



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: NAMBUYE, MUSINGA, & GATEMBU, J.J.A.)**

**CIVIL APPEAL NO. 127 OF 2017**

**BETWEEN**

**DAVID KIPLETING CHEMEI.....APPELLANT**

**AND**

**KANAMOI CHEPTOO KIMOITUK.....1ST RESPONDENT**

**THE ATTORNEY GENERAL**

**(on behalf of THE UASIN GISHU LAND DISPUTES TRIBUNAL)....2ND RESPONDENT**

**(Being an appeal from the Ruling of the Environment and Land Court of Kenya**

**at Eldoret (Odeny, J.) delivered on 12th April 2017**

***in***

***E.L.C Case No. 47 of 2017 (Formerly HCC No. 179 of 2007.)***

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**JUDGMENT OF THE COURT**

1. The background to this appeal is a land dispute between the appellant and the 1st respondent. The appellant filed a suit in the High Court at Eldoret alleging that he was the registered owner of a parcel of land known as ***Uasin Gishu/Illulah/288 (the suit land)***; that the 1st respondent lodged a complaint before the Uasin Gishu Land Disputes Tribunal (*the Tribunal*) claiming to be entitled to ownership of the suit land; the Tribunal upheld the 1st respondent's claim and its award was adopted by the Chief Magistrates' Court as a judgment of the Court.
2. In his suit before the High Court which was subsequently transferred to the Environment and Land Court, the appellant stated; *inter alia*, that the Tribunal did not have jurisdiction to deal with the matter as the suit land was a registered land; and that the Magistrates' Court acted in breach of his rights under the rules of natural justice by failing to read the award to the parties.
3. Subsequently, the appellant was forcefully evicted from the suit land. He urged the trial court to issue a declaration that the proceedings and the award made by the Tribunal and the subsequent judgment by the Magistrates' Court were illegal, null and void and without jurisdiction. He also sought special damages amounting to over Kshs.3 million as a result of destruction of his property on the suit land.
4. The respondents denied the appellant's claim. The 1st respondent stated that although he had a lawful allotment letter and had taken physical possession of the suit land, the appellant fraudulently caused the suit land to be registered in his name. By way of a counterclaim, the 1st respondent urged the trial court to declare that he was the lawful owner of the suit land and cancellation of the appellant's title.
5. The 2nd respondent contended that following the filing of the claim by the 1st respondent, it was heard in the presence of the two parties and an award made. Thereafter the award was lodged in the Chief Magistrates' Court for adoption and it was therefore *functus officio*.
6. The 1st respondent filed a preliminary objection stating, *inter alia*, that the suit was *res judicata*; the suit was a backdoor appeal against the Tribunal's award that had been adopted as a judgment of the court, and that the court had no jurisdiction to entertain the suit.

7. In the impugned ruling the Environment and Land Court allowed the preliminary objection, and held that there was a prescribed procedure for challenging awards under the repealed Land Disputes Tribunal Act which was by way of an appeal to the Appeals Committee or a judicial review application, which was not done; and the land dispute having been heard between the same parties before the Tribunal and its award adopted as a judgment by a court of competent jurisdiction, the matter was *res judicata* and the court had no jurisdiction to deal with it and struck out the suit.

8. Being aggrieved by that decision, the appellant preferred an appeal to this Court. When the appeal came up for hearing, **Mr. Mathai** appeared for the appellant and **Mr. Kigen** for the 1st respondent. There was no appearance for the 2nd respondent. Both parties relied on their respective written submissions.

9. We have carefully perused the submissions by both parties, which are mainly centred on the issue of jurisdiction of the Tribunal under the repealed Land Disputes Tribunal Act and the appellate process from the Tribunal's decisions, and the issue of *res judicata*.

10. From the record of appeal, it is not in dispute that the appellant and the 1st respondent appeared before the Tribunal sometime in August and September 2006. By then the suit land had long been registered in the appellant's name and a Title Deed issued to him on 9th October 1992. The Tribunal decided the dispute over ownership of the suit land in favour of the 1st respondent and not only ordered that the Title Deed be cancelled, but also directed the appellant to remove all the developments on the land. The Tribunal's decision dated 25th October 2006 was delivered in the absence of the parties.

11. On 30th November 2006, the Chief Magistrates' Court at Eldoret adopted the Tribunal's award vide ex parte proceedings that had been instituted by the 1st respondent.

12. It is trite law that under **section 3(1)** of the repealed Land Disputes Tribunal Act the Tribunal had no jurisdiction to hear and determine disputes relating to ownership of registered land. The section stated 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, shall be heard and determined by a Tribunal established under section 4.”**

13. When a body acts without jurisdiction its decision is a nullity and is not enforceable. It matters not that the appellant did not expressly raise the issue of jurisdiction when he appeared before the Tribunal. Nevertheless, he told the Tribunal that he had been issued with a Title Deed on 9th October 1992 and produced a copy of the same. The Tribunal therefore knew or ought to have known that it had no jurisdiction to deal with the matter.

14. Jurisdiction cannot be presumed or conferred by consent, not even by a party's acquiescence, if it has not been given by the Constitution or Statute. See ***Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others [2012] eKLR***.

15. Neither the Tribunal nor the Chief Magistrates' Court had jurisdiction to order cancellation of the appellant's Title Deed. Their decisions were therefore a nullity.

16. Turning to the issue of *res judicata*, this Court in

***Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** held: -

**“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:**

**(a) The suit or issue was directly and substantially in issue in the former suit.**

**(b) That former suit was between the same parties or parties under whom they or any of them claim.**

**(c) Those parties were litigating under the same title.**

**(d) The issue was heard and finally determined in the former suit.**

**(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”**

17. Since neither the Tribunal nor the Chief Magistrates' Court had jurisdiction to determine the dispute over ownership of the suit land, it cannot therefore be said that the matter was *res judicata*.

18. For those reasons, we find that the learned judge erred in law in upholding the preliminary objection. We therefore allow the appeal and

set aside the ruling and orders of the trial court issued on 12th April 2017. The appellant's suit before the Environment and Land Court is hereby reinstated. We direct that the suit be mentioned before that court within 21 days from the date of delivery of this judgment for purposes of taking directions as to hearing and disposal of the suit.

19. The appellant is awarded costs of this appeal as well as costs arising from the preliminary objection before the trial court.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2020.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb.**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**