittany for the purchase of one acre of land from L.R 733/17 IR 53970 allegedly bought from the respondent at Kshs. 45,000. The dispute was lodged before the Tribunal in 2005. The question is whether, even had the Tribunal the jurisdiction to determine the question of title and ownership of land, it could deal with the issue 13 years after the alleged contract. Section 7 of the *Limitation of Actions Act* provides that:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.



28. Section 13(3) of the repealed *Land Disputes Tribunal Act* expressly provided that the Tribunal was also subject to the provisions of the Limitations of Actions Act. It provided that:

Nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which time for bringing such proceedings is barred under any law relating to Limitation of Actions.

29. I believe I have said enough to demonstrate that the decision and award made by the Uasin Gishu Land Disputes Tribunal was insupportable on two jurisdictional planks. The Tribunal had no jurisdiction to determine questions relating to contracts for sale of land, and none whatsoever to direct the respondent to sell a portion to the appellant at a particular price. Secondly, it had no jurisdiction to deal with an issue relating to the sale of land long past the limitation period allowed under the *Limitation of Actions Act*. By exceeding its jurisdiction in these two respects and its award being adopted by the Chief Magistrate’s Court in Eldoret, there was a clear deprivation of the respondent’s property, and a violation of his rights. While a constitutional reference was not the ideal mechanism for seeking redress of a patent injustice, the High Court cannot be faulted for arriving at the decision it did in the peculiar circumstances of this case.

30. Accordingly, it is my finding that the present appeal has no merit. I would dismiss the appeal with costs to the respondent.

Judgment of Tuiyott, J.A

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

JUDGMENT OF KIAGE, J.A

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, J.A. with which I am in full agreement with nothing useful to add.

2. As Tuiyott, J.A is equally agreed, the appeal shall be disposed of as proposed by Mumbi Ngugi, J.A.

Dated and Delivered at Kisumu this 28th day of April, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

